views, other than, as I have indicated, to state that one of the reasons for a case and controversy requirement is to recognize the limitations of the judicial office.

When President Truman seized the steel mills, this was an act that took place at a fixed time. It was like a taking under the fifth amendment. It was something that the court could very manageably work with. And they gave an important pronouncement in that case.

It is a case that still has puzzles to it, but it is one of the leading cases on presidential power. That was a circumstance that had fixed boundaries, both as to time and to space, and the actions of the participants involved. That is the kind of case that the court can very manageably undertake.

Senator HEFLIN. Thank you, Mr. Chairman. My time is up.

Senator KENNEDY. The Senator from Iowa.

Senator GRASSLEY. Thank you, Mr. Chairman.

Judge Kennedy, during the committee's consideration of Supreme Court nominees over the past several months, it has been asserted several times by different people that one of the jobs of a judge is to find and create rights which are not in fact mentioned in the Constitution, but which the Judge might deem to be very "fundamental." Fundamental in terms of the mind of the judge and the judge's own abstract moral philosophy.

Do you see any dangers with such an undefined standard as a foundation for constitutional analysis? In other words, how confident can we be that judges, fallible human beings as they are, will exercise that mighty power appropriately?

Judge KENNEDY. I am not sure how you can be satisfied that a judge will not overstep the Constitutional bounds. What you must do is, number one, examine the judge's record; document his or her qualifications and commitment to constitutional rule.

As I think Mr. Justice Jackson said, judges are not there because they are infallible; they are infallible because they are there.

I think that comment is somewhat inappropriate. I do not think judges think of themselves as infallible at any point. Certainly the history of the Supreme Court in which the Court has been willing to recognize its errors and to overrule its decisions, indicates that the justices take very conscientiously their duty to interpret the Constitution in the appropriate way.

Senator GRASSLEY. If we do not recognize the dangers of judges using undefined standards, aren't we doomed to end up with a small group of unelected, unrepresentative judges making the law in this country?

Judge KENNEDY. That, Senator, is one of the great concerns of any scholar of the Constitution. This is not the aristocracy of the robe.

Judges are not to make laws; they are to enforce the laws. This is particularly true with reference to the Constitution.

The judges must be bound by some neutral, definable, measurable standard in their interpretation of the Constitution.

Senator GRASSLEY. Judge Kennedy, you stated in an August 1987 speech before the Ninth Circuit Judicial Conference that there are two limitations on judicial power. I hope I interpret the speech correctly.

The first limitation is that the Constitution is a written law to which courts are bound when announcing constitutional doctrine.

As you know, Judge Kennedy, the Bill of Rights and many later amendments are phrased in broad, spacious terms. If a judge were so inclined, he or she could expand the interpretation, use, and effect of many provisions of the Constitution.

And I believe you to be an advocate of judicial restraint. As Chief Justice Marshall emphasized in *Marbury* v. *Madison,* judges have a duty to respect constitutional restraints.

How do you apply the words of the Constitution to problems that the framers could not have foreseen?

Judge KENNEDY. The framers, because they wrote a constitution, I think well understood that it was to apply to exigencies and circumstances and perhaps even crises that they could never foresee.

So any theory which is predicated on the intent the framers had what they actually thought about, is just not helpful.

Then you can go one step further on the progression and ask, well, should we decide the problem as if the framers had thought about it? But that does not seem to me to be very helpful either.

What I do think is that we can follow the intention of the framers in a different sense. They did do something. They made certain public acts. They wrote. They used particular words. They wanted those words to be followed.

We can see from history more clearly now, I think, what the framers intended, than if we were sitting back in 1789. I made that discovery when I gave the speech to the Canadian judges.

They had just written a constitution 2 or 3 years ago. They knew the draftsmen. And yet, they were, it seemed to me, more at sea as to what it meant than we were in interpreting our own Constitution.

We have a great benefit, Senator, in that we have had 200 years of history. History is not irrelevant. History teaches us that the framers had some very specific ideas.

As we move further away from the framers, their ideas seem almost more pure, more clarified, more divorced from the partisan politics of their time than before.

So a study of the intentions and the purposes and the statements and the ideas of the framers, it seems to me, is a necessary starting point for any constitutional decision.

Senator GRASSLEY. Is there any room for a judge to apply his or her own values and beliefs for the purpose of interpreting the text of the Constitution?

Judge KENNEDY. The judge must constantly be on guard against letting his or her biases or prejudices or affections enter into the judicial process.

Senator GRASSLEY. Well, what other factors are there which can affect a judge's interpretation of the text of the Constitution?

Can these factors be determined and applied without involving the personal bias of the judge?

Judge KENNEDY. The whole idea of judicial independence, the whole reason that judges are not accountable to the Congress once they're confirmed, other than for misbehavior, the whole theory is that the judge is impartial; that he will apply a law, or that she

will apply a law, that is higher than themselves. It is higher than their own particular predilections.

