

Judge KENNEDY. Marital right to privacy; that is what I thought you said. Yes, sir.

The CHAIRMAN. Thank you.

Senator LEAHY. Well, if I might follow on that, have you had any cases so far when you have been in the Court of Appeals where you have had to follow the *Griswold* case?

Judge KENNEDY. The *Beller v. Middendorf* case was one where we examined it and discussed it extensively. The case we discussed yesterday.

And I'm tempted to say that is the only one.

Senator LEAHY. But in that, what reference did you make to *Griswold*?

Judge KENNEDY. We tried, I tried, in the *Beller* case, to understand what the Supreme Court's doctrine was in the area of substantive due process protection, and came to the conclusion, as stated in the opinion, that the Supreme Court has recognized that there is a substantive component to the due process clause.

I was willing to assume that for the purposes of that opinion. I think that is right. I think there is a substantive component to the due process clause.

Senator LEAHY. And that is your view today?

Judge KENNEDY. Yes.

Senator LEAHY. When you first—

Judge KENNEDY. And I think the value of privacy is a very important part of that substantive component.

Senator LEAHY. The reason we spend so much time on this is that it is probably the area where we hear as much controversy and as much debate in the country about Supreme Court decisions as any single issue. Certainly I do in my own State, and I am sure others do. It is a matter that newspaper debates will go on, editorial debates will go on.

And in a court that often seems tightly divided, everybody is going to be looking at you. None of us are asking you to prejudge cases. But I think also, though, if we are going to respond to our own responsibility to the Senate, we have to have a fairly clear view of what your views are before we vote to confirm you.

I should also just add—something that obviously goes without saying—we expect you to speak honestly and truthfully to your views, and nobody doubts but that you will. Some commentators and some Senators seem to make the mistake of thinking that a view expressed by a nominee here at these confirmation hearings must, by its expression, become engraved in stone, and that a nominee can never change that view. You do not have that view, do you?

Judge KENNEDY. Well, I would be very careful about saying that a judge should make representations to the committee that he immediately renounces when he goes on the court.

Senator LEAHY. That is not my point, Judge Kennedy. What I am saying is that I would assume that your own views on issues have evolved over the years.

Judge KENNEDY. Yes.

Senator LEAHY. What I am suggesting is that even as to views expressed here, should you go on the Supreme Court, there is noth-

ing to stop an evolution of your views in either direction, or in any direction?

Judge KENNEDY. I think you would expect that evolution to take place. And with reference to the right of privacy, we are very much in a stage of evolution and debate.

I think that the public and the legislature have every right to contribute to that debate. The Constitution is made for that kind of debate.

The Constitution is not weak because we do not know the answer to a difficult problem. It is strong because we can find that answer.

Now it takes time to find it, and the judicial method is slow.

Senator LEAHY. It is also an evolutionary method, is it not?

Judge KENNEDY. It is the gradual process of inclusion and exclusion, as Mr. Justice Cardozo called it. And it may well be that we are still in a very rudimentary state of the law so far as the right of privacy is concerned.

If you had a nominee 20 years ago for the Supreme Court of the United States, and you asked him or her what does the first amendment law say with reference to a State suit based on defamation against a newspaper, not the most gifted prophet could have predicted the course and the shape and the content of the law today.

And we may well be there with reference to some of these other issues that we are discussing.

Senator LEAHY. I would hope that all Members of the Senate will listen to that answer. I think that the fallacy that has come up, in some of the debate on Supreme Court nominees—one that has probably been heard across the political spectrum—is that we can somehow take a snapshot during these hearings that will determine for all time how Judge Anthony Kennedy or Judge Anybody is going to then vote on the Supreme Court on every issue. And that just cannot be done, and in fact, should not be done. That is not the purpose of these hearings.

You said back in June of 1975, at the time you were sworn in to the Court of Appeals, that you were not yet committed in this debate on the reach of the federal Constitution. I think what we would like to explore, though, is what has happened in that 12 years. You have written in numerous cases, participated in hundreds of cases. And so you have been part of that constitutional debate, and your thinking has evolved. And let me just go into a couple of areas of that.

In the Stanford University speech that everybody has talked about here, you said that it is important to distinguish between essential rights in a just system, and essential rights in our own constitutional system. And as I understand your speech, the rights in the first category—rights that some may consider essential to a just system but not essential rights in our own constitutional system—are not enforceable by our courts. Is that correct?

Judge KENNEDY. That is correct. I was quite willing to posit that the framers did not give courts authority to create a just society.

Senator LEAHY. Now those rights that are essential to a just system are those things like providing adequate housing, nutrition, education, those kind of rights?

Judge KENNEDY. Yes, sir.

Senator LEAHY. And that requires affirmative government action?

