And I want to say one other thing while we are on this. And that is, that things haven't changed all that much, Judge. I remember my first case as a young lawyer in the Court of Common Pleas in New Castle County, Delaware. I was assigned to—I was sent a client who was accused of driving under the influence, and my first thing that I did was to go in and to ask for a continuance.

And, as I stood there waiting in line, a fellow named Switch Di Stefano, God bless him, the clerk of the court, turned to Judge Gallo and he said, and I could hear him say, "Ask him if rule 1 has been complied with?"

And he asked me, and I looked and I panicked. I thought I knew what rule 1 was but I couldn't see how it related to this. And I said, "Your Honor, I am embarrassed. I am not sure what rule 1 is."

They called me to the bench and Switch Di Stefano leaned over and he said, "Before we grant the continuance, have you gotten the fee?" [Laughter.]

I am sure that never happened in your life, Judge, but it happened in mine. And I want to yield now to the Senator from Alabama.

Senator HEFLIN. Judge Kennedy, have you found the teaching of law while being a judge rewarding?

Judge KENNEDY. I have to say since I am under oath that teaching is the most enjoyable day of my week. I love it.

Senator HEFLIN. Would you plan if you go to the Supreme Court to do some teaching, too, on the side?

Judge KENNEDY. From what I hear about the workload, I think the answer must be no, Senator.

Senator HEFLIN. Does teaching cause any problems with predetermination of issues?

Judge KENNEDY. I fear that if I were appointed to the Supreme Court that it might. In the ninth circuit there would be maybe two or three times a year in which I would get a little close to a case that was before me, and so I thought I would stay away from it. But you know what the usual drill is. You simply ask the student the question and then you take the opposite side.

I always made it clear to my students that I did not care what they thought but I did care passionately how they came to that conclusion, within certain broad limits of tolerance, of course.

Senator HEFLIN. In the case of *U.S.* v. *Alberto Antonio Leon,* which is now a famous case—and was heard by the Supreme Court—you dissented from the opinion of the ninth circuit and you closed your dissent with this language:

> Whatever the merits of the exclusionary rule its rigidities become compounded unacceptably when courts presume innocent conduct when the only common sense explanation for it is ongoing criminal activity. I would reverse the order suppressing the evidence.

Now I would assume as a teacher after the Supreme Court decided the *Leon* case, you and your students discussed this decision and also your dissent in the ninth circuit's decision. Did that occur?

Judge KENNEDY. Well, Senator, the constitutional law course as it is now composed no longer includes criminal procedure, so I was not able to discuss that with my students. As you have indicated, I get somewhat, at least by inference, more credit for the *Leon* case

than I deserve, because I did not find that there had been an illegal search in that case.

Senator HEFLIN. You looked at the conduct and felt it was continuous conduct and therefore that the information was adequate for the warrant, but you did use the word "good faith" in one aspect——

Judge KENNEDY. Yes, sir.

Senator HEFLIN. So you at least have some claim for that. You also mentioned the rigidities of the exclusionary rule. Do you see in other areas, say in warrantless cases, that the good faith exception could be applied?

Judge KENNEDY. I was on a panel and authored the decision in a case called the *United States* v. *Peterson* in which drug enforcement agents relied on the statement of Philippine law officials for the proposition that they could tap a telephone.

They interdicted a ship some 100 miles off the coast of California with a huge volume of illegal drugs on it. We held that the good faith exclusionary rule applied in the circumstances on the theory that the officers acted reasonably in relying on the assurances of their foreign counterparts. So I have addressed that issue. There was no warrant there.

Whether or not it should apply to warrantless searches in the United States is a question that I have not addressed, and I would want to consider very deliberately whether or not the rule should be extended to those instances because you then get, as you know, into the problem of objective versus subjective bad faith. You must be very careful to ensure that by the exception you do not swallow the rule.

Senator HEFLIN. Now let me ask you about the interpretation of the freedom of religion and the Establishment Clause. Over the past several years many have accused the Supreme Court of interpreting the Establishment Clause in an overly expansive manner. You are quoted in a 1968 interview with McGeorge School of Law newspaper as saying that the Court should leave room for some expressions of religion in State-operated places. There should be a place for some religious experience in schools or a Christmas tree in a public housing center.

Now, without speaking to any specific case, can you elaborate a little on your thoughts pertaining to this issue?

