STATEMENT OF THE AMERICAN CIVIL LIBERTIES UNION

TO THE SENATE JUDICIARY COMMITTEE

ON THE NOMINATION OF

JUDGE ANTHONY M. KENNEDY

PREPARED BY THE

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REPORT
ON THE CIVIL LIBERTIES RECORD OF
JUDGE ANTHONY M. KENNEDY

We have prepared a report on the judicial philosophy and civil liberties record of Anthony M. Kennedy, Judge on the U.S. Court of Appeals for the Ninth Circuit, who has been nominated for the position of Associate Justice of the United States Supreme Court. This report reviews Judge Kennedy's 400 authored opinions while on the bench,[1] as well as his unpublished speeches and testimony before the Senate Judiciary Committee in connection with the nomination.[2] The report focuses on Judge Kennedy's record in the following civil liberties areas: privacy, discrimination and its remedies, voting rights, rights of aliens, separation of powers, freedom of speech, freedom of religion, criminal law and procedure, access to the courts and due process.

1/ The report focuses on opinions that Judge Kennedy wrote (whether for the majority, concurring or in dissent), in order to distill Judge Kennedy's judicial philosophy from his own words.

2/ This report does not discuss written testimony recently submitted to the Committee by Judge Kennedy.

INTRODUCTION AND SUMMARY

Judge Kennedy has been on the bench for a dozen years and has participated in more than 1200 decisions. He does "not have an over-arching theory, a unitary theory of interpretation."[3] Nevertheless, in a February 1984 speech, Kennedy observed:

> My own judicial philosophy has been described by others as conservative, and therefore unlikely to accept doctrines which substantially expand the role of the courts. None of us likes a simple label to explain our thought, but the description is probably apt as a general rule.[4]

He has also stated that "as to some fundamental constitutional questions it is best not to insist on definitive answers."[5]

On the court of appeals, Judge Kennedy's record shows both a cautious application of precedent and considerable appreciation for constitutional values. As a matter of style, his opinions are refined, subtle and narrowly tailored to the facts at hand. When he joins the majority, Judge Kennedy often adds a few "remarks" of his own in a brief concurrence. He has authored quite a number of dissenting opinions, and not infrequently dissents from the full court's denial of rehearing en banc.

3/ Transcript of Proceedings, United States Senate, Committee on the Judiciary, Nomination Hearings of Anthony M. Kennedy To Be an Associate Justice of the Supreme Court, Dec. 15, 1987, at 16-18 [hereinafter, Hearing Testimony].

4/ A. Kennedy, Unpublished Speech, Sacramento Chapter of the Rotary Club, Sacramento, CA (Feb. 1984), at 6 [hereinafter Rotary Club Speech].

5/ A. Kennedy, Unpublished Speech, McGeorge European Studies Program, McGeorge School of Law of the University of the Pacific, Salzburg, Austria (Nov. 1980), at 11 [hereinafter, Salzburg Speech].

Judge Kennedy has written sparingly on key civil liberties issues such as freedom of speech, church-state relations, and discrimination and its remedies. In the area of privacy, Judge Kennedy has never had occasion to address issues affecting reproductive freedom.

Certain aspects of the nominee's judicial record are troubling. In particular, Judge Kennedy's decisions in the area of discrimination and its remedies raise serious concerns. He has very frequently rejected claims of discrimination based on sex or race. He has dismantled a desegregation decree in the face of resegregation. He has barred civil rights litigants from the federal courts on narrow and technical grounds. His notion of invidious discrimination reveals an insensitivity to the pervasive nature of systemic discrimination.

In contrast, Judge Kennedy's decisions in the First Amendment area are positive. His free speech opinions fit comfortably within current Supreme Court doctrine. Here, as in other areas of the law, Judge Kennedy is not prone to ideological digressions. Several opinions are quite strong in their recognition of core First Amendment values, particularly in the area of prior restraints.

Although he has not been receptive to claims of vote dilution on behalf of minorities, in other contexts Judge Kennedy has vigorously enforced the principle of one-person, one-vote. In the criminal law area, Judge Kennedy's decisions show sensitivity to the needs of law enforcement. They nevertheless

reflect a fair application of precedent. Even in the face of strong evidence of guilt, Kennedy has been willing to reverse criminal convictions where there is evidence of police misconduct or where the jury was not properly instructed on the law. On the other hand, Judge Kennedy has extended the "good faith" exception to the exclusionary rule and has narrowly construed the Fifth Amendment's protection against self-incrimination and double jeopardy.

Judge Kennedy's unpublished speeches and hearing testimony also provide insight to his views on civil liberties and the function of the Supreme Court. Above all, Judge Kennedy places great trust in the structure of government, which includes separation of powers and the independence of the states, to protect individual rights.[6] Indeed, after reviewing Judge Kennedy's unpublished speeches and hearing testimony, it is fair to conclude that in considering the various mechanisms for protecting rights, the nominee has a relatively diminished view of the importance of the substantive legal limits in the Bill of Rights, and a relatively enhanced view of the importance of structural protections, including state sovereignty. How he will resolve the tension between local government power and the Bill of Rights in particular instances is therefore cause for concern.

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[6] See, e.g., A. Kennedy, Unpublished Speech, Sacramento Chapter of the Rotary Club, Sacramento, CA (Oct. 15, 1987), at 7 [hereinafter, Sacramento Rotary Club Speech].

Within the structural allocation of powers, Judge Kennedy stresses the importance of an independent judiciary. "[O]nce the independence of the judiciary is undermined," he states, "it can never be restored."[7] He urges, however, that the federal judiciary exercise a "morality of restraint" -- informed by the intent of the Framers -- when reviewing the actions of the political branches:[8]

> [A] principled theory of constitutional interpretation necessarily requires that there must be some demonstrated historical link between the rule being advanced in the court and the announced declarations and language of the framers.
>
> * * *
>
> It seems to me that the doctrine of original intent is responsive to some of the concerns I have mentioned although I think original intent is best conceived of as an objective rather than a methodology.[9]

7/ A. Kennedy, Unpublished Speech, Special Session of the Judges of the Ninth Circuit, Phoenix, AZ (Aug. 1978), at 25.

8/ A. Kennedy, Ninth Circuit Judicial Conference, "A Bicentennial Review of Separation of Powers: What is the Role of the Courts in Constitutional Interpretation?" (Aug. 21, 1987), at 6 [hereinafter, Ninth Circuit Speech].

9/ Id. at 4-5. See also A. Kennedy, Unpublished Speech, Los Angeles Patent Lawyers Assoc., Los Angeles, CA (Feb. 1982), at 8. At his confirmation hearings, Judge Kennedy was questioned repeatedly about original intent. In response to these questions, he elaborated somewhat on the sort of intent he views as relevant to constitutional interpretation:

> [A]ny theory which is predicated on the intent of the framers, [with] reference to what they actually thought about, is just not helpful.
>
> Then you can go one step further on the progression and ask, well, should we decide the problem as if the framers had thought about it?

(continued...)

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Moreover, he identifies "an unwritten constitution in every state" that ought to serve as "an additional brake," "an additional restraint" on judicial power:

> It's not a source of authority to interpret. And the unwritten constitution consists of our ethical culture, our shared beliefs, our common vision, and in this country, the unwritten constitution counsels the morality of restraint, and it applies to each branch of the government.
>
> And it teaches that any branch of the government which attempts to exercise its powers to the full, literal extent of the language of the Constitution is both indecorous and destabilizing to the constitutional order.[10/]

In Kennedy's view, lack of restraint injures the judiciary itself. "The issue of judicial independence and its legitimacy is a necessary part of the equation when one debates the legitimacy of a source or method of constitutional

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9/ (...continued)

> But that does not seem to be very helpful either.
>
> What I do [think] is that we can follow the intention of the framers in a different sense. They did do something. They made certain public acts. They wrote. They used particular words.
>
> And they wanted those words to be followed.

Hearing Testimony, Dec. 14, 1987, at 220; see also Dec. 15, 1987, at 9-10. According to Kennedy, "original intent, broadly conceived, ... is present in far more cases than we give it credit for." Hearing Testimony, Dec. 14, 1987, at 224. Thus, in "very many cases," Kennedy finds that "the ideas, the values, the principles, the rules set forth by the framers, are a guide to the decision." Id. at 224-25.

10/ Ninth Circuit Speech, supra, at 5-6.

interpretation. If we overreach, it is fair to call our commissions into question."[11]

Judge Kennedy's dual emphasis on structural limits and judicial restraint affects his view of unenumerated rights. In a 1986 speech on this subject, Kennedy stated:

> In discussions of unenumerated rights, there seems to be an undercurrent that judicial power to declare them is a necessary antidote to the potential excesses of a democratic majority. That formulation tends to distract us from the fact that there are other protections in the American system ....
>
> At the outset, the Framers conceived the Constitution primarily as a system for the structural allocation of powers. ... [T]he Bill of Rights, including the Ninth Amendment, and the amendments after the Civil War, spacious as are some of their phrases, were not intended to relieve the political branches from their responsibility to determine the attributes of a just society.[12]

Judicial articulation of unenumerated rights could, in his view, cause

> the political branches of the government [to] misperceive their own constitutional role, or neglect to exercise it. If the judiciary by its own initiative or by silent complicity with the political branches announces unenumerated rights without ade-

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11/ A. Kennedy, Unpublished Speech, "Unenumerated Rights and the Dictates of Judicial Restraint," Canadian Institute for Advanced Legal Studies, The Stanford Lectures, Palo Alto, CA (July 24 - Aug. 1, 1986), at 22 [hereinafter, Unenumerated Rights Speech].

12/ Id. at 2-3. In this speech, Kennedy discusses three unenumerated rights: the right of travel, the right of privacy, and the right to vote. His comments on privacy focus primarily on the Supreme Court's decision in Bowers v. Hardwick, 106 S.Ct. 2841 (1986). He did note that "the results in Pierce and Meyer, if not their broad statements, are sustainable under the First Amendment." Unenumerated Rights Speech at 16.

> quate authority, the political branches may deem themselves excused from addressing constitutional imperatives in the course of the legislative process.[13/]

Kennedy's emphasis on judicial restraint does not, however, preclude the overruling of precedent. Noting that "stare decisis is not an automatic mechanism," Kennedy outlined at the hearings the factors that he would consider in deciding whether to overrule a particular case:

> What does the most recent decision ... say? What is its logic? What is its reasoning? What has been its acceptance by the lower courts? Has the rule proven to be workable? Does the rule fit with what the judge deems to be the purpose of the Constitution as we have understood it over the last 200 years? And history is tremendously important in this regard.[14/]

Judge Kennedy's structural approach leads him to trust federalism to protect individual liberty.[15/] In October 1987, Kennedy observed:

13/ Id. at 21.

14/ Hearing Testimony, Dec. 14, 1987, at 211.

15/ Several of the nominee's most recent speeches -- delivered in October 1987 — set forth his views on federalism. Judge Kennedy considers federalism one of the four structural elements of the Constitution, along with separation of powers, checks and balances, and judicial review. Our system of dual state and federal sovereignty, Kennedy maintains, was "the unique and most daring contribution made by the framers to the science of government." Sacramento Rotary Club Speech, supra, at 7. He warns, however, that "of all the structural elements in the Constitution, federalism is the only one that has undergone the transformation, [and] the only one whose future is problematic and endangered." A. Kennedy, Unpublished Speech, "Federalism: The Theory and the Reality," Historical Society for the United States District Court for the Northern District of California, San Francisco, CA (Oct. 26, 1987), at 1 [hereinafter, Historical Society Speech].

> The states, and their subdivisions, with more visible and approachable legislators, and often with an initiative and referendum process, are likely to be more responsive to the citizens than the federal government.[16]

He underscores the importance of protecting state sovereignty against federal encroachment:[17]

> [T]he principal protection for the states is that the national government is one of limited powers. ... The principal structural mechanism to enforce the rule that the national government is one of limited authority is judicial review. Federalism concerns underlie most constitutional cases. Suppose, for instance, the issue is whether or not a Miranda warning must be given to a criminal. At bottom lies the issue whether or not the federal courts, as an arm of the federal government, can impose an obligation on the states.[18]

Implicit in this view is a possible diminution of the Supreme Court's special role as protector of individual liberty.

16/ Id. at 13.

17/ Id. at 9; see also Hearing Testimony, Dec. 15, 1987, at 129-30; Dec. 14, 1987, at 109-10. Kennedy testified, for example, that "there are no automatic mechanisms, or very few, in the Constitution, to respect the rights of states. ... Which indicates, I think, that we have a special obligation to ascertain the effects of national policy on the existence of state sovereignty." Hearing Testimony, Dec. 15, 1987, at 129-30; see also Dec. 14, 1987, at 109-10.

18/ Historical Society Speech, supra, at 9.

CIVIL LIBERTIES RECORD

What follows is a subject-by-subject analysis of decisions authored by Judge Kennedy during his tenure on the Ninth Circuit. Where relevant, we have also incorporated portions of his unpublished speeches and hearing testimony.

PRIVACY

At the hearings, Judge Kennedy stated that he has no "fixed view" on "privacy, or abortion."[1/] This view is consistent with his more general belief that constitutional principles need time to evolve.[2/] The emphasis on judicial restraint found in many of his speeches, however, suggests that Judge Kennedy is likely to be cautious in his articulation of unenumerated rights such as privacy:

> The judicial method ... is to decide specific cases, from which general propositions later

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1/ Hearing Testimony, Dec. 14, 1987, at 103-4.