Senator GRASSLEY. I do not disagree, but I do not know to what extent you mentioned other factors that can come into play to affect a judge's interpretation of the text of the Constitution?

Judge KENNEDY. When a judge hears a constitutional case, a judge gets an understanding of the Constitution from many sources: from arguments of counsel; from the nature of the injuries and the claims asserted by the particular person; and from the reading of the precedents of the court, and the writings of those who studied the Constitution.

All of these factors are, in essence, voices through which the Constitution is being heard.

But the idea is that the Constitution is itself a law. It is a document that must be followed.

Senator GRASSLEY. You described yourself in a February, 1984 speech before the Sacramento Rotary Club as a "judicial conservative."

Does this mean that you are in any way adverse to evolving interpretations of the Constitution that accommodate new technology or current trends in society?

Judge KENNEDY. A conservative recognizes that any State must contain within it the ability to change in order to preserve those values that a conservative deems essential.

As applied to a judge, I think that is consistent with the idea that constitutional values are intended to endure from generation to generation and from age to age.

Senator GRASSLEY. In that August, 1987 speech before the Ninth Circuit Judicial Conference—which I previously mentioned—you stated that the doctrine of original intent is best conceived of as an "objective" rather than a "methodology."

I would like to have you explain the difference between using the doctrine of original intent as an "objective," and using it as a "methodology"; and why that is a better practice?

Judge KENNEDY. I think what I had in mind there was to indicate that the doctrine of original intent is not necessarily helpful as a way to proceed in evaluating a case; but that really it is one of the things that we want to know.

The doctrine of original intent does not tell us how to decide a case. Intention, though, is one of the objectives of our inquiry.

If we know what the framers intended in the broad sense that I have described, then we have a key to the meaning of the document.

I just did not think that original intent was very helpful as a methodology, as a way of proceeding, because it just restates the question.

Senator GRASSLEY. Well, when the objective of original intent is not met, do you reevaluate your result and underlying analysis? Or do you accept the result despite not obtaining the objective?

Judge KENNEDY. Let me see if I—if you cannot find the original intent, is that your point?

Senator GRASSLEY. Yes, when the objective of original intent is not met.

Judge KENNEDY. Is not met?

Senator GRASSLEY. Yes.

Judge KENNEDY. Original intent, broadly conceived as I have described it, is extant in far more cases than we give it credit for.

I think that in very many cases, the ideas, the values, the principles, the rules set forth by the framers, are a guide to the decision. And I think they are a guide that is sufficiently sure that the public and the people accept the decisions of the court as being valid for that reason.

If there is not some historical link to the ideas of the framers, then the constitutional decision, it seems to me, is in some doubt.

Senator GRASSLEY. Well, in your role as a judge—and I do not question your statement that original intent is more often met than we may realize—but if it is not met, do you then at that point reevaluate your result and underlying analysis?

Or do you accept the result, despite not attaining the objective?

Judge KENNEDY. Well, I do not wish to resist your line of questioning, because I think it is very important; it goes to the judicial method.

But I think that in almost all cases there is an intent, at least broadly stated; the question is whether it is narrow enough to decide the particular case.

It is, I think, an imperative that a judge who announces a constitutional rule be quite confident, be quite confident, that it has an adequate basis in our system of constitutional rule; and that means an adequate basis in the intention of the Constitution.

Senator GRASSLEY. Over the past few months, it has been suggested that the broad and spacious terms of the Constitution are best utilized by the courts to relieve the political branches of their responsibility to determine what some might consider to be the attributes of a just society.

What is your opinion of the current perception in our society that only the courts, rather than the political branches of government, should address constitutional problems?

Judge KENNEDY. I resist that idea as a proper constitutional approach. In my view, it is the duty of the legislative and of the executive to act in a constitutional manner, and to make a constitutional judgment as to the validity of each and every one of their actions.

We have a rule in the courts that we presume that a statute is constitutional. If the legislature says, well, it is simply up to the courts, the basis for that presumption is not there. If the legislature does not take the responsibility of making a constitutional determination that its actions are justified, then the presumption of constitutionality should be destroyed. I do not think that would be consistent with our political system.

Senator GRASSLEY. Judge Kennedy, do you believe that one of the consequences of this deference to the judicial branch that I have just described is the judicial activism the Supreme Court has practiced over the last 20 or 30 years, and that a good way to alleviate this problem would be for the Court to begin practicing a greater degree of judicial restraint?

Judge KENNEDY. I think judicial restraint is important in any era. It is especially important if the political branches for some

reason think that they can delegate or have delegated the power to make constitutional decisions entirely to the courts.

Senator GRASSLEY. Your answer is yes, then?

Judge KENNEDY. Yes.

