character, and I told him, as I have told others of you, that I admire anyone with strong moral beliefs.

Now it would be highly improper for a judge to allow his, or her, own personal or religious views to enter into a decision respecting a constitutional matter. There are many books that I will not read, that I do not let, or these days do not recommend, my children read. That does not prohibit me from enforcing the first amendment because those books are protected by the first amendment.

A man's, or a woman's, relation to his, or her, God, and the fact that he, or she, may think they are held accountable to a higher power, may be important evidence of a person's character and temperament. It is irrelevant to his, or her, judicial authority. When we decide cases we put such matters aside, and as—I think it was—Daniel Webster said, "Submit to the judgment of the nation as a whole."

The CHAIRMAN. So Judge, when you said—if it is correct—to Senator Helms: "Indeed I do, and I admire it, I am a practicing Catholic," you were not taking, at that point a position on the constitutional question that has been and continues to be before the Court?

Judge KENNEDY. To begin with, that was not the statement.

The CHAIRMAN. Will you tell us what——

Judge KENNEDY. We had a wide-ranging discussion and those two matters were not linked.

The CHAIRMAN. Those two matters were not linked. So the article is incorrect?

Judge KENNEDY. In my view, yes.

The CHAIRMAN. That is fine. I thank you. My time is up. I yield to my colleague from South Carolina.

Senator THURMOND. Thank you, Mr. Chairman.

Judge Kennedy, a fundamental principle of American judicial review is respect for precedent, for the doctrine of stare decisis. This doctrine promoted certainty in the administration of the law, yet at least over 180 times in its history, the Supreme Court has overruled one or more of its precedents, and more than half of these overruling opinions have been issued in the last 37 years.

Judge Kennedy, would you tell the committee what factors you believe attribute to this increase in overruling previous opinions.

Judge KENNEDY. That is a far-ranging question, Senator, which would be an excellent law review article, but let me suggest a few factors.

First, there is a statistical way to fend off your question, by pointing out that the Supreme Court hears many more cases now than it formerly did. You will recall, in the early days of the Republic, when some cases were argued for days.

The CHAIRMAN. He may be the only one able to recall the early days of the Republic, here, on the committee. [Laughter.]

Judge KENNEDY. I was using "you" in the institutional sense, Senator. And that has changed.

Secondly, the Court has taken many more public-law cases on its docket.

And thirdly, there are simply many, many more precedents for the Court to deal with, and so the adjustment, the policing, the shaping of the contours of our law simply require more over ruling, as a statistical matter.

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That does seem, though, to be not quite a complete answer to your question, because your question invites at least exploration of the idea whether or not the Supreme Court has changed its own role, or its own view of, its role in the system, or has changed the substantive law, and it has.

In the last 37 years, the Supreme Court has followed the doctrine of incorporation by reference, so that under the Due Process Clause of the 14th amendment, most of the specific provisions of the first eight amendments have been made applicable to the States, including search and seizure, self-incrimination, double jeopardy, and confrontation. Many of these cases, many of these decisions, involved overruling. So there was a substantive change of doctrine that did cause an increase in the number of overruled cases, Senator.

Senator THURMOND. Incidentally, Judge, if I propound any question that you feel would infringe upon the theory that you should not answer questions in case it might come before the Supreme Court, just speak out, because I do not want you to feel obligated to answer if I do.

Judge KENNEDY. Thank you very much, Senator.

Senator THURMOND. Judge Kennedy, we have recently celebrated the 200th anniversary of the Constitution of the United States.

Many Americans expressed their views about the reason for the amazing endurance of this great document. Would you please share with the committee your opinion as to the success of our Constitution, and its accomplishment of being the oldest existing Constitution in the world today.

Judge KENNEDY. Well, the reasons for its survival, and its success, Senator, are many fold. The first is the skill with which it was written. Few times in history have men sat down to control their own destiny before a government took power; in the age of Pericles, and in the Roman empire, just before Augustus, and again, in 1789. The framers wrote with great skill, and that is one reason for the survival of the Constitution, for the survival of the Constitution despite a horrible civil war, a war arguably, and I think probably, necessary to cure a defect in the Constitution.

Then there is the respect that the American people have for the rule of law. We have a remarkable degree of compliance with the law in this country, because of the respect that the people have for the Constitution and for the men who wrote it.

