Holmes said that "A page of history is worth a volume of logic," and certainly 200 years of history is not irrelevant, so I think we are in a better position. The answer is, I think we are in a much better position.

And the other point is that over time the intentions of the framers are more remote from their particular political concerns and so they have a certain purity and a certain generality now that they did not previously.

The CHAIRMAN. I think I will stop there. I will reserve the balance of my time.

The Senator from South Carolina.

Senator THURMOND. Thank you, Mr. Chairman.

Judge Kennedy, I want to commend you for the astute manner in which you have answered the questions during this hearing. You have answered them with credibility and with knowledge. You have shown the great respect you have for the Constitution of the United States, which, in my opinion, is the greatest document that has ever been penned by the mind of man for the governing of a people.

You have shown that you are an independent thinker. In other words, you will draw your own conclusions after you get the facts. And you have shown a knowledge of the construction of the Constitution and the law, which I think is to be admired by all, and that it is your desire to construe it for the best interests of the American people.

On the question of issues, you have impressed me as being open-minded and will give careful consideration. You will follow stare decisis unless there is some overriding reason why you would act differently. For instance, in *Plessy* v. *Ferguson* the Supreme Court reversed itself. There may be instances in the future in which they will reverse themselves, and you would not hesitate to reverse a decision if you felt it was the right thing to do.

You have shown I think that you are not prejudiced and that you will be fair to all. I have been deeply impressed with your testimony. And I am not going to take more time at this point, I think we can all cut these questions short. I think they have had a chance to size you up, and the only conclusion they can reach is you are a good man and ought to be confirmed.

Judge KENNEDY. Thank you very much, Senator.

The CHAIRMAN. You don't object to that, do you?

Judge KENNEDY. Not at all. I appreciate the Senator's most gracious remarks.

The CHAIRMAN. The Senator from Ohio.

Senator METZENBAUM. Judge Kennedy, I have some questions in the antitrust area, and I know that is not your special field of expertise, so I am not going to get into what I call the nitty-gritty of some of the Court decisions.

Judge KENNEDY. Well, I know that it is yours, Senator, so I would be pleased to learn.

Senator METZENBAUM. Pardon?

Judge KENNEDY. I know that it is yours, so I would be pleased to learn.

Senator METZENBAUM. Well, I will at least make an overall inquiry.

As you may recall, Judge Bork wrote and testified that manufacturers should be able to fix the resale price of their product even though the Supreme Court has declared such price-fixing per se illegal. Letting manufacturers fix the resale price—and what we are talking about is where the manufacturer tells the retailer that you must sell at a certain price or else you lose the product—would actually drive discounters out of business and consumers would be forced to pay billions of additional dollars.

I am frank to say to you that I consider this a very major issue, because to me the essence and bulwark of this whole system of free enterprise is free competitive forces working and being permitted to work. If manufacturers can say that you can only sell a refrigerator or a stove or a set of dishes, or whatever, at a certain price, I think that is hurtful not alone to the consumer, but also to the nation as a whole. I would sort of like to get your views on the subject as to whether you agree with the current law or with Judge Bork that manufacturers should have the right to fix resale prices?

Judge KENNEDY. At the outset let me tell you, Senator, that I did not hear Judge Bork's testimony on that point and I am simply not familiar with his views. There is a case on the Supreme Court's docket, and I am not sure if it is one that has been argued this term, in which the question of whether or not vertical price restraints, which is the kind of restraint that you have described, are *per se* violative of the antitrust laws. So I should tread very warily about expressing a view on that case.

Senator METZENBAUM. I am not trying to get you into any specific cases. I am more trying to get you into this whole idea of vertical price restraints and the whole question of freedom of the retailer who owns the product to be able to sell at such a price as he or she determines the product should be sold at.

Judge KENNEDY. I understand. I just wanted to tell you why I am going to be very guarded in my answer, because it is such a specific issue that the Supreme Court is now considering.

Generally, I think it is fair to say, and I think that the law should be this, that a *per se* rule is justified if in almost every event it has an anticompetitive effect. Only if a particular trade practice that is challenged is pro-competitive is there a justification for it when there is a restrictive agreement of the kind you describe. I take it that is the starting position for analyzing this kind of problem.

And so the question, I suppose, would be whether or not there can be any demonstration that vertical price restraints are in any respect pro-competitive, and it is not clear to me exactly what showing would be made on that. You can get economists to testify on each side of any issue, as you know.

Senator METZENBAUM. I am not sure how vertical price restraints could ever be shown to be pro-competitive. Almost by definition, the restraint precludes competition.

Judge KENNEDY. That is the question. And, incidentally, by saying that economists testify on either side of the issue, I do not mean necessarily to denigrate them. There is just a great deal of disagreement, and we use experts in lawsuits this way all the time.

