

JUSTICE ANTHONY KENNEDY

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Location: West Conference Room

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SUSAN SWAIN, HOST, C-SPAN: Justice Anthony Kennedy, 21 years now on the Supreme Court, and I'm wondering since you came from the federal appeals court is there really such a difference here?

ANTHONY KENNEDY, ASSOCIATE JUSTICE, UNITED STATES SUPREME COURT:

Yes, and it took me a few years to understand that. Sometimes you think you're functioning at a high level, but you're paying attention just to the details and not to the larger picture.

I was a judge on the court of appeals, a very fine court of appeals, the United States Court of Appeals for the 9th Circuit in San Francisco, and I thought I was a very good appellate judge and this was just another appellate assignment. Wrong. This is a different institution. It has a different function and you must approach it in a different way.

SWAIN: Can you put some words to those differences, please?

KENNEDY: Well, on a court of appeals you can write just for the case that's in front of you so that you have room in the next case to make adjustments, to make qualifications, and to accommodate your colleagues who are also writing in the same area.

Here your function is to try to give some guidance to the state supreme courts or to the federal courts and you're not going to see this kind of case again for maybe at least a few years, and you don't have the luxury of equivocating much.

The other thing is that all the cases are hard. The only reason we take them, as some of my colleagues may tell you, is that other courts are in disagreement most of the time. And that means that other judges and other actors in the legal system have come to differing conclusions. Every case is that way, so it's a different function.

SWAIN: You said that it took you a while to realize it. Can you talk through that process of first realizing that you didn't know as much as you thought and when you finally said, "I get this."

KENNEDY: Well of course you're always hesitant to say, "I get it now," the nature of life is that life is learned looking backward and lived going forward. And it would maybe be pretentious to say, "Oh, I know everything about this job now," because of course if you're not open and willing to learn about the institution and learn about yourself, then you should get a different job.

But I guess my first realization came when I was given the – my first assignment. The first assignment to a junior justice is usually a simple little case, and this was by our standards, and it was terribly difficult.

I got into this and said, "Well, maybe this, maybe that," and then I realized, you know, this is a different job and that began to sink in.

Also the legal system, and to some extent the press and to some extent the public, is concentrating with great intensity on what you say, and you can use different metaphors for the judicial system, different means, allegories to define what this court is. I like to think of us as teachers that first teach ourselves and then teach others, and we're teaching what the law means.

I was in my, one of my son's dormitory rooms a few years ago when he was in college, waiting because he had something important to do, so I was sitting there waiting. And I opened one of his books, *Aristotle's Aesthetics*, Aristotle's essay on aesthetics, and Aristotle gives advice to playwrights and he said, "You can write about what was, what is, or what it ought to be."

And it reminded me of the judicial function. We write about what was, what happened, what were the facts? Was it an auto accident or a crime or a dispute among government officials and a private business owner? What happened? What was?

Then what is, what is the law? But we must always write about what ought to be because that is how we teach, and this court is really, I think, a teaching institution when it functions at its best.

SWAIN: What do you like best about the job?

KENNEDY: Oh the best part about the job is that I have the opportunity to try in my own way to teach young people particularly, but I hope all judges and lawyers and all citizens and

to teach myself constantly, that the law and freedom and what it stands for only survives if you're conscious of what they mean, to you, to America, to its heritage.

Look, at – if – when we rebelled against the English, the world was amazed. And Americans said, "We want freedom," and the English said, "What do you mean, freedom?" These Americans are the freest people you've ever seen. They pay taxes when they want and not when they don't want to. They have all the land that they need. They seem to do quite well. What are they talking about freedom?

So we had to give them an answer, right? We didn't have a fax machine or an e-mail, but we had to give them an answer back. Why – what did we want? So that our first answer was the Declaration of Independence, Jefferson's beautiful preamble, explaining that we owed a decent respect for the opinions of humankind and that we owed an explanation, an answer.

And we gave that answer. Then, some years later, that was 1776, then 1787 the Constitution of the United States was drafted, that was our second answer. And the result is that Americans have a self image, a self identification, a self understanding about who they are by their legal documents.

