

Senator DECONCINI. And that is because the regulation was only before you and not the question of whether or not there was a right of privacy for this activity; is that what you are saying?

Judge KENNEDY. Well, that is correct except that you might have argued that this right was so fundamental and so all-embracing that the military could not—

Senator DECONCINI. Could not infringe on it.

Judge KENNEDY. Could not abridge it in any event. For analytic purposes, we simply left to another day the question whether or not there is this fundamental right. In other contexts, we assumed that there could be. We said that in the context of the military there were adequate, stated, articulated reasons for the enforcement of the policy.

Senator DECONCINI. I read that case very carefully more than once because of the significance of what I consider judicial restraint, and my compliments about the case, but it seemed to me a great temptation for a judge who wanted to express an opinion for or against there being a fundamental right for the homosexual activity not to do so. I think the greatest compliment I can pay you, Judge, is that you stayed with the issue there that I think was very clear. But quite frankly, if a court had gone off the other way I might have disagreed with him or I might have agreed with him, and sometimes the court does. And I really wanted to say that that opinion, as many of your opinions, have impressed upon me your real strict understanding of what you think judicial restraint is, and trying to exercise it.

I may disagree with it or someone else may, but I think it is fundamental and very complimentary to you and the President for choosing someone who has that restraint in their mind.

Judge KENNEDY. Thank you, sir.

Senator DECONCINI. Thank you. I am finished for now. I do want to talk to you about judicial tenure, a subject that you and I have shared some fun over the last years, and we will do that tomorrow I guess.

Judge KENNEDY. I am looking forward to that, Senator.

Senator DECONCINI. Thank you, Judge Kennedy.

Recognize Senator Simpson because Senator Biden isn't here.

Senator SIMPSON. I thought maybe we were going to take over there for a minute. With the Chairman gone, it was marvelous opportunity, but I see you were prepared.

Like Senator DeConcini, I found that case fascinating for its clarity and getting just to where he wanted to get and not one whit further. It was a superb decision, the one that Dennis speaks of. Dennis and I come at each other occasionally in this league, but he is a fine lawyer. I have a great respect for him. But I have exactly the same feelings about that case in reading it and knowing what a hot one that was.

You know, you could have at any point gotten off onto a little Hindu, some philosophy or something else, or morals or everything else, but you really did a beautiful job with that.

Well, I am interested in you doing very well in the surveillance that is being performed here. I don't know if I—I sometimes forget, but I can't help but tell you that in the last such proceedings there was a gathering of various groups who said that they wanted to

find the transcript of the law school records of all the members of the judiciary to see just how well we all did.

The CHAIRMAN. I sent mine. Did you send yours? [Laughter.]

No, I make it a habit of not picking mine up. I never have.

Senator SIMPSON. I am going to move right on now. I have nothing more.

But I was interested, I told them, I said, I am glad you asked that question because, I was in the top 20 of my class. And there was a scribbling and that was the end of that, and they went off, I guess, to check.

But the interesting thing was, then I think I turned to Joe and I said, "That is going to be great." I said, "There were only 18 of us in our class." [Laughter.]

So we get the surveillance. Indeed, we do, and there will be ever more of that, and is, in this league. But with that the light comes back to privacy. What is this right of privacy? We talked about it a lot with regard to Judge Bork, an awful lot. This right to privacy, what is it? You know, and you get into it. It is a detonator, and you have answered that very well so far.

I think the most pungent comment on it was Judge Griffin Bell, our former Attorney General, who said that the right of privacy is the right to be left alone. He really cut through the fog as we were dissecting the right to privacy and where it was with *Griswold* and whether it was written or unwritten, or in the Constitution or out of the Constitution, or innate or conditional, is the right to be left alone. That is something that really means something I think to the American people. At least the average guy, he likes that.

And then as I say, I shared with many my frustration that at the very time these very high-blown probes were going on with regard to that there were few worthies who were finding Judge Bork's video rental records to find out what he was renting, hoping to find all sorts of things. My mother has written me about that and talked to me about that, and I won't go into that. It was a rather smart phrase.

But I commend the ACLU who rallied to that in a moment. The District of Columbia is now dealing with a statute on that. There is a House bill in on that, and I am certainly going to be looking into that from the Senate side. So there's some positive results—but those are more real examples than, you know, law school theories out there on the right to privacy. In my mind they are.

