NOMINATION OF ANTHONY M. KENNEDY TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

TUESDAY, DECEMBER 15, 1987

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 9:35 a.m., in room SR-325, Russell Senate Office Building, Hon. Joseph R. Biden, Jr., chairman of the committee, presiding.

Also present. Senators Kennedy, Metzenbaum, Leahy, Heflin, Thurmond, Hatch, Grassley, Specter, and Humphrey.

The CHAIRMAN. What I would like to know before we begin, Mr. Kennedy, is: Did Senator Metzenbaum tell you about the candy barrel in his office?

Senator METZENBAUM. The candy is very good.

The CHAIRMAN. We are delighted to have you back, Judge. In this town, as you know, there are instant reviews and instant analyses, and I observed last night and this morning what I observed when you were here: that everyone thinks you did well. I want to admit I share that opinion.

Judge KENNEDY. Thank you, Senator.

The CHAIRMAN. Notwithstanding the Wall Street Journal's editorials.

Senator Metzenbaum is next to speak, but he has been gracious enough to accommodate Senator Specter's schedule. He has a meeting at the White House at 10:30. So what we will do, once again——

Senator METZENBAUM. If the Chair would yield for a question?

The CHAIRMAN. I would be delighted to.

Senator METZENBAUM. The news reports within the last hour have indicated that one of the former contenders for the Democratic nomination is about to re-enter the race and has called a press conference for today at noon. Do you have any plans to call a press conference for tomorrow at noon?

The CHAIRMAN. No, but——

Senator LEAHY. We just want to be able to schedule, Mr. Chairman. That is all it is.

The CHAIRMAN. It will be today at 3. [Laughter.]

Senator LEAHY. Mr. Chairman, could I ask a serious question?

The CHAIRMAN. You mean that is not serious? [Laughter.]

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Senator LEAHY. No, I was very serious, but you have already answered 3 o'clock. I will go to the gym during that time. No, actually, I would be at the press conference, Mr. Chairman.

Senator Specter is going to go next, then Senator Metzenbaum. Just so that I can plan, I am perfectly free, whatever you want to do, would I then be after Senator Metzenbaum on questioning?

The CHAIRMAN. The answer is yes, you would.

Senator LEAHY. That would put us back into the sequence.

The CHAIRMAN. Yes, you would. I hope that Senator Humphrey is listening—I do not mean that facetiously—so we do not get into a discussion about two Democrats in a row, et cetera. What we will do, the order will be as follows: The Senator from Pennsylvania, the Senator from Ohio, the Senator from Vermont, the Senator from New Hampshire, the Senator from Alabama—no, you already asked questions, as a matter of fact, yesterday, if I am not mistaken—the Senator from Illinois, who will be at the Hart press conference, and then back to me and to the ranking member.

With that, are you not really fascinated by all this, Judge?

Judge KENNEDY. It is more interesting than some of my sessions, Senator.

The CHAIRMAN. We will now begin with the Senator from Pennsylvania who will question for his first round for half an hour.

Senator SPECTER. Thank you, Mr. Chairman, and I thank my colleague, Senator Metzenbaum, for yielding at this time.

Judge Kennedy, as already indicated, I am going to have to depart after my round. We have a meeting on the Strategic Defense Initiative and the INF treaty. We will be following through staff and listening on the radio as I drive away.

Judge KENNEDY. Thank you, Senator. I certainly understand.

Senator SPECTER. Judge Kennedy, I would like to begin with exploring the legal theories that run through your writings and through your decisions: original intent, interpretivism, legal realism, result-oriented—all subjects which you have addressed and matters which have been referred to, to some extent, in yesterday's session.

I start with a comment which you made this year at the Ninth Circuit Conference where you say, "There must be some demonstrated historical link between the rule being advanced in the court and the announced declarations and language of the framers."

In a speech which you made in 1978 to the judges of the ninth circuit, you have identified three cases—*Brown* v. *Board of Education, Baker* v. *Carr, Gideon* v. *Wainwright*—where you noted and reminded the audience that it was not the political branches which decided those cases. And in the context of *Baker* v. *Carr,* you referred to the fact that the court has wrought the revolution of *Baker* v. *Carr.* You had picked out these three cases as being distinctive matters of judicial interpretation. I would like to begin with *Brown* v. *Board of Education,* the desegregation case.

In examining the issue of framers' intent, I refer to the treatise by Raoul Berger, a noted constitutional authority, who set the factual circumstances at the time the Equal Protection Clause of the 14th amendment was adopted in this context. And at page 118 in Professor Berger's book, "Government By Judiciary," he points out

that Congressman Wilson, the sponsor in the House of the 14th amendment, stated, "Civil rights do not mean that all citizens shall sit on juries or that their children shall attend the same schools." Later at page 123, Professor Berger goes on to point out that at the time the 14th amendment was adopted, eight Northern States provided for separate segregated schools; five States outside the Old Confederacy, either directly or by implication, excluded black children entirely from their public schools; and that Congress had permitted segregated schools in the District of Columbia from 1864 onward. Then Professor Berger notes, at page 125, that even the Senate gallery itself was segregated at that time.

Now, my question is: Is it ever appropriate for the Supreme Court of the United States to decide a case at variance with the framers' intent?

Judge KENNEDY. Well, in answering that question, let me say that implicit in your introduction was the proposition that it was not the framers' intent to forbid segregation in schools, and I think Professor Berger has 180 degrees the wrong slant on that point. He defines intent in a very narrow way. He defines intent to mean what the framers, as he calls them, actually thought.

I think that is irrelevant. What is important are the public acts that accompanied the ratification of, in this case, the 14th amendment. Remember that the framers are not the sole repository from which we discover the necessary intention and the necessary purpose. In the legislature we do not ask what the staff person thought when he or she wrote the bill, we ask what the Senators thought.

And so with the Constitution. It is what the legislatures thought they were doing and intended and said when they ratified these amendments.

The whole lesson of our constitutional experience has been that a people can rise above its own injustice, that a people can rise above the inequities that prevail at a particular time. The framers of the Constitution originally, in 1789, knew that they did not live in a perfect society, but they promulgated the Constitution anyway. They were willing to be bound by its consequences.

In my view, the 14th amendment was intended to eliminate discrimination in public facilities on the day that it was passed because that is the necessary meaning of the actions that were taken and of the announcements that were made. You can read the abolitionist writings that were the precursor to so much of the 14th amendment. So, that, as Professor Berger states, the framers did not have it in mind at the time or that they knew they had a segregated school system, is irrelevant.

Senator SPECTER. Well, Judge Kennedy——

Judge KENNEDY. So with that preface, we then come to the next part of your question: Can the court ever decide a case contrary to intent? I just wanted to make it clear that I somewhat disagree with the thesis that you interjected at the outset because I think *Brown* v. *Board of Education* was right when it was decided, and I think it would have been right if it had been decided 80 years before. I think *Plessy* v. *Ferguson* was wrong on the day it was decided.

Senator SPECTER. Judge Kennedy, I quite agree with you that *Plessy* was wrong and *Brown* was right, and I am very pleased to hear you say that people can rise above their own injustices, and that a society can rise above its own inequities. Those are very sound principles, and I am pleased to hear you say that.

But I do not square the statement you made at the Judicial Conference, referring to framers' intent, with the statement you just made, "What the framers actually thought was irrelevant." You have made a statement about ratifiers, legislators, and I agree that when you have a constitutional amendment, you have the framers who adopt it in Congress and then you have ratification by the state legislatures. But if you take a look at the states which ratified the 14th amendment, you will find that they were the States where the factual situations outlined by Professor Berger were in existence.

I do not quote Professor Berger for any philosophical approach or any theory or any conclusion. I quote Raoul Berger for the factual basis. And I could quote many other sources. He just has it neatly pigeonholed in terms of putting in one place the fact that segregation, segregated schools were a fact of life—in the District of Columbia, in Southern States, in Northern States. Segregation was a fact in the Senate chamber. The principal sponsor of the 14th amendment said it was not intended to have integrated schools, that segregation was the order of the day. And in the statement you made at the Judicial Conference, you talk about framers; you do not talk about ratifiers. "There must be some demonstrated historical link between the rule being advanced in the court and the announced declarations and language of the framers."

So I do not quite understand your statement today, "What the framers thought was irrelevant." Could you expand upon that a bit?

Judge KENNEDY. Well, number one, I not only should expand on it, I should probably correct it. It is highly relevant what the framers thought. But the general inquiry, the principal inquiry, should be on the official purpose, the official intent as disclosed by the amendment. In looking at legislative history to determine the meaning of Congress, we sometimes find statements made on the floor of the Senate or the floor of the House that seem almost at variance with the purpose of the legislation when viewed overall as an institutional matter. I am applying that same rule here.

With reference to framers, I and many others use "framers" in a rather loose sense. I think obviously we want to know what Madison and Hamilton thought, and the other draftsmen of the Constitution. But theirs is not the entire body of contemporary opinion and contemporary expression that we look to.

In my view, for instance, the abolitionist writings are critical to an understanding of the 14th amendment. It was in response to their concerns that that amendment was enacted.

Senator SPECTER. Well, Judge Kennedy, when you say that the principal inquiry should be directed to the official purpose, who is going to determine the official purpose? In the case of *Brown* v. *Board* in 1954, the Supreme Court of the United States declared that as a matter of basic justice and equal protection of the law, as

we understood that concept, it was patently unfair to have black children go to segregated schools.

Judge KENNEDY. Yes.

Senator SPECTER. But if you contrast that with what the intent was of the framers, ratifiers of the 14th amendment, the cold facts are that their intent was very different.

That leads me to a conclusion that the real judicial philosophy comes through when you say that people can rise above their own injustices, rise above their inequities, but really look to an intent of justice and an official meaning of equal protection as it is viewed in 1954, as opposed to the way it is viewed in 1868, when the 14th amendment is ratified; and there are segregated schools and a segregated Senate gallery. And the operative intent of the Congressman who passed the amendment and the legislators who ratified it were to be satisfied and really expect segregation.

Judge KENNEDY. Well, I am not saying that the official purpose, the announced intention, the fundamental theory of the amendment as adopted will in all cases be the sole determinant. But I think I am indicating that it has far more force and far more validity and far more breadth than simply what someone thought they were doing at the time. I just do not think that the 14th amendment was designed to freeze into society all of the inequities that then existed. I simply cannot believe it.

Senator SPECTER. Well, I agree with that. But to come to that conclusion, you have to disregard what is a pretty obvious inference of intent of the framers or ratifiers because they lived in a segregated society.

Judge KENNEDY. That is true, and I think maybe many Senators felt at the time they passed the Civil Rights Act of 1964 that they lived in a society that did not comply in all respects with what the statute required them to do. They were willing to make a statement that society should be changed. The Constitution is the preeminent example of our people making such a statement.

Senator SPECTER. But the legislature's role is clearly established under our principles of government. The contest comes up as to whether the court has any business handing down a decision like *Brown* v. *Board* if the court is supposed to look only to framers' intent. And I think the court did have business doing that. But if you contrast that with the Civil Rights Act of 1964, everyone would say, well, that is up to the Congress; that is up to the elected officials; contrasted with the judges who have life tenure who should not make political decisions. And if you have a shifting meaning of equal protection—and I think you do, and I think that is the realism—then it seems to me that that is realistically an abandonment of a rigid nexus to the intent of the framers and ratifiers in 1868.

Judge KENNEDY. Well, I do not want to put us in a deeper trench, because I think there is an element of agreement between us. But I must insist that the intention of the 14th amendment is much more broad than you seem to state in the predicate for all of your questions.

Senator SPECTER. Well, where do you find the intention in the Equal Protection Clause of the 14th amendment more broadly stated than the fact of segregation, which was, in practice, obviously in the minds of the framers and ratifiers?

Judge KENNEDY. It was very clear to me that the purpose of the 14th amendment was to effect racial equality in public facilities in this country.

Senator SPECTER. But what did that mean?

Judge KENNEDY. It was very clear from the abolitionist writings; it was very clear from some of the statements on the floor; and it is abundantly clear from the text of the language, which admits of no exception, in my view. I think the framers were willing to be bound by the consequences of their words. And their words are sweeping, and their words are very important and they have great power.

Senator SPECTER. Are you saying that there is something in the legislative history of the Equal Protection Clause of the 14th amendment which specifies that schools should be desegregated?

Judge KENNEDY. No. Those who addressed the amendment specified their purpose in much broader, much more general terms. I think that they were willing to be bound by the consequences of what they did and the consequences of what they wrote. And I think *Plessy* v. *Ferguson* was wrong the day it was decided on that basis.

Senator SPECTER. Well, I agree with you about that, and I agree with you about *Brown* v. *Board* being correctly decided. But I do not——

Judge KENNEDY. But that cannot be because society changed between 1878 and 1896.

Senator SPECTER. Well, I was not around in 1896 when *Plessy* was decided, and neither were you. So our perspectives are very different. But the perspectives of the framers, I think, were clearly established by the facts of life.

I do not see how you can take a broad principle and say that there was framers' intent or ratifiers' intent to have equal protection, which is specified in desegregation, when the schools were all segregated and the Senate gallery was segregated and the principal sponsor, Congressman Wilson, said it was not their intent to have desegregated schools.

It seems to me that the conclusion is conclusive that it is just Judge Kennedy and Arlen Specter viewing it in a different era with different eyes, and the inequities appear differently. As you say, people can rise above their own injustices and above their inequities. And it is a different interpretation, and it does not really turn on what the framers necessarily had in mind.

Judge KENNEDY. Well, I agreed with you until your last statement, because I think what the framers had in mind was to rise above their own injustices. It would serve no purpose to have a Constitution which simply enacted the status quo.

Senator SPECTER. Well, let me move on to another category, the——

Judge KENNEDY. And, incidentally, we should note for the record that Mr. Justice Harlan was there in 1896, and he dissented in *Plessy*. *Plessy* was not a unanimous decision. The first Mr. Justice Harlan.

Senator SPECTER. Well, he was correct, but it was a decisive minority view, unfortunately. Only one out of nine saw it, contrasted with *Brown* v. *Board* where all nine saw it. In our society, it is hard to understand how anybody ever saw it differently or why it

took the political branches—the Congress or the executive branch—so long to catch up. That is the point you make in your speech, pointing to the courts and not to the political branches.

That underscores what I consider to be a very basic point that at times, notwithstanding the valid principle of judicial restraint, and notwithstanding the fact that it is up to the Congress and the political branches to establish public policy, public policy of change, that the inequities can be so blatant that the court must step in, as it did in *Brown* v. *Board*, and say that equal protection simply mandates desegregation, which is, of course, what happened.

Judge KENNEDY. Well, you know, it sometimes takes humans generations to become aware of the moral consequences, or the immoral consequences, of their own conduct. That does not mean that moral principles have not remained the same.

Senator SPECTER. Well, I believe that these are very important considerations on judicial philosophy, Judge Kennedy, because judges everywhere are applying them—not only in the Supreme Court, but in courts of appeals and in District courts and in State courts. And people are listening to what Judge Kennedy has to say about these subjects, perhaps even to what some of the Senators have to say about the subjects.

There is a real battle on interpretivism and legal realism, and to look for some conclusive nexus between framers' intent and the decision in a specific case is very, very difficult, and in my own view in *Brown* was impossible. But we have explored it at some length. I would like to move on, if I may now——

Judge KENNEDY. Certainly, Senator.

Senator SPECTER [continuing]. To the subject of neutral principles. Here, again, we are on a subject which has been very extensively applied. And judges are always looking to neutral principles, and the hard thing is to make a decision about what a neutral principle is.

You say, or said, in a speech to the Sacramento chapter of the Rotary Club just a few months ago, October 15th of this year, that "Closely related to the inquiry over the legitimacy of constitutional interpretation is the dangers that courts might be thought of as exercising policy review and not applying neutral judicial principles." And you pick up on that same theme in your response to the Judiciary Committee's questionnaire, when you say that "Judges must strive to discover and define neutral juridical categories."

In a speech you gave to the Stanford law faculty on May 17, 1984, you refer to Dean Ely, and you say, "He might make the argument that we prove his point that interpretivism is more hollow than real, because obviously the framers could not and did not foresee a sprawling administrative state."

And my question to you, Judge Kennedy, is: Considering, as you have said in this speech, that there are some circumstances which the framers could not have contemplated, obviously—such as the sprawling administrative state—just how far can you go on the principle of interpretivism as a fixed and resolute ideology for application by the courts?

Judge KENNEDY. All right. You are talking about quite a few things here.

Let me say at the outset that it is somewhat difficult for me to offer myself as someone with a complete cosmology of the Constitution. I do not have an over-arching theory, a unitary theory of interpretation. I am searching, as I think many judges are, for the correct balance in constitutional interpretation. So many of the things we are discussing here are, for me, in the nature of exploration and not the enunciation of some fixed or immutable ideas.

Once again, we must be very careful to note that when we speak of intent we speak on many different levels. The fact that the framers never thought of an ICC is not entirely relevant. The question is whether or not an administrative agency can and does fit within the principles that the framers announced for separation of powers.

Now, the position of administrative agencies in a system in which the Constitution mandates the separation of powers—legislative, executive, and judicial—has not been clearly established in the case law. Much work needs to be done there. It seems to me that the Government of the United States could have hardly survived without those agencies, and that may itself be a strong argument for the fact that they are legitimate, given what the framers promulgated. But that whole area of the law, as Professor Bator, I think, has described it, is a very unruly one. And I think, the courts have not really come to grips with how to explain the position of an administrative agency, that is, whether or not it is an appropriate exercise of article I power.

Did I answer the question?

Senator SPECTER. Yes, I think you did early on. I am pleased to hear you say that you have no cosmology of constitutional theory, no over-arching principles, and I think that is a very important basic concept. When you take up the ideologies of original intent or you take up the ideologies of interpretivism and neutral principles, there is a tendency, as I see it, for the Supreme Court, for the federal courts or any courts to become musclebound and unduly restrictive.

There are many cases that we could take up. I wanted to discuss with you at some length *Baker* v. *Carr,* where you have noted in your own writings that there is no established philosophy. And you characterized *Baker* v. *Carr,* one-man, one-vote, as the wroughting of a revolution. In some of our hearings, we have become entangled in very rigid ideological philosophies of the court. And I repeat, I am pleased to hear you say that you are looking for a balance as opposed to immutable philosophies, to give you the answer in every case, even though you may not be able to find original intent or even though you may not be able to find a neutral principle of interpretivism.

I have got about 4 minutes left, Judge Kennedy, or 3. The time really flies.

I want to come to a central issue about the administration of justice and due injustice, and I intend to return to this in another round. I have made reference in my opening to a very provocative comment, very interesting comment, very constructive comment which you made in your speech to the Canadian Institute in 1986 where you say, "A helpful distinction is whether we are talking about essential rights in a just system or essential rights in our

constitutional system. Let me propose that the two are not coextensive."

Now yesterday, when Chairman Biden was asking you questions, you adopted the principles of the second Justice Harlan, and if I had time I would go through Cardozo and *Palco* and fundamental values and Frankfurter. We may have time later to come to that. But when we talk about doing justice and we talk about people rising above their own inequities and above their own injustice, why should it not be that the essential rights in our constitutional system should not be coextensive with the essential rights in a just system? Or stated differently, should not essential constitutional rights be implemented to see to it that essential rights in a just system are recognized, that the two are coextensive?

Judge KENNEDY. Well, I think the American people would be very surprised if a judge announced that the Constitution enabled a judge to issue any decree necessary to achieve a just society. The Constitution simply is not written that way. And I think it is an exercise in fair disclosure to the American people, and to the political representatives of the Government, to make it very clear that the duty to provide a just society is not one that can be undertaken solely by the judiciary.

I indicated yesterday there is no truly just or truly effective constitutional system in the very broad sense of that term—constitutional with a small "c"—if there is hunger, if there are inadequate educational opportunities, if there is poor housing. It is not clear to me that the Constitution addresses those matters.

Senator SPECTER. My time is up. I will return later. Thank you very much, Judge Kennedy.

Thank you, Mr. Chairman. Thank you, Senator Metzenbaum.

The CHAIRMAN. Now, we will turn to Senator Metzenbaum.

Senator METZENBAUM. Judge Kennedy, in the *Aranda* v. *Van Sickle* case, you joined a decision which held that the constitutional voting rights of Mexican-Americans were not violated by the election system of the city of San Fernando, California. That was a case where Mexican-Americans claimed that they had been denied their voting rights by the city, and that they had been denied equal access to the political process.

Some Hispanic groups, it is only fair to say, find that decision very troubling. They say that you ignored a lot of evidence which showed that the political process was not equally open to participation by Mexican-Americans, and that Mexican-Americans had less opportunities than other residents to participate in the political process and elect legislators of their choice.

For example, the evidence showed that up until 1972, two-thirds of the polling places had been located in the homes of whites, and "that the private homes which were used were invariably not Spanish-surnamed households, and they were not located in an area of the city where Mexican-Americans lived."

In your opinion, you said, "There is no substantial evidence in the record indicating that location of polling places has made it systematically more difficult for the Mexican-Americans to vote, causing Mexican-Americans who otherwise would have voted to forego voting."

I guess in this connection I might quote a Supreme Court Justice, when referring to obscenity, who said, "I know it when I see it." And I sort of feel the same thing about this kind of situation. Is it not sort of common sense, or does it not sort of speak for itself, that when you locate polling places in white homes and in a Mexican-American area that you are going to bring about the results—I think the results were that only 28 percent of the Mexican-Americans were voting, although they made up about 48 percent of the population.

I just was wondering how you came to the conclusion you did in that case.

Judge KENNEDY. Well, I am pleased to talk with you about that case, Senator. I found it a very troubling case and still do.

You began by saying that in that case I found that the constitutional rights of the Hispanic community to vote were not violated.

Senator METZENBAUM. Would you mind pulling the mike a little bit around? Thank you.

Judge KENNEDY. You began by saying that in that case I found the constitutional right to vote of Hispanics in the community were not violated. That was precisely what I was concerned about. It was precisely what I did not find. It is precisely why I wrote a separate opinion.

In this case, the plaintiffs, who were residents of the city of San Fernando in Southern California, brought a challenge to the at-large system of voting, and they asked for the remedy of a federal court decree to require district voting—the purpose being so that Hispanics could have representation in the city government. Although I forget the facts of the case, I will assume that there were neighborhoods which were largely Hispanic. I think that is probably implicit in the facts of the case. So they would have achieved that had that remedy been granted.

The lower court found the evidence insufficient to state a cause of action and granted summary judgment. My two colleagues on the court agreed. I felt that there was something wrong in that case. So I undertook to write a separate opinion to express my concerns.

I went through the evidence and brought out the fact that voting booths were located in non-Hispanic neighborhoods, that there had been no representation on city commissions and boards, et cetera. I indicated that these facts might very well support an action for relief in the federal courts.

In that case, however—and you are never sure why lawyers and litigants frame the cases the way they do—the insistence by the plaintiffs was that they wanted only the one remedy of a district election scheme rather than an at-large election scheme. That is the only remedy they sought.

This is one of the most powerful, one of the most sweeping, one of the most far-reaching kinds of remedies that the federal court can impose on a local system. And in our view, or in my view as expressed in the concurrence, that remedy far exceeded the specific wrongs that had been alleged. I concluded that the remedy sought did not match the violation established. But I made it very clear—and that was the point of my opinion in what I still consider trou-

bling and a very close case—I had a serious concern that individual rights violations had been established in the record.

What was the outcome of that case, whether a subsequent suit was brought based on my concurring opinion, I do not know. My concurring opinion is a textbook for an amended complaint, or a textbook for a new action. I tried to indicate my concerns and my sensitivities in that case rather than simply joining in the majority opinion, which I thought did not adequately address some very real violations.

Senator METZENBAUM. Did you make it clear, in your opinion, that if the remedy sought had been a different one, that based upon the same facts, and I think the facts also were that all of the election process was in English and it made it that much more difficult for people to vote, but had the remedy sought been a different one, that you very well might have arrived at a different conclusion?

Or is that your comment here today?

Judge KENNEDY. Well, I thought that that was implicit if not explicit in my opinion. I was writing a concurring opinion. I did not have the second vote, so I could not order—I could not frame the judgment in the case.

Senator METZENBAUM. Just on this point, why did you not let it go to the jury? You affirmed a summary judgment.

Judge KENNEDY. Or to the finder of fact.

Senator METZENBAUM. Or to the finder of fact. Since you were troubled by it, and there were the egregious circumstances of polling booths being in white homes, that decision is made by the local ordinance, by the local election officials, if you were troubled by it, why not then let it go to the next stage and let a finding of fact be permitted?

Judge KENNEDY. Well, remember, number one, I just don't have the judgment. But so far as my own separate concurring opinion, why didn't I recommend that, I guess would be your question.

Senator METZENBAUM. Yes. And you might at the same time answer this: why could you not have indicated in your decision what the proper remedy should be? Even though the plaintiffs sought a certain kind of remedy, couldn't you have come to the conclusion in your opinion that another kind of remedy was appropriate? Perhaps the court is not required to deny all relief merely because the petitioner comes in asking for one kind of remedy. Shouldn't the court be able to come up with another remedy in this case?

Judge KENNEDY. That is a fair question, and I am not sure I have an adequate answer in my own memory—now.

As I recall the case, we explored the case with counsel extensively at oral argument. And counsel said, "This is a case in which all we are seeking is an abolition of at-large elections. That is all this case is about." And that was my concern.

Why clients and attorneys present cases in this way is beyond me. It was very clear to me, based on my understanding of the record, that any Hispanic resident could bring an action to change the places of the polling booths and to rectify the other injustices that were there in the system.

Now, under the—well, I'm not an expert in the amendments to the Voting Rights Act of 1980, I haven't had cases on those. At this time, we were operating under the assumption that the remedy had to fit the wrong, and that was the argument that I had with the attorneys in the case.

But I wanted to make it very clear in the concurring opinion that I was concerned with the treatment that the court was giving to these litigants, and I wanted to put on the record that I thought there was some evidence of discrimination.

And I guess, Senator Kennedy, the answer to your question of why didn't it go to the finder of fact, is because the attorneys insisted that this was all the suit was about, at-large versus district elections.

I just did not see that as a plausible remedy, as a permissible remedy, given the violations they had established.