Senator GRASSLEY. Judge, I am sure that you will agree with me, that there have been many unpopular, and in many cases, even "bad" laws enacted in the history of our country.

However, many of these laws, no matter how unpopular, were, or are, constitutional. What is the court's role when faced with a bad or unpopular law which is nonetheless constitutional?

Judge KENNEDY. It is very clear. The court's role is to sustain and to enforce that law.

Senator GRASSLEY. Is it your judgment, then, that it is the responsibility of the political branches of government to deal with an unpopular law?

Judge KENNEDY. Absolutely, Senator. The essence of the democratic process is that the legislature protects citizens against unjust laws, and acts promptly to repeal them.

Senator GRASSLEY. Do you think it is within the jurisdiction of the Court to address these laws, or is this an example of what you called, in your July 1986 address to the Canadian Institute for Advanced Legal Studies the "unrestrained exercise of judicial power"?

Judge KENNEDY. If a law is wrong-headed, or a bad, or an ill-conceived law, but is nevertheless constitutional, the court has no choice but to enforce it.

Senator GRASSLEY. What exactly is—using your words—the "unrestrained exercise of judicial power"?

Judge KENNEDY. The unrestrained exercise of judicial power is to declare laws unconstitutional merely because of a disagreement with their wisdom.

Senator GRASSLEY. The second limitation of judicial power which you discussed in your August 1987 speech before the Ninth Circuit Judicial Conference is the constitutional requirement of "case or controversy." Correct?

Judge KENNEDY. Yes.

Senator GRASSLEY. However, you suggested that this requirement is not as effective as it once was. Why do you think that this is so? In other words, how did you come to this conclusion?

Judge KENNEDY. The underpinning for the doctrine of *Marbury* v. *Madison* is that the court pronounces on the Constitution because it has no other choice. It is faced with a case, and it must decide the case one way or the other. It cannot avoid that responsibility, and so the constitutional question is necessarily presented to it. Chief Justice Marshall says that very clearly. He said we do not have the responsibility, or the institutional capability, or the constitutional obligation, to pronounce on the Constitution, except as we must in order to decide a case.

Now I had long thought that the case or controversy requirement therefore was an important limit on the court's jurisdiction. The court would not decide cases or issues that should be properly addressed by the political branches in the first instance.

But the case or controversy rules are changing. The Court has relaxed rules of standing in some of its own decisions. The Congress has done the same. We have class actions. We have remedial

relief. Courts have entered the 20th century in order to make their judgments efficient, which they must do, and their systems efficient, which they must do.

All of this has meant that what was once a selection process has now really diminished in its importance and its significance. The courts are more and more confronted with cases that involve the great, current public issues of our time.

Therefore, judicial restraint is all the more an imperative.

Senator GRASSLEY. Could it in any way be said that part of the blame for the ineffectiveness of the "case or controversy" requirement must lie with Congress and its historic deference towards regulating the courts?

In other words, should Congress consider removing federal court jurisdiction over certain controversies?

Judge KENNEDY. Well, that is a very delicate question, Senator. The authority of the Congress to reduce the jurisdiction of the federal courts in a particular class of cases presents a very difficult, and, I think, a significant constitutional question.

It presents a question that goes perhaps to the verge of the congressional power. Before the Congress would enact such a rule, I would submit that it would have to have the most serious and the most compelling of reasons, and even after that any such attempt would present a serious constitutional issue for the Court itself to decide.

Senator GRASSLEY. Well, should the Supreme Court try to find some way to make more effective the "case or controversy" requirement?

Judge KENNEDY. Case or controversy is requisite in the Constitution and I agree that the Court should be very, very careful to insure that that requirement is met in every case, and I think it should pay very, very close attention to that.

Senator GRASSLEY. I was asking my question based upon your statement that in modern times there have been ways of getting around the "case or controversy" requirement; that it is not as effective as it once was.

Is there some answer here? I sense that you seem to feel that this is an area in which Congress ought not to operate in, or at least you seem to indicate that it is a very controversial area. I think you have indicated that there is a problem; is there some answer to the problem?

Judge KENNEDY. I may also have misinterpreted your earlier question. Congress certainly can relax the rules of standing, or tighten the rules of standing, in order to give more content to the case or controversy rule without——

Senator GRASSLEY. Well, of course Congress has had some deference toward regulating the courts to any great extent.

Judge KENNEDY. Yes.

Senator GRASSLEY. Would it be unfair to say that another reason for the failure of the "case or controversy" requirement is the philosophy of judicial activism which the Court has applied over the last 20 or 30 years? In other words, because the Court has so often extended its holdings to issues not directly presented in the cases before it, do you think litigants and attorneys are more inclined to

go to court with attenuated, rather than direct, injuries, expecting relief, nonetheless?

