Senator LEAHY. No, I was very serious, but you have already answered 3 o'clock. I will go to the gym during that time. No, actually, I would be at the press conference, Mr. Chairman.

Senator Specter is going to go next, then Senator Metzenbaum. Just so that I can plan, I am perfectly free, whatever you want to do, would I then be after Senator Metzenbaum on questioning?

The CHAIRMAN. The answer is yes, you would.

Senator LEAHY. That would put us back into the sequence.

The CHAIRMAN. Yes, you would. I hope that Senator Humphrey is listening—I do not mean that facetiously—so we do not get into a discussion about two Democrats in a row, et cetera. What we will do, the order will be as follows: The Senator from Pennsylvania, the Senator from Ohio, the Senator from Vermont, the Senator from New Hampshire, the Senator from Alabama—no, you already asked questions, as a matter of fact, yesterday, if I am not mistaken—the Senator from Illinois, who will be at the Hart press conference, and then back to me and to the ranking member.

With that, are you not really fascinated by all this, Judge?

Judge KENNEDY. It is more interesting than some of my sessions, Senator.

The CHAIRMAN. We will now begin with the Senator from Pennsylvania who will question for his first round for half an hour.

Senator SPECTER. Thank you, Mr. Chairman, and I thank my colleague, Senator Metzenbaum, for yielding at this time.

Judge Kennedy, as already indicated, I am going to have to depart after my round. We have a meeting on the Strategic Defense Initiative and the INF treaty. We will be following through staff and listening on the radio as I drive away.

Judge KENNEDY. Thank you, Senator. I certainly understand.

Senator SPECTER. Judge Kennedy, I would like to begin with exploring the legal theories that run through your writings and through your decisions: original intent, interpretivism, legal realism, result-oriented—all subjects which you have addressed and matters which have been referred to, to some extent, in yesterday's session.

I start with a comment which you made this year at the Ninth Circuit Conference where you say, "There must be some demonstrated historical link between the rule being advanced in the court and the announced declarations and language of the framers."

In a speech which you made in 1978 to the judges of the ninth circuit, you have identified three cases—*Brown* v. *Board of Education, Baker* v. *Carr, Gideon* v. *Wainwright*—where you noted and reminded the audience that it was not the political branches which decided those cases. And in the context of *Baker* v. *Carr,* you referred to the fact that the court has wrought the revolution of *Baker* v. *Carr.* You had picked out these three cases as being distinctive matters of judicial interpretation. I would like to begin with *Brown* v. *Board of Education,* the desegregation case.

In examining the issue of framers' intent, I refer to the treatise by Raoul Berger, a noted constitutional authority, who set the factual circumstances at the time the Equal Protection Clause of the 14th amendment was adopted in this context. And at page 118 in Professor Berger's book, "Government By Judiciary," he points out

that Congressman Wilson, the sponsor in the House of the 14th amendment, stated, "Civil rights do not mean that all citizens shall sit on juries or that their children shall attend the same schools." Later at page 123, Professor Berger goes on to point out that at the time the 14th amendment was adopted, eight Northern States provided for separate segregated schools; five States outside the Old Confederacy, either directly or by implication, excluded black children entirely from their public schools; and that Congress had permitted segregated schools in the District of Columbia from 1864 onward. Then Professor Berger notes, at page 125, that even the Senate gallery itself was segregated at that time.

Now, my question is: Is it ever appropriate for the Supreme Court of the United States to decide a case at variance with the framers' intent?

Judge KENNEDY. Well, in answering that question, let me say that implicit in your introduction was the proposition that it was not the framers' intent to forbid segregation in schools, and I think Professor Berger has 180 degrees the wrong slant on that point. He defines intent in a very narrow way. He defines intent to mean what the framers, as he calls them, actually thought.

I think that is irrelevant. What is important are the public acts that accompanied the ratification of, in this case, the 14th amendment. Remember that the framers are not the sole repository from which we discover the necessary intention and the necessary purpose. In the legislature we do not ask what the staff person thought when he or she wrote the bill, we ask what the Senators thought.

