WRITTEN QUESTIONS SUBMITTED BY SENATE MEMBERS AND JUDGE KENNEDY'S ANSWERS

UNITED STATES COURT OF APPEALS
FOR THE
NINTH CIRCUIT

CHAMBERS OF
ANTHONY M. KENNEDY
UNITED STATES CIRCUIT JUDGE

SUITE 1400
555 CAPITOL MALL
SACRAMENTO, CALIFORNIA 95814

January 6, 1988

The Honorable Joseph R. Biden, Jr., Chairman
United States Senate
Committee on the Judiciary
Washington, D.C. 20510-6275

Dear Senator Biden:

Enclosed please find my answers to the written questions from you and Senators Heflin, DeConcini, Simon, and Levin, forwarded to me by your letter of December 18, 1987. Also, I have made the necessary corrections to the transcript of my testimony before your Committee, and I am transmitting those corrections to the appropriate office.

Please let me take this opportunity to thank you and the members of the Committee once again for the many courtesies you have extended to me.

Sincerely,

Anthony M. Kennedy

Enclosures

ANSWERS TO QUESTIONS FROM SENATOR BIDEN

1. If you assume that every right must have a remedy, difficult questions are raised about what it would mean to eliminate the exclusionary rule. If the courts were to decide that the exclusionary rule is not a proper remedy for violations of an individual's Fourth Amendment rights, the courts would then arguably have to provide some other remedy. Putting aside the issue of whether the exclusionary rule should be abolished, do you believe that there must be some alternative remedy for Fourth Amendment violations before the exclusionary rule could be eliminated?

My testimony before the Committee was that society has paid a high price for putting the exclusionary rule in place. The rule is now an important and workable part of the criminal justice system. It is the duty of the Court to ensure that it is administered in a pragmatic and reasonable manner. Transcript of Hearings, December 15, 1987, Afternoon Session. I also stated before the Committee my belief that when the exclusionary rule was created, the courts were concerned that the Fourth Amendment was not being enforced. Transcript of Hearings, December 15, 1987, Afternoon Session. I am aware that some have argued that alternative means for ensuring compliance with the Fourth Amendment could be substituted in place of the exclusionary rule, but I know of no precise proposal submitted by either Congress or the courts to accomplish this.

2. Even if alternative remedies to the exclusionary rule were in place, it is not clear that the rule should necessarily be abolished. It may be that the rule is desirable for other reasons as well -- to deter police misconduct, for example, or to keep the courts from becoming involved in illegal acts.

In his confirmation hearings to be Director of the Federal Bureau of Investigation, William Sessions testified:

> As a judge, I know that the protections afforded by the exclusionary rule are extremely important to fair play, and the proper carrying out of the law enforcement responsibility. . . . And my own belief is, in the role as director of the FBI, that I would encourage a careful review of [the exclusionary rule], and a careful carving out, if there can be exceptions. But, by and large, I am happy with it and the way it is, because I know that as difficult as it is for law enforcement in the courts, that it

protects the rights of citizens and that is important.

It may be that you disagree, at least in part, with Judge Sessions, as you have referred to the "rigidities" of the exclusionary rule in two of your opinions. If there were an alternative remedy in place, would it be proper, in your view, to abolish the exclusionary rule?

Judge Sessions' comments seem generally in accord with the views on the rule that I expressed in answer to your question 1 above, and, in my Committee hearing testimony, particularly in an exchange with Senator Leahy. Transcript of Hearings, December 15, 1987, Afternoon Session.

The exclusionary rule, and the search and seizure protections it secures, must be interpreted in a reasonable, sensible manner. Fourth Amendment principles are basic liberties, but they should not be synonymous with a doctrine of such abstraction that it cannot be implemented in a practical way.

Before the Court could consider any overruling of the exclusionary rule, it would be required to resolve at least two questions. First, the Court would evaluate whether any alternate protections that were offered to replace the exclusionary rule were in fact effective. Second, the Court would consider whether the exclusionary rule, nevertheless, has independent constitutional significance. Respected jurists and commentators have argued that courts become implicated in the violation of a basic constitutional liberty when they rely on tainted evidence. That argument must be carefully considered in any decision affecting the exclusionary rule.

3. You have occasionally been somewhat critical of the way courts have applied the exclusionary rule. In one case, you stated that it may be necessary to "reexamine it altogether," if it "becomes an end in itself." (U.S. v. Harvey.)

These comments are relevant to a debate that has been carried on in the Supreme Court in recent years. Some Justices, such as Justice Brennan, argue that there are strong moral and legal justifications for the exclusionary rule outside of any impact it may have on police behavior. They argue that it is unconstitutional for the courts to accept evidence that was illegally obtained, simply because the courts must have "clean hands," and must not engage in or benefit from illegal conduct.

Other Justices, such as Justice White, reject the notion that the exclusionary rule has a moral force in and of itself. These Justices argue that the only acceptable rationale for the exclusionry rule is if it deters the police from engaging in improper conduct.

Do you believe that there are any acceptable justifications for the exclusionary rule other than deterring improper police conduct?

If you believe that deterrence is the only acceptable rationale, have you found, based on your experience in criminal law cases, that the rule has been successful in influencing police behavior?

I hope that my answers in questions 1 and 2 are sufficient to respond to this question as well. It bears repeating that the exclusionary rule should not become an end in itself in the sense that it becomes unhinged from the real and substantive Fourth Amendment values that it implements and protects. If presented in the context of a concrete dispute before the Court, I will give every consideration to counsels' arguments on potential purposes and justifications for the rule. The rule has been successful in influencing police behavior.

4. Antonia Hernandez, President and General Counsel of the Mexican-American Legal Defense and Education Fund, testified on Wednesday, December 16, that she had considerable concern about your commitment to protecting the civil rights of the Hispanic community. In particular, Ms. Hernandez said:

> . . . I want . . . to go back and to ask Judge Kennedy to give further assurance and clarification as to how he views Hispanics. My concern is that he might not feel that we deserve the same type of protection as the black community and other protected minorities that are protected from civil rights.
>
> I want that assurance. I want to see what he states on the record. I'm also concerned on the issue of women, the AFSCME issue. I'm concerned on the Spangler issue, I'm concerned with the TOPIC issue, and basically the common threat that one sees in those cases is the threat that he . . . kicks people out of court, that he doesn't give them that opportunity. And even when they do win, even when they do satisfy the stringent requirements of a Federal District Judge, that he overturns those decisions.
>
> He is a man of intellect, no question about it; a man of devotion, but he's also a man of the establishment and, unfortunately, we have not been part of that establishment.

And what I want is an expans[ive] consideration of that perception of what America is. (Tr. 12/16/87, at 258-59.)

Please identify those aspects of your record that, in your view, respond to Ms. Hernandez's concerns. In addition, please discuss whether and how the philosophy and approach that you would bring to the Supreme Court, should you be confirmed by the Senate, would be responsive to these concerns.