Judge KENNEDY. I can not recall that article or that interview. I saw another article about it just yesterday or the day before. I would say that the law would be an impoverished subject if my views did not change over 20 years.

As I understand the Establishment Clause doctrine, the Court has a very difficult problem because, as you know, the Establishment Clause, which tells us that the Government should not aid or assist religion, in some senses works at cross purposes with the free exercise clause. The classic example is the furnishing of a chaplain to the military. If the Government furnishes the chaplain, it is in a sense assisting religion. If it does not it is denying soldiers whose conduct is completely controlled by their officers the free exercise of their religion. So the clauses sometimes point in different directions.

Now, the test the Supreme Court has for Establishment Clause cases is whether or not the particular legislation or governmental program adopted has the purpose or the effect of aiding religion or of hurting religion and whether or not there is a forbidden entanglement of religion. The Court is struggling with that test on a case-by-case basis. The decisions are difficult to reconcile, Senator.

In this area more than in almost any other one the Court has relied on the historic practices of the people of the United States, and has found in history a guide to a decision. In that respect in this area history has been helpful to the Supreme Court. It seems to me that that is an appropriate reference in those cases.

Where I would draw the line in any given case is a question that I have not addressed in my circuit decisions so far. I have no really fixed views on the subject other than to say that the framers were very careful about this. Many of the framers were religious people, but they were careful not to allow that to enter into the debates in the Constitutional Convention.

Madison was very concerned about religious intolerance and so when Alexander Hamilton asked for the protection of contracts, Madison asked that the test oath clause be put in the main body of the Constitution. The main body of the Constitution contains religious protection and the framers were very, very conscious of this. It is a fundamental value of the Constitution of the United States that the Government does not impermissibly assist or aid all religions or any one religion over the other.

Senator HEFLIN. Going to another subject, media reports have indicated that your relationship with President Reagan came as a result of your assistance in writing proposition No. 1, which was a tax limitation measure. Would you tell us about your circumstances in relationship to now Attorney General Edwin Meese and now President Ronald Reagan when he was Governor and the circumstances concerning that?

Judge KENNEDY. In those halcyon days, Senator, when our current President was Governor of the State of California and Edwin Meese, I suppose his executive secretary, I am not sure exactly of the title, the Governor's administration concluded that it was time to propose to the people of the State of California an amendment which would limit the spending of the government of the State of California. It was a rather complex proposal designed to impose a spending limit. It was hoped that tax reform would follow from that. The spending limit was based on a percentage of the total gross product for the State of California, and the permitted spending, expressed as a percentage, was to decline each year. It was a highly complex measure.

The Governor at the time believed very strongly that the citizens of the State of California should be able to control their government. He and Mr. Meese asked if I would be the draftsman for this complex proposal. One of the reasons the proposal failed of adoption, I am told, is it was too difficult for people to understand. I understood it, but it was an exceptionally complex document. It was very interesting to work on.

Senator HEFLIN. Well, your judicial writings have improved.

Judge KENNEDY. Well, thank you.

Senator HEFLIN. In this Canadian Institute speech you deal with unenumerated rights, and in that speech you state that most rights in the Constitution are enforced as negatives or prohibitions, not affirmative grants, and you list as examples, Congress shall make no law respecting the establishment of religion, no warrant shall issue but upon probable cause, or nor shall any State deprive any person of life, liberty or property without due process of law.

You seem to view these prohibitions in the Constitution as limiting the expansion of judicial power. Are they also, though, a means of preventing government from denying individuals their fundamental rights?

Judge KENNEDY. I would agree that they certainly are, Senator. And in the negative form they are easily understood well, not always easily enforced, but I think easily understood.

Senator HEFLIN. In Judge Bork's hearing, I think we questioned him for a long time before we finally got around to asking him about *Roe* v. *Wade*. I suppose if there is any one issue, that issue is probably within the spotlight the most.

He answered by saying that his position relative to reviewing *Roe* v. *Wade*, if it came up for a review and if he was on the Supreme Court, would be directed in three different areas. One is looking to the Constitution to find whether or not there was any specific authorization for an abortion; second, whether or not he could find a general right of privacy by which he would base a decision relative to *Roe* v. *Wade;* and, third, stare decisis.

There was no question that he had been quoted as saying that that decision was a unsatisfactory decision of the U.S. Supreme Court. He had previously been quoted and he admitted that he thought it was a wrong decision, and that he thought that the reasoning of the decision was defective.