Senator METZENBAUM. I don't think we need to debate it further. But suffice it to say, if I were a Mexican-American, I think there would be a keen sense of disappointment that you did not take that extra step so that the summary judgment would not have precluded a different kind of remedy.

And as you have already said, maybe you could have or should have indicated something to that effect.

Judge KENNEDY. Well, it brings up the troubling point that I have not resolved, Senator: To what extent can courts try lawsuits for the litigants. In this case, as I recall, these were extremely experienced, capable attorneys.

Senator METZENBAUM. Judge, I want to make a distinction on that point.

Judge KENNEDY. And for me to say, well, now, you have done this the wrong way, you go back, when they insisted they did not want to do that, it seems to me is perhaps overstepping.

Senator METZENBAUM. You are saying that the court cannot try the case for the litigants' attorney.

But I do not think it was a matter of trying the case in a different manner. I think it was a matter of providing a different solution, a different conclusion, than the summary judgment.

The evidentiary material was already in the record. It was sufficient. There were Mexican-Americans, 48 percent; 28 percent only voting. Voting booths were in the white homes. All of the election process was in English.

So the facts were there. And so I do not think it is a matter of saying that the court had to tell the lawyers how to try the case differently. I think what you're really saying is whether the court should come up with a different kind of result or different kind of remedy than that which is being sought by the litigants.

Judge KENNEDY. Well, but it is not clear to me that the court should, if the litigants insist that this is all they are asking for.

Senator METZENBAUM. Well, I understand your point.

Judge KENNEDY. And the whole point of the decision was that I did not want Hispanics to think that I did not think there were some serious problems down there in San Fernando.

Senator METZENBAUM. Let me go on to another issue.

Let us look at your 1985 opinion in *AFSCME* v. *State of Washington* where you reversed a lower court finding that the State had

violated the civil rights law by paying women substantially less than men for comparable work.

Until the early 1970s, the State of Washington ran segregated male-only and female-only help wanted ads. In 1974, following a comprehensive job pay study, the State concluded that women overall were paid about 20 percent less than men in jobs of comparable value, and in certain jobs, were paid as much as 135 percent less.

These differences were not related to education or skills. They were related only to sex. After the State study, then Governor, now Senator, Evans, conceded there was an inequity, and said the State had an obligation to remove it.

Despite its knowledge of the inequity, the State did not correct it. The district court held that the State's knowing, quote, "deliberate perpetuation," end of quote, of a discriminatory pay system, combined with the State's admission of the discrimination, and its past segregated job ads, supported a finding of unlawful discrimination under title VII of the civil rights law.

Now, in reaching that conclusion, the court was guided by the Supreme Court's 1981 *Gunther* decision, which said that Congress wanted title VII's prohibition of discriminatory job practices to be, quote, "broadly inclusive, to strike at the entire spectrum of disparate treatment of men and women resulting from their sex stereotypes," end of quote.

The district court's findings obviously raise very serious questions as to the state's discriminatory practices toward women.

I have difficult in understanding your complete rejection of the court's conclusion on these facts. And I wonder if you would care to address yourself to it because it is a decision that frankly has many in this country very worried.

Judge KENNEDY. I would be glad to address it, Senator.

We must at the outset distinguish between equal pay and comparable pay. The Congress of the United States has a statute which says that women and men in the same positions are to be given the same pay.

That is not what this case was about. That law is clear; that policy is clear; that obligation is clear; and the courts enforce that.

That is not what this case was. What this case was about was a theory that women should be paid the same as men for different jobs.

The theory of the case was that the State of Washington was under an obligation to adopt this differential pay scale or a compensatory pay scale, because it had notice of the fact that there were pay disparities based on long classifications and stereotypes of women in particular jobs.

I understand that. You do not have to be married to a school teacher for very long to figure out that the reasons educators are not paid enough in this country is because for hundreds of years the education system has been borne on the backs of women.

They have borne the brunt of it. And I think you can make a pretty clear inference that the reason for those low pay scales is because women have dominated that profession. I think that is very unfortunate.

On the other hand, it is something of a leap to say that every school district in the country is in violation of title VII because it does not adopt a system whereby you find comparable worth and lower the salaries of drivers of equipment which, say, are male dominated jobs—let's assume they are—and raise the salaries of women.

That may be a commendable result but, number one, we did not see in title VII that Congress had mandated that result, or in the Equal Pay Act. We looked very carefully at the legislative history.

Second, we did not see, in the evidence presented to us, that the State of Washington had intentionally discriminated by continuing to use the market system in effect.

The State of Washington was subject to a judgment for $800 million, which I take it is a large amount of money, perhaps even in Washington, DC, on the theory that their failing to depart from the market system and from market forces was an actionable violation.

Now, the Governor recognized—I forget if it was the Governor or the legislature or both—that in their view, the State as an affirmative matter should undertake this correction.

We did not think, however, that there was a shred of evidence to show that the State had deliberately maintained that pay scale difference in order to discriminate against women.

It is true that the State had in the past advertised for some job categories as male only. And the State had corrected that.

Once again, I guess we are talking about the difference between the wrong and the remedy.

Senator METZENBAUM. I am not sure we are in this case, because the Supreme Court in the *Gunther* case laid down the rule that title VII's ban on discriminatory job practices should be liberally interpreted and strictly enforced.

Now, what concerns me is whether you applied title VII too narrowly. You seem to hold that to prove discriminatory treatment, it would be necessary to show that the employer harbored a—this is your word—"discriminatory animus," end of quote, or a discriminatory motive.

But the district court had already found that the State of Washington knew for several years that it was perpetuating a discriminatory pay system.

Didn't you go too far in immunizing an employer from title VII liability? Should not an employer who has knowingly and deliberately perpetuated a discriminatory wage system be legally liable for engaging in unlawful employment discrimination?

Judge KENNEDY. We held not. We held that under that formula—it appeared to me, it appears to me, that under that formula, every employer in the United States is charged with an intentional discrimination because it follows the market system even though it did not create that market system.

Senator METZENBAUM. But it seems to me the case is very similar to *Gunther*. *Gunther* went beyond equal pay for equal work. *Gunther* said that a case could be brought where the court was not required to make subjective assessments of job worth.

The State did its own study in this case, and therefore there was no requirement in the *AFSCME* case that the court make a subject judgment.

There was the finding by the State. The State had done the work. The facts were there. *Gunther* had recognized that it appeared to be enough. The appellate court, with you writing the opinion, reversed that and undermined the rights of the women established in the *Gunther* case.

And frankly, it is a kind of a case that causes great concern, and my guess is, we will hear some testimony, some witnesses, on the subject. Women are saying they are concerned about whether you went too far to reverse the lower court in this case, and went beyond the requirements of the Supreme Court as enunciated in *Gunther*.

Judge KENNEDY. I am absolutely committed to enforcing congressional policy to eliminate barriers that discriminate against women, particularly in employment or in the market place or in any other area where it is presented to me.

We do not have a free society when those barriers exist. We do not have a free society if women cannot command pay that is calculated without reference to the fact that they are of a particular sex.

But it is simply not clear to me at all that the State of Washington, because it undertakes a survey and discovers what is intuitive for many people, that some job classifications are dominated by women and that they are paid less, can be held to be a violator for not correcting that.

I think the State should be commended for undertaking the study. If the holding were that any employer who undertakes a study of comparable worth is liable for failing to correct the inequity—I simply don't think that the Congress has let the courts go that far.

If the Congress wants to enact that, I will enforce it. If the Congress has not enacted it, I cannot as a judge invent it.

Senator METZENBAUM. But the lower court found the law and the evidence adequate. *Gunther* seemed to say that much evidence was sufficient.

And what is of concern to this Senator, as well as to many women, is that you then saw fit to reverse.

But let us not belabor that point.

Judge KENNEDY. Well, it is an important case, Senator, and I do not mind talking about it. A couple of final points. First, my understanding is that every other court in the country that has looked at the issue has reached the same result. Second, we indicated that in a case where you can establish that the wage scales were set because women were dominant in the pay group, there could be an actionable violation, of course.

We made that very clear. We did not find it on this evidence.

Senator HATCH. Howard, would you yield to me for a comment on my time? It will take less than a minute.

Senator METZENBAUM. If the Chair permits it.

The CHAIRMAN. If there is no objection from anyone else.

Senator HATCH. I just want to point out that in the *Gunther* case the court specifically noted that it was not deciding the case on the basis of comparable worth. It was simply ruling on a discriminatory method of evaluation.

In this case, you didn't have the same set of circumstance. And one last thing, this was a three judge decision, right?

Judge KENNEDY. Yes.

Senator HATCH. How was it decided?

Judge KENNEDY. It was unanimous.

Senator HATCH. Okay. That is all.

Senator METZENBAUM. And you wrote the opinion?

Judge KENNEDY. Yes, sir.

Senator METZENBAUM. And I am not going to get into a debate with my colleague on it, because I want to go further.

I want to ask you about a labor law case called *Kaiser Engineers.* As you know, that case involved the question whether employees who petition their Congresspersons on a matter of public policy that affects their job security are engaging in protected activity under the National Labor Relations Act.

The ninth circuit held that it was unlawful to discharge employees who wrote to their Congressman regarding a proposed change in immigration policy that they felt threatened their jobs.

You wrote a dissent from the ninth circuit majority opinion. Two years later, the Supreme Court in the *Estek* case squarely rejected your position.

Justice Powell, writing for seven members of the court, concluded that employees are protected when they seek to improve terms or conditions of employment through channels outside the immediate employer-employee relationship.

The court specifically mentioned appeals to legislators, and cited the *Kaiser* majority decision with approval.

In light of the Supreme Court's decision in *Estek,* have you reevaluated your position? And do you feel that perhaps the conclusion you reached in the *Kaiser* was wrong?

Judge KENNEDY. I am fully satisfied with the decision of the Supreme Court. I should note that in *Kaiser* the implication of the employees was that the employer was supporting their policy position. And the employer's decision to discharge was based on a theory that the engineers had misrepresented the employer's position.

But as for the rule that the Supreme Court has announced, I have absolutely no trouble with. And I think it is a good rule.

Senator METZENBAUM. I must tell you, Judge, that I am troubled by the pattern of your opinions in the area of labor law.

In addition to the *Estek* case, there are two instances in which the Supreme Court granted review of ninth circuit decisions involving labor law questions.

In both cases, you wrote, or joined the opinion. In both decisions involving labor law questions.

In both cases, you argued for a restrictive interpretation of employee or union bargaining rights.

In both cases, the court rejected your position by a vote of 9 to 0.

I refer here to the 1982 case called *Woelke* v. *Romero,* and the 1986 case called *Financial Institution Employees of America.*

But the Supreme Court cases really only tell part of the story. In your 12 years on the bench, you have participated in more than 50 decisions reviewing orders issued by the NLRB.

It is my understanding that although you have voted to reverse board rulings against the employer approximately a third of the time, you have never voted to overrule the NLRB when it has ruled in favor of the employer.

It seems to me that your judicial writings reflect a disturbing lack of concern for the bargaining rights of employees. I hope that I am wrong.

Can you suggest some other interpretation of this record? Or can you tell us where or when in your opinions or other writings you have evidenced a commitment to employee rights in the collective bargaining context?

Judge KENNEDY. It is very clear to me that the unions of this country are entitled to full and generous enforcement of the national labor relations laws that protect their activities.

The box score here I am not quite familiar with. It is a fundamental matter of national policy that workers are protected in their right to organize, and in their right to collective bargaining.

And in my view, I have fully and faithfully interpreted the law in that regard. I have great admiration for working people. I worked through all kinds of jobs when I was working my way through school.

Since I was 14 or 15 years old I had jobs with manual laborers. I learned that they had a great deal of wisdom and a great deal of compassion, and that their rights should be protected by bargaining agents.

Senator METZENBAUM. Just in conclusion, I do not think the question really is, are some of your decisions right or wrong, but I think the issue is whether your consistent support for the employer position on important, unresolved matters of statutory interpretation is indicative of a predisposition in the area of labor law.

I do not know. If you are confirmed maybe my questions today will cause you to reflect a bit on this very issue.

Thank you, Judge.

Judge KENNEDY. Thank you.

The CHAIRMAN. As preordered, we will now go to the Senator from Vermont, and then the Senator from New Hampshire.

Senator LEAHY. Thank you, Mr. Chairman. Judge Kennedy, welcome back.

Judge KENNEDY. Thank you, sir.

Senator LEAHY. To you and your family. I always like to get a chance to get my family to sit still this long to listen to me, and I say that only semi-facetiously, because they have had to sit through and listen to too many speeches during campaigns and everything, and do it dutifully.

But I think this is such an extraordinary circumstance, as it should be in your life, that I hope it has been something of interest to your family. Certainly we have never seen anybody sit here more attentively than they have.

Judge KENNEDY. Thank you very much, sir.

Senator LEAHY. Judge, I mentioned to you when we met privately that I was impressed with your comments at the White House in which you said that not only did you look forward with eagerness to these hearings, but, and I am paraphrasing now, that they very definitely were not only an integral part of our constitutional

makeup, but a very important one, and one that should be done thoroughly and completely.

Do you still feel that way, I hope?

Judge KENNEDY. Certainly, Senator, I do.

Senator LEAHY. I want to ask you questions in three different areas, primarily. One is in the privacy area; one is in the criminal law area—I spent about a third of my adult life as a prosecutor, so I have an interest there, and you have written a number of cases there; and then lastly in the first amendment area

Normally, in these things, I take first amendment first, but a number of your comments to me privately, a number of decisions you have made in the past, give me a lot more comfort in those areas than a number of other nominees have.

To begin in the area of privacy, I wonder if I might just follow up on a couple of questions. Senator Biden asked you a number of questions in this area yesterday. In response to one, you said that you think, "most Americans, most lawyers, most judges, believe that liberty includes protection of a value we call privacy."

You did not state your own view at that point. But slightly later you said that you had no fixed view on the right of privacy. Senator DeConcini followed up on that. And in response to a question from him, you said that you had no doubt about the existence of a right to privacy, although you prefer to think of it as a value of privacy.

Is this a semantic difference? Or is there a difference between right and value? And if there is a difference, what is your view?

Judge KENNEDY. I pointed out at one time in yesterday's hearings that I am not sure whether it is a semantic quibble or not. I think that the concept of liberty in the due process clause is quite expansive, quite sufficient, to protect the values of privacy that Americans legitimately think are part of their constitutional heritage. It seems to me that sometimes by using some word that is not in the Constitution, we almost create more uncertainties than we solve. It is very clear that privacy is a most helpful noun, in that it seems to sum up rather quickly values that we hold very deeply.

Senator LEAHY. But you understand——

The CHAIRMAN. Will the Senator yield on that point?

Senator LEAHY. Certainly.

The CHAIRMAN. And this may save some time, because I had a whole round of questions on this.

Let me put it to you very bluntly. Do you think *Griswold* was reasoned properly?

Judge KENNEDY. I really think I would like to draw the line and not talk about the *Griswold* case so far as its reasoning or its result.

I would say that if you were going to propose a statute or a hypothetical that infringed upon the core values of privacy that the Constitution protects, you would be hard put to find a stronger case than *Griswold*.

The CHAIRMAN. That doesn't answer the question. Is there a marital right to privacy protected by the Constitution?

Judge KENNEDY. Yes—pardon, is there a——

The CHAIRMAN. Marital right to privacy.

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

The CHAIRMAN. Thank you.

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

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

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

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

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

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

Senator LEAHY. And that is your view today?

Judge KENNEDY. Yes.

Senator LEAHY. When you first——

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

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

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

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

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

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

Judge KENNEDY. Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Judge KENNEDY. Yes, sir.

Senator LEAHY. And that requires affirmative government action?

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

Senator LEAHY. So there are essentials?

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

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

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

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

Are there rights included in this unwritten constitution?

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

Senator LEAHY. Such as?

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

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

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

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

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

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

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

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

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

Judge KENNEDY. Well, I hope they square.

Senator LEAHY. Can the courts make them square?

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

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

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

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

Judge KENNEDY. Yes.

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

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

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

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

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

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

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

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

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

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

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

Should I wait?

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

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

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

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

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

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

Senator LEAHY. Press to be at a trial.

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

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

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

Senator LEAHY. Thank you.

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

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

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

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

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

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

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

Judge KENNEDY. Did they——

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Senator LEAHY. Thank you, Judge.

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

The CHAIRMAN. Without objection.

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

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

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

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

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

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

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

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

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

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

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

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

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

Senator HUMPHREY. Well, they are very good. The ones I have read are very, very good. Inasmuch as you write them yourself, that gives us some insight into your thinking. I find your logic to be very clear.

The Stanford speech is one that has been examined a number of times. That is an important speech. It is a very good speech, would you not say so?

Judge KENNEDY. I enjoyed it. I want to make clear that I never speak from notes.

Senator HUMPHREY. Yes.

Judge KENNEDY. I gave the Senate what notes I had. I think that speech came out about that way.

Senator HUMPHREY. Yes.

Judge KENNEDY. One of the dangers is you sometimes forget the principal part of the speech until after you have given it.

Senator HUMPHREY. Well, we all understand that. I think it is a very good speech. I want to examine a few parts of that and then parts of some other speeches, if I have time.

Let me quote from your Stanford speech.

"One can assume that any certain or fundamental rights should exist in any just society. It does not follow that each of those essential rights is one that we, as judges, can enforce under the written Constitution."

"The due process clause is not a guarantee of every right that should inhere in an ideal system."

Is that a correct quote?

Judge KENNEDY. That is a correct quote, and I think it is a correct concept.

Senator HUMPHREY. You have not changed your mind since 1986?

Judge KENNEDY. No, sir.

Senator HUMPHREY. "The due process clause is not a guarantee of every right that should inhere in an ideal system." So it is not a blank check?

Judge KENNEDY. Certainly not.

Senator HUMPHREY. How about the ninth amendment?

Judge KENNEDY. Well, as I indicated yesterday, the meaning of the ninth amendment, and even its purpose, is shrouded in doubt, and the Court has not, in my view, found it necessary to refer to that amendment in order to stake out the protections for liberty and for human rights that it has done so far in its history.

Senator HUMPHREY. Never used the ninth amendment to ground an opinion——

Judge KENNEDY. Yes. There may be some quarrel with that statement because of an isolated reference by Mr. Justice Douglas in the *Griswold* case, and by the concurring opinion of Mr. Justice Goldberg in the same case.

Senator HUMPHREY. Well, if judges—in your opinion—if judges cannot enforce each of the essential rights which should exist in a just society, what should the Court do to move us toward a more ideal system when the political branches fail to act?

Judge KENNEDY. I suppose the Court can cry in protest if it sees an injustice in a particular case. The law is an ethical profession, and the law is designed to seek justice.

And if courts see an injustice being done, I think the oath of our profession requires us to bring that to the attention of the Congress. On the other hand, judges who are appointed for life cannot use the judiciary as a platform for their own particular views. So there is a duality there.

Senator HUMPHREY. What do you mean by "judges bringing that to the attention of the Congress"?

Judge KENNEDY. Well, from time to time, in our opinions we tell the Congress, please look at this statute and see the way we are enforcing it. Do you really want us to do this? I think that is quite a legitimate function of the Court.

I have said that in some of the RICO cases. Some of my other colleagues have, too. It is just not at all clear to us that the way we are enforcing RICO is what Congress really had in mind, but we are following where the words lead us.

Senator HUMPHREY. I want to go back to the ninth amendment.

Yesterday, you said it seems to me the Court is treating it as something of a reserve clause to be held in the event that the phrase liberty, and the other spacious phrases in the Constitution appear to be inadequate for the Court's decision.

You say, it seems to me the Court is treating, has been treating it as a reserve clause.

Is that your view, that it ought to be treated as a reserve clause, to be held in the event that the spacious phrases are inadequate to the matter at hand?

Judge KENNEDY. My characterization was what I thought the philosophy of the Court was to date, and I think it is important that the Court not confront such an ultimate and difficult issue unless it has to.

A case grounded solely on the ninth amendment requires the judge to search in the very deep recesses of the law, where I am not sure there are any answers.

Senator HUMPHREY. Well, if I have time, I want to come back to the ninth amendment and discuss the historical context, the intent of the authors and the framers, which seems to have been ignored in some of the discourse in this hearing so far.

May I ask the Chairman his intent with regard to a second round.

The CHAIRMAN. We will stay as long as the Senators have questions.

Senator HUMPHREY. Good. Quoting again from your Stanford speech, Judge, you said: "The unrestrained exercise of judicial authority ought to be recognized for what it is—the raw exercise of political power."

"If in fact that is the basis of our decisions, then there is no principled justification for our insulation from the political process."

Why did you feel constrained to raise the subject of unrestrained exercise of judicial authority in that speech?

Judge KENNEDY. I think there is a concern in society that the courts sometimes reach results simply because the courts think in their own view that those results are right, and I think it is extremely important for judges to remember that they are not political officers in black robes.

On the other hand, I think it is also important for the public to know the limitations of our own powers. Perhaps the public is, from time to time, disappointed with the cases that we write.

Perhaps the public thinks that we should reach out to rectify an injustice, to amend a complaint, to change a lawyer's theory of the case, and the constraints of the judicial process simply do not always allow that.

Senator HUMPHREY. You speak of the public concern, but your audience was judges. It was not a public speech, was it? Was it judges, or lawyers?

Judge KENNEDY. These were judges from Canada who have a new constitution.

Senator HUMPHREY. Yes.

Judge KENNEDY. They had been under a parliamentary system where the legislative authority is supreme, as have the English judges for many, many years, and they were curious to know what the extent of their authority was.

And I think it fair to say most of them were looking forward to exercising it, and therefore, I was sounding a note of caution.

Senator HUMPHREY. Well, you say the public is concerned that judges have sometimes overreached. Is Anthony Kennedy concerned that judges have sometimes overreached?

Judge KENNEDY. I think it is always a legitimate concern, and that we must remind ourselves, constantly, of the limitations on our authority.

Senator HUMPHREY. But I mean the question in more than the abstract sense. Is it your view that at times in our history, the Supreme Court has overreached, has exercised, rawly exercised political power?

Judge KENNEDY. There are a few cases where it is very safe to say that they did, the *Dred Scott* case being the paradigmatic example of judicial excess.

Senator HUMPHREY. So it is more than an abstract matter. How about in modern times? Is it your view? This is a modern speech, a contemporary speech. You felt constrained to make a rather strong statement about abuse of the judicial prerogatives.

I have got to think that it is almost a cri de coeur. Is it?

Judge KENNEDY. I did not really have a list of cases in mind. I had more in mind an approach, an attitude that I sometimes see reflected on the bench.

Senator HUMPHREY. An approach and an attitude?

Judge KENNEDY. That I sometimes see reflected on the bench in my own court.

Senator HUMPHREY. So irrespective of ultimate decisions, you are concerned at least about an approach and an attitude in certain instances, in contemporary times?

Judge KENNEDY. Yes, and this can affect the decisional course of the court.

The CHAIRMAN. If I understand the answer to the question the Senator asked, is that there are no specific cases which you had in mind when you referred to the unrestricted exercise——

Judge KENNEDY. That is correct. None come immediately to mind. But that concern always underlies the examination by a

judge of his own writings, or her own writings, and of the writings of their colleagues.

It is something you must constantly be aware of as you are trying to evaluate the pulls and tugs, and the impulses and the constraints that come to bear on the decisional process.

Senator HUMPHREY This approach and attitude which caused you to make the statement cautioning against unrestrained exercise of judicial authority, as raw exercise of political power—this concern about the approach and the attitude that you have seen in contemporary times, in some cases—is that something that bothers you, professionally?

Judge KENNEDY. Well, I do not think the judiciary of the United States, as a whole, has departed from its mandate or its authority, but I simply think it is a concern that must always remain in the open, so that judges are aware of the limitations on their authority.

Senator HUMPHREY. Moving from general concerns over your views on judicial restraint to the privacy issue, in your Stanford speech you noted that *Bowers* v. *Hardwick* upheld the Georgia law which proscribes sodomy, yet you noted the decision did not overrule *Griswold,* the case which announced the right of privacy.

And then you asked, "Are the decisions then in conflict over the substantive content of the privacy right?"

My first question is, when you speak of decisions, are you speaking of *Bowers* vis-a-vis *Griswold,* or are you speaking of *Bowers* vis-a-vis *Dudgeon,* which the Court, in your opinion——

Judge KENNEDY. Yes. There is a case called *Dudgeon,* decided by the European Court of Human Rights, under the Convention of Human Rights, and it reached a result that was absolutely contrary to *Bowers* v. *Hardwick,* and as I indicated in the speech, the Supreme Court had enough to wrestle with with its own precedents without trying to incorporate the European court. But I thought that it was an interesting exercise to compare the European court case with the *Bowers* case.

Senator HUMPHREY. I am still not perfectly clear——

Judge KENNEDY. And the answer is the comparison was between the *Dudgeon* case and the *Bowers* case.

Senator HUMPHREY. Well nonetheless, do you see any conflict between *Bowers* and *Griswold*?

Judge KENNEDY. Well, the methodology of the cases, it seems to me, are not easy to square, although that is nothing to be particularly upset about. The law accommodates a certain amount of contradiction and duality while it is in a state of growth. Absent a perfect society, justice and symmetry are not synonymous.

Senator HUMPHREY. You say there should be a certain amount of—how did you phrase it a moment ago?—a certain amount of ambiguity?

Judge KENNEDY. I think I said duality and tension. I do not know.

Senator HUMPHREY. Well, that seems to contradict what you said yesterday, when you said that judges are not to make laws, they are to enforce the laws. This is particularly true with reference to the Constitution. That judges must be bound by some neutral, definable, measurable standard in their interpretation of the Constitution.

Are you not contradicting yourself?

Judge KENNEDY. Well, between the idea and the reality falls the shadow. We attempt, of course, to have symmetry. We attempt, of course, to have cases that are all on fours with each other.

To the extent they are not, that indicates that the court has further work to do.

Senator HUMPHREY. I think in the meantime, it strikes me that in the meantime, while the Court is doing its further work, some citizens are suffering injustices.

I suppose we cannot hope for perfection in the courts, but I would certainly hope for objectivity, to the greatest possible extent.

Judge KENNEDY. I would agree with that, Senator. I think that is perhaps the correct resolution—objectivity.