As a Californian, I have understood for many years that Hispanic people are a vital part of our society and culture, and that their ethnic or minority status should not be used to disadvantage them, either by acts of hostility or acts of passive indifference.

Indifference to the civil rights of Hispanics, women, and other minorities is unacceptable. Hispanic persons are entitled to civil rights protections, in whatever degree is necessary to ensure that they have each and every one of the rights guaranteed to all Americans. In my testimony before the Committee, I stated that "We simply do not have any real freedom if we have discrimination based on race, sex, religion or national origin, and I share that commitment." Transcript of Hearings, December 14, 1987, Afternoon Session. I also stated in my testimony that the Equal Protection Clause applies to all persons: "[t]he amendment by its terms, of course, includes persons, and I think was very deliberately drafted in that respect." Transcript of Hearings, December 14, 1987, Afternoon Session. I stated in my response to the Senate Judiciary Committee Questionnaire that "[c]ompassion, warmth, sensitivity, and an unyielding insistence on justice are the attributes of every good judge." Questionnaire at 54.

I have written or joined various opinions ruling in favor of claims brought by Hispanics, women, and other civil rights claimants. In Flores v. Pierce, 617 F.2d 1386 (9th Cir.), cert. denied, 444 U.S. 875 (1980), I upheld a judgment in favor of Hispanics against municipal officials who had a history of racially motivated activity against Hispanics. In James v. Ball, 613 F.2d 180 (9th Cir. 1980), rev'd, 451 U.S. 355 (1981), a voting rights case, I invoked the one-person, one-vote principle to strike as unconstitutional a state statute that limited voting in elections for directors of an agriculture and power district to landowners, even though a large number of the district's users of water and power were not landowners. In Bates v. Pacific Maritime Ass'n, 744 F.2d 705 (9th Cir. 1984), I upheld an employer's obligations under a Title VII consent decree that required four of each ten new employees be minority group members, by finding that the consent decree applied to the successor employer that had acquired the business. In NLRB v. Apollo Tire Co., 604 F.2d 1180 (9th Cir. 1979) (Kennedy, J., concurring), I concluded that illegal aliens are employees entitled to protection under the

National Labor Relations Act, and stated that "if the [Act] were inapplicable to workers who are illegal aliens, we would leave helpless the very persons who most need protection from exploitative employer practices such as occurred in this case." Id. at 1184. In Lynn v. Western Gillette, Inc., 564 F.2d 1282 (9th Cir. 1977), I wrote an opinion that adopted a broad and generous interpretation of the time period for claimants to bring suit in sex discrimination cases.

The Flores case extensively reviewed evidence of discrimination, including subtle code words for discrimination, such as statements that applications were reviewed for "desirability" of the applicant, that the town involved was "a fine little town," and that it was necessary to keep the town on a "good level." In summarizing the holding of the case, I stated:

> One of the first cases interpreting the equal protection clause stands for the rule, among others, that the effect of a law may be so harsh or adverse in its weight against a particular race that an intent to discriminate is not only a permissible inference but also a necessary one. Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886). In the instant case, the disparate effect of the action on Mexican-Americans was so compelling that the effect may approach, if it does not reach, the demonstration of an intent to discriminate that was made in Yick Wo v. Hopkins. This might be a case where "a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action." Arlington Heights, supra, 429 U.S. at 266, 97 S. Ct. at 564. We need not, however, rely on effect alone, for other evidence suggests a motive or intent to discriminate. It was shown that the defendant city officials deviated from previous procedural patterns, that they adopted an ad hoc method of decision making without reference to fixed standards, that their decision was based in part on reports that referred to explicit racial characteristics, and that they used stereotypic references to individuals from which the trier of fact could infer an intent to disguise a racial animus.

617 F.2d at 1389.

In addition, from 1967 through 1969, I represented a group of Hispanic citizens of the Sacramento area. The group planned to develop a city block in downtown Sacramento as a cultural center and retail complex with emphasis on fostering Hispanic culture and providing opportunities for businesses owned

by Hispanic proprietors. We were successful in obtaining from the Redevelopment Agency of the City of Sacramento development rights for one square block in the downtown area. We incorporated an entity called Plaza de las Flores. After submission of a prospectus, we received a permit from the Commissioner of Corporations of the State of California for a limited public offering to raise the necessary capital. Building costs, interest rates, and other economic factors became unfavorable, and the cultural center was not developed. I devoted over five hundred hours of unpaid legal services to this project, and in the course of it came to know better and understand the aspirations of the Hispanic community in California.

ANSWERS TO QUESTIONS FROM SENATOR DeCONCINI

1. You were quite critical several years ago on the portion of the Judicial Tenure Act dealing with the discipline of judges.

Now that this provision has been in effect for a few years, I would like to know if your feelings about it have changed at all, and whether you feel the independence of the judiciary has diminished?

I am pleased to have the opportunity to comment on my criticism of the original legislative proposal that led to enactment of the Judicial Tenure and Disability Act.

At the 1978 Ninth Circuit Conference, there was considerable concern about the bill in its original form. At the request of the judicial delegation of the Conference, I presented the opposition case in response to a presentation by Leonard Janofsky, then President of the American Bar Association, who spoke in favor of the bill.

In its original form, the bill would have established a national commission, ignoring existing lines of authority within the circuits. The commission would have had authority to remove a judge from office without the necessity of impeachment. My position was that the core of judicial independence would be subverted by either or both of these provisions. I adhere to that view.

As other judges voiced similar opposition and were prepared to testify against the bill, I took no part in any later discussions or hearings on the bill. The two principal features that I had criticized were eliminated from the enacted measure.

The Act in its present form was adopted in 1980. I have not had extensive contact with it. I did suggest that the Ninth Circuit should draft rules to implement the Act, and I participated in that project. Our rules were sent to other circuits for study and were considered by the Judicial Conference of the United States in its recommendations for uniform rules. I have received reports from time to time from our Chief Judge and from the Assistant Circuit Executive charged with administering the Act. We have had two serious cases, one involving a non-Article III judge and one involving an Article III judge. In both of these matters, I was either off the Circuit Council on rotation or recused.

Over the last decade, I have observed that federal judges are becoming more conscious of their responsibility to explain and clarify judicial procedures to the public and are becoming more conscious, too, that the perception of fairness, as

well as the fact of it, is essential in any judicial system. This growing sensitivity reflects several factors, including heightened awareness of the duty of all officials to be accountable to the public; effective use of the Circuit Conference to exchange views between the bench and the bar regarding attitude, temperament, and performance of judges; and the institution, through the Circuit Conference, of procedures for individual judges to take surveys and use other techniques for self-evaluation. These matters are difficult to measure, but I tend to think this change in attitude would have come about without passage of the Act. Nevertheless, the provisions of the Act fit well within this framework.

My own assessment is that in the Ninth Circuit the experience under the Act has been good. The Act provides an avenue for lawyers or litigants to express criticism or grievances. This has value in itself, both as a safety valve and as a basis for us to evaluate our performance. In this circuit, a copy of any complaint goes immediately to the judge concerned. Many of the complaints are frivolous, but, even so, the existence of a misunderstanding or dissatisfaction is significant for the judge involved.