In Beller v. Middendorf, 632 F.2d 788 (1980), cert. denied, 452 U.S. 905 (1981), Kennedy side-stepped the question whether Navy regulations mandating discharge of anyone engaged in homosexual activities infringed on a protected right of privacy. Kennedy's opinion concedes "arguendo" that "some kinds of government regulation of private consensual homosexual behavior may face substantial constitutional challenge." Id. at 810. Judge Norris, in his dissent from the court's rejection of the suggestion for rehearing en banc, criticizes the opinion for failing to resolve the privacy issue. See Miller v. Rumsfeld, 647 F.2d 80 (1981).

In Aujero v. CDA Todco, Inc., 756 F.2d 1374 (1985), Kennedy affirmed dismissal of a claim that imposition of a mandatory meal payment on elderly residents of a federally-funded housing project violated a substantive right of privacy.

2/ A. Kennedy, Unpublished Speech, Sacramento Chapter of the Rotary Club, Sacramento, CA (Feb. 1984), at 6 [hereinafter Rotary Club Speech].

> evolve, and this approach is the surest safeguard of liberty. It forts constitutional dynamics, and it defies the presidential [sic] method to announce in a categorical way that there can be no unenumerated rights, but I submit it is imprudent as well to say that there are broadly defined categories of unenumerated rights, and to say so apart from the factual premises of decided cases. This follows from the dictates of judicial restraint.[3/]

According to Kennedy, judicial restraint does not permit extensive use of the Ninth Amendment or other constitutional provisions to protect individual rights not mentioned in the Constitution; he maintains that creation of such rights is primarily the responsibility of the legislature.[4/] Similarly, he stated with respect to the Due Process Clause: "One can conclude that certain essential, or fundamental, rights should exist in any just society. It does not follow that each of those essential rights is one that we as judges can enforce under the

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[3/] Unenumerated Rights Speech, supra, at 4-5. Kennedy made a similar point in a 1984 speech:

> To recognize the necessity of continued interpretation does not give us a license to interpret the document for utilitarian ends. The Constitution cannot be thrown about as a panacea for every social ill. ... The Constitution cannot be divorced from its logic and its language, the intention of its framers, the precedents of the law, and the shared traditions and historic values of our people.

A. Kennedy, Unpublished Speech, Sacramento Chapter of the Rotary Club, Sacramento, CA (Feb. 1984), at 7 [hereinafter, Rotary Club Speech].

[4/] See generally Unenumerated Rights Speech, supra, at 2-3. Judge Kennedy's speeches show some solicitude for unenumerated rights where they can be found to "rest[] on a value of federalism and not a more fundamental conception of right and wrong ...." Id. at 6. But see Fisher v. Reiser, 610 F.2d 629 (1979).

written Constitution. The Due Process Clause is not a guarantee of every right that should inhere in an ideal system."[5]

At the hearings, Kennedy reaffirmed this distinction between rights essential to a just society and unenumerated rights that judges can enforce.[6] He never stated that the Constitution protects a general right to privacy. Rather than recognizing a right to privacy, Kennedy would allow only that the guarantee of liberty in the Due Process Clause protects certain values, including a "value" of privacy:[7]

> SENATOR HUMPHREY: Are you saying that these privacy cases would be better dealth with under the Liberty Clause?
>
> JUDGE KENNEDY: That is why I have indicated that I think liberty does protect the value of privacy in some instances.
>
> SENATOR HUMPHREY: You would prefer then to deal with the privacy cases under the Liberty Clause?
>
> JUDGE KENNEDY: Yes.
>
> SENATOR HUMPHREY: As opposed to dealing with them under the emanations of penumbrae?
>
> JUDGE KENNEDY: Yes, sir.[8]

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[5] Unenumerated Rights Speech, supra, at 13.

[6] See, e.g., Hearing Testimony, Dec. 15, 1987, at 20, 47-48, 63-64.

[7] See, e.g., Hearing Testimony, Dec. 14, 1987, at 98, 176-177; Dec. 15, 1987, at 135-136, 208-209.

[8] Hearing Testimony, Dec. 15, 1987, at 209-10. Kennedy testified that he would consider the following factors to determine which activities are protected by the Constitution:

> A very abbreviated list of the considerations are the essentiality of the right to human dignity, the

(continued...)

When asked if Griswold v. Connecticut[9] -- which recognized a married couple's right to purchase contraceptives -- was properly decided, Kennedy would not commit himself to the correctness of either "its reasoning or its result."[10] When pressed on this point, Judge Kennedy did agree that the Constitution protects a marital right to privacy.[11]

Kennedy continued to express doubt as to whether the Ninth Amendment could be used as a source of unenumerated rights:

> [T]he Ninth Amendment was in [a] sense a recognition of state sovereignty and a recognition of state independence and a recognition of the role of the states in defining human rights. That is why it is something of an irony to say that the Ninth

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8/ (...continued)

> injury to the person, the harm to the person, the anguish to the person, the inability of the person to manifest his or her own personality, the inability of a person not to obtain his or her own self-fulfillment, the inability of a person not to reach his or her own potential.
>
> On the other hand, the rights of the state are very strong indeed. There is the deference that the court owes to the democratic process, the deference that the court owes to the legislative process, the respect that must be given to the role of the legislature, which itself is an interpreter of the Constitution, the respect that must be given to the legislature because it knows the values of the people.

Id. at 80-81. See also id. at 57. Kennedy denied that these were subjective judgments, adding that "The task of the judge is to try to find objective reference ... for each of those categories." Id. at 81.

9/ 381 U.S. 479 (1965).

10/ Hearing Testimony, Dec. 15, 1987, at 42.

11/ Id. at 43.

> Amendment can actually be used by a Federal Court to tell the state that it cannot do something. But the incorporation doctrine may lead to that conclusion, and that is the tension.[12]

Judge Kennedy suggested that the Supreme Court has treated the Ninth Amendment as "something of a reserve clause, to be held in the event that the phrase 'liberty' and the other spacious phrases in the Constitution appear to be inadequate for the Court's decision."[13] He declined, however, to endorse this approach. To the contrary, Judge Kennedy stated:

> [I]t is the ultimate irony that an amendment that was designed to assuage the States is being used by a federal entity to tell the States that they cannot commit certain acts.[14]

DISCRIMINATION AND ITS REMEDIES

Judge Kennedy's civil rights record is sparse but troubling. He seems to believe that discrimination, even based on race, is permissible if the discriminators have no intent to stigmatize. His narrow definition of invidious discrimination does not comport with Supreme Court precedent. Nor does it reflect sensitivity to the pervasive and subtle forms of modern-day discrimination. Kennedy's requirement of proof of intent has led him to reject claims of discrimination in several important

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12/ Hearing Testimony, Dec. 15, 1987, at 79.

13/ Hearing Testimony, Dec. 14, 1987, at 97.

14/ Hearing Testimony, Dec. 15, 1987, at 220.

cases. Finally, Judge Kennedy's membership in restrictive clubs raises serious questions as to his basic commitment to equal justice under law.

Club Membership

The ABA Code of Judicial Conduct states that "[i]t is inappropriate for a judge to hold membership in any organization that practices invidiously discriminates on the basis of race, sex, or religion." During the 1970's and 1980's, Judge Kennedy belonged to several clubs that limit membership based on race and gender. He did not resign his membership in the restrictive Olympic Club until October 27, 1987.[15] In defense of his club membership, Kennedy put forth a troubling construction of "invidious discrimination." He noted:

> "Invidious discrimination" suggests that the exclusion of particular individuals on the basis of their sex, race, religion or national origin is intended to impose a stigma on such persons. As far as I am aware, none of these policies or practices were the result of ill-will. I recognize nonetheless that real harm can result from membership exclusion regardless of its purported justification.[16]

At the hearings, Judge Kennedy made clear that he believes discrimination to be invidious only when the discriminators have an intent to stigmatize. Although Judge Kennedy acknowledged that "the injury and the hurt and the personal hurt can be there,

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[15] See Response to Question 3, Part III, Senate Judiciary Committee Initial Questionnaire (concerning restrictive membership policies of clubs to which the nominee has belonged).

[16] Id. at 50 (emphasis added).

regardless of the motive,"[17] he never conceded that the discriminatory policies of the all-male clubs to which he belonged were in fact invidious. Moreover, when asked generally whether race-based classifications could ever be justified, the nominee limited his response only to invidious discrimination.[18] He does not seem to recognize that the fact of exclusion imposes a stigma that is itself a subject of legitimate concern regardless of any "ill-will" toward an excluded group.

Race and Natural Origin

Judge Kennedy's concern for state's rights rather than civil rights may be seen in Spangler v. Pasadena City Bd. of Education, 611 F.2d 1239 (1979). There, after a remand from the Supreme Court, the court of appeals reversed a district court's denial of the school board's motion to relinquish jurisdiction. The court relied on the board's present compliance with integration efforts and its official representations that it would continue to engage in action in support of integration. Judge Kennedy concurred, writing separately "to give emphasis to certain aspects of this case." Id. at 1242. He stated:

> [W]hen a court ordered remedy has accomplished its purpose, jurisdiction should terminate. The relinquishment of jurisdiction in a proper case serves to restore to the state and local agencies the legal responsibility for supervising a school system that is properly theirs, and this too is

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17/ Hearing Testimony, Dec. 14, 1987, at 141.

18/ Id. at 168.

> a necessary consideration in fixing the duration of the court's remedial supervision.

Ibid.

According to Kennedy, "compliance with the 'Pasadena Plan' for nine years is sufficient in this case, given the nature and degree of the initial violation, to cure the effects of previous improper assignment policies." Id. at 1244. He stated:

> The Supreme Court has emphasized that when a large percentage of minority students in a neighborhood school results from housing patterns for which school authorities are not responsible, the school board may not be charged with unconstitutional discrimination if a racially neutral assignment method is adopted.

Ibid. In fact, Supreme Court precedent establishes that a federal remedy may be appropriate if the residential segregation results from governmental action, even if not the action of the school authorities. See, e.g., Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 32 (1971). Moreover, Judge Kennedy refused to accept the district court's finding that, by announcing its intention to return to the pre-1970 neighborhood school pattern, the Board acted with the same segregative intent as it had in 1970. Judge Kennedy instead assumed, without factual basis, that "[a] policy favoring neighborhood schools in not synonymous with an intent to violate the constitution." 611 F.2d at 1245.

Judge Kennedy's willingness to return power to local authority, despite evidence of resegregation, is consistent with the notion of federalism expressed in his unpublished speeches.

Both reflect the nominee's deference to state and local sovereignty and his distrust of federal encroachment on local control, particularly when assisted by the courts.

Judge Kennedy displayed greater receptivity to a claim of discrimination, however, in Flores v. Pierce, 617 F.2d 1386 (1980), cert. denied sub nom. Autry v. Flores, 449 U.S. 875 (1980), where there was a strong showing of invidious intent. Two Mexican-Americans sued local officials under §1983, claiming that issuance of a liquor license had been delayed due to plaintiffs' race or national origin. A jury found that the officials violated the Constitution and awarded damages. The court of appeals, per Kennedy, affirmed. He found the "disparate effect" of the defendants' action so compelling that it "may approach, if it does not reach, the demonstration of an intent to discriminate that was made in Yick Wo v. Hopkins." Id. at 1389. He also found ample evidence of intent to discriminate:

> It was shown that the defendant city officials deviated from previous procedural patterns, that they adopted an ad hoc method of decision making without reference to fixed standards, that their decision was based in part on reports that referred to explicit racial characteristics, and that they used stereotypic references to individuals from which the trier of fact could infer an intent to disguise a racial animus.

Ibid. In Kennedy's view, the subsequent approval of plaintiffs' license by state authorities did not eliminate the constitutional injury:

> If the rigors of the governmental or administrative process are imposed upon certain persons with an intent to burden, hinder, or

> punish them by reason of their race or national origin, then this imposition constitutes a denial of equal protection, notwithstanding the right of the affected persons to secure the benefits they seek by pursuing further legal procedures.

Id. at 1391.

Gender

In AFSCME v. State of Washington, 770 F.2d 1401 (1985), Judge Kennedy reversed a lower court's finding that the State discriminated on the basis of sex in violation of Title VII. Beginning in 1974, the State of Washington undertook job evaluation studies to determine whether wage disparities existed among predominantly male and female job categories. For jobs of comparable worth, the studies found approximately a 20 percent disparity, to the disadvantage of employees in jobs held mostly by women. The State enacted legislation which would implement a compensation scheme based on comparable worth over a ten-year period. In this suit, AFSCME sought immediate implementation of a comparable worth system of compensation and back pay for workers who had been subject to discrimination.

Judge Kennedy found "nothing in the language of Title VII or its legislative history to indicate Congress intended to abrogate fundamental economic principles such as the laws of supply and demand ...." Id. at 1407. In addition, he noted:

> The instant case does not involve an employment practice that yields to disparate impact analysis. ... A compensation system that is responsive to supply and demand and other market forces is not the type of specific, clearly delineated employment policy contemplated by Dothard and Griggs; such a compen-

> sation system, the result of a complex of market forces, does not constitute a single practice that suffices to support a claim under a disparate impact theory.

Id. at 1406. Thus, in Kennedy's view, "job evaluation studies and comparable worth statistics alone are insufficient to establish the requisite inference of discriminatory motive critical to the disparate treatment theory."[19] Id. at 1407.

