Forum

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A liberal Democrat's case for Judge Kennedy

By John B. Oakley
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THE GENIUS of a country is measured by its institutions, not by its individual citizens. Social institutions are just groups of people, of course, organized systematically to continue the institution even as the people constituting it come and go, one at a time, like the planks of a boat rebuilt entirely at sea. But the mark of institutional genius is the ability to produce the right individual when the need is great. Some planks are more important than others.

Supreme Court Justices are rather crucial planks in our ship of state. We greet the occasion of their replacement with a general call to quarters, and we have commissioned part of the crew to check the captain's choice with unusual care. Just where a justice fits is somewhat mysterious, but we know it has something to do with keeping us on course even if we don't know just where we want to go. Faced with this mystery, we want to make sure that the justice is made of good timber. Beyond that we must trust to the genius of our institutions.

In my opinion the nation has been well served by the nomination of Judge Anthony M. Kennedy to sit on the Supreme Court. Our institutions, conceived in genius 200 years ago in Philadelphia, still operate in a way that would make their framers proud. We, too, should be proud that this selection for the court was in a very real sense an *institutional* choice. Judge Kennedy was not the choice of any one person, party or faction. He was a choice dictated by the structure of our institutions. His nomination for the Supreme Court shows that those institutions are working well.

Clearly it was imperative that this nominee be a person of the highest personal probity. It was also important, in my opinion, that the nominee have the sort of judicious temperament and judicial philosophy that would command broad, bipartisan support.

The defeat of Judge Bork's confirmation was healthy for our judicial system because it focused attention on the process of constitutional interpretation and the need for social consensus upon which the legitimacy of law so vitally depends. It was also a reminder that the process of seating a justice on the Supreme Court is an explicitly political one in which the legislative and the executive branches of government can and should play co-equal parts. Vigorous senatorial testing of presidential appointees to the Supreme Court is an important part of the Constitution's system of checks and balances in the exercise of governmental power. But to have the Borkian battle repeated, with the possibility of narrow confirmation of a justice unpalatable to much of the country, or alternatively to have a bitter confrontation over senatorial refusal to hold confirmation hearings until after the 1988 elections, seemed to me to threaten a degree of intrusion of politics into the work of the Supreme Court likely to cause long-term harm to an institution that is at once our most noble and our most fragile. That threat seemed to be materializing until Judge Ginsburg withdrew, and so I was relieved and thankful when it was Judge Kennedy whom the president next asked to step into the public spotlight.

On the basis of 10 years of working with Judge Kennedy, not as a lawyer appearing before him but as a fellow law teacher interested in jurisprudence and judicial administration, I am an enthusiastic supporter of his confirmation. I hold this view despite my lifelong affiliation with the Democratic Party. I have worked for the federal government as a civil rights lawyer in the Carter administration. As a lawyer I have just one client, who lives at San Quentin under sentence of death. On most of the issues of the day to which the label is applied, I would be classified as a "liberal." Since Judge Kennedy is supposedly a "conservative," I have some explaining to do.

I mentioned earlier that unimpeachable probity and a comfortably "mainstream" temperament and philosophy about the job of a judge were the key characteristics required of the president's third nominee to replace Justice Powell. I'm going to touch on each of these criteria in justifying my whole-hearted support for Judge Kennedy despite our differing political affiliations.

Judge Kennedy's personal probity is not seriously questioned, except with regard to his past membership in San Francisco's Olympic Club, a private organization that has excluded women and minorities from membership. Surely the extent of his involvement in the club and his views on its membership policy will come up in the course of the strict senatorial scrutiny that he has welcomed. Although it is not a subject I have discussed with Judge Kennedy, I doubt he favored the exclusionary policies. Sexism and racism are difficult attitudes to conceal over 10 years of interaction, and I have never seen or heard from him a hint of such attitudes. His membership in a controversial private club may indicate some sympathy with the idea of privacy, however, and so there may be some silver to be found in or around the one arguable cloud on the record of his personal and private life.

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The reputation of Tony Kennedy as a thoroughly nice person is widespread and deserved My own dealings with him began when I was barely 30 years old. My academic work led me to be named to a committee on judicial administration on which Judge Kennedy also served. He was just past 40, bright, energetic and enthusiastic. He occupied a very powerful position, and was the envy of lawyers decades his senior in age Yet he wore the mantle with humility and humor.