And so with the Constitution. It is what the legislatures thought they were doing and intended and said when they ratified these amendments.

The whole lesson of our constitutional experience has been that a people can rise above its own injustice, that a people can rise above the inequities that prevail at a particular time. The framers of the Constitution originally, in 1789, knew that they did not live in a perfect society, but they promulgated the Constitution anyway. They were willing to be bound by its consequences.

In my view, the 14th amendment was intended to eliminate discrimination in public facilities on the day that it was passed because that is the necessary meaning of the actions that were taken and of the announcements that were made. You can read the abolitionist writings that were the precursor to so much of the 14th amendment. So, that, as Professor Berger states, the framers did not have it in mind at the time or that they knew they had a segregated school system, is irrelevant.

Senator SPECTER. Well, Judge Kennedy——

Judge KENNEDY. So with that preface, we then come to the next part of your question: Can the court ever decide a case contrary to intent? I just wanted to make it clear that I somewhat disagree with the thesis that you interjected at the outset because I think *Brown* v. *Board of Education* was right when it was decided, and I think it would have been right if it had been decided 80 years before. I think *Plessy* v. *Ferguson* was wrong on the day it was decided.

Senator SPECTER. Judge Kennedy, I quite agree with you that *Plessy* was wrong and *Brown* was right, and I am very pleased to hear you say that people can rise above their own injustices, and that a society can rise above its own inequities. Those are very sound principles, and I am pleased to hear you say that.

But I do not square the statement you made at the Judicial Conference, referring to framers' intent, with the statement you just made, "What the framers actually thought was irrelevant." You have made a statement about ratifiers, legislators, and I agree that when you have a constitutional amendment, you have the framers who adopt it in Congress and then you have ratification by the state legislatures. But if you take a look at the states which ratified the 14th amendment, you will find that they were the States where the factual situations outlined by Professor Berger were in existence.

I do not quote Professor Berger for any philosophical approach or any theory or any conclusion. I quote Raoul Berger for the factual basis. And I could quote many other sources. He just has it neatly pigeonholed in terms of putting in one place the fact that segregation, segregated schools were a fact of life—in the District of Columbia, in Southern States, in Northern States. Segregation was a fact in the Senate chamber. The principal sponsor of the 14th amendment said it was not intended to have integrated schools, that segregation was the order of the day. And in the statement you made at the Judicial Conference, you talk about framers; you do not talk about ratifiers. "There must be some demonstrated historical link between the rule being advanced in the court and the announced declarations and language of the framers."

So I do not quite understand your statement today, "What the framers thought was irrelevant." Could you expand upon that a bit?

Judge KENNEDY. Well, number one, I not only should expand on it, I should probably correct it. It is highly relevant what the framers thought. But the general inquiry, the principal inquiry, should be on the official purpose, the official intent as disclosed by the amendment. In looking at legislative history to determine the meaning of Congress, we sometimes find statements made on the floor of the Senate or the floor of the House that seem almost at variance with the purpose of the legislation when viewed overall as an institutional matter. I am applying that same rule here.

With reference to framers, I and many others use "framers" in a rather loose sense. I think obviously we want to know what Madison and Hamilton thought, and the other draftsmen of the Constitution. But theirs is not the entire body of contemporary opinion and contemporary expression that we look to.

In my view, for instance, the abolitionist writings are critical to an understanding of the 14th amendment. It was in response to their concerns that that amendment was enacted.

Senator SPECTER. Well, Judge Kennedy, when you say that the principal inquiry should be directed to the official purpose, who is going to determine the official purpose? In the case of *Brown* v. *Board* in 1954, the Supreme Court of the United States declared that as a matter of basic justice and equal protection of the law, as

we understood that concept, it was patently unfair to have black children go to segregated schools.

Judge KENNEDY. Yes.

Senator SPECTER. But if you contrast that with what the intent was of the framers, ratifiers of the 14th amendment, the cold facts are that their intent was very different.