Senator HUMPHREY. The problem with judges is that they are human beings, and that is why the theory does not quite work out.

Judge KENNEDY. Madison said if men were angels we would not need a Constitution.

Senator HUMPHREY. Well, I want to discuss your *Beller* opinion, not that I want to take up the subject of homosexuality, or discuss the merits, or the demerits, or the immorality of homosexuality, but I want to discuss your *Beller* opinion because there is certain language in there that worries this Senator.

You said that, quote: "We recognize, as we must, that there is substantial academic comment which argues that the choice to engage in homosexual activity is a personal decision that is entitled, at least in some instances, to recognition as a fundamental right and to full protection as an aspect of the individual's right to privacy."

Why did you feel in writing that, that you must recognize substantial academic comment? My goodness, you can find academic comment to justify almost anything. There is just as much, and far more weighty opinion in centuries of law, and thought, and writing, which you did not bother to mention in your opinion.

Judge KENNEDY. Well, I had read extensively in preparing for this opinion, in order to understand the right approach, and I usually think it is fair to the parties to set forth the things that I have read.

This was the first case involving a challenge to the discharge of homosexuals from the military, and I spent a great deal of time on it, and I thought it important for the reader, and for the litigants to know that I had considered their point of view.

Senator HUMPHREY. Do you find something commanding about academic opinion versus societal mores, when they differ?

Judge KENNEDY. Well, it is interesting that the legal profession is the only profession that is intimidated by its initiates. We have law review articles written by students who are not even lawyers and they get paid a great deal of attention, I guess that is one thing that keeps the law vigorous and vital.

But I am not overly persuaded by academic comment. I frankly do not have time to read very much of it.

Senator HUMPHREY. You referred, likewise, in your Stanford speech to the responsibility of the political branches, quote, "to determine the attributes of a just society." How much weight, as a judge, or as a Justice, will you give to the political—the responsibil-

ity, indeed, the prerogatives of the political branches to determine the attributes of a just society?

Judge KENNEDY. I think it is the prerogative and the responsibility of the political branch to take the leadership there. As I have indicated yesterday, I think the political branch has the obligation to assess each of its actions under the standard of constitutionality, and I think when the Court confronts an act by a legislature, it must know, it must recognize that the legislators understood the Constitution, that they acted deliberately with reference to it, and the legislature is entitled to a high degree of deference.

This is not just the political system at work. It is the constitutional system at work.

Senator HUMPHREY. Let us turn to criminal law. In your speech to the Sixth South Pacific Judicial Conference this year, you said, "Equally disturbing is that Goetz"—referring to the case in New York of the subway shooting—"Equally disturbing is that Goetz emerged from the subway incident as a hero in the eyes of a large portion of the citizenry: the victim who finally fought back. If the rule of law means that citizens must forego private violence in return for the State's promise of protection, then the public acclaim with which Goetz's actions were received in some quarters indicates that the present criminal justice system breeds disrespect for the rule of law."

If that is so, must the judiciary share in the responsibility for a criminal system which breeds disrespect for the rule of law?

Judge KENNEDY. Absolutely. The judiciary system is responsible for the immediate supervision and the immediate implementation of the criminal system. The judiciary has itself made many of the rules that are binding upon the police, and it is the obligation of the judiciary to constantly reassess those rules as to their efficacy and as to their reasonableness.

In this connection, we were talking about violent crime. We were talking about victims who feel helpless in the wake of crime, and courts must be very, very conscious of their front-line position here.

Senator HUMPHREY. Well, did you mean to say in your speech to the conference that the present criminal justice system breeds disrespect for the rule of law? Is that what you were saying?

Judge KENNEDY. I think that it can in some quarters. Everybody can point the finger to each other, but I think the courts bear a large responsibility. I know in some States, some States represented by the members of this committee, there simply are not enough funds for courts, for law enforcement officials, for correctional facilities. And it is a tremendous problem.

What we do is take care of society's failures. We have very little to do with preventative measures other than the deterrent value that quick and efficient enforcement of the criminal system brings.

Senator HUMPHREY. The courts must share some responsibility in this present system which breeds, to some extent, disrespect.

Judge KENNEDY. Of course.

Senator HUMPHREY. Including the Supreme Court?

Judge KENNEDY. I would include the Supreme Court, of course.

Senator HUMPHREY. Quoting further from the same speech, "The significant criminal law decisions of the Warren Court focused on the relation of the accused to the State and the police as an instru-

ment of the State. Little or no thought was given to the position of the victims."

Why did you choose to criticize the Warren Court in this?

Judge KENNEDY. Well, it was that court, of course, which implemented the great changes that we have had in the criminal procedure system, changes which are now really a part of that system. I was pointing out the fact that really there has been a lack of awareness by all parts of the Government of the position of the victim.

I had indicated yesterday that victim was a word that I never even heard in law school, and, frankly, I do not think I heard of it until the last 6 or 7 years until the Congress of the United States and commentators brought it to our attention when you passed the Victims Assistance Act.

Senator HUMPHREY. How much time do I have left?

The CHAIRMAN. You have about 2 minutes, but why don't you take more time at this break. We have had you sitting a long time, Judge. What we are going to do is we will break for the luncheon recess when Senator Humphrey finishes, which will end the first round.

But before we leave, I would ask the audience please do not get up. We have a little business to conduct here, so if you are going to leave, leave now and not at the end so we cannot hear what we are about to do. It will take 3 minutes after the Senator from New Hampshire finishes. At that time, we will break. And if you need another 5 minutes or so, you go ahead, Senator.

Senator HUMPHREY. Thank you.

The CHAIRMAN. Is that all right with you, Judge?

Judge KENNEDY. Certainly.

Senator HUMPHREY. I have a speaking engagement off the Hill at 12, so I cannot take too much time. I am sure you will be glad to hear that, Mr. Chairman.

I want to go back to the ninth amendment, Judge Kennedy. If I understood some of the questions correctly, some Senators seem to be trying to get you to say that there are some privacy rights hiding there in the ninth amendment waiting to come out, come out, wherever you are. That seems to me to be a very generous reading of the intent of the authors and ratifiers of the ninth amendment. Wouldn't you agree?

Would you give us your understanding of the historical intent of the ninth amendment?

Judge KENNEDY. Well, as I have indicated, the intent is really much in doubt. My view was that Madison wrote it for two reasons. Well, they are really related. He knew, as did the other framers, that they were engaged on an enterprise where they occupied the stage of world history; not just the stage of legal history, but the stage of world history. These were famous, famous men even by the standards of a day unaccustomed to celebrities. And he was very, very careful to recognize his own fallibilities and his own limitations.

So he first of all wanted to make it clear that the first eight amendments were not an exhaustive catalogue of all human rights. Second, he wanted to make it clear that State ratifying conventions, in drafting their own constitutions, could go much further

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than he did. And the ninth amendment was in that sense a recognition of State sovereignty and a recognition of State independence and a recognition of the role of the States in defining human rights. That is why it is something of an irony to say that the ninth amendment can actually be used by a federal court to tell the State that it cannot do something. But the incorporation doctrine may lead to that conclusion, and that is the tension.

Senator HUMPHREY. May lead to that conclusion.

Judge KENNEDY. May. May lead to that conclusion.

Senator HUMPHREY. Well, let me ask you this, finally. I do hope we will have an opportunity to think about matters further and ask further questions of you. Let me just ask you this, finally, with regard to privacy rights.

What standards are there available to a judge, a Justice in this case, to determine which private consensual activities are protected by the Constitution and which are not?

Judge KENNEDY. There are the whole catalogue of considerations that I have indicated, and any short list or even any attempt at an exhaustive list, I suppose, would take on the attributes of an argument for one side or the other.

A very abbreviated list of the considerations are the essentials of the right to human dignity, the injury to the person, the harm to the person, the anguish to the person, the inability of the person to manifest his or her own personality, the inability of a person to obtain his or her own self-fulfillment, the inability of a person to reach his or her own potential.

On the other hand, the rights of the State are very strong indeed. There is the deference that the Court owes to the democratic process, the deference that the Court owes to the legislative process, the respect that must be given to the role of the legislature, which itself is an interpreter of the Constitution, and the respect that must be given to the legislature because it knows the values of the people.

Senator HUMPHREY. Those, especially the first category, sound like very subjective judgments.

Judge KENNEDY. The task of the judge is to try to find objective referents for each of those categories.

Senator HUMPHREY. Thank you, Mr. Chairman. Thank you, Judge.

The CHAIRMAN. Thank you.

Let me ask my colleagues who are here, so we can plan the rest of the day and give Judge Kennedy some notion of how long we will be asking him to stick around today. Can my colleagues who are here indicate those who would think they would want a full second round of 30 minutes apiece? Senator Humphrey, Senator Specter, Senator Hatch?

Senator HATCH. I only have a few questions.

The CHAIRMAN. Senator Thurmond, are you going to take 30 more minutes?

Senator THURMOND. No, I will not. I may take 5 minutes.

Senator LEAHY. I might be able to do it in less, but I think there is a good possibility of 30 minutes, Joe.

The CHAIRMAN. All right. I am told that Senator Heflin has a second round and Senator Metzenbaum and Senator Grassley. So

we are up to at least 5 hours if that is the case. I would hope my colleagues might not find it necessary to take the full time.

It would be my intention, Judge, if we can, to have your testimony end today. I know that would disappoint you not to be able to come back tomorrow. But if you will bear with me, with the Chair, we will try, by accommodating 15-minute breaks every couple hours, to finish up today. I would hope we could finish relatively early, but maybe as some of the questions are asked in the second round others will find it unnecessary to pursue, if their line of inquiry is the same, their full 30 minutes.

What I would like to suggest is that, since we kept you so long, we not start another round this morning, and that we recess until, say, a quarter after 1. Well, let us make it 1:30. It will give you an hour and 45 minutes to get some lunch and be back here.

Judge KENNEDY. Thank you, Senator.

The CHAIRMAN. We will start at 1:30 with a second round of questions, and we will see where that takes us.

The hearing is recessed until 1:30.

[Whereupon, at 11:48 a.m., the committee recessed, to reconvene at 1:30 p.m., the same day.]

AFTERNOON SESSION

The CHAIRMAN. The hearing will come to order.

Judge, the reason for the absence of my colleagues, both the Democratic and Republican Caucuses are meeting until 2 o'clock, but we will begin.

Judge KENNEDY. All right, Senator.

The CHAIRMAN. In an effort to see if we can finish today.

And I will repeat this when some additional members are here, but although I will not limit anyone on the panel to anything less than 30 minutes, I would like to encourage them to be 20 minutes; and so at 20 minutes I am going to have that little red light go off—go on, I should say, and then we have 10 minutes after. Maybe that might encourage people to move a little bit more. And I will try to do that, and hopefully not even take the full 20 minutes. At the very end I may have a few concluding questions.

Judge, you have, as you discussed with Senator Specter this morning, you have praised dissent in *Plessy* v. *Ferguson,* that infamous separate but equal case that *Brown* overruled, and you praised Harlan's dissent.

As I am sure you are aware, Harlan's dissent in the *Plessy* case has been used by some scholars and officeholders alike to reinforce the notion of a colorblind Constitution; in a way, the idea that has been tremendously powerful in impacting upon one of the elements in the struggle for civil rights in this country, and that is the whole question of affirmative action.

It also is being used by some to argue that Congress lacks the authority to take race into account in any context. The Congress does not have the right to pass any laws even if our action is designed to improve equal opportunity for a group previously discriminated against or to remedy past discrimination.

When you say that Justice Harlan was correct, do you give his opinion that kind of meaning, that it proscribes the Congress from passing any laws to take into account any issue relating to race?

Judge KENNEDY. I recognize the quotation that the Constitution is colorblind. It was, of course, in the context, as you point out, of a case in which affirmative action was not before the Court and has since been used, as an interpretation, to argue against affirmative action. I do not think that that is a necessary interpretation of the opinion.

The CHAIRMAN. Could you tell us whether when you say you agree with Harlan whether it is your interpretation? What do you mean when you say you agree with Harlan's dissent?

Judge KENNEDY. My agreement with Mr. Justice Harlan's dissent is his reasoning as he was applying it to the facts of *Plessy* v. *Ferguson*.

The CHAIRMAN. Can you tell us what your views are on the permissibility of Congress engaging in legislative activity that is characterized as affirmative action?

Judge KENNEDY. The issue has not come before me in a judicial capacity as a circuit judge, and might well as a Supreme Court Justice, so I would not commit myself on the issue.

I will say that my experience in law school taught me the arguments for the practice.

The CHAIRMAN. I beg you pardon?

Judge KENNEDY. My experience in law school taught me the arguments in favor of affirmative action. Whether or not they would prevail in a court of law on a constitutional basis is by no means certain. But, in the law schools, in 1965, one percent of the nation's law school student body was black. After 10 years of effort by the law schools, including the one where I was privileged to teach, to encourage applicants from the black community, that had risen to 8 percent, an 800 percent increase. I know of no professor in legal education that does not think that it is highly important that we have a representative group of black law students in law schools.

It has apparently stayed about that rate, at 8 percent. I will notice in some of my classes there are not as many blacks as the year before, and then I will notice it picks up again. So, it is an area that the law schools, and I am sure other professional schools, are continuing to pay attention to, and I think it is a very important objective on the part of the schools.

I recognize that in the area of State schools there are different kinds of programs that may present constitutional questions that have yet to be resolved fully by the Court. As you know, the Court is still engaged in determining the appropriate rationale and the appropriate explanation for affirmative action under the Constitution.

The CHAIRMAN. I am not sure, quite frankly, how to fairly pursue the issue further with you without getting into areas that you might have to decide on. Your answer indicates a sensitivity to the need to encourage minorities and give them access to all institutions, in this case law, but I am not sure that it sheds much light on whether or not the Congress has the right under the Constitution to pass legislation that in fact requires affirmative action on

the part of various institutions over which it has control or indirect control.

Judge KENNEDY. As you know, the leading case on the subject is *Fullilove* v. *Klutznik,* a Supreme Court case which ratified, validated an affirmative action program for minority hiring for government contracts. That case is quite sweeping in its reasoning and in its rationale. But again, this is an area of the law where there is still much exploration and much explanation to be done on a case-by-case basis. I am not sure if there is any such case on the docket of the Supreme Court this term, but I know there are some cases in the circuits.

The CHAIRMAN. Do you think that voluntary plans by employers, voluntary affirmative action plans are permissible?

Judge KENNEDY. Yes, and incidentally, I said that I have not written in this area. Perhaps that was imprecise. Your question brings to mind one case where we had a unanimous court and I was the author of the opinion. It was called *Bates* v. *The Pacific Maritime Association,* and the question was whether or not a consent decree, which in a sense is voluntary action, was binding on a successor employer.

The previous employer had agreed to the terms and conditions of the consent decree and thereafter sold the enterprise. But the employee pool was the same, the equipment was the same, and we held that the consent decree, which required affirmative action for racial minority hiring, was valid and was binding on the successor. And you might be able to obtain some insight into my approach in this area by looking at that case.

The CHAIRMAN. Let me move to a different area of precedent. I have been fascinated by your responses to my colleagues on the role of history in the evolution of the Constitution and the relationship of the text to the practice and societal values.

And, in your remarks to the ninth circuit, you asked a question of Paul Brest, the dean of Stanford Law School, that I would like to put to you, because it bears upon our discussion here and may also tie this discussion into earlier exchanges you have had with some of my colleagues.

You noted that the Canadian Constitution is only 5 years old, and then you asked Dean Brest, and I think I am quoting, "What do you think would be easier, to be a constitutional judge in Canada or a judge interpreting the Constitution of the United States? Would it be easier to decide a close question when you essentially are a contemporary of those who frame the document or does 200 years of history and experience and teaching give us insight the Canadians don't have?" That is the question.

Judge KENNEDY. Paul Brest is a great constitutional scholar and I wish he had answered the question. He did not.

I thought when I first began teaching constitutional law that John Marshall was in the finest position of all of us to know what the Constitution meant, and in part because of my experience in talking about the Canadian Constitution with the Canadian judges I have changed that view. I think 200 years of history gives us a magnificent perspective on what the framers did intend, on what they did plan, on what they did build, on what they did structure for this country.

Holmes said that "A page of history is worth a volume of logic," and certainly 200 years of history is not irrelevant, so I think we are in a better position. The answer is, I think we are in a much better position.

And the other point is that over time the intentions of the framers are more remote from their particular political concerns and so they have a certain purity and a certain generality now that they did not previously.

The CHAIRMAN. I think I will stop there. I will reserve the balance of my time.

The Senator from South Carolina.

Senator THURMOND. Thank you, Mr. Chairman.

Judge Kennedy, I want to commend you for the astute manner in which you have answered the questions during this hearing. You have answered them with credibility and with knowledge. You have shown the great respect you have for the Constitution of the United States, which, in my opinion, is the greatest document that has ever been penned by the mind of man for the governing of a people.

You have shown that you are an independent thinker. In other words, you will draw your own conclusions after you get the facts. And you have shown a knowledge of the construction of the Constitution and the law, which I think is to be admired by all, and that it is your desire to construe it for the best interests of the American people.

On the question of issues, you have impressed me as being open-minded and will give careful consideration. You will follow stare decisis unless there is some overriding reason why you would act differently. For instance, in *Plessy* v. *Ferguson* the Supreme Court reversed itself. There may be instances in the future in which they will reverse themselves, and you would not hesitate to reverse a decision if you felt it was the right thing to do.

You have shown I think that you are not prejudiced and that you will be fair to all. I have been deeply impressed with your testimony. And I am not going to take more time at this point, I think we can all cut these questions short. I think they have had a chance to size you up, and the only conclusion they can reach is you are a good man and ought to be confirmed.

Judge KENNEDY. Thank you very much, Senator.

The CHAIRMAN. You don't object to that, do you?

Judge KENNEDY. Not at all. I appreciate the Senator's most gracious remarks.

The CHAIRMAN. The Senator from Ohio.

Senator METZENBAUM. Judge Kennedy, I have some questions in the antitrust area, and I know that is not your special field of expertise, so I am not going to get into what I call the nitty-gritty of some of the Court decisions.

Judge KENNEDY. Well, I know that it is yours, Senator, so I would be pleased to learn.

Senator METZENBAUM. Pardon?

Judge KENNEDY. I know that it is yours, so I would be pleased to learn.

Senator METZENBAUM. Well, I will at least make an overall inquiry.

As you may recall, Judge Bork wrote and testified that manufacturers should be able to fix the resale price of their product even though the Supreme Court has declared such price-fixing per se illegal. Letting manufacturers fix the resale price—and what we are talking about is where the manufacturer tells the retailer that you must sell at a certain price or else you lose the product—would actually drive discounters out of business and consumers would be forced to pay billions of additional dollars.

I am frank to say to you that I consider this a very major issue, because to me the essence and bulwark of this whole system of free enterprise is free competitive forces working and being permitted to work. If manufacturers can say that you can only sell a refrigerator or a stove or a set of dishes, or whatever, at a certain price, I think that is hurtful not alone to the consumer, but also to the nation as a whole. I would sort of like to get your views on the subject as to whether you agree with the current law or with Judge Bork that manufacturers should have the right to fix resale prices?

Judge KENNEDY. At the outset let me tell you, Senator, that I did not hear Judge Bork's testimony on that point and I am simply not familiar with his views. There is a case on the Supreme Court's docket, and I am not sure if it is one that has been argued this term, in which the question of whether or not vertical price restraints, which is the kind of restraint that you have described, are *per se* violative of the antitrust laws. So I should tread very warily about expressing a view on that case.

Senator METZENBAUM. I am not trying to get you into any specific cases. I am more trying to get you into this whole idea of vertical price restraints and the whole question of freedom of the retailer who owns the product to be able to sell at such a price as he or she determines the product should be sold at.

Judge KENNEDY. I understand. I just wanted to tell you why I am going to be very guarded in my answer, because it is such a specific issue that the Supreme Court is now considering.

Generally, I think it is fair to say, and I think that the law should be this, that a *per se* rule is justified if in almost every event it has an anticompetitive effect. Only if a particular trade practice that is challenged is pro-competitive is there a justification for it when there is a restrictive agreement of the kind you describe. I take it that is the starting position for analyzing this kind of problem.

And so the question, I suppose, would be whether or not there can be any demonstration that vertical price restraints are in any respect pro-competitive, and it is not clear to me exactly what showing would be made on that. You can get economists to testify on each side of any issue, as you know.

Senator METZENBAUM. I am not sure how vertical price restraints could ever be shown to be pro-competitive. Almost by definition, the restraint precludes competition.

Judge KENNEDY. That is the question. And, incidentally, by saying that economists testify on either side of the issue, I do not mean necessarily to denigrate them. There is just a great deal of disagreement, and we use experts in lawsuits this way all the time.

Senator METZENBAUM. There is a case called the *State of Arizona* v. *Maricopa County Medical Society.* You concurred in an opinion

that said doctors could fix prices—so long as it was a maximum rather than a minimum price—without automatically violating the antitrust laws.

You rejected the State's argument that the agreement led doctors to charge the maximum, making it legal price-fixing by its very nature. The Supreme Court reversed, holding 4 to 3 that "the anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some."

Could you tell us why or how you concluded that maximum price-fixing for the doctors should not be per se illegal, and whether you still feel that same way today despite the Supreme Court's reversal of your opinion in *Maricopa*?

Judge KENNEDY. I thought it was a close case then, and I am quite willing to accept the Supreme Court's decision, although all of us were disappointed that there was not a majority in the Supreme Court—there were only four votes—because the district courts and the circuit courts need guidance and we wanted the Supreme Court to set the rule.

My concern there was that I wanted a record. I wanted the case to go to trial. It simply wasn't clear to me from what I know as a judge, from what I am capable of understanding as a judge, that arrangements for health care services which use a pool of doctors and which allow the patient to choose the particular doctor are in all respects necessarily anti-competitive if they use a price schedule.

Senator METZENBAUM. If they what?

Judge KENNEDY. The issue, as I understood it, as framed by the plaintiffs, who were challenging the scheme, was whether allowing a health plan, where you have a choice of physicians and the physicians have a schedule that they agree upon, is necessarily anti-competitive. I simply saw no body of doctrine or learning or experience in the courts that would justify my coming to the conclusion that in all cases that must be anti-competitive.

The health care field is sufficiently volatile and dynamic, and the cost problems in the health care field are so well understood that I thought that the courts could benefit from a trial where we could have experts testify one way or the other and then evaluate the record. It did not seem to me that the rules for fixing the prices of retail goods necessarily applied to the medical profession, which was attempting to provide this kind of group service.

And the Supreme Court said, in the 4-to-3 opinion, that that was incorrect—that a horizontal price schedule is a horizontal price restraint, and that it is *per se* illegal.

I recognize the utility of *per se* rules. Because if you have a rule of reason trial, which is usually at the other end of the spectrum, it is a global sort of judgment. It is a very expensive suit to try. The plaintiff has to go through an elaborate and costly trial, and, when the trial is over you often do not learn a lot. That is the argument against the rule of reason and the argument for *per se* rules.

My concern was that in the health field—we knew so little about it that we should have a trial on the merits. But the Supreme Court disagreed, and I understand why.

Senator METZENBAUM. While you haven't written a great many antitrust opinions, you appear to have written enough to have a working knowledge of antitrust laws and, undoubtedly, as so far indicated in this last few minutes, some views on it.

I raise the subject not only because it matters a great deal to me, which really is totally unimportant, but because the Supreme Court, as you know, makes a great deal of law in this area. There will be more law made by the Supreme Court with respect to antitrust issues than in almost any other field.

Some have felt free to substitute their own views for those of Congress in applying the antitrust laws. Now, there is no question the antitrust statutes are admittedly general and Congress' intent in enacting them is not all that clear.

Give me your thoughts, if you will, as to what you think Congress had uppermost in its mind when it enacted the Sherman and Clayton Acts, our basic antitrust statutes, and what are your views on the obligations of the Court to ascertain and enforce congressional intent in this area?

Judge KENNEDY. Well, the Sherman Antitrust Acts and the Clayton Acts were passed in an era when corporate acquisitions and mergers were proceeding at a tremendous rate. In the period, I think, from 1900 to 1930, over 7,000 small firms, each with a capital of over $100,000, simply disappeared. The concern was, in the acquisitions and merger field, that the capitalistic system simply could not work if there was not an opportunity for small and medium-sized businesses to invest capital, to have resources and talent in localities throughout the country, and to have some protection against being acquired by competitors and by large conglomerates. This particularly happened in the utility area.

Unfortunately, what happened was that the Supreme Court, in the *E.C. Knight* case, gave a restrictive interpretation under the Commerce Clause to the reach of the Sherman Act, and at the same time they were willing to enforce agreements against price restraints, and the two in combination accelerated this merger pace. And it was only when the Supreme Court changed its rules under the Commerce Clause that antitrust enforcement became a reality in the merger field.

So I think it is necessary to go back to that intent of Congress and to recognize that it is a central part of our national policy to have a capitalistic system which is free, which is open.

So far as the consumer is concerned, the consumer is protected by aggressive price competition, and the antitrust laws make it very clear that price-fixing is improper and illegal. As you know, in some cases violations of the antitrust laws can be criminal, and in those cases I think the criminal law should be vigorously enforced. A price-fixing agreement that is unlawful can cause great damage and great injury, just as much as a bank embezzler can, and I am in favor of strict enforcement of the criminal laws when there is a violation.

Senator METZENBAUM. Some have argued, Judge Kennedy, that mergers are a good thing even if they leave only two or three firms in the market. Would you go that far? And what would be your standards, generally speaking, for judging mergers?

Judge KENNEDY. I am not an economist and I would want to hear the arguments in the particular case before I ventured anything that I think would be of very much substance or help to you, Senator. I would want to look at the facts in the particular case.

Senator METZENBAUM. Well, let me ask you this. Some have argued, and I think it is fair to say that they are conservative antitrust thinkers, that only economic efficiency matters in antitrust analysis; that is, a merger or a monopoly is good if its efficient even if the net result or the bottom line is that it raises prices or hurt the consumer.

Others, and I include myself in this group, believe Congress want our judges to consider other things as well, things like unfair exploitation of consumers, excess concentrations of corporate power, and the effect on small businesspeople.

