

You gentlemen are the experts on what to do. I think we have to attack it at every level, in the law schools, with Inns of Court, with judges participating with the bar, and with an insistence that the highest standards of advocacy pertain in the federal courts.

It is a problem that persists. And it is a problem that should be addressed.

We had in the ninth circuit a committee study for 4 years on whether or not we should impose standards on the attorneys that practice in the federal courts of the ninth circuit. We finally came up with a proposal that they had to certify that they had read the rules. And it was turned down. So judges, as well as attorneys, must be more attentive to this problem.

Senator THURMOND. Judge, I want to thank you for your responses to the questions I have propounded, and I think they indicate that you are well qualified to be an Associate Justice of the Supreme Court.

Judge KENNEDY. Thank you, sir.

The CHAIRMAN. Judge, before I yield to Senator Kennedy, I want to set the record straight.

It has been called to my attention that I may have left the implication that on November the 12th you met with only one Senator, when in fact you met with about 10 Senators.

I was referring to a single conversation.

Judge KENNEDY. I was handed a note to that effect. And I did not understand your question that way. But it is true that I met with a number of your colleagues.

The CHAIRMAN. I didn't think it was that confusing, either. I am glad you didn't. But obviously, our staffs did. So now we have cleared up what wasn't confusing before.

And one last comment that I will make. I was at the White House with the President on one occasion with the Senator from South Carolina. And the President was urging me to move swiftly on a matter.

And he said to me, he said, Joe, when you get to be my age, you want things to hurry up. Senator Thurmond looked at him and said, Mr. President, when you get to be my age, you know it does not matter that much. [Laughter.]

I will yield to the Senator from——

Senator THURMOND. Mr. Chairman, I just want to say, experience brings wisdom. And as time goes by, I'm sure you will realize this is the case. [Laughter.]

The CHAIRMAN. I realize it now. That is why I follow you, boss. I yield to the Senator from Massachusetts.

Senator KENNEDY. Thank you very much.

Mr. Chairman, when I had the good opportunity, like other members of the committee, to meet with the nominee, I showed him in my office the seal of the name Kennedy in Gaelic.

And the name Kennedy in Gaelic means helmet. And I wondered whether the nominee was going to bring a helmet to these particular hearings. But I am not sure we are playing tackle. Maybe perhaps touch football.

But nonetheless, I do not know whether he is prepared to say whether he is really enjoying these hearings, like some mentioned earlier or not.

Judge KENNEDY. I will put on a helmet when you do, Senator. [Laughter.]

Senator KENNEDY. As I mentioned during the course of our exchange, we talked about the issues of civil rights and the progress that had been made in this country in the period of the last 25 years.

And I think it has been extraordinary progress. You have referred to it in a peripheral way in response to some of the earlier questions, but it has been progress which I think some of the American people have been proud of.

It has been progress which Republican and Democratic presidents have contributed to, and for which there's been strong bipartisan support in the House of Representatives and the Senate of the United States.

The role of the courts, both in interpreting and in enforcing this progress, has been important and virtually indispensable. That is certainly something that you have recognized in ensuring that we are going to get a fair interpretation of the laws, and that the laws are going to be vigorously enforced.

You made a number of speeches, but one of the ones that I find extremely eloquent was one you made in 1978, when you were talking about the independence of the federal judiciary.

And you said, and I quote:

It was not the political branches of the government that decided *Brown v. Board of Education*. It was not the political branches of the government that wrought the resolution of *Baker v. Carr*, the apportionment decision, or that decided the right of counsel case in *Gideon v. Wainwright*. It was the courts.

And I submit that if the courts were not independent, those decisions might not have been made, or if made, might not properly have been enforced.

Some of the opinions you have written, Judge, do not seem to reflect that same sensitivity, and I would like to review some of those cases with you at this time.

The first area is fair housing. I think as you probably know the discrimination in housing is one of the most flagrant forms of discrimination, because it perpetuates the isolation and the ignorance that are at the roots of prejudice.

In 1985, the Department of Housing and Urban Development reported there are 2 million incidents of race discrimination in housing each year. In fact, a black family looking for rental housing stands over a 70 percent chance of being a victim of discrimination.

