

# JUSTICE KENNEDY

## TALKS ON

By Professor Richard E. Shugrue



There's an electricity in the air when a United States Supreme Court Justice visits the Law School.

Students—who have been poring over the opinions of the Court in class—finally get an opportunity to see the author in person, to listen to what the Justice has to say, to ask questions, even exchange pleasantries.

At Creighton, the arrival of Justice Anthony M. Kennedy this fall was a signature event of the academic calendar. The Kennedy visit was the first of two, with Justice Clarence Thomas scheduled to teach a seminar on the Supreme Court in February.

Justice Kennedy came to the Law School just before the start of the October, 2000 term, because of his long relationship with Dean Patrick Borchers. When he was fresh out of law school, Borchers was tapped by the then United States Court of Appeals jurist to serve as a judicial clerk.

The Justice agreed to teach a first-year Constitutional Law class and, that evening, to address the annual alumni dinner.

Heidi Krings, a second-year law student originally from Columbus, Nebraska, said she was “in awe” at the opportunity

to hear and meet the Justice. A former aide to Sen. Chuck Hagel (R.-Neb.) on Capitol Hill, Krings said her Washington experience exposed her to political and governmental “celebrities” on a daily basis. “But meeting a Supreme Court Justice was a once-in-a-lifetime experience for most of us in the Law School,” she added.

Krings noted that Washingtonians rarely see Justices at events. The chance to hear the Supreme Court member was “definitely unforgettable.”

That impression was echoed by another 2-L, Adam Franzen of Ayr, Nebraska, who had thought that a member of the Supreme Court “would speak over our heads.” He added, “Justice Kennedy’s ability to talk on our level made an indelible impression on me, both as a law student and as a person.”

### **Kennedy: A Great Teacher**

Kennedy had a reputation as a great teacher long before he became a judge. A Phi Beta Kappa graduate of Stanford University who earned his law degree *cum laude* at Harvard, Kennedy was admitted to the California Bar nearly 40 years ago. A Sacramento native, he served in the National Guard and then began practicing with a San Francisco firm.

In 1963, his father, who was a respected Sacramento attorney-lobbyist, died, and the young lawyer took over his dad’s practice in the California capital. He also began his own involvement in politics and legislative

# TEACHES CLASS

## PROFESSIONALISM AT CU

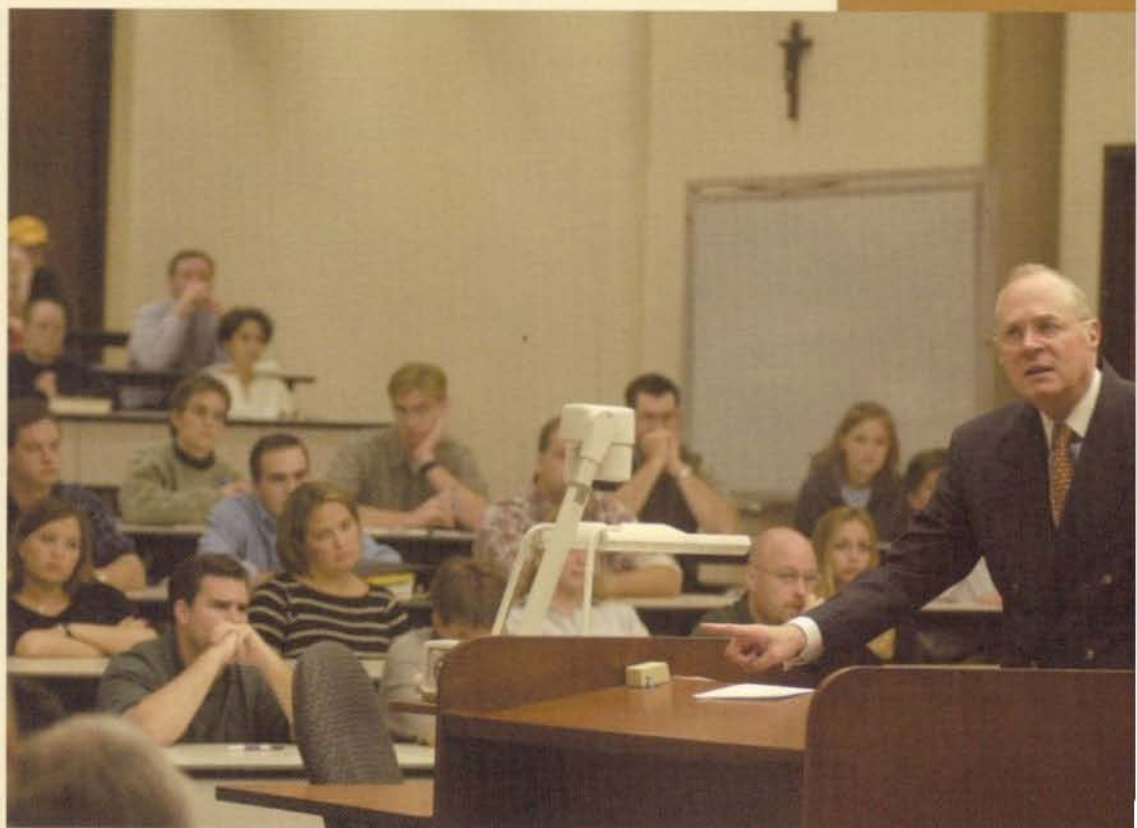
affairs, developing a close friendship with another young legislative lawyer, Edwin Meese, a future United States Attorney General. When Meese left lobbying to work for the newly-elected Governor Ronald Reagan in 1967, Kennedy continued his association with Meese. He helped draft California's ballot initiative to limit state spending, for example.