2. Do you believe that there are any specific areas of the Act which require refinement? This is, of course, assuming that the Act will remain in force. If your answer is yes, what suggestions would you have for improving this Act?

I have not studied the Act at great length and have no specific suggestions for amendment or refinement. Question 2 is broad, so please note my failure to suggest amendments should not be understood as saying the Act is valid in its various potential applications.

3. Judge Kennedy, if your opinion of the Judicial Tenure Act has not changed in the last seven years, what alternatives would you offer in replacement of the Act?

Pending further study, I would not recommend repeal of the Act as it exists or an alternative to replace it.

4. In your opinion, do you believe the implementation of the Act has had any positive effect on the judiciary? Has there been any negative effect on the judiciary since adoption of the Act?

I drafted my answers to questions 1 and 2 to be responsive to this question as well. I have noted the positive effects, though it is difficult to measure how many are directly attributable to the Act. I see no negative effects, except that the Act should not be a precedent for interference with judicial independence in the guise of imposing further disciplinary procedures.

5. Judge Kennedy, I am curious as to how you feel this legislation would undermine the independence of the judiciary when it does not take any authority away from the judiciary. The legislation merely provides a process through which the judiciary may police itself.

You have stated that this legislation will pit judge against judge. Even if this occurs, how would this amount to an undermining of judicial independence?

Since the Act would promote the integrity and moral behavior of judges, wouldn't the independence of the judiciary viz-a-viz the legislative and executive branches actually be strengthened?

As indicated, my opposition to the legislation was in its original form, and not as it is now on the books.

I respectfully submit my 1978 comment that we must be careful not to pit judge against judge remains valid. A federal judge is independent not only from other branches of the government, but also from other judges within the judiciary, subject to review and correction of his or her judgments in the ordinary course and to routine administrative control. Legislation that puts disciplinary power in the hands of judges can be just as corrosive of judicial independence as legislation that puts disciplinary powers in the political branches. A decision in favor of an unpopular cause can make the judge unpopular with his or her colleagues, as well as with the public. That judge deserves protection. Judicial independence has an individual aspect, as well as an institutional one.

Finally, the suggestion that a statute enhances independence because it promotes integrity and moral behavior is unavailing, especially if offered as a blanket justification for proposals of the incursive kind I criticized in 1978. In that context, the argument proves too much. Separation of powers is an essential element of the constitutional design. The lesson of history is that structural integrity of the separate branches preserves the constitutional balance. A breach of the structure undermines that balance, whatever the motive. Judicial independence may be lost beyond restoration if it is compromised, even for the best of motives. It is my hope that Congress will continue to review the Act we are discussing in this series of

questions, and that it will give all deference to the proposition that structural independence of the judiciary is one of the surest protections of our constitutional freedoms.

6. Judge Kennedy, let us assume that your criticisms of the Judicial Tenure Act are right on target.

Do you feel that the impeachment process, the primary constitutional policing mechanism on the judiciary, can sufficiently redress all instances of judicial misconduct, given the time and other practical restraints which are inherent in the impeachment process?

If you respond in the negative, then how do you propose that we fill this void?

Recent events reaffirm that sufficiently serious misconduct by a federal judge may result in the judge's impeachment. Although impeachment is a somewhat cumbersome process, it retains its vitality.

In my view, judicial independence is best preserved if the impeachment process is the sole mechanism to remove federal judges. The Framers insisted on judicial independence as a necessary component of the elaborate and delicately-balanced constitutional system they devised, and impeachment was the device that the Framers provided to hold judges accountable for their misconduct. I urge this as a matter of policy and do not thereby intend to express an opinion on constitutional interpretation.

ANSWERS TO QUESTIONS FROM SENATOR HEFLIN

1. Judge Kennedy, would you please elaborate on your views of the incorporation doctrine? Do you believe that the authors of the due process clause intended to apply the Bill of Rights against the states, as well as the Federal government? Do you accept the Supreme Court's rulings in this area as settled law?

In 1925, in Gitlow v. New York, 268 U.S. 652 (1925), the Supreme Court announced that it would assume that the First Amendment right of free speech was encompassed within the word "liberty" of the due process clause of the Fourteenth Amendment. The Supreme Court has since held that many of the provisions of the Bill of Rights apply to the states by incorporation through the Fourteenth Amendment. In so doing, the Court has been careful to reject the argument, made most notably by the late Justice Black, that the Bill of Rights is applicable in its entirety to the states. I have not formed any conclusive views on this point; and the question whether certain provisions should be applied to the states (the civil jury trial guarantee of the Seventh Amendment, for example) may still come before the Court. Accordingly, while the incorporation doctrine is a central tenet of constitutional law, its application in discrete instances is still open to explanation and refinement.

2. Judge Kennedy, as you know, Section 2 of Article III refers to the appellate jurisdiction of the United States Supreme Court, and has the exceptions and regulations clause contained therein. Would you set forth your views on whether Congress could strip the Supreme Court or the lower federal courts of jurisdiction pertaining to a particular subject matter such as school prayer?

The scope of congressional power under the exceptions and regulations clause has been a subject of debate since the inception of the federal judicial system under the Constitution. While the power conferred in Congress is undoubtedly significant, its limits must await a case by case determination.

As a general matter, it appears to me that there are serious questions whether Congress is authorized to constrain the jurisdiction of the Supreme Court to determine issues of federal law or constitutional rights. Under the tripartite scheme of government established by the Constitution, the Supreme Court is generally regarded as the ultimate arbiter of the meaning of federal law and rights conferred on individuals by the Constitution. There would be grave constitutional questions concerning whether the exceptions and regulations clause gives

Congress the power to divest the Supreme Court of jurisdiction to hear cases involving school prayer if the effect were to strip the Court of jurisdiction to determine rights under the First Amendment.

This is a distinct question from the power of Congress to alter the diversity jurisdiction of the federal courts. I have suggested that in order to reduce the heavy caseload of the federal courts, Congress may wish to consider excluding certain classes of diversity cases, such as auto accident cases.

Please refer also to my answers to Senator Simon's written questions on this point.

ANSWERS TO QUESTIONS FROM SENATOR SIMON

1. I would like your views on one of my favorite quotations from Justice Harlan. He said, "Liberty is not a series of isolated points pricked out in terms of the taking of property, the freedom of speech, press, and religion. It is a rational continuum which, broadly speaking, includes a freedom from all substantial, arbitrary impositions and purposeless restraints." What do you believe should be the Supreme Court's role in advancing that continuum?

As I stated in a response to a question of Senator Biden on December 14, 1987, there is a zone of liberty, a zone of protection for the individual. A line is drawn, and the individual can tell the government that beyond the line it may not go. The Supreme Court's role is to determine where that line is drawn and to determine what principles are to be used in defining the protections contained within the zone of liberty. Transcript of Hearings, December 14, 1987, Afternoon Session. Those principles must be based on an objective application of the Constitution.

