

Finally, my wife Mary, who has the love and admiration of our family and also of her 30 students in the Golden Empire School in Sacramento. They most appreciate your invitation to be with us here today, Mr. Chairman.

Thank you very much.

The CHAIRMAN. We welcome you all here. I surely do not envy your tuition bill. [Laughter.]

Judge KENNEDY. I am glad that is part of the record, Mr. Chairman.

The CHAIRMAN. It is a sacrifice you are making, and I mean that sincerely.

Please move forward, Judge, if you would like.

Judge KENNEDY. That concludes my opening remarks, Mr. Chairman. I am ready to receive questions from you and your committee members.

The CHAIRMAN. Judge, let me explain to you, and to my colleagues, how the ranking member and I would like to proceed today. That is, as has been the custom in the recent past, we will allow each Senator to question you up to a half an hour, hopefully to have some continuity to the questions, and allow both you full time to answer the questions and they to flesh out the line of questioning they wish to pursue.

It is my hope, although not my expectation, that we will complete one round of questioning today. We will stop, though, at 6 o'clock, or as close to 6 o'clock as we can get. And at approximately 3:15, we will take a break for 15 minutes or so to give you an opportunity to stretch your legs and maybe get a cup of coffee or whatever you would like.

Judge, I will begin my first round here by telling you at the outset that I would like to pursue or touch on three areas in my first round. One is the question of unenumerated rights, and if there are such, if they exist under our Constitution. Secondly, as a matter, quite frankly, more of housekeeping and for the record, with you under oath, I would like to question you about your meetings with Justice Department, White House and other officials, and whether or not any commitments were elicited or made. I quite frankly must tell you at the outset I have had long discussions and full cooperation from the White House in this matter, and I am satisfied; but I think we should have it under oath what transpired and what did not.

Thirdly, if time permits—which it probably will not—I would like to discuss with you a little bit about your views on the role of precedent as a Supreme Court Justice. Oftentimes, it is mentioned here that we unanimously voted for you when you came up as a circuit court appointee, and that is an honor. You are to be congratulated. But as you well know, we unanimously vote for almost everybody who comes up. Ninety-eight percent of all those that come before the Congress are unanimously approved of. That is in no way to denigrate the support shown to you by us in your previous appearance here, but it is to indicate that, as you know better than most of us, the role of a lower court judge and the role of a Supreme Court judge are different. They are both to seek out and find justice under the Constitution, but lower court judges are bound by precedent. They do not have the authority, the constitu-

tional authority to alter Supreme Court decisions. But as a Supreme Court Justice, you obviously will have that authority, and I would like at some point to discuss to what extent you think that authority resides in a member of the court.

Judge Kennedy, let me begin, though, with the unenumerated rights question, which occupied a great deal of our time in the prior hearing—not your prior hearing, but the prior hearing with Judge Bork.

Judge Kennedy, in your 1986 speech on unenumerated rights which, if I am not mistaken—I have a copy of it here—was entitled “Unenumerated Rights and the Dictates of Judicial Restraint,” in that speech you place great emphasis on the specific text of the Constitution as a guidepost for the court. You said, for example—and I quote from the concluding page of that speech—

I recognize, too, that saying the constitutional text must be our principal reference is in a sense simply to restate the question what that text means. But uncertainty over precise standards of interpretation does not justify failing to attempt to construct them, and still less does it justify flagrant departures.

What we find out today, or at least I do, is how you go about attempting to construct such standards of interpretation. As I read your speech you were concerned that unenumerated rights articulated by the Supreme Court, such as the right of privacy, but not exclusively limited to that, in your words “have a readily discernible basis in the Constitution.” But you also recognize, Judge Kennedy, that the text of the Constitution is not always, to use your phrase, I believe, “a definitive guide.”

On two separate occasions, in August of 1987 and February of 1984, you have described the Due Process Clause, which, of course, contains the word “liberty,” the 14th amendment. You described that as a spacious phrase. That seems to—well, let me not suggest what it suggests.

The point I want to raise with you is there seems to be an underlying tension here; that you talk about liberty as being a spacious phrase, and you insist at the same time that the constitutional text must be our principal reference.

Although I have my own view of what you mean by that—and they are not incompatible, those two phrases, as I see it—I would like you to give us your view of the liberty clause. Do you believe that the textual reference to liberty in the 5th and 14th amendments and in the Preamble of the Constitution provides a basis for certain fundamental unenumerated rights?

Judge KENNEDY. Senator, of course, the great tension, the great debate, the great duality in constitutional law—and this has been true since the court first undertook to interpret the Constitution 200 years ago—has been between what the text says and what the dictates of the particular case require from the standpoint of justice and from the standpoint of our constitutional tradition. The point of my remarks—and we can talk about the Canadian speech in detail, if you choose—was that it is really the great role of the judge to try to discover those standards that implement the intention of the framers.

