

We do not expect nominees for the Supreme Court, nor do we expect Senators, not to have some negatives. Can you tell us something of those negatives, even though you did not consider them significant enough to make a point.

Judge TYLER. Very simply, Senator Metzenbaum, as always, we encountered a few lawyers who were probably result-oriented as much as anything else. In other words, frequently, with lawyers, it depends on whether or not you and your client won or lost.

Senator METZENBAUM. Never. As a former practicing lawyer, never.

Judge TYLER. I must say, in fairness, though, there were one or two who did say that they thought that in connection with certain appeals which they handled, that he might have gone further in his discussion of the issues, and that sort of thing. But no one suggested, even those who were result-oriented, or quarreled a little bit with the opinions, doubted his integrity or his intellectual ability, and his willingness to try to address the issues in the case and not do any more.

Senator METZENBAUM. Thank you. I want to say that I stand shoulder to shoulder with Senator Kennedy, and many of us on this committee, on this question of judges being a member of a discriminatory club, or clubs. Yet in saying that, I also have to tell you, that I feel somewhat sensitive about the fact that we in the United States Senate act in connection with civil-rights laws, fair-housing laws, equal-employment laws, discriminatory laws with respect to women, and, yet I know that some Members of the United States Senate who are acting in connection with such laws are indeed members of clubs that have discriminatory policies with respect to women, and with respect to minorities.

And so I must tell you that—not that it is specifically relevant, but maybe confession is good for the soul. I am not confessing that I am a member of such a discriminatory club.

But I think that the United States Senate, makes this a very strict criterion in connection with the judicial appointments. I am not sure we turn it around on ourselves, and we probably do not have any opportunity to do that because, in the last analysis, the only people who can judge us are those of our own constituencies.

Whereas, in this case, we, in the Senate, and you, in the ABA, are in a different role. I thought I'd comment on that. I do not need any response from you, but I do feel a sense of sensitivity in this area with respect to our own House. Thank you, Mr. Chairman.

Senator KENNEDY. The Senator from Utah. Senator Hatch.

Senator HATCH. Well, I would like to welcome each of you here, and we appreciate the work that you attempt to do in all of these matters. It is a lot of work, and you do not get much thanks for it, and sometimes you get beaten up pretty badly for it.

And I have been in both positions, where I have thanked you, and also found a great deal of fault.

In looking at what Senators Kennedy and Metzenbaum have drawn your attention to, the Olympic Club, did you consider the fact that Judge Kennedy had resigned from the Del Paso Country Club due to a perception problem over women members, and did you find—if you did look at that—that that illustrated the necessary sensitivity to these problems and issues?

Judge TYLER. That is really why I pushed aside the other three clubs, Senator Hatch. We obviously looked. One of the clubs I, personally—and I think most of my colleagues agreed—really is not a club in the true sense we are discussing this under, say, the heading of canon 2. When you join a athletic club which you pay a fee for, and all members are—as long as they pay the fee—I do not consider that a private club.

The country club was a small place where it turned out—as we found out at least—there were no set policies against minorities or women anyhow. And then of course there was the Sutter Club which he had resigned because he was uncomfortable with what their attitudes were as long ago as seven years ago. That is so.

Senator HATCH. Well, that is good. Part of the point with regard to the Olympic Club is that the real sense of the problem did not even arise until the U.S. Open last summer, is that correct?

Judge TYLER. Well, I think that one could say that is not literally, perhaps, a total answer to the question because they had apparently had policies for many years. What we looked at, though, was the fact that the open tournament sort of brought this problem out in the open, along with the article in the New Yorker Magazine.

We recognize that the Olympic Club is a very large organization. It is not what you would call a small, private kind of affair, and therefore, we thought it was important to inquire deeply, in not only the interview sense, but any other information we could obtain.

But as has been pointed out already, we believe that he was sensitive to the issue when it surfaced, and then he tried to do something about it. Perhaps it could be said he should have been more alert earlier, but we did not think that that was important now, and that is why, among other reasons, we did not think it was a disqualifying factor in connection with his nomination and these hearings.

Senator HATCH. Well, I appreciate that. Now, as I understand it, your committee unanimously rated Judge Kennedy well-qualified which is the highest rating he could be given for the Supreme Court. Is that correct?

Judge TYLER. That is correct.

Senator HATCH. Now my own review of his record has left me with the impression that he will be a fine addition to the Supreme Court, and we have extensively reviewed his record.

But let me just review, for the record, the degree to which your committee did examine Judge Kennedy's background.

For instance, how many federal judges did you interview in your investigation?

Judge TYLER. Well, including State judges, and federal judges, we interviewed a little over three hundred. I would guess—and I have not got the figures right in front of me—that we talked to about 260 federal judges at all levels.