Judge KENNEDY. I would not quarrel with that characterization. I might be a little bit hard-put to give you a specific example, but there seems to be a thrust in favor of the courts reaching out to decide the issues.

Senator GRASSLEY. The previous nominee before this committee to fill this vacancy on the Supreme Court was a strong advocate of the belief that rationale was more important than results.

He criticized what he called result-oriented jurisprudence in which the rationale was made secondary to the actual result reached.

He was admittedly taken to task for his position on this matter, especially before this committee.

What is your position regarding this so-called result-oriented jurisprudence, and when, if ever, is it justified?

Judge KENNEDY. I think if a judge decides a case because he or she is committed to a result, it destroys confidence in the legal system.

Senators and Representatives are completely free to vote for a particular bill because it favors labor, or because it favors business. That is the way politics works, and that is your prerogative. To identify such an interest, it seems to me, is very candid.

That is improper for a court. The court must base its decision on neutral principles applicable to all parties. That is inconsistent, in my view, with deciding a case because it reaches a particular result.

Now we all know that the way we make our judgments in everyday life is to look quickly at a result and act accordingly if the result seems instinctively correct.

I think sometimes judges do that initially when they hear a case. They say well, this case is just wrong, or this case is just right. But the point of the judicial method is that after the judge identifies the result, he or she must go back and make sure that that result is reachable because the law requires the result, and not otherwise.

Senator GRASSLEY. I think I liked the first half of your answer. On the second half, are you in the middle between "results" versus "rationale"?

Judge KENNEDY. I insist that a result is irrelevant. I just have to tell you that many judges have an instinctive feeling for a case, and sometimes you reason backwards.

Sometimes you say the case ought to come out this way and you begin to write it, and to prepare an opinion for your colleagues, and it just is not working, and then you know that the result is wrong.

That is the nature of the judicial method. That is why we write. We do not write because it is easy to read, or because we think people enjoy reading it. We write because it is a discipline on our own process.

Senator GRASSLEY. Judge, as we become more familiar with you and as we study those opinions that you have written, I sense that you are very adept at addressing the narrow question at hand without expanding into unnecessary discussions of the law.

Can you think of any situation where it is appropriate for a Supreme Court Justice to depart from the issue at hand, and announce broad, sweeping constitutional doctrine?

Judge KENNEDY. I think that the constitutional doctrine that is announced should be no broader than necessary to decide the case at hand.

I do have to tell you this, Senator, and it was touched on earlier. When the Supreme Court has only 150 cases a year, and it is charged with the responsibility of supervising the lower courts, it has to write with a somewhat broader brush, in order to indicate what its reasons are.

This does not mean, however, that it is free to go beyond the facts of the particular case, or that it is free to embellish upon the constitutional standard.

Senator GRASSLEY. Mr. Chairman, thank you. Judge Kennedy, thank you.

Judge KENNEDY. Thank you, sir.

The CHAIRMAN. Thank you. Judge, we do not have time to get another round in and keep the commitment to get out of here by 6 which I told my colleagues, and we have four Senators who have yet to ask a first round. I do not know how many will have a second.

Judge, would you mind coming in at 9:30 tomorrow instead of 10, so we can start a little bit earlier?

Judge KENNEDY. Not at all. I am here at the pleasure of the committee, Senator.

The CHAIRMAN. All right. Why don't we start at 9:30. We will probably start with Senator Specter at 9:30 and Senator Metzenbaum at 10, unless Senator Metzenbaum is here, and we would alternate. But otherwise, I had told him he would probably start at 10, and I do not know whether he will be able to be back by 9:30. I do not know if he will get the message.

So if you are prepared to go at 9:30, or at 10:00, if not 9:30, 10 o'clock would be the time we would start.

Senator SPECTER. That is fine, Mr. Chairman. I very much appreciate that.

The CHAIRMAN. And Judge, I appreciate your being so forthcoming today and we look forward to another day, and it is my hope that tomorrow we can finish with your testimony.

I know several Senators will have a second round of questions, and we will plan on going from 9:30 until noon, and break for an hour again, and hopefully go until we finish, and then Wednesday morning begin the public witnesses with, if all goes well, with the American Bar Association, Judge Tyler coming before the committee with the recommendation of the ABA.

The Senator from South Carolina.

Senator THURMOND. Thank you, Mr. Chairman. I just want to say that Judge Kennedy has handled himself in an exemplary manner, and I feel that we stand a chance that we might be able to finish his testimony tomorrow.

The CHAIRMAN. The best measure of how exemplary the manner is, is every Senator who has spoken so far has indicated they do not fully agree with you. You have a lot going for you.

Judge KENNEDY. Thank you very much, Senator.

The CHAIRMAN. Seriously, Judge, I appreciate you being so forthcoming.

The hearing will recess until tomorrow at 9:30.

[Whereupon, at 5:40 p.m., the committee adjourned, subject to the call of the Chair.]