The framers were very careful about the words they used. They were excellent draftsmen. They had drawn 11 constitutions for the separate states. This, they recognized, was a unique undertaking.

But the words of the Constitution must be the beginning of our inquiry.

Now, how far can you continue that inquiry away from the words of the text? Your question is whether or not there are unenumerated rights. To begin with, most of the inquiries that the Supreme Court has conducted in cases of this type have centered around the word "liberty." Now, the framers used that, what I call "spacious phrase," both in the fifth amendment, almost contemporaneous with the Constitution, and again in the 14th amendment they reiterated it.

The framers had an idea which is central to Western thought.

The CHAIRMAN. Western thought?

Judge KENNEDY. Thought. It is central to our American tradition. It is central to the idea of the rule of law. That is there is a zone of liberty, a zone of protection, a line that is drawn where the individual can tell the Government: Beyond this line you may not go.

Now, the great question in constitutional law is: One, where is that line drawn? And, two, what are the principles that you refer to in drawing that line?

The CHAIRMAN. But there is a line.

Judge KENNEDY. There is a line. It is wavering; it is amorphous; it is uncertain. But this is the judicial function.

The CHAIRMAN. It is not unlike, as I understand what you have said, one of your predecessors—if you are confirmed—discussing shared traditions and historic values of our people in making that judgment, and another of your predecessors suggesting that there is a right to be let alone, left alone.

Let me ask you, Judge Kennedy, Justice Harlan, one of the great true conservative Justices, in my view, of this century, had a similar concern; and as I understand it—correct me if I am wrong—expressed it not dissimilarly to what you are saying when he said no formula could serve as a substitute in this area for judgment and restraint, and that there were not any "mechanical yardsticks" or "mechanical answers."

Do you agree with the essence of what Justice Harlan was saying?

Judge KENNEDY. It is hard to disagree with that. That was the second Mr. Justice Harlan. Remember, though, Senator, that the object of our inquiry is to use history, the case law, and our understanding of the American constitutional tradition in order to determine the intention of the document broadly expressed.

One of the reasons why, in my view, the decisions of the Supreme Court of the United States have such great acceptance by the American people is because of the perception by the people that the Court is being faithful to a compact that was made 200 years ago. The framers sat down in a room for three months. They put aside politics; they put aside religion; they put aside personal differences. And they acted as statesmen to draw a magnificent document. The object of our inquiry is to see what that document means.

The CHAIRMAN. Judge, it will come as no surprise to you that one of the storm centers of our last debate and discussion was

whether or not there were unenumerated rights and whether the document was expansive.

Would you agree with Justice Harlan that, despite difficult questions in this area, the Court still has a clear responsibility to act to protect unenumerated rights, although where it draws that line depends on the particular Justice's view?

Judge KENNEDY. Yes, although I am not sure that he spoke in exactly those terms.

The CHAIRMAN. No, I am not quoting him.

Judge KENNEDY. I am not trying to quibble, but it may well be the better view, rather than talk in terms of unenumerated rights to recognize that we are simply talking about whether or not liberty extends to situations not previously addressed by the courts, to protections not previously announced by the courts.

The CHAIRMAN. Let us be more fundamental than that. There are certain rights that the courts over the years have concluded that Americans have either retained for themselves or have been granted that do not find specific reference in the Constitution—the right of privacy being one, as you pointed out in your speech, the right to travel.

So what we are talking about here, what I am attempting to talk about here and you are responding, is that whether or not in the case of the 14th amendment the word “liberty” encompasses a right that maybe heretofore has not been articulated by the court and does not find residence in some text in the Constitution, and whether or not the ninth amendment means anything.

Could you tell me what the ninth amendment means to you? And for the record, let me read it. I know you know it well. “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”

Can you tell me what you think the framers meant by that?

Judge KENNEDY. I wish I had a complete answer. The ninth amendment has been a fascination to judges and to students of the Constitution for generations.

When Madison—and he was the principal draftsman of the Bill of Rights—wrote the Bill of Rights, he wanted to be very sure that his colleagues, the voters, and the world understood that he did not have the capacity to foresee every verbal formulation that was necessary for the protection of the individual. He was writing and presenting a proposal at a time when State constitutions were still being drafted, and he knew that some State constitutions, for instance the Virginia Bill of Rights went somewhat further than the Constitution of the United States.

In my view, one of his principal purposes, simply as a statesman, was to give assurance that this was not a proclamation of every right that should be among the rights of a free people.

Now, going beyond that, I think the sense of your question is: Does the ninth amendment have practical significance—

Senator THURMOND. Please keep your voice up so we can hear you.

Judge KENNEDY. Does the ninth amendment have practical significance in the ongoing determination of constitutional cases?

