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."

And it seems, if you read the ninth amendment, how anyone could avoid the conclusion that the word "retained" means "retained." Now you can argue whether it is retained by the States, or retained by individuals. That is a second argument. I won't go into that at the moment. But it seems to me that one of the—I have not found any reason, which I think in part disturbs my friend from New Hampshire, to disagree with any of the points you have made about your interpretations of the Constitution.

As I have indicated earlier, I find your reading of the Constitution, your finding of the word "liberty" in the Constitution and that it has some meaning and application, and your attitude about the fourteenth amendment in general, the fifth amendment, to be a conservative, mainstream and fundamentally different than Judge Bork's.

But having said all that, let me ask you a few questions, and hopefully this will be the end of it for me. I indicated to you earlier that staff received a telephone call from a former student and subsequently, as we do with all these calls, followed up on the call and apparently contacted four of your former students, all of whom are supporters, and strong supporters, of your nomination to the bench.

But the issue related to the question of a discussion you had in 1973 with students about the role of women in law firms at that time; that is, in the context of 1973. Could you for the record just tell us a little bit about it, without my characterizing it, because you indicated you remember it vaguely, the incident? Just tell us a little about it.

Judge KENNEDY. Both the incident and the class discussion are not very clear.

The CHAIRMAN. Quite frankly, I don't think they are very important, either.

Judge KENNEDY. But I had the habit of talking to my students in the course of a 3½-hour lecture about the problems that lawyers face in their practice, and I think it is imperative that lawyers realize that they have an obligation, first of all, to know themselves, to know their own motivations and to comply with the law strictly so that they can be a model for their clients.

And I recited to my class, as I recall, the incident of a lady who had come to our office seeking employment, and at the time we did not have a position open in any event, but I was pleased to chat with her. She was extremely well qualified. She had sent in a résumé I think and I had said that if she was in town we would be glad to talk to her. It wasn't clear to me from the résumé that she was male or female.

And when she was a female I told her that she might find some resistance in certain law firms and told her the story of a lawyer in San Francisco whom I know very well and who is a man of remarkable self-knowledge and remarkable honesty and who has a remarkable admiration for the law, who had taken the position that he would not have women in his law firm because he had a very close relation with his partners and he did not want to share that relation with another woman because of the respect he had for his wife. He behaved the way he did in front of his partners, in a way that he thought was very free, and he thought of his relations with the law partners as very intimate.

And I told her that this was an attitude that many lawyers had about their law partners. I said that in my own law firm that she would find certain problems of adjustment because of the way my partners behaved, but that I wanted to put this out in front for her, to tell her that this was the kind of thinking that some people that were sitting on the other side of an interview desk would be having, and that if I were ever to either hire or not hire her and I harbored those feelings that I wanted to make her sure that she knew that I was trying to explore, for my own satisfaction, my own motives, and my own intent.

And I told her that the world was changing. I told her also the story of when I was in the Harvard Law School and a certain professor would have "Ladies Day," and ladies were not called on unless it was "Ladies Day." And today this would not only be seen as terribly stigmatizing and patronizing but probably actionable.

And I recited this to my students to indicate that lawyers must always be honest with themselves about their motivation, honest with the people with which they deal about their motivation. And the lady, as I recall, was very appreciative of the conversation. She subsequently went to work in her own city of Los Angeles, I believe, which was where she was from. And that was all that the incident was about.

The CHAIRMAN. Have your views changed about the role of women in law firms since 1973?

Judge KENNEDY. Well, of course that wasn't my view. I was trying to indicate to her that I thought that the law was very much in flux and that it would change, and it has. Women now occupy——

The CHAIRMAN. Is it good or bad that it has changed?

Judge KENNEDY. I think it is good that it has changed.

The CHAIRMAN. Why?

Judge KENNEDY. Women can bring marvelous insight to the legal profession. Women, themselves, have been in a position where they have been subjected to both overt and subtle barriers to their advancement, and the fact that women are on the bench and on our court brings a very, very valuable insight and perspective.

We now have, I would think, close to 35 or 40 percent women in the night division of our law school class, and they are making their way into the profession and are performing admirably. And it is too bad they were not in it a hundred years ago.

