

"Equal Justice Under Law"; and whether they are going to feel, particularly those that have been left out and left behind, that in Justice Kennedy they are going to have someone that will not be looking for the technicalities and the narrow and crabbed or pinched view of a particular statute, but a justice who is going to be sensitive to the basic reasons for why that statute was passed.

That is something that we will be making judgment on. I do not know whether you care to comment.

Judge KENNEDY. Well, thank you, Senator. I think it is an important part of the advise and consent process that you make the judge aware of your own deep feelings and sensitivities. I would say that if I am appointed to the Supreme Court and I do not fully meet the great proclamation that stands over its podium, that I would consider that my career has not been a success.

Senator KENNEDY. Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you.

The Senator from Wyoming, Senator Simpson.

Senator SIMPSON. Thank you, Mr. Chairman. First, Mr. Chairman, let me say that yesterday I mentioned—and I want this very important matter to be heard—a group called the National Women's Law Center as a group who had spoken out against Judge Bork on issues of discrimination based upon sex, and that they had no men in their organization. That was incorrect and in error and unfortunate. The group was not the National Women's Law Center, which is a Washington, D.C.-based group. My confusion was occasioned by the fact that one lady named Marsha D. Greenberger is the managing attorney of the National Women's Law Center and a member of their board. She is also a member-at-large and on the letterhead of a group called the Federation of Women Lawyers Judicial Screening Panel, which is a Washington organization. My confusion was caused by that dual membership of this lady attorney on that National Women's Law Center and this Federation of Women Lawyers Judicial Screening Panel. This group, the Women's Law Center, did object to Bork, in fact, in a letter they stated that they had never before ever taken a position on a judicial nomination, but because of the extreme nature of Judge Bork's legal views and the dramatic effect on the rights of women, the center felt compelled to take that step.

But what I was referring to was the letter of the Federation of Women Lawyers with regard to Judge Sentelle where they were objecting to his being a member of the Masons because it was a male organization. I was saying there is the true irony because the letterhead of that group does not contain the name of any male.

Now, before sinking deeper into the morass there, I do indeed owe an apology to the National Women's Law Center. The remarks I made with regard to the Federation of Women Lawyers Judicial Screening Panel I would leave on the record, but I certainly want to apologize to the National Women's Law Center as an error on my part. I would like to clear that record, and especially to Marsha D. Greenberger. And my apology, surely due, is certainly hereby expressed, and I earnestly hope accepted.

With that, I shall move on.

Mr. Chairman, you know, regardless of what we say, sometimes the needle does get stuck here, and we have reviewed old ground,

the things we reviewed in the previous nomination: unenumerated rights, framers' intent, ninth amendment, rights of privacy, precedent, States' rights, antitrust, civil rights, freedom of press, speech, criminal law, equal protection, race and gender, gender discrimination, Establishment Clause, death penalty, congressional standing, judicial restraint, voting rights. The only one I do not remember was comparable worth. But we have, indeed, plowed old ground.

The CHAIRMAN. Sounds like the Constitution, Senator.

Senator SIMPSON. It does. Should be. Lively little place in here. But let us keep the record quite clear that we have all dabbled in just what we dabbled in before, and will again because that is our role.

So yesterday there was an interesting discussion on criminal matters. It did not come up as much in the previous hearings, but there were questions about imposing strict sentences on convicted criminals. I remember some of your comments on that. A tough one always for a judge. I know in my practice when the trial was ended and the sentence awaited, and the jury, having concluded their deliberations or a non-jury case, the sentencing was always the troublesome part for the judge. You know, those are the ones, as they say, that keep you up at night.

But, anyway, you referred to that. We have just grappled with technical amendments to the sentencing guidelines legislation which established uniform sentencing for criminals across the United States. That was somewhat controversial. Senators Thurmond and Kennedy worked many years on the criminal law, sentencing guidelines, those things. The sentencing guidelines were designed, or at least we believe that they will work to bring uniformity in the sentencing of white collar criminals—white collar crime, more specifically—one that was tough to get at.

