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

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.