

judicial system great strength and great power. It enables the judge to continue to explore for the meaning of the Constitution. That is what I wish to do.

If you had a visitor coming to this country, and he asked: What is it that makes America unique? What is the gift that we have for civilization? What is it that America has done for history? I think most people would say America is committed to the Constitution and to the rule of law. And I have that same commitment.

Senator LEAHY. Thank you, Judge.

Thank you, Mr. Chairman. I would ask unanimous consent that written questions from Senator Simon be submitted on his behalf.

The CHAIRMAN. Without objection.

[Senator Simon's questions appear on p. 739.]

The CHAIRMAN. Senator Humphrey, who has waited patiently. The Senator from New Hampshire.

Senator HUMPHREY. Good morning, Judge Kennedy. I have been patiently waiting, anxiously waiting. I so much enjoy these hearings. This is really what I had in mind when I offered myself as a candidate for the U.S. Senate, this sort of thing. This is what I envisioned, not the passing out of money to the gimme groups, which is our daily fare around here.

These are very interesting hearings. I have found them fascinating. Frankly, I would not mind if we had another three or four after your confirmation, may I say. I would not mind if we had another three or four in the next year. I find these to be so fascinating. That might have a good effect on the court, may I say. I happen to believe that it would.

Fascinating though they are, the hearings do become a little oppressive at times, so I want to begin with a joke which comes at the expense of lawyers. If you have heard this, pretend you have not.

A woman called a law firm and asked for Mr. Smith, who was—I guess it was a man. I beg your pardon. A man called a law firm and asked for one of the senior partners whose name was Mr. Smith. The receptionist said, "Oh, I am very sorry. I guess you have not heard the news. Mr. Smith passed away three months ago."

And the caller said, "I want to talk with Mr. Smith." The receptionist said, "You do not understand. He is dead. He is deceased."

And the caller said, "I want to talk with Mr. Smith." "Sir, he is dead. Don't you understand?"

And the caller said, "Yes, I understand, but I cannot hear it often enough." [Laughter.]

Well, while it is true that we make jokes about lawyers, certainly the profession of the law is very important, and the role of the Supreme Court, the Judiciary, particularly the Supreme Court, is critically important. The Supreme Court is the Super Bowl of the law profession, and you are auditioning, in a way, for a place on the team.

The CHAIRMAN. We will have order in the room. Thank you. I know the joke was funny but \* \* \* [Laughter.]

Senator HUMPHREY. Now, to get down to serious matters, you write your own speeches; is that correct?

Judge KENNEDY. Yes, Senator; for better or worse.

Senator HUMPHREY. Well, they are very good. The ones I have read are very, very good. Inasmuch as you write them yourself, that gives us some insight into your thinking. I find your logic to be very clear.

The Stanford speech is one that has been examined a number of times. That is an important speech. It is a very good speech, would you not say so?

Judge KENNEDY. I enjoyed it. I want to make clear that I never speak from notes.

Senator HUMPHREY. Yes.

Judge KENNEDY. I gave the Senate what notes I had. I think that speech came out about that way.

Senator HUMPHREY. Yes.

Judge KENNEDY. One of the dangers is you sometimes forget the principal part of the speech until after you have given it.

Senator HUMPHREY. Well, we all understand that. I think it is a very good speech. I want to examine a few parts of that and then parts of some other speeches, if I have time.

Let me quote from your Stanford speech.

"One can assume that any certain or fundamental rights should exist in any just society. It does not follow that each of those essential rights is one that we, as judges, can enforce under the written Constitution."

"The due process clause is not a guarantee of every right that should inhere in an ideal system."

Is that a correct quote?

Judge KENNEDY. That is a correct quote, and I think it is a correct concept.

Senator HUMPHREY. You have not changed your mind since 1986?

Judge KENNEDY. No, sir.

Senator HUMPHREY. "The due process clause is not a guarantee of every right that should inhere in an ideal system." So it is not a blank check?

Judge KENNEDY. Certainly not.

Senator HUMPHREY. How about the ninth amendment?

Judge KENNEDY. Well, as I indicated yesterday, the meaning of the ninth amendment, and even its purpose, is shrouded in doubt, and the Court has not, in my view, found it necessary to refer to that amendment in order to stake out the protections for liberty and for human rights that it has done so far in its history.

