

Perhaps we would become accustomed to it after awhile. The press is a part of our environment. We cannot really excise it from the environment.

But in the courtroom, I think that the tradition has been that we not have that outside distraction, and I am inclined to say that I would not want them in appellate court chambers.

I once had a case—it was a very celebrated case—in the City of Seattle. The courtroom was packed. We were at a critical point in the argument. I was presiding.

A person came in with all kinds of equipment and began setting it up. He disturbed me. He disturbed the attorneys. He disturbed everybody in the room.

He was setting up an easel to paint our picture, which was permitted. If he had a little Minox camera, we would have held him in contempt.

So the standard doesn't always work.

Senator HERLIN. Well, there are certain courts that have given a lot of study to this issue. And they impose certain restrictions such as certain locations, certain places, no flash bulbs, etc.

My observation has been that it can be done without interfering with the court.

It does cause a few of the justices to wear blue shirts and red ties and dark suits. But that is not uncommon among judges anyway.

I think there is one other question that I think should be asked with Senator Kennedy here. You are not kin to Ted Kennedy in any way are you?

Judge KENNEDY. Well, my father once announced that we probably were. And my mother came back the next evening and said, you know, we are related. And she began to smile, and she said, on the Fitzgerald side. So [Laughter.]

So I'm not sure.

The CHAIRMAN. You would both be lucky if you were.

The Senator from Pennsylvania.

Senator SPECTER. Thank you, Mr. Chairman.

Judge Kennedy, when my first round expired, I was asking you about the comment in your speech concerning the distinction between essential rights for a just system, or essential rights in our constitutional system.

And I am going to try to boil this question down, because I have quite a few questions to ask, and there is not a great deal of time remaining. And I know that Chairman Biden wants to finish up this evening.

The CHAIRMAN. Take as much time as you want. No Senator will be cut off.

Senator SPECTER. Well, in that event, I will take it slow and easy.

The CHAIRMAN. Seriously. We are going to stay with the rounds. Just like we did in every hearing I have ever conducted.

That is, you have your half an hour. And if you have more questions, we will go to the next round, and narrow it down until there are only one or two left.

You can ask questions until you exhaust questions. And I have never known you or anyone else in this committee to go on and ask questions that were not warranted.

So take all the time you need.

Senator SPECTER. Well, thank you, Mr. Chairman.

I think the questions are warranted, and there are a number of important areas I think yet to be covered.

You have written criticizing legal realism. You make specific reference, in one of your speeches, to three very important decisions, characterizing *Baker v. Carr* as being a matter where a revolution was wrought, and *Brown v. Board* and *Gideon v. Wainwright*.

And in response to questions here today, you have stated your agreement with the *Mapp v. Ohio* search and seizure case and *Escobedo* and *Miranda* on warnings.

And my question is, do you agree generally with the decisions of the Warren court, which have been characterized in many quarters as being a product of legal realism?

Judge KENNEDY. Well, there are two different questions at least, implicit in your statement.

One is this question of legal realism altogether. And the second is the decisions of the Warren Court.

I have indicated that I thought the decisions of the Warren Court went to the very verge of the law at least. We are talking about criminal procedure cases, the ones we have mentioned. That we have paid a heavy cost for imposing those rules on the criminal system; that they seem to be part of our constitutional system now; and that I think a very strong argument would have to be mounted in order to withdraw those decisions.

I do think the decisions have evinced on an explicit basis, the fact that they involve pragmatic, preventative rules announced by the Court, and the Court itself has admitted that they are not necessarily demanded by the Constitution.

Now, so far as legal realism is concerned, that is a philosophy which I think has a substantial grip on much of the profession, on much of the bench. And it is probably a description of how we feel and how we behave.

But I think it has very little part in constitutional interpretation. Legal realism is really an offspring of the school of historicism, which is the idea that no principle, no institution, no charter, no rule, survives its own generation, its own time; that everything is up for grabs every generation.

I think that is just completely inconsistent with the idea of a Constitution. I think it just has no place in constitutional law.

Now, it is true that in the lower courts this may be a description of our process. Because we look at economics, and we look at sociology, et cetera, in order to make our judgments. But in those areas, the Senate of the United States and the Congress can correct us if we are wrong.