The trial judge, however, had made no direct finding that the State's compensation scheme reflected "market forces." To the contrary, the trial judge found "no credible evidence ... that would support a finding that the State's practices and procedures were based on any factor other than sex." 578 F. Supp. 846, 866 (W.D. WA. 1984) (emphasis added). The record contains considerable evidence that the State did not follow the "market" in setting wages. Nor does Kennedy recognize that the market reflects patterns of discrimination and that reliance on the market is therefore not a conclusive response to claims of discrimination. In any event, if Judge Kennedy believed that the district court had not given sufficient weight to a "market defense," the proper course would have been to remand; instead,

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[19] In addition, he found plaintiffs' independent evidence of discrimination "insufficient to support an inference of the requisite discriminatory motive." 770 F.2d at 1407. Judge Kennedy did not explain why the district court's factual conclusion to the contrary was clearly erroneous, as required under Pullman-Standard v. Swint, 456 U.S. 273, 287-89 (1982), and Anderson v. Bessemer City, 470 U.S. 564 (1985). Indeed, under the formulation of Teamsters v. United States, 431 U.S. 324 (1977), plaintiffs clearly introduced sufficient evidence for a factual finding of intentional classwide disparate treatment, i.e., statistical evidence plus individual instances of facially discriminatory actions. Judge Kennedy, however, overturned that finding.

Judge Kennedy ignored the record evidence and simply assumed the factual basis of a market defense.[20/]

Even more troubling is Judge Kennedy's refusal to apply disparate impact analysis to the facts of the case. To be sure, certain courts have limited disparate impact analysis only to cases that challenge a specific employment criteria, such as a written test or height and weight requirement.[21/] But since Griggs it has been clear that an employment test that works a disparate impact on women or minorities suffices to support a claim under disparate impact theory.[22/] Judge Kennedy, by contrast, gave disparate impact theory the most restrictive interpretation possible, holding it can be applied only to "a specific, clearly delineated employment practice applied at a single point in the job selection process." 770 F.2d at 1406.[23/]

20/ The Supreme Court has struck down under the Equal Pay Act wage differentials which simply "reflected a job market in which [the employer] could pay women less than men for the same work." Corning Glass Works v. Brennan, 417 U.S. 188, 205 (1974). "That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work." Ibid.

21/ One aspect of this issue is currently pending before the Supreme Court. See Watson v. Fort Worth Bank & Trust Co., No. 86-6139, cert. granted, 55 U.S.L.W. 3876 (1987). Watson concerns whether subjective selection devices can be challenged through the use of disparate impact analysis.

22/ See Griggs v. Duke Power Co., 401 U.S. 424 (1971).

23/ He relied primarily upon a Ninth Circuit panel opinion, Atonio v. Wards Cove Packing Co., 768 F.2d 1120 (1985), which was subsequently reversed en banc, 810 F.2d 1477 (1987).

See also Fadhl v. City and County of San Francisco, 741 F.2d 1163 (1984). In Fadhl, Kennedy reversed a district court decision in favor of a Title VII plaintiff, a female police trainee, who was terminated for "un-

(continued...)

In his testimony before the Senate Judiciary Committee, Kennedy defended the decision in AFSCME. He continued to criticize the imposition of liability for what he viewed solely as a failure to depart from the market:

> The State of Washington was subject to a judgment of $800 million ... on the theory that their failing to depart from the market system and from the market forces was an actionable violation.
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> ....
>
> We did not think, however, that there was a shred of evidence to show that the state had deliberately maintained that pay scale dif-

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23/ (...continued)
acceptable performance." Id. at 1165. The district held the city liable, based on its finding that discrimination affected the evaluative process. However, Kennedy concluded that the district court incorrectly found the plaintiff was not present at her termination hearing, and, despite the apparent lack of relevance between this finding and the imposition of liability, ordered a remand because "we do not know what weight the trial judge gave to this incorrect finding." Id. at 1166. Kennedy also remanded for further findings on the issue of damages. Id. at 1167. See also White v. Washington Public Power Supply System, 692 F.2d 1286 (1982) (reversing finding of discrimination of the basis of race and sex because the district court improperly shifted the burden of proof on the defendant).

In Gerdom v. Continental Airlines, 692 F.2d 602 (1982) (en banc), cert. dismissed, 460 U.S. 1074 (1983), Judge Kennedy joined the dissent, which took a narrow view of disparate impact and discriminatory treatment analysis under Title VII. At issue in Gerdom was a policy that required employees who were "flight hostesses" to comply with strict weight requirements as a condition of their employment, while not imposing similar restrictions on male "directors of passenger service." The majority held that the policy constituted discriminatory treatment on the basis of sex under Title VII, and thus did not address whether the policy could also be attacked under disparate impact analysis. While acknowledging that Gerdom established a prima facie case of disparate treatment, the dissent nonetheless concluded that the case should be remanded for further evidence, stating that the majority erred in "making a factual comparison between flight hostesses and directors of passenger service ... on a motion for summary judgment." Id. at 614. The dissent also held that the policy could not be challenged under disparate impact analysis. Id. at 611-12.

> ference in order to discriminate against women.[24]

Notwithstanding Judge Kennedy's lack of receptivity to statutory claims of gender discrimination, he suggested at the hearings that he might be willing to consider raising the standard of review for constitutional claims. Noting that the judicial system has not had "the historical experience with gender discrimination cases that we have had with racial discrimination," Kennedy stated:

> [T]he law there really seems to me in a state of evolution at this point, and it is going to take more cases for us to ascertain whether or not the heightened scrutiny standard is sufficient to protect the rights of women, or whether or not the strict standard should be adopted.[25]

As an appellate judge, however, Judge Kennedy has not applied heightened scrutiny to Constitutional claims of gender discrimination. In United States v. Smith, 574 F.2d 988 (1978), cert. denied, 439 U.S. 852 (1978), male federal prisoners challenged their conviction for forcible sodomy upon another male prisoner under the Federal Assimilative Crimes Act. By incorporating a state law definition of rape, the Act imposed a higher sentence than federal law, which applied only to male rape of a female. Judge Kennedy rejected the claim "that the difference in the penalties for these offenses constitutes

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24/ Hearing Testimony, Dec. 15, 1987, at 31-32. See also id. at 194-195.

25/ Hearing Testimony, Dec. 14, 1987, at 170.

unlawful discrimination on the basis of sex" applying a rational relation test.[26] Id. at 991.

Sexual Orientation

Judge Kennedy has consistently refused to protect gay and lesbian litigants against discrimination. He consistently applies a rational basis standard. We do not know whether this approach will carry over to other unpopular minorities not now protected by heightened scrutiny.

Beller v. Middendorf, 632 F.2d 788 (1980), cert. denied, 452 U.S. 905 (1981), upheld the constitutionality of a Navy regulation mandating discharge of anyone engaged in homosexual activities. Judge Kennedy, writing for the court, noted that substantive due process, rather than equal protection, was the

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[26] Judge Kennedy's justification for the sentencing differential shows a lack of sensitivity to the act of male rape of a female, as well as a clear repugnance for acts which, about coercion, are associated with male homosexuality:

> The physical abuses against the victim's anatomy committed in this case were acts distinct in kind from the act of rape as proscribed by federal statute and defined by common law. It is rational to determine that the harm, both physical and mental, suffered by victims of these two crimes are of a different quality in each instance. These distinctions are reflected in traditions and community attitudes that have prevailed for centuries, and penal laws may properly take account of such differences by assigning a separate generic classification to each offense. ... The equal protection clause is not offended when Congress punishes one offense by assimilation of a state statute but provides its own definition and punishment for a rationally distinguishable offense.

574 F.2d at 991.

basis for the plaintiffs' constitutional claim. He explained that "[r]ecent decisions indicated that substantive due process scrutiny of a government regulation involves a case-by-case balancing" of the competing interests, rather than the "formal three-tier analysis" applied to equal protection claims. Id. at 807.[27] Citing substantial authority on both sides of the question, the opinion conceded "arguendo" that "some kinds of government regulation of private consensual homosexual behavior may face substantial constitutional challenge." Id. at 810. Judge Kennedy then uncritically accepted the government's asserted interest in military discipline, finding that it outweighs "whatever heightened solicitude is appropriate for private homosexual conduct." Ibid.

27/ Kennedy noted, however, "important analytical and rhetorical similarities" between the two approaches:

> [W]hen conduct either by virtue of its inadequate foundation in the continuing traditions of our society or for some other reason, such as lack of connection with interests recognized as private and protected, is subject to governmental regulation, then analysis under the substantive due process clause proceeds in much the same way as under the lowest tier of equal protection scrutiny. ... At the other extreme, where the government seriously intrudes into matters which lie at the core of interests which deserve due process protection, then the compelling state interest test employed in equal protection cases may be used by the Court to describe the appropriate due process analysis. See, e.g., Roe v. Wade; Griswold v. Connecticut; Skinner v. Oklahoma ....
>
> The case before us lies somewhere between these two standards.

632 F.2d at 808-09 (citations omitted).

In a long footnote, Judge Kennedy criticized decisions in other courts requiring proof that a particular plaintiff, terminated on grounds of homosexuality, is unfit for employment. According to Kennedy, those courts "misunderstood the meaning of rationality in the Court's due process cases." Id. at 808, n.20. Judge Kennedy also suggested that dismissal would have been proper even under equal protection analysis. "Discharge of the particular plaintiff before us would be rational, under minimal scrutiny," Judge Kennedy stated, "not because their particular cases present the dangers which justify Navy policy, but instead because the general policy of discharging all homosexuals is rational." Ibid.

Judge Norris dissented from the court's rejection of the suggestion for rehearing en banc. Miller v. Rumsfeld, 647 F.2d 80 (1981). In his view, the Beller panel "seriously misconstrued the proper methodology of substantive due process analysis," by rejecting the fundamental rights approach adopted in Griswold v. Connecticut in favor of a "balancing" approach. Id. at 80-81. Contrary to Kennedy's reliance on "recent decisions," the dissent argues that

> it is not in any sense accurate to suggest that the recent decisions of the Supreme Court compel or even allow this. The problem with the panel's balancing approach--the reason, I suggest, that the Supreme Court has refrained from adopting it--is that it is inherently standardless.

Id. at 82. The dissent also took issue with the panel's uncritical acceptance of the government's military necessity

justification, noting that, "[c]onsidered with proper detachment rather than knee-jerk acquiescence, the military necessity argument is revealed not to be supported by the record in Beller." Id. at 87.

Judge Kennedy also wrote the majority decision in Sullivan v. INS, 772 F.2d 609 (1985), which involved deportation of a homosexual alien despite claims that extreme hardship would result if separated from his life partner of 12 years. Respondent further claimed that as a highly publicized gay leader, he faced extreme hardship in his country of origin, known to be hostile to homosexuals. Judge Kennedy, over a strong dissent, held that the Board of Immigration Appeals did not abuse its discretion in construing narrowly the extreme hardship provision. "Deportation rarely occurs," Judge Kennedy wrote, "without personal distress and emotional hurt."[28/] Id. at 611.

Handicap

Nor does Judge Kennedy's record display vigorous enforcement of legislation designed to assist historically disadvantaged groups such as the handicapped. In Mountain View-Los Altos Union High School Dist. v. Sharron B.H., 709 F.2d 28 (1983), Kennedy adopted a narrow construction of the Education for All

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28/ Judge Kennedy's casual treatment of the bond between homosexual life partners, see 772 F.2d at 612, stands in marked contrast to his solicitude for the traditional family, see United States v. Penn, supra, 647 F.2d 876, 888-9 (Kennedy, J., dissenting), cert. denied, 449 U.S. 903 (1980).

Handicapped Children Act (EAHCA). Relying on the pendency of the Act's administrative procedures, Kennedy held that parents could not unilaterally decide to transfer their handicapped child to a private school and then seek reimbursement from the school district. He stated:

> The statute does confer on district courts the power to give all "appropriate relief" ..., but absent legislative history suggesting the contrary, such a phrase is usually construed as a mere grant of jurisdiction to enforce and supplement the administrative procedures for identification, evaluation, and placement of the child, and not of authority to award retrospective damages.

Id. at 30 (citations omitted).

Two years later, in Burlington School Comm. v. Massachusetts Dept. of Education, 471 U.S. 359 (1985), the Supreme Court squarely rejected this construction of EAHCA. In a unanimous opinion by Justice Rehnquist, the Court held that "by empowering the court to grant 'appropriate' relief Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case." Id. at 370. The Court rejected the characterization of reimbursement as damages, noting that "reimbursement merely requires the [school district] to belatedly pay expenses that it should have paid all along." Id. at 370-371.

At the hearings, Judge Kennedy invoked federalism in defense of his decision: "[W]e were being asked in this case to say that a local school district, an entity of the state, was required to

pay this sum. We thought a question of Federalism was involved, in that school districts are strapped for every penny."[29/]

Economic Regulation

Judge Kennedy has likewise rejected equal protection challenges to economic classifications, even where fundamental rights are alleged to be at stake. In Fisher v. Reiser, 610 F.2d 629 (1979), the Court of Appeals, per Kennedy, upheld Nevada's worker's compensation statute which denied cost-of-living increases to out-of-state beneficiaries. Faced with an alleged burden on the right-to-travel, Judge Kennedy upheld the classification, refusing to apply strict scrutiny on behalf of "one who has migrated from the state which denies the benefit in question." Id. at 633.