Senator HUMPHREY. Never used the ninth amendment to ground an opinion—

Judge KENNEDY. Yes. There may be some quarrel with that statement because of an isolated reference by Mr. Justice Douglas in the *Griswold* case, and by the concurring opinion of Mr. Justice Goldberg in the same case.

Senator HUMPHREY. Well, if judges—in your opinion—if judges cannot enforce each of the essential rights which should exist in a just society, what should the Court do to move us toward a more ideal system when the political branches fail to act?

Judge KENNEDY. I suppose the Court can cry in protest if it sees an injustice in a particular case. The law is an ethical profession, and the law is designed to seek justice.

And if courts see an injustice being done, I think the oath of our profession requires us to bring that to the attention of the Congress. On the other hand, judges who are appointed for life cannot use the judiciary as a platform for their own particular views. So there is a duality there.

Senator HUMPHREY. What do you mean by "judges bringing that to the attention of the Congress"?

Judge KENNEDY. Well, from time to time, in our opinions we tell the Congress, please look at this statute and see the way we are enforcing it. Do you really want us to do this? I think that is quite a legitimate function of the Court.

I have said that in some of the RICO cases. Some of my other colleagues have, too. It is just not at all clear to us that the way we are enforcing RICO is what Congress really had in mind, but we are following where the words lead us.

Senator HUMPHREY. I want to go back to the ninth amendment.

Yesterday, you said it seems to me the Court is treating it as something of a reserve clause to be held in the event that the phrase liberty, and the other spacious phrases in the Constitution appear to be inadequate for the Court's decision.

You say, it seems to me the Court is treating, has been treating it as a reserve clause.

Is that your view, that it ought to be treated as a reserve clause, to be held in the event that the spacious phrases are inadequate to the matter at hand?

Judge KENNEDY. My characterization was what I thought the philosophy of the Court was to date, and I think it is important that the Court not confront such an ultimate and difficult issue unless it has to.

A case grounded solely on the ninth amendment requires the judge to search in the very deep recesses of the law, where I am not sure there are any answers.

Senator HUMPHREY. Well, if I have time, I want to come back to the ninth amendment and discuss the historical context, the intent of the authors and the framers, which seems to have been ignored in some of the discourse in this hearing so far.

May I ask the Chairman his intent with regard to a second round.

The CHAIRMAN. We will stay as long as the Senators have questions.

Senator HUMPHREY. Good. Quoting again from your Stanford speech, Judge, you said: "The unrestrained exercise of judicial authority ought to be recognized for what it is—the raw exercise of political power."

"If in fact that is the basis of our decisions, then there is no principled justification for our insulation from the political process."

Why did you feel constrained to raise the subject of unrestrained exercise of judicial authority in that speech?

Judge KENNEDY. I think there is a concern in society that the courts sometimes reach results simply because the courts think in their own view that those results are right, and I think it is extremely important for judges to remember that they are not political officers in black robes.

On the other hand, I think it is also important for the public to know the limitations of our own powers. Perhaps the public is, from time to time, disappointed with the cases that we write.

Perhaps the public thinks that we should reach out to rectify an injustice, to amend a complaint, to change a lawyer's theory of the case, and the constraints of the judicial process simply do not always allow that.

Senator HUMPHREY. You speak of the public concern, but your audience was judges. It was not a public speech, was it? Was it judges, or lawyers?

Judge KENNEDY. These were judges from Canada who have a new constitution.

Senator HUMPHREY. Yes.

Judge KENNEDY. They had been under a parliamentary system where the legislative authority is supreme, as have the English judges for many, many years, and they were curious to know what the extent of their authority was.

And I think it fair to say most of them were looking forward to exercising it, and therefore, I was sounding a note of caution.

Senator HUMPHREY. Well, you say the public is concerned that judges have sometimes overreached. Is Anthony Kennedy concerned that judges have sometimes overreached?

Judge KENNEDY. I think it is always a legitimate concern, and that we must remind ourselves, constantly, of the limitations on our authority.

Senator HUMPHREY. But I mean the question in more than the abstract sense. Is it your view that at times in our history, the Supreme Court has overreached, has exercised, rawly exercised political power?

Judge KENNEDY. There are a few cases where it is very safe to say that they did, the *Dred Scott* case being the paradigmatic example of judicial excess.

Senator HUMPHREY. So it is more than an abstract matter. How about in modern times? Is it your view? This is a modern speech, a contemporary speech. You felt constrained to make a rather strong statement about abuse of the judicial prerogatives.

I have got to think that it is almost a *cri de coeur*. Is it?