Senator SPECTER. But as a generalization, you do believe, and I think you answered this in the prior question, that the American courts have not departed from their mandate, and that as the continuum or tradition of American constitutional law has evolved, the only case you picked out that you disagreed with was *Dred Scott*.

So that as a generalization, the established precedents are satisfactory.

Judge KENNEDY. Well, I have been rather cautious about going through a list of cases that I agree with and disagree with. Because

I think that the position of a Supreme Court Justice has to be that precedents can be reexamined and we cannot commit to the Senate Judiciary Committee otherwise.

Senator SPECTER. Let me turn now to the *Chadha* decision, Judge Kennedy. And to the statement which I had referred to in my opening, which was somewhat critical of the Congress.

And that was your statement at the end of the speech, which you made at the Stanford law faculty back in 1984, where you said, the ultimate question then is whether the *Chadha* decision will be the catalyst for some basic Congressional changes.

My view of this is not a sanguine one. I am not sure what it will take for Congress to confront its own lack of self-discipline, its own lack of party discipline, its own lack of a principled course of action besides the ethic of ensuring its reelection.

Those are fairly strong statements. And I do not bring them up to disagree, necessarily, but to ask you if that view of the legislative process, and that view of the Congress, played any part, however minor, in your decision in *Chadha*.

Judge KENNEDY. I think the answer is no. That statement is rapidly rising to the top of the list of things I wish I hadn't put in my speech notes.

It was designed to trigger a discussion with the Stanford law faculty, which I am not sure we ever got to, about whether or not the Congress of the United States is in a position, under the Constitution, to make essential and important changes in its operations so that it can police and supervise the regulatory agencies that we said it could not in *Chadha*.

Certainly I did not in the speech or in the speech notes mean to indicate any disrespect for the Congress or the legislative process. It is really the heart of our democracy.

And I have said here repeatedly that in my view, it is the Congress of the United States that must take the lead in ensuring the fact and the reality that we have the basic conditions necessary for the enjoyment of the Constitution.

Senator SPECTER. Judge Kennedy, you have testified about your firm conviction on the propriety of *Marbury v. Madison* and of judicial review.

Judge KENNEDY. Yes.

Senator SPECTER. There was a comment in a speech you made before the Los Angeles Patent Lawyers Association back in February of 1982, which I would like to call to your attention and ask you about.

Quote: As I have pointed out, the Constitution, in some of its most critical aspects, is what the political branches of the government have made it, whether the judiciary approves or not.

By making that statement, you didn't intend to undercut, to any extent at all, your conviction that the Supreme Court of the United States has the final word on the interpretation of the Constitution?

Judge KENNEDY. That is my conviction. And I think that the Court has an important role to play in umpiring disputes between the political branches.

Senator SPECTER. What did you mean by that, that in most critical aspects, it is what the political branches of the government have made it, whether the judiciary approves or not?

Judge KENNEDY. I was thinking in two different areas. One in this area of separation of powers and the growth of the office of the presidency. The courts just have had nothing to do with that.

Second, and even more importantly, is the shape of federalism. It seems to me that the independence of the States, or their non-independence, as the case may be, is really largely now committed to the Congress of the United States, in the enactment of its grants-in-aid programs, and in the determination whether or not to impose conditions that the States must comply with in order to receive federal monies; that kind of thing.

Senator SPECTER. Well, this is a very important subject. And I want to refer you to a comment which was made by Attorney General Meese in a speech last year at Tulane, and ask for your reaction to it.

He said this: But as constitutional historian Charles Warren once noted, what is most important to remember is that, quote, however the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law, not the decisions of the Court.

By this, of course, Charles Warren did not mean that a constitutional decision by the Supreme Court lacks the character of law. Obviously it does have binding quality. It binds the parties in a case, and also the executive branch for whatever enforcement is necessary.

But such a decision does not establish a supreme law of the land that is binding on all persons and parts of government henceforth and evermore.

Do you agree with that?

Judge KENNEDY. Well, I am not sure—I am not sure I read that entire speech. But if we can just take it as a question, whether or not I agree that the decisions of the Supreme Court are or are not the law of the land. They are the law of the land, and they must be obeyed.

I am somewhat reluctant to say that in all circumstances each legislator is immediately bound by the full consequences of a Supreme Court decree.

Senator SPECTER. Why not?

