Kennedy and the Gays, Again

When President Ronald Reagan announced his nomination of Judge Anthony M Kennedy to fill the Supreme Court seat left vacant by Justice Lewis F Powell, Jr, on Wednesday, November 11, I called the *Native* and asked how soon I would have to write something in order for us to have an article about Kennedy in the next week's paper I was given a very short deadline, and quickly drafted the piece which appeared in *Native* 239, which focused on Kennedy's opinion for the Ninth Circuit Court of Appeals in *Beller v Middendorf*, 632 F2d 788 (Ninth Cir 1980)

Write in haste, repent at leisure When I read the November 13 issue of the *Washington Blade* I realized further research was in order Kennedy's record on gay legal issues is more involved (and more negative) than my earlier column indicated

It seems that Kennedy wrote another, more recent opinion which is worse than *Beller*, *Sullivan v Immigration and Naturalization Service*, 772 F2d 609 (Ninth Cir 1985) Furthermore, his anti-gay votes are recorded in two other cases where he was not the author of the court's opinion *Singer v US Civil Service Commission*, 530 F2d 247 (Ninth Cir 1976), *Society for Individual Rights v Hampton*, 528 F2d 905 (Ninth Cir 1975)

As you may recall, in *Beller* Kennedy held for a unanimous three-judge panel that the Navy's policy of discharging homosexuals did not violate any constitutional provisions While I disagreed with the decision, I observed that it was more narrowly focused and definitely less vitriolic than a similar opinion by Judge Robert Bork which had become the focus of gay opposition to Bork's confirmation, and even contained some signs that Kennedy might be open to finding constitutional protection for private, consensual gay sex outside the military setting

Having examined the other three opinions, I have to say that Kennedy seems rather obtuse on important gay issues, and indeed must be counted a likely vote against us on most matters likely to come before the Supreme Court I'll take them in chronological order

1 *Society for Individual Rights* This case involved a challenge to Civil Service Commission regulations which excluded all homosexuals from federal employment The trial court found the regulations unconstitutional and ordered the reinstatement of the gay man whose dismissal had stimulated the lawsuit The Society for Individual Rights (SIR), a gay rights group which had brought the case on his behalf, also secured an order from the court barring the Commission from applying its anti-gay policy in the future, but the trial court refused to issue a broad order requiring reinstatement and back pay for all gays who had lost their government jobs in the past

Both sides initially appealed the case While the appeal was pending, however, reacting to a similar decision by the DC Circuit Court of Appeals, the Commission revised its regulations to end the anti-gay ban and withdrew its appeal Thus, the only appeal before the Ninth Circuit panel in which Kennedy participated was that of the gay plaintiffs demanding reinstatement and back pay Kennedy joined in a unanimous, unsigned opinion *denying* that relief, on the ground that such "class-type" relief would be of little practical value, since each individual claim of unlawful dismissal would have to be individually litigated to determine whether it came within the new regulations The decision is essentially symbolic, but it indicates the panel's (and Kennedy's) unwillingness to grant even a symbolic victory to the gay litigants whose efforts had overturned the Commission's anti-gay policies

(The *Blade*'s article misstates this holding, describing it as a positive ruling by the Ninth Circuit in support of the reinstatement of the gay man who initially brought the case But the court's opinion clearly states that it is not dealing with that issue in any way, since the government had withdrawn its appeal.)

2 *Singer v US Civil Service Commission* At about the same time as the *SIR* case, John Singer, a gay activist employed as a clerk at the Equal Employment Opportunity Commission in Seattle, was battling to keep his job Unlike past gay litigants who were dismissed from government employment after being entrapped by plainclothes cops in public restrooms or cruising areas Singer was dismissed because he acted as if being openly gay was a normal state of affairs, he would kiss other men in public, dress and behave according to his own "gay sensibility" at the office, and even applied for a marriage license with his boyfriend, resulting in a local media spectacle that ended up in the Washington State Supreme Court

Singer challenged his dismissal within the Civil Service appeals system and then in a federal district court in Washington State, losing at every turn In essence, the Commission took the position that he was not discharged for being a homosexual, but rather for acting gay publicly As far as the Commission was concerned, even under the new regulations which precluded discharging somebody just for being homosexual it could still discharge somebody who acted "gay," because having openly gay employees around would "impair the efficiency of the federal service" (Shall we play a game of 20 questions about the so-called "efficiency" of the federal service? Sorry about that to any gay readers who work in the federal service, those of you whom I know personally have told me plenty of stories that would justify maligning the "efficiency" of the service at every opportunity)

Kennedy was part of a three judge panel which rejected Singer's claim, although Kennedy did not write the opinion The panel, in an opinion by W J Jameson, a senior district judge from Montana who was spending his vacation on the coast hearing cases in the Ninth Circuit, merely restated the Commission's argument that "open and public flaunting or advocacy of homosexual conduct" deserved no constitutional protection That is, you can be a gay federal employee so long as nobody in the public knows about it! Singer appealed to the Supreme Court, which vacated the panel's decision for reconsideration in light of new regulations which had been announced by the Commission during the pendency of the case