Tsosie v. Califano, 630 F.2d 1328 (1980), rejected an equal protection challenge to the denial of child's insurance benefits under the Social Security Act to a child adopted after the death of the eligible wage earner. Judge Kennedy found nothing irrational in the statute's test of dependency, which excluded from coverage an after-adopted child who had actual dependency upon the wage earner.

VOTING RIGHTS

Judge Kennedy's voting rights record is mixed. Where an electoral scheme has not implicated race or ethnicity, he has vigorously enforced the principle of one-person, one-vote. By

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29/ Hearing Testimony, Dec. 14, 1987, at 133.

contrast, his record shows a insensitivity to the role of race and ethnicity in electoral politics and a misunderstanding of the concept of vote dilution.

Judge Kennedy's most troubling opinion in this area is Aranda v. Van Sickle, 600 F.2d 1267 (1979), cert. denied, 446 U.S. 951 (1980), which involved a constitutional challenge on behalf of Mexican-Americans to an at-large election scheme in the City of San Fernando. Judge Kennedy, "[a]fter some hesitation," id. at 1275, concurred in the majority's affirmance of summary judgment against the plaintiffs.[30/]

The evidence of discrimination in Aranda was strong, and certainly sufficient to require a trial on the merits. The City of San Fernando had used an at-large election scheme since its incorporation in 1911. By the early 1970's, the population had become half Mexican-American, yet only three Mexican-Americans had ever been elected to the City's five-member City Council. Mexican-Americans were a distinct, geographically insular community; most of the polling places were located in white homes; few Mexican-Americans were employed as election officials and few had been appointed to city boards and commissions; political campaigns were characterized by racial appeals; all ballots and election materials were available only in English; and the City had a history of discrimination against Mexican-Americans.

[30/] Vote dilution cases are almost never disposed of on summary judgment; when they are, they have been regularly reversed on appeal. See, e.g., Monroe v. City of Woodville, Mississippi, 819 F.2d 507 (5th Cir. 1987).

The Supreme Court in White v. Regester, 412 U.S. 755 (1973), had relied on effect-type evidence, without proof of intent, to invalidate at-large elections for state legislators. Nevertheless, Judge Kennedy required plaintiffs to prove "that the at-large system for electing the mayor and city council members is maintained because of an invidious intent." 600 F.2d at 1277.[31]

At the hearings, Kennedy was questioned extensively about Aranda. Despite the substantial evidence of discrimination, he maintained that the result in that case was dictated by the intrusive nature of the remedy sought by the plaintiffs -- a district election scheme. Kennedy stated:

> This is one of the most powerful, one of the sweeping, one of the most far-reaching kinds of remedies that the Federal Court can impose on a local system. And in our view, or in my view, as is expressed in the concurrence, that remedy far exceeded the specific wrongs that had been alleged.[32]

In contrast to Aranda, Judge Kennedy actively protected the principle of one-person, one-vote in James v. Ball, 613 F.2d 180 (1979), rev'd, 451 U.S. 355 (1981), which involved the constitutionality of an Arizona statute providing that voting in elections for directors of a water storage and delivery and power district could be limited to landowners, with votes apportioned

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[31] In 1982, Congress amended § 2 of the Voting Rights Act to make clear that electoral practices that have a discriminatory effect are illegal.

[32] Hearing Testimony, Dec. 15, 1987, at 23-24. See also id. at 112-116; 222-226.

according to acreage owned within the district. Judge Kennedy, for a divided court, struck down the statute, relying on the fact that the district did not have "a special limited purpose" and its activities did "not disproportionately affect landowners." Id. at 184. The Supreme Court reversed, with Justices White, Brennan, Marshall and Blackmun dissenting.

McMichael v. County of Napa, 709 F.2d 1268 (1983), involved a challenge to a countywide referendum adopting a slow-growth ordinance applying only to the unincorporated area of Napa County, California. Residents of unaffected incorporated areas were allowed to vote in the referendum. Plaintiff, a resident of the unincorporated area, contended that his vote was thereby unconstitutionally diluted. The majority affirmed dismissal on standing grounds. Judge Kennedy concurred, but would have dismissed the complaint for failure to state a claim. He stated:

> Federal courts will enter orders to invalidate state election results where voters have suffered an unconstitutional deprivation of the opportunity to vote even when it is not clear that the outcome would have been affected, but such relief has been reserved for instances of willful or severe violations of established constitutional norms. The present case is not in that category.

Id. at 1273-74 (citations omitted).[33/]

[33/] Judge Kennedy did not acknowledge that under certain circumstances, the voters of one jurisdiction might lack a sufficient legal interest in the affairs of another jurisdiction to justify their inclusion in an election. See, e.g., Locklear v. North Carolina State Board of Elections, 514 F.2d 1152 (4th Cir. 1975) (allowing city residents who had an independent school system to vote in county school board elections dilutes the voting strength county residents in violation of the equal protection clause).

RIGHTS OF ALIENS

Judge Kennedy record on the rights of aliens is also mixed and is not easy to characterize.[34/]

Kennedy has limited the procedural recourse available to aliens in immigration proceedings. For instance, in Reyes v. INS, 571 F.2d 505 (1978), Judge Kennedy determined that the Court of Appeals could not review a decision of the Board of Immigration Appeals ("BIA") to deny a stay of deportation until the BIA decided a pending motion to reopen the proceedings. Kennedy's decision yielded the anomalous result that Reyes was deported while his motion to reopen was pending, and was denied an opportunity to meaningfully appeal that deportation. This comported with Congress' intention, wrote Kennedy, to "correct abuses in the process of judicial review of deportation orders" and prevent "dilatory tactic[s]." Id. at 507.[35/]

Similarly, in Gutierrez v. INS, 745 F.2d 548 (1984), Judge Kennedy also narrowly circumscribed the procedural rights available to the alien. A prior Ninth Circuit decision held that when the basis upon which the INS seeks deportation is identical to a statutory ground for exclusion for which discretionary

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34/ In a February 1984 speech, Kennedy observed that the rights of aliens — particularly claims for asylum — raise "great difficulties in making our Constitution mesh neatly with extensive international commitments." Rotary Club Speech, supra, at 7-8.

35/ Two years later, in Sotelo Mondragon v. Ilchert, 653 F.2d 1254 (1980), the Ninth Circuit corrected this anomaly by establishing that an alien could challenge the BIA's decision to deny such a stay of deportation through a writ of habeas in the district court. This possibility was not discussed in Kennedy's earlier decision.

relief would be available, the equal protection clause requires that discretionary relief be accorded in the deportation context as well. In dicta, Kennedy implicitly rejected the alien's claim that the equal protection clause required the availability of discretionary relief for an alien deportable for entry without inspection because there "[is] no precise parallel among the explicit grounds for exclusion." Id. at 550.

Judge Kennedy has also been willing to impose high burdens of proof on aliens seeking to enter. Dissenting in Urbano de Maluluan v. INS, 577 F.2d 589 (1978), for example, he disputed the majority's view that inconvenience to two citizen children might constitute "hardship" supporting a motion to reopen deportation proceedings, and suggest that the majority was improperly swayed by the "sympathetic fact situation[]." Id. at 596. In Oi Lan Lee v. INS, 573 F.2d 592 (1978), Judge Kennedy upheld the BIA's decision to weigh inconclusive blood test evidence against the plaintiff's visa application on behalf of her alleged son, and to discount what Judge Kennedy termed "the appellant's self-serving affidavits of herself and her daughter" in support of the application.

Further, in Quintanilla-Ticas v. INS, 783 F.2d 955 (1986), Judge Kennedy rejected the petition of an alien and his family for political asylum, relying in part on his own views of the situation in El Salvador. Quintanilla-Ticas had been threatened in El Salvador because he wore a military uniform. Since he had resigned from the military, observed Kennedy, "persecution is

less likely." Id. at 957. Moreover, "[e]ven if petitioners would face some danger in their home town because of Quintanilla-Ticas' former military status, deportation to El Salvador does not require petitioners to return to the area of the country where they formerly lived." Id. at 957.

In one notable instance, however, Kennedy was especially solicitous of aliens' rights. In NLRB v. Apollo Tire Co., 604 F.2d 1180 (1979), Kennedy concurred in the majority opinion that employed aliens are covered by the National Labor Relations Act (("NLRA"), since "[i]f the NLRA were inapplicable to workers who are illegal aliens, we would leave helpless the very persons who most need protection from exploitative employer practices such as occurred in this case." Id. at 1184.[36]

SEPARATION OF POWERS

Judge Kennedy's best known decision involved the balance of powers among the three branches of government. Several of his speeches also discuss separation of powers, stressing the benefits of a flexible, case-by-case approach, especially where Executive power is at stake.

For example, in a 1980 speech on the constitutional aspects of the presidency, Kennedy observed:

> The constitutional system works best if there remain twilight zones of uncertainty and tension between the component parts of the government. The surest protection of

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[36] The Ninth Circuit was only the second court of appeals to consider this issue; the Supreme Court later adopted a view similar to that of Judge Kennedy in Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984).

> constitutional rule lies not in definitive announcements of power boundaries but in a mutual respect and deference among all the component parts.[37]

Kennedy criticized the Supreme Court's resolution of the Watergate tapes controversy on this ground. He noted that

> [b]y acting to expedite the hearing and decision, the Supreme Court pretermitted the debate over disclosure that was going on between the political branches, the executive, and the Congress. ... The integrity of the legislature and its authority to preserve its own place in the constitutional system might have been established more decisively if it had solved its own problem with the Executive, without the unasked for help from the courts.[38]

Kennedy believes, however, that the Constitution supports expansive Executive power. He states that "[t]he draftsmen of the Constitution structured the presidency so that its powers and functions would be drawn as much by history and tradition as by specific written provisions."[39] Thus, he has suggested that the Executive can exercise broad authority in matters involving foreign affairs and national security:

> [I]n the field of foreign affairs, the President, while he is not viewed as a monarch, does embody the national will in the way that he does not domestically. ... From this concept, great powers flow to the President in foreign affairs. This is

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37/ Salzburg Speech, supra, at 11.

38/ Id. at 12-13. In his testimony, Kennedy made the same point: "[T]he Constitution does not work if any one branch of the government insists on the exercise of its powers to the extreme." Hearing Testimony, Dec. 15, 1987, at 50; see also Dec. 14, 1987, at 215.

39/ Salzburg Speech, supra, at 2.

> established by custom, tradition, and judicial precedent.[40]

By contrast, Kennedy believes that "the institutional structure of the legislature is not particularly well suited to the nuances" of foreign policy.[41]

In Chadha v. INS, 634 F.2d 408 (1981), aff'd, 462 U.S. 919 (1983), Judge Kennedy relied primarily on separation of powers analysis to invalidate the legislative veto provision of the Immigration and Nationality Act, which allowed one house to disapprove suspension of an order of deportation.[42] According

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[40] Id. at 9. Kennedy added that "the President in the international sphere can commit us to a course of conduct that is all but irrevocable, despite the authority of Congress to issue corrective instructions in appropriate cases." Id. at 10.

[41] Id. at 13-14. Judge Kennedy made similar points in his testimony, although he moderated his criticism of Congress. For example, Kennedy stated:

> [Youngstown] tells us, or begins to discuss, the critical question, whether or not the President is simply the agent of Congress, bound to do its bidding in all instances, or whether or not there is a core of power that lies at the center of the presidential office that the Congress cannot take away.
>
> As I understand current doctrine, and the Youngstown case, there is that core of power. The extent to which it can be exercised in defiance of congressional will is a question of abiding concern, I know, to the Congress and to judges.

Hearing Testimony, Dec. 14, 1987, at 215.

[42] By contrast, Chief Justice Burger's opinion for the Supreme Court relied exclusively on the constitutional requirements of presentment and bicameralism. 462 U.S. 919. Judge Kennedy, in an unusual extrajudicial discussion of the opinion, contrasted his analysis with the "more sweeping approach" taken by the Supreme Court. A. Kennedy, Hoover Lecture, Stanford Law School, Palo Alto, CA (May 17, 1984), at 1 [hereinafter, Hoover Lecture]. He noted that

> [i]n our court we left open the possibility of

(continued...)

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to Judge Kennedy, separation of powers serves two purposes: to prevent "an unnecessary and therefore dangerous concentration of power in one branch," 634 F.2d at 422, and "to promote governmental efficiency." Id. at 424. A violation of separation of powers occurs when there is

> an assumption by one branch of powers that are central or essential to the operation of a coordinate branch, provided also that the assumption disrupts the coordinate branch in the performance of its duties and is unnecessary to implement a legitimate policy of the Government.

Ibid.

Applying this analysis to the one-house veto provision, Kennedy concluded that it violated separation of powers. If viewed as a corrective device, Congress was performing "a role ordinarily a judicial or an internal administrative responsibility." Id. at 430. Because of the possibility of congressional disapproval, nearly all judicial interpretations of suspension of deportation proceedings "are rendered, in effect, impermissible advisory opinions." Ibid. Judge Kennedy termed this interference with the central function of the judiciary "both disruptive and unnecessary." Ibid. If the purpose of the

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42/ (...continued)
> further analysis or doctrinal elaboration by confining the opinion to the case before us. This was [an] implied acknowledgement that some forms of legislative veto might survive. I had mentioned the presentment clause, but struck it from the last draft as superfluous to our holding.