Judge KENNEDY. Well, as I have indicated before, the Constitution doesn't work very well if there is not a high degree of voluntary compliance, and, in the school desegregation cases, I think, it was not permissible for any school board to refuse to implement *Brown v. Board of Education* immediately.

On the other hand, without specifying what the situations are, I can think of instances, or I can accept the proposition that a chief executive or a Congress might not accept as doctrine the law of the Supreme Court.

Senator SPECTER. Well, how can that be if the Supreme Court is to have the final word?

Judge KENNEDY. Well, suppose that the Supreme Court of the United States tomorrow morning in a sudden, unexpected development were to overrule in *New York Times v. Sullivan*. Newspapers no longer have protection under the libel laws. Could you, as a legislator, say I think that decision is constitutionally wrong and I

want to have legislation to change it? I think you could. And I think you should.

Senator SPECTER. Well, there could be legislation——

Judge KENNEDY. And I think you could make that judgment as a constitutional matter.

Senator SPECTER. Well, there could be legislation in the hypothetical you suggest which would give the newspapers immunity for certain categories of writings.

Judge KENNEDY. But I think you could stand up on the floor of the U.S. Senate and say I am introducing this legislation because in my view the Supreme Court of the United States is 180 degrees wrong under the Constitution. And I think you would be fulfilling your duty if you said that.

Senator SPECTER. Well, you can always say it, but the issue is whether or not I would comply with it.

Judge KENNEDY. Well, I am just indicating that it doesn't seem to me that just because the Supreme Court has said it legislators cannot attempt to affect its decision in legitimate ways.

Senator SPECTER. Well, but the critical aspect about the final word that the Supreme Court has is that there is a significant school of thought in this country that the Supreme Court does not have the final word. That the President has the authority to interpret the Constitution as the President chooses and the Congress has the authority to interpret the Constitution as the Congress chooses, and there is separate but equal and the Supreme Court does not have the final word.

And, if *Marbury v. Madison* is to have any substance, then it seems to me that we do have to recognize the Supreme Court as the final arbiter of the Constitution, just as rockbed.

Judge KENNEDY. Well, as I have indicated earlier in my testimony, I think it was a landmark in constitutional responsibility for the Presidents in the *Youngstown* case and the *Nixon* case to instantly comply with the Courts decisions. I think that was an exercise of the constitutional obligation on their part. I have no problem with that at all.

Senator SPECTER. Well, there has been compliance because it has been accepted that the Supreme Court is the final arbiter. I just want to be sure that you agree with that proposition.

Judge KENNEDY. Yes, but there just may be instances in which I think it is consistent with constitutional morality to challenge those views. And I am not saying to avoid those views or to refuse to obey a mandate.

Senator SPECTER. Well, I think it is fine to challenge them. You can challenge them by constitutional amendment, you can challenge by taking another case to the Supreme Court. But, as long as the Court has said what the Court concludes the Constitution means, then I think it is critical that there be an acceptance that that is the final word.

Judge KENNEDY. I would agree with that as a general proposition. I am not sure there are not exceptions.

Senator SPECTER. But you can't think of any at the moment?

Judge KENNEDY. Not at the moment.

Senator SPECTER. Okay. If you do think of any between now and the time we vote, would you let me know?

Judge KENNEDY. I will let you know, Senator.

Senator SPECTER. Let me pick up some specific issues on executive power and refer to a speech that you presented in Salzburg, Austria, back in November of 1980, where you talk about the extensive discretion saying, "The blunt fact is that American Presidents have in the past had a significant degree of discretion in defining their constitutional powers."

Then you refer to, "The President in the international sphere can commit us to a course of conduct that is all but irrevocable despite the authority of Congress to issue corrective instructions in appropriate cases." Then you refer to President Truman, saying he committed thousands of troops to Korea without a congressional declaration. And then you say, "My position has always been that as to some fundamental constitutional questions it is best not to insist on definitive answers."

And you say further, "I am not one who believes that all of the important constitutional declarations of most important constitutional evolutions come from pronouncements of the courts."

And, without asking you for a specific statement on the War Powers Act, that is a matter of enormous concern that engulfs us with frequency. Major questions arise under the authority of the Congress to require notice from the President on covert operations coming out of the Iran-contra hearings. What is the appropriate range of redress for the Congress? Do we cut off funding for military action in the Persian Gulf? Do we cut off funding for covert operations? Are these justiciable issues which we can expect the Supreme Court of the United States to decide?