And this is the only – one of the few countries in the world that's that way. We come from many different backgrounds, many different religions, many different ethnicities, but we have this thing called the Declaration of Independence, this document called the Constitution in common. It defines us and the best part about this job is that you can have a very small part in reminding yourself and reminding the legal system and reminding the public, that this is our heritage, our freedom.

And that it's only maintained if you understand it and if you transmit – you know, you don't take a DNA test to see if you bleed freedom. It's taught and it's learned and teaching and learning are conscious acts, and each generation has to learn it all over again what the Constitution means.

And great cases, great teaching cases are the one in which we wrote in – or, the framers wrote in 1789, 1787, ratified in 1789, has real meaning today. We had a case some years ago, the flag burning case? Can you burn a flag? Americans get infuriated when you burn a flag. It's just – drives us crazy because we love the flag.

And then this court said, well, that's OK? You can burn it? Well, we said that because of the Fifth Amendment – oh, pardon me – because of the First Amendment. It was the First Amendment.

And so that gave the Constitution real meaning in our own lives and in our own time, and that's when the Constitution is most important. It's not just some old relic, some old dusty thing you read. It's yours.

SWAIN: In your 21 years here have there ever been for the institution any dark days?

KENNEDY: Any dark days?

SWAIN: Yes.

KENNEDY: Oh I guess every day when you're not in the majority you think is a dark day. Judges were once lawyers and we think of arguing a case and I've not met too many lawyers that don't think they're on the right side, and if you can't convince your colleagues then you think it's a dark day.

But the nature of the profession is that you're – you go on to the next case and you respect your colleagues. You – one of the things you learn when you're a judge is that you're not the only person in the room that is objective, disinterested, detached, knowledgeable, unbiased. Your other colleagues feel the same way and you have to recognize that.

SWAIN: When we asked Chief Justice Roberts about his role he was very modest in his answer, but as someone who's lived under more than one chief justice, I'm wondering how significant they – the individual is on the culture of the Supreme Court?

KENNEDY: Well there's – I'd give you answers on two different parts of that, and I've been very fortunate. I knew Earl Warren very well because he was from Sacramento, California and we were family friends. He was an older man and I was a young boy, but I knew him very well.

Of course I knew Chief Justice Burger, Chief Justice Rehnquist, now, Chief Justice Roberts. On the one hand, this is the one hand and the other hand answer, on the one hand there's not much the chief justice can do. The – his eight associate justices have a lifetime job. They have a duty to uphold the Constitution.

He can't fire them. He's got to get along with them. We have traditions which will outlast any chief justice and so the chief justice comes to a court where there are these elements of stability and permanence and protection, and we have our tradition and we have our oath.

On the other hand, the chief justice who presides over our conference, and steers us through the mechanics of hearing the cases and calendars, by his personality and his warmth and his decisiveness and his understanding of the law and of the institution of his colleagues, can do a great deal to set the tone.

SWAIN: I wanted to, if you'll bear with us, in the course of our time here we're going to be able to see various rooms and it will be interesting to hear your take on what happens in those rooms. We've heard about the process of conference from some of the justices, but if we were to have a camera in conference while you were there, which we will never be able to do, what's it like?

KENNEDY: I think it was my colleague – I'm sure it was my colleague Justice Breyer who made a very interesting comment one day. Somebody asked us – we were together – are you nervous before you go on the bench? He answered, "No, not at all. I'm not nervous when I go on the bench. I look forward to it."

Sometimes you'll hear a university professor say, "Well," or a high school teacher say, "Well, you know, it's as hard to give the exam as to take it." Don't believe it. Same thing with attorneys; I was always nervous when I appeared in court as an attorney.

Even not long ago I was in Sacramento, California, I went up the court steps because I was there to visit a judge and my heart started to beat because I remembered my days as an attorney. Judges don't feel that way. It's relaxed. It's easy. We have to be careful that we're courteous to the attorneys and that we're open-minded and that we do our job.

That's a preface to your question what happens in the conference room. Justice Breyer made the observation, very right, he gets nervous before he goes in the conference and so do I.

SWAIN: Why is that?

KENNEDY: It's like being an attorney once again. You're arguing your case. I have eight colleagues who've studied very hard on the case, who may have some very fixed views, they may be tentative depending on how they've thought the case through, and I have to give my point of view and hopefully to persuade them.

