There was the finding by the State. The State had done the work. The facts were there. *Gunther* had recognized that it appeared to be enough. The appellate court, with you writing the opinion, reversed that and undermined the rights of the women established in the *Gunther* case.

And frankly, it is a kind of a case that causes great concern, and my guess is, we will hear some testimony, some witnesses, on the subject. Women are saying they are concerned about whether you went too far to reverse the lower court in this case, and went beyond the requirements of the Supreme Court as enunciated in *Gunther*.

Judge KENNEDY. I am absolutely committed to enforcing congressional policy to eliminate barriers that discriminate against women, particularly in employment or in the market place or in any other area where it is presented to me.

We do not have a free society when those barriers exist. We do not have a free society if women cannot command pay that is calculated without reference to the fact that they are of a particular sex.

But it is simply not clear to me at all that the State of Washington, because it undertakes a survey and discovers what is intuitive for many people, that some job classifications are dominated by women and that they are paid less, can be held to be a violator for not correcting that.

I think the State should be commended for undertaking the study. If the holding were that any employer who undertakes a study of comparable worth is liable for failing to correct the inequity—I simply don't think that the Congress has let the courts go that far.

If the Congress wants to enact that, I will enforce it. If the Congress has not enacted it, I cannot as a judge invent it.

Senator METZENBAUM. But the lower court found the law and the evidence adequate. *Gunther* seemed to say that much evidence was sufficient.

And what is of concern to this Senator, as well as to many women, is that you then saw fit to reverse.

But let us not belabor that point.

Judge KENNEDY. Well, it is an important case, Senator, and I do not mind talking about it. A couple of final points. First, my understanding is that every other court in the country that has looked at the issue has reached the same result. Second, we indicated that in a case where you can establish that the wage scales were set because women were dominant in the pay group, there could be an actionable violation, of course.

We made that very clear. We did not find it on this evidence.

Senator HATCH. Howard, would you yield to me for a comment on my time? It will take less than a minute.

Senator METZENBAUM. If the Chair permits it.

The CHAIRMAN. If there is no objection from anyone else.

Senator HATCH. I just want to point out that in the *Gunther* case the court specifically noted that it was not deciding the case on the basis of comparable worth. It was simply ruling on a discriminatory method of evaluation.

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 reevaluated 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.