Ibid.

legislative veto is for Congress to share in the administration of the statute, "such involvement trespasses upon central functions of the Executive." Id. at 432.[43/]

In a speech delivered at Stanford Law School, Kennedy discussed the implications of the Supreme Court's categorical invalidation of the legislative veto:

> The ultimate question then is whether the Chadha decision will be the catalyst for some basic congressional changes. My view of this is not a sanguine one. I am not sure what it will take for Congress to confront its own lack of self-discipline, its own lack of party discipline, its own lack of a principled course of action besides the ethic of ensuring its reelection. Madison distrusted the Congress because it would aggrandize the other branches; but I think the more real concern is its competence within its own legitimate sphere.[44/]

This indictment of congressional competence may explain Kennedy's willingness to protect the judicial and executive branches from perceived legislative overreaching.

In Pacemaker Diagnostic Clinic of America v. Instromedix, 725 F.2d 537 (1984), cert. denied, 474 U.S. 847 (1985), Judge Kennedy also applied separation of powers analysis, but reached a different result. Writing for a majority of the court, he found that the Federal Magistrates Act, which allows magistrates to

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43/ Kennedy's opinion also rejects the argument that the legislative veto was a separate legislative procedure that operated only after the executive and judicial procedures were complete. He noted that "the power to 'make all laws' has important formal and procedural limitations," most notably, bicameralism. 634 F.2d at 433.

44/ Hoover Lecture, supra, at 8.

conduct civil trials with the consent of the parties, did not violate separation of powers. While acknowledging that magistrates are not protected from removal or diminution of salary, Judge Kennedy held that "as this aspect of the separation of powers doctrine embodied in Article III is personal to the parties, it may be waived." Id. at 542.[45/]

FIRST AMENDMENT

Judge Kennedy has written few First Amendment decisions during his twelve years on the federal bench. He has written only one opinion dealing with the religion clauses. He has written sparingly on associational questions. And he has written only a handful of opinions dealing with free speech issues. His views on the scope of the First Amendment and the limits of political advocacy are virtually unknown. Nor do we know his views on church-state relations.

At the hearings, Kennedy testified:

> The First Amendment ... applies not just to political speech, although that is clearly one of its purposes, and in that respect it ensures the dialogue that is necessary for the continuance of the democratic process. But it applies, really, to all ways in which we express ourselves as persons. It applies to dance and to art and to music, and these features of our freedom are to many people as important or more important than political

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45/ The dissent disagreed with the proposition that Article III jurisdiction can be determined by consent of the parties. 725 F.2d at 547. The dissent also noted that one of the dangers of the Magistrates Act, recognized by Congress, was that it would "induce economically disadvantaged litigants, unable to afford the delay and cost of waiting or adjudication by an Article III judge, to consent to trial before a magistrate," thereby creating a two-tiered system of justice. Id. at 554.

> discussions or searching for philosophical truth, and the First Amendment covers all of these forms.[46]

On balance, it seems fair to say that Judge Kennedy's record on the First Amendment is a positive one. His record is not entirely unblemished but, on the whole, it demonstrates a sensitivity to the value of free speech in a constitutional democracy.

Campaign Finance

Judge Kennedy's longest and most significant First Amendment opinion is California Medical Ass'n v. Federal Election Comm'n, 641 F.2d 619 (1980), aff'd, 453 U.S. 182 (1981). The issue was whether Congress could constitutionally place a $5,000 limit on a professional association's contribution to a political action committee. Judge Kennedy upheld the contribution limit in a strong endorsement of the Supreme Court's approach in Buckley v. Valeo.[47] Based on Buckley, he ruled that strict judicial scrutiny was unnecessary because the contribution limit imposed only a minimal burden on First Amendment rights. Rather, he

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[46] Hearing Testimony, Dec. 14, 1987, at 152-153. But see Singer v. U.S. Civil Service Commission, 530 F.2d 247 (1976), vacated and remanded, 429 U.S. 1034 (1977), in which Judge Kennedy joined a unanimous decision that narrowly construes the scope of protected First Amendment activity. Singer was fired from his job as a clerk typist with the EEOC. The Ninth Circuit upheld the firing on the ground that Singer "openly and notoriously flaunt[ed] his homosexual way of life." The "notorious" activities included Singer's attempt to marry his lover, as well as a leadership role, including public speaking, on behalf of the Seattle Gay Alliance. The decision's holding that "open ... advocacy of homosexual conduct" is not protected speech raises serious questions as to whether Judge Kennedy will apply the First Amendment to unpopular or dissident views; no specific language, however, can be ascribed to Judge Kennedy.

[47] 424 U.S. 1 (1976) (per curiam).

held, the relevant question was whether the contribution limit promoted "a discernible, important and legitimate policy of the Congress." Id. at 628. Judge Kennedy found such a policy "inherent in the structure" of the federal campaign finance laws, id. at 629, and therefore rejected plaintiffs' First Amendment challenge. The ACLU took the opposite position in an amicus brief.

Employee Speech

Judge Kennedy's approach to employee free speech rights also raises a civil liberties concern. In Kotwica v. City of Tucson, 801 F.2d 1182 (1986), he ruled that a municipal employee could be sanctioned by her employer for deliberately misstating official policy to the press. The holding itself is not remarkable. Judge Kennedy's statement of the law, however, is sweeping in its implications. "The government's interest," he wrote, "is in direct proportion to the potential for interference with its ability to function, and in judging the level of interference, the government had broad discretion." Id. at 1184.

Lynn v. Sheet Metal Workers' Intern. Ass'n, 804 F.2d 1472 (1986), involved similar issues in a somewhat different context. The plaintiff in Lynn was dismissed from his position as union business manager after he publicly disagreed with the union leadership on the need for a dues increase. He then sued the union, claiming that his dismissal violated the labor bill of rights contained in the Landrum-Griffin Act. The majority agreed. Judge Kennedy argued in dissent that federal law pro-

tected only plaintiff's right to union membership, not his right to union office.

> [T]he majority errs in holding that union leadership cannot discharge a business manager who actively opposes the leadership on a fundamental issue of union policy.
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> * * *
>
> Although this action indirectly penalizes [plaintiff] for his exercise of protected rights, it does so only in his capacity as an officer, not as a member. Absent a serious threat to the continued democratic governance of the union, such a dismissal does not violate the rights of union membership protected by [federal law]....

Id. at 1485.

Prior Restraints

By contrast, Judge Kennedy has scrupulously resisted prior restraints, whether sought by the government or private parties. For example, in Goldblum v. NBC, 584 F.2d 904 (1978), petitioner sought an injunction against an NBC "docu-drama" detailing abuses in the securities industry. Petitioner was at the time in jail for securities fraud. He contended that the film would prejudice his chances for early parole and inflame future juries against him in any possible civil actions. The district judge ordered the film produced so it could be reviewed for "inaccuracies." The network declined production, and the district court ordered the network's counsel imprisoned for contempt. In his opinion for the panel, Judge Kennedy reversed the district court, stating:

> The express and sole purpose of the district court's order to submit the film for viewing

> by the court was to determine whether or not to issue an injunction suspending its broadcast. Necessarily, any such injunction would be a sweeping prior restraint of speech and, therefore, presumptively unconstitutional.

Id. at 906.

Similarly, Judge Kennedy has rejected two requests for cease and desist orders sought by the Federal Trade Commission in commercial advertising cases. In Standard Oil Co. of California v. FTC, 577 F.2d 653 (1978), the FTC issued a cease and desist order that extended to any product promoted by Standard Oil or its advertising agency based on a finding that advertisements for gasoline additives had been false and misleading. Judge Kennedy struck down the order as overbroad:

> [F]irst Amendment considerations dictate that the Commission exercise restraint in formulating remedial orders which may amount to a prior restraint on protected commercial speech. ... At a minimum, administrative agencies may not pursue rigorous enforcement to the extent of discouraging advertising with no concomitant gain in assuring accuracy or truthfulness.

Id. at 662.

FTC v. Simeon Management Corp., 532 F.2d 708 (1976), addressed a related procedural issue. In support of its request for a preliminary injunction to restrain the advertising campaign of a diet clinic, the FTC argued that its determination that an injunction was necessary should be accepted by the court unless plainly unreasonable. Judge Kennedy disagreed:

> When potentially protected speech is subjected to prior restraint ... procedural safeguards are vitally important. Such

> safeguards would be inadequate if courts were required ... to enjoin advertising because the FTC claimed it was false, without first making an independent determination of the sufficiency of that claim.

Id. at 713. Judge Kennedy also noted that "forbidding the advertising altogether because public policy disfavors the underlying activity would raise serious first amendment questions." Id. at 717.

Press Access

In a somewhat analogous context, Judge Kennedy rejected the government's effort to shield certain litigation papers from public scrutiny in CBS v. United States District Court, 765 F.2d 823 (1985). The government had persuaded the district court that it should not be forced to reveal documents sealed in connection with a motion to reduce the sentence of one of John DeLorean's co-defendants. Judge Kennedy disagreed:

> The government and the trial court ... went so far as to assert that the government's interest would be threatened if even its position of support or opposition to the motion were made known. That idea is as remarkable as it is meritless.

Id. at 826. At the same time, Judge Kennedy "assumed that the right of access to criminal proceedings could, in appropriate circumstances, be limited to protect private property interests as well as the defendant's right to a fair trial." Id. at 825. The implications of that "assumption" are potentially troubling; the issue, however, was not directly addressed in the CBS case.

Libel

Judge Kennedy has written two libel decisions. One involves substance, the other procedure. In Koch v. Goldway, 817 F.2d 507 (1987), the Mayor of Santa Monica was sued for defamation for making the following comment about a local political opponent: "There was a well-known Nazi war criminal named Ilse Koch during World War II. Like Hitler, Ilse Koch has never been found. Is this the same Ilse Koch? Who knows?" Judge Kennedy ruled that the statement was protected opinion and therefore not actionable. He reached this conclusion by examining both the words and the context in which they were uttered, placing particular stress on the fact that the speech occurred in the midst of a political debate:

> The law of defamation teaches ... that in some instances speech must seek its own refutation without intervention by the courts. ... Base and malignant speech is not necessarily actionable.

Id. at 510.[48/]

In Church of Scientology of California v. Adams, 584 F.2d 893 (1976), Judge Kennedy addressed the important question of whether a libel action can be brought against a newspaper in any state where the newspaper is sold. The case arose after the St. Louis Post-Dispatch published a series of articles on the Church

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48/ Judge Kennedy also rejected the claim that the Mayor's speech created a cause for intentional infliction of emotional distress. Although not fully analyzed, this holding is worth noting since the Supreme Court is presently considering whether defamation and intentional infliction of emotional distress are governed by the same constitutional standards. See Falwell v. Flynt, 797 F.2d 1270 (4th Cir. 1986), cert. granted, 55 U.S.L.W. 3657 (1987).

of Scientology of Missouri. The national church, located in California, then brought suit in California. The only basis for jurisdiction in California was that 156 copies of the St. Louis paper had been mailed to subscribers in the state. Judge Kennedy ruled that this was insufficient to make a newspaper defend a libel action in a distant forum. While cautioning that jurisdictional rules did not change merely because a newspaper was involved, Judge Kennedy wrote:

> The nature of the press is such that copies of most major newspapers will be located throughout the world, and we do not think it consistent with fairness to subject publishers to personal jurisdiction solely because an insignificant number of copies of their newspaper were circulated in the forum state.

Id. at 897.

Political Speech

The constitutional protection for political speech and association has not been a major focus of Judge Kennedy's writings. It has been a tangential issue, however, in two of his decisions. United States v. Freeman, 761 F.2d 549 (1985), involved a criminal prosecution against a self-proclaimed tax protestor who was convicted of counseling others to evade the tax laws based, in part, on a series of public workshops he conducted. Citing the Brandenburg standard,[49] Judge Kennedy reversed the conviction on the ground that "the jury should have been charged that the expression was protected unless both the

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[49] See Brandenburg v. Ohio, 395 U.S. 444 (1969).

intent of the speaker and the tendency of his words was to produce or incite an imminent lawless act ...." Id. at 552.[50]

In United States v. Abel, 707 F.2d 1013 (1983), aff'd, 469 U.S. 45 (1984), the issue was whether a defense witness in a criminal trial could be impeached by bringing out the fact that both the witness and the defendant had belonged to a secret prison organization whose members were allegedly committed to lying on each other's behalf. The majority ruled that this associational connection was constitutionally irrelevant without some showing that the witness shared the association's objectives. Judge Kennedy dissented, arguing that the majority's rule was appropriate when group membership was used as a basis for punishment but not when it was used only for purposes of impeachment. In Judge Kennedy's words, "[t]he witness who is impeached by membership in a group sworn to perjury is subject to no sanction other than that his testimony may be disbelieved." Id. at 1017. The Supreme Court subsequently accepted Judge Kennedy's view.

Religion

Judge Kennedy has written only one opinion dealing with the free exercise and establishment clauses of the First Amendment. In Graham v. Comm'r of Internal Revenue, 822 F.2d 844 (1987), Judge Kennedy upheld the Commissioner's disallowance of certain

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[50] In his testimony, Judge Kennedy endorsed the Brandenburg standard. He stated that he knew of "no substantial, responsible argument which would require the overruling of that precedent." Hearing Testimony, Dec. 15, 1987, at 229.

payments made to the Church of Scientology, claimed as charitable deductions by church members. Writing for a unanimous panel, Kennedy found no violation of the taxpayers' free exercise rights. He doubted that they had shown a burden on the right of free exercise, but, even if there was a burden, Kennedy found compelling the government's interest in "a neutral and enforceable taxation system." Id. at 853. Finally, Kennedy dismissed the Scientologists' establishment clause claim, finding it without support in the record. Ibid.