Senator METZENBAUM. There is a case called the *State of Arizona* v. *Maricopa County Medical Society.* You concurred in an opinion

that said doctors could fix prices—so long as it was a maximum rather than a minimum price—without automatically violating the antitrust laws.

You rejected the State's argument that the agreement led doctors to charge the maximum, making it legal price-fixing by its very nature. The Supreme Court reversed, holding 4 to 3 that "the anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some."

Could you tell us why or how you concluded that maximum price-fixing for the doctors should not be per se illegal, and whether you still feel that same way today despite the Supreme Court's reversal of your opinion in *Maricopa*?

Judge KENNEDY. I thought it was a close case then, and I am quite willing to accept the Supreme Court's decision, although all of us were disappointed that there was not a majority in the Supreme Court—there were only four votes—because the district courts and the circuit courts need guidance and we wanted the Supreme Court to set the rule.

My concern there was that I wanted a record. I wanted the case to go to trial. It simply wasn't clear to me from what I know as a judge, from what I am capable of understanding as a judge, that arrangements for health care services which use a pool of doctors and which allow the patient to choose the particular doctor are in all respects necessarily anti-competitive if they use a price schedule.

Senator METZENBAUM. If they what?

Judge KENNEDY. The issue, as I understood it, as framed by the plaintiffs, who were challenging the scheme, was whether allowing a health plan, where you have a choice of physicians and the physicians have a schedule that they agree upon, is necessarily anti-competitive. I simply saw no body of doctrine or learning or experience in the courts that would justify my coming to the conclusion that in all cases that must be anti-competitive.

The health care field is sufficiently volatile and dynamic, and the cost problems in the health care field are so well understood that I thought that the courts could benefit from a trial where we could have experts testify one way or the other and then evaluate the record. It did not seem to me that the rules for fixing the prices of retail goods necessarily applied to the medical profession, which was attempting to provide this kind of group service.

And the Supreme Court said, in the 4-to-3 opinion, that that was incorrect—that a horizontal price schedule is a horizontal price restraint, and that it is *per se* illegal.

I recognize the utility of *per se* rules. Because if you have a rule of reason trial, which is usually at the other end of the spectrum, it is a global sort of judgment. It is a very expensive suit to try. The plaintiff has to go through an elaborate and costly trial, and, when the trial is over you often do not learn a lot. That is the argument against the rule of reason and the argument for *per se* rules.

My concern was that in the health field—we knew so little about it that we should have a trial on the merits. But the Supreme Court disagreed, and I understand why.

Senator METZENBAUM. While you haven't written a great many antitrust opinions, you appear to have written enough to have a working knowledge of antitrust laws and, undoubtedly, as so far indicated in this last few minutes, some views on it.

I raise the subject not only because it matters a great deal to me, which really is totally unimportant, but because the Supreme Court, as you know, makes a great deal of law in this area. There will be more law made by the Supreme Court with respect to antitrust issues than in almost any other field.

Some have felt free to substitute their own views for those of Congress in applying the antitrust laws. Now, there is no question the antitrust statutes are admittedly general and Congress' intent in enacting them is not all that clear.

Give me your thoughts, if you will, as to what you think Congress had uppermost in its mind when it enacted the Sherman and Clayton Acts, our basic antitrust statutes, and what are your views on the obligations of the Court to ascertain and enforce congressional intent in this area?

Judge KENNEDY. Well, the Sherman Antitrust Acts and the Clayton Acts were passed in an era when corporate acquisitions and mergers were proceeding at a tremendous rate. In the period, I think, from 1900 to 1930, over 7,000 small firms, each with a capital of over $100,000, simply disappeared. The concern was, in the acquisitions and merger field, that the capitalistic system simply could not work if there was not an opportunity for small and medium-sized businesses to invest capital, to have resources and talent in localities throughout the country, and to have some protection against being acquired by competitors and by large conglomerates. This particularly happened in the utility area.

Unfortunately, what happened was that the Supreme Court, in the *E.C. Knight* case, gave a restrictive interpretation under the Commerce Clause to the reach of the Sherman Act, and at the same time they were willing to enforce agreements against price restraints, and the two in combination accelerated this merger pace. And it was only when the Supreme Court changed its rules under the Commerce Clause that antitrust enforcement became a reality in the merger field.

So I think it is necessary to go back to that intent of Congress and to recognize that it is a central part of our national policy to have a capitalistic system which is free, which is open.

So far as the consumer is concerned, the consumer is protected by aggressive price competition, and the antitrust laws make it very clear that price-fixing is improper and illegal. As you know, in some cases violations of the antitrust laws can be criminal, and in those cases I think the criminal law should be vigorously enforced. A price-fixing agreement that is unlawful can cause great damage and great injury, just as much as a bank embezzler can, and I am in favor of strict enforcement of the criminal laws when there is a violation.