Where would you come out on this debate—not on any case, but on this whole question of economic efficiency, which is on one side of the issue, versus the questions of unfair exploitation of consumers, excess concentration of corporate power, and negative effects on small business? Where would you want to place yourself in that debate?

Judge KENNEDY. Well, I would not want to do that because I really do not have a fixed position. I think my earlier answer indicates to you that I would be as sensitive to and most interested in those arguments that indicated that economic efficiency was not the sole controlling determinant.

Senator METZENBAUM. So that you, are you saying that those who would maintain that economic efficiency is not the sole determinant would have the burden of proof to convince you that negative consumer impact, or loss of competition, or excess concentration of corporate power, outweigh or negate the efficiencies. Are you saying that the scale starts off being weighted in favor of economic efficiency unless you can prove the contrary? Are you saying that?

Judge KENNEDY. I think that any person who argues for a simple conclusive formula always has the burden of proof to demonstrate to me that it is correct.

Senator METZENBAUM. Well, you could say that factors relating to unfair exploitation of consumers, or excess concentration of corporate power, or effect on small business tie in with previous decisions of the Supreme Court, and that those who claim that economic efficiency is the only thing that matters should have the burden of proof. It is really a question of which comes first, the chicken or the egg. But let us assume that neither comes first, that both are evenly on the scale. And I am saying where does Judge Kennedy come down, without addressing yourself to any particular cases or any particular issues pending before the Court.

I think this is a fundamental concept of antitrust law. I honestly believe that we are entitled to something further on your thinking on the subject than we have so far.

Judge KENNEDY. I just do not want to tell you that there has been a lot of thinking on my part when there has not been, Senator. To the extent that the precedents say that economic efficiency is not the sole determinant—and that is the way I understand most of the precedents in the area—the burden of proof would be on the

person who wishes to change that doctrine and change that approach.

Senator METZENBAUM. I think it is fair to say that this is not a field in which you have been that much involved. I would like to leave you with the concerns of this Senator that the antitrust laws are not liberal laws, they are not conservative laws. They came into being with Republican sponsorship, a Senator from my own State, John Sherman. And that when you have those cases before you I would hope that you would think seriously not just about the impact upon the consumer, not just about the impact upon the businessperson, not just about the impact of those employees who may or may not be forced out of work by reason of corporate mergers, but that you think about the overall impact upon the economic system, the free enterprise system, and recognize that our antitrust laws have served us well over a period of many years in protecting free competition in this country with many of the attendant benefits that have resulted in the system.

Judge KENNEDY. That is an eminently persuasive statement of the antitrust laws, which commends itself to me, Senator.

Senator METZENBAUM. Thank you very much, Judge Kennedy.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Hatch.

Senator HATCH. Thank you, Senator.

Judge, I want to compliment you for the candid way you have answered these questions, and I think you have enlightened us in many ways.

Judge KENNEDY. Thank you, Senator.

Senator HATCH. I just have a few questions I would like to go over with you that I think need to be brought out and may be helpful to everybody concerned, and certainly in this bicentennial time of the Constitution.

I would like to point out there is much value in a unanimous Court. When the Court is unanimous, it tends to put an end to further debate about the merits of any particular decision or issue. Supreme Court historians have recounted how Justice Burger labored diligently to get a unanimous Court in the *U.S.* v. *Nixon* case concerning executive privilege during the Watergate era.

Similarly, historians report that Chief Justice Warren worked prodigiously to get a unanimous decision in *Brown* v. *Board of Education.* You are sworn to uphold the Constitution and we would want you to do nothing else. But there might be times when unanimity on a ruling is more important than your own dissenting view.

Now, how would you weigh the merits of such a case, and what factors would cause you to submerge your own views in deference to the need for a unanimous opinion?

Judge KENNEDY. We have confronted that on our own court, Senator, and it is a difficult problem. But I think, as you have indicated, that it is also a very important one. In some cases on the court in the ninth circuit you can not always tell really how long an author of an opinion has had a case because sometimes when a panel is in disagreement, one of us will say, well, why don't you let me try writing the opinion and I will see if I can solidify our view.

And the two polar tensions here are, on the one hand, the duty of the judge to speak his or her conscience and not to compromise his or her views. Judicial decisions are not a log-rolling or a trading exercise. That is inappropriate. And, on the other hand, there is the institutional need to provide guidance, to provide uniformity, to have a statement of rules that all of the court agrees on. And I think that the Supreme Court functions much better if it has fewer fragmented opinions. Fragmented opinions are terribly difficult for all of us to work with.

I recognize that these are the toughest issues there are, and so views will differ. On the other hand, I think it is the duty of the judge to submerge his or her own ego, to accept the fact that his or her colleagues, too, have much wisdom and have great dedication to the law. Sometimes I have concurred in opinions simply because I did not think the majority had it right, but I can not say that those have added a great deal to the volume of the law. I think there is much in what you suggest, to commend judges to try to concur in other judges' opinions.

Senator HATCH. There is much to that. There is the other side of the coin, too, and, you know, I want to give some thought to that as well. I am speaking about the need to stand courageously alone on matters of principle. *Plessy* v. *Ferguson* was a perfect illustration of that where Justice Harlan, you know, a single Justice, decided that this separate but equal doctrine established by that case was wrong. And, frankly, he issued a remarkable dissent reminding the Nation that the Constitution ought to be "colorblind."

Now, what factors are going to enter into your decision to stand alone as a sole dissenter?

Judge KENNEDY. Holmes and Brandeis were also known for their great dissents. You must stand alone. You may be *vox clamatis in deserto,* a voice crying in the wilderness, even though it is a lonely and difficult position. Judging is a lonely and difficult position. This is a very lonely job, Senator.

The Federal system has its own isolation that it imposes on the judges. Within your own chambers, within your own thought processes, you wrestle to come to the right result. If you think there is a matter of legal principle that has been ignored, if you think there is a matter of principle that affects constitutional rule, if you think there is a principle that affects the judgment in the case, you must state that principle, regardless of how embarrassing or awkward it may be.

Senator HATCH. One final point concerning the changing style of the Supreme Court, more than the substance of its rulings, and that is this. In recent years the Court's opinions have become far more complex. Plurality opinions have multiplied. I think you have noticed it, I have noticed it. Hardly any opinion is issued without an accompanying flurry of concurring and dissenting viewpoints.

On the one hand, as we have discussed, this is an important part of the process because arguments are preserved for the future and develop more deliberately as the legal and political communities respond to an unresolved mosaic of opinions on any particular single issue.

Yet again, when the Court issues an opinion which nods to both sides of an issue, or which includes a five-pronged analysis of com-

plex factors, what the Court has actually done, in my opinion, is abdicate, instead of giving clear guidance as it could do. And by abdicating it thus leaves up to the lower courts to give various kinds of emphasis to various parts of the mosaic which is wrong.

Now what can be done to get shorter, more succinct and clear guidance in some of the Court's opinions?

Judge KENNEDY. Well, I think, Senator, that Justices simply must be conscious of the duties that they have to the public, the duties they have to the lower courts, the duties they have to the bar—to give opinions that are clear, workable, pragmatic, understandable, and well-founded in the Constitution. More than that I cannot say, other than that judges also must be careful about distinguishing between a matter of principle and a matter that really is dear to their own ego.

Senator HATCH. I see you as a person, with your experience both as an eminent lawyer, as a person who has worked as a lobbyist, as a person who might have a great deal of ability on that Court to bring about consensus, and to help bring unanimity in those cases where it should be, and I also see you as a person who is willing to stand up for principle, even if you are the sole dissenter, which is an enviable position as well. So I just wanted to point this out, because a lot of people do not give enough thought to those various aspects of Supreme Court practice.

Judge KENNEDY. I agree that that is a very valuable characteristic in a Justice.

Senator HATCH. Thank you. Let me shift ground just for a minute. I do not want to keep you too long, so I will only take a few more minutes.

But earlier, you were engaged by one of my colleagues in a discussion about original intent. Now because there has been a great deal of concern and confusion about what is meant by original intent, I thought that maybe we could just return for a moment to that particular issue.

In the first place, I prefer the term original meaning to original intent, because original intent sounds like it refers to the subjective intent of the legislators who wrote the Constitution, or its amendments, or in the case of other legislation, the Congress and State legislatures who wrote the legislation or amendments that were passed.

When you use the term "original intent," I presume that you are in reality discussing the objective intent of the framers as expressed in the words of the Constitution.

Would that be a fair characterization?

Judge KENNEDY. Yes, and I am glad that you brought the subject up. I think there is a progression, in at least three stages. There is original intent in the sense of what they actually thought.

Senator HATCH. Right.

Judge KENNEDY. There is original intent in the sense of what they might have thought if they had thought about the problem. I do not think either of those are helpful.

There is the final term of original intent in the sense of what were the legal consequences of their acts, and you call that the original meaning.

Senator HATCH. Right.

Judge KENNEDY. I accept that as a good description. We often say intent because we think of legislative intent, and in this respect, we mean legislative meaning as well.

Your actions have an institutional meaning. One of you may vote for a statute for one reason, and another for another reason, but the courts find an institutional meaning there and give it effect.

Senator HATCH. Well, I appreciate that. Our fundamental law is the text of the Constitution as written, not the subjective intent of individuals long since dead.

Specifically, you were asked if statements by the Members of the 39th Congress acknowledging segregated schools meant that the 14th amendment permitted a separate but equal reading, and I think you were absolutely correct in saying that the text of the 14th amendment outlaws separate but equal, regardless of the statements or subjective intents of some of its authors, and I appreciated that.

In fact this example clarifies my thinking for using the term original meaning instead of original intent. Often, the framers write into the Constitution a rule which they themselves cannot live by. I think the 39th Congress was a perfect illustration of that. They never did completely live up to the aspirations that they included in the Constitution in the 14th amendment, but we should live by the words of the Constitution, not by the subjective intent or the practices of its authors.

In a similar vein, the framers could not anticipate the age of electronics, but they stated in the fourth amendment, that Americans should not be subject to unreasonable searches and seizures.

And so the words and the principles of the fourth amendment govern situations beyond the subjective imaginings of the actual authors back in 1789.

Now do you agree that there are real dangers in relying too heavily on the subjective intent of the framers of legislation, or, in this case, the Constitution?

Judge KENNEDY. Yes. We always have to keep in mind the object for which we are making the inquiry, and the object for which we are making inquiry is to determine the objective, the institutional intent, or the original meaning, as you say, of the document. That is our ultimate objective.

Senator HATCH. Well, we hear criticism sometimes of original intent, or original meaning analysis, and these critics say that intent governs, or, they really ask the question, whose intent is the important intent? In this case, the authors', the ratifiers', the statements made contemporaneously with, the statements that were not fully recorded?

That again, it seems to me, to confuse subjective intent with original meaning. And so I would ask you, in your opinion, whose intent does govern, or whose meaning does govern?

Judge KENNEDY. It is the public acts of the framers—what they said, the legal consequences of what they did, as you point out and suggest by your phrase, not their subjective motivations.

Senator HATCH. That is good. Well, let me just say this: that we could go on and on on this principle, and I think it is a pretty important principle, and one that we really do not discuss enough, and one that I think is very much mixed up.

I think many members of this panel misconstrued Judge Bork's approach towards original intent, as though it was some sort of a Neanderthal approach to just a literal interpretation of the Constitution, when in fact it was far more complex and far more difficult than that.

Let me just say the cases may evolve, circumstances may change, doctrines may change, applications of the Constitution may evolve, but the Constitution itself does not evolve unless the people actually amend it. Do you agree with that?

Judge KENNEDY. Yes.

Senator HATCH. That is all I have, Mr. Chairman. Thank you for the time. Thank you.

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. Thank you very much, Mr. Chairman.

We reviewed, Judge Kennedy, yesterday, some of your decisions on the handicapped, and on fair housing; and we exchanged views about whether the decisions you had made were particularly narrow.

We talked a little bit about the question of sensitivity on cases affecting minorities' rights, women's rights in the clubs issue, where you had been involved and participated in club activities, and then eventually resigned.

I do not want to get back into the facts on those, but I want to get back into related subjects in terms of you, if you are confirmed and because a Supreme Court Justice, whether those, who are either left out, or left behind in the system, can really look to you as a person that is going to be applying equal justice under law.

And there are some concerns that have been expressed through the course of these hearings, and I want to have an opportunity to hear you out further on some of these issues.

I come back to one of the cases that was brought up earlier today, and that is the *Aranda* case.

Judge KENNEDY. Yes, sir.

Senator KENNEDY. We discussed that earlier in the day, and I just want to review, briefly, the evidence in that particular case. You are familiar with it.

—Ten of the fifteen polling places in the city were in the homes of whites living in a predominantly white section of town.

—Although Mexican-Americans constituted 49 percent of the city's population, and 28 percent of the registered voters, only three Hispanics had been elected to the city council in 61 years.

—During a voter-registration drive conducted by the Mexican-American community, the city clerk issued statements alleging irregularities, and the mayor issued a press release charging that unnamed activists were trying to take control of the city government.

—In the preceding election there was evidence of harassment of Mexican-American poll-watchers by the city police.

—And Mexican-Americans were significantly under-represented in the ranks of election inspectors and judges, the membership of city commissions, and the ranks of city employees.

Now, the lower court indicated that they did not find that there was any violation of the law. It was appealed to you. You wrote a separate opinion, and I believe in the exchange earlier today, you had indicated that even if there had been a finding that all of these

facts had been true, that you did not believe that that would justify the kind of relief that was requested by the petitioners, which would have been a change in the whole citywide election process.

Am I correct up to this point?

Judge KENNEDY. I think that is correct. Yes, sir.

Senator KENNEDY. I am not trying to fly-speck you on this, but I want to get to the substance of my concerns.

Judge KENNEDY. I think that is a fair beginning.

Senator KENNEDY. The concern that I would have, and I would think most of those Hispanics would have, is that discrimination today, whether it applies to women or minorities, does not appear on signboards. It is often hidden, and, given, if all of these facts were true, that there had been harassment of the poll workers, that there had been the conscious positioning of those polls in white homes that perhaps did not include Hispanics—given the record—if there had been the harassment of the Mexican-American poll-watchers, why wouldn't you believe that it would have been wise to let the jury, or judge hear out the facts on that, to make a judgment on whether that whole election process and system was sufficiently corrupt and sufficiently discriminatory, so that the kind of relief that the petitioner wanted might be justified?

Judge KENNEDY. In that case, I thought an adequate showing had been made to survive a summary judgment motion. I said that to conclude, "That plaintiff's evidence could not justify striking down the at-large election system, does not, in my view, necessarily mean that the plaintiffs may not be entitled to some relief. For example, plaintiff's statistics regarding placement of polling places in private homes"—this is a very long paragraph.

Senator KENNEDY. Right. The point is, don't you think if you heard, or that a jury heard, the testimony with these kinds of serious allegations about poll-watchers being harassed, and about irregularities by the city clerks, other kinds of these types of activities which obviously, if they are true, and you say even if they are true, might indicate that the whole system, the whole system within that community is sufficiently tainted, that the opportunity for a true election would be virtually impossible? Don't you think if a jury heard and listened to those witnesses that made those allegations, and heard their cross-examinations, given the significance and the importance of discrimination that exists in my own community, in the City of Boston, and in other parts of our country—did you ever think for a moment that we really ought to try to hear that out, or send it back and let a jury or a judge find out how invidious this really is, before we deny, effectively, these petitioners their day in court?

Judge KENNEDY. Yes, it would be a judge in this case, and I thought that the action did justify further pursuit in the courts. I have indicated that I thought that a complaint would lie for these actions.

I did think, Senator, that because of the insistence of the plaintiffs that they wanted only the at-large election remedy, that a judge could not reasonably conclude that the at-large remedy—or pardon me—that the maintenance of the at-large system was intentionally caused, because I did not think that the evidence supported that inference.

I did not think that inference could be drawn. Now, if you want to hypothesize, saying that because of this injury there should have been a remedy of district elections, then that is another point, and under the 1982 amendments to the Voting Act, I think that may very well be the case.

Senator KENNEDY. Well, it was because we went into an effects test. But we do not want to leave the record to suggest that you remanded for further proceedings. You affirmed the earlier decision. You could have remanded for further proceedings which——

Judge KENNEDY. Well, I was a single judge. I did not have the dispositive power over the judgment.

Senator KENNEDY. Let me go into, again, this question about a different type of discrimination. We talked about it, briefly, yesterday, and that is the whole question of stigmatization and invidious discrimination, particularly with regards to women in our society.

And we addressed that issue as it related to your former club memberships, and I do not want to go back over that ground. But I want to get back to what you think is necessary in terms of finding invidious forms of discrimination, again against a background where we have seen, with regards to women and minorities, that issues of discrimination are now much more sophisticated.

They certainly have become so in recent times, and I think the American people understand that. Now as a practical matter, blacks were excluded from the Olympic Club because of their race, or sex, and during our discussion yesterday, you agreed that it is stigmatizing for a woman to be excluded from a club where business is conducted.

In fact you said it is "almost Dickensian" and inappropriate, but, at the same time you indicated that in your view—and I quote: "None of these clubs practiced invidious discrimination."

Now the Bar Association, in its commentary, does not require that there actually is an evil intent, in its restrictions of membership in various clubs. And I am just wondering whether you think that there can be invidious discrimination—without trying to reach back into the mind of the particular drafters of a statute, or by-law, or regulation—whether the effects of that type of a by-law, or regulation or statute effectively can discriminate invidiously, or whether you find that you have to go back to the mindset of the individual who either voted for or drafted that particular by-law or statute?

Judge KENNEDY. Invidious is the term that the ABA used, and it is the term that the Judicial Ethics Committee uses as well.

It is not a term that so far as I know has a meaning that has been explored in the case law, and therefore, it is somewhat imprecise. I think that the dictionary definition would be evil or hostile.

Senator KENNEDY. I have got it here. I do not want to be spending the time on it, but you know the point I am driving at.

Judge KENNEDY. The law in torts says that you can be charged with the natural consequences of your own acts. It is clear, to me, that if a discriminatory barrier exists for too long, if it is visible, if it is hurtful, and if it is condoned, that the person who condones it can be charged with invidious discrimination. I would concede that.

Senator KENNEDY. I think I will leave that there.

Let me go on to another area, if I could, that involves both the availability and the sensitivity and the usefulness of statutes and laws to correct wrongs. What I am talking now is access to the courts.

I am sure all of us understand the importance of having our day in court. It is part of our national heritage, but courts are especially important for those that lack the financial resources and the skills to be able to protect their rights. So as you know, class actions are often a means used by large groups of victims to pool their resources and bring a lawsuit for the benefit of all the members of the class. It may be women, it may be blacks, it may be senior citizens in terms of Social Security, which we saw reflected during previous nominations.

In a decision in 1982, in the *Pavlak* v. *Church* case, you held that the fact that a motion to certify a class action was pending did not stop the clock from running on the statute of limitations on the claims of members of the class. The approach you took would severely undercut the usefulness of the class actions because each victim, effectively, would have to file intervention papers in the class action in order to protect his or her rights if the courts denied the motion to certify the class.

So in the hypothetical employment discrimination suit I referred to, every person who was discriminated against would have to file intervention papers. They, in effect, would have to get a lawyer and file in case the court decided not to treat the case as a class action.

Now, the Supreme Court in 1983 vacated your decision because in two cases that year the Supreme Court unanimously rejected the view you expressed.

Would you address the concern that your decision in the *Pavlak* case reflects a very technical and narrow view in terms of the access to the courts to American people, who may be poor or handicapped?

Judge KENNEDY. To begin with, you have to remember that the class action failed there. So the question is whether a person who has an individual injury can sue.

Senator KENNEDY. That is right.

Judge KENNEDY. And the Supreme Court decision does make it easier for those persons who are injured to file an individual suit after the class has failed.

Senator KENNEDY. Right.

Judge KENNEDY. Our concern was that by the pendency of the class action, of course, the defendant has an open-ended contingent liability, and there is some interest in terminating those contingencies and in encouraging people with individual claims to come forward so the defendant knows what it has to defend against.

Senator KENNEDY. Sure.

Judge KENNEDY. And in this case, the plaintiff did not seek to intervene even after the court gave leave to intervene. The court gave leave to intervene at the conclusion of the class action, and the plaintiff did not. That was our rationale for saying that the statute has run. I certainly do think it is a close case, and I am quite willing to accept the decision of the Supreme Court. I forget

where the other circuits were on that point. I think we followed the decision of the second circuit, but I am not sure.

Senator KENNEDY. This is with regards to whether you have got individuals who have a grievance, and they are trying to find out if there is going to be certification of a class action.

Judge KENNEDY. Yes.

Senator KENNEDY. That request or certification can be denied for any number of reasons—the size of the class dissimilar interest, any number of different reasons for which a class action, as I understand, can be dismissed. And we are talking about the statute of limitations, for example, that in some instances are not 7 years, but 60 or 90 days. Fair housing is 120 days. So we are talking about a relatively short period of time in areas, particularly in the area of housing, where there are some very serious, egregious situations and where this may have a significant effect. I hear your reasons for it.

Let me ask whether these narrow rules really effectively have a booby-trapping effect on individuals. Just again on the issues of the statute of limitations, in *Koucky* v. *Department of Navy* in 1987, you affirmed a lower court decision dismissing a handicap discrimination claim against the Navy on statute of limitation grounds because the complaint, that was filed on time, named only the Department of the Navy, not the Secretary of the Navy, as required by law.

Similarly, in *Allen* v. *Veterans Administration*, you affirmed a district court order dismissing a suit on statute of limitation grounds because the papers, filed on time, named the Veterans Administration, rather than the United States, as the defendant.

What I am looking for is some assurance that these and other cases do not reflect any predisposition on your part to look for ways to keep worthy cases out of court.

Judge KENNEDY. They do not. If you will look at our opinion in *Lynn* v. *Western Gillette*, I am tempted to say, you will see that I was quite capable of giving a generous interpretation to a statute of limitation in a Civil Rights Act case.

The claims cases you mentioned against the Government are ones where I wish the Congress would pass just a little bill——

Senator KENNEDY. That is asking a lot.

Judge KENNEDY [continuing]. To clean up the statute of limitations law. I could write it for you on the back of an envelope during a recess. We have been pleading with the Congress for years to give attention to this, to what we consider to be as the law of our circuit—the mandatory rule that you have to serve two different people. It is a trap. There is no question it is a trap. It is also, Senator, the law.

Senator KENNEDY. Well, I thank you. I would be interested in your recommendations on it, and I know that the time is flowing down. But at least in these cases affecting minorities, affecting the handicapped, affecting access and discrimination, we welcome your response. I think the real question that certainly members hear across the country, which is the most important aspect, people want to know whether—not only as a nominee, but should you be confirmed—whether you are going to live by those four words that are above the Supreme Court, which you know so well, and that is

"Equal Justice Under Law"; and whether they are going to feel, particularly those that have been left out and left behind, that in Justice Kennedy they are going to have someone that will not be looking for the technicalities and the narrow and crabbed or pinched view of a particular statute, but a justice who is going to be sensitive to the basic reasons for why that statute was passed.

That is something that we will be making judgment on. I do not know whether you care to comment.

Judge KENNEDY. Well, thank you, Senator. I think it is an important part of the advise and consent process that you make the judge aware of your own deep feelings and sensitivities. I would say that if I am appointed to the Supreme Court and I do not fully meet the great proclamation that stands over its podium, that I would consider that my career has not been a success.

Senator KENNEDY. Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you.

The Senator from Wyoming, Senator Simpson.

Senator SIMPSON. Thank you, Mr. Chairman. First, Mr. Chairman, let me say that yesterday I mentioned—and I want this very important matter to be heard—a group called the National Women's Law Center as a group who had spoken out against Judge Bork on issues of discrimination based upon sex, and that they had no men in their organization. That was incorrect and in error and unfortunate. The group was not the National Women's Law Center, which is a Washington, D.C.-based group. My confusion was occasioned by the fact that one lady named Marsha D. Greenberger is the managing attorney of the National Women's Law Center and a member of their board. She is also a member-at-large and on the letterhead of a group called the Federation of Women Lawyers Judicial Screening Panel, which is a Washington organization. My confusion was caused by that dual membership of this lady attorney on that National Women's Law Center and this Federation of Women Lawyers Judicial Screening Panel. This group, the Women's Law Center, did object to Bork, in fact, in a letter they stated that they had never before ever taken a position on a judicial nomination, but because of the extreme nature of Judge Bork's legal views and the dramatic effect on the rights of women, the center felt compelled to take that step.

But what I was referring to was the letter of the Federation of Women Lawyers with regard to Judge Sentelle where they were objecting to his being a member of the Masons because it was a male organization. I was saying there is the true irony because the letterhead of that group does not contain the name of any male.

Now, before sinking deeper into the morass there, I do indeed owe an apology to the National Women's Law Center. The remarks I made with regard to the Federation of Women Lawyers Judicial Screening Panel I would leave on the record, but I certainly want to apologize to the National Women's Law Center as an error on my part. I would like to clear that record, and especially to Marsha D. Greenberger. And my apology, surely due, is certainly hereby expressed, and I earnestly hope accepted.

With that, I shall move on.

Mr. Chairman, you know, regardless of what we say, sometimes the needle does get stuck here, and we have reviewed old ground,

the things we reviewed in the previous nomination: unenumerated rights, framers' intent, ninth amendment, rights of privacy, precedent, States' rights, antitrust, civil rights, freedom of press, speech, criminal law, equal protection, race and gender, gender discrimination, Establishment Clause, death penalty, congressional standing, judicial restraint, voting rights. The only one I do not remember was comparable worth. But we have, indeed, plowed old ground.

The CHAIRMAN. Sounds like the Constitution, Senator.

Senator SIMPSON. It does. Should be. Lively little place in here. But let us keep the record quite clear that we have all dabbled in just what we dabbled in before, and will again because that is our role.

So yesterday there was an interesting discussion on criminal matters. It did not come up as much in the previous hearings, but there were questions about imposing strict sentences on convicted criminals. I remember some of your comments on that. A tough one always for a judge. I know in my practice when the trial was ended and the sentence awaited, and the jury, having concluded their deliberations or a non-jury case, the sentencing was always the troublesome part for the judge. You know, those are the ones, as they say, that keep you up at night.