Incidentally, I too admire Justice Harlan, whose words you quote.

2. Judge Kennedy, I had an exchange with Judge Bork during the hearings on his nomination that helped crystallize for me the differences in our philosophy. I don't assume you necessarily share Judge Bork's views, but I would like your comments on our discussion.

In a speech Bork had stated, "what a court adds to one person's constitutional rights, it subtracts from the rights of others." I asked Judge Bork about that statement, and he told me, "I think it's a matter of plain arithmetic." Now, as I told Judge Bork, "I have long thought it to be fundamental in our society that when you expand the liberty of any of us, you expand the liberty of all of us." Please comment.

As a philosophic and legal proposition, I agree with your statement that ". . . in our society . . . when you expand the liberty of any of us, you expand the liberty of all of us." Our constitutional history is replete with examples of cases in which the Supreme Court has held that the liberty provided in the Constitution extends to a particular action or right asserted by a person; and, as a result, all of our freedoms have been enhanced.

I think there is universal agreement that liberties are not absolutes which must necessarily supersede all competing interests. In an appropriate case where the rights of others are implicated, the authority of the legislature to regulate begins to come in play. For example, the constitutional right to travel does not necessarily include the right to trespass on the property of another, and the right of free speech does not permit a person in every instance to defame another.

3. My father was a Lutheran minister, and I understand the yearnings that some people have for values. But while I believe that there are some things government can do well, there are also things government cannot do well, like promote religion. I think it is important to respect our constitutional tradition of separation of church and state. The system that has evolved is basically very healthy for both government and religion.

In 1968 in a publication of the students of the McGeorge Law School, you were asked how you would like the law reformed in your field, constitutional law. Among other things you stated:

> "And the Court should leave room for some expressions of religion in state-operated places. There should be a place for some religious experience in schools, for a Christmas tree in a public housing center."

Is this still your view? Could you elaborate? What principles would you use in deciding what religious expressions should be permitted state sponsorship?

As I told Senator Heflin in response to a similar question about that article, the law would be an impoverished subject if my views had not changed over twenty years. Transcript of Hearings, December 14, 1987, Afternoon Session. As a circuit judge, I have not had an opportunity to address Establishment Clause questions in depth. I have no fixed views on the subject, and I would not now necessarily endorse all of the views in the article you quote.

As I understand the Establishment Clause, which, among other protections, prohibits the government from either advancing or inhibiting religion, it can work at counter purposes with the Free Exercise Clause. The classic example is government's determination whether to furnish a chaplain to soldiers stationed on a military base. If the government does supply a chaplain, it is in a sense advancing religion; if it does not, one could argue that it is inhibiting the free exercise of religion. Transcript of Hearings, December 14, 1987, Afternoon Session.

This is a complicated area of the law, and the decisions are difficult to reconcile. The Supreme Court has relied on the historic practices of the people of the United States for guidance in interpreting the Establishment Clause, and this approach is helpful, although not necessarily conclusive. I recognize that the Establishment and Free Exercise Clauses are fundamental precepts of American constitutional law. Transcript of Hearings, December 14, 1987, Afternoon Session. The framers of the Bill of Rights, as well as the framers of the main body of the Constitution, recognized these principles in explicit terms. U.S. Const. art. VI, cl. 3; U.S. Const. amend. I. I will endeavor to decide how these constitutional provisions should be implemented by an objective application of the text and purpose of the Framers in light of the Supreme Court's precedents.

4. In answer to a question from Senator Thurmond yesterday, you suggested that one way to reduce the workload of the federal courts would be for Congress to exclude certain kinds of cases from federal court jurisdiction. Legislation to remove various kinds of cases -- school prayer, abortion, busing to remedy segregated schools --- from the Supreme Court and other federal jurisdiction has been introduced and is pending in the Subcommittee on the Constitution, which I chair. These bills have proven to be highly controversial. In what kind of cases do you think Congress should consider eliminating federal jurisdiction? What Constitutional problems might that pose?

In view of your interpretation, it is most important to clarify my response.

I did not intend to suggest that it is constitutional for Congress to limit jurisdiction in a class of cases based on the constitutional or federal issues presented. In fact, I suggested at one point in my testimony that Congress should not take that step without serious consideration of the grave constitutional questions it would present. Transcript of Hearings, December 14, 1987, Afternoon Session.

My answer to Senator Thurmond was in the context of diversity cases. For some years, those who study the federal system have been concerned that the heavy workload of the courts may have an adverse affect on the continued efficiency of the federal courts in the interpretation and enforcement of federal law. One solution offered over the years is to eliminate or curtail diversity jurisdiction. I suggested in my testimony that rather than increasing the jurisdictional amount in diversity cases, a proposal that has its own set of problems, Congress could consider changing diversity jurisdiction to exclude certain classes of diversity cases, e.g. auto accident cases. Transcript of Hearings, December 14, 1987, Afternoon Session. I do not necessarily endorse this without further study; the comment was to suggest an approach for further consideration by Congress.

Please refer also to my answers to Senator Heflin's written questions on this point.

5. Last August, in a panel discussion at the Ninth Circuit Judicial Conference in Hawaii you addressed what you called the "unwritten constitution," which you defined as "our ethical culture, our shared beliefs, our common vision, and in this country, the unwritten constitution counsels the morality of restraint."

There have been times, however, when the shared beliefs or common vision of the majority have resulted in the deprivation of rights of minorities, such as the belief that whites and blacks should not have access to the same restaurants or seats in a bus or public schools, or that Japanese-Americans should be removed to internment camps.

When do you believe it is appropriate for courts to intervene in opposition to widely shared beliefs?

Some of the most significant cases in the history of the Court are those in which the Court protected minorities from laws enacted by a majority insensitive to their rights and liberties. Indeed, those are the instances in which rights and liberties are most endangered. This is the very protection that the judiciary exists to provide. The highest duty of a judge is to use the full extent of his or her power where a minority group or even a single person is being denied the rights and protections of the Constitution.

The unwritten Constitution I refer to consists of additional commitments to liberty and freedom, not ideas or sentiments which undercut it. There are about 160 written Constitutions throughout the world; but in few of those societies do any real protections for life or liberty exist. Americans, on the other hand, have a commitment to the rule of law and to the idea that we are all bound to respect the rights of others. This underpinning of our Constitution is a great heritage that ensures our written Constitution is a living reality, not, in Madison's phrase, a mere "parchment barrier."

6. During that same panel discussion, you stated that "a principled theory of constitutional interpretation necessarily requires that there must be some demonstrated historical link between the rule being advanced in the court and the announced declarations and language of the framers." You have previously acknowledged that there are some "spacious" terms in the Constitution, phrases like "liberty," "equal protection," and "due process."

How does the doctrine of original intent relate to these spacious phrases?

In an extended series of exchanges with Senator Specter, I maintained that specific intent of the framers, that is to say their actual thought process, is not an adequate basis for interpreting the Constitution. Transcript of Hearings, December 15, 1987, Morning and Afternoon Sessions.