Senator HATCH. I see. Well, that group included members of the Supreme Court as well, is that correct?

Judge TYLER. Yes, sir.

Senator HATCH. As well as district and circuit court judges?

Judge TYLER. Right. That is correct.

Senator HATCH. And you interviewed State court judges as well, generally supreme court chief justices?

Judge TYLER. Generally appellate, high-court judges in the several States. That is correct.

Senator HATCH. All right. And some of those, I take it, were chief judges of the supreme court?

Judge TYLER. That is so.

Senator HATCH. Were the judges that you interviewed basically from the geographical area of the Ninth Federal Circuit, or, were they from all over the country?

Judge TYLER. No. Across the country. Of course we made a special effort to interview Judge Kennedy's colleagues on the ninth circuit.

Senator HATCH. Sure.

Judge TYLER. But we covered the whole countryside.

Senator HATCH. Yes, that is my understanding. How many lawyers did you interview concerning Judge Kennedy?

Judge TYLER. Well, as we say in the letter—but this is sort of a shifting thing because sometimes lawyers' reports come in late. A little over a hundred. We might have done more except that we got such uniformly good reviews on the whole. As I explained to Senator Metzenbaum, we had some minor criticisms, but, uniformly, the reports were so good that we decided that there was no need of just building up the statistics in that area.

Senator HATCH. That is great. I understand, then, that you also interviewed lawyers nationwide, although I am sure you had to interview a lot of lawyers in the area where he is best known?

Judge TYLER. Well, of course the main burden, quite understandably, fell within the ninth circuit, which, as you all know is a large circuit. Mr. Andrews, who is here this morning, and our other ninth circuit member, Samuel Williams—who would have been here except he suffered a serious illness last week, much to our discomfiture—of course spent a lot of time interviewing lawyers who had appeared before a panel of which Judge Kennedy was a member.

Also, our second circuit representative, Mr. Willis of New York City, and I, interviewed lawyers in New York who argued before Judge Kennedy, and they were more or less—as I said to Senator Metzenbaum—very affirmative about him.

Senator HATCH. As I understand it, these included lawyers who had lost cases, as you have stated before?

Judge TYLER. Well, occasionally, they were a little disgruntled, but even they had to recognize that he was a pretty good judge.

Senator HATCH. Sure. How many deans, law professors, and scholars did you interview in reaching your opinion?

Judge TYLER. Slightly in excess of eighty, and my recollection is something like eighty-four.

Senator HATCH. All right. What was the extent of your review of his written opinions?

Judge TYLER. Well, first of all, in the early going, we commenced our work on December 11th, as I said to the Chairman—November 11th, I am sorry. I decided, as Chairman, that we ought to get several law schools involved because of the time problem, and, frankly, because I would like to see as many law schools get involved in

these inquiries because they are very proud and eager to do this work, for which we are eternally grateful, by the way.

Also, as you would well understand, in the ninth circuit, the judges have occasion to hear a number of environmental-law cases of significance beyond the reach of the ninth circuit. I asked the Vermont Law School, which has a very reputable group of environmental-law people, to participate for that reason.

Senator LEAHY. I see that was a good time to come in.

Judge TYLER. Yes. And I hope Senator Leahy will agree with me that they do have this capacity, because they, along with Fordham and Pennsylvania were very useful. But basically, we tried to break the work down so that we would get it done.

The people in my office looked at every opinion of Judge Kennedy. I do not want to say, however, that the people in my office did the kind of analysis that a specialist, say, in the environmental-law field would have done with environmental cases. We did not do it that way.

Senator HATCH. I understand that. You also reviewed opinions where he sat on the panel but did not express a written opinion?

Judge TYLER. Only to a very limited extent.

Senator HATCH. Did you review his speeches and other writings?

Judge TYLER. To the extent we could uncover them, and I think we saw 20 speeches, most of which were—I would call them relatively informal. Those twenty I believe are the same twenty which were delivered to this committee.

Perhaps the most substantive one was the one which has already come up in this hearing, I believe. The one he delivered at Stanford in connection with what I think is called the Stanford-Canadian Program.

Senator HATCH. Well, it is apparent that you have done an exhaustive search, and done an awful lot of work as you do in all of these Supreme Court nominations.

Judge Tyler, during the confirmation hearings on the nomination of Judge Bork, you indicated that action would be taken to prevent breaches of confidentiality by your committee.

Shortly after President Reagan announced his intention to nominate Judge Ginsburg to the Supreme Court, we read commentary in the papers from a member of your committee regarding the problems with that nomination.

Have you attempted to ascertain the source of that breach of confidentiality?

Judge TYLER. I believe I am familiar with the one that—that was not a quotation which, if accurate, was very pleasant.

Senator HATCH. Right.

