we are up to at least 5 hours if that is the case. I would hope my colleagues might not find it necessary to take the full time.

It would be my intention, Judge, if we can, to have your testimony end today. I know that would disappoint you not to be able to come back tomorrow. But if you will bear with me, with the Chair, we will try, by accommodating 15-minute breaks every couple hours, to finish up today. I would hope we could finish relatively early, but maybe as some of the questions are asked in the second round others will find it unnecessary to pursue, if their line of inquiry is the same, their full 30 minutes.

What I would like to suggest is that, since we kept you so long, we not start another round this morning, and that we recess until, say, a quarter after 1. Well, let us make it 1:30. It will give you an hour and 45 minutes to get some lunch and be back here.

Judge KENNEDY. Thank you, Senator.

The CHAIRMAN. We will start at 1:30 with a second round of questions, and we will see where that takes us.

The hearing is recessed until 1:30.

[Whereupon, at 11:48 a.m., the committee recessed, to reconvene at 1:30 p.m., the same day.]

AFTERNOON SESSION

The CHAIRMAN. The hearing will come to order.

Judge, the reason for the absence of my colleagues, both the Democratic and Republican Caucuses are meeting until 2 o'clock, but we will begin.

Judge KENNEDY. All right, Senator.

The CHAIRMAN. In an effort to see if we can finish today.

And I will repeat this when some additional members are here, but although I will not limit anyone on the panel to anything less than 30 minutes, I would like to encourage them to be 20 minutes; and so at 20 minutes I am going to have that little red light go off—go on, I should say, and then we have 10 minutes after. Maybe that might encourage people to move a little bit more. And I will try to do that, and hopefully not even take the full 20 minutes. At the very end I may have a few concluding questions.

Judge, you have, as you discussed with Senator Specter this morning, you have praised dissent in *Plessy* v. *Ferguson,* that infamous separate but equal case that *Brown* overruled, and you praised Harlan's dissent.

As I am sure you are aware, Harlan's dissent in the *Plessy* case has been used by some scholars and officeholders alike to reinforce the notion of a colorblind Constitution; in a way, the idea that has been tremendously powerful in impacting upon one of the elements in the struggle for civil rights in this country, and that is the whole question of affirmative action.

It also is being used by some to argue that Congress lacks the authority to take race into account in any context. The Congress does not have the right to pass any laws even if our action is designed to improve equal opportunity for a group previously discriminated against or to remedy past discrimination.

When you say that Justice Harlan was correct, do you give his opinion that kind of meaning, that it proscribes the Congress from passing any laws to take into account any issue relating to race?

Judge KENNEDY. I recognize the quotation that the Constitution is colorblind. It was, of course, in the context, as you point out, of a case in which affirmative action was not before the Court and has since been used, as an interpretation, to argue against affirmative action. I do not think that that is a necessary interpretation of the opinion.

The CHAIRMAN. Could you tell us whether when you say you agree with Harlan whether it is your interpretation? What do you mean when you say you agree with Harlan's dissent?

Judge KENNEDY. My agreement with Mr. Justice Harlan's dissent is his reasoning as he was applying it to the facts of *Plessy* v. *Ferguson*.

The CHAIRMAN. Can you tell us what your views are on the permissibility of Congress engaging in legislative activity that is characterized as affirmative action?

Judge KENNEDY. The issue has not come before me in a judicial capacity as a circuit judge, and might well as a Supreme Court Justice, so I would not commit myself on the issue.

I will say that my experience in law school taught me the arguments for the practice.

The CHAIRMAN. I beg you pardon?

Judge KENNEDY. My experience in law school taught me the arguments in favor of affirmative action. Whether or not they would prevail in a court of law on a constitutional basis is by no means certain. But, in the law schools, in 1965, one percent of the nation's law school student body was black. After 10 years of effort by the law schools, including the one where I was privileged to teach, to encourage applicants from the black community, that had risen to 8 percent, an 800 percent increase. I know of no professor in legal education that does not think that it is highly important that we have a representative group of black law students in law schools.

It has apparently stayed about that rate, at 8 percent. I will notice in some of my classes there are not as many blacks as the year before, and then I will notice it picks up again. So, it is an area that the law schools, and I am sure other professional schools, are continuing to pay attention to, and I think it is a very important objective on the part of the schools.

I recognize that in the area of State schools there are different kinds of programs that may present constitutional questions that have yet to be resolved fully by the Court. As you know, the Court is still engaged in determining the appropriate rationale and the appropriate explanation for affirmative action under the Constitution.

The CHAIRMAN. I am not sure, quite frankly, how to fairly pursue the issue further with you without getting into areas that you might have to decide on. Your answer indicates a sensitivity to the need to encourage minorities and give them access to all institutions, in this case law, but I am not sure that it sheds much light on whether or not the Congress has the right under the Constitution to pass legislation that in fact requires affirmative action on

the part of various institutions over which it has control or indirect control.