There is a widespread public perception in society that white collar crime does not receive the same degree of strict sentencing which other crimes receive. I would appreciate having your comments on the importance of sentencing in the area of white collar crime as it is in this country today.

Judge KENNEDY. White collar crime, as I have indicated in the initial exchange with Senator Metzenbaum, is, I think, an unfortunate term. It sounds as if it is a clean crime, which is, of course, a contradiction in terms. White collar crime can rob people of millions of dollars just as effectively as a person with a gun. I know bank officers who have congratulated me for my tough stance on crime because we put away bank robbers, but then they will turn around and they will, for fear of publicity, not prosecute one of their officers who has embezzled \$50,000. I think that is wrong.

White collar crime is very, very dangerous, particularly in the consumer fraud area where people are deprived of their life savings. I think the courts should be very vigorous with respect to so-called white collar crime, and I wish we could find another aphorism that indicates that it is really a very, very ugly deed that we are talking about.

Senator SIMPSON. Yes, it is a tough one because it often arises from a position of trust to embezzlement and other aspects of that crime.

Well, now I have a totally provincial question. I want to get right down to that. I would ask you about perhaps an expansion of your opinions on the importance of States' rights in the constitutional system. That is sometimes overused. I think we do overuse that; perhaps I do, too. "States' rights." But as a Westerner from the State of Wyoming, I think it is sometimes forgotten that here is a State of almost 100,000 square miles; 50 percent of the surface of it is owned by the Federal Government, and 63 percent of its minerals are owned by the Federal Government. In that State is 40 percent of the Nation's wilderness in the lower 48.

So we have continual conflict on States' rights when you have the surface of a State owned 50 percent by the Federal Government. That means it belongs to the people of the United States and not to the people of the State of Wyoming. So I have this abiding interest in the opportunity for states to determine their own destiny on a multitude of issues without intrusive interference from the Federal Government, recognizing, of course, the federal nature of the public lands—or the public nature of the federal lands might be a better way to say it.

Could you give me your philosophy briefly regarding that general issue of States' rights and the reservation of power to the States under the Constitution?

Judge KENNEDY. Federalism is one of the four structural components of the Constitution. The framers thought of it as really one of the most essential safeguards of liberty. They thought that it was improper, that it was spiritually wrong, morally wrong, for a people to delegate so much power to a remote government that they could no longer have control over their own destiny, their own lives. That is the reason for the states.

The framers were very concerned that the sheer problem of geographic size would doom their experiment in a republican form of government. Their studies had taught them that the only successful republican form of government or democracy would be a small city-State. In those times, there were great diversities. One of the framers at the convention from South Carolina said the differences that divided his State and Maine and New Hampshire and Massachusetts were greater than those that divided Russia and Turkey. And he might have been right.

The CHAIRMAN. Senator Kennedy and Senator Thurmond, thank you.

All right.

Judge KENNEDY. That is the purpose of the Federal system, and it is the duty of all the branches of the government to respect the position of the place of the states in the Federal system.

As I indicated yesterday, there are no automatic mechanisms, or very few, in the Constitution, to respect the rights of States. You can read all through the Constitution and you will see very little about States.

This indicates, I think, that we have a special obligation to ascertain the effects of national policy on the existence of State sovereignty.

Senator SIMPSON. Obviously, you have made several references to the history of the Court, the history of the Constitution, the Constitutional Convention. That has been most interesting to me.

Obviously, you enjoy reading and studying Supreme Court history; is that true?

Judge KENNEDY. Yes, sir.

Senator SIMPSON. I would think that would be a tremendous asset to any Supreme Court Justice to have that appreciation and flavor of the historical analysis of the Court before a judge would go on that court.

I am going to conclude with a question. I remember that Senator Humphrey waived his whole stack of comments yesterday—and in accordance with trying to get the job done, I am going to conclude.

And you have been very good, Mr. Chairman, at accelerating things, and I hope we can continue to do that.

But let me ask you this, Judge. In your knowledge of the history of the Supreme Court, and reading of it, have you come upon a favorite among Supreme Court justices down through history, those who have served, one on whom you might lavish just a little extra ration of praise among all the remarkable men who have served?