Then I was interested in your comments on the two cases, *Topic v. Circle Realty* and the *Mountain View-Los Altos Union High School District*.

Judge KENNEDY. Yes, sir.

Senator SIMPSON. Hearing your explanation of those was very important to me. You used the phrase "we ruled," and I think that we don't want to forget that, as I understand it, and you can respond, that those were both unanimous decisions of a three-judge group. I mean, I don't know what you call that in your—

Judge KENNEDY. That is correct, Senator. It was a three-judge panel on each of those cases.

Senator SIMPSON. Panel.

Judge KENNEDY. And, as you know, each judge researches the record independently and we usually come to the bench not having

conferred with one another in order to ensure both the fact and the appearance of fairness for the litigants. We confer only after the oral argument.

Senator SIMPSON. In the *Topic* case, there was Justices Chambers and Trask and yourself.

Judge KENNEDY. Yes.

Senator SIMPSON. And in the *Mountain View* case, Justices Trask and Poole and yourself.

Judge KENNEDY. Yes.

Senator SIMPSON. And those were unanimous decisions and, as you say, an interesting finding as to how you come to those, giving every evidence of fairness in that; isn't it?

Judge KENNEDY. That is correct. We thought both of them were close cases in which we were trying to divine the will of Congress.

Senator SIMPSON. I had a feeling that one on the disabled child would be a very important one and probably will be reviewed again, so I was particularly interested in that, you know, because it is so easy to pick an issue and say how will you vote on this or—for us, how do you vote on this, Simpson? You can't vote "maybe", you have to vote yes or no. It is a very precise activity here.

I was very interested in how you did decide because you obviously were impressed, and you have said it here. The facts of that case were rather unique in a sense. This boy, this son who was involved here had some extreme behavioral problem. It said, while the assessment was taking place the boy was excluded from school for repeated misconduct. It went on, they stopped the process then. They stopped, and no one knows why.

Then there was the offer to send a teacher to the boy's home for instruction. District personnel recommended private schools. The appellant placed the boy in one of the schools and he was expelled for continued misbehavior and then he attended another. He was a very disruptive young man apparently is what I gather. It is a very short opinion.

And then it was determined that he be placed in a resource classroom in a regular public school program, and the appellant, still dissatisfied, requested an administrative hearing under the Act and the administrative law judge determined the parents were entitled to reimbursement.

The school district then brought the action and the appellant was saying that—the district court, of course, adopted that and held the appellant had violated the so-called "stay put" provision—I wouldn't want that to get left out here—by placing the boy in this other school before the administrative proceedings were concluded.

That is a very important thing because it says very clearly that during the pendency of any proceeding conducted pursuant to this section unless the State or local education agency and the parents or guardians otherwise agree the child shall remain in the then current educational placement of such child until all such proceedings have been completed.

I was fascinated by the precision of that. She was saying that her actions were not unilateral and they were saying they were, it was that simple, I guess. And you were saying something that is said to us all the time as Congresspersons. Why do you pass laws that

leave the burden on the local districts or the local county or the municipality?

Your decision said that the threat of damages in a case like this would not make compliance any more likely and would subject school districts to contingent liabilities hardly foreseeable when the annual school budget is prepared.

Now, with disabled children and the disabilities and special education, one of the most serious problems in the United States is that the school districts can't afford it. And they tell us that when they go home, but who is going to come back here and say you can't afford to take care of disabled children, so we don't say much about it. We just pass another law and ship it back to the local district.

Some districts are paying out \$100,000 and \$200,000 for maybe one person in one year, and we just sit and say go ahead, that is your job. Now that won't last much longer. They can't stand that burden.

So it is such a well-focused opinion. A very well-centered and reasonable decision, and I don't think it should have any kind of flavor that somehow you are not sensitive to the disabled in our society. And I don't think that was the intent but we surely wouldn't want it to be at all expressed in that form because that is not what it dealt with as I see it. Compassion was there but this was, under the fact situation, a most difficult person.

And we do that with our new asbestos law. We passed a dazzling law about asbestos in the schools and then just sent it back to the States and said go to it. We don't know where you are going to get the money to do two or three hundred grand worth of ripping asbestos out of a school built in 1930, but get at it. And this is the same kind of thing that we do well, and I think you called attention to that.

Well, that is just my view of that. Some of that of that case.