My third suggestion for why there has been a great success in the American constitutional experience is the respect that each branch of the government shows to the other. This is a vital part of our constitutional tradition. It has remained true since the founding of the Republic.

Senator THURMOND. I had a question on the ninth amendment, but you have already been asked about that.

Judge Kennedy, under the Constitution, powers not delegated to the federal government are reserved to the States, and to the people.

Would you describe, in a general way, your view of the proper relationship between the federal and State law.

Judge KENNEDY. The framers thought of the States as really a check-and-balance mechanism, operating, obviously, not on the national level.

The idea of preserving the independence, the sovereignty, and the existence of the separate States was of course critical to the Constitution, and it remains critical.

Now there are very few automatic mechanisms in the Constitution to protect the States. If you read through the Constitution you will see very little about the rights and prerogatives of the States.

At one time, as you all well know, United States Senators were chosen by State legislatures, which gave the States an institutional control over the national government. That has long since disappeared, and I am sure no one argues for its return.

But that was one of the few automatic mechanisms for the States to protect themselves. The Congress of the United States is charged, in my view, with the principal duty of preserving the independence of the States, and it can do so in many ways; in the way that it designs its conditional grant-in-aid bills, in the ways that it passes its statutes.

The courts, too, have a role, and the courts have devised some very important doctrines to protect federalism. The idea of abstention in *Younger* v. *Harris,* the Erie rule, the independent State ground rule, have all been designed by the courts out of respect for the States.

But in my view, this is the job of every branch of the government.

Senator THURMOND. Are you of the opinion that our forefathers had in mind, as I understand it, that the federal government, the central government, the national government, was simply to be a government of limited powers?

Judge KENNEDY. It is very clear that that was the design of the Constitution.

Senator THURMOND. I am glad to hear you say that, and I wish more people in this country would recognize that. I see you are a good student of the Constitution.

Judge KENNEDY. Well, I am glad you give me a good mark, Senator.

Senator THURMOND. Judge Kennedy, the Supreme Court's decision in *Marbury* v. *Madison* is viewed as a basis of the Supreme Court's authority to interpret the Constitution, and issue decisions which are binding on both the executive and legislative branches.

Would you please give the committee your views on this authority.

Judge KENNEDY. *Marbury* v. *Madison* is one of the essential structural elements of the Constitution of the United States. As we all know, the doctrine of judicial review is not explicit in the Constitution. I have very little trouble finding that it was intended. Federalist Number 78 makes that rather clear, and I think that this vital role is one of the critical structural elements of the Constitution, and that it is essential to the maintenance of constitutional rule.

Senator THURMOND. Judge Kennedy, would you please tell us your general view of the role of antitrust today, including those

antitrust issues which you believe most seriously affect competition and the consumer.

Judge KENNEDY. I am not a student of the antitrust law. I try to become one whenever I have an antitrust opinion.

This is an area which is one of statutory law, and it is an interesting one because the Congress of the United States has essentially delegated to the courts the duties of devising those doctrines which are designed to insure competition.

I have no quarrel with the Congress doing that, because if the courts do not perform adequately, if they do not follow the intent of Congress, there is always a corrective. And I think it is somewhat reassuring that the judiciary has performed well under the antitrust laws.

The particular elements that are necessary to preserve competition are of course vigorous enforcement of the law against illegal practices, particularly price fixing, and other prohibited practices.

Senator THURMOND. Judge, do you believe the Court has given sufficient consideration to a relevant economic analysis in evaluating the effects of restraints of trade, and are you satisfied with the guidance that the Court has provided on the proper role of economic analysis in antitrust laws?

Judge KENNEDY. An important function of the courts, Senator, is to serve as interpreters of expert opinions, and the courts of the United States have received economic testimony, have studied economic doctrine, and have formed these into a series of rules to protect competition.

Now economists, like so many others of us, have great disagreements, and we have found—for instance—that economic testimony tells us that some vertical restrictions are actually pro competitive, and the courts have accepted this economic testimony.

And I think the courts, all in all, have done a good job of articulating their reasoning in antitrust cases, and identifying when they are relying on economic reasoning. Sometimes that reasoning is wrong, but at least it is identified.