Judge KENNEDY. Mostly affirmative government action, although the Supreme Court in a case, *Plyler v. Doe*, held that the State of Texas could not altogether deprive illegal aliens of education.

Senator LEAHY. So there are essentials?

Judge KENNEDY. So even here there is an area for the courts to participate in.

Senator LEAHY. So there are some essential rights in our own constitutional system, to use your words, that are not explicitly spelled out in the Constitution, but are enforceable by our federal courts?

Judge KENNEDY. The equal protection jurisprudence makes that rather clear.

Senator LEAHY. Now, earlier this year in the Ninth Circuit Judicial Conference speech, you said that each branch of government—and I assume you include the courts in that—is bound by an unwritten constitution that consists of our ethical culture, our shared beliefs, our common vision.

Are there rights included in this unwritten constitution?

Judge KENNEDY. Well, I would think so, yes.

Senator LEAHY. Such as?

Judge KENNEDY. My point about the unwritten constitution, I suppose, has been to try to explain how that term was used by early political philosophers.

Plato, Aristotle, Hobbes, all talked about the constitution. And what they meant was, the whole fabric of a society.

As you know, there are something like 160 written constitutions in the world today. Very few of them work like ours does. And yet their terms in some cases are just as eloquent, and perhaps even more eloquent.

Their terms are somewhat more far-reaching in the grant of the positive entitlements that we have talked about, the right to adequate housing, food, shelter.

But they do not work. The reason ours works is because the American people do have a shared vision. And I think important in that shared vision is the idea that each man and woman has the freedom and the capacity to develop to his or her own potential.

That is somewhat different than the Constitution states it, but I think all Americans believe that. And I think that has a strong and a very significant pull on the legislature and on the courts.

Senator LEAHY. At the same time, an unwritten constitution—you say that it instructs government to exercise restraints. What does the court do when another branch of government ignores that counsel and takes some unrestrained action? Say the action of another branch does not violate a specific constitutional prohibition, can the courts strike that down because it violates this unwritten constitution that restrains all branches?

Judge KENNEDY. No. But, again, this is the consensus that our society has that makes it work. One of the great landmark—

Senator LEAHY. How do you square them if you have got these essential rights out there one way—that is, at the same time you have got the essential rights pushing here, but you have some unrestrained action pushing there. Do they square?

Judge KENNEDY. Well, I hope they square.

Senator LEAHY. Can the courts make them square?

Judge KENNEDY. Absent an abiding respect by the people for the judgments of the court, the judgments of the court will not work. And the Constitution does not work if any one branch of the Government insists on the exercise of its powers to the extreme.

One of the great landmarks in constitutional history was when President Truman complied within the hour with the Supreme Court's order to turn back the steel mills. President Nixon did the same thing with the tapes. That is what makes the Constitution work.

The Constitution fails when a governor stands in front of the courthouse with troops to prevent the integration of the schools subject to a Supreme Court order. The Constitution does not work very well when that happens.

Senator LEAHY. Let me just go back a bit, if I might, Judge. In a democracy, any branch of our Government exists only if there is respect for that branch, only if it can be heeded. If we did not respect the constitutional mandate for a President to leave office at the end of his term and the new President to come in, where would we be?

Judge KENNEDY. Yes.

Senator LEAHY. I think it is a very powerful statement to the rest of the world when we see a President who may have been defeated in an election riding with the incoming President up for the oath of office. It is a very powerful statement: if we have a President die in office and another President comes in immediately with total continuity.

But I think you were suggesting more of what happens with the courts. In the last generation, have we pushed that parameter where faith or confidence or respect for the courts may have been damaged?

Judge KENNEDY. I do not think so. I think courts have the obligation always to remind themselves of their own fallibility in this regard. They have the obligation to announce their judgments in neutral, logical, accepted terms that are consistent with the judicial method. And the courts have, of course, the obligation to respect the legislative branch.

Your example of the President leaving office is probably a better example than any one that I have thought of on this mystic idea of this unwritten constitution. I think it is an important example; it is a good one.

Senator LEAHY. But we have courts stepping into areas of great controversy. Without going into specific cases, we do it in areas of busing, of abortion, of civil rights, voting rights. Some of these things are very explosive, and we have had instances where Federal troops have had to be brought out, Federal marshals, local police, State police, to enforce the ruling of a court. But yet if the court is right, you are not suggesting that they should then refrain from issuing that kind of a ruling, even if it may well require strong and controversial executive action to carry out the ruling?

Judge KENNEDY. No. The courts, except in perhaps rare instances, have never shrunk from their duty to interpret the Constitution and they never should. But as you indicate, one of the really

great ironies of our system is that a branch of the Government that is not supposed to be political in nature has historically resolved disputes of great political consequences. One of the great issues for the first 30 years in this country was whether or not Congress had the right to establish a national bank. And the Supreme Court stepped right into the middle of that—and fairly early in the controversy—and it has not been successful in extricating itself since.