The framers chose their words with great care. Those words have an objective meaning that we should ascertain from the perspective of history and our constitutional experience. The words of the Constitution, their objective meaning, and the official consequence of their enactment as a constitutional rule, are the principal guides to constitutional interpretation. This said, please permit me to underscore my earlier statements that I do not have a unitary or grand design of constitutional interpretation.

7. Judge Kennedy, I have reviewed a number of your decisions on voting rights matters. When I was an Illinois state legislator in the 1960's I observed the dramatic changes in many of our state legislatures brought on by the U.S. Supreme Court's decisions applying the "one person, one vote" doctrine. I was pleased to note, therefore, that one of your opinions extended that principle to a state agriculture district and reversed a district court which permitted a voting plan limited to landowners. (James v. Ball, 613 F.2d 180). However, your decision in Aranda v. Van Sickle, 600 F.2d 1267 (1979), troubles me. There, you concurred in a decision which threw out a class action lawsuit alleging voting discrimination against Mexican-Americans in San Fernando, California. You examined the record of only three Hispanics elected to the City Council in sixty-five years, almost no Hispanics appointed to municipal posts, low voter registration levels, and, for those Hispanics who did go to the polls or observed the proceedings there, evidence of harassment and discriminatory placement of voting machines in white homes. You affirmed the district court's opinion ascribing the lack of Hispanic participation in politics and municipal jobs to apathy, low education and high unemployment, not discrimination. I am disappointed by this. Can you share with me your reasons for not letting these plaintiffs go to trial? Also, on the issue of standing generally, in what cases have you ruled in favor of civil rights plaintiffs?

I discussed at length my concurring decision in the case of Aranda v. Van Sickle, 600 F.2d 1267 (9th Cir. 1979), cert. denied, 446 U.S. 951 (1980), in response to questions by Senators Kennedy, Metzenbaum, and Specter. Transcript of Hearings, December 15, 1987, Morning and Afternoon Sessions. I respectfully refer you to those remarks as a detailed answer to your first

question. In essence, my separate opinion in that case indicates that the relief sought exceeded the actual injury alleged. As I understood the law and precedents then existing, the framework of the suit established by the plaintiffs justified the grant of summary judgment against the plaintiffs on the pleadings before us. Legislative enactments since that decision might change the result.

For me the case was, and remains, a close and troubling one. The point of the concurrence was to disassociate myself from the reasoning of the district court and my colleagues. My concern with the language and reasoning of both the district court and the majority opinion in the court of appeals prompted me to write the separate concurrence to underscore that there was evidence of discrimination that these other judges overlooked. I said:

> To conclude that the plaintiffs' evidence could not justify striking down the at-large election system does not, in my view, necessarily mean that plaintiffs may not be entitled to some relief. For example, plaintiffs' statistics regarding placement of polling places in private homes, few of which are Spanish-surnamed or located in the barrio, might be sufficient to withstand a summary judgment motion in a lawsuit seeking to have some of the city's polling places located in the Mexican-American community. Similarly, although a minority group does not have a constitutional right to proportional appointments on municipal commissions, the plaintiffs' showing in this case regarding Mexican-American representation of city commissions might, after further examination, justify a remedial requirement of increased consideration and/or appointment of Mexican-Americans to such bodies.

600 F.2d 1279. The concurrence argues that the injuries alleged by the plaintiffs would be sufficient for a trial on the merits if appropriate relief had been sought.

You further ask, "on the issue of standing generally, in what cases have [I] ruled in favor of civil rights plaintiffs." While not a traditional civil rights case, in Chadha v. INS, 634 F.2d 408 (9th Cir. 1980), aff'd, 462 U.S. 919 (1981), I wrote a majority opinion holding that an alien facing deportation proceedings had standing to challenge the underlying statutory scheme. Also, in Graham v. Deukmejian, 713 F.2d 518 (9th Cir. 1983), I joined in a majority opinion recognizing standing for Jehovah's Witnesses who challenged actions by the State of California. It was alleged that the state was interfering with physicians who acceded to the plaintiffs' religious preferences in performing certain medical operations.

8. In Gladstone Realtors v. Bellwood, 441 U.S. 91 (1979), Justice Powell in a case from a different circuit cited nine federal circuit decisions which differed from your decision in TOPIC v. Circle Realty, 532 F.2d 1273 (1976). Justice Powell pointed out that "[m]ost federal courts that have considered the issue agree that section 810 and 812 provide parallel remedies to precisely the same prospective plaintiffs. . . the notable exception is the Ninth Circuit TOPIC v. Circle Realty." (citation omitted): Gladstone at 108. Justice Powell concluded, "[T]he Court of Appeals in this case correctly declined to follow TOPIC. Standing under section 812, like that under section 810, is 'as broad as is permitted by Article III of the Constitution.'" Id. at 109.

I know that Senator Kennedy discussed this case with you yesterday and I do not wish to belabor it. However, I was left a little dissatisfied with your answer. I want a Supreme Court Justice who leads on civil rights and does not arrive at the correct position years later. At this point, I am confident that you are a forward-looking individual. However, in this case you chose to interpret the Fair Housing Act narrowly. Don't you believe that it is important that civil rights statutes be read to encompass rights rather than dispense with them without a hearing on the merits of a claim?

It remains a fundamental precept of the judicial process that jurisdictional and procedural requirements must be satisfied before courts are empowered to adjudicate disputes, and this principle is, of course, applicable to civil rights cases.

In TOPIC v. Circle Realty, 532 F.2d 1273 (9th Cir.), cert. denied, 429 U.S. 859 (1976), the first question addressed was whether, as a matter of law, the plaintiffs could assert a violation of a statutory right. The Act contained two different sections with jurisdictional grants. The case turned on a jurisdictional section that had not yet been interpreted. The opinion I wrote for a unanimous panel held that the claims under this section could not be addressed in court without first being submitted to the agency that Congress had created for enforcement of the Act. As shown by our experience with voting rights, agency action is sometimes more effective than court action as a remedy for system-wide deprivations of rights. The TOPIC opinion interpreted the statutory provision as requiring plaintiffs to apply first to the administrative agency for relief. The opinion did not, therefore, hold that the plaintiffs could not secure judicial relief at any point.

Three years later the Supreme Court interpreted the statute differently. Incidentally, Justice Powell found there were district court decisions on point, not circuit court opinions. As I told the Committee, I respect the Court's decision

without reservation. Transcript of Hearings, December 15, 1987, Afternoon Session.

I am in full agreement that civil rights statutes should be read in a fair and common sense way to encompass each and every one of the concerns to which they are addressed. I agree with the premise implicit in your question that the civil rights statutes should not be interpreted in a grudging, timorous, or unrealistic way to defeat congressional intent or to delay remedies necessary to afford full protection of the law to persons deprived of their rights.

