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."