Senator METZENBAUM. Some have argued, Judge Kennedy, that mergers are a good thing even if they leave only two or three firms in the market. Would you go that far? And what would be your standards, generally speaking, for judging mergers?

Judge KENNEDY. I am not an economist and I would want to hear the arguments in the particular case before I ventured anything that I think would be of very much substance or help to you, Senator. I would want to look at the facts in the particular case.

Senator METZENBAUM. Well, let me ask you this. Some have argued, and I think it is fair to say that they are conservative antitrust thinkers, that only economic efficiency matters in antitrust analysis; that is, a merger or a monopoly is good if its efficient even if the net result or the bottom line is that it raises prices or hurt the consumer.

Others, and I include myself in this group, believe Congress want our judges to consider other things as well, things like unfair exploitation of consumers, excess concentrations of corporate power, and the effect on small businesspeople.

Where would you come out on this debate—not on any case, but on this whole question of economic efficiency, which is on one side of the issue, versus the questions of unfair exploitation of consumers, excess concentration of corporate power, and negative effects on small business? Where would you want to place yourself in that debate?

Judge KENNEDY. Well, I would not want to do that because I really do not have a fixed position. I think my earlier answer indicates to you that I would be as sensitive to and most interested in those arguments that indicated that economic efficiency was not the sole controlling determinant.

Senator METZENBAUM. So that you, are you saying that those who would maintain that economic efficiency is not the sole determinant would have the burden of proof to convince you that negative consumer impact, or loss of competition, or excess concentration of corporate power, outweigh or negate the efficiencies. Are you saying that the scale starts off being weighted in favor of economic efficiency unless you can prove the contrary? Are you saying that?

Judge KENNEDY. I think that any person who argues for a simple conclusive formula always has the burden of proof to demonstrate to me that it is correct.

Senator METZENBAUM. Well, you could say that factors relating to unfair exploitation of consumers, or excess concentration of corporate power, or effect on small business tie in with previous decisions of the Supreme Court, and that those who claim that economic efficiency is the only thing that matters should have the burden of proof. It is really a question of which comes first, the chicken or the egg. But let us assume that neither comes first, that both are evenly on the scale. And I am saying where does Judge Kennedy come down, without addressing yourself to any particular cases or any particular issues pending before the Court.

I think this is a fundamental concept of antitrust law. I honestly believe that we are entitled to something further on your thinking on the subject than we have so far.

Judge KENNEDY. I just do not want to tell you that there has been a lot of thinking on my part when there has not been, Senator. To the extent that the precedents say that economic efficiency is not the sole determinant—and that is the way I understand most of the precedents in the area—the burden of proof would be on the

person who wishes to change that doctrine and change that approach.

Senator METZENBAUM. I think it is fair to say that this is not a field in which you have been that much involved. I would like to leave you with the concerns of this Senator that the antitrust laws are not liberal laws, they are not conservative laws. They came into being with Republican sponsorship, a Senator from my own State, John Sherman. And that when you have those cases before you I would hope that you would think seriously not just about the impact upon the consumer, not just about the impact upon the businessperson, not just about the impact of those employees who may or may not be forced out of work by reason of corporate mergers, but that you think about the overall impact upon the economic system, the free enterprise system, and recognize that our antitrust laws have served us well over a period of many years in protecting free competition in this country with many of the attendant benefits that have resulted in the system.

Judge KENNEDY. That is an eminently persuasive statement of the antitrust laws, which commends itself to me, Senator.

Senator METZENBAUM. Thank you very much, Judge Kennedy.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Hatch.

Senator HATCH. Thank you, Senator.

Judge, I want to compliment you for the candid way you have answered these questions, and I think you have enlightened us in many ways.

Judge KENNEDY. Thank you, Senator.

Senator HATCH. I just have a few questions I would like to go over with you that I think need to be brought out and may be helpful to everybody concerned, and certainly in this bicentennial time of the Constitution.

I would like to point out there is much value in a unanimous Court. When the Court is unanimous, it tends to put an end to further debate about the merits of any particular decision or issue. Supreme Court historians have recounted how Justice Burger labored diligently to get a unanimous Court in the *U.S.* v. *Nixon* case concerning executive privilege during the Watergate era.

Similarly, historians report that Chief Justice Warren worked prodigiously to get a unanimous decision in *Brown* v. *Board of Education.* You are sworn to uphold the Constitution and we would want you to do nothing else. But there might be times when unanimity on a ruling is more important than your own dissenting view.

Now, how would you weigh the merits of such a case, and what factors would cause you to submerge your own views in deference to the need for a unanimous opinion?

Judge KENNEDY. We have confronted that on our own court, Senator, and it is a difficult problem. But I think, as you have indicated, that it is also a very important one. In some cases on the court in the ninth circuit you can not always tell really how long an author of an opinion has had a case because sometimes when a panel is in disagreement, one of us will say, well, why don't you let me try writing the opinion and I will see if I can solidify our view.