This work, Kennedy's reputation as a private attorney and in public affairs, and his service as an adjunct professor at McGeorge School of Law (from 1965 until his ascent to the Supreme Court in 1988) could not have but helped earn him the recommendation from Governor Reagan to then-President Gerald Ford to fill a vacancy on the Ninth Circuit in 1975.

When Lewis E. Powell, Jr., announced his resignation from the Supreme Court in 1987, Kennedy was named to fill the vacancy by President Reagan. Many court-watchers remember Kennedy as the third nominee to the vacancy, after the failed candidacies of Robert Bork and Douglas Ginsburg. Kennedy received the highest recommendation of the American Bar Association's Standing Committee on the Federal Judiciary. Its praise was based on the jurist's integrity, judicial temperament, and professional competence.

### A Centrist-Conservative

Lawyers and scholars who study the work of the Supreme Court characterize Justice Kennedy as a "centrist", who often holds the balance of power between the Court's more conservative and liberal wings. It wasn't always so, however. By the end of the October, 1988-1989 term, Kennedy had voted with Chief Justice William Rehnquist in 90 percent of the cases and with Justice Antonin Scalia in 89 percent of the cases.



In the 1990s, the Court re-examined the nature of federalism. Justice Kennedy played a major role in this work, and occupied the middle ground. He was the author of *Alden v. Maine* in 1999, and argued that states "are not relegated to the role of mere provinces or political corporations, but retain the dignity...of sovereigns" in the American system of government.

His opinion in *Alden* built upon his fellow justices' work in cases such as *New York v. United States*, in 1992, *United States v. Lopez*, in 1995, and *United States v. Printz*, in 1997. Writing for the five-person majority in *Alden*, Kennedy ruled that the Eleventh Amendment prohibited Congress from using its Article I powers to allow private parties to sue state governments for money damages in federal courts.

CONTINUED ON PAGE 6

## JUSTICE KENNEDY TEACHES CLASS

### **Kennedy: States Are Partners**

Kennedy propounds the doctrine of dual sovereignty in which, as one scholar put it, “the internal operation of both the state and federal governments were to at least some extent immune from direct interference from the other party.” This conclusion should not be surprising from a jurist whose concurring opinion had said in the 1995 case of *United States Term Limits, Inc. v. Thornton* that “Federalism was our Nation’s own discovery. The Framers split the atom of sovereignty.”

It is at least noteworthy that in *Thornton*, Kennedy concurred in a case in which the majority was written by Justice John Paul Stevens, and a vigorous dissent on behalf of himself and Justices Thomas, Scalia, and O’Connor, was filed by the Chief Justice.

Kennedy’s work on the high court has inspired Yale Law School Professor Akhil Amir to write, “The Justice is a teacher here, all Americans are his students; and he tries to reach us by using words and images we can understand.”



Nowhere better was Kennedy’s skill as a superb teacher seen than during his Constitutional Law class at Creighton. Dean Borchers noted that Justice Kennedy had a reputation at McGeorge as a great teacher. “Students fought to get into his Con Law class,” the Dean said. “He also called upon his clerks to do practice rounds of moot court so that he would be thoroughly prepared to judge competitions,” Borchers added, and recalled that the judge “would ask us clerks to give oral presentations on issues involved in his exams, so that his questions made perfect sense.”

The Dean declared that he would “trade a month of my very best education for an afternoon of working closely with Judge Kennedy. He is, quite simply, a great teacher.”

Those sentiments were echoed by Creighton students who had the opportunity to participate in Justice Kennedy’s class. “He is a master of the Socratic method,” 2-L student Nicole Lindsey of Omaha, said. “I could understand every question and see where he was taking the first-year students,” she added. “Maybe it was because I wasn’t being asked the questions, but it was as much fun as it was exciting to be in the Spaceship that morning!”

First-year student Karen Douglas of Omaha, who had spent a number of years as a legal assistant, was amazed at how “down to earth” Justice Kennedy’s classroom presentation was. “I think of the Court as being remote, but he was so human, and so clear, that it was a wonderful class.”

“I was fascinated by his explanation of the interpretation of the Constitution as the swing of a pendulum,” Joe Villareal, a 1-L from Redlands, California, observed. “The Justice makes you think about the Constitution as a living document, something other than a cold and remote instrument,” he added.

### **White: He Always Made Time for Students**

Creighton Professor Michaela White was on the

McGeorge faculty and knew of Kennedy’s reputation as a “master teacher.” She explained that he taught in the night program, “but still made time for school functions.” She vividly remembers students she had taught in their first year reporting to her what a great teacher Kennedy was for them in their second-year Con Law course.

Alums, faculty and students attending the banquet at the Strategic Air Command Museum near Eugene Mahoney State Park were impressed not only with the Justice’s cordiality and warmth, but with his insights about the future of American democracy and the role of the citizen in a free society.

These are themes he has returned to time and again throughout his tenure on the Court. In 1997, for example, he addressed the American Bar Association’s annual convention challenging the lawyers of the nation to uphold three principles:

**The responsibility of the individual, who must be held accountable for his or her own actions;**

**A commitment to rationality, or the belief that citizens united in law can examine a problem with adequate information and come to a reasoned, common conclusion, as in jury trials; and**

**The observance of civility, the mark of an accomplished and superb professional, but also an end in itself.**

Students, faculty and alumni of Creighton Law School were impressed with the wit of the Justice. Some Washington insiders have speculated he might be elevated to the Chief Justice’s seat when William Rehnquist retires. But whatever his future, his presence at Creighton changed many stereotypes of a remote high jurist. As Lindsey, the 2-L student who attended both the class and the banquet, put it, “I was particularly impressed by his ability to weave interesting human insights into the work of the court with profound lessons on law and the profession.”