And I feel a sense of anticipation, whether it's an adrenalin rush or I don't know what they call it, but this is a big, big day for us. We sometimes have as many as six cases and I have to present the argument as – well, usually four – in four cases and I have to be professional and accurate and fair.

And each of my colleagues feels the same way so there's a little tension and excitement in the room, but we love it. We're lawyers. We're designed to do that. The job is no good if you can't argue.

SWAIN: You mentioned, excuse me, the traditions in the court. It seems as though conference is one of those places where many of those traditions come to bear.

KENNEDY: Right.

SWAIN: Will you talk about them?

KENNEDY: Well, I think they're probably pretty well known. The – when we're discussion cases, which we usually do 48 to 72 hours after the argument, you should know this. Before the case is heard we have an unwritten rule, we don't talk about it with each other. Oh sometimes if there's a technical problem I might go to Justice Scalia and say, "Hey, Nino, I think there may be a technical problem in this case."

But if we go into it then we send a memo to everybody that what we've talked about, just because we don't want little cliques or cabals or little groups that lobby each other before. We don't do that. The first time we know what our colleagues are thinking is in oral argument from the questions.

And one of the reasons you ask a question is to advise your colleagues what you're thinking or what your concerns are, and a good attorney can realize that he or she is engaging in the conversation that the court is having with itself.

So that's the first time we ever get an inkling of what our colleagues' views are. Then we go in the conference that you're asking about, about 48 to 72 hours later. This is the first time in which we give our tentative views on the case.

When we're on the bench we – that's the first time we're beginning to make up our mind, when we're in the conference room we try to have made up our mind tentatively depending on what other people think.

So as we go around the table it can be quite fascinating to see how this case is unfolding, and it's not just win or lose, reverse or affirm, it's what rationale we use. What principle you use to teach something.

And if there – the case is close, five to four, and let's say you're on the side that prevailed with the majority, there are not a lot of high fives and back slaps and there's a moment of quiet, a moment of respect, maybe even sometimes awe at the process.

We realize that one of us is going to have to write out a decision which teaches and gives reasons for what we do. The point of writing an opinion is to command some allegiance to the result, and we have no army. We have no budget. We do not have press conferences and we don't give speeches, saying how wonderful my dissent was or how bad the majority – we don't do that.

We're judged by what we write and we have to write something which shows that we're following the rules and that we're open and honest, that we give reasons for you to believe that what we did was right.

SWAIN: Do you take good notes in conference?

KENNEDY: Do I take notes?

SWAIN: Yes.

KENNEDY: Yes. I never speak from notes, but I take notes from what other people say.

SWAIN: Because it might end up in framing an argument to bring someone over to your side?

KENNEDY: Well you take notes because you might have – be assigned the case. You don't know who's going to be assigned the case until after the conference, and if you're senior in the majority or the dissent, then you assign it.

And you should have notes so that you can remember what your colleagues said because as I indicated it's not just what you do but it's how you do it. And it's fascinating. Sometimes a case will be nine-zero, but different points of view on how to reach the result, so that's part of the process.

SWAIN: Is the room well designed for what happens there?

KENNEDY: Well sure. It's not all that exciting. It's a rectangular table, I mean, that's about it. I mean I suppose you could have a circular table and what was it, the Korean peace talks where they spent a year talking about the size of the – the shape and the table? Ours happens to be rectangular and it works out that way.

SWAIN: Portraiture around you?

KENNEDY: Yes, just the standard portraiture of the ...

SWAIN: Nothing inspirational?

KENNEDY: ... justices. When it looks like he had a good day, you know?

SWAIN: So nothing in particular that foments great argument in the room?

KENNEDY: No, although when you're getting into the building, why is it that we have an elegant, astonishingly beautiful, imposing, impressive structure that – is it so that we feel important? I think not. It's to remind us that we have an important function and to remind the public when it sees the building of the importance and the centrality of the law.

And if you're – some time I'll teach a high school class maybe and I'll say, "Give me one word to describe this building." Cold? Warm? Opulent, arrogant, inspiring, durable, stable, you know, choose your adjectives, and the building is magnificent enough so that you can think about these adjectives as you come to it.