That leads me to a conclusion that the real judicial philosophy comes through when you say that people can rise above their own injustices, rise above their inequities, but really look to an intent of justice and an official meaning of equal protection as it is viewed in 1954, as opposed to the way it is viewed in 1868, when the 14th amendment is ratified; and there are segregated schools and a segregated Senate gallery. And the operative intent of the Congressman who passed the amendment and the legislators who ratified it were to be satisfied and really expect segregation.

Judge KENNEDY. Well, I am not saying that the official purpose, the announced intention, the fundamental theory of the amendment as adopted will in all cases be the sole determinant. But I think I am indicating that it has far more force and far more validity and far more breadth than simply what someone thought they were doing at the time. I just do not think that the 14th amendment was designed to freeze into society all of the inequities that then existed. I simply cannot believe it.

Senator SPECTER. Well, I agree with that. But to come to that conclusion, you have to disregard what is a pretty obvious inference of intent of the framers or ratifiers because they lived in a segregated society.

Judge KENNEDY. That is true, and I think maybe many Senators felt at the time they passed the Civil Rights Act of 1964 that they lived in a society that did not comply in all respects with what the statute required them to do. They were willing to make a statement that society should be changed. The Constitution is the preeminent example of our people making such a statement.

Senator SPECTER. But the legislature's role is clearly established under our principles of government. The contest comes up as to whether the court has any business handing down a decision like *Brown* v. *Board* if the court is supposed to look only to framers' intent. And I think the court did have business doing that. But if you contrast that with the Civil Rights Act of 1964, everyone would say, well, that is up to the Congress; that is up to the elected officials; contrasted with the judges who have life tenure who should not make political decisions. And if you have a shifting meaning of equal protection—and I think you do, and I think that is the realism—then it seems to me that that is realistically an abandonment of a rigid nexus to the intent of the framers and ratifiers in 1868.

Judge KENNEDY. Well, I do not want to put us in a deeper trench, because I think there is an element of agreement between us. But I must insist that the intention of the 14th amendment is much more broad than you seem to state in the predicate for all of your questions.

Senator SPECTER. Well, where do you find the intention in the Equal Protection Clause of the 14th amendment more broadly stated than the fact of segregation, which was, in practice, obviously in the minds of the framers and ratifiers?

Judge KENNEDY. It was very clear to me that the purpose of the 14th amendment was to effect racial equality in public facilities in this country.

Senator SPECTER. But what did that mean?

Judge KENNEDY. It was very clear from the abolitionist writings; it was very clear from some of the statements on the floor; and it is abundantly clear from the text of the language, which admits of no exception, in my view. I think the framers were willing to be bound by the consequences of their words. And their words are sweeping, and their words are very important and they have great power.

Senator SPECTER. Are you saying that there is something in the legislative history of the Equal Protection Clause of the 14th amendment which specifies that schools should be desegregated?

Judge KENNEDY. No. Those who addressed the amendment specified their purpose in much broader, much more general terms. I think that they were willing to be bound by the consequences of what they did and the consequences of what they wrote. And I think *Plessy* v. *Ferguson* was wrong the day it was decided on that basis.

Senator SPECTER. Well, I agree with you about that, and I agree with you about *Brown* v. *Board* being correctly decided. But I do not——

Judge KENNEDY. But that cannot be because society changed between 1878 and 1896.

Senator SPECTER. Well, I was not around in 1896 when *Plessy* was decided, and neither were you. So our perspectives are very different. But the perspectives of the framers, I think, were clearly established by the facts of life.

I do not see how you can take a broad principle and say that there was framers' intent or ratifiers' intent to have equal protection, which is specified in desegregation, when the schools were all segregated and the Senate gallery was segregated and the principal sponsor, Congressman Wilson, said it was not their intent to have desegregated schools.

It seems to me that the conclusion is conclusive that it is just Judge Kennedy and Arlen Specter viewing it in a different era with different eyes, and the inequities appear differently. As you say, people can rise above their own injustices and above their inequities. And it is a different interpretation, and it does not really turn on what the framers necessarily had in mind.