Judge KENNEDY. I did not really have a list of cases in mind. I had more in mind an approach, an attitude that I sometimes see reflected on the bench.

Senator HUMPHREY. An approach and an attitude?

Judge KENNEDY. That I sometimes see reflected on the bench in my own court.

Senator HUMPHREY. So irrespective of ultimate decisions, you are concerned at least about an approach and an attitude in certain instances, in contemporary times?

Judge KENNEDY. Yes, and this can affect the decisional course of the court.

The CHAIRMAN. If I understand the answer to the question the Senator asked, is that there are no specific cases which you had in mind when you referred to the unrestricted exercise—

Judge KENNEDY. That is correct. None come immediately to mind. But that concern always underlies the examination by a

judge of his own writings, or her own writings, and of the writings of their colleagues.

It is something you must constantly be aware of as you are trying to evaluate the pulls and tugs, and the impulses and the constraints that come to bear on the decisional process.

Senator HUMPHREY. This approach and attitude which caused you to make the statement cautioning against unrestrained exercise of judicial authority, as raw exercise of political power—this concern about the approach and the attitude that you have seen in contemporary times, in some cases—is that something that bothers you, professionally?

Judge KENNEDY. Well, I do not think the judiciary of the United States, as a whole, has departed from its mandate or its authority, but I simply think it is a concern that must always remain in the open, so that judges are aware of the limitations on their authority.

Senator HUMPHREY. Moving from general concerns over your views on judicial restraint to the privacy issue, in your Stanford speech you noted that *Bowers v. Hardwick* upheld the Georgia law which proscribes sodomy, yet you noted the decision did not over-*rule Griswold*, the case which announced the right of privacy.

And then you asked, "Are the decisions then in conflict over the substantive content of the privacy right?"

My first question is, when you speak of decisions, are you speaking of *Bowers vis-a-vis Griswold*, or are you speaking of *Bowers vis-a-vis Dudgeon*, which the Court, in your opinion——

Judge KENNEDY. Yes. There is a case called *Dudgeon*, decided by the European Court of Human Rights, under the Convention of Human Rights, and it reached a result that was absolutely contrary to *Bowers v. Hardwick*, and as I indicated in the speech, the Supreme Court had enough to wrestle with with its own precedents without trying to incorporate the European court. But I thought that it was an interesting exercise to compare the European court case with the *Bowers* case.

Senator HUMPHREY. I am still not perfectly clear——

Judge KENNEDY. And the answer is the comparison was between the *Dudgeon* case and the *Bowers* case.

Senator HUMPHREY. Well nonetheless, do you see any conflict between *Bowers* and *Griswold*?

Judge KENNEDY. Well, the methodology of the cases, it seems to me, are not easy to square, although that is nothing to be particularly upset about. The law accommodates a certain amount of contradiction and duality while it is in a state of growth. Absent a perfect society, justice and symmetry are not synonymous.

Senator HUMPHREY. You say there should be a certain amount of—how did you phrase it a moment ago?—a certain amount of ambiguity?

Judge KENNEDY. I think I said duality and tension. I do not know.

Senator HUMPHREY. Well, that seems to contradict what you said yesterday, when you said that judges are not to make laws, they are to enforce the laws. This is particularly true with reference to the Constitution. That judges must be bound by some neutral, definable, measurable standard in their interpretation of the Constitution.

Are you not contradicting yourself?

Judge KENNEDY. Well, between the idea and the reality falls the shadow. We attempt, of course, to have symmetry. We attempt, of course, to have cases that are all on fours with each other.

To the extent they are not, that indicates that the court has further work to do.

Senator HUMPHREY. I think in the meantime, it strikes me that in the meantime, while the Court is doing its further work, some citizens are suffering injustices.

I suppose we cannot hope for perfection in the courts, but I would certainly hope for objectivity, to the greatest possible extent.

Judge KENNEDY. I would agree with that, Senator. I think that is perhaps the correct resolution—objectivity.

Senator HUMPHREY. The problem with judges is that they are human beings, and that is why the theory does not quite work out.

Judge KENNEDY. Madison said if men were angels we would not need a Constitution.

Senator HUMPHREY. Well, I want to discuss your *Beller* opinion, not that I want to take up the subject of homosexuality, or discuss the merits, or the demerits, or the immorality of homosexuality, but I want to discuss your *Beller* opinion because there is certain language in there that worries this Senator.