SWAIN: Do you have one adjective you would use?

KENNEDY: I would like to say timeless. It dates from the Greeks, of course, and in fact there are a lot of Greek architectural features to it. What is that – the shape of the windows? Rectangle? No, it's smaller at the top than at the bottom.

It looks like a rectangle and we, which we found out to our grief when we were ordering new windows, they came and measured the bottom and they measured the height, but they forgot to measure the top.

So the windows were all wrong because it's slightly smaller at the top. It's not a rectangle. It's a quadrilateral structure because it's smaller at the top, and designed so that it looks durable, elegant, imposing, balanced, symmetrical from a distance, which is what the law ought to look like.

SWAIN: You mentioned before we even started taping that the steps and the entrance is of particular note to you.

KENNEDY: Well, again it's symbolic. It's something we like to think of the law and the Constitution and the great documents of freedom as something that you have to respect and so that you should frequently be inspired and have elevated thoughts. And so that's the idea of the steps.

I was one time, meeting – when I first was here on the court and one of the things I learned is – a prime minister from a foreign country who is also an attorney. And it was a nice day so I met him outside. I thought it would be courteous to do. And we stood looking up at this beautiful building and the steps.

And above the steps on the pediment is “Equal Justice Under Law.” And I thought, oh my. He's going to ask me where that comes from and I don't know. And my mind was racing. It

wasn't in the Declaration of Independence or the Constitution, not in one of our cases. It had to be before 1937 when the building was built.

And so I steered the conversation in a different direction so that he wouldn't ask me something I didn't know. So then I went to the files and I found out. "Equal Justice Under Law" was made up by the architect because the size of the letters and the balance of the words kind of works out. It looks good on the pediment.

Now "Equal Justice Under Law" has become a very, very famous phrase. But the law takes help from wherever it can get it. And if we get inspiration from an architect, all the better. And you can ask yourself if equal justice isn't redundant. Isn't all justice – not justice if it isn't equal but you know we need, again, reminding. So even if it's redundant, we need reminding.

But the steps are wonderful. Not too many years ago, I guess it was five years ago, that in Washington we dedicated the monument to World War II. And the government flew World War II veterans in from all over the country and for two or three days they were walking around the city. And these people would be in their late 70s or 80s. And I thought I'd take a walk over in front of the building.

And two of these obvious vets, they came from the Midwest. They had farming community dress. I stopped and I said, "Well, good morning. I guess you're here on behalf of the memorial." And they said, "Oh, the government did something very nice for us." And I said, "Well, you did something wonderful for the nation."

And the man said that, “Oh, Charlie here, my friend, he said we served in the Pacific together as Marines and we now live a couple hundred miles apart. But we phone each other all the time.” And he said, “Now come on, Charlie. That’s the Supreme Court. We can make it up the steps.”

And it’s important for the justices. It’s important for the attorneys. It’s important for the public to make sure that people always want to come up these steps because we’re doing the job the right way. And we – not a day goes by where we must not ask ourselves, “Are we doing this job the right way?” The nature of a judge, the nature of a reporter, the nature of most human enterprises to ask yourself as an introspective way am I doing this the right way. And the law is designed for that in a way because we have to write out and give reasons for what we do. We have to give reasons for what we do. And the first justification for that is we have to convince ourselves, when I sit down and write an opinion, the first thing I do is convince myself. There’s a lot of stuff that goes in the wastebasket, and then you have to convince others.

So again, this court reminds you of the fact that you have to this job.

SWAIN: And as a local citizen, I’ve always remarked at the design and how suitable it seems to be for public expression of sentiment, the protests and affirmations that go on at the court. I’m sure that was not the intent of the architect originally, but what do you think about the fact that it’s the site of so many public protestations and affirmations?

KENNEDY: Well, it’s very important. Again, you know the law – and the Constitution don’t belong to the court. The Constitution is yours. It’s yours. And it’s yours to talk about,

to explain, to express, to defend. And that's why it's so important for people, young people particularly, to know and understand the Constitution.