Your opinion in the *Circle Realty* case in 1976 raises a question about how you interpret the anti-discrimination laws in housing.

And in that case, the citizens had claimed that their communities were segregated as a result of racial steering by real estate brokers, that is, blacks were steered to black neighborhoods and whites were steered to white neighborhoods.

You ruled that those citizens did not even have standing to raise their claim of discrimination under a key provision of the Act because they were only testers, and they were testing the brokers to see if they were actually steering clients in this discriminatory way.

You threw them out of court because they weren't actually trying to rent or to buy a house. In 1978, the Supreme Court ruled

7 to 2, in an opinion by Justice Powell, that your interpretation of the law was wrong, and that the testers did have a right to go to federal court to remedy this blatant form of racial discrimination in housing.

My question is this; How do you respond to the concern that your opinion reflects a narrow approach to the civil rights laws as the Supreme Court has interpreted those laws?

Judge KENNEDY. Well, Senator, at the outset, it is entirely proper, of course, for you to seek assurance that a nominee to the Supreme Court of the United States is sensitive to civil rights.

We simply do not have any real freedom if we have discrimination based on race, sex, religion or national origin, and I share that commitment.

Now, in the particular case, what occurred was, plaintiffs who themselves were not homebuyers went to real estate agents and were turned down allegedly because of their color, or were not turned down but were shown a black community if they were black or to a white community if they were white.

This is, of course, of critical concern because brokers are a small channel in the stream of housing sales. And if there is discrimination at that point, that is a good point to attack it.

Now in a sense, I think it is incorrect, Senator, to say that I threw them out of court. There were two provisions in the law.

One provision provided for immediate redress from a court of law. Another provision, which I believe was Section 810, required that the plaintiffs must go first to the agency responsible for enforcement of anti-discrimination in housing laws.

Because there were some unresolved questions as to standing at the time of this litigation, we thought that Congress, in its scheme, had made a distinction based on the degree of injury that the particular plaintiff had shown.

We found no other way to explain the difference in the two sections. And we indicated in the opinion that administrative remedies may be superior in some cases to judicial remedies.

The lesson of the Voting Rights Act cases, and the Voting Rights Act statutes, is that courts can be very inefficient. One of the great lessons for courts taught by the Voting Rights Act statutes is that there are remedies other than courts if civil rights are being deprived.

We thought this was a creative, important, helpful statement of what Congress had in mind. The Supreme Court said we were wrong, and I certainly have no quarrel with the decision. I was puzzled by the statute. And so far as the Supreme Court's decision is concerned, I would willingly and fully enforce it.

Senator KENNEDY. I do not think you will get any argument, at least from Senator Specter and myself, with regards to using administrative remedies.

We have legislation that is cosponsored now by some 38 Senators to try to strengthen these administrative remedies. You point out that there are two possible remedies in this particular legislation, one that involved running through an administrative procedure and then being able to go to the courts; and another in which one could go directly to the courts.

My question is: how do you respond to the concern as to whether you were using a rather narrow, cramped, interpretation of that legislation, in an area where there is a good deal of discrimination in our society? And what kind of assurance can you give to people that are concerned about this, that you have a real sensitivity to the type of problem that at least the existing legislation was focused on?

Judge KENNEDY. Yes. You are entitled to that assurance. And I have the greatest respect for the lead that the Congress has taken in this area.

We had thought that this was really the appropriate way to explain why the two sections were different. In that respect, we thought we were being faithful to the drafting of the statute and the structure of the statute.

It is true, of course, that these laws must be generously enforced, or people are going to get hurt.

Senator KENNEDY. The reason I raise this, Judge, is because both the Supreme Court had reached a different decision than you had, and the four other cases that finally were decided by other courts had also reached a different decision than you had.

And to get your assurances about this issue, I think, is important.

Let me go to another area, and that dealt with the *Mountain View-Los Altos Union High School* case. As the Judge knows, we indicated to you prior to today that we were going to explore various decisions with you, and named the particular cases.

In recent years, Congress and the States have taken steps to protect the civil rights of handicapped persons. And we have much more to do to ensure that the disabled are not isolated, and can participate to the full extent possible in our society.