But the point is that a court must recognize that its function is not a political function; it is a judicial one. We manipulate different symbols. We apply different standards.

Senator LEAHY. Judge, let me ask you about another right that was not mentioned in your Stanford speech—the right of the press and the public to attend criminal trials. In the case of *Richmond Newspapers v. Virginia*, the Supreme Court recognized this right, though the court acknowledged that “The Constitution nowhere spells out a guarantee for the right of the public to attend trials”.

You have had occasion to enforce what apparently is an unenumerated right to attend trials. I believe that in one of the DeLorean trials, you did. Do you think the Supreme Court made a right or wrong turn when it recognized the right of public access in the first place, in the *Richmond Newspapers* decision?

Judge KENNEDY. Well, rather than comment specifically on the opinion, I would say that right of access generally is an important part of the first amendment and is properly enforced by the courts.

Should I wait?

Senator LEAHY. No. Just a bomb going off. Senator Heflin does sort of a bomb alert, but we never clear the room for little things like that.

Judge KENNEDY. In the *DeLorean* case, incidentally, the question was whether or not newspapers could inspect sentencing documents.

Senator LEAHY. You say that from the first amendment, but that is an expansive reading of the first amendment, is it not?

Judge KENNEDY. I am not so sure that it is that expansive.

Senator LEAHY. You would not consider that expansive? You would not consider it an expansive reading of the first amendment, the right of the public to be—

Judge KENNEDY. That the press is allowed to be at trial?

Senator LEAHY. Press to be at a trial.

Judge KENNEDY. Well, I think perhaps we could characterize it as an expansive reading.

Senator LEAHY. But a justifiable one? I am not trying to put words in your mouth. I am really not trying to put words in your mouth.

Judge KENNEDY. I think a very powerful case can be made for the legitimacy of that decision.

Senator LEAHY. Thank you.

What about the right to teach a foreign language to one's children? In the Stanford speech, you point out that such a right might be found from an expansive reading of the first amendment. The Supreme Court did not find the right there but recognized the right anyway in the case of *Meyer v. Nebraska*.

Judge KENNEDY. Yes. *Meyer v. Nebraska* has a whole catalogue of rights that the Supreme Court thought were fundamental, some of them quite expansive—the right to pursue happiness. The first amendment, it seems to me, has tremendous substantive force and can easily justify the result in *Meyer* and *Pierce*.

Senator LEAHY. But that was not what the Supreme Court found.

Judge KENNEDY. No. The Supreme Court at that time, I think, was essentially unaware of the expansive nature of its first amendment decisions. Those cases were 1916. Well, the laws were passed in 1916, and then it took a few more years to get up to the court.

Senator LEAHY. But were they wrong in their decision? I mean, did they have the right result, the wrong reasoning?

Judge KENNEDY. Well, my point was that the statements in the opinion, the broad statements of the opinion, I was not sure could support a whole body of jurisprudence.

Senator LEAHY. Well, that whole list of rights: should they recognize and enforce each of the rights they listed out in *Meyer*?

Judge KENNEDY. Did they—

Senator LEAHY. No. Should they recognize and enforce each of the rights in *Meyer*? You have got the right to marry, to establish a home, bring up children, worship.

Judge KENNEDY. Again, I think that most Americans think that they have those rights, and I hope that they do. Whether or not they are fully enforceable by the courts in those specific terms is a matter that remains open.

Senator LEAHY. So are those rights—you find a right of privacy—but as to the rights in *Meyer*, I did not quite follow your last answer. That threw me a bit. Would you repeat that, please?

Judge KENNEDY. Well, it is not clear to me that each and every one of the rights set forth in *Meyer* can sustain a complaint for relief in a federal court. I would be very puzzled if I received a complaint that alleged that the plaintiff was denied his right to happiness.

Senator LEAHY. Well, in fact, that is sort of like what you said in the Stanford speech. Let me just take one quote out of there. You say, "It seems intuitive to say that our people accept the views set forth in *Meyer*, but that alone is not a conclusive reason for saying the court may hold that each and every right they have mentioned is a substantive, judicially enforceable right under the Constitution".

What do you look for beyond just the feeling that our people accept these rights to make them such fundamental rights that they are judicially enforceable?

Judge KENNEDY. Well, there is a whole list of things, and one problem with the list is that it may not sound exhaustive enough. But, essentially, we look to the concepts of individuality and liberty and dignity that those who drafted the Constitution understood. We see what the hurt and the injury is to the particular claimant who is asserting the right. We see whether or not the right has been accepted as part of the rights of a free people in the historical interpretation of our own Constitution and the intentions of the framers.

Those are the kinds of things you look at, but it is hardly an exhaustive list. You, of course, must balance that against the rights asserted by the State, of which there are many.