The president takes an oath to preserve, protect and defend the Constitution. You can't preserve something you don't revere. You can't protect something you haven't learned. You can't defend what you don't know. And as I indicated, you must understand the traditions of freedom, its meaning, the purpose of liberty so that you can hand it down to the next generation.

Democracy isn't – doesn't have a permanent life expectancy. It has to be preserved from one generation to the next.

SWAIN: Can you ever hear the public on days when there are big protests going on when you're working in your chambers?

KENNEDY: Oh, it's interesting, I see the demonstrations sometimes, but I'm on the front of the building. But I don't know which side they're on. I know they're interested but I don't know which side they're on.

SWAIN: So no consciousness as you're working on an opinion of what might be going on?

KENNEDY: Other than it reminds you that you have to be clear and honest about your reasons and try to convince people that you're right.

SWAIN: Let's talk about the actual Supreme Court chamber itself because you've worked in other courtrooms.

KENNEDY: Yes.

SWAIN: And I'm wondering what you think of this one with its ornate red drapes, velvet drapes, and its touches of tradition from past centuries in that.

KENNEDY: Well, as I've indicated, it's principal purpose is to remind the judges and the lawyers and the litigants of the absolute importance, the essential duty that you have, to follow the mandates of your profession. And the mandates of the law. That's what it's for.

You know when the Iron Curtain fell and we began seeing more Russian judges, they couldn't quite believe that the White House didn't give us a call to tell us how this case should come out. We said, "No, no, no. That's not the way it works. There's separation of power." And then they thought, "Well, maybe so but there's some cultural mechanism where we try to see, get the signal from somebody of what to do."

And it was quite a task of educating our foreign visitors in that respect. And when we took them in the court room I said two things. I said, number one, the government sits at this table. The government argues its case just like everybody else. And we have a rule, of course, that we don't talk to litigants and we don't talk to attorneys other than in open in public where everybody can hear what the reasons are.

So that was a help to them to know that, number one, the government is just like every other litigant, and number two, the government has to argue before us. That helped teach the lesson.

SWAIN: One of the observations about this court that I just, as a lay person hadn't struck me before, but you often have attorneys arguing cases here who have one shot at it in their entire legal career.

KENNEDY: Yes.

SWAIN: And the court that you came from, it's a bar where you regularly see the same lawyers, who you know their expertise. What's the quality of oral argument here compared to the 9th circuit?

KENNEDY: It's good. I think we sometimes do a disservice to the profession by complaining too much about the oral arguments. It's good. Look, I've made arguments to judges. And I made up my mind that I was always going to be courteous to the attorney and understand the stress that he is under or that she is under, as I indicated earlier. I'm completely at ease. I know they're not.

And sometimes we ask a question just to help the attorney make the point that the attorney wanted to make.

SWAIN: We're talking to you on a day close to the end of session with a number of opinions coming out. We were in the press room earlier today, which is quite a scene on a

day like this. A number of the reporters have spent much of their professional career here, Nina Totenburg, Lyle Denniston and the like. What is your relationship as a justice with the long-term reporters covering the Court?

KENNEDY: I don't see them on a regular basis other than in the Court. Occasionally there will be a retirement party at which we meet each other. We have a – each a professional obligation of keeping a certain amount of distance, a certain amount of independence. We never complain about what they write, even though they sometimes are wrong on the facts.

SWAIN: But you do read it, obviously.

KENNEDY: Yes. I don't really rush to do it. I am upset sometimes when I see an editorial and it's obvious they haven't read the opinion and they don't understand - the reason we write, as I explained, is to explain the reason for what we did. And to just write an editorial which indicates that you've made up your mind without reading what we wrote is to me quite silly.

But by and large, the people that cover us like their work. They, as you indicate, they know our traditions, they know the schedule, and they do a very good job of reporting with this – this observation. The news cycle, the interest, the attention span being what it is, they have 24/48 hours to make the point. Well, we write for a different time dimension than that. It's not just the results. It's what the principle is. And the press does a very good job of reporting what we do. It's a little more difficult, for reasons I've explained, to report why we did it. And I can understand their problem because they have the 24-hour, 48-hour news cycle.

So they have a tough job. They have a tough job.

SWAIN: Talked about the importance of stressing the...