But, anyway, you referred to that. We have just grappled with technical amendments to the sentencing guidelines legislation which established uniform sentencing for criminals across the United States. That was somewhat controversial. Senators Thurmond and Kennedy worked many years on the criminal law, sentencing guidelines, those things. The sentencing guidelines were designed, or at least we believe that they will work to bring uniformity in the sentencing of white collar criminals—white collar crime, more specifically—one that was tough to get at.

There is a widespread public perception in society that white collar crime does not receive the same degree of strict sentencing which other crimes receive. I would appreciate having your comments on the importance of sentencing in the area of white collar crime as it is in this country today.

Judge KENNEDY. White collar crime, as I have indicated in the initial exchange with Senator Metzenbaum, is, I think, an unfortunate term. It sounds as if it is a clean crime, which is, of course, a contradiction in terms. White collar crime can rob people of millions of dollars just as effectively as a person with a gun. I know bank officers who have congratulated me for my tough stance on crime because we put away bank robbers, but then they will turn around and they will, for fear of publicity, not prosecute one of their officers who has embezzled $50,000. I think that is wrong.

White collar crime is very, very dangerous, particularly in the consumer fraud area where people are deprived of their life savings. I think the courts should be very vigorous with respect to so-called white collar crime, and I wish we could find another aphorism that indicates that it is really a very, very ugly deed that we are talking about.

Senator SIMPSON. Yes, it is a tough one because it often arises from a position of trust to embezzlement and other aspects of that crime.

Well, now I have a totally provincial question. I want to get right down to that. I would ask you about perhaps an expansion of your opinions on the importance of States' rights in the constitutional system. That is sometimes overused. I think we do overuse that; perhaps I do, too. "States' rights." But as a Westerner from the State of Wyoming, I think it is sometimes forgotten that here is a State of almost 100,000 square miles; 50 percent of the surface of it is owned by the Federal Government, and 63 percent of its minerals are owned by the Federal Government. In that State is 40 percent of the Nation's wilderness in the lower 48.

So we have continual conflict on States' rights when you have the surface of a State owned 50 percent by the Federal Government. That means it belongs to the people of the United States and not to the people of the State of Wyoming. So I have this abiding interest in the opportunity for states to determine their own destiny on a multitude of issues without intrusive interference from the Federal Government, recognizing, of course, the federal nature of the public lands—or the public nature of the federal lands might be a better way to say it.

Could you give me your philosophy briefly regarding that general issue of States' rights and the reservation of power to the States under the Constitution?

Judge KENNEDY. Federalism is one of the four structural components of the Constitution. The framers thought of it as really one of the most essential safeguards of liberty. They thought that it was improper, that it was spiritually wrong, morally wrong, for a people to delegate so much power to a remote government that they could no longer have control over their own destiny, their own lives. That is the reason for the states.

The framers were very concerned that the sheer problem of geographic size would doom their experiment in a republican form of government. Their studies had taught them that the only successful republican form of government or democracy would be a small city-State. In those times, there were great diversities. One of the framers at the convention from South Carolina said the differences that divided his State and Maine and New Hampshire and Massachusetts were greater than those that divided Russia and Turkey. And he might have been right.

The CHAIRMAN. Senator Kennedy and Senator Thurmond, thank you.

All right.

Judge KENNEDY. That is the purpose of the Federal system, and it is the duty of all the branches of the government to respect the position of the place of the states in the Federal system.

As I indicated yesterday, there are no automatic mechanisms, or very few, in the Constitution, to respect the rights of States. You can read all through the Constitution and you will see very little about States.

This indicates, I think, that we have a special obligation to ascertain the effects of national policy on the existence of State sovereignty.

Senator SIMPSON. Obviously, you have made several references to the history of the Court, the history of the Constitution, the Constitutional Convention. That has been most interesting to me.

Obviously, you enjoy reading and studying Supreme Court history; is that true?

Judge KENNEDY. Yes, sir.

Senator SIMPSON. I would think that would be a tremendous asset to any Supreme Court Justice to have that appreciation and flavor of the historical analysis of the Court before a judge would go on that court.

I am going to conclude with a question. I remember that Senator Humphrey waived his whole stack of comments yesterday—and in accordance with trying to get the job done, I am going to conclude.

And you have been very good, Mr. Chairman, at accelerating things, and I hope we can continue to do that.

But let me ask you this, Judge. In your knowledge of the history of the Supreme Court, and reading of it, have you come upon a favorite among Supreme Court justices down through history, those who have served, one on whom you might lavish just a little extra ration of praise among all the remarkable men who have served?

I would be interested if you do have such a preference for a person?

Judge KENNEDY. I've sometimes tried to make up all-star lists of the Supreme Court. I will usually just put on seven in case somebody else has their favorites.

Chief Justice Marshall foresaw the great destiny of this country. He knew the necessity for a national government.

He had a power and a persuasiveness and a rhetoric and a morality to his opinions that few other justices have ever possessed. He went to law school for just 6 weeks. He had a remarkable grasp of the meaning of government and the meaning of the Constitution.

The two Justice Harlans, the Justice Harlan in *Plessy* v. *Ferguson,* and the Justice Harlan of the not too distant past, were great, great judges because of their understanding of the Constitution.

Brandeis, Cardozo and Holmes sat on the same Court, and were some of the greatest justices who ever sat on the Court.

And one of your colleagues, one of your predecessor colleagues, Hugo Black, was one of the great justices of the Court. He had a hideaway office somewhere here in the Capitol, and he would read Burke and Marx and Hume and Keynes and Plato and Aristotle during the Senate's sessions.

He was simply a magnificent justice. He carried around, as many of you know, a little pocket copy of the Constitution at all times, in case he was asked about it, a habit that has been emulated by many of his admirers.

Those were all great men in the history of the court, Senator. To talk only of those who are not living.

Senator SIMPSON. Well, that is fascinating. Now, instead of reading those things, we read stuff from our staff while we are squirreled away in some warren somewhere.

And maybe we ought to go back to some of those treatises in every way.

A Wyoming man served on the Supreme Court, Mr. Van Devanter.

Judge KENNEDY. Mr. Justice Van Devanter. He was one of the greatest justices on the court for achieving a compromise among the justices.

When they were searching for a common point of agreement, Mr. Justice Van Devanter could find it.

He did not produce a lot of the opinions of the Court, because he found it very difficult to write; he was a slow writer.

But he was valued very, very highly by all of his colleagues.

Senator SIMPSON. That is very interesting. Thank you so much, Judge.

Judge KENNEDY. Thank you, Senator.

The CHAIRMAN. Let me ask you a question about history, and I am not being facetious when I ask this.

Didn't Justice Black, when he was Senator Black, also carry a book with a list of all his supporters and contributors? A little book?

I am told that Justice Black, when he was a Senator, literally carried a book—was it Black? He was Senator Black from Alabama that had a list of all his supporters.

So every county he went into, he would take out his little book. And he would know exactly who had helped him in the previous election. He carried that with him all the time, I was told.

Judge KENNEDY. I am not aware of that. He was from Clay County in Alabama.

The CHAIRMAN. Maybe our Alabamian at the end of the row could clarify it when we get to that.

Senator HEFLIN. It would have had to have been the Encyclopedia Britannica.

The CHAIRMAN. Well, I was told it was his contributors, but I will move on to the great State of Vermont. Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman. I do not want to delay, but when Judge Kennedy and my friend Al Simpson talk about Hugo Black, I remember when I was in law school. I'm sure you remember a lot of things about law school, we all do, but for me one thing really stands out the most of all the matters in law school. Because we were right here in town, Georgetown, the law school, decided to have a luncheon inviting all the Supreme Court justices. They all accepted on one condition: there not be a head table. We were going to be in a bunch of small, round tables, and it would be run by either the student bar or something of the law school. They would draw lots, and different justices would sit at different tables. And that was the only way they would do it, so they could sit with the students.

So we drew lots, and I ended up sitting next to Justice Hugo Black whom I had never met but just seen in the Court. And at the last minute one of the other students was sick. My wife came with me. And it was the most fascinating thing in 3 years of law school. He had no idea I was going to sit there. I mentioned I was from Vermont. And he said, oh yes. He said, Franklin—the first time he said it, I didn't realize he meant, of course, President Roosevelt—he said, Franklin sent me to Vermont to campaign during a contested election.

He told me the towns he went to—this was back in the 1930s. Who he campaigned for. And what the votes were, the numbers.

We went back and checked with the Secretary of State's office subsequently, and he was absolutely right. Remember, they picked their lots as they came in, and ended up at their particular tables.

But during the course of the thing, a couple of times when questions came from different students, the hand went to the inside pocket. Out came the copy of the Constitution. It was more worn than the one I carry. And he would refer to it.

And it was a remarkable experience. I felt that it was worth at least one full year of law school, that one luncheon, just listening to this man.

Senator HEFLIN. He had a remarkable memory. He could remember the score of every tennis game that he beat me. [Laughter.]

Senator LEAHY. Well, that really was not fair, him beating you, because he was younger, wasn't he, Senator Heflin?

But let me just go back, and I will try to brief but to go back to this morning. You have been asked a lot of questions about your views on privacy, and you have answered me and other Senators.

And those answers appear to establish that you recognize the protection of privacy as a value that the country should enforce in constitutional litigation, even though the word, privacy, is not mentioned in the Constitution; even though the boundaries of privacy or of the right to privacy may be unclear. Nobody is asking you to say here today just where those boundaries are, nor I suspect from your testimony, do you feel that anybody could say today just where those boundaries are. Am I correct so far?

Judge KENNEDY. I think that is correct, Senator.

Senator LEAHY. You have also said that there are other rights not specified in the Constitution that you think the courts can enforce. You have given some clue as to where you go to look for those—to history, precedent, national values.

Now, let us turn to an area where the issue is not what unenumerated rights should be recognized, but what the specific bill of rights means, and that is the area of criminal law.

You have ruled, as I read your cases, you have ruled for the defendants in about a third of the criminal cases you have heard. You have done it for the government in about two-thirds of the cases. And going down—and I'm not suggesting anything by that number. One of the nice things about being a prosecutor rather than a defense attorney is that prosecutors win most of their cases, if they are at all smart about what they bring, and defense attorneys, by the same nature, would have to lose most of them.

You gave a speech at McGeorge Law School in 1981, a commencement address, and you said, and I quote: "We encourage debate among ourselves and with anyone else on the wisdom of the rules we adopt. I question many of them myself. For instance, some of the refinements we have invented for criminal cases are carried almost to the point of an obsession. Implementing these rules has not been without its severe costs."

Now, are you referring when you talk about the point of obsession to some of the detailed refinements that have been made in the application, for example, of the fourth amendment to warrantless searches?

Judge KENNEDY. Well, I suppose I had the fourth amendment in mind generally. This is pretty broad rhetoric.

With the fourth amendment, we have, as I have indicated, extracted a tremendous cost for putting the system in place.

Now that it is in place, it works rather well if it has a pragmatic cast to it. That is the purpose of the good faith exception. Whether the good faith exception is going to be so broad that it will swallow up the rule remains to be seen.

Senator LEAHY. Well, let me go into that a little bit. Because, again, thinking of days when I was a prosecutor, I might chafe a little bit at the idea of the exclusionary rule, but I also realized, and anybody in law enforcement has to be honest enough to realize, that absent the exclusionary rule, there are some groups within law enforcement that would just push things as far as they could.

Most of the better trained, better equipped, either State or local police, or groups like the FBI, have been able to work well within the confines of the exclusionary rule.

But on good faith—well let me just back up and make sure I understand this. You do not feel the exclusionary rule by itself is a mistake; is that correct?

Judge KENNEDY. Now that it is in place, I think we have had experience with it, and I think it is a workable part of the criminal system.

Senator LEAHY. But you do not——

Judge KENNEDY. If it is administered in a pragmatic and reasonable way.

Senator LEAHY. Now, I realize this is jumping to quite a hypothetical. But you do not see yourself as being one, back at the time the exclusionary rule came in, of being the one to be at the forefront initiating the exclusionary rule?

Judge KENNEDY. I am not sure I understood your question, Senator.

Senator LEAHY. Well, you say, the exclusionary rule, now that it is in, you accept it.

Judge KENNEDY. Yes.

Senator LEAHY. But I take it by that you do not think you would have been the one to have been the first person to have put the exclusionary rule in?

Judge KENNEDY. Well, I did not mean to imply that. I think that the courts were generally concerned that there was a lack of any enforcement of that provision.

Senator LEAHY. Well, you said in the *Harvey* case, *U.S.* v. *Harvey*, "the court has the obligation to confine the rule to the purposes for which it was announced."

How do you see those purposes?

Judge KENNEDY. The purposes are in the nature of a deterrent. The purpose of the exclusionary rule is to advise law enforcement officers in advance that if they do not follow the rules of the fourth amendment, the evidence they seize is not going to be usable.

Now if the rule goes beyond that point, and a police officer in all good faith, after studying the rule, makes a snap decision that a warrant is valid, or a considered decision that a warrant is valid, then I think the system ought to give some recognition to that reasonable exercise of judgment on his part.

Senator LEAHY. But you do accept the idea that the expansion of that good faith exception could, to use your term, swallow the rule?

Judge KENNEDY. That could very well happen. And it remains to stake out the proper dimensions of that rule—of that exception.

Senator LEAHY. I understand. And is that an appropriate place for the courts to act, in staking out those parameters?

Judge KENNEDY. The courts must act there, because it is their rule.

Senator LEAHY. Thank you. There are areas where legislatively—well, I don't want to go into that.

Let me ask you about the sixth amendment right to counsel for criminal defendants. Is that a principle that has been taken to the point of obsession?

Judge KENNEDY. No. Although there may be cases where the right—no, I think not.

Senator LEAHY. Let me just make sure I understand. *Betz* v. *Brady,* right to counsel in federal felony cases. You have no problem with that?

Judge KENNEDY. Well, no, and of course that is pre-*Gideon.*

Senator LEAHY. And you have no problem with *Gideon*?

Judge KENNEDY. No.

Senator LEAHY. Even though that, some could say, erodes independent State law. You have no problem with *Gideon* v. *Wainwright*?

Judge KENNEDY. Well, as a general proposition of law, it is accepted. I know of no really substantial advocacy for its change.

Senator LEAHY. *Miranda.* How do you feel about *Miranda*?

Judge KENNEDY. Well, we are going down the line here. The *Miranda* rule, it seems to me, again, we have paid the major cost by installing it.

We have now educated law enforcement officers and prosecutors all over the country, and it has become almost part of the criminal justice folklore.

Senator LEAHY. And you do not have any problem with that now?

Judge KENNEDY. Criminal justice system folklore. Well, I think that since it is established, it is entitled to great respect.

Senator LEAHY. I suspect a sigh of relief might be given by most police officers. I can't imagine a police officer anywhere in the country who doesn't have the card.

Judge KENNEDY. That is a remarkable example of the power of the courts. And it is a reason for judges reminding themselves that they should confine their rules to the absolute necessities of the case.

Senator LEAHY. Do you want to expand on that? Did they confine themselves that time?

Judge KENNEDY. Well, the *Miranda* rule, as I said, is in place. It was a sweeping, sweeping rule. It wrought almost a revolution.

It is not clear to me that it necessarily followed from the words of the Constitution. Yet it is in place now, and I think it is entitled to great respect.

Senator LEAHY. Well, one couldn't say it followed the absolute necessities of that case, could you? Even with the confusion that still existed following *Escobedo*?

Judge KENNEDY. That is right. I think it went to the verge of the law.

Senator LEAHY. I often ask myself whether it would have if *Escobedo* had not preceded it——

Judge KENNEDY. Yes.

Senator LEAHY [continued]. Which caused all kinds of confusion. I mention that only because there is the flip side of it. *Escobido*, I thought anyway, left a lot of confusion as to just what you are supposed to say and everything else. And *Miranda*, I happen to agree with you, went way out there.

But I wonder if it was not a practical reality, because the Court had to know that there was confusion from *Escobedo*. And the confusion was laid down with the little card that one could carry out of *Miranda*.

Judge KENNEDY. Well, the merit of simple rules is that they are workable. Their vice is that they may go beyond the necessities of the case.

Senator LEAHY. And you think in this case they may have?

Judge KENNEDY. I think they may have, yes.

Senator LEAHY. Thank you.

Let me just ask you just one last area. It goes into what has to be the hardest and loneliest duty of a Justice of the Supreme Court.

Now you act as a circuit justice. Every Justice of the Supreme Court gets the ability to act as a circuit justice. You have authority to act alone without the other justices on emergency matters that come within the geographical circuit to which you have been assigned.

Now one of those matters, and it comes up often—it is almost impossible to go more than a couple of weeks without reading in the news—that someone on death row has filed a petition seeking a stay of execution.

Now, sometimes there are motions still pending in other courts and so on. But let us take the instance of death warrants issued by the governor. The lower courts have refused to suspend them. Other courts are in recess. You're back home, and it is hours before the petitioner or the prisoner is to be executed. You are at the end of the line. The decision is up to you. You have got a few minutes to make it.

Without going into a question of how you feel about the death penalty, how do you approach a decision like that?

Judge KENNEDY. Well, we have had situations like that where we have had single judges acting in single motions.

Senator LEAHY. In the ninth circuit?

Judge KENNEDY. Yes, sir. The first thing you do is you take off your coat, and you sit down at the desk and you begin working it out. If there is merit to the claim you simply have to stop the execution until you get the information before you. You may end up increasing the suffering, and the aggravation, and the anguish of the defendant, but I just know of no other way to do it.

It happens with every single execution. The courts do not look good. We act with the appearance of feverish haste. The defendant, who has been sentenced to die, has his deadline extended again. But the law of this country is that the Supreme Court of the

United States exercises supervisory power over its circuits, and if that is what the jurisdiction is, the jurisdiction must be exercised.

Senator LEAHY. You are also saying that it is a case-by-case thing. There are no mechanical rules you can follow?

Judge KENNEDY. There are no mechanical rules. Now there have been suggestions by task forces that we have fixed points for cutting off any petitions, but the problem was always that there is new evidence and new argument, and I just do not know how to cut that off.

Senator LEAHY. So you do not agree with those task-force recommendations?

Judge KENNEDY. Well, they have not even come out with anything, that I have looked at, that looks very solid.

Senator LEAHY. It would be kind of hard to do it, wouldn't it?

Judge KENNEDY. Yes.

Senator LEAHY. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. We will now go to Senator Grassley, and after that, Judge, we will give you an opportunity to get up and stretch your legs, and break for 15 minutes.

Judge KENNEDY. Thank you, sir.

Senator GRASSLEY. Thank you, Mr. Chairman.

Judge Kennedy, several times you have spoken of the tension between order, on the one hand, and liberty on the other. Constitutional scholars often speak of the tension between our American ideal of democratic rule and the concept of individual liberties, and we often refer to this as the "Madisonian dilemma."

The U.S. was founded on a Madisonian system, one that permits the majority to govern in many areas of life, simply because it is the majority. On the other hand, it recognizes that certain individual freedoms must be exempt from being trampled upon by the majority.

The dilemma is that neither the majority nor minority can be fully trusted to define the proper spheres of democratic authority and individual liberty.

First, could I have your assessment of this "Madisonian dilemma." Would you agree that there is a tension there?

Judge KENNEDY. Well, I am not—of course order and liberty can be set up on a polar spectrum, but I think it was Mr. Justice Reed who said that, "To say that our choice is between order and liberty is an act of desperation." You may have order and liberty, and without both you only have anarchy. That is my addition.

Senator GRASSLEY. It is at least unavoidable?

Judge KENNEDY. Pardon me?

Senator GRASSLEY. The tension there is at least unavoidable?

Judge KENNEDY. The tension does seem to be unavoidable.

Senator GRASSLEY. Well, given the fact that there was very little debate during the Constitutional Convention of 1787 over the whole subject of the judicial branch, it seems somewhat unclear that the framers envisioned the leading role for the judiciary in the resolution of this dilemma.

After all, you will recall that Alexander Hamilton spoke of our judicial branch as the "least dangerous" branch, having "neither force nor will, only judgment."

And over time, of course, people have come to assume that it is the job of the judiciary, particularly the Supreme Court, to decide how to resolve the tension.

I assume that you agree with this role for the third branch, correct?

Judge KENNEDY. Well, I am uncomfortable with saying that the judicial branch has assumed a role that was not intended for it by the Constitution. On the other hand, we have to recognize that immediately after the Hamiltonian structure and the Madisonian—it was really a Hamiltonian structure that was in place—we had a Jeffersonian Bill of Rights added onto it.

And so, from the outset, we built in a tension, and the framers did not pay very much attention to the courts, Senator, and I am not quite sure why that is. Perhaps it is because they never conceived of the courts exercising the broad jurisdiction, the broad authority to announce the law that they now have.

I am just not sure why. It is fascinating. They distrusted the legislature. You have bicameralism as a principal check, and, of course, the President, and there are very few checks on the courts. And so that is why it is important for the court to check itself.

Senator GRASSLEY. I think you are telling me that there is a role there for the Court in solving that, "Dilemma," and you see that as a proper role?

Judge KENNEDY. I do. Yes, sir.

Senator GRASSLEY. Some judges and scholars believe that in resolving the "dilemma", that courts' obligation to the intent of the Constitution are so generalized and remote, that the judges are very free to create a Constitution that they think best fits into today's changing society.

Now I am not saying that that is your approach, but I want to know what you think of that approach, because there are scholars who believe it and there are people that practice it?

Judge KENNEDY. I think when a judge defines, or articulates a constitutional principle, he should find very, very convincing and authoritative evidence to support his, or her, conclusion.

Senator GRASSLEY. So then you would take some exception to some scholars' beliefs that the courts are free to create a Constitution that best fits today's needs?

Judge KENNEDY. I could not accept that formulation as being consistent with the Court's role in the constitutional system.

Senator GRASSLEY. Let me illustrate what happens, then, when Justices are not faithful to the original understanding of the Constitution, due to over-generalization, like I just expressed.

Justice Brennan has characterized the Constitution as being, quote, "pervasively concerned with human dignity," unquote. From this basic point, he creates a more general judicial function of "enhancing human dignity", even when it is contrary to the intent of the framers.

The problem with this theory is that every Justice's concept of human dignity is very personal with the thought process of that individual.

Judicial discretion becomes, "untethered." It becomes a matter of each Justice adjudicating according to some personal bias or belief, not the Constitution.

Would you agree with that?

Judge KENNEDY. I would agree; I had an exchange with Senator Humphrey just before the luncheon break in which we were discussing the categories that a judge might look to in order to determine whether there was a privacy claim, and it occurred to me, as soon as I concluded my answer, that I had made an assumption but had not stated it.

And the assumption is we are doing this in order to determine if this fits with the text and the purpose of the Constitution. That is why we are doing it. We are not doing it because of our own subjective beliefs. We are not doing it because of our own ideas of justice.

We are doing it because we think that there is a thread, a link to what the framers provided in the original document.

Senator GRASSLEY. Permit me to continue with the practical application of Justice Brennan's theory of constitutional interpretation.

Brennan finds that capital punishment, even for those who commit the most heinous crimes, violates the Constitution, because capital punishment, to him, falls short of his "constitutional vision of human dignity."

I disagree with Justice Brennan. First, because I believe that capital punishment is explicitly authorized by the Constitution. There are four or five references to capital crimes or the loss of life in the Constitution. I also have a problem with this type of constitutional analysis—Justices generalizing from particular clauses and then applying the generalization instead of the clauses.

Can you comment on this theory of constitutional analysis—a theory that permits the creation of rights so general as to give courts no guidance in how to interpret them?

Judge KENNEDY. As you have stated it, that, it seems to me, would be an illicit theory.

Senator GRASSLEY. If I could, I would like to turn to the subject of the legislative veto. You and I discussed it briefly in my office. You know of my interest in it, and you have written on the subject at least in one outstanding case.

Perhaps your most significant ninth circuit opinion is that one striking down the legislative veto in the *Chadha* case, in 1980. This opinion was affirmed and expanded upon considerably by Chief Justice Burger 3 years later.

I have a real interest in the legislative veto. Senator DeConcini of our committee, Senator Levin, and I and others have introduced legislation to revive the legislative veto as a check on the bureaucracy that over-regulates our lives.

And I am sure you are aware of all the business people in America who are complaining about too much government red tape, or the taxpayer that has been abused by the IRS.

So I have a series of questions on both the constitutional and practical dimensions of the legislative veto.

You would agree that federal agencies, which are routinely delegated legislative or quasi-legislative power, may issue regulations having the force and effect of law, without bicameral approval or presidential signature, isn't that correct?

Judge KENNEDY. Well, that is the existing law, and we had a colloquy earlier this morning in which I indicated that this is a rather

untidy area of the Constitution, so far as explaining the justification and the constitutional bases for administrative agencies.

I think most of us recognize their necessity, and there is no question that agencies make law. We cannot avoid that fact. And so I think I would say that I do agree that that is what happens.

Senator GRASSLEY. Would you also agree that sometimes these regulations can be excessive, burdensome, ill-advised, or just plain wrong-headed?

Judge KENNEDY. Yes, and I could say the same things about decisions of courts. I agree.

Senator GRASSLEY. Well, if agencies need not satisfy the article I requirement when they pass something that is wrong-headed, or however you want to characterize it, why, then, is the Congress's mere reservation—just the mere reservation of a veto subject to a more exacting article I test?

Judge KENNEDY. I thought that this was a tremendously difficult problem in the *Chadha* case. In the *Chadha* case, there was an adjudication of an alien's status, and he was granted leave to remain in the United States on the grounds of extreme hardship.

They made an adjudication in an individual case. One House of the Congress, the House of Representatives, for no given reason, attempted to cancel that and he was to be deported.

We found, in the ninth circuit, that this was impermissible, that this was an interference with the core function of the executive branch, and also with the judicial branch.

The opinion was written very narrowly because we reserved the question of whether or not the Congress might have a veto mechanism over the rulemaking functions of agencies. We did not think that case was presented and we thought that that might present different considerations.

Now we recognized, of course, that any broader formulation than the one we adopted would strike down 250 statutes, and we thought that one was enough for that opinion.

The Supreme Court did affirm our court, but I have to say, on a different rationale. The Chief Justice, writing for the court, invoked the presentment clause and thereby I think pretermitted any evaluation of a one-House veto over rulemaking, and we did not come to that conclusion.