Judge KENNEDY. Well, whether or not they are justiciable issues, of course, depends on the peculiar facts of the case, and I would not like to commit myself on that. But the very examples you gave indicate to me that there are within the political powers of the Congress, within its great arsenal of powers under article I of the Constitution, very strong remedies that it can take to bring a chief executive into compliance with its will, and this is the way the political system was designed to work.

The framers knew about fighting for turf. I don't think they knew that term, but they deliberately set up a system wherein each branch would compete somewhat with the other in an orderly constitutional fashion for control over key policy areas. And these are the kinds of things where the political branches of the government may have a judgment that is much better than that of the courts.

Senator SPECTER. But isn't it unrealistic, Judge Kennedy, to expect the Congress to respond by cutting off funds for U.S. forces in the Persian Gulf? If you accept the proposition that the President can act to involve us in war without a formal declaration, and the President and the Congress ought to decide those questions for themselves, isn't that pretty much an abdication of the Supreme Court's responsibility to be the arbiter and the interpreter of the Constitution?

Judge KENNEDY. Well, I don't know if it is an abdication of responsibility for a nominee not to say that under all circumstances he thinks the Court can decide that broad of an issue. If the issue is presented in a manageable judicial form, in a manageable form,

I have no objection to the Court being the umpire between the branches.

On the other hand, I point out that having to rely on the courts may infer, or may imply an institutional weakness on the part of the Congress that is ultimately debilitating. It seems to me that in some instances Congress is better off standing on its own feet and making its position known, and then its strength in the federal system will be greater than if it had relied on the assistance of the courts.

Senator SPECTER. Well, you testified earlier that you could say standing enhanced by legislative enactment.

Judge KENNEDY. Yes.

Senator SPECTER. And some of the legislation is now pending to give broader standing as was given in *Buckley v. Valeo*, so that you would—obviously, you have to reserve judgment, but you could see an appropriate role for a judicial decision on these tough constitutional questions, notwithstanding the generalizations that I just read to you?

Judge KENNEDY. I think so. Dean Choper, of the University of California at Berkeley, has a book in which he proposes the idea that the Court should always withdraw from any dispute between the branches. He would, I think, say *Youngstown* is wrong, that the *Nixon* tapes case is wrong, and I disagree with that. I think there is a role for the Court.

Senator SPECTER. Well, I think that is an important proposition, and I think it may well be before you, and I obviously don't ask for any commitments or any statements on it except to hear what one Senator has to say about it and what is the prevailing view in the Senate, that at some point we feel the War Powers Act has to be tested. That it has been a very important response to the fact of life that the United States is involved in wars without declarations, that the constitutional authority of the Congress has eroded there, the impracticality of cutting off funds once there is a military action. You note the commitment of troops in Korea. There has been many others.

And I was just a little concerned about your statements that the executive defines its own authority and your statements about the courts keeping hands off. And I am assured, as you have testified today, that there may be an appropriate role for the Supreme Court of the United States, depending on the specific factual presentation.

Judge KENNEDY. Yes. And, as I think we would both agree, much of what I was saying there was a recitation of simple facts. The Presidency has grown to have power of tremendous proportions.

Senator SPECTER. Judge Kennedy, I would like now to refer to a number of cases where I have certain concerns where you have reached conclusions as a matter of law which seem to me to undercut the fact-finding process. These are cases which you and I discussed when we talked informally in my office sometime ago.

The case of the *City of Pasadena School Board*, quite a controversial matter, was decided in an opinion which you wrote, or you wrote a concurring opinion after a district court judge had sought to retain jurisdiction. And the memorandum opinion of the district court judge sets forth an extensive sequence of factual findings ex-

pressing a concern about the conduct of the Board, election promises, which the district judge, the finder of fact, concluded required the district court to retain jurisdiction.

And, without going through them at great length, there boil down in footnote 19 where the district court judge found "a majority of the defendants [those on the school board] have acted with unyielding zeal and overt antipathy to the desegregative concept of the Pasadena Plan. Promising return to neighborhood schools with a recognition that it cannot be accomplished without resegregation of Pasadena schools is bad faith not only to the principles of constitutional duty but also to their own constituency."

