

## Justice Kennedy?

Some conservatives are cool to Anthony Kennedy, the likely next nominee for the seat that should be Robert Bork's, though mostly because Senator Biden labeled him the "least controversial" choice. This is fair enough to the Bork bashers, but scarcely fair to Anthony Kennedy.

Judge Kennedy should not be blamed for not being Robert Bork. If Senator Biden and Senator Kennedy want to vote for someone of his persuasion, it's fine by us. We continue to suspect, though, that Judge Kennedy's honeymoon will last only until he's officially nominated, that the goal of the Bork-wrecking crew remains to deny Ronald Reagan the chance to appoint anyone. As the ACLU's Morton Halperin told Senator Biden in a "Dear Joe" letter, "there is no such thing as a noncontroversial nominee."

When Judge Kennedy is nominated, the left will discover he is guilty of longtime association with Ronald Reagan and Edwin Meese. Mr. Kennedy worked on Proposition 1, the precursor to Proposition 13. In the early 1960s, he was a registered "Legislative Advocate" in Sacramento. Among his clients was—gotcha!—a liquor company. The left is no doubt searching for witnesses to lunches 25 years ago to raise appearances of "ethical impropriety."

Judge Kennedy's record is of a conservative jurist who reasons each case narrowly. In his 12 years on the Ninth Circuit, he invalidated the legislative veto, comparable worth and much of the exclusionary rule. This, we guess, shows where "the mainstream" has moved. Our suspicion, though, is that Judge Kennedy will get the Bork treatment of attacking the results and ignoring the reasoning:

*Chadha v. Immigration and Naturalization Service.* Judge Kennedy's 1980 opinion invalidated the legislative veto under which either House could reverse a decision by an executive-branch official. The Supreme Court

agreed this was an unconstitutional violation by Congress of separation of powers. People for the American Way will claim this proves Judge Kennedy favors an imperial presidency.

*AFSCME v. Washington.* Judge Kennedy ruled that Washington state did not have to adopt a "comparable worth" pay system. He wrote that the equal-pay and civil-rights laws showed no evidence that Congress meant to "abrogate fundamental economic principles such as the law of supply and demand." NOW will cite this as "insensitivity" to women.

*United States v. Leon.* In a 1983 dissent that the Supreme Court adopted a year later, Judge Kennedy argued that there should be a good-faith exception to the exclusionary rule. Police officers could introduce drugs as evidence even though the search warrant was later shown to have a minor fault. Officers can't do more than make a reasonable effort to comply with the search rules. The ACLU will say he doesn't apply the Bill of Rights to alleged criminals.

Judge Bork was the biggest threat to the left because he has the intellectual force to lead the Supreme Court toward a more cohesive and principled jurisprudence. Douglas Ginsburg would have added a brilliant scholar from the law and economics school. Judge Kennedy may not be a major legal philosopher, but his record shows he would be a creditable addition to the original-intent, judicial-restraint wing of the court.

The sharks see lots of blood in the water. They see the possibility of icing their Bork victory with a division of conservatives into warring factions. It is true that Judge Kennedy would not be the best possible justice; the most qualified nominee was defeated by a campaign of distortion. Anger at the Bork defeat is certainly justified, but it should be aimed only and squarely at the Bork bashers.