Senator THURMOND. Judge Kennedy, recent Supreme Court decisions, such as *Illinois Brick, Monfort,* and *Associated General Contractors,* have, for different reasons, restricted standing to bring private antitrust suits.

Generally, what is your view of these decisions, and how do you assess their impact on access to the courts by private parties?

Judge KENNEDY. Well, the Court has struggled to draw the appropriate line for determining who may recover and who may not recover in an antitrust case. As we know, if there is an antitrust violation it has ripple consequences all the way through the system.

Antitrust cases are ones in which triple damages are recoverable, and therefore, the courts have undertaken to draw a line to allow only those who are primarily injured to recover.

Not only is this, it seems to me, necessary simply as a matter of enforcing the antitrust laws, but it reflects, too, the underlying value of federalism, because to the extent to which federal antitrust laws apply, State laws are displaced.

Where that line should be, how successful the *Illinois Brick* doctrine has been in terms of promoting competition, and permitting,

at the same time, antitrust plaintiffs to sue when necessary, is a point on which I have not made up my mind.

Senator THURMOND. Judge Kennedy, there has been much publicity and debate recently about corporate takeovers. What is your general view about the antitrust implications of these takeovers, and how do you view State efforts to limit takeovers?

Judge KENNEDY. The Supreme Court has recently issued a decision in which it approves of State statutes which attempts to regulate takeovers.

This is a tremendously complex area. It is highly important because business corporations throughout the United States have a fixed-capital investment, and a fixed investment in human resources. They have managers, they have skilled workers, and it is important that they be given protection.

Now it seems to me that the States might make a very important contribution in this complex area.

Senator THURMOND. Judge Kennedy, some of your opinions involve application of the per se rule of liability. Generally, when do you believe it is appropriate to apply the per se rule in antitrust cases, and when would you apply the rule of reason?

Judge KENNEDY. As to the specific instances, I cannot be particularly helpful to you, Senator. Let me see if I can express what I think are the considerations that the Court should address.

There is a continuum here, or a balance. On the one hand, there is a rule of reason, and this involves something of a global judgment in a global lawsuit. A rule of reason antitrust suit is very expensive to try. And once it is tried, it is somewhat difficult to receive much guidance from the decision for the next case.

Per se rules, on the other hand, are precise. They are automatic, in many cases, as their name indicates. The problem with per se rules is that they may not always reflect the true competitive forces.

The Supreme Court has to make some kind of adjustment between these two polar concepts, and it has taken cases on its docket in order to do this.

Senator THURMOND. Judge Kennedy, recently, there has been some discussion in regards to raising the amount in controversy requirement in diversity cases. If the amount is raised, it should reduce the current civil caseload in the federal courts.

Would you please give the committee your opinion on this matter.

Judge KENNEDY. On diversity jurisdiction, generally—I may be drummed out of the judges' guild—but I am not in favor of a total abolition of diversity jurisdiction. I have tried cases in the federal courts, and I realize their importance.

On the other hand, we simply must recognize that the federal courts' time is extremely precious. The Congress of the United States has vitally important goals that it wants enforced by the federal courts.

Rather than looking at jurisdictional limits, which can be avoided, and which are the subject of further controversy as to whether or not they have been adequately pleaded, it seems to me that perhaps Congress should look at certain types of cases which could be excluded from the diversity jurisdiction, say, auto-accident cases.

It seems to me that that is a better approach, generally.

Senator THURMOND. That question really involved a decision by Congress, but I just thought maybe your opinion would be helpful.

Judge KENNEDY. Well, it is somewhat tempting, with diversity jurisdiction, to think that we could take a byzantine area of the law, and simply make it irrelevant by abolishing the jurisdiction. Many lawyers, many judges, would think Congress had done them a great favor if they made that whole branch of our learning simply irrelevant.

On the other hand, I think the commitment to diversity jurisdiction, both in the Constitution and in many segments of the bar, is sufficiently strong so that the better approach is to find a class of cases that we can eliminate from the jurisdiction, rather than abolishing it altogether.

Senator THURMOND. Judge Kennedy, 20 years have passed since the *Miranda* v. *Arizona* decision which defined the parameters of police conduct for interrogating suspects in custody.

Since this decision, the Supreme Court has limited the scope of *Miranda* violations in some cases.