At the hearings, Kennedy provided only minimal elaboration of his views on church-state relations. In response to a general question about the establishment clause, Kennedy testified that "it is a fundamental value of the Constitution ... that the Government does not impermissibly assist or aid all religions or any one religion over the other."[51/] However, he also made a point of noting a tension between the establishment clause and the free exercise clause.[52/]

51/ See Hearing Testimony, Dec. 14, 1987, at 208. In a 1968 interview with the McGeorge School of Law newspaper, Kennedy was quoted "as saying that the Court should leave room for some expressions of religion in State-operated places. There should be a place for some religious experience in schools or a Christmas tree in a public housing center." Id. at 206. When asked about this, Kennedy stated that he did not recall the article or the interview. He also suggested that the comments attributed to him no longer reflect his views: "I would say that the law would be an impoverished subject if my views didn't change over 20 years." Ibid.

52/ Ibid.

CRIMINAL LAW AND PROCEDURE

Judge Kennedy has written well over 100 opinions in the criminal law area. His decisions show great sensitivity to the needs of law enforcement. Nevertheless, Judge Kennedy has been willing to reverse a criminal conviction when faced with evidence of police misconduct.[53/]

Several of Judge Kennedy's unpublished speeches also address criminal law issues. The nominee has questioned the wisdom of rules adopted in the criminal area to protect constitutional rights. For example, in a 1981 speech, Kennedy noted that "some of the refinements we have invented for criminal cases are carried almost to the point of an obsession. Implementing these rules has not been without its severe cost."[54/] At the South Pacific Judicial Conference, Kennedy also criticized judicial indifference to the rights of crime victims:

> The significant criminal law decisions of the Warren Court focused on the relation of the accused to the state, and the police as an instrument of the state. Little or no thought was given to the position of the victims.[55/]

[53/] Senator Leahy noted, without contradiction, that Kennedy ruled for the defendant in about a third of the criminal cases he heard, and for the government in the remaining two-thirds. Hearing Testimony, Dec. 15, 1987, at 136.

[54/] A. Kennedy, Unpublished Speech, McGeorge School of Law Commencement, Sacramento, CA (May 30, 1981), at 2. When asked about this statement at the hearings, Kennedy admitted that it was "pretty broad rhetoric" and explained that he "had the Fourth Amendment in mind generally." Hearing Testimony, Dec. 15, 1987, at 137.

[55/] A. Kennedy, Unpublished Speech, South Pacific Judicial Conference, Aucklard, New Zealand (March 3-5, 1987), at 8.

Judge Kennedy stressed the fact that appellate judges "are in an ideal position either to mandate or, by persuasion, to bring about important and needed reforms to protect victims and indeed other witnesses."[56/] It is unclear what impact, if any, this solicitude for victims would have on Judge Kennedy's decisions in criminal cases.[57/]

Fourth Amendment

Judge Kennedy's view of the exclusionary rule raises significant civil liberties concern. Judge Kennedy believes that the rule exists solely to deter police misconduct. It therefore has no application to the "good faith and sensible actions" of the police:

> If the exclusionary rule becomes an end in itself and the courts do not apply it in a sensible and predictable way, then one approach is to reexamine it altogether. We do not have that authority; but we do have the commission, and the obligation, to confine the rule to the purposes for which it was announced.
>
> In this case, the exclusionary rule seems to have acquired such independent force that it operates without reference to any improper conduct by the police.

56/ Id. at 8.

57/ In his hearing testimony, Judge Kennedy recited similar expressions of concern for the rights of crime victims. See, e.g., Hearing Testimony, Dec. 14, 1987, at 159-160; Dec. 15, 1987, at 76-77. However, with the exception on one case involving restitution as a condition of parole, Kennedy indicated that victims' rights had not played a role in his criminal law decisions. Id. at 171.

United States v. Harvey, 711 F.2d 144 (1983) (dissent from denial of rehearing en banc).[58]

Judge Kennedy's best known Fourth Amendment decision is probably his dissent in United States v. Leon, No. 82-1093 (Jan. 19, 1983) (unpublished), rev'd, 468 U.S. 897 (1984). The Court of Appeals affirmed the district court's holding that a search warrant was invalid because based on information that was both over five-months-old and failed to establish the credibility of the informant. In dissent, Judge Kennedy argued that the warrant was valid because the five-month-old information had been validated by "a continuing course of suspicious conduct." Ibid. While noting that the police investigation was "conducted with care, diligence, and good faith," id. at 5, Judge Kennedy's dissent was not based on the "good faith" of the police officers.[59] The Supreme Court reversed, and established a "good faith" exception to the exclusionary rule.

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[58] See also Satchell v. Cardwell, 653 F.2d 408, 414 (1981) (concurring opinion) (questioning application of the "iron logic of the exclusionary rule" to the "good faith and sensible actions the officer took here"), cert. denied 454 U.S. 1154 (1982).

[59] A number of press accounts have mischaracterized Kennedy's dissent in Leon. See The National Law Journal, November 23, 1987 (in Leon, Kennedy "urged an exception where police act in good faith"); see also The National Conservative Weekly, November 21, 1987, p. 7 (claiming that Kennedy's dissent in Leon was "so persuasive" that it was adopted by the Supreme Court).

At the hearings, Kennedy acknowledged this: "I get somewhat ... more credit for the Leon case than I deserve, because I did not find that there had been an illegal search in that case." Hearing Testimony, Dec. 14, 1987, at 204.

Judge Kennedy has already extended the "good faith" exception beyond the rule established in Leon. In United States v. Peterson, 812 F.2d 486, 491-92 (1987), for example, a case involving a joint venture between United States and Philippine narcotics authorities, Judge Kennedy applied the "good faith" exception to "reliance on foreign law enforcement officers' representations that there has been compliance with their own law." Id. at 492. He acknowledged that "Leon speaks only in terms of good faith reliance on a facially valid search warrant," but did not consider this dispositive:

> Holding [U.S. officers] to a strict liability standard for failings of their foreign associates would be even more incongruous than holding law enforcement officials to a strict liability standard as to the adequacy of domestic warrants. We conclude that the good faith exception to the exclusionary rule announced in Leon applies to the foreign search.

Ibid.[60/] But see United States v. Spilotro, 800 F.2d 959, 968 (1986) (refusing to apply the "good faith" exception to facially overbroad warrant).

[60/] At the hearings, however, Kennedy indicated that he would proceed with caution in this area:

> Now whether or not [the good faith exception] should apply to warrantless searches in the United States is a question that I have not addressed, and I would want to consider very deliberately whether or not the rule should be extended to those instances because you then get, as you know, into the problem of objective versus subjective bad faith and you must by very careful to ensure that by the exception you do not swallow the rule.

Hearing Testimony, Dec. 14, 1987, at 205-206.

Judge Kennedy has upheld warrantless searches in a variety of contexts, especially where there is no evidence of police misconduct.[61] In United States v. Allen, 633 F.2d 1282 (1980), cert. denied, 454 U.S. 833 (1981), Kennedy held that a ranch owner had no reasonable expectation of privacy in portions of his property observed and photographed by a Coast Guard helicopter conducting aerial surveillance to uncover evidence of drug smuggling.[62] The Supreme Court subsequently upheld the constitutionality of warrantless aerial surveillance. See California v. Ciraolo, 476 U.S. ___, 90 L.Ed.2d 210 (1986). Justice Powell, joined by Justices Brennan, Marshall and Blackmun, dissented. Justice Powell's objections to the search in Ciraolo are equally applicable to the search in Allen:

> Here, police conducted an overflight at low altitude solely for the purpose of discovering evidence of crime within a private enclave into which they were constitutionally forbidden to intrude at ground level without a warrant.

Id. at 225.[63]

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[61] See, e.g., United States v. Sledge, 650 F.2d 1075 (1981); United States v. Gardner, 627 F.2d 906 (1980); United States v. Sherwin, 539 F.2d 1 (1976) (en banc); United States v. Scharf, 608 F.2d 323 (1979).

[62] In a speech, Kennedy warned that "[T]he constitutional order today is under a tremendous attack by criminal conspiracies that operate and profit from sale of illegal drugs." Rotary Club Speech, supra, at 2. He described some responses to this "drug invasion": "As for the drug traffickers themselves, we have ruled that aerial photo intelligence, radar and infrared surveillance, and coastguard boardings for vessel inspection, whether inside or outside the territorial twelve mile limit, are lawful for the purpose of interdicting the drug trade." Id. at 3.

[63] Judge Kennedy did note, however, that the court was not presented with "an attempt to reduce, by the use of vision-enhancing devices or the

(continued...)

When faced with instances of police misconduct or overreaching, however, Judge Kennedy has applied the exclusionary rule, even where it means overturning convictions. In United States v. Cameron, 538 F.2d 254 (1976), one of his earliest opinions in this area, Kennedy reversed a drug conviction based on evidence obtained by a body cavity search that included "two forced digital probes, two enemas, and forced [administration of] a liquid laxative." Id. at 258. Judge Kennedy recognized the magnitude of the intrusion involved and concluded that

> [i]n a situation thus laden with the potential for fear and anxiety, a reasonable search will include beyond the usual procedural requirements, reasonable steps to mitigate the anxiety, discomfort, and humiliation that the suspect may suffer.

Ibid. Finding that the procedures employed "were lacking in these respects," Kennedy held that the search violated the Fourth Amendment.[64/] Ibid.

Similarly, in United States v. Rettig, 589 F.2d 418 (1978), Kennedy was willing to look behind a facially valid warrant, to examine the circumstances under which it was issued and executed.

63/ (...continued)
incidence of aerial observation, the privacy expectation associated with the interiors of residences or other structures." 633 F.2d at 1289.

64/ The opinion expresses concern over the "excesses in both the incidence and the extent of body searches" conducted by the government, and insists that the government "keep careful statistics henceforth and make them available to the United States Attorney," so that the court can determine whether to adhere to its rule that a warrant is not always required in body search cases. 538 F.2d at 259-60. But see United States v. Shreve, 697 F.2d 873 (1983) (applying circuit precedent, Kennedy upheld a warrantless X-ray search for body cavity smuggling).

Finding bad faith on the part of the government, he reversed several drug convictions obtained as a result. The record established that when DEA agents applied to a state court judge for a warrant to search for evidence of marijuana possession, they did not disclose the fact that a federal magistrate had denied their application the day before, nor did they reveal the true purpose of the search, namely, to obtain evidence of a cocaine conspiracy. Kennedy ruled that,

> [b]y failing to advise the judge of all the material facts, including the purpose of the search and its intended scope, the officers deprived him of the opportunity to exercise meaningful supervision over their conduct and to define the proper limits of the warrant.

Id. at 422. He found that because "the agents did not confine their search in good faith to the objects of the warrant. ... this warrant became an instrument for conducting a general search." Id. at 423.

Finally, in United States v. Penn, 647 F.2d 876, cert. denied, 449 U.S. 903 (1980), a majority of the court reversed a lower court decision granting the defendant's motion to suppress a jar of heroin found in her backyard. The police had obtained this evidence by offering $5 to the defendant's five-year-old son. Although the court disapproved of this police tactic, it nevertheless found that the action did not "shock the conscience," id. at 880, and was not "unreasonable" under the Fourth Amendment. Id. at 883. The court also found that the police's interaction with the child did not violate any

legitimate expectation of privacy held by the mother. Ibid. It found that "no 'family' interest of constitutional stature is implicated here." Id. at 884.

Judge Kennedy dissented. In his view,

> [t]he question is whether the police can use the search of a residence as the occasion for a severe intrusion upon the relation between a mother and a child who has not reached the age of reason. Her relationship to the child belongs intimately to the mother ... . To say that she has no standing to complain of the stark intrusion upon it in this case is to assume a negative to the very question in issue, namely, to what extent the law can protect the relationship from disruption in the home.

Id. at 888 (citation omitted). He pointed out that courts have protected the parent-child relationship "where the threat of disruption is in some respects more attenuated than in the circumstances of the case before us." Ibid. He concluded that this police practice was "both pernicious in itself and dangerous as precedent. Indifference to personal liberty is but the precursor of the state's hostility to it." Id. at 889.

Fifth Amendment

Self-Incrimination

Judge Kennedy takes a narrow view of the kind and degree of compulsion prohibited by the Fifth Amendment privilege against self-incrimination. For example, in Ryan v. Montana, 580 F.2d 988 (1978), cert. denied, 440 U.S. 977 (1979), Kennedy concluded that the Fifth Amendment does not require a state to grant a probationer use immunity for testimony given at a probation revocation and deferred sentencing hearing, when he is under

indictment for the act that constitutes the probation violation. Because no inference of guilt was or could have been drawn from the defendant's silence at the probation revocation proceeding, Judge Kennedy found that these procedures do not violate the Fifth Amendment as construed by the Supreme Court. Judge Kennedy's opinion did, however, question the wisdom of the challenged practice:

> If our opinion as to the wisdom of the Montana rule were dispositive, we might prefer the California procedure, ... which provides use immunity for a probationer's testimony if it is given at a revocation hearing held prior to trial on criminal charges which were the basis for the revocation proceeding.