Judge TYLER. Not just from our internal point of view, but it would certainly, if accurate, give the perception to the public that the speaker had already decided in advance, before we have begun.

Senator HATCH. Right.

Judge TYLER. I can simply say, Senator Hatch, that as a result of that, I called a meeting, had face-to-face conversations with every member of our committee, and some several that could not get there I conferred with separately later, to make it abundantly clear, that aside and apart from our own rule, that only the chairman should respond to press inquiries, that the last thing that any-

body could condone was to have somebody suggest, as a committee member, that he or she had already made up his mind, or her mind, before we even investigated the candidate.

I am happy to say, that as a result, I believe that thought there is the usual dispute as to who said what, I do not think I want to go into that because I think that is unimportant.

We believe that we have—knock on wood—corrected that problem, and that there has been a perception, not only in terms of any particular individual member, but all of us, that this is something where we are duty-bound to continue to struggle to avoid this kind of thing.

I do not want to say that we are perfect—we probably never will be—but I do say that this was—I think at last came home to us all, that whether we like it or not, we have got to be very careful about what we say because it is harmful if we say things like that.

Senator HATCH. Well, I appreciate that. I think that it is crucial that this committee—I mean, you are 15 people who represent hundreds of thousands of lawyers. You are 15 individuals who have your own sets of likes and dislikes, biases and non-biases, and, to the extent that you operate in a totally unbiased way I think you do a terrific job.

And we have seen it through the 11 years I have been here, and I want to compliment you for it. But it is no secret: I was very, very upset about the Bork matter, the way it was handled, the press releases that occurred, the talking to the press, and then to find it happen in Ginsburg just about blew my mind, to be honest with you, and I just have to raise that issue.

But I am not raising it to make your job uncomfortable here today. I just want to make sure that in the future, that that type of breach really does not occur, because to me, that is highly unethical for that to have occurred.

And if there is a member on the committee who still exists there, who did that, I really personally believe that member ought to be removed. But be that as it may, you have satisfied me that you have taken steps, and you are trying to do what is right here, and you will in the future, and there will not be any breaches like this in the future.

Have you given any thought to removing the cloak of anonymity from your proceedings? Now this, I will be frank to tell you, might include making public the credentials and the selection process for committee members, making public the individuals consulted, and making any particular assessment, including informal contacts with friends and political figures, and making public each member's reasons for voting, so that we can really understand that this is a democratic process and not some sort of a secretive process.

Have you given any consideration to that? Because I happen to agree with some of the editorials that have been written, particularly those in the Washington Post, that this would help solve a lot of problems, too.

Judge TYLER. Well, I have to say in all due respect to you, Senator Hatch, and the Washington Post, I firmly disagree. We are, as I said during the course of the hearings in September, a committee, and not just 15 lawyers who are members of some bar association.

As you are well aware, and as my mail continually reminds me, there are individuals in the ABA who do not agree with our committee's work.

Senator HATCH. That is right.

Judge TYLER. And indeed, we do not really speak for the entire membership of the ABA in any event. We are a working committee.

Senator HATCH. That is my point.

Judge TYLER. The operational word is committee, and I, for one, would have resigned summarily if I was just one of 15 people who wandered in here occasionally and gave my personal views on any candidate for appointment to the federal court, because I think it would be a disservice to this committee, the entire Senate, and to the nominating authority.

Who needs me, as an individual, telling this committee what my views are on any candidate? I think that would be monstrously off point.

Second of all, I do not think that I agree with the Washington Post, which has continually said that we never gave any reasons at all, which defies my understanding of the simple language of the report we submitted to this committee in writing, in connection with not only this nomination but the previous nomination.

And third of all, I would point out that we are very hard-working people who have to do our thing as lawyers. We are not full-time public servants. We cannot be exposed in our offices to a camera, or a microscope of every moment, or every conversation we have in doing this work, which I might tell you on the record, consumes at least 400, and often more hours a year, for which we get no compensation at all.

And by the way, in the last 5 months, this committee has processed and reported on more than twice as many nominations to any federal court than in any previous 6 months within recent memory, and that is not to mention the work we did on the nomination of Judge Bork, on the nomination of Judge Ginsburg, and now, the nomination of this candidate.

And I say to you, sir, with great firmness, that I cannot accept, and my committee cannot accept, the constant references that we have been reading about, that we do not tell what we do and that we are operating in secrecy, and therefore in an invidious and unfair manner.

That is a totally baseless, unwarranted accusation, and I cannot understand to this day how this persists. I am perfectly prepared and used to the fact that we will be criticized, depending on what happens.

That has been true in the history of this committee for some 35 years, and we accept that. But to say that we have to have the sunshine laws apply to us, or that we have to individually account, would really turn the whole process, and the work of your committee, sir, on its head.