One comment that you made in your opinion that I have a question about, one I read to you when we met privately about 10 or 12 days ago, where you said at 611 Fed. 2nd at 1247, "Where the Court retains jurisdiction a board may feel obliged to take racial factors into account in each of its decisions so that it can justify its actions to the supervising court. This may make it more, rather than less, difficult to determine whether race impermissibly influences board decisions. Where the subject is injected artificially into the decision process and the weight that racial considerations might otherwise have had is more difficult to determine."

And my question to you before, and I repeat now, what is wrong with that, especially in the context of the very strong findings of fact by the lower court judge of bad faith by the school board?

Judge KENNEDY. This case had a long history. It went to the Supreme Court on more than one occasion. It was in our court on I guess four different occasions. And this particular aspect of it presented one of the most troubling areas of desegregation laws, and that is when does a court's supervision cease?

In this case the City of Pasadena had, in compliance with a court decree, been implementing a plan that was certified ultimately by the Supreme Court to be a plan for a unitary district, which is the parlance for saying a district that complies in all respects with a desegregation decree.

The findings of the Supreme Court of the United States and of our court—and uncontradicted by the district court—were that the district had met full compliance for a period of more than 2 years. Now the question was how long does the district court's supervision last? This was a case in which the district court judge at one time, in response to that question from an attorney, had said that district court supervision will last as long as I live.

Now, at some point school districts must assume responsibilities for their own affairs. At some point the jurisdiction of the court must cease. At some point we must allow the school districts to again resume charge of their affairs. And, if there is a further violation of the Constitution of the United States, an action can then again be implemented.

We concluded that because there had been full compliance, because a unitary district had been achieved, the court was acting improperly in looking at election campaign promises and election rhetoric in order to justify its continued decrees.

What happened here was there were some schools—I forget if they called them magnet schools or neighborhood schools—that had been proposed in a district in which unitary compliance had



been achieved, and we simply ruled that the district had to again stand on its own feet, and that if there was a violation there could again be a suit.

It is a very difficult area of the law to determine how to withdraw. The very fact that the court is involved affects the equation.

Senator SPECTER. How much were you influenced by the judge's statement that he would keep jurisdiction as long as he would live? Did you consider having the judge replaced in the case, if that statement really amounted to a declaration of a bias or prejudice?

Judge KENNEDY. Well, it didn't amount to a declaration of bias and prejudice but it indicated the difficulties that the district court had in extricating itself from the decree of the court. And we felt that the school district having been in good faith full compliance for a period of years was entitled to a release of the jurisdiction of the court.

Senator SPECTER. Well, but that is the question. The question is whether the school board was in compliance. You note in your opinion, "The district court found that the board has acted and failed to act with the same segregative intent that this court found in 1970," and the memorandum opinion of the board is replete with facts and, of course, we know that the lower court is in a better position to find the facts, especially questions of intent. And it was a little hard for me to follow the conclusion as a matter of law that the lower court was wrong in the face of those very extensive factual findings.

Judge KENNEDY. Well, we looked at the findings and concluded otherwise I think, Senator. I agree with you that the fact-finding functions of a district court cannot be usurped by an appellate body. On the other hand, they have to fit the ultimate remedy the court gave, and in this event we thought that the Pasadena School District should be restored to its own status.

Senator SPECTER. Well, the other two cases that I want to talk to you about, and there are many more but I have limited it to three cases, are the *AFSCME v. State of Washington* case—

Judge KENNEDY. Yes.

Senator SPECTER [continuing]. And here again there were very strong factual findings by the lower court. The district court said at page 863 of 578 Fed. supp., "Evidence which when considered as a whole shows discriminatory intent includes the historical contacts out of which the challenge to failure to pay arose," and later in the district court's opinion the comment is made, "There is little doubt that the State produced evidence that the unlawful discrimination was other than in bad faith the *Manard* and *Norse* decisions would have persuaded this court that back pay would not have been in an appropriate remedy."

Then going on to say, "Rather the persistent and intransigent conduct of defendant in refusing to pay plaintiffs indicates bad faith."

This is a very complicated case and there is a great deal involved and you commented on it to some extent, and I don't cite it really to—well, I cite it on the substantive law, but really more particularly—and my time is up, and let me just finish it and then give you a chance to respond.

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.