

The CHAIRMAN. Thank you, Senator.

My colleague from Utah, Senator Hatch.

Senator HATCH. Well, thank you, Mr. Chairman. Again, like the others, I am happy to welcome you, Judge Kennedy, and your family to these hearings.

I have been very impressed with you as we have met for extensive periods of time, and as we have chatted, and I just want to tell you it is nice to see this day arrive.

It is indeed an honor to welcome you, an individual, who I think is eminently qualified to serve in the nation's premier judicial office.

You have the highest qualifications given you by the American Bar Association. Unanimously. I think that is a great thing after what I saw Judge Bork go through, and I want to give some credit to the Washington Post for the good editorials that they have written with regard to the rating system of the ABA, recognizing its importance, but also recognizing that there is an obligation there, too.

And I think that they have lived up to their obligations with regard to you, and I am very pleased about that.

You have had 14 years experience as a practicing attorney, 20 years as a professor of constitutional law, and more than 12 years on the circuit court that defines federal law for nine States and 37 million people. I think this has prepared you for the trust that we are about to place in you, and the trust displayed in you by President Ronald Reagan.

Indeed, as this hearing progresses, I think President Reagan's trust will soon be shared by the people of the United States.

As we all know, it would be difficult to find an aspect of American life that has not been touched by the Supreme Court. I might say, in approximately the time that you have served on the ninth circuit, a President has resigned, the world's largest telecommunications company has disintegrated, or at least has been changed, rules for criminal trials have changed, and even a town's ability to display a creche during the holiday season has been established, all because nine individuals in our society have found enduring principles in the Constitution itself.

But as we well know, it has recently become an issue whether the Supreme Court must find the principles for its decisions in the Constitution.

Some legal scholars and even some judges have contended that judges need not base their decisions on the words of the Constitution. Instead, they contend that judges may go outside the Constitution to decide cases on the basis of the judges' understanding of human dignity, or some other vague and unlimited principle.

The problem with this argument is that it permits unelected judges to override democratic laws created by the people themselves without constitutional justification.

For example, judges have overturned capital punishment laws in 34 States—even though the Constitution itself, in four or five instances, mentions the death penalty—and this is known generally as judicial activism.

In my mind, judges who take upon themselves to overrule the people's laws without clear warrant from the Constitution, overstep

their authority. Of course, all judges are not so bold. Most judges do practice judicial restraint, which is another way of saying they refrain from using extra-constitutional principles to decide cases.

The reason for judicial restraint is I think well-illustrated in a statement by a distinguished jurist:

The imperatives of judicial restraint spring from the Constitution itself, not from a particular judicial theory. The Constitution was written with care and deliberation, not by accident. Its draftsmen were men skilled in the art and science of constitution writing. The constitutional text, and its immediate implications, traceable by some historical link to the ideas of the Framers, must govern judges.

*Marbury v. Madison* states the rule: "It is apparent that the Framers of the Constitution contemplated that instrument as a rule for the government of the courts, as well as the legislature."

Now this eminent jurist with profound respect for the Constitution is none other than Judge Anthony Kennedy in an address to the Canadian Institute for Advanced Legal Studies, more than a year ago.

To those who classify judges who practice judicial restraint as conservative, Judge Kennedy I think has the best response. As he stated, judicial restraint is neither conservative or liberal, but a requirement of the Constitution and a natural predicate for the doctrine of judicial review.

Now Judge Kennedy is a champion of judicial restraint. It is easy to understand why he has won President Reagan's trust, and it is easy to understand why he will win the trust of the American people as well.

After all, he will let the American people govern themselves, and refrain from imposing his own predispositions from the bench. If the people legislate a death penalty, for example, I think he will apply it because the Constitution is clearly no bar.

In that regard, Judge, I just want to make a recommendation to you. There are a lot of comments about how you will have to go into philosophy here, and you are going to have to go into judicial theories, and concepts, and that you can treat them any way you want to.

Let me just say this: I think we, as a committee, have to refrain from delving into your personal views with regard to constitutional doctrine.

First of all, I think it is unfair to future litigants before the Supreme Court. So, if you do want to answer some of these questions, choose with care how you do it because you may have that case before the Supreme Court at some future time, and you do not want to prejudice your right to decide that case, or have them criticize you after the fact, which certainly will occur.

The very ones who raise it here will be the most critical if you do not agree with them in the future. I think future litigants need to know that Judge Kennedy is open to their arguments, not predisposed against them. That he is going to be open to whatever the arguments and facts of the case really are.

And I think you have to show that you will not be prejudiced for or against any doctrines, and that is a very delicate, difficult line to traverse. So I want to just recommend to you, don't be bullied or badgered into thinking you have got to answer every question that we ask up here.

Some of them you simply cannot answer, and some of them you will simply have to say, this is a matter that is presently in the courts of this land or may come before the Supreme Court, and I have to be concerned about whether or not I prejudice my right to sit on that particular case in the future, and besides, I do not know what the facts are going to be in future cases that come before the Court.

So, there are limitations to what even you distinguished Senators can ask in your very time-honored and constitutional function of investigating for purposes of confirming, or not confirming, and your function of advising and consenting.

I do not think you can offer an informed view of doctrines until they really appear in the form of a case. Before a judge can make a determination on the merits of certain doctrines, I think he, or she, needs to read the briefs, hear oral argument, discuss the matter with colleagues, and see the issue in the context of the specific facts of that case.

And a judge should not presume to short-circuit this process with any prior opinions. Now that does not mean you cannot give your opinion, but certainly, you have to take that into consideration, and I think people here will respect such a decision.

The judiciary is an independent branch. Congress should not attempt to dictate the outcome of future cases, or even meddle in the processes of another branch, by extracting any kind of promises at any kind of confirmation hearing, least of all this confirmation hearing for one of the most important positions in our country's history.

So judges are independent. They are not subject to political pressure from Congress, and you do not have to be subject to it, either—I just want you to know that—in this very important set of hearings that we will have, where you will have an opportunity to really be a major participant.

I think it is totally unnecessary to delve into inquiries that you might have to have come before you at a future time. You have written over 430 opinions. You have participated in many, many more opinions, over a thousand opinions in addition to that, and I think this is an adequate body of evidence, and the best body of evidence, to ascertain how you will perform as a Supreme Court Justice.

So don't feel like you have to do something like that. By the way, I think it is good to see a Republican Kennedy in this environment. I just want you to know that, and I have noticed how well you have been treated by the press in this matter.

You know, some members of the press have treated you so fairly, that basically, they may have overlooked which branch of the Kennedy clan you come from, and I just want to tell you that I am glad to have you here.

And I also have deep respect for my colleague. We have been on as many as three committees together. So it is good to have you here.

I could say many more laudatory things about you. You are a wonderful family man from what I see. You have a profound determination to fight crime, and your opinions indicate that.

That is exactly what President Reagan said he would do, in trying to appoint people to the bench. And you want to fight it with appropriate legal tools. You have devoted much of your life to education and to teaching. These are very important things to me.

And I think the highest compliment a judge can receive, is that you know that ours is a government of laws, not of men, and that you have really been a stickler for abiding by the law, and I think that is important.

I think you deserve many more compliments than that. I think you have been a very appropriate model of judicial restraint on the bench, and I think that your service will serve to remind other judges of their duty to uphold the Constitution as written.

So these are important things, and I just want to compliment you for the efforts you have made in the past, for the reputation that you have gained, and of course for the good person that you are, and I hope that you will enjoy this appearance before the committee, and I know that you will enjoy your service on the Supreme Court in the future. Thank you.

[The statement of Senator Hatch follows:]