One Saturday morning we drove to San Francisco together for a committee meeting. On the way home my car broke down, much to my mortification. To Judge Kennedy this was the most ordinary predicament in the world. Which, of course, it was — but I for one take heart in the knowledge that a future Supreme Court justice is familiar with life as the rest of us live it. It had been a long day by the time we parted company My companion was patient and sympathetic. I never heard a word of complaint

That level-headedness is characteristic of Judge Kennedy, and was evident during the roller-coaster ride leading to his nomination. You may remember that when President Reagan first prepared to announce a nominee to send forward in lieu of Judge Bork, his choice was widely supposed to be Judge Kennedy. Only on the very morning of the announcement did the White House resolve to pick Judge Ginsburg instead.

For every lawyer I know (save Judge Kennedy), and for almost any lawyer I can imagine, this dramatic sequence of boom and bust would have been more than modestly depressing. What did Judge Kennedy do? He flew back to Sacramento, issued a set of gracious statements, and then flew on court business to American Samoa, of all places. That may sound exotic, but trace it on the map, and in your mind.

In the past week you have flown back to Washington, been announced to have ascended to the pinnacle of your profession by every pundit in the news media, the next night you fly back to Sacramento while the rest of the country is talking about Douglas Ginsburg, then you fly through a parade of time zones and across the international date line, catching planes at all hours of the night, and after four days you make your way back through the same maze of airports to Sacramento.

When you cross the international date line, west to east, you generally fly through the night and arrive on the morning of the day you departed. That proved a pretty accurate metaphor for Tony Kennedy's week. He's exhausted, so what does he do? Just what he had promised to do. He goes with his wife to the Kings' game. It's the first game of the new season, and Sacramento wins. The next morning, at 6 a m , the White House calls. One more plane ride. This time the trip home was much easier. The new season is looking good for Sacramento.

The temperament of a good judge consists of more than a pleasant demeanor and clean personal living, of course. It entails a distinct attitude toward people, and toward the disputes they bring to court: that the law is the measure of the rights and duties of people that a court will enforce. This attitude requires that the irrelevant details of people's lives not count for or against them in court. It also requires that the job of determining what the law is be undertaken seriously, without underestimation of the degree to which the process of finding the law may be subjective and the determination of what the law requires may be controversial. Kennedy's record of opinions as a federal appellate judge makes clear that he does not decide cases by cues, stretching to reach liberal or conservative outcomes. He looks closely at the facts, and the results he reaches defy easy generalization because they are so sensitive to the differences between individual cases.

In the course of 12 years he has decided some major points of law, however, and his methodology for deciding controversial issues of law deserves close examination. In my view, he is committed to the legal tradition of our country, to a tradition of judicial review of the constitutionality of legislative and executive action, to a tradition of constitutional protection of individual rights, and to a tradition of genuine respect for the authority of precedent that regards the overruling of precedent as occasionally necessary but always regrettable.

JUDGE KENNEDY is often described as a conservative judge; he describes himself as a firm proponent of "judicial restraint." These are grounds for worry on the part of liberals. Many features of American law that liberals applaud — such as the desegregation of state school systems by federal court decree; the exclusion of illegally seized evidence from use in criminal trials; the outlawing of malapportioned legislative districts under the rule of "one man, one vote"; the banning of school prayer; the right to have an abortion in the early stages of pregnancy — have been introduced into our law by court opinions rather than legislation. Many conservatives have decried such cases as offensive to the concept of judicial restraint. Would Judge Kennedy seek to overturn these precedents? We need to think more about what "judicial restraint" means before we can venture a guess.

The problem is to determine if the call for "judicial restraint" is really a call for conservatism in the *process* by which judges decide cases, or is rather a protest that the *substance* of past court decisions has been inconsistent with conservative political values On its face the doctrine of judicial restraint deals with how judges make their decisions, not with what those decisions are. Judicial restraint insists that improving the law is the province of the legislature and the legislative process for amending the Constitution. Thus the believer in judicial restraint ought, in principle, to disagree with a decision that goes beyond existing law even if the decision is an improvement of the law and makes our society the better for it.

Advocates of judicial restraint sometimes make just this claim. They say they support the *effects* of groundbreaking Supreme Court opinions, especially those regarding minority rights and the policing of elections, but object nonetheless to these opinions as departures from judicial restraint. The role of the courts, they say, is to apply the law and not to invent it; when judges make up the law they act without judicial restraint, and it is no excuse that the law they make up is better law than the law we truly have. It is this law, the true law as honestly found in the text of statutes and the Constitution and common law precedent, that judges should respect and not rewrite

Liberals have learned to suspect such protestations that conservative attacks on the Supreme Court spring from concern for judicial restraint regardless of the merit of the law the court has announced. Many controversial opinions recognizing rights against government greater than those previously

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found in the Constitution have been joined in by judges whose careers would seem to define the concept of judicial restraint — such as Justice Frankfurter, who declared segregation unconstitutional in *Brown v. Board of Education*; Justice Harlan, who joined in the court's unanimous reaffirmation of *Brown* just two months after he took his seat on the court; and Chief Justice Burger, who declared abortions to be constitutionally protected in *Roe v. Wade*. If judges who exemplify judicial restraint nonetheless decide that the law really does confer the previously unrecognized rights enforced by controversial new decisions, what can account for conservative apoplexy about these decisions other than hostility to the substance of the rights these trusted judges have declared to exist?