But that is the law, and the Supreme Court has handed down the *Chadha* case, and I think that legislative veto in one House, or both House vetoes—

Senator GRASSLEY. Do you think there is any way to validate the legislative veto through the use of the doctrine of original intent?

Judge KENNEDY. Yes. I tried to find that. You know, it can work both ways for us, Senator. We do not always find the answer we want. I read all of "The Federalist Papers." I read everything I could find that Madison had written.

I read what Jefferson had written, even though he was not at the Convention. I concluded that, in this case, the veto mechanism did violate the express intent of the framers.

And it is a good example of the fact that the Constitution can teach you something.

Senator GRASSLEY. I think it is important that we look at what the framers actually said in "The Federalist Papers" about the im-

portance of bicameralism. But could they have intended this result?

It seems to me that the framers were very practical politicians. They knew how to resolve political dilemmas, and that is why the Federal Government was chartered with a great deal of flexibility.

I do not think they could have foreseen in 1787 what would be developing in a modern government; that there would be whole industries to regulate, consumers' and investors' interests to be protected, government benefits to be distributed, and so on. We could make a longer list than you or I want to make, of all the things that government is involved in today.

If they had known this, do you really think that they would have intended every bit of legislation to be done in this "civics-book" fashion?

Judge KENNEDY. Well, you are asking me for my legal opinion. In the case that we wrote, we found sufficient differentiation between an adjudicatory proceeding, on one hand, and generic rulemaking, which is what you are describing on the other, to confine our case to the former. I thought that the situation you described, with generic rulemaking, might present a different constitutional problem.

Senator GRASSLEY. Doesn't this really get us back to the issue of how to find the original understanding

Judge KENNEDY. I think it is a good example of it, Senator, and it is one in which I thought the Constitution spoke rather clearly against interference with the core function of another branch of the government.

I thought that the legislative veto in *Chadha* was violative of the provision of separation of powers, and I made it clear that the legislative veto, in other instances, might not violate that separation.

What you had in *Chadha* was one of the highest officers in the executive branch of the government, making a determination in his executive capacity It was followed by court review or the possibility of court review, and, for one House of Congress, without reason, to simply upset that adjudication, seemed to me to violate separation of powers, and we so held.

Senator GRASSLEY. Judge Kennedy, on at least a couple of occasions, Justice Rehnquist has suggested that Congress has unconstitutionally delegated responsibilities to federal agencies.

As you know, with the creation of the "modern administrative State", no federal statute that I know of, in the last 50 years, has ever been invalidated on the grounds that the congressional delegation to the agency was too broad.

Do you think the Supreme Court ought to revive the so-called "non-delegation" doctrine, which was last used to strike down some of the New Deal legislation?

Do you see any possibilities in that area, following Rehnquist's view, at least?

Judge KENNEDY. Well, the non-delegation cases—and I think that is the right term to give them—seem to be lying dormant, don't they? And it is not clear, to me, the extent to which they still have vitality.

But these questions go very much to the core of the functioning of the Congress, and I think that the Congress must give very, very

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careful attention to how it can control the agencies that it creates. I think that problem is pointed up by the opinion of the Supreme Court, and of our own court, in *Chadha*.

Senator GRASSLEY. I would like now to turn to a different area.

Judge Kennedy, during the Bork hearings, much was made of the fact that many law teachers opposed Judge Bork's nomination.

In his writings, Judge Bork was very critical of the prevailing academic establishment which tended to have a liberal political philosophy.

Bork was critical of law professors who, once realizing that they could never convince democratic electorates to vote in their social policies, turned to judges as a fast way to make society over to their liking.

Of course I suppose wanting judges to do "good things," simply because the electorate will not do them, and do them quickly enough, is not limited just to liberalism, I will admit.

But I do sense an attitude among what I refer to as the "legal elites" of this country, that when the legislative process "malfunctions", judges ought to step in and deem themselves lawmakers.

That is why I am so concerned about getting someone who believes in judicial restraint on the Supreme Court. You have been a constitutional law professor for many years. Can you comment on your perception of the ideology that eminates from most law schools today?

Judge KENNEDY. Well, it might be somewhat presumptuous of me to characterize the legal education establishment nationwide in just a few words, particularly because I am a part-time law professor.

It is true that the law schools throughout the United States have a tremendous influence on the way our system works. There is a high degree of uniformity in law school teaching and in law school curriculum, and this has some great benefits. To begin with, lawyers are taught, in effect, a national language and this makes for a very, very efficient legal system.

The capitalistic system in this country, and the corporation system, was built by the legal profession. They are important as shipwrights were to England. And so the legal profession has, and the legal education system has presented a tremendous contribution to the capitalistic system of this country with the legal talent that it educates.

Now, on the other hand, with this uniformity we can create perhaps a lack of diversity, a lack of creativity. I don't see that in the law schools. I think individual professors are willing and able to explore their own philosophies in their own terms. But the danger is always there and I think law schools should be aware of it—the danger of uniformity.

Senator GRASSLEY. Well, regarding this "uniformity", tell me whether or not you agree that the prevailing judicial philosophy among many law professors is one that applauds judicial activism?

Judge KENNEDY. I am not particularly comfortable in making those judgments. I am certain that a number of law school professors do hold that view, but there are others who do not.

Senator GRASSLEY. Can I ask you then, in your own approach to teaching, how have you gone about teaching your students the activist decisions of the Warren and Burger courts.?

Judge KENNEDY. Well, as I indicated yesterday, I, within certain limits of tolerance, do not care what my students think. I do care passionately how they think. The method is the important thing. Each case must be justified according to logic, according to precedent, and according to the law of the Constitution, and I insist that each student do that for every case.

Senator GRASSLEY. Could I ask just one last question?

The CHAIRMAN. Surely.

Senator GRASSLEY. I don't think it is going to take a lot of time.

Have you challenged your students to question the rationale, the reasoning, behind the Supreme Court's most expansionist of decisions like the *Miranda* case, the *Griswold* case, and the *Roe* v. *Wade* case?

Judge KENNEDY. Yes. That is a routine part of the curriculum. It is a routine part of the exercise. Because if those decisions cannot stand rigorous analysis, then they can be called in question.

Senator GRASSLEY. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Before we break, Judge, as you can see, you are causing a dilemma for some on this committee. You are not turning out to be quite what anybody thought.

So with that, we will break for 15 minutes.

[Recess.]

The CHAIRMAN. The hearing will come to order.

Judge, I realized as we broke you and others may have misunderstood my closing comment. What I meant to say was you are turning out not to be espousing the same philosophy that we heard before, and that is disturbing to some, reassuring to others, and confusing to still others; and you are turning out to be exactly what you advertised to be—your own man—and that is what I meant. I did not mean it in a way that was meant to be in any way insulting. I meant it in a complimentary way when I said no one knows for sure.

Judge KENNEDY. Well, thank you, Senator. I didn't take it in any other respect.

The CHAIRMAN. Now, before I yield to my colleague from Alabama, the Senator from Arizona would be the next to question, but he is tied up in a conference that is going on now which will determine when and if we, the Senate and the House, ever adjourn prior to Christmas. And he will, unless he is able to make it back prior to the closing out of your testimony, he ask unanimous consent that his questions be submitted for you to respond in writing.

Judge KENNEDY. I would be pleased to do that, sir.

[The questions for Senator DeConcini appear at p. 733.]

The CHAIRMAN. Without objection, that will be done.

Now, I yield to my friend from Alabama for his——

Senator LEAHY. Senator Heflin was gracious enough to say he would yield to me just for one follow-up question on an earlier point. I want to make it absolutely clear that I understood the answer.

The CHAIRMAN. Well, fine. The Senator from Vermont.

Senator LEAHY. Judge Kennedy, on *Miranda*—aside from whether you would have written in the opinion "here are the four warnings to give," do you agree that defendants should be warned of their right to counsel and their right to free counsel if they cannot afford it?

Judge KENNEDY. That, of course, is the law and I know of no strong argument for overruling the law that is now in place.

Senator LEAHY. And you agree with that right?

Judge KENNEDY. Well, I don't want to commit myself that I wouldn't re-examine it, but I think it would take a strong argument to require me to change it.

Senator LEAHY. Thank you.

Thank you very much, Senator Heflin.

The CHAIRMAN. The Senator from Alabama, Senator Heflin?

Senator HEFLIN. Judge Kennedy, you were a witness in a criminal prosecution against Judge Harry Claiborne, as I understand it.

Judge KENNEDY. Yes, sir.

Senator HEFLIN. Would you give us the circumstances pertaining to your appearance as a witness, how you were called and basically, in a thumbnail sketch, the facts?

Judge KENNEDY. Judge Claiborne was a U.S. District Judge in the District of Nevada. He was indicted and tried for various charges, one of which was the solicitation of a bribe from a former client of his. The former client of his was one Conforte who operated a brothel in Nevada known as The Mustang Ranch.

Claiborne had been Conforte's attorney when Conforte was charged by the U.S. Government for tax evasion. Conforte was convicted. Claiborne was not his attorney on the appeal because between the time of the ending of the trial and the taking of the appeal Claiborne became a judge.

Conforte's case was appealed to the ninth circuit. There was a three-judge panel consisting of Judge Tang, a United States Circuit Judge from Arizona; Judge Palmieri, U.S. District Judge from the Southern District of New York, sitting with us by designation; and me, and I was the presiding member of the panel.

During the oral argument of the case, the panel was quite vigorous in questioning the government, and it might have appeared to someone who was in the audience that the panel was quite concerned about the conviction and might be disposed to overturning Conforte's conviction.

The ninth circuit, because of its workload, historically has assigned district judges to sit with us on the circuit, and Claiborne himself, now a judge, had been assigned to our circuit and had sat with me a week earlier, and he subsequently sat with me a month later.

At the time he sat with me earlier, a week or so before, I was not aware that the *Conforte* case would come up and I had no idea that he was connected with it. When I sat with him a month later I suppose I was aware of it, but we certainly did not discuss it.

The allegation was that Claiborne solicited a bribe from his client of $50,000—I never did read the indictment—of a certain amount of money in order to influence the panel in its decision. Each of the judges on the panel, including me, testified to the fact

that Claiborne had not contacted us to influence the result of the case.

I did not hear the testimony. I was careful not to hear the testimony or read the newspaper accounts or even read the indictment. So my information on the case may not be even as good as someone who read the newspapers. But, as I understand it, the testimony was that Claiborne, the judge, had told Conforte, his former client, that Claiborne had met with Judge Palmieri in Judge Palmieri's apartment in New York. Judge Palmieri had never met the man, and so testified. All of us testified that there had been no attempts to influence us in the case.

I did say that Judge Claiborne, in a telephone conversation, with my clerk a party to the conversation, had asked when are you coming out with the *Conforte* case and I had said the case is under submission, which was a polite way of saying I am not talking about the case.

My testimony and the testimony of the other judges before the U.S. district court, which was now trying Claiborne for the bribery charge and for the tax evasion charges, was to outline the circumstances, to explain how the court of appeals works, to give background, and to give in a capsule—and to say what I have just told you in a capsule form.

The jury did not convict on any of the counts. It was a hung jury. Subsequently, Judge Claiborne was retried just for some tax evasion counts. They did not retry on this matter. And he was convicted in court and subsequently was impeached by the House of Representatives and convicted and removed by the U.S. Senate.

Senator HEFLIN. Well, you were called in by the government to testify largely as to how it worked, to deny this matter pertaining to approaches being made to the three-judge panel, and I suppose as to the inquiry as to when the *Conforte* case would come down. Is that basically correct?

Judge KENNEDY. Yes.

Senator HEFLIN. And you testified as a government witness?

Judge KENNEDY. Yes, I testified as a government witness in the case.

Senator HEFLIN. All right, sir. Now this brings up the issue of impeachment proceedings and the independence of the judiciary.

Judge KENNEDY. Yes, sir.

Senator HEFLIN. I know that Senator DeConcini will probably submit written questions to you pertaining to the Judicial Conduct and Disability Act of 1980, as I believe it was called, which was known as the DeConcini-Nunn bill, which deals with the activity of judicial councils and the circuits and the Judicial Conference I believe, and ultimately perhaps Congress' role relative to the impeachment procedure.

You opposed pretty vigorously in a 1978 speech to the ninth circuit judges the Judicial Conduct and Disability Act.

Judge KENNEDY. Yes, sir.

Senator HEFLIN. And I know that Senator DeConcini has told me that he appeared there with you and had quite a debate pertaining to that matter. You and I are on the same side. I voted against it and made a speech questioning its constitutionality when it was on the floor of the Senate.

But basically, I think you felt like it had some constitutional imperfections. Do you want to explain your opposition to that bill?

Judge KENNEDY. Yes, Senator. The bill, incidentally, in the form that it was initially proposed, the Nunn-DeConcini bill, and the form that we were concerned with in the Arizona debate was much more far-reaching than the bill that eventually was adopted. And that bill would have permitted a national committee of judges to inquire into the fitness and the behavior of any sitting U.S. judge, and I took, as did a number of my colleagues, the position that this was a serious threat to the independence of the judiciary.

The judges of the United States must be in a position where they can agree with each other and also disagree with each other very vigorously. And, if you are in a collegial body, and as you well know in the Senate, and you must constantly disagree and debate your colleagues, you need to rely on every bit of decorum, every bit of tradition, every bit of courtesy, every bit of etiquette that you can summon in order to maintain your professional friendship with each other. And we felt that this was one of the serious defects of Nunn-DeConcini. That it would set judge against judge in an arena where previously the Constitution had committed that responsibility solely to the U.S. Senate, and those were some of the grounds of our opposition to the bill.

Senator HEFLIN. Well, does testifying against a judge pit one against another?

Judge KENNEDY. Well, I suppose it does, although there, in the context where we were called as witnesses for the government, it was not as if we, the judges, were bringing the case.

Senator HEFLIN. After the Claiborne matter was heard by the Senate and he was impeached, a number of Senators felt that the procedure was cumbersome and perhaps may even lack some due process, in effect, the jurors being the members of the Senate, hearing evidence, hearing arguments, absences, and many of them having to do just like we are doing now, where people have to be at conferences. Very important issues are up on the legislative basis. They have their staff there but in some of the proceedings in the Senate, some of the arguments were done in secret, in closed session, and none of the staff was present.

Do you have any thoughts on whether or not the impeachment procedure that is followed under the Constitution needs changing or needs some fine tuning, or a different method, perhaps looking at what some of the States have done relative to the issue of discipline and removal of judges?

Judge KENNEDY. The framers were very deliberate about this decision, as you well know, Senator, and what have there been? Something like, I am tempted to say nine impeachments before Claiborne. There have been ten impeachments and five convictions, or something like that, in the history of the United States. There have been about 10 or 12 other instances where the Senate was about to convict and the judge resigned.

I adhere to my view that the existing constitutional system should be maintained. I am a little cautious about commenting at length on your impeachment procedures for two reasons: one, because I haven't given the matter much thought; two, because there

is a case in the courts now involving a judge and it is likely to come before the Supreme Court.

I think we can say that most of the commentary in the literature has been that the design of the impeachment trial process and its conduct is for the Senate to decide, guided by the managers in the House, and that it is not judicially reviewable.

Senator HEFLIN. You, in regard to the DeConcini-Nunn bill, or the Judicial Conduct and Disability Act, have taken a pretty strong position. Now, if you are confirmed and sitting on the Supreme Court, what standard would you use in determining whether or not to recuse yourself from cases that would come before you as a judge on the Supreme Court if the issue of its constitutionality were to be raised?

Do you feel like there are certain standards that you would use or follow on the issue of recusals pertaining to this issue and any other issue in which you have firmly stated a position, in effect, in a nonjudicial capacity.

Judge KENNEDY. As you know, Senator, there are two methods of recusal. One is automatic recusal. Automatic recusal is required under the statute whenever a judge has a financial interest, even the ownership of one share of stock in a corporation that is a party to a given case.

So the first thing you do is you look at the statute—it is 18 USC Section 455—to determine whether or not recusal is required.

Then there is a more flexible standard in which the judge in his discretion must recuse himself if his impartiality can reasonably be perceived as being affected in the case.

In the instance you give, I do not think the fact that I gave one speech, even though it was a rather hard-hitting speech as I recall, would disqualify me, because I think I could keep a fair and open mind on the issue.

Senator HEFLIN. Well, following that same line of reasoning, relative to issues like privacy or abortion, if you made a statement on the issues here before this committee, in a similar manner that you may have made in a discussion before the ninth circuit court of appeals judges on the disability and the conduct matter, do you feel like that that would in effect cause you to have to recuse yourself under the perception ground?

Judge KENNEDY. I realize that some Supreme Court nominees have taken the position before this committee that the reason they cannot answer the questions is they have to recuse.

I have some trouble with that. I think the reason for our not answering detailed questions with respect to our views on specific cases, or specific constitutional issues, is something quite different.

I think the reason is that the public expects that the judge will keep an open mind, and that he is confirmed by the Senate because of his temperament and his character, and not because he has taken particular positions on the issues.

The press is designed to keep politics and the judicial function separate. It is not because we would be compelled to recuse ourselves in cases.

Senator HEFLIN. You have made speeches pertaining to victims' rights, including a speech in March of this year to the Sixth South Pacific Judicial Conference.

And you came up with a number of suggestions in effect how to ease the problems that confront victims as they come before the court.

Would you comment on the role that victim rights have played in the decisions you have written pertaining to criminal law.

Judge KENNEDY. Yes. I cannot say at this time that I have given any specific consideration to the new provisions which involve restitution and so forth.

I misspoke. I sat on one case on whether or not restitution could be required as a condition of parole.

And I can't now recall if I authored the opinion or not. But we held that the judge was within his discretion in insisting that as a condition of parole, the offender make restitution to the victim. That is an important part of the criminal process. The whole point of awareness about the victims—is because we can expand our horizon somewhat.

Sometimes the best way to impress upon the criminal defendant, especially if he is a first time offender in a domestic violence type of case, the best way to impress on him, on the defendant, the moral wrong that he has committed, the best way to encourage him to ask for the forgiveness of the victim, is to confront him or her with the victim in the proceeding.

And that has worked in lower courts. In the State courts, they are doing this more than we are in the federal courts.

Senator HEFLIN. I remember reading somewhere, maybe in one of your speeches where you mentioned the *Bernard Goetz* case, I believe, relative to the fact that he had been mugged previously before this subway incident.

That just comes to my mind. Do you recall what you had stated on that in the past?

Judge KENNEDY. I think it was in the New Zealand speech, in which I indicated that the *Goetz* case had been a celebrated case, and simply speculated on whether or not this particular person felt abused by the system, not in anyway intending to excuse the act, but just attempting to point out that victims are a real party in interest in the crime.

They have a certain standing in the proceeding. In many cases, the ordeal the victim faces requires him or her to relive the circumstances of the crime.

It is very, very difficult. And courts can do so much just by the way of attitude, simple mechanical arrangements for the convenience and the comfort of the victim, to make it known that the law has an interest in the victim.

Senator HEFLIN. You have been on the television cameras here. There have been some feelings that the proceedings of the Supreme Court of the United States should be televised.

Some of the State courts have televised their proceedings. Some make a distinction between appellate courts and trial courts.

Do you have any initial reaction about TV in the courts?

Judge KENNEDY. My initial reaction is that I think it might make me and my colleagues behave differently than we would otherwise.

Perhaps we would become accustomed to it after awhile. The press is a part of our environment. We cannot really excise it from the environment.

But in the courtroom, I think that the tradition has been that we not have that outside distraction, and I am inclined to say that I would not want them in appellate court chambers.

I once had a case—it was a very celebrated case—in the City of Seattle. The courtroom was packed. We were at a critical point in the argument. I was presiding.

A person came in with all kinds of equipment and began setting it up. He disturbed me. He disturbed the attorneys. He disturbed everybody in the room.

He was setting up an easel to paint our picture, which was permitted. If he had a little Minox camera, we would have held him in contempt.

So the standard doesn't always work.

Senator HEFLIN. Well, there are certain courts that have given a lot of study to this issue. And they impose certain restrictions such as certain locations, certain places, no flash bulbs, etc.

My observation has been that it can be done without interfering with the court.

It does cause a few of the justices to wear blue shirts and red ties and dark suits. But that is not uncommon among judges anyway.

I think there is one other question that I think should be asked with Senator Kennedy here. You are not kin to Ted Kennedy in any way are you?

Judge KENNEDY. Well, my father once announced that we probably were. And my mother came back the next evening and said, you know, we are related. And she began to smile, and she said, on the Fitzgerald side. So [Laugher.]

So I'm not sure.

The CHAIRMAN. You would both be lucky if you were.

The Senator from Pennsylvania.

Senator SPECTER. Thank you, Mr. Chairman.

Judge Kennedy, when my first round expired, I was asking you about the comment in your speech concerning the distinction between essential rights for a just system, or essential rights in our constitutional system.

And I am going to try to boil this question down, because I have quite a few questions to ask, and there is not a great deal of time remaining. And I know that Chairman Biden wants to finish up this evening.

The CHAIRMAN. Take as much time as you want. No Senator will be cut off.

Senator SPECTER. Well, in that event, I will take it slow and easy.

The CHAIRMAN. Seriously. We are going to stay with the rounds. Just like we did in every hearing I have ever conducted.

That is, you have your half an hour. And if you have more questions, we will go to the next round, and narrow it down until there are only one or two left.

You can ask questions until you exhaust questions. And I have never known you or anyone else in this committee to go on and ask questions that were not warranted.

So take all the time you need.

Senator SPECTER. Well, thank you, Mr. Chairman.

I think the questions are warranted, and there are a number of important areas I think yet to be covered.

You have written criticizing legal realism. You make specific reference, in one of your speeches, to three very important decisions, characterizing *Baker* v. *Carr* as being a matter where a revolution was wrought, and *Brown* v. *Board* and *Gideon* v. *Wainwright.*

And in response to questions here today, you have stated your agreement with the *Mapp* v. *Ohio* search and seizure case and *Escobedo* and *Miranda* on warnings.

And my question is, do you agree generally with the decisions of the Warren court, which have been characterized in many quarters as being a product of legal realism?

Judge KENNEDY. Well, there are two different questions at least, implicit in your statement.

One is this question of legal realism altogether. And the second is the decisions of the Warren Court.

I have indicated that I thought the decisions of the Warren Court went to the very verge of the law at least. We are talking about criminal procedure cases, the ones we have mentioned. That we have paid a heavy cost for imposing those rules on the criminal system; that they seem to be part of our constitutional system now; and that I think a very strong argument would have to be mounted in order to withdraw those decisions.

I do think the decisions have evinced on an explicit basis, the fact that they involve pragmatic, preventative rules announced by the Court, and the Court itself has admitted that they are not necessarily demanded by the Constitution.

Now, so far as legal realism is concerned, that is a philosophy which I think has a substantial grip on much of the profession, on much of the bench. And it is probably a description of how we feel and how we behave.

But I think it has very little part in constitutional interpretation. Legal realism is really an offspring of the school of historicism, which is the idea that no principle, no institution, no charter, no rule, survives its own generation, its own time; that everything is up for grabs every generation.

I think that is just completely inconsistent with the idea of a Constitution. I think it just has no place in constitutional law.

Now, it is true that in the lower courts this may be a description of our process. Because we look at economics, and we look at sociology, et cetera, in order to make our judgments. But in those areas, the Senate of the United States and the Congress can correct us if we are wrong.

Senator SPECTER. But as a generalization, you do believe, and I think you answered this in the prior question, that the American courts have not departed from their mandate, and that as the continuum or tradition of American constitutional law has evolved, the only case you picked out that you disagreed with was *Dred Scott.*

So that as a generalization, the established precedents are satisfactory.

Judge KENNEDY. Well, I have been rather cautious about going through a list of cases that I agree with and disagree with. Because

I think that the position of a Supreme Court Justice has to be that precedents can be reexamined and we cannot commit to the Senate Judiciary Committee otherwise.

Senator SPECTER. Let me turn now to the *Chadha* decision, Judge Kennedy. And to the statement which I had referred to in my opening, which was somewhat critical of the Congress.

And that was your statement at the end of the speech, which you made at the Stanford law faculty back in 1984, where you said, the ultimate question then is whether the *Chadha* decision will be the catalyst for some basic Congressional changes.

My view of this is not a sanguine one. I am not sure what it will take for Congress to confront its own lack of self-discipline, its own lack of party discipline, its own lack of a principled course of action besides the ethic of ensuring its reelection.

Those are fairly strong statements. And I do not bring them up to disagree, necessarily, but to ask you if that view of the legislative process, and that view of the Congress, played any part, however minor, in your decision in *Chadha*.

Judge KENNEDY. I think the answer is no. That statement is rapidly rising to the top of the list of things I wish I hadn't put in my speech notes.

It was designed to trigger a discussion with the Stanford law faculty, which I am not sure we ever got to, about whether or not the Congress of the United States is in a position, under the Constitution, to make essential and important changes in its operations so that it can police and supervise the regulatory agencies that we said it could not in *Chadha*.

Certainly I did not in the speech or in the speech notes mean to indicate any disrespect for the Congress or the legislative process. It is really the heart of our democracy.

And I have said here repeatedly that in my view, it is the Congress of the United States that must take the lead in ensuring the fact and the reality that we have the basic conditions necessary for the enjoyment of the Constitution.

Senator SPECTER. Judge Kennedy, you have testified about your firm conviction on the propriety of *Marbury* v. *Madison* and of judicial review.

Judge KENNEDY. Yes.

Senator SPECTER. There was a comment in a speech you made before the Los Angeles Patent Lawyers Association back in February of 1982, which I would like to call to your attention and ask you about.

Quote: As I have pointed out, the Constitution, in some of its most critical aspects, is what the political branches of the government have made it, whether the judiciary approves or not.

By making that statement, you didn't intend to undercut, to any extent at all, your conviction that the Supreme Court of the United States has the final word on the interpretation of the Constitution?

Judge KENNEDY. That is my conviction. And I think that the Court has an important role to play in umpiring disputes between the political branches.

Senator SPECTER. What did you mean by that, that in most critical aspects, it is what the political branches of the government have made it, whether the judiciary approves or not?

Judge KENNEDY. I was thinking in two different areas. One in this area of separation of powers and the growth of the office of the presidency. The courts just have had nothing to do with that.