He outlined, not in specific terms the criteria that he would use, but in general terms the criteria that he would review relative to stare decisis. In all fairness I think the American people would like for you to give an expression pertaining to that case, your views, how you would approach, without specifying how you might hold, but how you would review and how you would approach that issue.

Judge KENNEDY. In any case, Senator, the role of the judge is to approach the subject with an open mind, to listen to the counsel, to look at the facts of the particular case, to see what the injury is, see what the hurt is, to see what the claim is, and then to listen to his or her colleagues, and then to research the law. What does the most recent precedent, the precedent that is before the Court if it is being examined for a possible overruling, and what does that precedent say? What is its logic? What is its reasoning? What has been its acceptance by the lower courts? Has the rule proven to be workable? Does the rule fit with what the judge deems to be the purpose of the Constitution as we have understood it over the last 200 years? History is tremendously important in this regard.

Now, as you well appreciate, and as you certainly know, Senator, stare decisis is not an automatic mechanism. We do not just pull a stare decisis lever or not pull it in any particular case. Stare decisis is really a description of the whole judicial process that proceeds on a case-by-case basis as judges slowly and deliberately decide the facts of a particular case and hope their decision yields a general

principle that may be of assistance to themselves and to later courts.

Stare decisis ensures impartiality. That is one of its principal uses. It ensures that from case to case, from judge to judge, from age to age, the law will have a stability that the people can understand and rely upon, that judges can understand and rely upon, and that attorneys can understand and rely upon. That is a very, very important part of the system.

Now there have been discussions that stare decisis should not apply as rigidly in the constitutional area as in other areas. The argument for that is that there is no other overruling body in the constitutional area. In a stare decisis problem involving a nonconstitutional case, the Senate and the House of Representatives can tell us we are wrong by passing a bill. That can not happen in the constitutional case.

On the other hand, it seems to me that when judges have announced that a particular rule is found in the Constitution, it is entitled to very great weight. The Court does two things: it interprets history and it makes history. It has got to keep those two roles separate. Stare decisis helps it to do that.

Senator HEFLIN. Let me ask you about the death penalty. If you believe that the death penalty is constitutional, and some of the speeches you have made indicate that you believe that it is, what safeguards do you think are necessary to prevent the use of the death penalty in a discriminatory manner?

Judge KENNEDY. I, at the outset, Senator, would like to underscore that I have not committed myself as to the constitutionality of the death penalty. I have stated that if it is found to be constitutional it should be enforced.

With reference to its being used in a discriminatory manner, there are at least two safeguards. The first is that the legislature itself defines the category of crimes that deserve the ultimate punishment. The second is that courts develop, articulate, and pronounce rules for instructions to the jury so that the jury's decision is properly channeled. You know better than I because of your experience in the trial courts, Senator, the tremendous power of that jury. Juries simply must be given clear guidelines so that they can apply the death penalty on a consistent basis.

It is not clear to me that under the existing law that requisite has been satisfied in some of the cases that I have reviewed. On the other hand, I recognize the difficulty in formulating these standards that I so blithely recommend.

Senator HEFLIN. In 1980, you gave a speech in Salzburg, Austria, which focused on the power of the Presidency. In that speech you stated:

> I think that the accepted view is that while Congress can instruct the President in most matters there are some inherent powers in the office exercisable in an emergency but their nature and extent are still not fully understood. These answers must wait an evolutionary process in the continuing traditions of the Presidency. My position has always been that as to some fundamental constitutional questions it is best not to insist on definitive answers. The constitutional system works best if there remains twilight zones of uncertainty and tensions between the component parts of the government. The surest protection of constitutional rule lies not in definitive announcements or power boundaries but in a mutual respect and deference

among all the component parts. This furthers recognition of the need to preserve a working balance.

Would you elaborate on the inherent powers you believe might be exercisable by the President in an emergency?

Judge KENNEDY. As you know, Senator, if you look at article II of the Constitution, it is much different in style than article I.

Article I, which specifies the powers of the legislative branch, is quite detailed. Article II is not. It is almost as if it were written by different people. It was not, but it looks that way.