You said that, quote: "We recognize, as we must, that there is substantial academic comment which argues that the choice to engage in homosexual activity is a personal decision that is entitled, at least in some instances, to recognition as a fundamental right and to full protection as an aspect of the individual's right to privacy."

Why did you feel in writing that, that you must recognize substantial academic comment? My goodness, you can find academic comment to justify almost anything. There is just as much, and far more weighty opinion in centuries of law, and thought, and writing, which you did not bother to mention in your opinion.

Judge KENNEDY. Well, I had read extensively in preparing for this opinion, in order to understand the right approach, and I usually think it is fair to the parties to set forth the things that I have read.

This was the first case involving a challenge to the discharge of homosexuals from the military, and I spent a great deal of time on it, and I thought it important for the reader, and for the litigants to know that I had considered their point of view.

Senator HUMPHREY. Do you find something commanding about academic opinion versus societal mores, when they differ?

Judge KENNEDY. Well, it is interesting that the legal profession is the only profession that is intimidated by its initiates. We have law review articles written by students who are not even lawyers and they get paid a great deal of attention, I guess that is one thing that keeps the law vigorous and vital.

But I am not overly persuaded by academic comment. I frankly do not have time to read very much of it.

Senator HUMPHREY. You referred, likewise, in your Stanford speech to the responsibility of the political branches, quote, "to determine the attributes of a just society." How much weight, as a judge, or as a Justice, will you give to the political—the responsibil-

ity, indeed, the prerogatives of the political branches to determine the attributes of a just society?

Judge KENNEDY. I think it is the prerogative and the responsibility of the political branch to take the leadership there. As I have indicated yesterday, I think the political branch has the obligation to assess each of its actions under the standard of constitutionality, and I think when the Court confronts an act by a legislature, it must know, it must recognize that the legislators understood the Constitution, that they acted deliberately with reference to it, and the legislature is entitled to a high degree of deference.

This is not just the political system at work. It is the constitutional system at work.

Senator HUMPHREY. Let us turn to criminal law. In your speech to the Sixth South Pacific Judicial Conference this year, you said, "Equally disturbing is that Goetz"—referring to the case in New York of the subway shooting—"Equally disturbing is that Goetz emerged from the subway incident as a hero in the eyes of a large portion of the citizenry: the victim who finally fought back. If the rule of law means that citizens must forego private violence in return for the State's promise of protection, then the public acclaim with which Goetz's actions were received in some quarters indicates that the present criminal justice system breeds disrespect for the rule of law."

If that is so, must the judiciary share in the responsibility for a criminal system which breeds disrespect for the rule of law?

Judge KENNEDY. Absolutely. The judiciary system is responsible for the immediate supervision and the immediate implementation of the criminal system. The judiciary has itself made many of the rules that are binding upon the police, and it is the obligation of the judiciary to constantly reassess those rules as to their efficacy and as to their reasonableness.

In this connection, we were talking about violent crime. We were talking about victims who feel helpless in the wake of crime, and courts must be very, very conscious of their front-line position here.

Senator HUMPHREY. Well, did you mean to say in your speech to the conference that the present criminal justice system breeds disrespect for the rule of law? Is that what you were saying?

Judge KENNEDY. I think that it can in some quarters. Everybody can point the finger to each other, but I think the courts bear a large responsibility. I know in some States, some States represented by the members of this committee, there simply are not enough funds for courts, for law enforcement officials, for correctional facilities. And it is a tremendous problem.

What we do is take care of society's failures. We have very little to do with preventative measures other than the deterrent value that quick and efficient enforcement of the criminal system brings.

Senator HUMPHREY. The courts must share some responsibility in this present system which breeds, to some extent, disrespect.

Judge KENNEDY. Of course.

Senator HUMPHREY. Including the Supreme Court?

Judge KENNEDY. I would include the Supreme Court, of course.

Senator HUMPHREY. Quoting further from the same speech, "The significant criminal law decisions of the Warren Court focused on the relation of the accused to the State and the police as an instru-

ment of the State. Little or no thought was given to the position of the victims."

Why did you choose to criticize the Warren Court in this?

Judge KENNEDY. Well, it was that court, of course, which implemented the great changes that we have had in the criminal procedure system, changes which are now really a part of that system. I was pointing out the fact that really there has been a lack of awareness by all parts of the Government of the position of the victim.

I had indicated yesterday that victim was a word that I never even heard in law school, and, frankly, I do not think I heard of it until the last 6 or 7 years until the Congress of the United States and commentators brought it to our attention when you passed the Victims Assistance Act.