Second, and even more importantly, is the shape of federalism. It seems to me that the independence of the States, or their non-independence, as the case may be, is really largely now committed to the Congress of the United States, in the enactment of its grants-in-aid programs, and in the determination whether or not to impose conditions that the States must comply with in order to receive federal monies; that kind of thing.

Senator SPECTER. Well, this is a very important subject. And I want to refer you to a comment which was made by Attorney General Meese in a speech last year at Tulane, and ask for your reaction to it.

He said this: But as constitutional historian Charles Warren once noted, what is most important to remember is that, quote, however the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law, not the decisions of the Court.

By this, of course, Charles Warren did not mean that a constitutional decision by the Supreme Court lacks the character of law. Obviously it does have binding quality. It binds the parties in a case, and also the executive branch for whatever enforcement is necessary.

But such a decision does not establish a supreme law of the land that is binding on all persons and parts of government henceforth and evermore.

Do you agree with that?

Judge KENNEDY. Well, I am not sure—I am not sure I read that entire speech. But if we can just take it as a question, whether or not I agree that the decisions of the Supreme Court are or are not the law of the land. They are the law of the land, and they must be obeyed.

I am somewhat reluctant to say that in all circumstances each legislator is immediately bound by the full consequences of a Supreme Court decree.

Senator SPECTER. Why not?

Judge KENNEDY. Well, as I have indicated before, the Constitution doesn't work very well if there is not a high degree of voluntary compliance, and, in the school desegregation cases, I think, it was not permissible for any school board to refuse to implement *Brown* v. *Board of Education* immediately.

On the other hand, without specifying what the situations are, I can think of instances, or I can accept the proposition that a chief executive or a Congress might not accept as doctrine the law of the Supreme Court.

Senator SPECTER. Well, how can that be if the Supreme Court is to have the final word?

Judge KENNEDY. Well, suppose that the Supreme Court of the United States tomorrow morning in a sudden, unexpected development were to overrule in *New York Times* v. *Sullivan.* Newspapers no longer have protection under the libel laws. Could you, as a legislator, say I think that decision is constitutionally wrong and I

want to have legislation to change it? I think you could. And I think you should.

Senator SPECTER. Well, there could be legislation——

Judge KENNEDY. And I think you could make that judgment as a constitutional matter.

Senator SPECTER. Well, there could be legislation in the hypothetical you suggest which would give the newspapers immunity for certain categories of writings.

Judge KENNEDY. But I think you could stand up on the floor of the U.S. Senate and say I am introducing this legislation because in my view the Supreme Court of the United States is 180 degrees wrong under the Constitution. And I think you would be fulfilling your duty if you said that.

Senator SPECTER. Well, you can always say it, but the issue is whether or not I would comply with it.

Judge KENNEDY. Well, I am just indicating that it doesn't seem to me that just because the Supreme Court has said it legislators cannot attempt to affect its decision in legitimate ways.

Senator SPECTER. Well, but the critical aspect about the final word that the Supreme Court has is that there is a significant school of thought in this country that the Supreme Court does not have the final word. That the President has the authority to interpret the Constitution as the President chooses and the Congress has the authority to interpret the Constitution as the Congress chooses, and there is separate but equal and the Supreme Court does not have the final word.

And, if *Marbury* v. *Madison* is to have any substance, then it seems to me that we do have to recognize the Supreme Court as the final arbiter of the Constitution, just as rockbed.

Judge KENNEDY. Well, as I have indicated earlier in my testimony, I think it was a landmark in constitutional responsibility for the Presidents in the *Youngstown* case and the *Nixon* case to instantly comply with the Courts decisions. I think that was an exercise of the constitutional obligation on their part. I have no problem with that at all.

Senator SPECTER. Well, there has been compliance because it has been accepted that the Supreme Court is the final arbiter. I just want to be sure that you agree with that proposition.

Judge KENNEDY. Yes, but there just may be instances in which I think it is consistent with constitutional morality to challenge those views. And I am not saying to avoid those views or to refuse to obey a mandate.

Senator SPECTER. Well, I think it is fine to challenge them. You can challenge them by constitutional amendment, you can challenge by taking another case to the Supreme Court. But, as long as the Court has said what the Court concludes the Constitution means, then I think it is critical that there be an acceptance that that is the final word.

Judge KENNEDY. I would agree with that as a general proposition. I am not sure there are not exceptions.

Senator SPECTER. But you can't think of any at the moment?

Judge KENNEDY. Not at the moment.

Senator SPECTER. Okay. If you do think of any between now and the time we vote, would you let me know?

Judge KENNEDY. I will let you know, Senator.

Senator SPECTER. Let me pick up some specific issues on executive power and refer to a speech that you presented in Salzburg, Austria, back in November of 1980, where you talk about the extensive discretion saying, "The blunt fact is that American Presidents have in the past had a significant degree of discretion in defining their constitutional powers."

Then you refer to, "The President in the international sphere can commit us to a course of conduct that is all but irrevocable despite the authority of Congress to issue corrective instructions in appropriate cases." Then you refer to President Truman, saying he committed thousands of troops to Korea without a congressional declaration. And then you say, "My position has always been that as to some fundamental constitutional questions it is best not to insist on definitive answers."

And you say further, "I am not one who believes that all of the important constitutional declarations of most important constitutional evolutions come from pronouncements of the courts."

And, without asking you for a specific statement on the War Powers Act, that is a matter of enormous concern that engulfs us with frequency. Major questions arise under the authority of the Congress to require notice from the President on covert operations coming out of the Iran-contra hearings. What is the appropriate range of redress for the Congress? Do we cut off funding for military action in the Persian Gulf? Do we cut off funding for covert operations? Are these justiciable issues which we can expect the Supreme Court of the United States to decide?

Judge KENNEDY. Well, whether or not they are justiciable issues, of course, depends on the peculiar facts of the case, and I would not like to commit myself on that. But the very examples you gave indicate to me that there are within the political powers of the Congress, within its great arsenal of powers under article I of the Constitution, very strong remedies that it can take to bring a chief executive into compliance with its will, and this is the way the political system was designed to work.

The framers knew about fighting for turf. I don't think they knew that term, but they deliberately set up a system wherein each branch would compete somewhat with the other in an orderly constitutional fashion for control over key policy areas. And these are the kinds of things where the political branches of the government may have a judgment that is much better than that of the courts.

Senator SPECTER. But isn't it unrealistic, Judge Kennedy, to expect the Congress to respond by cutting off funds for U.S. forces in the Persian Gulf? If you accept the proposition that the President can act to involve us in war without a formal declaration, and the President and the Congress ought to decide those questions for themselves, isn't that pretty much an abdication of the Supreme Court's responsibility to be the arbiter and the interpreter of the Constitution?

Judge KENNEDY. Well, I don't know if it is an abdication of responsibility for a nominee not to say that under all circumstances he thinks the Court can decide that broad of an issue. If the issue is presented in a manageable judicial form, in a manageable form,

I have no objection to the Court being the umpire between the branches.

On the other hand, I point out that having to rely on the courts may infer, or may imply an institutional weakness on the part of the Congress that is ultimately debilitating. It seems to me that in some instances Congress is better off standing on its own feet and making its position known, and then its strength in the federal system will be greater than if it had relied on the assistance of the courts.

Senator SPECTER. Well, you testified earlier that you could say standing enhanced by legislative enactment.

Judge KENNEDY. Yes.

Senator SPECTER. And some of the legislation is now pending to give broader standing as was given in *Buckley* v. *Valeo,* so that you would—obviously, you have to reserve judgment, but you could see an appropriate role for a judicial decision on these tough constitutional questions, notwithstanding the generalizations that I just read to you?

Judge KENNEDY. I think so. Dean Choper, of the University of California at Berkeley, has a book in which he proposes the idea that the Court should always withdraw from any dispute between the branches. He would, I think, say *Youngstown* is wrong, that the *Nixon* tapes case is wrong, and I disagree with that. I think there is a role for the Court.

Senator SPECTER. Well, I think that is an important proposition, and I think it may well be before you, and I obviously don't ask for any commitments or any statements on it except to hear what one Senator has to say about it and what is the prevailing view in the Senate, that at some point we feel the War Powers Act has to be tested. That it has been a very important response to the fact of life that the United States is involved in wars without declarations, that the constitutional authority of the Congress has eroded there, the impracticality of cutting off funds once there is a military action. You note the commitment of troops in Korea. There has been many others.

And I was just a little concerned about your statements that the executive defines its own authority and your statements about the courts keeping hands off. And I am assured, as you have testified today, that there may be an appropriate role for the Supreme Court of the United States, depending on the specific factual presentation.

Judge KENNEDY. Yes. And, as I think we would both agree, much of what I was saying there was a recitation of simple facts. The Presidency has grown to have power of tremendous proportions.

Senator SPECTER. Judge Kennedy, I would like now to refer to a number of cases where I have certain concerns where you have reached conclusions as a matter of law which seem to me to undercut the fact-finding process. These are cases which you and I discussed when we talked informally in my office sometime ago.

The case of the *City of Pasadena School Board,* quite a controversial matter, was decided in an opinion which you wrote, or you wrote a concurring opinion after a district court judge had sought to retain jurisdiction. And the memorandum opinion of the district court judge sets forth an extensive sequence of factual findings ex-

pressing a concern about the conduct of the Board, election promises, which the district judge, the finder of fact, concluded required the district court to retain jurisdiction.

And, without going through them at great length, there boil down in footnote 19 where the district court judge found "a majority of the defendants [those on the school board] have acted with unyielding zeal and overt antipathy to the desegregative concept of the Pasadena Plan. Promising return to neighborhood schools with a recognition that it cannot be accomplished without resegregation of Pasadena schools is bad faith not only to the principles of constitutional duty but also to their own constituency."

One comment that you made in your opinion that I have a question about, one I read to you when we met privately about 10 or 12 days ago, where you said at 611 Fed. 2nd at 1247, "Where the Court retains jurisdiction a board may feel obliged to take racial factors into account in each of its decisions so that it can justify its actions to the supervising court. This may make it more, rather than less, difficult to determine whether race impermissibly influences board decisions. Where the subject is injected artificially into the decision process and the weight that racial considerations might otherwise have had is more difficult to determine."

And my question to you before, and I repeat now, what is wrong with that, especially in the context of the very strong findings of fact by the lower court judge of bad faith by the school board?

Judge KENNEDY. This case had a long history. It went to the Supreme Court on more than one occasion. It was in our court on I guess four different occasions. And this particular aspect of it presented one of the most troubling areas of desegregation laws, and that is when does a court's supervision cease?

In this case the City of Pasadena had, in compliance with a court decree, been implementing a plan that was certified ultimately by the Supreme Court to be a plan for a unitary district, which is the parlance for saying a district that complies in all respects with a desegregation decree.

The findings of the Supreme Court of the United States and of our court—and uncontradicted by the district court—were that the district had met full compliance for a period of more than 2 years. Now the question was how long does the district court's supervision last? This was a case in which the district court judge at one time, in response to that question from an attorney, had said that district court supervision will last as long as I live.

Now, at some point school districts must assume responsibilities for their own affairs. At some point the jurisdiction of the court must cease. At some point we must allow the school districts to again resume charge of their affairs. And, if there is a further violation of the Constitution of the United States, an action can then again be implemented.

We concluded that because there had been full compliance, because a unitary district had been achieved, the court was acting improperly in looking at election campaign promises and election rhetoric in order to justify its continued decrees.

What happened here was there were some schools—I forget if they called them magnet schools or neighborhood schools—that had been proposed in a district in which unitary compliance had

been achieved, and we simply ruled that the district had to again stand on its own feet, and that if there was a violation there could again be a suit.

It is a very difficult area of the law to determine how to withdraw. The very fact that the court is involved affects the equation.

Senator SPECTER. How much were you influenced by the judge's statement that he would keep jurisdiction as long as he would live? Did you consider having the judge replaced in the case, if that statement really amounted to a declaration of a bias or prejudice?

Judge KENNEDY. Well, it didn't amount to a declaration of bias and prejudice but it indicated the difficulties that the district court had in extricating itself from the decree of the court. And we felt that the school district having been in good faith full compliance for a period of years was entitled to a release of the jurisdiction of the court.

Senator SPECTER. Well, but that is the question. The question is whether the school board was in compliance. You note in your opinion, "The district court found that the board has acted and failed to act with the same segregative intent that this court found in 1970," and the memorandum opinion of the board is replete with facts and, of course, we know that the lower court is in a better position to find the facts, especially questions of intent. And it was a little hard for me to follow the conclusion as a matter of law that the lower court was wrong in the face of those very extensive factual findings.

Judge KENNEDY. Well, we looked at the findings and concluded otherwise I think, Senator. I agree with you that the fact-finding functions of a district court cannot be usurped by an appellate body. On the other hand, they have to fit the ultimate remedy the court gave, and in this event we thought that the Pasadena School District should be restored to its own status.

Senator SPECTER. Well, the other two cases that I want to talk to you about, and there are many more but I have limited it to three cases, are the *AFSCME* v. *State of Washington* case——

Judge KENNEDY. Yes.

Senator SPECTER [continuing]. And here again there were very strong factual findings by the lower court. The district court said at page 863 of 578 Fed. supp., "Evidence which when considered as a whole shows discriminatory intent includes the historical contacts out of which the challenge to failure to pay arose," and later in the district court's opinion the comment is made, "There is little doubt that the State produced evidence that the unlawful discrimination was other than in bad faith the *Manard* and *Norse* decisions would have persuaded this court that back pay would not have been in an appropriate remedy."

Then going on to say, "Rather the persistent and intransigent conduct of defendant in refusing to pay plaintiffs indicates bad faith."

This is a very complicated case and there is a great deal involved and you commented on it to some extent, and I don't cite it really to—well, I cite it on the substantive law, but really more particularly—and my time is up, and let me just finish it and then give you a chance to respond.

One of your concluding statements, as it appears on 77 Fed. 2nd at 1408, "Absent the showing of discriminatory motive, which has not been made here, the law does not permit the Federal courts to interfere in a market-based system for the compensation of Washington's employees."

And, in this one, like the *City of Pasadena* case, I question in terms of your coming to a conclusion as a matter of law which overturns very strong findings of fact by a lower court in the civil rights area.

Judge KENNEDY. I suppose I would disagree with your conclusion about very strong findings, in that I don't think the findings at all related to the remedy. I don't think the findings at all related to the violation that the district court findings were—the part you quoted was simply conclusory. The actual findings were that the State of Washington had done a comparable worth study. The actual findings were that the State of Washington had advertised in some cases for male-only jobs and that it had ceased that. And we simply found that as a matter of law this was wholly insufficient to say that Washington was violating the law by not adopting a comparable worth scheme for every one of its female employees.

So I would think that those are fact findings simply are not related to the judge's conclusion, and so I would disagree with the characterization as strong.

Senator SPECTER. Thank you very much, Judge Kennedy. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Byrd.

Senator BYRD. Judge Kennedy, I am sure you feel you have had a very fair hearing here, and that the questions have been tempered and incisive, to the point; am I correct?

Judge KENNEDY. You are certainly correct, Senator.

Senator BYRD. I am pleased to have had an opportunity to meet with you privately. I am sure that everybody else on here probably have done the same thing. But based on my own private conversations with you, and you didn't promise me anything or commit to anything in those conversations, and I didn't ask you to, and based on what I have read and heard and my observations of the hearing, I don't believe you are in any trouble.

I am inclined to vote for you, barring some unforeseen happening. I am a conservative when it comes to the courts. Probably a liberal on some matters and moderate in others. I hope I am not an extremist in anything.

Disraeli said that he was a conservative to conserve all that was good in his constitution and that the radicals would do all that was bad. I believe in the death penalty. I believe it is constitutional. The Constitution refers to capital crimes.

What are your comments, or would you have any on the subject?

Judge KENNEDY. Well, with reference to the death penalty, Senator, I have taken the position with your colleagues on the committee that the constitutionality of the death penalty has not come to my attention as an appellate judge and that I will not take a position on it, but that if it is found constitutional I think it should be efficiently enforced.

Senator BYRD. We had a little difficulty with another nominee for this position recently in connection with congressional standing, and I was left to believe that the Congress would not be allowed in the Court in the event there were disputes between the legislative branch and the executive on that occasion.

Perhaps others have asked questions on this subject, but would you care to indicate whether or not you feel that there is—do you have any problem with Congress being able to get standing to receive justice in the Court if you become a member of the Supreme Court and there is a serious question that arises between the executive branch and the legislative and the country's national security interests, let's say, are involved?

Judge KENNEDY. In a colloquy that we had earlier this afternoon, Senator——

Senator BYRD. No, I did not hear the colloquy.

Judge KENNEDY. Right. I mean one that I had before you came in. I made it clear that in my view it is quite appropriate for the Court to act as an umpire between the political branches of the government. The circumstances in which a case that meets the case or controversy doctrine are ones that we would have to examine in a particular case. I think that in the *Youngstown* case, the steel seizure case, and the *Nixon* tapes case, the Court acted completely appropriately in defining and determining the bounds of power between the two political branches. I think that is a completely appropriate role for the Court to play.

Senator BYRD. Why would you want to be a Supreme Court Justice? Has anybody asked you that question yet?

Judge KENNEDY. I think Senator Leahy asked me that question.

Senator BYRD. Well, then you don't need to answer it for me.

Judge KENNEDY. Well, I would be pleased to tell you, Senator, that I am committed to constitutional rule and I think every person in this Senate is, and I think every American is; and I want to do the best I can to honor that commitment.

Senator BYRD. I suppose you have been queried as to your position on judicial restraint, how you view the responsibilities and role of the Supreme Court under the Constitution.

Judge KENNEDY. I have, Senator, and I believe the role of the Supreme Court must be to maintain its independence but at all times to obey the Constitution and the law.

Senator BYRD. And I suppose you would view the Court not as a traveling constitutional convention?

Judge KENNEDY. Absolutely.

Senator BYRD. Or as an erstwhile legislative branch?

Judge KENNEDY. Not at all, Senator. I would not so view it.

Senator BYRD. Well, what is the role of the Supreme Court? Is it merely that of interpreting the law and the Constitution and applying the law and the Constitution to the facts of the case, or is it that of blazing new trails and, in essence, changing the laws, enacting the laws, enacting new laws?

I am sure you have probably been asked these questions already, and I apologize to you. You need not elaborate at great length on my questions if others have asked them because I will be reading the hearing.

Judge KENNEDY. Senator, the Court can use history in order to make the meaning of the Constitution more clear. As the Court has the advantage of a perspective of 200 years, the Constitution becomes clearer to it, not more murky. The Court is in a superior advantage to the position held by Mr. Chief Justice Marshall when he was beginning to stake out the meanings of the Constitution in the great decisions that he wrote.

And this doesn't mean the Constitution changes. It just means that we have a better perspective of it. This is no disparagement of the Constitution. It is no disparagement of the idea that the intentions and the purposes of the framers should prevail. To say that new generations yield new insights and new perspectives does not mean the Constitution changes. It just means that our understanding of it changes.

The idea that the framers of the Constitution made a covenant with the future is what our people respect and that is why they follow the judgments of the Supreme Court, because they perceive that we are implementing the understanding of the framers. I am committed to that principle.

Senator BYRD. How do you view previous decisions, precedent, the doctrine of *stare decisis*? Do you feel that precedent should be given a great deal of weight? Is precedent supreme, or is precedent to be given a strong place but in the light of changing circumstances, perhaps? That you would not have any great difficulty in overriding precedent?

Judge KENNEDY. As you know, Senator, *stare decisis* has an element of certainty to it, which most Latin phrases do, but it really is a description of the entire legal process. *Stare decisis* is the guarantee of impartiality. It is the basis upon which the case system proceeds, and without it we are simply going from day to day with no stability, with no contact with our past.

And so *stare decisis* is very important, but, obviously, if a case is illogical, if it cannot be reconciled with all of the parallel precedent, if it appears that it is simply out of accord with the purposes of the Constitution, then it must be overruled.

Senator BYRD. Well, I congratulate you again, and I think that in due time the Senate will consider your nomination. I can assure you that your nomination will be given a very fair and thorough hearing in the course of Senate debate based on your testimony thus far and your conduct in these hearings and my perception based on what I have read and heard and seen and what I have listened to among my colleagues, I have a feeling that you are going to have the opportunity to don those robes and sit on that Court. And if the good Lord does his will and nothing happens to keep you from doing that, I certainly want to extend the hope that you will be there a long time. I have a favorable impression from the standpoint of my own measurements, my own standards, as one who believes that the legislative branch under this system was created to do the legislating and that the branches are equal, coordinate. I believe strongly in our system of checks and balances, and I believe the Court has the role of interpreting the laws and the Constitution. I think the judges should exercise restraint and not allow themselves to get over into the realm of the legislative branch.

And having said that, I will exercise a little restraint, Mr. Chairman, and say no more, except thank you for the hearing. I would like to thank my colleagues for the dedication that they always pursue in hearing the nominees, the questions that they ask, the preparations that they make in advance of the hearings. And again, to compliment you and wish you and your family a happy holiday season.

Judge KENNEDY. Thank you for those gracious remarks, Mr. Chairman, and for the courtesy that all of your colleagues have shown me. The advise and consent process is a very meaningful one to me.

The CHAIRMAN. Thank you, Senator.

The Senator from New Hampshire.

Senator HUMPHREY. Back to judicial restraint, Judge, if you don't mind.

Judge KENNEDY. Not at all, Senator.

Senator HUMPHREY. The advise and consent role is very important. We exercise it only once with each nominee.

I am not fully satisfied that I have your views in this area perfectly in focus. Just how seriously do you view the absence of judicial restraint, which I will call judicial activism? How seriously do you view that as misconduct by judges?

If you were a Senator, would you reject, refuse to confirm a candidate to the bench who rejected the philosophy and the doctrine of judicial restraint?

Judge KENNEDY. Well, it is not clear to me that a Senator can always reject a nominee because of some disagreement with philosophy. But, if you have a nominee who tells you that he or she is not bound by the law of the Constitution, that he or she is superior to precedent, that he or she has some superior insights into the great principles that made this country devoted to constitutional rule, then I think you could very easily reject that nominee.

Senator HUMPHREY. Yes, that would be easy but it doesn't present itself that way, as you know.

Judge KENNEDY. I think there may be a problem in that I am not sure that, in the last 20 years, any nominee has not embraced the doctrine of judicial restraint because that is a phrase that is rather simple to adopt, and the question is whether or not it is given meaning and given application in the deliberative approach that the judge brings to his or her work. I can point to my record—12 years of opinions in which I think I indicate that careful approach.

Senator HUMPHREY. Earlier you mentioned facts which judges might consider in determining what activities are covered by the privacy right. You mentioned things such as the essentiality of the right to human dignity, the inability of a person to manifest his or her own personality, the inability of the person to obtain his or her own self-fulfillment.

It seems to me that such broad subjective concepts are an invitation, or can certainly lead to the exercise of political power, raw political power that you spoke of disparagingly in your Stanford speech.

Judge KENNEDY. They are unless they are used with the view to determining what the Constitution means. The framers had—by that I mean those who ratified the Constitution—a very important

idea when they used the word "person" and when they used the word "liberty." And these words have content in the history of Western thought and in the history of our law and in the history of the Constitution, and I think judges can give that content. They cannot simply follow their own subjective views as to what is fair or what is right or what is dignified. They can do that so that they can understand what the Constitution has always meant.

Senator HUMPHREY. I remain uneasy about what you said regarding the ninth amendment. You said, it seems to me, the Court is treating it as something of a reserve clause to be held in the event the phrase "liberty" and the other spacious phrases in the Constitution appear to be inadequate for the Court's decision.

I don't know why you choose to be so vague, and in my mind so—leave things in such a worrisome suspension, when the Court has never used the ninth amendment to invent new rights. Indeed one of the most liberal of the liberals, William O. Douglas, said in his concurring opinion in *Dole* that the ninth amendment obviously does not create federally enforceable rights, and against that finding by Justice Douglas, against the history of the Court, against the clear—there are few amendments that have a clearer historical context, where the intent is clearer, than the ninth amendment.

And now the thing has been reversed—if we apply the doctrine of incorporation illogically to it, and you seem to hold open that possibility, the thing is reversed in its intent——

Judge KENNEDY. Yes.

Senator HUMPHREY [continuing]. Intended application, and now you are saying that the Court is holding it in reserve. In case it can't find something else in the Constitution, why it always has this to fall back on.

Judge KENNEDY. Well, to begin with, don't shoot the messenger. I am describing the jurisprudence of the Court as I think it exists. The Court has simply not had the occasion to reach the ninth amendment for the resolution of its cases, and it seems to me inappropriate for me to announce in advance what its meaning is. I have indicated what I think, what I understand its original purpose to be, which was actually a disclaimer that the Constitution of the United States was intended to constrain the States in any respect in the adoption of their Bills of Rights.

Senator HUMPHREY. Well, do you find a—do you consider the intent of the ninth amendment to be pretty clear?

Judge KENNEDY. No.

Senator HUMPHREY. Even given the historical——

Judge KENNEDY. Well, the purpose of it is as I believe I have described it.

Senator HUMPHREY. Well, what is the difference between the purpose and the intent?

Judge KENNEDY. Its meaning is somewhat unclear. The reason for Madison's using it as a device is not completely clear. I think the explanation I gave is the best one, but that is not completely clear.

Senator HUMPHREY. Well, his words are pretty clear on the point, if I just knew where to find them. I am getting paper fatigue at this point. You have got fatigue yourself I am sure. Here it is.

He said that "It has been objected also against the Bill of Rights that by enumerating particular exceptions to the grant of power it would disparage those rights which were not placed in that enumeration, and it might follow by implication that those rights which were not singled out were intended to be assigned into the hands of the general government and were consequently insecure."

And so this was a clarification on the part of the Federalists that even though certain rights were enumerated that didn't mean that everything else was denied to the States.

Judge KENNEDY. I think that that is the most plausible interpretation of the amendment.

Senator HUMPHREY. Jumps right out at you. Couldn't be clearer.

And then I am concerned likewise by your vagueness, unwillingness to recognize 200 years or so of validation of capital punishment. The Court has never, even in *Furman* the Court has never suggested that capital punishment is unconstitutional per se, fundamentally. Why are you not willing to—why are you so vague on a point that is so well settled?