9. One of the most critical factors in my evaluation of a Supreme Court nominee is that individual's sensitivity to women's rights. Over my lifetime I have seen much needed progress made in this area. Much of the progress is due to the willingness of the Supreme Court Justices to move this country in the right direction. For example, in 1971 the Court in the landmark decision of Reed v. Reed held that because women have been the subject of unreasonable prejudices, laws affecting such groups must be given very careful scrutiny. Courts in evaluating laws which treat women differently than men must determine not if there is a rational basis for this difference, but rather if the difference is substantially related to an important government interest. I question whether Judge Bork was sensitive enough to the need for heightened scrutiny in this area. In reviewing your record I am pleased to see that you have correctly described the test that should be applied in sex discrimination cases. However, I am a concerned about your application of the test. Therefore, I would like to know what is your view of the appropriate test for deciding sex discrimination cases under the 14th Amendment, and can you cite any example of cases in which you have applied it appropriately?

The law in this area is in a state of evolution and flux, but the Court's general trend is a plausible and a rational way to implement the Equal Protection Clause. It will require more cases to ascertain whether or not the heightened scrutiny standard is sufficient to protect the rights of women. I have not specifically addressed this question in any case that has come before me as a circuit judge.

10. If we are to eliminate sex discrimination we must get away from commonly held beliefs about the "proper" role of women in society. Only when we evaluate people as individuals, rather than as members of groups, will women achieve equality. I have noticed in your decisions an apparent willingness to look to custom and tradition in deciding sex discrimination cases. For example, in 1982 in Gerdom v. Continental Airlines you disagreed with the majority's decision that weight requirement for female flight attendants was discriminatory on its face. Instead you

supported the argument that customer preferences for attractive women was reasonable. It concerns me that you would consider these customer preferences, which smack of prejudice, to be an appropriate criteria. Could you comment upon the role you feel custom and tradition should play in reviewing sex discrimination cases?

In Gerdom v. Continental Airlines, 692 F.2d 602 (9th Cir. 1982), cert. dismissed, 460 U.S. 1074 (1983), I joined in a dissent from an en banc decision finding the airline liable for discrimination on the basis of sex because the airline's policy required flight hostesses to comply with strict weight requirements as a condition of employment. The majority found that the plaintiffs had made out a cause of action under the disparate treatment theory. The dissenters maintained that liability under the disparate treatment theory should not be imposed automatically. The dissent noted the failure of the district court to develop a record regarding the airline's contention that the regulation affected different classes of women and that women were not being treated differently from men. The dissent wanted the facts established to better answer the very concerns which underlie your questions. The dissenters did not suggest, and I would not have subscribed to a suggestion, that custom and tradition could form the basis for legitimate employment criteria if those criteria were used as a pretext to discriminate on the basis of sex.

11. In one of your decisions, you write that "indifference to personal liberty is but the precursor of the state's hostility to it" (U.S. v. Penn, 647 F.2d at 899). I agree with that statement. It was made in a case where the personal liberty at stake was the traditional parent-child relationship and you felt strongly that it should be protected. Serious concerns have been raised, however, about your decisions concerning liberty and equality in other areas -- particularly in cases where women seek to protect their rights to pursue jobs and equal pay beyond the traditional parent-child relationship. Do you believe that indifference to personal liberty is but the precursor of the state's hostility to it when it comes to equal rights for women? How do your decisions and opinions show that?

I agree that indifference to the rights of women to obtain employment and to receive equal pay for equal work is unacceptable, and, more generally, that active hostility can follow indifference in cases involving women's rights, just as with other liberties.

In my testimony before the Senate Judiciary Committee on December 14, 1987, I stated that "We simply do not have any real freedom if we have discrimination based on race, sex, religion, or national origin, and I share that commitment." Transcript of

Hearings, December 14, 1987, Afternoon Session. I also stated in my testimony that the Equal Protection Clause applies to all persons: "the amendment by its terms, of course, includes persons, and I think was very deliberately drafted in that respect." Transcript of Hearings, December 14, 1987, Afternoon Session. I stated in my responses to the Senate Judiciary Committee questionnaire that "[c]ompassion, warmth, sensitivity, and an unyielding insistence on justice are the attributes of every good judge." Questionnaire at 54.

While I have been involved in only a limited number of cases concerning the rights of women, I have written or joined various opinions ruling in favor of claims brought by women. For instance, in Lynn v. Western Gillette, Inc., 564 F.2d 1282 (9th Cir. 1977), I wrote an opinion that adopted a broad and generous interpretation of the time period for claimants to bring suit in sex discrimination cases. Also, in Morrill v. United States, 821 F.2d 1426 (9th Cir. 1987) (per curiam), I joined an opinion permitting a rape victim to bring an action for damages against the federal government under the Federal Tort Claims Act for its negligent supervision of the rapist, a military enlisted man.

12. I believe a Supreme Court Justice must demonstrate a sensitivity to individual rights and liberties. Indeed what distinguishes this country from others is our commitment to individual freedom. The individual rights recognized by the Supreme Court are extremely important to the progress of our nation. In choosing a new Supreme Court Justice I am looking for someone who would not jeopardize the precision gains that have been made, and who would further the development of these Constitutional rights. Thus, I was pleased to see that in two of your Fourth Amendment opinions upholding the exclusion of evidence, U.S. v. Penn, 647 F.2d 876 and U.S. v. Cameron, 538 F.2d 254 you have relied heavily, and with considerable conviction on the importance of the privacy interests invaded -- focusing in Penn on the sanctity of the parent-child relationship and in Cameron on the intrusiveness of that rectal search.

What relationship, if any is there between your protectiveness of these rights in the context of the Fourth Amendment and your views regarding a generalized right of privacy in non-criminal areas?

As your question indicates, the Fourth Amendment protects certain privacy interests of individuals. And, as I have indicated in my testimony to the Committee, I believe that the liberty protected by the Fifth and Fourteenth Amendments includes protection for the value that we call privacy. Transcript of Hearings, December 15, 1987, Morning Session. Both the holdings and the reasoning of the Fourth Amendment cases you cite can be instructive in determining the rights of individuals in the civil context. The Supreme Court's jurisprudence on the right to

privacy may be still in the early stage of evolution, and I have no fixed view or overriding theory about the full scope of the right to privacy. Transcript of Hearings, December 15, 1987, Morning Session. I can assure you that I will interpret and apply the Constitution in accordance with the general judicial approach that I have described to the Committee, regardless of whether a given constitutional claim arises under the Fourth, Fifth, or Fourteenth Amendments.

13. I am a member of the Subcommittee on Immigration and Refugee Affairs and I have found that policy area to be among the most challenging ones in the Senate. I have examined your decisions and speeches concerning immigration. If you are confirmed by the Senate, you will bring to the Supreme Court more experience in this area than the other Justices did. In the Apollo Tire case you enforced an NLRB decision granting labor law protections to undocumented immigrant workers and wrote that doing otherwise "would leave helpless the very persons who most need protection from exploitative employer practices." NLRB v. Apollo Co., Inc., 604 F.2d 1187 (1979). The Supreme Court accepted this expansive protection five years later in Sure-Tan v. NLRB, 467 U.S. 883 (1984). However, in a 1984 Rotary Club speech you seemed to question the expansion of asylum claims when you said, "Asylum formerly was thought of as the right of a sovereign state to protect the alien, but now is viewed as a personal right of the alien to protect his or her own life and property." Finally, before the Barristers Club of Sacramento in 1985 you stated, "If we do not announce supportable, workable, and doctrinally consistent principles in the area of immigration law, our court could be the subject for harsh and legitimate criticism."