Senator HUMPHREY. How much time do I have left?

The CHAIRMAN. You have about 2 minutes, but why don't you take more time at this break. We have had you sitting a long time, Judge. What we are going to do is we will break for the luncheon recess when Senator Humphrey finishes, which will end the first round.

But before we leave, I would ask the audience please do not get up. We have a little business to conduct here, so if you are going to leave, leave now and not at the end so we cannot hear what we are about to do. It will take 3 minutes after the Senator from New Hampshire finishes. At that time, we will break. And if you need another 5 minutes or so, you go ahead, Senator.

Senator HUMPHREY. Thank you.

The CHAIRMAN. Is that all right with you, Judge?

Judge KENNEDY. Certainly.

Senator HUMPHREY. I have a speaking engagement off the Hill at 12, so I cannot take too much time. I am sure you will be glad to hear that, Mr. Chairman.

I want to go back to the ninth amendment, Judge Kennedy. If I understood some of the questions correctly, some Senators seem to be trying to get you to say that there are some privacy rights hiding there in the ninth amendment waiting to come out, come out, wherever you are. That seems to me to be a very generous reading of the intent of the authors and ratifiers of the ninth amendment. Wouldn't you agree?

Would you give us your understanding of the historical intent of the ninth amendment?

Judge KENNEDY. Well, as I have indicated, the intent is really much in doubt. My view was that Madison wrote it for two reasons. Well, they are really related. He knew, as did the other framers, that they were engaged on an enterprise where they occupied the stage of world history; not just the stage of legal history, but the stage of world history. These were famous, famous men even by the standards of a day unaccustomed to celebrities. And he was very, very careful to recognize his own fallibilities and his own limitations.

So he first of all wanted to make it clear that the first eight amendments were not an exhaustive catalogue of all human rights. Second, he wanted to make it clear that State ratifying conventions, in drafting their own constitutions, could go much further



than he did. And the ninth amendment was in that sense a recognition of State sovereignty and a recognition of State independence and a recognition of the role of the States in defining human rights. That is why it is something of an irony to say that the ninth amendment can actually be used by a federal court to tell the State that it cannot do something. But the incorporation doctrine may lead to that conclusion, and that is the tension.

Senator HUMPHREY. May lead to that conclusion.

Judge KENNEDY. May. May lead to that conclusion.

Senator HUMPHREY. Well, let me ask you this, finally. I do hope we will have an opportunity to think about matters further and ask further questions of you. Let me just ask you this, finally, with regard to privacy rights.

What standards are there available to a judge, a Justice in this case, to determine which private consensual activities are protected by the Constitution and which are not?

Judge KENNEDY. There are the whole catalogue of considerations that I have indicated, and any short list or even any attempt at an exhaustive list, I suppose, would take on the attributes of an argument for one side or the other.

A very abbreviated list of the considerations are the essentials of the right to human dignity, the injury to the person, the harm to the person, the anguish to the person, the inability of the person to manifest his or her own personality, the inability of a person to obtain his or her own self-fulfillment, the inability of a person to reach his or her own potential.

On the other hand, the rights of the State are very strong indeed. There is the deference that the Court owes to the democratic process, the deference that the Court owes to the legislative process, the respect that must be given to the role of the legislature, which itself is an interpreter of the Constitution, and the respect that must be given to the legislature because it knows the values of the people.

Senator HUMPHREY. Those, especially the first category, sound like very subjective judgments.

Judge KENNEDY. The task of the judge is to try to find objective referents for each of those categories.

Senator HUMPHREY. Thank you, Mr. Chairman. Thank you, Judge.

The CHAIRMAN. Thank you.

Let me ask my colleagues who are here, so we can plan the rest of the day and give Judge Kennedy some notion of how long we will be asking him to stick around today. Can my colleagues who are here indicate those who would think they would want a full second round of 30 minutes apiece? Senator Humphrey, Senator Specter, Senator Hatch?

Senator HATCH. I only have a few questions.

The CHAIRMAN. Senator Thurmond, are you going to take 30 more minutes?

Senator THURMOND. No, I will not. I may take 5 minutes.

Senator LEAHY. I might be able to do it in less, but I think there is a good possibility of 30 minutes, Joe.

The CHAIRMAN. All right. I am told that Senator Heflin has a second round and Senator Metzenbaum and Senator Grassley. So