

to guarantees. We are only entitled to know that you have an open mind.

I just realized that I had told the Senator from Pennsylvania that I would allow more questions, and here I was about to wrap up. I apologize to the Senator from Pennsylvania.

I will yield to the Senator from Pennsylvania and then to the Senator from New Hampshire if he has any further questions, and then—

Senator HUMPHREY. I have no further questions.

The CHAIRMAN. And then I will yield to the clock.

Senator SPECTER. Thank you, Mr. Chairman. I have just a few.

When the last round ended, Judge Kennedy, I was questioning certain findings you made as a matter of law in the face of certain underlying factual situations, and have referred to the Pasadena school desegregation case, and also *AFSCME v. Washington State* on the comparable worth case.

And the other case that I want to discuss with you, and I shall do so relatively briefly, is the *Aranda* case, which has already been the subject of some discussion.

Judge KENNEDY. Pardon me. Which case, Senator?

Senator SPECTER. The case of *Aranda v. Van Sickle*.

Judge KENNEDY. *Aranda v. Van Sickle*, yes, sir.

Senator SPECTER. And this is a voting rights case, a civil rights case, involving Mexican Americans, and I do not want to suggest, Judge Kennedy, that there are not many cases where you have been on the other side in the findings.

The case of *Flores v. Pierce* where you made findings in favor of Mexican Americans, and the case of *James v. Ball*, you made a finding for civil rights, so that there is balance and representation on both sides.

But the *Aranda* case is unique and, I think, significantly questionable, and the reason that I question it, Judge Kennedy, turns on the issue of summary judgment in a context where you say in your concurrence that it was not overwhelming.

And the law on summary judgment—and you and I had discussed this in our last session in my office—the standard for summary judgment requires that it be entered only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law, and where summary judgment is considered it is particularly inappropriate where there are issues involving intention and motivation, which were present in this case, and especially in the context where the lower court had denied a request for additional discovery.

It just seems hard to understand the use of summary judgment and the refusal to allow the facts to be submitted to a factfinder in view of the very substantial constitutional issues involved here.

And the other aspect of the case, and then I will ask you to comment on it, turns on your very thoughtful opinion which comes to the conclusion that other remedies were appropriate in terms of location of polling places and employment of Mexican Americans by commissions.

And the case might have been remanded for further factfinding or it might have been remanded for an amendment on the pleadings or you might have considered, as we lawyers do, to conform

the pleadings to the proof in the case and you might have entered a remedy which was not specifically asked for.

Most complaints in equity have the prayer or other equitable relief as may appear just and appropriate under the circumstances, and I understand your statement that the plaintiff sought to change the at-large representation here. But it just seems to me that all the facts of this case really cry out for some different result than was reached in this case as a matter of basic justice.

Judge KENNEDY. Well, Senator, I have some obligation to be interesting and creative, and I am disturbed by the fact that I may sound very repetitive because I have been through this with the other Senators this morning and again earlier this afternoon.

The parties and the attorneys have the right to determine the shape and the contours of their lawsuit. The repeated questioning in the court indicated to me that the attorneys were there for one remedy, and one remedy only, and that was the invalidation of at-large elections and the substitution of district elections.

Senator SPECTER. But, Judge Kennedy, was that not made in the context that that is what he wanted and did not want to accept any compromises?

And when you say that the parties have the right to determine the shape of the lawsuit, I understand what you are saying. We had discussed in the context of this case the issue as to whether a court ought to consider on appeal issues which were not raised by the parties.

And it seems to me that as to procedural matters, there is a broader responsibility on the court. Now, we are not talking about breaking new ground and about establishing new rights, and no generalizations, but a broader responsibility of the court to do justice where there are procedural issues involved.

And I can see a lawyer making the argument to you, no, Judge, this is what I want, all or nothing. And it is really in the context, in a sense, of putting the court's back to the wall as far as a litigant can.

But in the context where the facts were as present here, where there was really injustice to Mexican Americans under this circumstance, and important factors on location of polling places and hiring by commissions, is there not a responsibility for a court of appeals to mold the verdict, to mold the finding to do justice under the circumstances?

Judge KENNEDY. The law that we were applying at the time was that the remedy had to fit the violation, and the insistence was that this was the only remedy they wanted. And I was sufficiently concerned about it that I wrote the separate opinion indicating with every hint I could that I was very concerned about some substantive violations, but that I had to agree with my colleagues that the remedy was not permitted.

Senator SPECTER. But another remedy could have been ordered.

Judge KENNEDY. Certainly.

Senator SPECTER. Why not?

Judge KENNEDY. Yes, I think another remedy could have been ordered. So I think all we are talking about is whether or not I as a single judge should have said that I would remand. I certainly did

not have that authority because I did not have the votes. I did not have the authority to write the mandate in this case.