Then with regard to discrimination, that certainly came up and it has come up again here today. Discrimination based on gender, I don't like to harp here but I think it is so important that we just try to keep a continuity. We have a situation where six members of this 14-member panel have voted to cast a vote specifically to discriminate against women based solely on their gender. That may be a bit surprising but it is very real and you can't describe it any other way; and that is, to exclude women from the draft.

And six members of this panel, three from each side of the aisle, so we don't get into sloppy partisanship, voted to exclude women from the draft, which is obviously and patently a discrimination against women based solely on their gender. There is no other way to describe that that I know, as a lawyer.

So that is interesting, when we get into those tough issues that seem so good when they appear in law review articles, but in real life they are just plain tough.

You cited a very interesting thing about, I think you were talking about advocacy before the courts. The quality of advocacy has gone down, I hear you saying, or is not what it should be. Would you develop that a bit more? Tell me a little more about that. How do you feel about that?

Judge KENNEDY. Well, Senator, sometimes one asks the question, does a good lawyer really make a difference? The questioner I think, may think it a trick question because if you say yes, then you are not listening to the law, and if you say no, then you are just wasting your time listening to the oral argument.

But these cases are very, very difficult, and the law draws its sources from many places. Judges listen to many voices. The constraints and the compulsions of the facts of the particular case, and of the legislative history, all have to be brought to bear on the specific case before the court. Far more often than most people realize, the three judges on that panel all have their minds made up during the oral argument.

It is the time that I use to make up my mind. I wait until that oral argument. It is a tremendously important half hour or hour. It is very important that counsel be skilled.

Oh, sometimes we know that the counsel just has not seen the problem, and we will see it for him and save the case. But really, we have to impress upon the bar that the duty of the lawyer is to the client, and he may not let the court do the work for him or her. There should just be no shoddy practice in the federal courts; and there is too much of it.

Senator SIMPSON. Well, I think it was former Chief Justice Burger who made some statement years ago that we were doing 747 litigation with Piper Cub pilots, or something like that, and I think that is true. I admired Justice Burger, a Chief Justice, in so many ways a superb human being. He is a delightful gentlemen. I have come to know him personally and that has been my great gain.

Would you, if you were on the Supreme Court, and I honestly and sincerely hope you will be, would you hesitate to write and speak on that subject of lawyers when you are addressing the American Bar Association or the federal bar? Is that something you would like to get involved in, making our profession better and speaking as one who has heard these men and women before you?

Judge KENNEDY. I am committed to that. The former Chief Justice, Mr. Chief Justice Burger, did a marvelous service to the Constitution and to the rule of law when he insisted on this throughout the country. This is not to denigrate the legal profession or the law schools. They are doing a magnificent job.

But one of the frustrations of being a judge is that we get away from the practice somewhat. I see or hear of things going on in the practice, and conclude the ethic is changing out there. The law practice has become much more of a marketplace than of an ethical discipline, and I am concerned about that. But I am so far removed from the practice that I am not sure there is a whole lot I can do about it, other than to talk about the problem.

Senator SIMPSON. But you would be talking about that if you were on the Supreme Court bench?

Judge KENNEDY. I think it is vital.

Senator SIMPSON. That is very important to hear you say that. I think it is critical. I practiced law for 18 years and I loved it, and I did everything from the police court to the federal district court—everything. And now in the marts of trade, the law school students are interested only in what they will receive on their first job.

Those who recruit them are interested only in those who are in the top 8 percent of their class. They must come from the best schools, whoever makes those descriptions, and they must I guess have an overwhelming desire for pure greed. Because I think greed is overwhelming our profession. I think they are not practicing law, they are practicing money, and that disturbs me.

And, if you are placed on this Court, it will be a delight to see you with your tremendous ability to deal with young people as you have in your law school, in McGeorge, that you can get them back on track as to what it is. And what it is is not to see how many depositions you can Xerox during the discovery proceedings, you know, by the metric ton, or how to make discovery to put your children through college. The first and only rule under Rule 1 of the Rules of Civil Procedure is that the rule shall be construed to secure the just, speedy and inexpensive determination of every action. That is what it says, and it says that in every State rule, under the State rules of civil procedure.

So as we talk about dissecting cases, and that is critically important, we all do that in our law careers, and in theory and philosophizing the issue we are forgetting what has happened to the little guy. He can't even afford a lawyer anymore.

What are your thoughts about that?

Judge KENNEDY. Just to go back one moment—

Senator SIMPSON. Please.