Thus liberals have come to see the cry of "judicial restraint" not as a genuine commitment to keeping adjudication distinct from legislation, but rather as a disingenuous expression of hostility to the very idea that individuals have rights that the Constitution does protect against state interference. Is Judge Kennedy's avowed commitment to "judicial restraint" merely a pretense for hostility to individual rights?

I think not.

A judge who champions "judicial restraint" might be conservative in either (or both) of two senses: 1) conservative in the judicial sense that limits how broadly judges should decide controversial cases, particularly when the controversy is over the meaning of the vague or ambiguous clauses of the Constitution; or 2) conservative in the political sense that takes a dim view of the rights people ought to have to live their lives independently of the wishes of a majority of their community. A judicial conservative might be a political liberal, in the mold of President Roosevelt's appointee, Felix Frankfurter. Or a judicial conservative might be a political conservative, in the mold of President Eisenhower's appointee, John Harlan. A judicial "liberal" — an "activist" judge who thinks cases should be decided as a matter of justice rather than law — might also be a political liberal, in the mold of President Roosevelt's longest-lived appointment, William O. Douglas. And certainly an "activist" judge might be a political conservative. This is what Judge Robert Bork was thought to be, and why he was denied confirmation.

It was feared that Bork would treat the ambiguity and vagueness of the Constitution as blank pages on which to write his personal political values. Bork did not claim that this was his ambition. Instead he argued that the Constitution should be given its intended meaning. But the effect of his theory of "original intent" seemed to be to create blank pages where others saw none, by overruling decades of accumulated precedent and finding in the tea leaves of original intent support for a stingy view of individual rights.

My dealings with Judge Kennedy convince me that he would follow in the steps of Harlan and Frankfurter, not of Douglas, or Bork or Judge Ginsburg, who was thought likely to sit for as long as Douglas, and to be as conservative an activist judge as Bork. Kennedy's belief in judicial restraint is founded in his fear of unbounded power. The judicial power, he believes, is the least checked and balanced of the three branches of the federal government. A judge who seizes every opportunity to recast the law in the image of justice rides an unruly horse. Occasionally the task of interpreting the text and precedent of the law requires some appeal to morality, most classically in construing such majestically vague clauses of the Constitution as those guaranteeing "due process" or "equal protection." These are moral concepts, and to that extent disputes about their meaning and application require moral elaboration. But such cases should be decided with great caution, and full awareness that judges, like all other officials, are prone to the temptations of power.

The National Organization of Women has announced its opposition to Judge Kennedy, and has proclaimed that his confirmation would be a "disaster" for the civil rights of women and minorities. I think NOW is wrong in its evaluation of his record. His opinion, for a unanimous panel of three judges, that Congress has not yet required employers to pay salaries to women equal to those paid to men for jobs of "comparable worth," admittedly a setback to obtaining economic equality for women through litigation, cannot fairly be condemned as a distortion of the law. Far from being uncontroversial, the proposition that *existing law* prohibits employers from passively profiting from sex discrimination (which comparative worth theorists find endemic in the prevailing market wage levels of predominantly female jobs) has been accepted by no judge other than the lower court judge reversed by Judge Kennedy and his two colleagues.

Although I have some concerns about the economic mechanics for measuring comparative worth, I agree that our society would be a more just society if employers paid wages untainted by the market's lower valuation of traditionally "women's work." I would vote for a well-conceived comparable worth scheme. I consider myself a liberal, and liberals stand ready to use the engine of government to achieve economic justice. I don't know if Judge Kennedy would vote at the polls for a comparative worth scheme. I suspect he wouldn't. Republicans tend to be political conservatives, and political conservatives tend to oppose using state power to improve, rather than to protect, how a society's wealth is distributed among its members.

The National Organization for Women should campaign hard for supporters of comparable worth to be elected to Congress. If Tony Kennedy were running for Congress, NOW should oppose him unless he agreed to support a comparable worth amendment to our existing civil rights laws. But he is not running for Congress; he is up for confirmation for the Supreme Court. I don't think he should be faulted for failing to find that comparable worth is not already part of our law. Only an "activist" judge would find that it is. And certainly Democrats and liberals, whatever their special interests and personal values, cannot complacently assume that all activist judges share the liberal vision of social justice.