KENNEDY: If I could just interrupt. And of course we do have commentary and we have law reviews. Every law school in the country, every major law school, has a law review. And this law review is dedicated to explaining, criticizing, analyzing, the opinions of the courts, particularly this Court.

So don't think that it's just the institutional press that does this. We have law students who spend months working with the law professor analyzing our cases, often criticizing them in print in the law reviews. And we look at that with some care.

SWAIN: If you had a child or a grandchild, that came to you and said I'd like to be a lawyer, today would you say that's the direction I'd encourage you to go?

KENNEDY: Absolutely. I love – I still miss being a lawyer. After some years on the bench, I would be very happy to practice law. I loved it.

SWAIN: What is it about that that you love?

KENNEDY: Well, as I've indicated, you have an oath, an obligation, to defend something that is really basic to the American identity to the American ideal to freedom as we know it.

SWAIN: And you felt that fresh out of law school?

KENNEDY: Yes. And you're playing a little part, a little part in that when you have a case involving a misdemeanor or even a felony. You're just a little cog in the wheel. But the idea that the government cannot arrest your client without cause, convict your client without proof beyond a reasonable doubt is so impressive.

And half the world doesn't have freedom, A, because it can't, or B, because it doesn't want it. And the jury is out. And as to whether or not the rest of the world will choose freedom, we have to make that case. And frankly, it's not being made. I'm not sure that we're picking up a lot of ground.

SWAIN: What do you mean by that?

KENNEDY: Well, there are six billion people on this earth of human kind. Over half of them have to live outside the law. They see the law as an obstacle, not an instrument of progress. They see the law as a threat, not a promise. They see the law as something to avoid, something to be embraced. They don't understand it.

I gave a speech not long ago, I talked about Solzhenitsyn – the great Soviet writer – who gave a commencement speech in the 1970s, '78. And he criticized the United States and the West for being obsessed with the law. And I was astounded that this man who I thought understood the principles of freedom, the unyielding, indomitable, human spirit to rise above tyranny, would criticize law.

And it occurred to me that he thinks of the law as something cold, something as a threat. We don't – for us the law is liberating. And that's a big difference. And we have to teach that. We don't teach enough of it.

SWAIN: That might be the answer to the question I wanted to ask you. As you look across the justices, because of your lifetime tenure, because there isn't media coverage of this Court in the same way as the elective branches of government, you could choose whether or not you wish to be a public figure, to give speeches, to give commencement addresses, to teach, to do interviews such as this.

You have chosen to to some degree. Why is that?

KENNEDY: Again, because I think it's our obligation to do our very best to make sure that the institution is understood, to make sure that people know what's at stake. When we're – when we say that we want freedom for the rest of the world and that freedom we think is the only way to recognize the dignity of man, the dignity of woman, this is something that we can't talk about too much.

And look, Americans are busy. They're going to baseball games. They're working. They're raising their family. They don't think about the law night and day.

But I'm so impressed when I go around the country at how much people do know about their court system, about the respect that they do have for it. And of course that's one reason we have the jury system, which is a whole other subject.

SWAIN: As we close here, you're about to leave for summer. And while you're gone, there'll be hearings for a new justice for the Supreme Court. You've seen others come and go during your 21 years here. How much does the Court change when a new justice arrives? Is there a cultural shift? And what do you do to get a new member acclimated, as you talked about in the beginning?

KENNEDY: It's a new court. When I was trying jury cases, which is usually 12, if a juror had to be replaced because one was ill or something, I don't – it's just a different dynamic. It was a different jury. And it's the same way here. This will be a very different court.

And it's stressful for us because we so admire our colleagues. We wonder, oh, will it ever be the same? But I have great admiration for the system. The system works. After the appointment and the confirmation process is finished, if there's a confirmation, the system will bring us a very, very good justice.

And it gives us the opportunity, again, to look at ourselves to make sure that we're doing it the right way so that the new justice will be able to take some instruction from our example if we are doing it the right way. And I'm sure a new justice can always ask the question, "Well, what are you doing this for?" Then we have to think about whether or not we should continue to do it.

SWAIN: Justice Kennedy, thank you so much for your observations on the Court.

KENNEDY: Thank you for your work.

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