Judge KENNEDY [continuing]. To your first comment, the bar of the ninth circuit and the leaders of the bar in every circuit in the country do work with the courts very, very closely to assist their colleagues in understanding the rule of courts. They have helped us implement rule 11 on sanctions. They sometimes forget, though, the very critical point that the first duty of the lawyer is really to the law. He has an ethical obligation.

The greatest privilege that a lawyer has is counseling a client. I think we all miss that from our practice.

Every lawyer every day acts as a judge, telling his client what the facts are and insisting that his client or her client conforms their conduct to an ethical standard. That is what the law should be about. I am afraid we have lost some of that ideal in the profession, and part of the reason is money.

You can not have it two ways. You can not complain about poor representation and then, on the other hand, complain about the cost of legal services. There is a relation between the two. Law is so complex now that it takes lawyers longer to do the job. What the answer is so far as legal fees are concerned, I don't know. But it is quite true that if a wage-earner, a person in the middle-class is hit with a lawsuit and does not have an insurance company to defend him or her, they are in big, big trouble.

The repeat players in the system and, as I have indicated, including some public interest groups are very adequately represented. But the person that has one brush with the law sometimes has a problem.

Senator SIMPSON. Yes, that is an interesting part of our profession, counseling a real live, human being client who is in extremity usually. Because they have already talked to their spouse and said, "I wonder if I should go get a lawyer," and they think "I don't

think so. Better watch out." Then they go to their brother and then their uncle and finally they walk in to see a lawyer, and they know they are in trouble and they go only in extremity.

You know, that is the way law really is practiced in the world. It is not like here where there are 33,000 lawyers who, if you turn them loose with an anguished and tearful human being, they would hope they could find somebody down in the lower bowels of the office to take care of the poor old soul.

Well, I haven't asked many questions yet, have I? But I have been certainly launching around in them. Another thing though I wanted to—it is so good to hear someone saying that, and be on the Court saying that where you will be heard and have a forum. But, again, take the issue of clubs. You stated your position I thought very clearly. There is a discrimination based on hostility. And then there is a discrimination just based on plain old, you know, indifference, not paying attention. Joining a club and you don't know what is in the by-laws. You just were looking for a place to play squash.

We have been through some remarkable exercises here. We nearly torpedoed a guy because he was a member of the Masons. And everybody sobered up real quick and the word went around that there were about 20 of us in the Masons in the U.S. Senate and 60 or 70 over in the other body, or more than that, and it is really not too sinister an organization. Their tenets there are based on a fierce protection of wife and mother and daughter and son and brother. Probably like the Knights of Columbus in that respect. But we had to go through all that. I mean you really would have been dazzled by that.

And groups that care for the needy, and there is, you know, a secret society that believes in love of fellow man and woman. Interesting.

But the Elks Club now is really getting to be the epitome now. I joined the Elks Lodge in Cody, Wyoming, so I could get a suds on Sunday. That was the original reason. Since then I learned what they did, and their order is based on charity and brotherly love and helping their fellow man. That is what it is. It is not some sinister outfit.

I don't know about the Sutter Club but they must have some purpose. Charity—you know, they actually take Christmas baskets and do little silly things like that in real life in Cody, Wyoming, and help people. Give scholarships to boys and girls.

So, it really is fascinating. I did bring this up and I want to bring it up one more time because we had a group that wrote to us in strident terms during the last hearing, the National Women's Law Center, I believe was the name, in Chicago. There is a forum there of women lawyers. There is not a single man on the letterhead. And they really raised hell with us. And I asked if they had any men members, and they said no. But there wasn't much more to be said about that.

But, you know, come on. You can't have it both ways in this game. You reach the height of absurdity, and that is what gets reached in this exercise.

Well, I will hear from someone on that subject, but it is important to me to know that you have done the human practice of law

for 13 years and apparently with distinction that testimony from your neighbors, Vic Fazio, to hear him speak, I have great regard for him, Bob Matsui, Pete Wilson. Those things are very important to us as we make our decisions.

I understand you have represented minority groups. You were in the Judicial Administration for the Pacific Territories of American Samoa, were you not?

Judge KENNEDY. I am still on that committee, Senator.

Senator SIMPSON. And what is the nature of that work— I have 4 minutes remaining? Wait. Forget it. Don't bother with that. [Laughter.]

You were a member of a union, yourself?