In our efforts to reach that goal, Congress enacted the Education for All Handicapped Children Act in 1975. The Act gives handicapped children the right to education, either in public schools if possible, or in private schools if necessary; and federal funds are made available to defray the cost.

Now, in the *Mountain View-Los Altos Union High School* case in 1983, you read the statute narrowly and held that parents who transferred their handicapped child to a private school, while an administrative proceeding was pending, were not entitled to reimbursement for tuition expenses.

And once again, the Supreme Court took a different view; and in a unanimous opinion by Justice Rehnquist, the Court read the statute broadly, holding that the parents were entitled to reimbursement. Justice Rehnquist recognized that Congress did not intend to put parents to the choice of losing their rights under the Act or doing what they think is best for the educational needs of their child.

So my question here again is, what can you tell the members of the committee to give us confidence that you will not take a crabbed and narrow view in construing these extremely vitally important and significant statutes?

Judge KENNEDY. This was a vitally important case. I reviewed it only last night, and didn't have the record in front of me. But I recall the case.

It was unfortunately an all too typical case in which a young man had emotional problems. He found it very difficult to adjust to school.

And his mother was distraught, not only over how her child was developing, but over the battle she had to have with the administrative agency to get him special care.

The question was whether or not, if the school disagreed with the mother initially and said, no, we will not pay for the special care, whether the school, after the administrative agency had ruled in favor of the mother, had to pay for the cost of the special instruction in the interim.

We thought that the normal administrative remedies rule and exhaustion rule were written into the statute. There was a so-called stay-put provision in the statute, which we thought required the parent to leave the child in the hands of the school authorities if the school authorities did not agree with the parent; and in many cases, school authorities agree with the parent. In many cases, there is an agreement, and they immediately send the child.

The fourth, the seventh and the eighth circuits agreed with us. The first did not and the Supreme Court unanimously did not.

I have seen the necessity for spending more money in the schools on education across the board. And we were being asked in this case to say that a local school district, an entity of the State, was required to pay this sum.

We thought a question of federalism was involved, in that school districts are strapped for every penny.

It is true that the Congress of the United States had a policy in favor of supporting education for these disturbed children, and of course that should be given full and vigorous enforcement.

I have absolutely no problem with the Supreme Court's decision. It said that exhaustion of administrative remedies was not necessary.

The Court also made another very important statement. We had said that these are damages against the State. And the Supreme Court of the United States said, well, these are not damages. These are simply payments that the State had to make all along, and the State is really not injured. I fully accept and endorse the reasoning in that case, Senator.

Senator KENNEDY. It was really the reimbursement of the tuition, was it not?

Judge KENNEDY. Well, of the cost of the special school, yes, sir.

Senator KENNEDY. But again, the question is: Congress developed that legislation to try and deal with the need for the handicapped and disabled children to get an education; the question is whether you are going to interpret this Act in what I would have considered as both the spirit and the letter of the law—a sense of generosity, or whether it would be in a more reshaped way.

And that is really what we are trying—

Judge KENNEDY. I do not think those statutes should be interpreted grudgingly. There is a certain amount of finger pointing that goes on here where the courts say the Congress did not write the statute clearly enough, and more or less saddles Congress with the duty of cleaning up the language. I have come to recognize that

the workload of the Congress is such that we have to interpret the statutes as they are given to us.

Senator KENNEDY. Well, I think as you know from the process, as a result of being a political institution we somehow lack the kind of precision that a court might want.

Again, it seems that this particular issue, given the fact where the Supreme Court came out on this with a unanimous decision, it was appropriate to raise and have your comments today.

Let me move to another area, Judge Kennedy. And this is with regards to the memberships in various clubs. You are familiar with this issue.

As you know, in 1984, the American Bar Association amended the commentary to its Code of Judicial Conduct to provide, and I quote: "It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin."

It would seem from your questionnaire that you belonged to three clubs that discriminated against women, and that one or more of these clubs may have discriminated against racial minorities as well.

As I understand it, the Olympic Club is a country club in San Francisco which also has a downtown athletic facility with meeting rooms, dining, and residential facilities. And it has about 4,000 members.

And when you joined the Olympic Club in 1962, its membership was expressly limited to white males. And apparently, that explicit restriction on racial minorities was lifted in 1968.