It is a text in which you have to isolate phrases in order to pick out what the President's powers are. The President's power is to exercise the executive power; that is the way article II begins; he has the powers of the commander in chief; he has the power of appointment, the power to receive ambassadors, and the duty faithfully to execute the law. Duty has translated to power by the tradition of the office. I am not quite sure how that happened.

*Youngstown Sheet and Tube* tells us, or it begins to discuss, the critical question, whether or not the President is simply the agent of Congress, bound to do its bidding in all instances, or whether or not there is a core of power that lies at the center of the presidential office that the Congress cannot take away.

As I understand current doctrine, and the *Youngstown* case, there is that core of power. The extent to which it can be exercised in defiance of the congressional will is a question of abiding concern, I know, to the Congress and to the judges.

My point in those remarks was that these power zones are perhaps best defined as each branch accommodates the other, and expresses deference to the legitimate concerns of the other branch.

The history of the development of the presidency has been one of evolution. One suggestion given for the different textual treatment in article II was that the framers knew that Washington would be the president. They trusted him, indicating that the framers thought there would be an evolutionary component to the presidency as it evolved.

The extent to which the presidency can be controlled by the courts is not yet clear. We know that in the *Youngstown* case, where the president seized the steel mills, and in the *Nixon* tapes case, where the President was ordered to turn the tapes over to the prosecutor, there was immediate compliance by the president with the mandate of the Court.

To date, the court's authority to review the acts of the president has not been questioned by the president. Lincoln questioned the authority, because of the necessity of the Civil War.

Whether or not the courts are the appropriate body for the reconciliation of all of the disputes between the political branches of the government is a question as to which I have some doubt. In some disputes, it may be unclear there is a case and controversy which the courts can adequately and meaningfully interpret consistent with the case-by-case method.

Senator HEFLIN. Have you expressed in your opinions or speeches or statements a position on congressional standing?

Judge KENNEDY. No, sir, I have not. It has been an issue that has arisen principally in the District of Columbia circuit. It is an issue on which I have not expressed myself, and have no particular fixed

views, other than, as I have indicated, to state that one of the reasons for a case and controversy requirement is to recognize the limitations of the judicial office.

When President Truman seized the steel mills, this was an act that took place at a fixed time. It was like a taking under the fifth amendment. It was something that the court could very manageably work with. And they gave an important pronouncement in that case.

It is a case that still has puzzles to it, but it is one of the leading cases on presidential power. That was a circumstance that had fixed boundaries, both as to time and to space, and the actions of the participants involved. That is the kind of case that the court can very manageably undertake.

Senator HEFLIN. Thank you, Mr. Chairman. My time is up.

Senator KENNEDY. The Senator from Iowa.

Senator GRASSLEY. Thank you, Mr. Chairman.

Judge Kennedy, during the committee's consideration of Supreme Court nominees over the past several months, it has been asserted several times by different people that one of the jobs of a judge is to find and create rights which are not in fact mentioned in the Constitution, but which the Judge might deem to be very "fundamental." Fundamental in terms of the mind of the judge and the judge's own abstract moral philosophy.

Do you see any dangers with such an undefined standard as a foundation for constitutional analysis? In other words, how confident can we be that judges, fallible human beings as they are, will exercise that mighty power appropriately?

Judge KENNEDY. I am not sure how you can be satisfied that a judge will not overstep the Constitutional bounds. What you must do is, number one, examine the judge's record; document his or her qualifications and commitment to constitutional rule.

As I think Mr. Justice Jackson said, judges are not there because they are infallible; they are infallible because they are there.

I think that comment is somewhat inappropriate. I do not think judges think of themselves as infallible at any point. Certainly the history of the Supreme Court in which the Court has been willing to recognize its errors and to overrule its decisions, indicates that the justices take very conscientiously their duty to interpret the Constitution in the appropriate way.

Senator GRASSLEY. If we do not recognize the dangers of judges using undefined standards, aren't we doomed to end up with a small group of unelected, unrepresentative judges making the law in this country?

Judge KENNEDY. That, Senator, is one of the great concerns of any scholar of the Constitution. This is not the aristocracy of the robe.

Judges are not to make laws; they are to enforce the laws. This is particularly true with reference to the Constitution.

The judges must be bound by some neutral, definable, measurable standard in their interpretation of the Constitution.

Senator GRASSLEY. Judge Kennedy, you stated in an August 1987 speech before the Ninth Circuit Judicial Conference that there are two limitations on judicial power. I hope I interpret the speech correctly.