Please explain for me what doctrinal principles you would favor and of what type and from what sectors criticism would result if your approach were not adopted.

As I have testified, I have not developed a comprehensive theory of law or a system of principles to be applied to every case that I have to decide. Transcript of Hearings, December 15, 1987, Morning Session. Likewise, I have no set doctrine to be applied to immigration cases.

Immigration cases are difficult. The individual alien before the court has often done nothing more than what all of our ancestors did: travelled to this land in search of a better life. As with any case, a judge must examine with care the facts of the case, the text and history of the applicable laws, and any applicable precedent.

The myriad factual permutations of immigration cases make it difficult to formulate consistent doctrinal rules. Consistent rules are required, however, if the courts are to apply the law in a fair and evenhanded way. They are also necessary if

we are to give adequate guidance to the district courts and agencies. In my remarks to the Barristers Club in 1985, I was stressing the necessity for the many panels of the Ninth Circuit to develop cohesive doctrinal rules for immigration matters. If courts appear to be using unprincipled and inconsistent rules in any area of law, they will be subject to legitimate criticism from the various sectors of our society which are interested in their decisions.

The 1984 Rotary Club speech passage you cite was not intended to suggest that asylum claims should not be recognized or protected in a generous way. I used the example of the developing law of asylum as merely one facet of the emerging impact that human rights principles are having on immigration law.

The traditional approach to asylum has been shifted by recent Congressional enactments. It is apparent that a new dimension to the right of asylum has been added, one personal to the persecuted individual. The example was used to show that the law has changed to recognize political and social persecution to which we once were somewhat oblivious and to extend protection to persons who suffer from such persecution. The passage was offered in an historical context, not a critical one.

14. Judge Kennedy, I note in your written response to the Committee questionnaire that as a judge you have made 35 appointments of clerks to serve in your court. Of those, five were women and one was a minority, an Asian American. I know that the law schools in California where you sit probably have the highest percentage of minority law students in the country. I am not a lawyer but my wife and daughter are so I know that appellate court clerkships are usually a prerequisite for Supreme Court clerkships and often lead new law students to the track of academic positions and eventually judgeships of their own. I would like for you to discuss your hiring procedures, where you look for clerkships candidates, and any particular reason why you have never had a Hispanic or a Black law school graduate as one of your clerks?

At the outset, to the extent the question expresses a view that women and members of minority races should be represented in full strength in all spheres of the legal profession, I endorse the view without reservation. I am pleased that my female clerks, no less than my male clerks, have gone on to distinguish themselves as lawyers in government service, academia, and private practice. In one recent year, two of my three law clerks were women. As stated in my answers to questions at these hearings, arbitrary barriers that prevent women and racial minorities from achieving their full potential, in the legal profession or in any other occupation, have no place in today's society. Transcript of Hearings, December 15, 1987, Afternoon Session.

I do not look for clerks, or encourage applications, from any particular area of the country, or from any particular law school. Two of my clerks have been nationals of a foreign country. Every year, we receive somewhere between 100 and 200 applications for clerkships, from all over the country, and from a great number of law schools. My law clerks go through the applications initially to identify the candidates with superior academic records and recommendations. We offer interviews either by me or by a former clerk who lives in the applicant's area of the country, or both. We impose no ideological test and no barriers based on race, religion, sex, or ethnic background.

It is important to encourage more minority persons to attend law school, to enter the legal profession, and to begin their career as clerks. I welcome the opportunity to hire black and Hispanic clerks, as well as women, and will continue my attempts to do so while I remain a member of the federal judiciary.

15. Throughout my years of public service, America has become increasingly aware and concerned about the problems facing seniors. Issues like health care and mandatory retirement will become even more important during your years on the bench. I was certainly pleased to see your sensitivity to rights of the elderly in Simpson v. Providence Washington Insurance Group. As a legislator, I know that we in Congress have a tough job ahead to ensure that seniors are protected. What role do you think the Judiciary can play in advancing these same interests?

Our society as a whole is becoming more sensitive to the problems of the elderly, and the members of the judiciary should share in this growing awareness. The increasing number of elderly persons in our society will present new problems and legal categories should evolve to address them. I will be vigilant to enforce congressional statutes for the elderly and to ensure that the rights and claims of the elderly have full recognition in our decisional law.

16. In your October 1987 speech to the Sacramento Rotary Club you warn that we "will lose our freedom if we do not remain committed to the constitutional process, to ensure its adaption to the various crises of human affairs."

If you are confirmed as a member of the Supreme Court, you will no doubt be asked to address such crises and to protect our civil liberties. In those cases, it may be necessary for you to take an unpopular position and go against public opinion as well as the government.

As an example we can look to the 1942 decision of the Court on the internment of Japanese Americans. Although I was only a boy at that time, I remember that my father was one of the few people who publicly expressed his opposition to the internment. Even the Court gave in to the prevailing public hysteria and failed to protect the rights of these American citizens.

If you are in a situation where your interpretation of the Constitution demands that you make a very unpopular decision, is your personal constitution of such a nature that you can make such a decision and disregard public opinion? Are you willing to go all the way to preserve our freedom?

Some of the proudest moments in the history of the Supreme Court have occurred when the Court has stood firm against the tide of public opinion to safeguard the endangered rights of individuals and minorities. Many of the greatest Justices are known for their dissents from decisions in which the Court declined to protect minority or individual rights. These Justices' examples are an inspiration to the judiciary.

If confirmed, my duty as an Associate Justice of the Supreme Court would be to apply the law irrespective of public opinion. It would be a breach of my oath and of my duties as a judge to consider the extent to which my ultimate decision would be popular or unpopular. I am confident that I will follow the constitution even if doing so is an ultimate test of personal courage and integrity.

17. You have held membership in several private clubs with discriminatory membership policies. You belonged to the Olympic Club, which had a "white male only" policy when you joined, from 1962 until the day you were asked by the Justice Department to come to Washington to discuss your nomination. You belonged to the Del Paso Country Club, which has no black and few women members, from 1963 until just a few weeks ago. And you belonged to the Sutter Club, which excludes women and has few minority members, from 1963 until 1980.

You said, in answer to Senator Kennedy, that you did not resign earlier in part because you have become more sensitive over the years, and that you are still continuing to educate yourself. I commend you for that, and for your candor in expressing it.

However, I am concerned because the matter of membership in discriminatory private clubs is not just a question of personal morality when you are a federal judge. The ABA Code of Judicial Conduct states that it is "inappropriate" for a judge to hold such membership. I understand that you were a member of the ABA committee that recommended this.

