

And I think in that sense he is not at this point as appreciative as I might like him to be about the subtleties of discrimination in this culture, whether it relates to women or minorities or gays.

But I do think that he is a person who has a deep respect for the advancement of the law thus far in these areas, and I do not think we are going to see any backtracking on where we are.

Now that is a very subjective impression on my part.

The CHAIRMAN. Well, that is what I asked you. I understand that. And I realize that none of us know what another person is going to do.

Ms. PRAGER. And this is where I think I come back in my own thinking about this to his qualities of studiousness and deep interest in the law and genuine, I think, openness.

This is a person who I think is going to keep thinking over time, and reevaluating. And what I came down to in these last 7 months is that that was the quality that I was looking for the most.

Mr. SCHABER. Senator Biden?

The CHAIRMAN. Yes, Dean.

Mr. SCHABER. Might I just add that on December the 3rd of 1987, the Sacramento Bee, certainly a liberal newspaper, stated in an editorial concerning this exact matter the fact that Kennedy's actions in the matter of clubs, and his articulate explanation of the performance by him, reflect, "in our opinion, not dogged chauvinism, but a conscientious attempt to become sensitive to an issue that has recently overtaken a great many people of his age and background.

"On that score, Kennedy is precisely the kind of person the country needs if things are really going to change, both in the community and in the court."

I personally feel that is the case. I think his sensitivity has obviously increased in the time when, as a matter of fact, it is increasing quite appropriately in the minds and the hearts of many of us.

The CHAIRMAN. Would it be fair to say that Judge Kennedy was considered part of the establishment in Sacramento?

Mr. SCHABER. I suppose if the establishment consists of—

The CHAIRMAN. The most important people in the community; the ones with the most money and power.

Ms. PRAGER. That is an easy yes, right, Gordon?

Mr. SCHABER. A, I would say that the answer is, A, the money, no, and the power, no. Coming from a long and distinguished family and having a mother who was known as the Sacramentoan of the year and who was engaged in every kind of social and other good that one could think of, to that extent he was well known; but not the power structure.

The CHAIRMAN. Senator?

Senator HEFLIN. He was a Republican, wasn't he?

Mr. SCHABER. Yes, sir. But that is a difference between some of us.

Senator HEFLIN. I appreciate each of you being here. I appreciate your testimony. It is nice to see my old friend Professor Levin. I think he has a record of having appeared before the Judiciary Committee more than any individual. We have seen him many, many times. We appreciate it.

Judge Schaber, you mentioned the matter pertaining to the divorce case and the contingent fee. As I tried to make it abundantly clear, there is no rule or anything there that was a violation. And I do not mean to imply anything.

But it is, and perhaps maybe not coming from a community property State, but it does raise some issue, I think, in a person's mind, that community property State, that cases are taken on a contingent fee basis.

And tell us, if you would, since you said you have handled that, if you would like to respond to that particular aspect of it.

Mr. SCHABER. Even at that time it was an unusual activity. However, the case itself, as I understand it, was the case of another lawyer.

And as I mentioned, Judge Kennedy became a skilled trial practitioner. The other lawyer associated Judge Kennedy in order that Judge Kennedy would do the major trial work.

Therefore, as I understand it, the fee arrangements that normally had been made originally with the original engaging lawyer, and then with the firm in which Judge Kennedy was, of course, a partner.

At that time, as you said this morning, there was no rule even suggested—American Bar rule of professional responsibility that applied; and there was none in California.

The case involved a situation in which, as I recall, there was a very, very rich man who claimed that his wife had not one cent coming as a result of a divorce by virtue of various pieces of conduct which allegedly created all of the property to be separate.

And I assume that the original lawyer at that time—it was not uncommon but not necessarily done in every case—took this kind of a settlement fee.

The case went on for many years, as your records will show. It was very successfully done. And the woman involved obtained a very fair settlement. And fair settlement, far beyond the contingent fee.

That is not to justify it. We do not—none of us approve of that any more. It is not done any more. But to set the circumstances, that is about the way the case developed.

Senator HEFLIN. In other words, he was not the contracting lawyer.

Mr. SCHABER. No.

Senator HEFLIN. The contract had been entered into before he became associated with it? Well that is good.

Mr. SCHABER. He became a part of the contract, of course.

Senator HEFLIN. I am glad you clarified that, that is good.

Professor Levin, you dealt with him. And in some of the readings about Judge Kennedy, he was highly praised for instituting in the ninth circuit a staff attorney system that worked quite well there.

There are so many questions that we would have liked to have asked, but time is precious to us, again, due to the fact that we are trying to finish this before we leave for the Christmas holidays. And the other thing is, time on the floor.

Would you comment largely on that? Because I am, as you know, interested in the administration of justice. And I think in the

scheme of things, the members of the Supreme Court play a vital role in trying to improve the administration of justice.

I gather you are familiar with that?

Mr. LEVIN. Thank you, Senator, for that opportunity. And you understate it tremendously when you say you are interested in the administration of justice. I think it is well known that you are one of the major contributors in this half century in the State area.

I am familiar with that particular project. I happen to have known and know fairly well the first staff attorney. And he worked directly under Judge Kennedy, and had only the highest praise for Judge Kennedy's abilities, interest, careful supervision.

He is clearly one who is not only concerned with judicial administration, effective delivery of justice, but is creative about it, and has a pragmatic touch as well.

So you have got both the intellectual side and the pragmatic side.

And I will say that project has worked very well. It in some variations has been exported to other circuits. And I think that is one thing of which Judge Kennedy can be very proud.

I will say that there are other areas involving judicial administration. The pacemaker case is one in which Judge Kennedy has written. That involved the power of magistrates.

And it showed a tremendous sensitivity, not so much in the holding—it was an en banc—but in the notion—it was a problem of the authority of a magistrate to preside over a civil trial by consent of the parties.

And one of the things—we read the opinion recently, and such a marvelous sensitivity—he said, here there is consent. We are not prepared to decide the case where the consent is a result of undue delay in the system.

We do not need to reach that. But raising that is a problem.

I thought it showed very nice sensitivity in that area as well.

Senator HEFLIN. Thank you.

The CHAIRMAN. Thank you very much.

I appreciate your testimony. I apologize, we were doing a little committee business there. And as I said, particularly those of you who came from California, and those of you who walked up the street from Georgetown, and those who came—would you do me a favor, Professor Levin. You are at the University of Pennsylvania Law School. My son is at the undergraduate school. His exams start on Thursday. Would you check on him when you go back to school.

Mr. LEVIN. We in the faculty, Mr. Chairman, are happy when the students are not checking on us. But I am sure he is doing very well.

Mr. SCHABER. Senator, before you dismiss this panel, may I, on behalf of the La Raza Law Students Association, offer for the record this letter of resolution on their part, which they asked me to bring.

The CHAIRMAN. Surely.

Mr. SCHABER. It is, in effect, stating that they having had the firsthand knowledge indicate that because of his integrity and sensitivity to the minorities on the campus and in his class, "we, at a regularly scheduled meeting, unanimously voted to recommend to