Judge KENNEDY. Well, I guess we have a disagreement as to whether or not it is well settled, Senator. These decisions are very close. Some Justices have indicated that it is unconstitutional, and I simply think that I should not take a specific position on a constitutional debate of ongoing dimension.

I have indicated that in my view if held constitutional it should be swiftly and efficiently enforced. I recognize also that capital punishment is recognized in the Constitution, in the fifth amendment.

Senator HUMPHREY. I am sorry. I couldn't hear that last sentence.

Judge KENNEDY. Capital punishment is recognized in the Constitution.

Senator HUMPHREY. And you said something else that I didn't hear.

Judge KENNEDY. In the fifth amendment.

Senator HUMPHREY. Yes.

In your Stanford speech you point out that in the post-*Griswold* privacy cases the debate shifts to the word "privacy" rather than to the constitutional—to a constitutional term such as "liberty."

What is the significance in that statement? What are you trying to say?

Judge KENNEDY. Well, I was trying to indicate that simply because we find a new word we don't avoid a whole lot of very difficult problems. It is not clear to me that substituting the word "privacy" is much of an advance over interpreting the word "liberty," which is already in the Constitution.

And I indicated that, to illustrate that, that the Convention on Human Rights, which contains the word "private," produced a case which had many of the same issues in it that we would have to confront, and so that the word "privacy" should not be something that convinces us that we have much certainty in this area.

Senator HUMPHREY. Are you saying that these privacy cases would be better dealt with under the liberty clause?

Judge KENNEDY. That is why I have indicated that I think liberty does protect the value of privacy in some instances.

Senator HUMPHREY. You would prefer then to deal with privacy cases under the liberty clause?

Judge KENNEDY. Yes.

Senator HUMPHREY. As opposed to dealing with them under emanations of penumbrae?

Judge KENNEDY. Yes, sir.

Senator HUMPHREY. Ever seen an emanation? That is a real term of art, isn't it? I am not a lawyer. Had that ever been used before?

Judge KENNEDY. Certainly not in a constitutional case.

Senator HUMPHREY. That is really a, that one is really a shameless case of——

The CHAIRMAN. Senator, excuse me.

Senator HUMPHREY. Yes?

The CHAIRMAN. The Senator from West Virginia would like to ask you a question.

Senator BYRD. Did you say emanation? To emanate? What is the word you are referring to?

Judge KENNEDY. Emanations.

Senator BYRD. Emanations?

Judge KENNEDY. Emanations, yes. "Penumbras and emanations" was the phrase used in the *Griswold* case.

Senator BYRD. Thank you. That word is not in the Constitution, though, is it?

Judge KENNEDY. Not at all. And I have indicated it is not even in any previous—the Senator indicated it was not even in any previous cases.

Senator BYRD. But the word "liberty" is in the Constitution?

Judge KENNEDY. Yes, sir.

Senator BYRD. I like that word "liberty" in the Constitution.

Senator HUMPHREY. Do you think there are a whole lot more emanations from this penumbra?

Judge KENNEDY. I don't find the phrase very helpful.

Senator HUMPHREY. Good. Well, two hopes. Hope number one is that you will at least once a year read your Stanford speech. Hope number two is that you will not intrude on our turf. Thank you.

Judge KENNEDY. Thank you, Senator. I will certainly commit to the former, and I will try to comply with the latter.

The CHAIRMAN. Judge, have you had a chance to read "The Forgotten Ninth Amendment" by Bennett P. Patterson?

Judge KENNEDY. I think I glanced at it some years ago, Senator.

The CHAIRMAN. Well, while we are hoping, I hope you read it again.

Judge KENNEDY. All right.

The CHAIRMAN. We will have an opportunity, the Senator and I, as long as we are here to debate the meaning of the ninth amendment, but in here he liberally quoted from Madison's utterances at the time. It may be somewhat selective, I think not. And the point one of the authors makes is, "The last thought"—referring to the ninth amendment—"The last thought in their minds was that the Constitution would ever be construed as a grant to the individual of inherent rights and liberties. Their theory"—meaning the Founding Fathers—"Their theory of the Constitution was that it was only a body of powers which were granted to the government and nothing more than that."

And it seems, if you read the ninth amendment, how anyone could avoid the conclusion that the word "retained" means "retained." Now you can argue whether it is retained by the States, or retained by individuals. That is a second argument. I won't go into that at the moment. But it seems to me that one of the—I have not found any reason, which I think in part disturbs my friend from New Hampshire, to disagree with any of the points you have made about your interpretations of the Constitution.

As I have indicated earlier, I find your reading of the Constitution, your finding of the word "liberty" in the Constitution and that it has some meaning and application, and your attitude about the fourteenth amendment in general, the fifth amendment, to be a conservative, mainstream and fundamentally different than Judge Bork's.

But having said all that, let me ask you a few questions, and hopefully this will be the end of it for me. I indicated to you earlier that staff received a telephone call from a former student and subsequently, as we do with all these calls, followed up on the call and apparently contacted four of your former students, all of whom are supporters, and strong supporters, of your nomination to the bench.

But the issue related to the question of a discussion you had in 1973 with students about the role of women in law firms at that time; that is, in the context of 1973. Could you for the record just tell us a little bit about it, without my characterizing it, because you indicated you remember it vaguely, the incident? Just tell us a little about it.

Judge KENNEDY. Both the incident and the class discussion are not very clear.

The CHAIRMAN. Quite frankly, I don't think they are very important, either.

Judge KENNEDY. But I had the habit of talking to my students in the course of a 3½-hour lecture about the problems that lawyers face in their practice, and I think it is imperative that lawyers realize that they have an obligation, first of all, to know themselves, to know their own motivations and to comply with the law strictly so that they can be a model for their clients.

And I recited to my class, as I recall, the incident of a lady who had come to our office seeking employment, and at the time we did not have a position open in any event, but I was pleased to chat with her. She was extremely well qualified. She had sent in a résumé I think and I had said that if she was in town we would be glad to talk to her. It wasn't clear to me from the résumé that she was male or female.

And when she was a female I told her that she might find some resistance in certain law firms and told her the story of a lawyer in San Francisco whom I know very well and who is a man of remarkable self-knowledge and remarkable honesty and who has a remarkable admiration for the law, who had taken the position that he would not have women in his law firm because he had a very close relation with his partners and he did not want to share that relation with another woman because of the respect he had for his wife. He behaved the way he did in front of his partners, in a way that he thought was very free, and he thought of his relations with the law partners as very intimate.

And I told her that this was an attitude that many lawyers had about their law partners. I said that in my own law firm that she would find certain problems of adjustment because of the way my partners behaved, but that I wanted to put this out in front for her, to tell her that this was the kind of thinking that some people that were sitting on the other side of an interview desk would be having, and that if I were ever to either hire or not hire her and I harbored those feelings that I wanted to make her sure that she knew that I was trying to explore, for my own satisfaction, my own motives, and my own intent.

And I told her that the world was changing. I told her also the story of when I was in the Harvard Law School and a certain professor would have "Ladies Day," and ladies were not called on unless it was "Ladies Day." And today this would not only be seen as terribly stigmatizing and patronizing but probably actionable.

And I recited this to my students to indicate that lawyers must always be honest with themselves about their motivation, honest with the people with which they deal about their motivation. And the lady, as I recall, was very appreciative of the conversation. She subsequently went to work in her own city of Los Angeles, I believe, which was where she was from. And that was all that the incident was about.

The CHAIRMAN. Have your views changed about the role of women in law firms since 1973?

Judge KENNEDY. Well, of course that wasn't my view. I was trying to indicate to her that I thought that the law was very much in flux and that it would change, and it has. Women now occupy——

The CHAIRMAN. Is it good or bad that it has changed?

Judge KENNEDY. I think it is good that it has changed.

The CHAIRMAN. Why?

Judge KENNEDY. Women can bring marvelous insight to the legal profession. Women, themselves, have been in a position where they have been subjected to both overt and subtle barriers to their advancement, and the fact that women are on the bench and on our court brings a very, very valuable insight and perspective.

We now have, I would think, close to 35 or 40 percent women in the night division of our law school class, and they are making their way into the profession and are performing admirably. And it is too bad they were not in it a hundred years ago.

The CHAIRMAN. Do you think the attitude of the profession has changed as well?

Judge KENNEDY. Absolutely. I have had female law clerks that I have worked extremely closely with and it has been a really very remarkable years when they have been with me. I have enjoyed it very much.

The CHAIRMAN. When did you hire your first female law clerk, if you know?

Judge KENNEDY. I think my second set of clerks had my first female—I guess my third set of clerks, my third year.

The CHAIRMAN. Roughly what year was that?

Judge KENNEDY. 1978.

The CHAIRMAN. You indicated, and I am paraphrasing, in response to a question from one of my colleagues, you said if someone

had been sitting here 20 years ago and had been asked to comment on the law of the first amendment as it relates to the law of libel, not even the greatest prophet could have predicted the state of the law today. It may very well be that with respect to privacy we are in the same rudimentary state of the law.

Now, Judge, there has been, obviously, we have just had some discussion about your view on the ninth amendment. As you know, Justice Goldberg, as you mentioned, in the birth control case and Justice Burger in the *Richmond Newspaper* case both treated the ninth amendment as a rule of somewhat generous construction, not just a reminder that States can protect individual rights in their own constitution, an idea that would have made the ninth amendment in my view redundant in light of the fact we had a 10th amendment that provides for just that.

In the view of Justices Goldberg and Burger the ninth amendment announces that the word "liberty" in the fifth amendment and later in the 14th amendment is broader than specifically enumerated rights contained in the Bill of Rights. The ninth amendment, in other words, in my view confirms in the text of the Constitution that spacious reading of liberty, the so-called Liberty Clause, that you have said you thought was a proper reading.

I understood you yesterday as embracing the view of Goldberg and Burger in the regard that the notion of liberty, the Liberty Clause as being one of those spacious phrases.

Former Chief Justice Burger thought that the ninth amendment shows a belief by the framers that fundamental rights exist that are not expressly enumerated in the first eight amendments, and the intent of the rights included in the first eight amendments are not exhaustive.

I would like to quote from a case. Justice Burger says:

> But arguments such as the State makes have not precluded recognition of important rights not enumerated. Notwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees.
>
> For example, the rights of association and of privacy, the right to be presumed innocent, the right to be judged by a standard of proof beyond reasonable doubt in a criminal trial, as well as the right to travel, appear nowhere in the Constitution or the Bill of Rights. Yet, this important but unarticulated rights have nonetheless been found to share Constitutional protection in common with explicit guarantees.
>
> The concerns expressed by Madison and others have been resolved. Fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined.

Then there is a footnote, Footnote 15. It says, "Madison's comments in the Congress also revealed a perceived need for some sort of Constitutional saving clause, which, among other things, would serve to foreclose application of the Bill of Rights of the maximum that the affirmation of particular rights implies the negation of those not expressly defined.

"Madison's efforts, culminating in the ninth amendment, serve to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding others."

Now, Judge, in general terms do you share the view of Justice Burger about unenumerated rights?

Judge KENNEDY. Well, in general terms, it is not clear to me that Chief Justice Burger's position would be any different if the ninth

amendment were not in the Constitution. I think liberty can support those conclusions he reached, and the meaning, purpose, and interpretation of the ninth amendment, I think the Court has very deliberately not found it necessary to explore.

The CHAIRMAN. But I think Justice Burger used almost the same words you used yesterday that the Senator from New Hampshire would very much like for you to recant. He uses the phrase "saving clause."

Judge KENNEDY. I think I used the words "reserve clause."

The CHAIRMAN. You used the word "reserve" clause.

Judge KENNEDY. And I think the Court as a whole—I am not talking about individual Justices—has taken that view of the amendment, that they just find it unnecessary to reach that point.

The CHAIRMAN. Are they not also, with good reason, a little bit afraid of the amendment, because once you start down the road on that amendment—I find the ninth amendment clear, and I think most Justices have found it clear, in fact.

But they are reluctant to use it because once you start down the road on the ninth amendment, then it becomes very difficult to figure where to stop; what are those unenumerated rights.

Judge KENNEDY. And it is the ultimate irony that an amendment that was designed to assuage the States is being used by a federal entity to tell the States that they cannot commit certain acts.

The CHAIRMAN. Well, ironically, I think that it was, in fact, not designed, that amendment, in particular, to assuage the States as it related to the rights of the States. I think it was designed to assuage the representatives of the various States to allay their fears that any government—in this case, the only one they were dealing with at the moment, the central government—was going to, as a consequence of the first eight amendments, conclude that they were the only rights that, in fact, were retained by the people.

Judge KENNEDY. I understand that position.

The CHAIRMAN. That is a very tactful answer and you would make one heck of an ambassador. Maybe there are State Department representatives, but I do not think it is appropriate for me to push you any further on this because I, quite frankly, think you have left us all where I think it is proper to be left, quite frankly, and that is I do not think anybody here and anybody not here, including the President of the United States, and I suspect, Judge, not even you, knows how you are going to rule on some of these issues.

Quite frankly, I said at the outset when Judge Powell announced his resignation that, for me, that is just what I was looking for, as long as whomever came before us came with an open mind, did not have an ideological brief in their back pocket that they wished to enforce or move into law once they got on the Court, did not have an agenda.

The one thing that has come clear to me is that you are extremely bright, extremely well informed, extremely honorable, and open-minded. I suspect you are going to rule in ways that I am going to go, oh, my goodness, how could he have ruled that way. And I suspect you are going to rule in ways where Senator Humphrey is going to go, oh, my goodness, why did I let him get on the Court. But it seems to me that is the way it should be. We are not entitled

to guarantees. We are only entitled to know that you have an open mind.

I just realized that I had told the Senator from Pennsylvania that I would allow more questions, and here I was about to wrap up. I apologize to the Senator from Pennsylvania.

I will yield to the Senator from Pennsylvania and then to the Senator from New Hampshire if he has any further questions, and then——

Senator HUMPHREY. I have no further questions.

The CHAIRMAN. And then I will yield to the clock.

Senator SPECTER. Thank you, Mr. Chairman. I have just a few.

When the last round ended, Judge Kennedy, I was questioning certain findings you made as a matter of law in the face of certain underlying factual situations, and have referred to the Pasadena school desegregation case, and also *AFSCME* v. *Washington State* on the comparable worth case.

And the other case that I want to discuss with you, and I shall do so relatively briefly, is the *Arnada* case, which has already been the subject of some discussion.

Judge KENNEDY. Pardon me. Which case, Senator?

Senator SPECTER. The case of *Aranda* v. *Van Sickle.*

Judge KENNEDY. *Aranda* v. *Van Sickle,* yes, sir.

Senator SPECTER. And this is a voting rights case, a civil rights case, involving Mexican Americans, and I do not want to suggest, Judge Kennedy, that there are not many cases where you have been on the other side in the findings.

The case of *Flores* v. *Pierce* where you made findings in favor of Mexican Americans, and the case of *James* v. *Ball,* you made a finding for civil rights, so that there is balance and representation on both sides.

But the *Aranda* case is unique and, I think, significantly questionable, and the reason that I question it, Judge Kennedy, turns on the issue of summary judgment in a context where you say in your concurrence that it was not overwhelming.

And the law on summary judgment—and you and I had discussed this in our last session in my office—the standard for summary judgment requires that it be entered only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law, and where summary judgment is considered it is particularly inappropriate where there are issues involving intention and motivation, which were present in this case, and especially in the context where the lower court had denied a request for additional discovery.

It just seems hard to understand the use of summary judgment and the refusal to allow the facts to be submitted to a factfinder in view of the very substantial constitutional issues involved here.

And the other aspect of the case, and then I will ask you to comment on it, turns on your very thoughtful opinion which comes to the conclusion that other remedies were appropriate in terms of location of polling places and employment of Mexican Americans by commissions.

And the case might have been remanded for further factfinding or it might have been remanded for an amendment on the pleadings or you might have considered, as we lawyers do, to conform

the pleadings to the proof in the case and you might have entered a remedy which was not specifically asked for.

Most complaints in equity have the prayer or other equitable relief as may appear just and appropriate under the circumstances, and I understand your statement that the plaintiff sought to change the at-large representation here. But it just seems to me that all the facts of this case really cry out for some different result than was reached in this case as a matter of basic justice.

Judge KENNEDY. Well, Senator, I have some obligation to be interesting and creative, and I am disturbed by the fact that I may sound very repetitive because I have been through this with the other Senators this morning and again earlier this afternoon.

The parties and the attorneys have the right to determine the shape and the contours of their lawsuit. The repeated questioning in the court indicated to me that the attorneys were there for one remedy, and one remedy only, and that was the invalidation of at-large elections and the substitution of district elections.

Senator SPECTER. But, Judge Kennedy, was that not made in the context that that is what he wanted and did not want to accept any compromises?

And when you say that the parties have the right to determine the shape of the lawsuit, I understand what you are saying. We had discussed in the context of this case the issue as to whether a court ought to consider on appeal issues which were not raised by the parties.

And it seems to me that as to procedural matters, there is a broader responsibility on the court. Now, we are not talking about breaking new ground and about establishing new rights, and no generalizations, but a broader responsibility of the court to do justice where there are procedural issues involved.

And I can see a lawyer making the argument to you, no, Judge, this is what I want, all or nothing. And it is really in the context, in a sense, of putting the court's back to the wall as a far as a litigant can.

But in the context where the facts were as present here, where there was really injustice to Mexican Americans under this circumstance, and important factors on location of polling places and hiring by commissions, is there not a responsibility for a court of appeals to mold the verdict, to mold the finding to do justice under the circumstances?

Judge KENNEDY. The law that we were applying at the time was that the remedy had to fit the violation, and the insistence was that this was the only remedy they wanted. And I was sufficiently concerned about it that I wrote the separate opinion indicating with every hint I could that I was very concerned about some substantive violations, but that I had to agree with my colleagues that the remedy was not permitted.

Senator SPECTER. But another remedy could have been ordered.

Judge KENNEDY. Certainly.

Senator SPECTER. Why not?

Judge KENNEDY. Yes, I think another remedy could have been ordered. So I think all we are talking about is whether or not I as a single judge should have said that I would remand. I certainly did

not have that authority because I did not have the votes. I did not have the authority to write the mandate in this case.

Senator SPECTER. Do you recall whether you raised that issue specifically with the other two judges on the panel?

Judge KENNEDY. I cannot recall.

Senator SPECTER. One final point, Judge Kennedy, and it follows up from our discussion earlier today with respect to framers' intent and then one of my colleagues had raised the subject again and had talked about the difference on electronic surveillance on the fourth amendment where electronic surveillance was not known at the time the fourth amendment was adopted.

But that seems to me to be a very different consideration from the one which you and I had discussed previously, and that involves the framers' intent in the issue of segregated schools on the basic question to the propriety of the court in some extraordinary circumstances making a conclusion which is directly contrary to the framers' intent.

And in the discussion which you had today you talked about the fact that it was not subjective intent that the framers were looking toward, and my question is what kind of intent is there besides the intent in the minds of the individuals who frame the amendment.

Whether you call it subjective intent or objective intent, what is there besides what they are thinking about, as reflected by the facts surrounding the times when D.C. schools were segregated and schools were segregated all over the country and the gallery in the Senate was segregated?

They must have had in mind the segregation because that was the only fact of life that they knew.

Judge KENNEDY. That may have been, but they committed themselves to something that in legal consequence was entirely different, and they simply have to bear the consequences of that decision.

They made an agreement among themselves that racial discrimination would not be permitted when it was at the behest of the State, and I think they are bound by the consequences of what they did, regardless of whether——.

Senator SPECTER. Well, Judge, when you say the legal consequences, they committed themselves to legal consequences which were something different. I agree with the morality, the propriety, and the prevailing law on the subject, but I just do not see how you can say that they agreed to those consequences, given their understanding of what was happening in, their world.

Our world is different. The world was different in 1954 with *Brown* v. *Board,* but what seems to me to come through from your approach, and quite properly so, but I think this is an important principle, is that there are some extraordinary cases where there is an appropriate finding by the Supreme Court of the United States, as they did in *Brown* v. *Board of Education,* which goes right into the teeth of the intent of the framers who wrote the Equal Protection Clause of the fourteenth amendment.

Judge KENNEDY. Well, I guess, again, it comes down to a difference of the use of the term "intent."

Senator SPECTER. Is there any question in your mind about the Equal Protection Clause applying beyond blacks to women, to aliens, to indigents, to mentally retarded?

Judge KENNEDY. No. In fact, once again, the framers could have drafted the amendment so that it applied to blacks only, but they did not. They used the word "person."

Senator SPECTER. And is there any question in your mind about the propriety of the longstanding rule in the Supreme Court of the United States about the clear and present danger test or freedom of speech?

Judge KENNEDY. I am not sure that the clear and present danger test is a full description of the full protection that the Court gives to freedom of speech. I think *Brandenburg* goes a little further than the clear and present danger test.

Senator SPECTER. So you have the clear and present danger test, plus *Brandenburg* v. *Ohio*——

Judge KENNEDY. Yes.

Senator SPECTER [continuing]. And *Hess* v. *Indiana,* and you agree with that statement of the——

Judge KENNEDY. I know of no substantial, responsible argument which would require the overruling of that precedent.

Senator SPECTER. I know of none either, but some do.

That concludes my questioning. Thank you very much, Judge Kennedy.

Judge KENNEDY. Thank you, Senator.

Senator SPECTER. Thank you, Mr. Chairman.

The CHAIRMAN. Judge, you just proved that you did not listen to any of the Bork hearings. We take you at your word.

Do you have anything to say, Senator?

Senator THURMOND. I have nothing else to say. I again want to commend Judge Kennedy for the way in which he has handled himself, and I hope we will not extend these hearings unduly.

If the members would stay here and listen to questions asked, they would not have to ask them over and over and over again, and that is what is happening. We apologize to you.

Judge KENNEDY. Well, no apologies are necessary, Senator.

Senator THURMOND. Of course, they have a right to do that, but at the same time it takes a lot of time from all the people who are attending, and I just hope we can speed along.

Judge KENNEDY. No apologies are necessary, and I appreciate, Mr. Chairman and Senator, the great consideration and courtesy that you have shown to me and my family. We have enjoyed it.

The CHAIRMAN. Well, Judge, as you can verify now, the Senator from South Carolina—when they said "with all deliberate speed," they really meant it. He wanted to schedule your hearing 1 week after the President had named you and 3 days before your name was sent up, so he is always moving along rapidly.

I think that our colleagues asked very good questions, and we seldom disagree, but, Boss, it went smoothly. Here we are at 6 o'clock; we are about to close down, and so I hope you have a good dinner.

Let me ask one thing of the staff. Is there any Senator on his way to ask further questions?

[No response.]

The CHAIRMAN. I have some questions on criminal procedure which I will submit to you in writing, Judge. There is no hurry, obviously. As you know, because of the Senate schedule, we will not be back in until the end of January, so we will not vote on your nomination in committee until we get back.

Senator THURMOND. Well, Mr. Chairman, I was hoping you would change your mind and vote tomorrow when we finish, or the next day.

The CHAIRMAN. I thought you might, Senator, in contravention of our own rules. You know, all the breaks I cut this man—he does not cut me any on this score. All kidding aside——

Judge KENNEDY. I will abide by the will of the Senate, Senator.

The CHAIRMAN. Judge, you have every reason, in my view, to have a happy holiday. I appreciate your answering the questions. You have kept your commitment that you would discuss in broad terms the issues and the constitutional questions. You did that; we much appreciate it.

And unless Senator Thurmond has something good to say about the way the hearings have been conducted, I am going to close.

Senator THURMOND. Well, I think you, Mr. Chairman, are very fair and I want to congratulate you for your fairness.

The CHAIRMAN. Thank you.

Senator THURMOND. I hope you and your family go out and have a nice dinner, get a good night's rest, and we will see you tomorrow morning.

The CHAIRMAN. Hopefully, you will not have to see him tomorrow morning because I do not think we are going to have to call——

Senator THURMOND. Are we through?

The CHAIRMAN. Yes. I do not think we are going to have to——

Senator THURMOND. Well, if that is the case, we will excuse you, then.

Judge KENNEDY. Thank you very much, Senator.

The CHAIRMAN. In case you observed, I am no longer the Chairman. I just do this, you know. [Laughter.]

Senator THURMOND. Are you going to excuse him, too?

The CHAIRMAN. Well, Senator, if you have excused him, then there is no reason for me to excuse him.

I would just like to thank your family. I realize it is both boring and tedious to sit back there not able to move all this time for 2 days, but we truly appreciate it.

With your permission, Mr. Chairman, I will recess for the day.

Senator THURMOND. What time are you going to meet tomorrow?

The CHAIRMAN. We will start tomorrow—we were going to start at 10. You asked me to start at 9:30. We will start at 9:30 tomorrow.

Senator THURMOND. Thank you very much. You are very accommodating and I appreciate it.

Judge, if everybody is through with you, again, I just want to compliment you on the great service you have rendered, and say again I do not think anybody could be selected who is better qualified for the Supreme Court.

You have practiced law, you have taught law, you have been on the court, you have been a judge; you have been reasonable, you

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have been fair, and there is no reason in the world why anybody should raise complaints about your conduct and about your career and history. In my opinion, you will be confirmed.

In the meantime, though, I hope you will have a nice Christmas and you will get a fine message from us. The Chairman and I are going to do all we can to confirm you when we come back.

Thank you very much.

Judge KENNEDY. Thank you very much, Senator.

The CHAIRMAN. Judge, Senator Heflin indicated he will have a few questions in writing.

Now that I have gotten my marching orders from the Senator from South Carolina, we will recess. We will not call you back tomorrow, and I do not expect to call you back at all until this hearing is concluded. The next action would be a vote on your nomination in the committee.

We will resume tomorrow at 9:30. The American Bar Association will be the first to testify and then we will have public witnesses who, in all probability will take Wednesday and Thursday, but we will see how the day goes.

Thank you very much, Judge, and we thank your family.

Judge KENNEDY. Thank you very much.

The CHAIRMAN. The hearing is recessed.

[Whereupon, at 6:02 p.m., the committee was adjourned, to reconvene at 9:30 a.m., Wednesday, December 15, 1987.]