Today there are still, as I understand, no active black members of the club, and women can still not be full members of the club.

You were a member of the Olympic Club for many years before you became a federal judge. You continued to be a member of the club for 12 years after you became a federal judge, even though it discriminated against blacks and women.

Now in June of 1987, the San Francisco City Attorney warned the Olympic Club that its discriminatory practices violated the California civil rights laws. So the issue was becoming a public controversy.

At this time you first expressed concern about the club's restrictive membership policy. And in August you wrote to the Olympic Club to express those concerns, and you resigned from the Olympic Club in late October, when you were under consideration for nomination to the Supreme Court, and after the membership of the Olympic Club had voted against the board of directors' proposal to amend the bylaws of the club to encourage the sponsorship of qualified women and minority candidates.

So Judge Kennedy you apparently didn't try to change the discriminatory policies of the Olympic Club until this summer, and you didn't resign until your name had evidently surfaced on the short list of potential nominees.

My question is a simple one. Why did it take so long?

Judge KENNEDY. Discrimination comes from several sources. Sometimes it is active hostility. And sometimes it is just insensitivity and indifference.

Over the years, I have tried to become more sensitive to the existence of subtle barriers to the advancement of women and of minorities in society. This was an issue on which I was continuing to educate myself.

I want to see a society in which young women who are professionals have the same opportunity as I did to join a club where they meet other professionals. I would like that opportunity for my daughter if she were a practicing lawyer or in the business world.

With reference to the Olympic Club, in part it has the atmosphere of a YMCA with its downtown facilities reserved for me. I used it and enjoyed it and found it helpful.

In the late spring of 1987, this year, the U.S. Open was sponsored at the Olympic Club. At that time publicity surfaced that it did not have some racial minorities as members.

That was not a policy of the club, as I understood it, but it was pretty clear that the mix was not there if you looked at the membership rolls. The club expressly excluded women.

There was an article in the New Yorker magazine which really triggered my action. A very fine sports writer wrote about the Open and talked about the egalitarian history of the club.

I wrote a letter to the club, which the committee has, in which I indicated that it was time to make the egalitarian spirit a reality.

I had discussions with the legal counsel for the club. I knew no directors of the club or officers. I indicated that in my view it was high time that the Olympic Club changed.

They did have a membership meeting, as you've indicated, in part as a result of my discussions, but in part as a result of the action of the city attorney, and concerns expressed by other members.

I actually had heard that the bylaw that you referred to had passed. The board of directors were optimistic that it would, and somebody actually reported back to me that it had passed. I was not a voting member and cannot vote and was not at the meeting.

When I heard that the bylaw had been turned down, principally the objection was women in the athletic facility, not racial minorities.

I thought that my position had become quite untenable. I therefore resigned before I talked to the members of the Administration, thinking that it was not fair either to the Administration or the Members of this distinguished body to make that an issue.

Senator KENNEDY. This is also a club where professionals gather, and have some business associations or meetings or entertainment?

Judge KENNEDY. No question about it. It is downtown. It is a luncheon club.

Senator KENNEDY. I think you probably answered the point that I am getting at, but let me just back up and see if you have responded to it.

In the questionnaire, when you were asked about your definition of invidious discrimination, you wrote, I quote:

Invidious discrimination suggests that the exclusion of a particular individual on the basis of their sex, race, or religion or nationality is intended to impose a stigma upon such persons. As far as I am aware, none of those policies or practices were a result of ill will.

In talking about the Olympic Club, I gathered from the answer you just gave previously, when you were talking about this issue, you talked about insensitivity and indifference with regards to creating a stigma on professional people, women, minorities, and used the illustration of your daughter.

Judge KENNEDY. That is the distinction I drew.

Senator KENNEDY. I just want to make sure we have the whole response and answer here, so I have it correctly.

Judge KENNEDY. Thank you for giving me that opportunity. In my view, none of these clubs practiced invidious discrimination. That term is not a precise and crystal clear term. But as I understood it and as I have defined it in the questionnaire, none of the clubs did practice that, or had that as a policy.