As you know, the Court has rarely found occasion to refer to it. 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.

The CHAIRMAN. Judge, I do not want to hurt your prospects any, but I happen to agree with you, and I find comfort in your acknowledgement that it had a purpose.

There are some who argue it has no purpose. Some suggest it was a water blot in the Constitution. But I read it as you do. It does not make either of us right, but it indicates that there is some agreement, and I think the historical text, and the debate surrounding the Constitution sustains the broad interpretation you have just applied.

And is it fair to say that in the debate about unenumerated rights, and the right of privacy in particular, that there is a question of crossing the line, acknowledging the existence of unenumerated rights, and the existence of the right of privacy? The real debate for the last 40 years has been on this side of the line, among those who sit on the bench and the Supreme Court, who acknowledge that there is, in fact, for example, a right to privacy, but argue vehemently as to how far that right extends.

Some believe that extends only to a right of privacy to married couples. Others would argue, and will argue, I assume at some point, that that right of privacy extends to consensual homosexual activity. But the debate has been on this side of the line, that is, as to how far the right extends, not if the right exists.

Do you have any doubt that there is a right of privacy? I am not asking you where you draw the line, but that it does exist and can be found, protected within the Constitution?

Judge KENNEDY. It seems to me that most Americans, most lawyers, most judges, believe that liberty includes protection of a value that we call privacy. Now, as we well know, that is hardly a self-defining term, and perhaps we will have more discussions about that.

The CHAIRMAN. Well, I would like to go back to that, if my colleagues have not covered it. I only have about 10 minutes under my own rules, and I would like to settle, if we can at the outset here, the question of whether or not any commitments were given, or were asked for.

In your questionnaire, you identified at least seven different sets of meetings, and a number of phone calls that you had with White House staff, or Justice Department personnel before you were actually nominated by the President.

Let me ask you this first. Since completing your questionnaire, have you recalled any other meetings, or conversations of any type, that have not already been identified, and that took place before your actual nomination?

Judge KENNEDY. No, I have not recalled any such additional instances.

The CHAIRMAN. To be absolutely clear, I am asking you here about direct communications of any type with the White House or Justice Department, as well as indirect communications such as through some third party or intermediary. That is, someone coming to you, asking your view, and that view being transmitted

through that person back to anyone connected with the Administration.

Judge KENNEDY. I understood that question in the sense that you describe when I answered the questionnaire, and I understand it that way now. The conversations that I described were the only conversations that occurred.

The CHAIRMAN. Judge, I appreciate your cooperating in this matter, but I hope you understand why it is important.

Let's look at, if you will, the October 28th meeting that you identified. According to your questionnaire, that meeting was attended by Howard Baker, Kenneth Duberstein, A. B. Culvahouse, Mr. Meese, and Assistant Attorney General William Bradford Reynolds.

Were you asked at that meeting how you would rule on any legal issue?

Judge KENNEDY. I was not; I was asked no question which came even close to the zone of what I would consider infringing on judicial independence. I was asked no question which even came close to the zone of what I would consider improper. I was asked no question which came even close to the zone of eliciting a volunteered comment from me as to how I would rule on any particular case, or on any pending issue.

The CHAIRMAN. Judge, were you asked about your personal opinion on any controversial issue?

Judge KENNEDY. I was not.

The CHAIRMAN. Did anyone ask you what, as a personal matter, you thought of any issue or case?

Judge KENNEDY. No such questions were asked, and I volunteered no such comments.

The CHAIRMAN. And were you asked anything about cases currently before the Court?

Judge KENNEDY. No, sir.

The CHAIRMAN. I realize there is some redundancy in those questions, but is important, again, for the record.

Now, Judge, there was—if I can move to the end here—there was some newspaper comment about a meeting that took place after you had been nominated.

Let me ask you the question. Did you meet with any sitting United States Senators prior to your being nominated by the President?

Judge KENNEDY. No.

The CHAIRMAN. Now let me turn to that period, now, after the nomination.

Judge KENNEDY. Now let's be precise, however. I think the nomination was sent to the Senate some weeks after it was announced.

The CHAIRMAN. I beg your pardon. From the time the President had announced his intention—

Judge KENNEDY. At the time I had already met with you and a number of Senators, but if the demarcation in your question is as to the time the President made the announcement in the White House—

The CHAIRMAN. That is what I mean.

Judge KENNEDY. The answer is no, I had not met with any United States Senators prior to that time.

The CHAIRMAN. Now I would like to speak with you about the same issues, subsequent to the President standing with you and announcing to all of the world that you were going to be his nominee.

Have you made any commitments or promises to anyone in order to obtain their support for your nomination?

Judge KENNEDY. I have not done so, and I would consider it highly improper to do so.