Id. at 994.

Matter of Fred R. Witte Center Glass No. 3, 544 F.2d 1026 (1976), raised the question whether a taxpayer under investigation by the Internal Revenue Service could decline to produce his accountant's work papers. The majority held that production was compelled under Fisher v. United States.[65] Judge Kennedy concurred. He emphasized that Fisher might not apply to other papers, "especially those of a more private nature"; he suggested that there was a "high probability that an order to produce personal papers may compel assertions or communications that fall within the [Fifth Amendment] privilege." Id. at 1029.

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[65] 425 U.S. 391 (1976).

Miranda

At the hearings, Kennedy characterized Miranda as "a sweeping, sweeping rule," one which "wrought almost a revolution."[66] He also questioned the soundness of the decision: "[I]t is not clear to me that it necessarily followed from the words of the Constitution. And yet it is in place now, and I think it is entitled to great respect."[67] Despite these reservations, as a court of appeals judge, Kennedy has generally applied this precedent, even at the cost of reversing convictions.

In United States v. Scharf, 608 F.2d 323 (1979), for example, Judge Kennedy reversed a conviction where Miranda warnings had not been delivered during the course of what he found to be custodial interrogations. He cited "[t]he intensity of the surveillance, the repeated interrogations, and the fact that [the defendant] had been subject to custodial interrogation twenty-four hours before" as "factors that combine to render the last interrogation a custodial one." Id. at 325.

In Neuschafer v. McKay, 807 F.2d 839 (1987), the defendant was convicted of murdering a fellow inmate and sentenced to death. The district court dismissed his petition for a writ of habeas corpus. In an opinion by Judge Kennedy, the Court of Appeals remanded for an evidentiary hearing on whether

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66/ Hearing Testimony, Dec. 15, 1987, at 142.

67/ Ibid. Kennedy also testified that the rule established in Miranda may have gone "beyond the necessities of the case." Id. at 143.

incriminating statements were obtained in violation of Edwards v. Arizona.[68] Kennedy found that the district court's reliance on the state trial court record was improper when the state's highest court characterized the record as "unclear." He noted that, in habeas corpus proceedings, "deference must be granted to the findings of state appellate courts as well as state trial courts." Id. at 841.[69] After an evidentiary hearing, the district court concluded that the incriminating statements were admissible under Edwards. This time the Court of Appeals, again per Kennedy, affirmed. Neuschafer v. Whitley, 816 F.2d 1390 (1987).

By contrast, Judge Kennedy affirmed a conviction in United States v. Contreras, 755 F.2d 733 (1985), cert. denied sub nom. Soto v. United States, 474 U.S. 832 (1985), which involved a federal prosecution of prison gang members who had testified under immunity in a state investigation. Federal agents gave the standard Miranda warnings, but also advised defendants that the state grants of immunity were not binding on the federal court and did not apply in the federal investigation. Using a very lax standard -- "we find no objective flaw and no necessarily misleading inferences in the advice given by the federal agents"

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[68] 451 U.S. 477 (1981).

[69] The remand provoked a sharp dissent from Judge Chambers, who maintained that there could be no doubt as to Neuschafer's guilt. He read the majority "as simply saying our district judge can make a better record and [we] should not indulge in a gamble by one of our en bancs or risk the Supreme Court handling the case now." 807 F.2d at 842.

-- Judge Kennedy concluded that the defendants had made a knowing and intelligent waiver of their Miranda rights.[70] Id. at 737.

Similarly, in United States v. Edwards, 539 F.2d 689 (1976), Judge Kennedy upheld a rape conviction based on a confession made after the suspect had been in custody for more than six hours without being taken before a magistrate. The decision recites that the suspect had been "advised of his rights and signed a waiver thereof." Id. at 691. Despite the delay in arraignment, Judge Kennedy refused to exclude the confession:

> Confessions given more than six hours after arrest during a delay in arraignment are, however, not per se involuntary. The delay is only one factor, to be considered in light of all the surrounding circumstances. The trial court found that the delay in arraignment was caused solely by a shortage of personnel and vehicles to transport the suspect a distance of 125 miles to Tucson, the site of the nearest available magistrate. There was no evidence that the defendant was the subject of oppressive police practices prior to the admission.

Ibid (citation omitted).

Double Jeopardy

Judge Kennedy frequently dissents where the majority reverses a criminal conviction on double jeopardy grounds. On the facts presented in these cases, he saw no constitutional impediment to reprosecution for a more serious offense or the

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[70] Judge Canby dissented. He found that the statements were "fatally misleading" because "[t]hey failed to make clear that federal authorities were precluded from making use of the statements that the defendants had already given under a promise or grant of immunity by state authorities." 755 F.2d at 738.

imposition of cumulative sentences for convictions proscribing the same conduct.

For example, in Adamson v. Ricketts, 789 F.2d 722 (1986) (en banc), rev'd, 107 S.Ct. 2680 (1987), a capital case, the majority concluded that the double jeopardy clause barred reprosecution for first degree murder of a defendant who pled guilty to second degree murder and that the defendant had not waived his rights under the terms of his plea agreement. Judge Kennedy dissented. He maintained that a conviction resting on a plea agreement does not protect a defendant from trial for a more serious offense if the plea is later set aside by reason of the defendant's breach of the agreement. The Supreme Court substantially adopted Judge Kennedy's analysis.

Arizona v. Manypenny, 608 F.2d 1197 (1979), rev'd, 451 U.S. 232 (1981), involved a state prosecution of federal border patrolman, which was removed to federal court. The district judge set aside the jury's guilty verdict and entered a judgment of acquittal. The majority dismissed the state's appeal, finding no federal statutory authority for appellate jurisdiction. Judge Kennedy dissented. He maintained that

> it was neither appropriate nor necessary for Congress to speak to the authority of prosecutors who represent a separate state as the sovereign initiating criminal charges. That question is solely the prerogative of the State of Arizona, and the State allows appeals in cases such as the one before us.

Id. at 1202. [71]

In Brimmage v. Sumner, 793 F.2d 1014 (1986), Judge Kennedy denied habeas relief, upholding convictions for robbery and murder in the perpetuation of robbery even though robbery is a lesser included offense of felony murder. The cumulative sentences amounted to life without parole plus fifteen years. Judge Kennedy stated:

> [E]ven if the two statutes proscribe the same conduct, the Double Jeopardy Clause does not prevent the imposition of cumulative punishments if the state legislature clearly intends to impose them. ... We must accept the state court's interpretation of the legislative intent for the imposition of multiple punishments, although we are not bound by that court's ultimate conclusion concerning whether such punishments violate the Double Jeopardy Clause.

Id. at 1015 (citations omitted).[72]

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[71] On remand, Kennedy reversed the district court's judgment of acquittal. See 672 F.2d 761, cert. denied, 459 U.S. 850 (1982).

[72] Accord Haynes v. Cupp, 827 F.2d 435 (1987); United States v. Meyer, 802 F.2d 348 (1986); United States v. Bennett, 702 F.2d 833 (1983).

Judge Kennedy did not find an appearance of vindictive prosecution in United States v. Gallegos-Curiel, 681 F.2d 1164 (1982), involving a felony indictment for illegal re-entry after the defendant pled not guilty to a misdemeanor charge at an initial appearance before the magistrate. The prosecutor sought the increased charges after reviewing the alien defendant's prior record of illegal entry, which had not been available to the magistrate. In reversing the district court, Judge Kennedy explained:

> When increased charges are filed in the routine course of prosecutorial review or as a result of continuing investigation, ... there is no realistic likelihood of prosecutorial abuse, and therefore no appearance of vindictive prosecution arises merely because the prosecutor's action was taken after a defense right was exercised.

Id. at 1169 (citations omitted).

Sixth Amendment

Confrontation Clause

Barker v. Morris, 761 F.2d 1396 (1985), cert. denied, 474 U.S. 928 (1987), is probably Judge Kennedy's most significant Confrontation Clause decision. In Barker, he ruled that the admission of videotaped testimony of a witness who subsequently died did not violate the confrontation clause, despite the fact that the defendant had no opportunity to cross-examine the witness.[73] Judge Kennedy found that the testimony had "substantial and specific guarantees of trustworthiness and reliability." Id. at 1401. He also recognized that the confrontation clause is more than a guarantee of reliability:

> Though reliability may be the crux of analysis in determining both hearsay and Confrontation Clause violations, the Confrontation Clause has acquired in our system a value separate from the assurance of reliability. In a basic sense, the Confrontation Clause is one measure of the government's obligation to present its case in a form subject to open scrutiny and challenge by the accused, the trier of fact, and the public.

Id. at 1400. Nevertheless, Judge Kennedy evaluated the taped testimony almost exclusively in terms of its reliability and found no confrontation clause violation. His decision, however, is not inconsistent with current Supreme Court doctrine.[74]

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[73] The defendant was a fugitive at the time the testimony was given. The witness was extensively cross-examined by counsel for two co-defendants. See 761 F.2d at 1398.

[74] See, e.g., United States v. Inadi, 475 U.S. ___, 89 L.Ed.2d 390 (1986) (holding that admission of taped conversations of non-testifying co-conspirators did not violate the confrontation clause, even without a showing (continued...)

In Chipman v. Mercer, 628 F.2d 528 (1980), in contrast, Kennedy upheld a district court order overturning a state robbery conviction. In this case, the trial court had refused to allow cross-examination of the sole eyewitness to a robbery to show bias, despite the fact that the witness had previously accused residents of the facility for the mentally retarded where the defendant lived of theft and had tried to have the facility closed. Kennedy noted that, while

> a trial court normally has broad discretion concerning the scope of cross-examination, ... a certain threshold level of cross-examination is constitutionally required, and in such cases the discretion of the trial judge is obviously circumscribed.

Id. at 530. He found that full cross-examination was particularly important because this witness' testimony "was very significant to the case." Id. at 532. See also Burr v. Sullivan, 618 F.2d 583 (1980) (affirming order overturning a state arson conviction where defense counsel was prohibited from asking accomplices about juvenile offenses).[75]

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[74] (...continued)
of unavailability; context provided adequate indicia of reliability).

[75] Where Judge Kennedy has found the cross-examination allowed to be adequate and effective, however, he has rejected claims that limitations on cross-examination violated that confrontation clause. See, e.g., Bright v. Shimoda, 819 F.2d 227 (1987) (no violation for denial of cross-examination on a collateral matter); United States v. Kennedy, 714 F.2d 968, 973-74 (1983), cert. denied, 465 U.S. 1034 (1984) (no confrontation clause violation where cross-examination was only denied on collateral matters; jury received "ample presentation of appellant's theory").

Right to Counsel

Judge Kennedy has written very few opinions on this subject. While they tend to show a lack of receptivity to appeals based on claims of ineffective assistance of counsel, no persistent pattern emerges. In Satchell v. Cardwell, 653 F.2d 408, 414 (1981), cert. denied, 454 U.S. 1154 (1982), Judge Kennedy concurred in the panel's finding that defense counsel's failure to seek suppression of the fruits of a warrantless search did not constitute ineffective assistance of counsel. The panel assumed, without deciding, that Stone v. Powell[76] did not preclude habeas review of an ineffective assistance claim grounded in failure to make a Fourth Amendment argument.[77] In a concurring opinion, Kennedy stated:

> Even if we are permitted to circumvent Stone v. Powell in this way, we should be cautious about turning sixth amendment cases into fourth amendment ones unless there is an absolute necessity to do so. Based on the trial court's observation of the trial counsel's skill and the fact that the lawyer studied the fourth amendment point and researched it carefully, I would determine he was competent without further discussion of the fourth amendment issues.

Id. at 414.

In United States v. Pederson, 784 F.2d 1462 (1986), Kennedy also found no Sixth Amendment violation. He rejected the claim that the district court's refusal to grant a continuance deprived

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[76] 428 U.S. 465 (1976).

[77] This issue was later resolved by the Supreme Court in favor of review. See Kimmelman v. Morrison, 477 U.S. ___, 91 L.Ed.2d 305 (1986).

the defendant of effective assistance of counsel, since he continued to be represented by local counsel and substitute lead counsel was familiar with the case. Similarly, in Greenfield v. Gunn, 556 F.2d 935 (1977), cert. denied, 434 U.S. 928 (1977), Kennedy refused to find that defense counsel was ineffective for failing to raise defenses of insanity and unconsciousness. However, he did express concern over the fact that the defendant was represented by a series of different attorneys from the public defender's office:

> This type of horizontal representation may at times be an inevitable result of workload and budget constraints imposed on a public defender's office. But unless each attorney scrupulously acts to insure that all who participate in the case are informed of every aspect of that attorney's representation, there is some danger that the defendant may be deprived of effective legal assistance.

Id. at 938.

Eighth Amendment

Death Penalty

Judge Kennedy has published opinions in only a handful of capital cases. Although he has been willing to uphold convictions in capital cases,[78/] it is difficult to predict how

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[78/] Kennedy's opinions in two other capital cases, Adamson v. Ricketts, 789 F.2d 722 (1986) (en banc), rev'd, 107 S. Ct. 2680 (1987), and Neuschafer v. McKay, 807 F.2d 839, after remand Neuschafer v. Whitley, 816 F.2d 1390 (1987), are included in the discussion of the nominee's double jeopardy and Miranda decisions.