Do you feel that the efforts and comments of top law-enforcement officers throughout the country have had any effect on the Court's views, and what is your general view concerning the warnings this decision requires?

Judge KENNEDY. I cannot point to page and verse to show that the comments of law-enforcement officials have had a specific influence, but it seems to me that they should. The Court must recognize that these rules are preventative rules imposed by the Court in order to enforce constitutional guarantees; and that they have a pragmatic purpose; and if the rules are not working they should be changed.

And for this reason, the Court should pay close attention to the consequences of what it has wrought. Certainly comments of law-enforcement officials, taken in the proper judicial context, it seems to me, are relevant to that judgment.

Senator THURMOND. What did you say? Are relevant?

Judge KENNEDY. Are relevant.

Senator THURMOND. Thank you. Judge Kennedy, there are hundreds of inmates under death sentences across the country. Many have been on death row for several years as a result of the endless appeals process.

Would you please tell the committee your opinion of placing some limitation on the extensive number of post-trial appeals that allow inmates under death sentences to avoid execution for years after the commission of their crimes.

Judge KENNEDY. As to the specifics of a proposal, of course I could not and would not pass on it. It is true that when we have an execution which is imminent, say, 30 days, the courts, particularly at the appellate level, begin undergoing feverish activity, activity which is quite inconsistent with their usual orderly, mature, deliberate way of proceeding.

We are up past midnight with our clerks, grabbing books off the wall, and phoning for more information, where a man's life—it is usually a man—is hanging in the balance. And this does foster not a good perception of the judiciary. It is a feverish kind of activity

that is not really in keeping with what should be a very deliberate and ordered process.

Justice O'Connor who is the Circuit Justice for the Ninth Circuit is concerned about this. She has asked the Ninth Circuit to draft some procedures in order to make this a more orderly process. Any guidance that the Congress of the United States could give would, I think, be an important contribution to the administration of justice.

I really do not know how you are going to avoid it, but it is something that we should give attention to.

Senator THURMOND. Judge Kennedy, in the last several decades, we have seen a steady increase in the number of regulatory agencies which decide a variety of administrative cases.

I realize that the scope of judicial review of these administrative cases varies from statute to statute. However, as a general rule, do you believe that there is adequate opportunity today for the appeal of administrative decisions to the federal courts, and do you believe that the standard of review for such appeals is appropriate?

Judge KENNEDY. Generally, the answer to that question is yes. As I have indicated before, I think the courts play a very vital function by taking the expert, highly detailed, highly complex findings of an agency, and recasting them in terms that the courts themselves, the litigants, and the public at large, can understand. While with reference to particular agencies there may be areas for improvement by statute, I think generally the system of administrative review is working well.

Senator THURMOND. Judge Kennedy, in the past several decades, the caseload of the Supreme Court has grown rapidly, as our laws have become far more numerous and complex.

In an effort to reduce the pressures on the Supreme Court, an inter-circuit panel was proposed to assist the Court in deciding cases which involve a conflict among the judicial circuits.

In the 99th Congress, the Judiciary Committee approved such a panel on a trial basis. Similar legislation has been introduced in the 100th Congress. As you may know, former Chief Justice Warren Burger has been a strong advocate of this panel, along with many other current members of the Court.

Would you please give the committee your general thoughts on the current caseload of the Court, and the need for an inter-circuit panel.

Judge KENNEDY. Well, I hope, Senator, that some months from now I will have a chance to take a look at that firsthand. But it seems to me from the standpoint of a circuit judge that there are some problems with that proposal.

Circuit judges, I think, work under an important constraint when they know that they are writing for review by the Supreme Court of the United States, and not by some of their colleagues.

Furthermore, if you had a national court of appeals, it would not simply resolve particular issues; it would have its own case law, which would have its own conflicts.

And I am concerned about that.

Further, as I understand the statistics, this would save the Supreme Court about 35 cases a year, maybe 50. In all of those cases, the circuit courts have already expressed their views, and so the

Supreme Court has a very good perspective of what choices there are to make.

If those 50 cases were taken away, the nature of the docket of the Supreme Court might change. The Supreme Court might hear all public law cases in which the juridical philosophies that obtain on the court would divide them in more cases.

It seems to me somewhat healthy for the Supreme Court to find something that it can agree on.