The CHAIRMAN. So just to make the record clear, you made no promise to any Member of the Senate on anything?

Judge KENNEDY. Other than that I would be frank and candid in my answers.

The CHAIRMAN. Judge, I am not doubting you for a minute. As I am sure you are aware, though, one of my colleagues is reported to have spoken with you about the issue of abortion on November the 12th at a meeting at the White House.

Let me read to you—and I am sure you have seen the text—from a newspaper article by a columnist named Cal Thomas. And Mr. Thomas says the following happened. I am quoting from his article.

Republican Senator Jesse Helms of North Carolina told me that he and Judge Kennedy met in a private room at the White House on November the 12th.

Then a quote within a quote.

"I think you know where I stand on abortion," Mr. Helms said to Judge Kennedy.

Judge Kennedy smiled and answered, "Indeed I do, and I admire it. I am a practicing Catholic."

The article then goes on to say:

Judge Kennedy did not elaborate, but Mr. Helms interpreted the response to mean that Judge Kennedy is opposed to abortion and would look favorably on any case in which the Court's earlier decisions striking down the abortion laws of all 50 States might be overturned.

A bit later in the column, Mr. Thomas continued:

"I am certain as I can be," said Mr. Helms, "without having heard him say I shall vote to reverse *Roe v. Wade*—which of course he wasn't going to say—on what he called this 'privacy garbage'—recent Supreme Court decisions involving not only abortion but civil rights, protections for homosexuals—Mr. Helms indicated a certain collegiality with what he believes to be Judge Kennedy's views."

Ultimately though, said, Mr. Helms, quote, "Who knows?" but, quote, "That's where we are with any of the nominees." End of quote. End of column.

Could you, for the record, characterize for us how accurate or inaccurate you think that column is.

Judge KENNEDY. I have not seen that column, but I have absorbed it from what you have said, Senator.

To begin with, I think it is important to say that if I had an undisclosed intention, or a fixed view on a particular case, an absolutely concluded position on a particular case or a particular issue, perhaps I might be obligated to disclose that to you.

I do not have any such views with reference to privacy, or abortion, or the other subjects there mentioned, and therefore, I was not attempting, and would not attempt to try to signal, by inference, or by indirection, my views on those subjects.

The conversation that you referred to was wide-ranging, and of a personal nature. The Senator asked me about my family and my

character, and I told him, as I have told others of you, that I admire anyone with strong moral beliefs.

Now it would be highly improper for a judge to allow his, or her, own personal or religious views to enter into a decision respecting a constitutional matter. There are many books that I will not read, that I do not let, or these days do not recommend, my children read. That does not prohibit me from enforcing the first amendment because those books are protected by the first amendment.

A man's, or a woman's, relation to his, or her, God, and the fact that he, or she, may think they are held accountable to a higher power, may be important evidence of a person's character and temperament. It is irrelevant to his, or her, judicial authority. When we decide cases we put such matters aside, and as—I think it was—Daniel Webster said, "Submit to the judgment of the nation as a whole."

The CHAIRMAN. So Judge, when you said—if it is correct—to Senator Helms: "Indeed I do, and I admire it, I am a practicing Catholic," you were not taking, at that point a position on the constitutional question that has been and continues to be before the Court?

Judge KENNEDY. To begin with, that was not the statement.

The CHAIRMAN. Will you tell us what—

Judge KENNEDY. We had a wide-ranging discussion and those two matters were not linked.

The CHAIRMAN. Those two matters were not linked. So the article is incorrect?

Judge KENNEDY. In my view, yes.

The CHAIRMAN. That is fine. I thank you. My time is up. I yield to my colleague from South Carolina.

Senator THURMOND. Thank you, Mr. Chairman.

Judge Kennedy, a fundamental principle of American judicial review is respect for precedent, for the doctrine of stare decisis. This doctrine promoted certainty in the administration of the law, yet at least over 180 times in its history, the Supreme Court has overruled one or more of its precedents, and more than half of these overruling opinions have been issued in the last 37 years.

Judge Kennedy, would you tell the committee what factors you believe attribute to this increase in overruling previous opinions.

Judge KENNEDY. That is a far-ranging question, Senator, which would be an excellent law review article, but let me suggest a few factors.

First, there is a statistical way to fend off your question, by pointing out that the Supreme Court hears many more cases now than it formerly did. You will recall, in the early days of the Republic, when some cases were argued for days.

The CHAIRMAN. He may be the only one able to recall the early days of the Republic, here, on the committee. [Laughter.]

Judge KENNEDY. I was using "you" in the institutional sense, Senator. And that has changed.

Secondly, the Court has taken many more public-law cases on its docket.

And thirdly, there are simply many, many more precedents for the Court to deal with, and so the adjustment, the policing, the shaping of the contours of our law simply require more over ruling, as a statistical matter.