Senator KENNEDY. But in terms of stigmatizing various groups, since this is a prestigious club, in what I gather was the general commercial life of the city, the fact that either women or minorities cannot belong to it, does that not serve to stigmatize those individuals?

Judge KENNEDY. There is no question that the injury and the hurt and the personal hurt can be there, regardless of the motive.

Senator KENNEDY. You resigned from the Sutter Club, as I understand.

Judge KENNEDY. Yes, sir.

Senator KENNEDY. Could you tell us the reasons—and that was in 1980, is that correct?

Judge KENNEDY. Yes. The Sutter Club is in downtown Sacramento. It is a club that is primarily used at luncheon by professional and business people.

I was always seen there as a judge when I went there. And I had concerns with their restrictive policies against women.

Again, some of the great leaders in Sacramento city life, some of my very best friends, people who have no animosity, people who have sensitivity and goodwill, are members of those clubs. I in no way wish to criticize them, because many feel as I do that the policy should be changed.

I, however, felt that my membership there was one where I was there only as a judge, and that it was inappropriate for me to belong. And I resigned in 1980 before the canons of ethics on the subject were promulgated.

Senator KENNEDY. And you resigned from there, as I understand, because of both its restrictive kinds of policies and because you were, as I understand it, a judge, and you didn't want to appear to have an inappropriate appearance, since it was more restrictive in terms of women and minorities.

Judge KENNEDY. Yes. Everybody knew me there as a judge, and would come up and greet me and so forth. And I felt uncomfortable in that position.

Senator KENNEDY. Well, if you felt uncomfortable with regard to the Sutter Club in 1980, why didn't you—and since you were meeting on the Circuit Court in San Francisco, and you had another club there that had similar kinds of problems, why didn't you feel uncomfortable with that club?

Judge KENNEDY. Probably because nobody knew me, and I basically used the athletic facility.



Senator KENNEDY. But it really isn't a question just of being known, is it? It's a question about what you basically represent or your own beliefs on this.

Judge KENNEDY. Yes, although I think sometimes continued membership can be helpful. In California the rule is that judges should remain in those clubs and attempt to change their policies and resign only when it becomes clear that those attempts are unavailing.

Senator KENNEDY. Don't you think the club's rules did actually then stigmatize women and minorities?

Judge KENNEDY. Well, they were not intended to do so. I think women felt real hurt, and there was just cause for them to want access to these professional contacts.

It is most unfortunate, and almost Dickensian, for a group of lawyers to meet at 11:30 and to settle a case and to celebrate and say, well, let's all go to the club. And suddenly there is a silence, and they cannot go because there is a woman there. That is stigmatizing. That is inappropriate.

Senator KENNEDY. Mr. Chairman, I understand my time is up. In my next questioning, I would like to come into the area of the voting rights issue.

I think I have indicated to you that I had hoped to be able to get to that at another time.

Judge KENNEDY. Yes, sir.

The CHAIRMAN. Thank you, Senator. Senator Hatch.

Senator HATCH. Again, I welcome you, Judge, before the committee. Let's revisit for a few minutes the question of club membership. Just a few questions do linger from that.

First, as I understand it, you joined the Olympic Club back in 1962; is that correct?

Judge KENNEDY. That is correct, sir.

Senator HATCH. You have described the club a little bit, but could you describe it a little further with regard to some of its public service and charitable activities that it supported?

Judge KENNEDY. Well, it has been a club that is principally prominent in athletics. And it has promoted athletics for young people in the community for over 100 years.

It is recognized as a club with a strong sense of civic obligation. It has athletic meets and so forth at its facilities.

Senator HATCH. As I understand it, the club came into being about 2 years before the Civil Rights Act of 1964.

Judge KENNEDY. The Olympic Club was founded in the 19th century and I joined in 1962.

Senator HATCH. And in 1962, I think it's fair to say, a lot of clubs did have the same policies as this club, and that was one of the reasons why Congress enacted the 1964 act to begin with.

So it took only a few years for individuals to understand this.

As I understand it, you mentioned that the Olympic Club was the site of the U.S. Open, and this was a great honor, as I understand it, for that particular club at that time.

Judge KENNEDY. Yes, sir.

Senator HATCH. What preparations did the club make for this national event?