Judge KENNEDY. As you know, the leading case on the subject is *Fullilove* v. *Klutznik,* a Supreme Court case which ratified, validated an affirmative action program for minority hiring for government contracts. That case is quite sweeping in its reasoning and in its rationale. But again, this is an area of the law where there is still much exploration and much explanation to be done on a case-by-case basis. I am not sure if there is any such case on the docket of the Supreme Court this term, but I know there are some cases in the circuits.

The CHAIRMAN. Do you think that voluntary plans by employers, voluntary affirmative action plans are permissible?

Judge KENNEDY. Yes, and incidentally, I said that I have not written in this area. Perhaps that was imprecise. Your question brings to mind one case where we had a unanimous court and I was the author of the opinion. It was called *Bates* v. *The Pacific Maritime Association,* and the question was whether or not a consent decree, which in a sense is voluntary action, was binding on a successor employer.

The previous employer had agreed to the terms and conditions of the consent decree and thereafter sold the enterprise. But the employee pool was the same, the equipment was the same, and we held that the consent decree, which required affirmative action for racial minority hiring, was valid and was binding on the successor. And you might be able to obtain some insight into my approach in this area by looking at that case.

The CHAIRMAN. Let me move to a different area of precedent. I have been fascinated by your responses to my colleagues on the role of history in the evolution of the Constitution and the relationship of the text to the practice and societal values.

And, in your remarks to the ninth circuit, you asked a question of Paul Brest, the dean of Stanford Law School, that I would like to put to you, because it bears upon our discussion here and may also tie this discussion into earlier exchanges you have had with some of my colleagues.

You noted that the Canadian Constitution is only 5 years old, and then you asked Dean Brest, and I think I am quoting, "What do you think would be easier, to be a constitutional judge in Canada or a judge interpreting the Constitution of the United States? Would it be easier to decide a close question when you essentially are a contemporary of those who frame the document or does 200 years of history and experience and teaching give us insight the Canadians don't have?" That is the question.

Judge KENNEDY. Paul Brest is a great constitutional scholar and I wish he had answered the question. He did not.

I thought when I first began teaching constitutional law that John Marshall was in the finest position of all of us to know what the Constitution meant, and in part because of my experience in talking about the Canadian Constitution with the Canadian judges I have changed that view. I think 200 years of history gives us a magnificent perspective on what the framers did intend, on what they did plan, on what they did build, on what they did structure for this country.

Holmes said that "A page of history is worth a volume of logic," and certainly 200 years of history is not irrelevant, so I think we are in a better position. The answer is, I think we are in a much better position.

And the other point is that over time the intentions of the framers are more remote from their particular political concerns and so they have a certain purity and a certain generality now that they did not previously.

The CHAIRMAN. I think I will stop there. I will reserve the balance of my time.

The Senator from South Carolina.

Senator THURMOND. Thank you, Mr. Chairman.

Judge Kennedy, I want to commend you for the astute manner in which you have answered the questions during this hearing. You have answered them with credibility and with knowledge. You have shown the great respect you have for the Constitution of the United States, which, in my opinion, is the greatest document that has ever been penned by the mind of man for the governing of a people.

You have shown that you are an independent thinker. In other words, you will draw your own conclusions after you get the facts. And you have shown a knowledge of the construction of the Constitution and the law, which I think is to be admired by all, and that it is your desire to construe it for the best interests of the American people.

On the question of issues, you have impressed me as being open-minded and will give careful consideration. You will follow stare decisis unless there is some overriding reason why you would act differently. For instance, in *Plessy* v. *Ferguson* the Supreme Court reversed itself. There may be instances in the future in which they will reverse themselves, and you would not hesitate to reverse a decision if you felt it was the right thing to do.

You have shown I think that you are not prejudiced and that you will be fair to all. I have been deeply impressed with your testimony. And I am not going to take more time at this point, I think we can all cut these questions short. I think they have had a chance to size you up, and the only conclusion they can reach is you are a good man and ought to be confirmed.

Judge KENNEDY. Thank you very much, Senator.

The CHAIRMAN. You don't object to that, do you?

Judge KENNEDY. Not at all. I appreciate the Senator's most gracious remarks.

The CHAIRMAN. The Senator from Ohio.

Senator METZENBAUM. Judge Kennedy, I have some questions in the antitrust area, and I know that is not your special field of expertise, so I am not going to get into what I call the nitty-gritty of some of the Court decisions.

Judge KENNEDY. Well, I know that it is yours, Senator, so I would be pleased to learn.

Senator METZENBAUM. Pardon?

Judge KENNEDY. I know that it is yours, so I would be pleased to learn.

Senator METZENBAUM. Well, I will at least make an overall inquiry.