On the second appeal in Neuschafer, Kennedy rejected two other claims raised by the defendant. First, he found it unnecessary to address the claim that one of the three aggravating factors, that the murder "involved torture, depravity of mind or the mutilation of the victim" used an arbitrary (continued...)

the nominee would vote in any particular capital case. On balance, his opinions show a concern for procedural fairness and a willingness to apply precedent favorable to capital defendants.

For example, in Vickers v. Ricketts, 798 F.2d 369 (1986), cert. denied, 107 S.Ct 928 (1987), Judge Kennedy granted habeas relief to an Arizona death row prisoner convicted of first degree murder. Although there was evidence from which the jury might have found lack of premeditation, the trial court did not give an instruction for second degree murder, a lesser included offense. Even in the absence of a request for such an instruction, Kennedy found that the omission violated due process principles set forth in Beck v. Alabama[79/] and Hopper v. Evans.[80/] Based on the evidence, Kennedy stated that

> [a] jury given the choice between first and second degree murder might well return a verdict of either first degree murder or second degree murder. Under the Supreme Court's decisions in Beck and Hopper, due

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78/ (...continued)
standard. Under state law, in the absence of mitigating factors, the presence of either of the other two aggravating factors (which Neuschafer did not challenge), would have permitted the jury to impose the death sentence. 816 F.2d at 1393. The second claim was that the sentence was disproportionate. Citing Pulley v. Harris, 465 U.S. 37 (1984), Kennedy ruled that "constitutional principles do not require the federal court in habeas corpus proceedings[] to engage in any comparative proportionality review." Id. at 1394.

79/ 447 U.S. 625 (1980). The Supreme Court held that in capital cases, where the evidence would support conviction of a lesser included offense, the jury must be instructed to consider that alternative.

80/ 456 U.S. 605 (1982). This case reaffirmed Beck, but made clear that a lesser included offense instruction was constitutionally mandated only if fairly supported by the evidence.

> process required that the jury be given that choice.

Id. at 373.

At the hearings, Kennedy's testimony on the subject of the death penalty was surprisingly reserved. To the apparent dismay of some of the Judiciary Committee's conservative members, Judge Kennedy refused to commit himself to the constitutionality of the death penalty. In response to Senator Humphrey's concern over the nominee's "unwillingness to recognize 200 years or so of validation of capital punishment," Kennedy stated:

> Well, I guess we have a disagreement as to whether or not it [the constitutionality of the death penalty] is well settled, Senator. These decisions are very close. Some justices have indicated that it is unconstitutional, and I simply think that I should not take a specific position on a constitutional debate of ongoing dimension.[81]

ACCESS TO THE FEDERAL COURTS

Judge Kennedy has authored more than fifty opinions on issues relating to access to the federal courts. Judge Kennedy has consistently taken a strict view of statutes of limitations and has upheld dismissals, even in civil rights cases, on the ground that the suit is time barred. On the other hand, his decisions tend to be narrowly tailored to the particular issue at hand.

81/ Hearing Testimony, Dec. 15, 1987, at 207-208. See also Dec. 14, 1987, at 213; Dec. 15, 1987, at 197.

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Statutes of Limitations

In Allen v. Veterans Admin., 749 F.2d 1386 (1984), the plaintiff mistakenly named the Veterans Administration as defendant. By the time the suit was amended to include the United States as defendant, the statute of limitations had expired. Judge Kennedy's opinion affirmed dismissal of the case as time barred. Likewise, in Hatchell v. United States, 776 F.2d 244 (1985), Judge Kennedy upheld the district court's dismissal of a prisoner's complaint filed three days after expiration of the statute of limitations. The prisoner had filed a claim, which was denied. He then filed an action six months after receipt of denial of the claim; the statute required that it be filed within six months of the postmark.[82/]

Pavlak v. Church, 681 F.2d 617 (1982), vacated and remanded, 463 U.S. 1201 (1983), on remand, 727 F.2d 1425 (1984), involved a civil rights challenge to an allegedly unlawful wiretap. In Pavlak, the district court refused to certify a class action. After denial of certification, a putative class member attempted to file suit, contending that the statute of limitations had been tolled while the certification issue was pending. The Supreme Court had taken this position in Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 157 n.13 (1974), stating "[c]ommencement of a class action tolls the applicable statute as to all class members."

82/ But see Martin v. Donovan, 731 F.2d 1415 (1984) (failure to appeal within the time bar should not act as administrative res judicata when plaintiff was unaware of implications of failure to appeal).

Characterizing the footnote in Eisen as "puzzling," 681 F.2d at 620 (citation omitted), Judge Kennedy refused to follow it. The Supreme Court vacated and remanded. On remand, Judge Kennedy applied the tolling rule, but refused to reinstate the claim. Instead, he remanded to the district court for a factual determination of when plaintiff could or should have discovered her cause of action. 727 F.2d at 1428-29.

The issue in Lynn v. Western Gillette, Inc., 564 F.2d 1282 (1977), was when the 90-day period for bringing a private civil action under Title VII begins to run. The statute makes clear that EEOC notice or issuance of a formal right to sue letter triggers the time period. In Lynn, the EEOC had delayed its investigation of the plaintiff's sex discrimination charges. It then sent plaintiff the wrong notice. As a result of EEOC inaction and error, almost three years passed from the time the plaintiff filed charges and initiation of the lawsuit. Judge Kennedy allowed the suit to go forward, but gratuitously offered grounds for limiting plaintiff's relief:

> Our determination of the type of notice necessary to begin the period in which a private action may be filed does not imply that a plaintiff's lack of diligence in filing an action must be overlooked. ... The complainant should not be permitted to prejudice the employer by taking advantage of the Commission's slowness in processing claims or by procrastinating while being aware that the Commission intends to take no further action. Under such circumstances, it is proper for the district court, in the exercise of its equitable discretion, to take the plaintiff's lack of diligence into account in determining the amount of back

> pay, if any, to be awarded the plaintiff should he prevail on the merits.

Id. at 1287-88.

In EEOC v. Alioto Fish Co., 623 F.2d 86 (1980), the EEOC had initiated suit 62 months after a complaint had been filed and after many key witnesses had died. Judge Kennedy's opinion for the court affirmed a dismissal on the basis of laches. Nevertheless, in Coalition for Canyon Preservation v. Bowers, 632 F.2d 774 (1980), Judge Kennedy reversed the district court's dismissal of an environmental suit on grounds of laches. He stated: "Laches is not a favored defense in environmental cases. Its use should be restricted to avoid defeat of Congress' environmental policy." Id. at 779 (citation omitted).[83/]

Standing

Judge Kennedy's most important standing case is TOPIC v. Circle Realty, 532 F.2d 1273 (1976), cert. denied, 429 U.S. 859 (1976), in which he denied standing in a housing discrimination case. Three years later, the Supreme Court rejected his view in Gladstone Realtors v. Bellwood, 441 U.S. 91 (1979), a 7-2 decision with the majority opinion authored by Justice Powell.

In TOPIC, teams of black and white couples posing as home seekers determined that real estate brokers were practicing racial steering. They brought suit under the Fair Housing Act claiming they had been

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83/ See also Morgan v. Heckler, 779 F.2d 544 (1985) (government not stopped from withholding benefits unless it engaged in affirmative misconduct).

> deprived of the important social and professional benefits of living in an integrated community. Moreover, they have suffered and will continue to suffer embarrassment and economic damage in their social and professional activities from being stigmatized as residents of either white or black ghettoes.

532 F.2d at 1274.

Judge Kennedy reversed the district court's denial of the motion to dismiss, contending, in effect, that only direct victims of the steering practices had standing. The Supreme Court, with Justices Rehnquist and Stewart dissenting, held that standing under the Fair Housing Act is coterminous with Article III. "Most federal courts that have considered the issue agree ...," Justice Powell wrote, "The notable exception is the Ninth Circuit in TOPIC. ..." 441 U.S. at 108-09.

By contrast, in Davis v. United States Dept. of Housing and Urban Development, 627 F.2d 942 (1980), the Court of Appeals, per Kennedy, reversed dismissal for lack of standing. In Davis, low-income city residents challenged a Housing and Urban Development block grant which they claimed would prevent construction of low-income housing. Judge Kennedy wrote:

> Causation sufficient to confer standing may result from a defendant's acts or omissions. Plaintiffs claim that they were injured by the nonfederal appellees' failure to expend housing assistance for low-income persons.
>
> ***
>
> Municipal recipients of federal assistance may not so easily avoid challenges to their use of federal funds by threatening to opt out of the program. It is sufficient for standing purposes that the injury alleged

> here "can be traced to the challenged action of the defendant[s] and [is] not injury that results from the independent action of some third party not before the Court."

Id. at 944-45 (citations omitted).

Subject Matter Jurisdiction

In other circumstances, Judge Kennedy has narrowly construed jurisdictional bars to suits in federal court. For instance, in McIntyre v. McIntyre, 771 F.2d 1316 (1985), Judge Kennedy reversed the district court's dismissal of a husband's suit for money damages brought against his ex-wife because of her interference with his child visitation rights. Judge Kennedy wrote that the long-standing domestic relations exception to federal diversity jurisdiction would not bar a claim of tortious interference with visitation rights. See also Knudsen Corp. v. Nevada State Dairy Commission, 676 F.2d 374 (1982) (affirming a refusal of the lower court to abstain).

Additionally, some of Judge Kennedy's opinions overturn lower court decisions dismissing cases for failure to state a claim upon which relief can be granted. In Western Waste Service v. Universal Waste Control, 616 F.2d 1094 (1980), cert. denied, 449 U.S. 869 (1980), the district court dismissed an antitrust suit against a waste disposal company. The Ninth Circuit's decision, authored by Judge Kennedy, reversed the lower court, holding that cases should be dismissed for failure to state a claim only if on the most favorable reading of the plaintiff's complaint it is clear that the plaintiff cannot recover.

Jones v. Taber, 648 F.2d 1201 (1981), involved dismissal of a civil rights suit against prison officials for injuries suffered as a result of a beating by prison guards. The prisoner agreed to a settlement of the suit, but subsequently brought suit in district court. The case was dismissed. Judge Kennedy, writing for the court, reversed, concluding that the earlier settlement did not constitute a voluntary release by the prisoner. He noted that the coercion in the prison and the inmate's lack of understanding of his rights made the settlement highly suspect.[84/]

DUE PROCESS

Judge Kennedy has written only a handful of opinions which specifically address the issue of procedural due process.

He ruled in favor of fair process for federal employees in Albert v. Chafee, 571 F.2d 1063 (1977), which involved discharge of a civilian employee of the Navy dismissed for minor misconduct. At the employee's disciplinary hearing, new charges

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84/ There are instances in which Judge Kennedy dissented from Ninth Circuit decisions limiting access to the federal courts. In McDonnell Douglas Corp. v. United States District Court for the Central District of California, 523 F.2d 1083 (1975), the court of appeals reversed a decision certifying a class action for damages which resulted from an airplane crash. Judge Kennedy dissented, arguing that the class should have been certified and, in any event, contending that the case should have been heard en banc by the Ninth Circuit. See also Scharf v. United States Attorney General, 597 F.2d 1240 (1979) (reversing district court's grant of summary judgment in favor of the government in a case involving the deportation of a minor alien).

There are also, however, many decisions in which Judge Kennedy rules against federal jurisdiction. E.g., Portland Police Ass'n v. City of Portland, 658 F.2d 1272 (1981) (dismissing as not justiciable suit by police association).

were levelled. The court held that failure to give advance notice of all the charges violated due process and applicable statutory and regulatory procedures. In a one-paragraph opinion, Judge Kennedy concurred in a one-paragraph opinion: "In light of the trivial nature of the stated charge and the severity of the sanctions imposed, it was prejudicial to consider additional charges of which he had no notice." Id. at 1069.

Vanelli v. Reynolds School District No. 7, 667 F.2d 773 (1982), also involved the procedural protections afforded by the due process clause when a public employee is dismissed. A teacher was dismissed at the midpoint of a one-year contract after female students complained of offensive conduct. The school district dismissed without a pre-termination hearing. At a post-termination hearing, the school district upheld its earlier firing decision. Judge Kennedy found that a pre-termination hearing was constitutionally required, noting that "[t]here is a strong presumption that a public employee is entitled to some form of notice and opportunity to be heard before being deprived of a property or liberty interest." Id. at 778. Moreover, Judge Kennedy remanded for a determination of damages, finding that appellant could recover for injury to liberty as well as property that resulted from his procedural deprivation.

On the other hand, Judge Kennedy rejected a due process claim in Hazelwood Chronic & Convalescent Hospital v. Weinberger, 543 F.2d 703 (1976), vacated on other grounds, 430

U.S. 952 (1977), in which a hospital challenged retroactive application of Medicaid reimbursement regulations for the recapture of depreciation charges. Judge Kennedy reversed the district court and upheld retroactive application. He stated, "[t]he due process clause does not make unconstitutional every law with retroactive effect. ... Only when such retroactive effects are so wholly unexpected and disruptive that harsh and oppressive consequences follow is the constitutional limitation exceeded." Id. at 708.

CONCLUSION

This concludes our report on Judge Kennedy's judicial philosophy and civil rights record. We believe it represents a fair distillation of Judge Kennedy's major decisions in areas involving civil rights and civil liberties, as well as his unpublished speeches and testimony before the Senate Judiciary Committee.