I would be interested if you do have such a preference for a person?

Judge KENNEDY. I've sometimes tried to make up all-star lists of the Supreme Court. I will usually just put on seven in case somebody else has their favorites.

Chief Justice Marshall foresaw the great destiny of this country. He knew the necessity for a national government.

He had a power and a persuasiveness and a rhetoric and a morality to his opinions that few other justices have ever possessed. He went to law school for just 6 weeks. He had a remarkable grasp of the meaning of government and the meaning of the Constitution.

The two Justice Harlans, the Justice Harlan in *Plessy v. Ferguson*, and the Justice Harlan of the not too distant past, were great, great judges because of their understanding of the Constitution.

Brandeis, Cardozo and Holmes sat on the same Court, and were some of the greatest justices who ever sat on the Court.

And one of your colleagues, one of your predecessor colleagues, Hugo Black, was one of the great justices of the Court. He had a hideaway office somewhere here in the Capitol, and he would read Burke and Marx and Hume and Keynes and Plato and Aristotle during the Senate's sessions.

He was simply a magnificent justice. He carried around, as many of you know, a little pocket copy of the Constitution at all times, in case he was asked about it, a habit that has been emulated by many of his admirers.

Those were all great men in the history of the court, Senator. To talk only of those who are not living.

Senator SIMPSON. Well, that is fascinating. Now, instead of reading those things, we read stuff from our staff while we are squirreled away in some warren somewhere.

And maybe we ought to go back to some of those treatises in every way.

A Wyoming man served on the Supreme Court, Mr. Van Devanter.

Judge KENNEDY. Mr. Justice Van Devanter. He was one of the greatest justices on the court for achieving a compromise among the justices.

When they were searching for a common point of agreement, Mr. Justice Van Devanter could find it.

He did not produce a lot of the opinions of the Court, because he found it very difficult to write; he was a slow writer.

But he was valued very, very highly by all of his colleagues.

Senator SIMPSON. That is very interesting. Thank you so much, Judge.

Judge KENNEDY. Thank you, Senator.

The CHAIRMAN. Let me ask you a question about history, and I am not being facetious when I ask this.

Didn't Justice Black, when he was Senator Black, also carry a book with a list of all his supporters and contributors? A little book?

I am told that Justice Black, when he was a Senator, literally carried a book—was it Black? He was Senator Black from Alabama that had a list of all his supporters.

So every county he went into, he would take out his little book. And he would know exactly who had helped him in the previous election. He carried that with him all the time, I was told.

Judge KENNEDY. I am not aware of that. He was from Clay County in Alabama.

The CHAIRMAN. Maybe our Alabamian at the end of the row could clarify it when we get to that.

Senator HEFLIN. It would have had to have been the Encyclopedia Britannica.

The CHAIRMAN. Well, I was told it was his contributors, but I will move on to the great State of Vermont. Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman. I do not want to delay, but when Judge Kennedy and my friend Al Simpson talk about Hugo Black, I remember when I was in law school. I'm sure you remember a lot of things about law school, we all do, but for me one thing really stands out the most of all the matters in law school. Because we were right here in town, Georgetown, the law school, decided to have a luncheon inviting all the Supreme Court justices. They all accepted on one condition: there not be a head table. We were going to be in a bunch of small, round tables, and it would be run by either the student bar or something of the law school. They would draw lots, and different justices would sit at different tables. And that was the only way they would do it, so they could sit with the students.

So we drew lots, and I ended up sitting next to Justice Hugo Black whom I had never met but just seen in the Court. And at the last minute one of the other students was sick. My wife came with me. And it was the most fascinating thing in 3 years of law school. He had no idea I was going to sit there. I mentioned I was from Vermont. And he said, oh yes. He said, Franklin—the first time he said it, I didn't realize he meant, of course, President Roosevelt—he said, Franklin sent me to Vermont to campaign during a contested election.

He told me the towns he went to—this was back in the 1930s. Who he campaigned for. And what the votes were, the numbers.