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."