Judge KENNEDY. Well, I agreed with you until your last statement, because I think what the framers had in mind was to rise above their own injustices. It would serve no purpose to have a Constitution which simply enacted the status quo.

Senator SPECTER. Well, let me move on to another category, the——

Judge KENNEDY. And, incidentally, we should note for the record that Mr. Justice Harlan was there in 1896, and he dissented in *Plessy. Plessy* was not a unanimous decision. The first Mr. Justice Harlan.

Senator SPECTER. Well, he was correct, but it was a decisive minority view, unfortunately. Only one out of nine saw it, contrasted with *Brown* v. *Board* where all nine saw it. In our society, it is hard to understand how anybody ever saw it differently or why it

took the political branches—the Congress or the executive branch—so long to catch up. That is the point you make in your speech, pointing to the courts and not to the political branches.

That underscores what I consider to be a very basic point that at times, notwithstanding the valid principle of judicial restraint, and notwithstanding the fact that it is up to the Congress and the political branches to establish public policy, public policy of change, that the inequities can be so blatant that the court must step in, as it did in *Brown* v. *Board,* and say that equal protection simply mandates desegregation, which is, of course, what happened.

Judge KENNEDY. Well, you know, it sometimes takes humans generations to become aware of the moral consequences, or the immoral consequences, of their own conduct. That does not mean that moral principles have not remained the same.

Senator SPECTER. Well, I believe that these are very important considerations on judicial philosophy, Judge Kennedy, because judges everywhere are applying them—not only in the Supreme Court, but in courts of appeals and in District courts and in State courts. And people are listening to what Judge Kennedy has to say about these subjects, perhaps even to what some of the Senators have to say about the subjects.

There is a real battle on interpretivism and legal realism, and to look for some conclusive nexus between framers' intent and the decision in a specific case is very, very difficult, and in my own view in *Brown* was impossible. But we have explored it at some length. I would like to move on, if I may now——

Judge KENNEDY. Certainly, Senator.

Senator SPECTER [continuing]. To the subject of neutral principles. Here, again, we are on a subject which has been very extensively applied. And judges are always looking to neutral principles, and the hard thing is to make a decision about what a neutral principle is.

You say, or said, in a speech to the Sacramento chapter of the Rotary Club just a few months ago, October 15th of this year, that "Closely related to the inquiry over the legitimacy of constitutional interpretation is the dangers that courts might be thought of as exercising policy review and not applying neutral judicial principles." And you pick up on that same theme in your response to the Judiciary Committee's questionnaire, when you say that "Judges must strive to discover and define neutral juridical categories."

In a speech you gave to the Stanford law faculty on May 17, 1984, you refer to Dean Ely, and you say, "He might make the argument that we prove his point that interpretivism is more hollow than real, because obviously the framers could not and did not foresee a sprawling administrative state."

And my question to you, Judge Kennedy, is: Considering, as you have said in this speech, that there are some circumstances which the framers could not have contemplated, obviously—such as the sprawling administrative state—just how far can you go on the principle of interpretivism as a fixed and resolute ideology for application by the courts?

Judge KENNEDY. All right. You are talking about quite a few things here.

Let me say at the outset that it is somewhat difficult for me to offer myself as someone with a complete cosmology of the Constitution. I do not have an over-arching theory, a unitary theory of interpretation. I am searching, as I think many judges are, for the correct balance in constitutional interpretation. So many of the things we are discussing here are, for me, in the nature of exploration and not the enunciation of some fixed or immutable ideas.

Once again, we must be very careful to note that when we speak of intent we speak on many different levels. The fact that the framers never thought of an ICC is not entirely relevant. The question is whether or not an administrative agency can and does fit within the principles that the framers announced for separation of powers.

Now, the position of administrative agencies in a system in which the Constitution mandates the separation of powers—legislative, executive, and judicial—has not been clearly established in the case law. Much work needs to be done there. It seems to me that the Government of the United States could have hardly survived without those agencies, and that may itself be a strong argument for the fact that they are legitimate, given what the framers promulgated. But that whole area of the law, as Professor Bator, I think, has described it, is a very unruly one. And I think, the courts have not really come to grips with how to explain the position of an administrative agency, that is, whether or not it is an appropriate exercise of article I power.

