

In this case, you didn't have the same set of circumstance. And one last thing, this was a three judge decision, right?

Judge KENNEDY. Yes.

Senator HATCH. How was it decided?

Judge KENNEDY. It was unanimous.

Senator HATCH. Okay. That is all.

Senator METZENBAUM. And you wrote the opinion?

Judge KENNEDY. Yes, sir.

Senator METZENBAUM. And I am not going to get into a debate with my colleague on it, because I want to go further.

I want to ask you about a labor law case called *Kaiser Engineers*. As you know, that case involved the question whether employees who petition their Congresspersons on a matter of public policy that affects their job security are engaging in protected activity under the National Labor Relations Act.

The ninth circuit held that it was unlawful to discharge employees who wrote to their Congressman regarding a proposed change in immigration policy that they felt threatened their jobs.

You wrote a dissent from the ninth circuit majority opinion. Two years later, the Supreme Court in the *Estek* case squarely rejected your position.

Justice Powell, writing for seven members of the court, concluded that employees are protected when they seek to improve terms or conditions of employment through channels outside the immediate employer-employee relationship.

The court specifically mentioned appeals to legislators, and cited the *Kaiser* majority decision with approval.

In light of the Supreme Court's decision in *Estek*, have you re-evaluated your position? And do you feel that perhaps the conclusion you reached in the *Kaiser* was wrong?

Judge KENNEDY. I am fully satisfied with the decision of the Supreme Court. I should note that in *Kaiser* the implication of the employees was that the employer was supporting their policy position. And the employer's decision to discharge was based on a theory that the engineers had misrepresented the employer's position.

But as for the rule that the Supreme Court has announced, I have absolutely no trouble with. And I think it is a good rule.

Senator METZENBAUM. I must tell you, Judge, that I am troubled by the pattern of your opinions in the area of labor law.

In addition to the *Estek* case, there are two instances in which the Supreme Court granted review of ninth circuit decisions involving labor law questions.

In both cases, you wrote, or joined the opinion. In both decisions involving labor law questions.

In both cases, you argued for a restrictive interpretation of employee or union bargaining rights.

In both cases, the court rejected your position by a vote of 9 to 0.

I refer here to the 1982 case called *Woelke v. Romero*, and the 1986 case called *Financial Institution Employees of America*.

But the Supreme Court cases really only tell part of the story. In your 12 years on the bench, you have participated in more than 50 decisions reviewing orders issued by the NLRB.

It is my understanding that although you have voted to reverse board rulings against the employer approximately a third of the time, you have never voted to overrule the NLRB when it has ruled in favor of the employer.

It seems to me that your judicial writings reflect a disturbing lack of concern for the bargaining rights of employees. I hope that I am wrong.

Can you suggest some other interpretation of this record? Or can you tell us where or when in your opinions or other writings you have evidenced a commitment to employee rights in the collective bargaining context?

Judge KENNEDY. It is very clear to me that the unions of this country are entitled to full and generous enforcement of the national labor relations laws that protect their activities.

The box score here I am not quite familiar with. It is a fundamental matter of national policy that workers are protected in their right to organize, and in their right to collective bargaining.

And in my view, I have fully and faithfully interpreted the law in that regard. I have great admiration for working people. I worked through all kinds of jobs when I was working my way through school.

Since I was 14 or 15 years old I had jobs with manual laborers. I learned that they had a great deal of wisdom and a great deal of compassion, and that their rights should be protected by bargaining agents.

Senator METZENBAUM. Just in conclusion, I do not think the question really is, are some of your decisions right or wrong, but I think the issue is whether your consistent support for the employer position on important, unresolved matters of statutory interpretation is indicative of a predisposition in the area of labor law.

I do not know. If you are confirmed maybe my questions today will cause you to reflect a bit on this very issue.

Thank you, Judge.

Judge KENNEDY. Thank you.

The CHAIRMAN. As preordered, we will now go to the Senator from Vermont, and then the Senator from New Hampshire.

Senator LEAHY. Thank you, Mr. Chairman. Judge Kennedy, welcome back.

Judge KENNEDY. Thank you, sir.

Senator LEAHY. To you and your family. I always like to get a chance to get my family to sit still this long to listen to me, and I say that only semi-facetiously, because they have had to sit through and listen to too many speeches during campaigns and everything, and do it dutifully.

But I think this is such an extraordinary circumstance, as it should be in your life, that I hope it has been something of interest to your family. Certainly we have never seen anybody sit here more attentively than they have.

Judge KENNEDY. Thank you very much, sir.

Senator LEAHY. Judge, I mentioned to you when we met privately that I was impressed with your comments at the White House in which you said that not only did you look forward with eagerness to these hearings, but, and I am paraphrasing now, that they very definitely were not only an integral part of our constitutional