Senator THURMOND. Judge Kennedy——

Judge KENNEDY. And incidentally, this was a suggestion made by Arthur Hellman in a very perceptive law review article that I read a few years ago.

Senator THURMOND. Judge Kennedy, at present, federal judges serve during good behavior, which in effect is life tenure.

Federal judges decide when they retire, and when they are able to continue to serve. Congress, in the Judicial Councils Reform and Conduct and Disability Act of 1980 provided some limited ability for the judicial council of the circuits to act with respect to judges who are no longer able to serve adequately because of age, disability, or the like.

The Supreme Court is not covered by this act. Judge Kennedy, do you feel the Supreme Court should be covered by the Judicial Conduct and Disability Act?

And would you give the committee your opinion on the need to establish by constitutional amendment a mandatory retirement age for judges and justices?

Judge KENNEDY. Well, Senator, in the past few weeks, most of my thoughts have been on how to get on the Supreme Court, not how to get off it.

But my views are that I would view with some disfavor either of those proposals. The Supreme Court is sufficiently small, sufficiently collegial, sufficiently visible, that I think if a member of the court is incapable of carrying his or her workload, there are enough pressures already to resign.

History has been very kind to us in this regard.

Senator THURMOND. So far as I am concerned, it is not age but it is health that counts.

Judge KENNEDY. I am with you, Senator.

Senator THURMOND. Judge Kennedy, and this is the last question, there have been complaints by federal judges regarding the poor quality of advocacy before the nation's courts, including advocacy before the Supreme Court.

Do you feel that legal representation is not adequate? And if so, what in your opinion should be done to improve the quality of this representation?

Judge KENNEDY. The repeat players in the legal system—insurance companies, in some cases public interest lawyers—are very, very good.

The person that has one brush with the legal system is at risk. I wish I could tell the committee that most of the arguments I hear on the court of appeals, and we come from a great and respected circuit, are fine and brilliant and professional arguments. They are not.

You gentlemen are the experts on what to do. I think we have to attack it at every level, in the law schools, with Inns of Court, with judges participating with the bar, and with an insistence that the highest standards of advocacy pertain in the federal courts.

It is a problem that persists. And it is a problem that should be addressed.

We had in the ninth circuit a committee study for 4 years on whether or not we should impose standards on the attorneys that practice in the federal courts of the ninth circuit. We finally came up with a proposal that they had to certify that they had read the rules. And it was turned down. So judges, as well as attorneys, must be more attentive to this problem.

Senator THURMOND. Judge, I want to thank you for your responses to the questions I have propounded, and I think they indicate that you are well qualified to be an Associate Justice of the Supreme Court.

Judge KENNEDY. Thank you, sir.

The CHAIRMAN. Judge, before I yield to Senator Kennedy, I want to set the record straight.

It has been called to my attention that I may have left the implication that on November the 12th you met with only one Senator, when in fact you met with about 10 Senators.

I was referring to a single conversation.

Judge KENNEDY. I was handed a note to that effect. And I did not understand your question that way. But it is true that I met with a number of your colleagues.

The CHAIRMAN. I didn't think it was that confusing, either. I am glad you didn't. But obviously, our staffs did. So now we have cleared up what wasn't confusing before.

And one last comment that I will make. I was at the White House with the President on one occasion with the Senator from South Carolina. And the President was urging me to move swiftly on a matter.

And he said to me, he said, Joe, when you get to be my age, you want things to hurry up. Senator Thurmond looked at him and said, Mr. President, when you get to be my age, you know it does not matter that much. [Laughter.]

I will yield to the Senator from——

Senator THURMOND. Mr. Chairman, I just want to say, experience brings wisdom. And as time goes by, I'm sure you will realize this is the case. [Laughter.]

The CHAIRMAN. I realize it now. That is why I follow you, boss. I yield to the Senator from Massachusetts.

Senator KENNEDY. Thank you very much.

Mr. Chairman, when I had the good opportunity, like other members of the committee, to meet with the nominee, I showed him in my office the seal of the name Kennedy in Gaelic.

And the name Kennedy in Gaelic means helmet. And I wondered whether the nominee was going to bring a helmet to these particular hearings. But I am not sure we are playing tackle. Maybe perhaps touch football.

But nonetheless, I do not know whether he is prepared to say whether he is really enjoying these hearings, like some mentioned earlier or not.