

One of your concluding statements, as it appears on 77 Fed. 2nd at 1408, "Absent the showing of discriminatory motive, which has not been made here, the law does not permit the Federal courts to interfere in a market-based system for the compensation of Washington's employees."

And, in this one, like the *City of Pasadena* case, I question in terms of your coming to a conclusion as a matter of law which overturns very strong findings of fact by a lower court in the civil rights area.

Judge KENNEDY. I suppose I would disagree with your conclusion about very strong findings, in that I don't think the findings at all related to the remedy. I don't think the findings at all related to the violation that the district court findings were—the part you quoted was simply conclusory. The actual findings were that the State of Washington had done a comparable worth study. The actual findings were that the State of Washington had advertised in some cases for male-only jobs and that it had ceased that. And we simply found that as a matter of law this was wholly insufficient to say that Washington was violating the law by not adopting a comparable worth scheme for every one of its female employees.

So I would think that those are fact findings simply are not related to the judge's conclusion, and so I would disagree with the characterization as strong.

Senator SPECTER. Thank you very much, Judge Kennedy. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Byrd.

Senator BYRD. Judge Kennedy, I am sure you feel you have had a very fair hearing here, and that the questions have been tempered and incisive, to the point; am I correct?

Judge KENNEDY. You are certainly correct, Senator.

Senator BYRD. I am pleased to have had an opportunity to meet with you privately. I am sure that everybody else on here probably have done the same thing. But based on my own private conversations with you, and you didn't promise me anything or commit to anything in those conversations, and I didn't ask you to, and based on what I have read and heard and my observations of the hearing, I don't believe you are in any trouble.

I am inclined to vote for you, barring some unforeseen happening. I am a conservative when it comes to the courts. Probably a liberal on some matters and moderate in others. I hope I am not an extremist in anything.

Disraeli said that he was a conservative to conserve all that was good in his constitution and that the radicals would do all that was bad. I believe in the death penalty. I believe it is constitutional. The Constitution refers to capital crimes.

What are your comments, or would you have any on the subject?

Judge KENNEDY. Well, with reference to the death penalty, Senator, I have taken the position with your colleagues on the committee that the constitutionality of the death penalty has not come to my attention as an appellate judge and that I will not take a position on it, but that if it is found constitutional I think it should be efficiently enforced.

Senator BYRD. We had a little difficulty with another nominee for this position recently in connection with congressional standing, and I was left to believe that the Congress would not be allowed in the Court in the event there were disputes between the legislative branch and the executive on that occasion.

Perhaps others have asked questions on this subject, but would you care to indicate whether or not you feel that there is—do you have any problem with Congress being able to get standing to receive justice in the Court if you become a member of the Supreme Court and there is a serious question that arises between the executive branch and the legislative and the country's national security interests, let's say, are involved?

Judge KENNEDY. In a colloquy that we had earlier this afternoon, Senator—

Senator BYRD. No, I did not hear the colloquy.

Judge KENNEDY. Right. I mean one that I had before you came in. I made it clear that in my view it is quite appropriate for the Court to act as an umpire between the political branches of the government. The circumstances in which a case that meets the case or controversy doctrine are ones that we would have to examine in a particular case. I think that in the *Youngstown* case, the steel seizure case, and the *Nixon* tapes case, the Court acted completely appropriately in defining and determining the bounds of power between the two political branches. I think that is a completely appropriate role for the Court to play.

Senator BYRD. Why would you want to be a Supreme Court Justice? Has anybody asked you that question yet?

Judge KENNEDY. I think Senator Leahy asked me that question.

Senator BYRD. Well, then you don't need to answer it for me.

Judge KENNEDY. Well, I would be pleased to tell you, Senator, that I am committed to constitutional rule and I think every person in this Senate is, and I think every American is; and I want to do the best I can to honor that commitment.

Senator BYRD. I suppose you have been queried as to your position on judicial restraint, how you view the responsibilities and role of the Supreme Court under the Constitution.

Judge KENNEDY. I have, Senator, and I believe the role of the Supreme Court must be to maintain its independence but at all times to obey the Constitution and the law.

Senator BYRD. And I suppose you would view the Court not as a traveling constitutional convention?

Judge KENNEDY. Absolutely.

Senator BYRD. Or as an erstwhile legislative branch?

Judge KENNEDY. Not at all, Senator. I would not so view it.

Senator BYRD. Well, what is the role of the Supreme Court? Is it merely that of interpreting the law and the Constitution and applying the law and the Constitution to the facts of the case, or is it that of blazing new trails and, in essence, changing the laws, enacting the laws, enacting new laws?

I am sure you have probably been asked these questions already, and I apologize to you. You need not elaborate at great length on my questions if others have asked them because I will be reading the hearing.