Senator SPECTER. Do you recall whether you raised that issue specifically with the other two judges on the panel?

Judge KENNEDY. I cannot recall.

Senator SPECTER. One final point, Judge Kennedy, and it follows up from our discussion earlier today with respect to framers' intent and then one of my colleagues had raised the subject again and had talked about the difference on electronic surveillance on the fourth amendment where electronic surveillance was not known at the time the fourth amendment was adopted.

But that seems to me to be a very different consideration from the one which you and I had discussed previously, and that involves the framers' intent in the issue of segregated schools on the basic question to the propriety of the court in some extraordinary circumstances making a conclusion which is directly contrary to the framers' intent.

And in the discussion which you had today you talked about the fact that it was not subjective intent that the framers were looking toward, and my question is what kind of intent is there besides the intent in the minds of the individuals who frame the amendment.

Whether you call it subjective intent or objective intent, what is there besides what they are thinking about, as reflected by the facts surrounding the times when D.C. schools were segregated and schools were segregated all over the country and the gallery in the Senate was segregated?

They must have had in mind the segregation because that was the only fact of life that they knew.

Judge KENNEDY. That may have been, but they committed themselves to something that in legal consequence was entirely different, and they simply have to bear the consequences of that decision.

They made an agreement among themselves that racial discrimination would not be permitted when it was at the behest of the State, and I think they are bound by the consequences of what they did, regardless of whether—

Senator SPECTER. Well, Judge, when you say the legal consequences, they committed themselves to legal consequences which were something different. I agree with the morality, the propriety, and the prevailing law on the subject, but I just do not see how you can say that they agreed to those consequences, given their understanding of what was happening in, their world.

Our world is different. The world was different in 1954 with *Brown v. Board*, but what seems to me to come through from your approach, and quite properly so, but I think this is an important principle, is that there are some extraordinary cases where there is an appropriate finding by the Supreme Court of the United States, as they did in *Brown v. Board of Education*, which goes right into the teeth of the intent of the framers who wrote the Equal Protection Clause of the fourteenth amendment.

Judge KENNEDY. Well, I guess, again, it comes down to a difference of the use of the term "intent."

Senator SPECTER. Is there any question in your mind about the Equal Protection Clause applying beyond blacks to women, to aliens, to indigents, to mentally retarded?

Judge KENNEDY. No. In fact, once again, the framers could have drafted the amendment so that it applied to blacks only, but they did not. They used the word "person."

Senator SPECTER. And is there any question in your mind about the propriety of the longstanding rule in the Supreme Court of the United States about the clear and present danger test or freedom of speech?

Judge KENNEDY. I am not sure that the clear and present danger test is a full description of the full protection that the Court gives to freedom of speech. I think *Brandenburg* goes a little further than the clear and present danger test.

Senator SPECTER. So you have the clear and present danger test, plus *Brandenburg v. Ohio*—

Judge KENNEDY. Yes.

Senator SPECTER [continuing]. And *Hess v. Indiana*, and you agree with that statement of the—

Judge KENNEDY. I know of no substantial, responsible argument which would require the overruling of that precedent.

Senator SPECTER. I know of none either, but some do.

That concludes my questioning. Thank you very much, Judge Kennedy.

Judge KENNEDY. Thank you, Senator.

Senator SPECTER. Thank you, Mr. Chairman.

The CHAIRMAN. Judge, you just proved that you did not listen to any of the Bork hearings. We take you at your word.

Do you have anything to say, Senator?

Senator THURMOND. I have nothing else to say. I again want to commend Judge Kennedy for the way in which he has handled himself, and I hope we will not extend these hearings unduly.

If the members would stay here and listen to questions asked, they would not have to ask them over and over and over again, and that is what is happening. We apologize to you.

Judge KENNEDY. Well, no apologies are necessary, Senator.

Senator THURMOND. Of course, they have a right to do that, but at the same time it takes a lot of time from all the people who are attending, and I just hope we can speed along.

Judge KENNEDY. No apologies are necessary, and I appreciate, Mr. Chairman and Senator, the great consideration and courtesy that you have shown to me and my family. We have enjoyed it.

The CHAIRMAN. Well, Judge, as you can verify now, the Senator from South Carolina—when they said "with all deliberate speed," they really meant it. He wanted to schedule your hearing 1 week after the President had named you and 3 days before your name was sent up, so he is always moving along rapidly.

I think that our colleagues asked very good questions, and we seldom disagree, but, Boss, it went smoothly. Here we are at 6 o'clock; we are about to close down, and so I hope you have a good dinner.

Let me ask one thing of the staff. Is there any Senator on his way to ask further questions?

[No response.]