Did I answer the question?

Senator SPECTER. Yes, I think you did early on. I am pleased to hear you say that you have no cosmology of constitutional theory, no over-arching principles, and I think that is a very important basic concept. When you take up the ideologies of original intent or you take up the ideologies of interpretivism and neutral principles, there is a tendency, as I see it, for the Supreme Court, for the federal courts or any courts to become musclebound and unduly restrictive.

There are many cases that we could take up. I wanted to discuss with you at some length *Baker* v. *Carr,* where you have noted in your own writings that there is no established philosophy. And you characterized *Baker* v. *Carr,* one-man, one-vote, as the wroughting of a revolution. In some of our hearings, we have become entangled in very rigid ideological philosophies of the court. And I repeat, I am pleased to hear you say that you are looking for a balance as opposed to immutable philosophies, to give you the answer in every case, even though you may not be able to find original intent or even though you may not be able to find a neutral principle of interpretivism.

I have got about 4 minutes left, Judge Kennedy, or 3. The time really flies.

I want to come to a central issue about the administration of justice and due injustice, and I intend to return to this in another round. I have made reference in my opening to a very provocative comment, very interesting comment, very constructive comment which you made in your speech to the Canadian Institute in 1986 where you say, "A helpful distinction is whether we are talking about essential rights in a just system or essential rights in our

constitutional system. Let me propose that the two are not coextensive."

Now yesterday, when Chairman Biden was asking you questions, you adopted the principles of the second Justice Harlan, and if I had time I would go through Cardozo and *Palco* and fundamental values and Frankfurter. We may have time later to come to that. But when we talk about doing justice and we talk about people rising above their own inequities and above their own injustice, why should it not be that the essential rights in our constitutional system should not be coextensive with the essential rights in a just system? Or stated differently, should not essential constitutional rights be implemented to see to it that essential rights in a just system are recognized, that the two are coextensive?

Judge KENNEDY. Well, I think the American people would be very surprised if a judge announced that the Constitution enabled a judge to issue any decree necessary to achieve a just society. The Constitution simply is not written that way. And I think it is an exercise in fair disclosure to the American people, and to the political representatives of the Government, to make it very clear that the duty to provide a just society is not one that can be undertaken solely by the judiciary.

I indicated yesterday there is no truly just or truly effective constitutional system in the very broad sense of that term—constitutional with a small "c"—if there is hunger, if there are inadequate educational opportunities, if there is poor housing. It is not clear to me that the Constitution addresses those matters.

Senator SPECTER. My time is up. I will return later. Thank you very much, Judge Kennedy.

Thank you, Mr. Chairman. Thank you, Senator Metzenbaum.

The CHAIRMAN. Now, we will turn to Senator Metzenbaum.

Senator METZENBAUM. Judge Kennedy, in the *Aranda* v. *Van Sickle* case, you joined a decision which held that the constitutional voting rights of Mexican-Americans were not violated by the election system of the city of San Fernando, California. That was a case where Mexican-Americans claimed that they had been denied their voting rights by the city, and that they had been denied equal access to the political process.

Some Hispanic groups, it is only fair to say, find that decision very troubling. They say that you ignored a lot of evidence which showed that the political process was not equally open to participation by Mexican-Americans, and that Mexican-Americans had less opportunities than other residents to participate in the political process and elect legislators of their choice.

For example, the evidence showed that up until 1972, two-thirds of the polling places had been located in the homes of whites, and "that the private homes which were used were invariably not Spanish-surnamed households, and they were not located in an area of the city where Mexican-Americans lived."

In your opinion, you said, "There is no substantial evidence in the record indicating that location of polling places has made it systematically more difficult for the Mexican-Americans to vote, causing Mexican-Americans who otherwise would have voted to forego voting."