Judge KENNEDY. Senator, the Court can use history in order to make the meaning of the Constitution more clear. As the Court has the advantage of a perspective of 200 years, the Constitution becomes clearer to it, not more murky. The Court is in a superior advantage to the position held by Mr. Chief Justice Marshall when he was beginning to stake out the meanings of the Constitution in the great decisions that he wrote.

And this doesn't mean the Constitution changes. It just means that we have a better perspective of it. This is no disparagement of the Constitution. It is no disparagement of the idea that the intentions and the purposes of the framers should prevail. To say that new generations yield new insights and new perspectives does not mean the Constitution changes. It just means that our understanding of it changes.

The idea that the framers of the Constitution made a covenant with the future is what our people respect and that is why they follow the judgments of the Supreme Court, because they perceive that we are implementing the understanding of the framers. I am committed to that principle.

Senator BYRD. How do you view previous decisions, precedent, the doctrine of *stare decisis*? Do you feel that precedent should be given a great deal of weight? Is precedent supreme, or is precedent to be given a strong place but in the light of changing circumstances, perhaps? That you would not have any great difficulty in overriding precedent?

Judge KENNEDY. As you know, Senator, *stare decisis* has an element of certainty to it, which most Latin phrases do, but it really is a description of the entire legal process. *Stare decisis* is the guarantee of impartiality. It is the basis upon which the case system proceeds, and without it we are simply going from day to day with no stability, with no contact with our past.

And so *stare decisis* is very important, but, obviously, if a case is illogical, if it cannot be reconciled with all of the parallel precedent, if it appears that it is simply out of accord with the purposes of the Constitution, then it must be overruled.

Senator BYRD. Well, I congratulate you again, and I think that in due time the Senate will consider your nomination. I can assure you that your nomination will be given a very fair and thorough hearing in the course of Senate debate based on your testimony thus far and your conduct in these hearings and my perception based on what I have read and heard and seen and what I have listened to among my colleagues, I have a feeling that you are going to have the opportunity to don those robes and sit on that Court. And if the good Lord does his will and nothing happens to keep you from doing that, I certainly want to extend the hope that you will be there a long time. I have a favorable impression from the standpoint of my own measurements, my own standards, as one who believes that the legislative branch under this system was created to do the legislating and that the branches are equal, coordinate. I believe strongly in our system of checks and balances, and I believe the Court has the role of interpreting the laws and the Constitution. I think the judges should exercise restraint and not allow themselves to get over into the realm of the legislative branch.

And having said that, I will exercise a little restraint, Mr. Chairman, and say no more, except thank you for the hearing. I would like to thank my colleagues for the dedication that they always pursue in hearing the nominees, the questions that they ask, the preparations that they make in advance of the hearings. And again, to compliment you and wish you and your family a happy holiday season.

Judge KENNEDY. Thank you for those gracious remarks, Mr. Chairman, and for the courtesy that all of your colleagues have shown me. The advise and consent process is a very meaningful one to me.

The CHAIRMAN. Thank you, Senator.

The Senator from New Hampshire.

Senator HUMPHREY. Back to judicial restraint, Judge, if you don't mind.

Judge KENNEDY. Not at all, Senator.

Senator HUMPHREY. The advise and consent role is very important. We exercise it only once with each nominee.

I am not fully satisfied that I have your views in this area perfectly in focus. Just how seriously do you view the absence of judicial restraint, which I will call judicial activism? How seriously do you view that as misconduct by judges?

If you were a Senator, would you reject, refuse to confirm a candidate to the bench who rejected the philosophy and the doctrine of judicial restraint?

Judge KENNEDY. Well, it is not clear to me that a Senator can always reject a nominee because of some disagreement with philosophy. But, if you have a nominee who tells you that he or she is not bound by the law of the Constitution, that he or she is superior to precedent, that he or she has some superior insights into the great principles that made this country devoted to constitutional rule, then I think you could very easily reject that nominee.

Senator HUMPHREY. Yes, that would be easy but it doesn't present itself that way, as you know.

Judge KENNEDY. I think there may be a problem in that I am not sure that, in the last 20 years, any nominee has not embraced the doctrine of judicial restraint because that is a phrase that is rather simple to adopt, and the question is whether or not it is given meaning and given application in the deliberative approach that the judge brings to his or her work. I can point to my record—12 years of opinions in which I think I indicate that careful approach.

Senator HUMPHREY. Earlier you mentioned facts which judges might consider in determining what activities are covered by the privacy right. You mentioned things such as the essentiality of the right to human dignity, the inability of a person to manifest his or her own personality, the inability of the person to obtain his or her own self-fulfillment.

It seems to me that such broad subjective concepts are an invitation, or can certainly lead to the exercise of political power, raw political power that you spoke of disparagingly in your Stanford speech.

Judge KENNEDY. They are unless they are used with the view to determining what the Constitution means. The framers had—by that I mean those who ratified the Constitution—a very important