3 *Sullivan* Kennedy wrote the opinion for a three judge panel, with Circuit Judge Pregerson filing a spirited dissent This was part of the famous saga of Anthony Sullivan, an Australian, and Richard Adams, his Filipino-American lover Sullivan, in the US legally as a student during the early 1970s, met Adams, fell in love, and managed to obtain a marriage license from a maverick town clerk in Colorado in 1975. A minister performed a marriage ceremony for them, and then they began their campaign at the Immigration and Naturalization Service (INS) to get Sullivan permanent status in the US based on his marriage to an American citizen The INS was not buying this marriage, however, and the Ninth Circuit agreed with them, in an earlier opinion in which Kennedy did not participate.

Then the INS brought deportation proceedings against Sullivan, who had long overstayed his student visa Sullivan claimed he should be allowed to stay in the country on account of extreme hardship He argued that Australia was unlikely to allow his lover, Adams, to immigrate there Sullivan also pointed out that there was much open homophobia in Australia, so it was likely that he, an internationally notorious gay activist as a result of his legal battles with INS (which had been reported in the Australian press) was unlikely to receive a friendly reception in the land of his birth He

- KENNEDY AND THE GAYS AGAIN continued

expected to encounter discrimination in seeking work, and had already been totally rejected by family and former friends, retaining no personal ties to Australia

Judge Kennedy rejected all Sullivan's arguments Quoting long sections of the obtuse opinion by the Board of Immigration Appeals, which characterized Sullivan's alleged hardships as being no different from those suffered by other deportees, Kennedy asserted that Sullivan had failed to demonstrate any "special hardship" that would distinguish his case from others

Judge Pregerson's dissent expressed outrage at this farce Pregerson noted that neither the Board nor Kennedy had taken any notice of the peculiar difference between Sullivan's case and all the others they relied upon None o those other cases involved gay people gay life partners, or the kind of notoriety alleged by Sullivan He accused the majority of ignoring "the rule that each hardship case must be decided on its own facts'

The story has a sort of happy ending. After a farewell interview on the *Donahue* show, Sullivan and Adams left to wander the world, seeking a home port At about that time, Australia announced that it would permit immigration of gay lovers of Australian nationals! Looks like, in this instance, Australia, rather than America, is the land of the free

Toting it all up, I would say that Kennedy is no friend of gay rights, and while he does not seem the activist ogre that Bork was in *Dronenburg v Zech* his appointment should come as no cause for joy among gay people At the same time, it seems unlikely that gays alone can block his confirmation, and equally unlikely that Ronald Reagan would appoint anyone who would have voted differently in any of these cases In this regard, a look at the 1987 Supreme Court term, and in particular now-retired Justice Powell's voting patterns, may be illuminating

Each year in its November issue, the *Harvard Law Review* publishes a statistical analysis of the previous Supreme Court term The November 1987 *Review* has just been published, and the statistics are quite revealing. Assuming that voting in accord with Chief Justice William H. Rehnquist makes one a conservative (some would say "of the far right") and voting with Associate Justice Thurgood Marshall makes one a liberal (others might say "of the far left"), how does Powell fare?

Powell agreed with Rehnquist on 86% of the votes, more than with any other member of the Court, including conservatives Antonin Scalia and Sandra Day O'Connor He agreed least often, 55% of the time, with Marshall! This confirms what I said in my previous columns on this issue, including the first column on Bork during the summer Powell was a *very conservative* Justice

The statistics overall appear to me to show the following lineup from right to left (this is, of course, vastly oversimplifying things, since not all cases divide up along such political lines) Scalia is most conservative, followed by Rehnquist, Byron White, O'Connor, and Powell Justice John Paul Stevens plays things very much down the middle, while Justice Harry Blackmun agrees with Justices William J. Brennan and Marshall a bit more than he does with Stevens, placing him just a bit to the left of center

In the 45 cases where the Court was most closely divided, voting 5-4, Powell joined a basically conservative majority 25 times out of the 45 In seven cases, he provided the decisive fifth vote for the liberal-moderate group In the remaining close cases, it was usually White or Stevens who "switched sides" to vote apart from their normal "bloc," although virtually every justice found him or herself with some strange bedfellows on a case or two. Perhaps the most interesting example of this is Justice O'Connor's dissent in the Gay Olympics case (a 5-4 case, in which we lost Powell and Stevens) It may be that O'Connor will be receptive to future arguments in favor of equal protection treatment for gays

Another technical correction on my previous column about Judge Kennedy: I inadvertently omitted Alaska and Hawaii from the list of states covered by the Ninth Circuit Court of Appeals, the court on which he presently sits *Mea culpa* ■

THE LAW

by Arthur S. Leonard

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