Senator HATCH. Well, Judge, let me just say this. Excuse me, Mr. Chairman. I just want to make a couple of comments.

I agree with most everything you have said, except the last part, and I have total respect for you, and I think—

Judge TYLER. That is not the point. I understand that.

Senator HATCH. Well, I understand that, but I am just making the point, I have respect for you, and I have chatted with you, and I know that you have tried to do the very best job you can, and it is a very thankless job that you are not paid for, that takes a lot of time that you could be using for many benefits for others.

But let me tell you, in the most firm way I can, too: A lot of us up here were pretty embittered by what happened to Judge Bork, and by the report that occurred with regard to Judge Bork.

And I do not have any problems when the committee completely agrees, unanimously, that a judge is not qualified, or a judge is well-qualified. I do not have any problems with questions. Maybe if he is not qualified, I would, because I think the individual deserves, perhaps, at least a public elucidation as to why he is unqualified rather than just the general statements that normally come out in these hearings.

But let me tell you, when something happens to a judge, like happened to Judge Bork, who 5 years before was given an exceptionally well-qualified rating, and then all of a sudden, 5 years later, after writing better than a 100 opinions that were not reversed, and participating in over 400 that were not reversed, and there were four who—it appears to me, for very partisan, political reasons, did what they did—they ought to have to come in here and explain why they did it.

And I do not care whether they are volunteers in this process, or not. We have to. We are elected, and we face this, and we choose to do this. Well, you do, too.

It just is not fair to these nominees whose whole lives are put on the docket. It just is not fair to them to not have that.

So you and I respectfully disagree on that point, and I will tell you this. If we see another repeat of what happened to Judge Bork, that this Senator is going to do everything in his power to make sure that there will be explanations given in full, fair, and open hearings. Fair to you, fair to the nominee.

And that is regardless of what unpleasantness might occur. I just think it has to be.

Judge TYLER. If I may say so, Senator, I think our difference is not really—

Senator THURMOND. Speak in your microphone. I cannot hear you.

Judge TYLER. Yes. I do not think we are really joining the argument fairly. We are not suggesting, or I am not suggesting that we are being treated unfairly in the sense you have just mentioned. Not at all. We have always been treated courteously.

Senator HATCH. We think so.

Judge TYLER. Where I think our problem is is this: we did our level best to explain why we came out—both the majority and the minority—in respect to Judge Bork. I certainly—

Senator HATCH. You did.

Judge TYLER [continuing]. Do not think that it is fair, therefore, to say that we never explained ourselves. Now it is true, I refused, as you know, to identify who voted which way, and the reasons for that I think I have explained sufficiently for you at least to understand, whether you agree or not.

I think, therefore, what probably is at issue here is, that where we come up and do not come out one way, or the other, unanimously, you seem to feel that that is a difficult problem——

Senator HATCH. It is.

Judge TYLER [continuing]. And I do not quite understand that, because it seems to me, that if we always came out unanimously on everything, you will recall that years ago, this committee was criticized because they always did come out unanimously.

So we are sort of damned if we do, or damned if we do not. I do not understand that argument, frankly.

Senator HATCH. Well, I will tell you why I think it is a good argument. Because I think due process, in these proceedings, literally does require that—yes, you tried to explain what the 15 members had to say, in general, but of course nobody had a chance to hear what the four had to say specifically, and see, that is where the process seemed to break down to me.

And you know, I just think that under those circumstances, the nominee, especially for a position of this type of power and authority, and prestige and capacity, really ought to have the benefit of whether or not there were politics involved, whether or not there was really that good of a consideration involved.

Judge TYLER. You remember, Senator Hatch, that in September, in response to a letter to me as chairperson, from Senator Metz-enbaum, I wrote back saying that, look, we, as a committee, known as the ABA standing committee on the federal judiciary, should not be understood to be coming in and making the judgments that the Senate of the United States is empowered to make, and we certainly are not.

That meant, among other things, that we had no right to tell you when we made our recommendation—whatever it was under our standards—that we were here to endorse a position that you would take in your public role that you performed.

Now that being so, I do not see what good it would do—and indeed, I can see a lot of harm that would be done—realizing that we are not a public group, that we suddenly become 15 separate lawyers who, if we should vote one way as opposed to another, would have to come in here and individually explain ourselves.

I think that would make no sense at all, and I do not see how anybody would want to be a member of this committee. I certainly would not.

The CHAIRMAN. Senator——

Senator HATCH. My time has expired.

The CHAIRMAN. I would like to suggest, in light of the fact that it was raised, that the letter dated September 4th, to Senator Metz-enbaum from Judge Tyler, and a letter dated August 26th to Judge Tyler from Senator Metz-enbaum, be entered in the record at this time.

[Aforementioned letters follow:]