Why did you not resign when the ABA adopted this policy? Do you believe intent to harm is required before discrimination is invidious? If so, why?

First, let me correct one statement in the question. I have been a member of the Advisory Committee on Codes of Conduct, Judicial Conference of the United States, from 1979 to the present. But I have not been a member of the ABA Committee that recommended the provision in the ABA Code of Judicial Conduct to which the question refers.

The commentary to the ABA Code of Judicial Conduct was amended in 1984 to discuss membership in organizations that practice invidious discrimination. In part, that amendment stated that it was "inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin. . . . Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive."

I became a member of the Sutter Club on December 10, 1963, and resigned from membership on about September 31, 1980. To the best of my knowledge, during the period of my membership the Sutter Club had members of some racial minority groups, but not women members. I believe that the Sutter Club precluded women largely as a matter of practice. While the bylaws did not explicitly prohibit female membership, one reference to "men" implied that membership was restricted. I understand that the bylaws have been amended recently to substitute "person" for "men." In 1980, after advising the club of my concerns about its practices, I resigned. I believed that the members there knew me as a judge, and in view of the club's membership policy, I believed it would create an inappropriate appearance for me to continue to belong to this club. My resignation preceded the ABA Committee's amendment to the Judicial Code by several years.

I became a junior member of the Del Paso Country Club in 1958 and a full member in 1963. I tendered my resignation on October 22, 1987. To the best of my knowledge, during the period of my membership the club had some women members and members of some racial minority groups.

I became a member of the Olympic Club in 1962 and tendered my resignation on October 27, 1987. To the best of my knowledge, this club had members from some racial minorities, but no women full members, during the period of my membership.

Last summer, after reading an article in the New Yorker magazine, which talked about the egalitarian history of the Olympic Club, I wrote a letter to the club that expressed my concerns about the club's restrictions on female membership and the continuing perception of restrictive practices concerning minority members. I urged the club to make the egalitarian spirit

a reality. Both orally and in writing, I urged the club to amend its bylaws to permit women members and to encourage applications from women and racial minorities. The membership, however, voted against the board of director's proposal to amend the club's bylaws to promote those objectives. I was not a voting member and could not vote.

After the vote, I expressed in writing my intention to resign, and requested a meeting with the board of directors and the president to encourage the board to continue on its attempted course of changing membership policy. Because of events surrounding my nomination, I was unable to meet promptly with the board, and thereafter tendered my formal resignation. In view of my own and the board of director's continuing efforts to reform the Olympic Club from within and our prospects of success in those efforts, I do not believe that my resignation from this club was belated.

As I understood the language of the ABA amendment, "invidious discrimination" suggests an exclusion of particular persons based on sex, race, religion, or national origin that is intended to impose a stigma on such persons. As far as I am aware, none of the policies or practices were the result of ill-will. However, there is no question but that a hurt and an injury can be done, even if unintentionally.

Finally, as your question notes, I have testified before the Senate Judiciary Committee as to my growing recognition that discrimination comes from several sources -- sometimes from active hostility, but sometimes too from insensitivity or indifference. Transcript of Hearings, December 14, 1987, Afternoon Session. I have tried to continue to educate myself over the years to the existence of subtle barriers to the advancement of women and minorities in our society. As I affirmed in answer to Senator Kennedy, I want to see a society in which women and minorities have equal opportunities to join a club where they can meet other persons in their community. Transcript of Hearings, December 14, 1987, Afternoon Session.

Please also refer to my answers to Senator Levin's written questions on this point.

ANSWERS TO QUESTIONS FROM SENATOR LEVIN

1. Before the President announced his decision to nominate you, did any member of the White House staff or the Justice Department ask you any questions relating to, or did you comment on your views relative to, the following: abortion, affirmative action, capital punishment, school prayer, independent counsel, the standing of Congress to bring suit against the Executive Branch, separation of church and state, and the rights of defendants in criminal cases? If so, please describe to the best of your recollection the content of all such questions, and your comments, including an indication of who was present.

As I testified to the Committee on the Judiciary, Transcript of Hearings, December 14, 1987, Afternoon Session, no member of the White House staff or the Justice Department asked me any questions which directly or indirectly solicited my views on the subjects listed in your inquiry or on any other subject that might come before the Supreme Court for consideration. Further, I have not commented on, offered, or volunteered those views to any member of the White House staff, the Justice Department, or any other part of the administration.

2. Please set forth, in as much detail as you remember, specifically what you said to Senator Helms about your personal views, opinions, feelings, etc., relative to abortion.

As I testified to the Committee on the Judiciary, Transcript of Hearings, December 14, 1987, Afternoon Session, I did not say anything to Senator Helms concerning my personal views, opinions, or feelings about abortion or any other subject that might come before the Supreme Court for consideration. In all my discussions with members of the Senate, including my meeting with Senator Helms, I have taken the position that my religion may be of some relevance as to character and temperament, but that my religious beliefs, or any views on the subject of abortion, are a private matter that I will not consult in making a judicial decision. I also told Senator Helms that I obviously was aware of the depth of feeling that he has on this subject, but further indicated that as a judge I maintain a fair and open mind on the issue, so that I can resolve any particular case consistently with the law and the Constitution. Our pluralistic society allows us to admire persons with views and opinions based on a moral code, but such views are not, and should not, be an indication how a judge will rule when interpreting the law in any particular case.

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3. In the Senate Judiciary Committee's questionnaire, you responded to several questions concerning your membership in business clubs, social clubs, or fraternal organizations. One of these questions asked for your opinion as to whether any of the clubs or organizations you have belonged to practices invidious discrimination and other forms of discrimination. In the questionnaire, you defined the term "invidious discrimination" by explaining that it "suggests that the exclusion of particular individuals on the basis of their sex, race, religion or national origin is intended to impose a stigma on such persons." (p. 50, emphasis added). In a response to Senator Kennedy, you further explained that "discrimination comes from several sources. Sometimes it's active hostility, and some sometimes it's just insensitivity and indifference." (transcript, December 14, 1987, p. 137).

Can you give some real life examples of when discrimination against women and blacks would not be invidious? In your opinion, was the discrimination against women and blacks by the Olympic Club, during your membership, invidious?

I undertook in my response to the Judiciary Committee's Questionnaire, at page 50, to define the phrase "invidious discrimination" because the question to which I was responding specifically referred to the 1984 amendments to the ABA Code of Judicial Conduct which use that phrase. However, I did not say or imply that such legalistic interpretations provide an appropriate basis for individuals or organizations to justify their conduct. I believe that discrimination against women, blacks, or other minorities imposes real injury and is wrong whether it arises from intentional, active bias or from indifference and insensitivity. While I believe that the membership practices of the Olympic Club were not invidious in the sense intended by the ABA Code because they were not animated by ill-will, I disagreed with those practices, and when my efforts to change them were unavailing, I resigned.

Please refer also to my answers to Senator Simon's written questions on this point.