Senator LEAHY. What if some of those rights that you see felt by our people, strongly felt, conflict with your own personal views? What then?

Judge KENNEDY. I think that the judge, in assessing what the society expects of the law, must give that great weight rather than his or her own personal views.

Senator LEAHY. Where do you look, what do you look to to find out, you know, what these rights are—and I realize we are talking in a very gray area: Probably to some who might be listening this may seem like an academic discussion that is wonderful for a classroom. And somebody suggested yesterday your students will be watching to see how you answer this. I have to think that these are the same kinds of questions that have gone through judges' minds to a greater or lesser degree when we have made some of the major moves in our Constitution—some of the cases we now refer to as milestones and others would refer to as abrupt and unforgivable changes, depending upon which side you are on.

But what do you look to when you try to determine what those rights are that are so solid in our people, those senses of right? How do you find them?

Judge KENNEDY. Well, I wish I could give a good, clear answer to the question. I think in that same speech I said in frustration, "Come out, come out, wherever you are", looking for the sources and the definitions of unenumerated rights.

You look in large part to the history of our own law. This is what stare decisis is all about. You look to see how the great Justices that have sat on the Court for years have understood and interpreted the Constitution, and from that you get a sense of what the Constitution really means.

An English representative in the House of Commons once said that "History is Philosophy teaching by example"; and I think that the law can be described the same way.

Senator LEAHY. Judge, you are 51 years old. If you are confirmed, you are going to serve on the Supreme Court well into the next century. Anybody just looking back at the history of the Supreme Court in the last 20, 25 years knows that it has had to go—it has been faced with very difficult questions—and it has had to move the Constitution forward—or backward, depending, again, how people look at it—but certainly move it, change it from what people thought of as being a settled Constitution at that time. And you have to know that you are going to be faced with that same position, once, twice, maybe many times if you are on the Supreme Court. Does that cause you any apprehension, or do you look forward to that? Have you thought about that?

Judge KENNEDY. It causes me some apprehension, some awe. No jurist, no lawyer, no nominee could aspire to be on the Court that was occupied by Holmes and Brandeis and Cardozo and the two Harlans and Black, not to mention the great Marshall, without some of those feelings.

On the other hand, the very fact that those judges were there and that they wrote what they did gives the Constitution and the

judicial system great strength and great power. It enables the judge to continue to explore for the meaning of the Constitution. That is what I wish to do.

If you had a visitor coming to this country, and he asked: What is it that makes America unique? What is the gift that we have for civilization? What is it that America has done for history? I think most people would say America is committed to the Constitution and to the rule of law. And I have that same commitment.

Senator LEAHY. Thank you, Judge.

Thank you, Mr. Chairman. I would ask unanimous consent that written questions from Senator Simon be submitted on his behalf.

The CHAIRMAN. Without objection.

[Senator Simon's questions appear on p. 739.]

The CHAIRMAN. Senator Humphrey, who has waited patiently. The Senator from New Hampshire.

Senator HUMPHREY. Good morning, Judge Kennedy. I have been patiently waiting, anxiously waiting. I so much enjoy these hearings. This is really what I had in mind when I offered myself as a candidate for the U.S. Senate, this sort of thing. This is what I envisioned, not the passing out of money to the gimme groups, which is our daily fare around here.

These are very interesting hearings. I have found them fascinating. Frankly, I would not mind if we had another three or four after your confirmation, may I say. I would not mind if we had another three or four in the next year. I find these to be so fascinating. That might have a good effect on the court, may I say. I happen to believe that it would.

Fascinating though they are, the hearings do become a little oppressive at times, so I want to begin with a joke which comes at the expense of lawyers. If you have heard this, pretend you have not.

A woman called a law firm and asked for Mr. Smith, who was—I guess it was a man. I beg your pardon. A man called a law firm and asked for one of the senior partners whose name was Mr. Smith. The receptionist said, "Oh, I am very sorry. I guess you have not heard the news. Mr. Smith passed away three months ago."

And the caller said, "I want to talk with Mr. Smith." The receptionist said, "You do not understand. He is dead. He is deceased."

And the caller said, "I want to talk with Mr. Smith." "Sir, he is dead. Don't you understand?"

And the caller said, "Yes, I understand, but I cannot hear it often enough." [Laughter.]

Well, while it is true that we make jokes about lawyers, certainly the profession of the law is very important, and the role of the Supreme Court, the Judiciary, particularly the Supreme Court, is critically important. The Supreme Court is the Super Bowl of the law profession, and you are auditioning, in a way, for a place on the team.

The CHAIRMAN. We will have order in the room. Thank you. I know the joke was funny but \* \* \* [Laughter.]

Senator HUMPHREY. Now, to get down to serious matters, you write your own speeches; is that correct?

Judge KENNEDY. Yes, Senator; for better or worse.