Judge KENNEDY. I am trying to—I believe that I was. I had summer jobs where I did manual labor, usually in the oil fields, but one summer I worked in a lumber mill and I believe I was a member of the Millworkers union. At least I remember paying the money. I do not know if that made me a member or not.

Senator SIMPSON. If you paid money, we will talk to Lane Kirkland. I think you are all right if you paid in. But you are sensitive to those rights of unions and minorities and women and pro bono activity and fairness. Those things have all been forged in you. Would you say that that is a very important thing as you go on to this new duty, which I hope you will?

Judge KENNEDY. No judge comes to the bench as a clean slate and completely free of all compulsions and restraints from his background. Therefore I think the background of a person, his temperament and his character, or her background, temperament and character, are of relevance to your consideration. I have been pleased to make available to you my life so far as I can remember it, Senator.

Senator SIMPSON. Well, we will do that sometime. I would like that. And it has been a real treat to almost watch your cognitive processes as you deal with the issues and the questions presented to you. You handle the inquiry very well, and it is interesting to hear the verbalization of that cognitive process after you churn it, and it comes out in a way that is very understandable. And as I have always said, what good is our whole practice or profession if those we are supposed to serve can't understand what we are doing for them, can't read the lease you prepare, don't understand the will you did, can't understand the property settlement that you drafted. Clarity will save us yet. But I think you are going to be a great advocate of that. Thank you, sir.

Judge KENNEDY. Thank you very much, Senator.

The CHAIRMAN. Judge, do you realize how difficult you are making this for Senator Simpson? He spent a whole half hour defending you against charges no one made. [Laughter.]

You know, he is so much in the mode from the last confrontation that I hope that Senator Heflin says something nasty so we get something going here.

Senator SIMPSON. You have been always good with equal time.

The CHAIRMAN. You are the only one I would take the liberty to kid with because I know you have a sense of humor that exceeds mine.

And I want to say one other thing while we are on this. And that is, that things haven't changed all that much, Judge. I remember my first case as a young lawyer in the Court of Common Pleas in New Castle County, Delaware. I was assigned to—I was sent a client who was accused of driving under the influence, and my first thing that I did was to go in and to ask for a continuance.

And, as I stood there waiting in line, a fellow named Switch Di Stefano, God bless him, the clerk of the court, turned to Judge Gallo and he said, and I could hear him say, "Ask him if rule 1 has been complied with?"

And he asked me, and I looked and I panicked. I thought I knew what rule 1 was but I couldn't see how it related to this. And I said, "Your Honor, I am embarrassed. I am not sure what rule 1 is."

They called me to the bench and Switch Di Stefano leaned over and he said, "Before we grant the continuance, have you gotten the fee?" [Laughter.]

I am sure that never happened in your life, Judge, but it happened in mine. And I want to yield now to the Senator from Alabama.

Senator HEFLIN. Judge Kennedy, have you found the teaching of law while being a judge rewarding?

Judge KENNEDY. I have to say since I am under oath that teaching is the most enjoyable day of my week. I love it.

Senator HEFLIN. Would you plan if you go to the Supreme Court to do some teaching, too, on the side?

Judge KENNEDY. From what I hear about the workload, I think the answer must be no, Senator.

Senator HEFLIN. Does teaching cause any problems with pre-determination of issues?

Judge KENNEDY. I fear that if I were appointed to the Supreme Court that it might. In the ninth circuit there would be maybe two or three times a year in which I would get a little close to a case that was before me, and so I thought I would stay away from it. But you know what the usual drill is. You simply ask the student the question and then you take the opposite side.

I always made it clear to my students that I did not care what they thought but I did care passionately how they came to that conclusion, within certain broad limits of tolerance, of course.

Senator HEFLIN. In the case of *U.S. v. Alberto Antonio Leon*, which is now a famous case—and was heard by the Supreme Court—you dissented from the opinion of the ninth circuit and you closed your dissent with this language:

Whatever the merits of the exclusionary rule its rigidities become compounded unacceptably when courts presume innocent conduct when the only common sense explanation for it is ongoing criminal activity. I would reverse the order suppressing the evidence.

Now I would assume as a teacher after the Supreme Court decided the *Leon* case, you and your students discussed this decision and also your dissent in the ninth circuit's decision. Did that occur?

Judge KENNEDY. Well, Senator, the constitutional law course as it is now composed no longer includes criminal procedure, so I was not able to discuss that with my students. As you have indicated, I get somewhat, at least by inference, more credit for the *Leon* case