The CHAIRMAN. Do you think the attitude of the profession has changed as well?

Judge KENNEDY. Absolutely. I have had female law clerks that I have worked extremely closely with and it has been a really very remarkable years when they have been with me. I have enjoyed it very much.

The CHAIRMAN. When did you hire your first female law clerk, if you know?

Judge KENNEDY. I think my second set of clerks had my first female—I guess my third set of clerks, my third year.

The CHAIRMAN. Roughly what year was that?

Judge KENNEDY. 1978.

The CHAIRMAN. You indicated, and I am paraphrasing, in response to a question from one of my colleagues, you said if someone

had been sitting here 20 years ago and had been asked to comment on the law of the first amendment as it relates to the law of libel, not even the greatest prophet could have predicted the state of the law today. It may very well be that with respect to privacy we are in the same rudimentary state of the law.

Now, Judge, there has been, obviously, we have just had some discussion about your view on the ninth amendment. As you know, Justice Goldberg, as you mentioned, in the birth control case and Justice Burger in the *Richmond Newspaper* case both treated the ninth amendment as a rule of somewhat generous construction, not just a reminder that States can protect individual rights in their own constitution, an idea that would have made the ninth amendment in my view redundant in light of the fact we had a 10th amendment that provides for just that.

In the view of Justices Goldberg and Burger the ninth amendment announces that the word "liberty" in the fifth amendment and later in the 14th amendment is broader than specifically enumerated rights contained in the Bill of Rights. The ninth amendment, in other words, in my view confirms in the text of the Constitution that spacious reading of liberty, the so-called Liberty Clause, that you have said you thought was a proper reading.

I understood you yesterday as embracing the view of Goldberg and Burger in the regard that the notion of liberty, the Liberty Clause as being one of those spacious phrases.

Former Chief Justice Burger thought that the ninth amendment shows a belief by the framers that fundamental rights exist that are not expressly enumerated in the first eight amendments, and the intent of the rights included in the first eight amendments are not exhaustive.

I would like to quote from a case. Justice Burger says:

> But arguments such as the State makes have not precluded recognition of important rights not enumerated. Notwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees.
>
> For example, the rights of association and of privacy, the right to be presumed innocent, the right to be judged by a standard of proof beyond reasonable doubt in a criminal trial, as well as the right to travel, appear nowhere in the Constitution or the Bill of Rights. Yet, this important but unarticulated rights have nonetheless been found to share Constitutional protection in common with explicit guarantees.
>
> The concerns expressed by Madison and others have been resolved. Fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined.

Then there is a footnote, Footnote 15. It says, "Madison's comments in the Congress also revealed a perceived need for some sort of Constitutional saving clause, which, among other things, would serve to foreclose application of the Bill of Rights of the maximum that the affirmation of particular rights implies the negation of those not expressly defined.

"Madison's efforts, culminating in the ninth amendment, serve to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding others."

Now, Judge, in general terms do you share the view of Justice Burger about unenumerated rights?

Judge KENNEDY. Well, in general terms, it is not clear to me that Chief Justice Burger's position would be any different if the ninth

amendment were not in the Constitution. I think liberty can support those conclusions he reached, and the meaning, purpose, and interpretation of the ninth amendment, I think the Court has very deliberately not found it necessary to explore.

The CHAIRMAN. But I think Justice Burger used almost the same words you used yesterday that the Senator from New Hampshire would very much like for you to recant. He uses the phrase "saving clause."

Judge KENNEDY. I think I used the words "reserve clause."

The CHAIRMAN. You used the word "reserve" clause.

Judge KENNEDY. And I think the Court as a whole—I am not talking about individual Justices—has taken that view of the amendment, that they just find it unnecessary to reach that point.

The CHAIRMAN. Are they not also, with good reason, a little bit afraid of the amendment, because once you start down the road on that amendment—I find the ninth amendment clear, and I think most Justices have found it clear, in fact.

But they are reluctant to use it because once you start down the road on the ninth amendment, then it becomes very difficult to figure where to stop; what are those unenumerated rights.

Judge KENNEDY. And it is the ultimate irony that an amendment that was designed to assuage the States is being used by a federal entity to tell the States that they cannot commit certain acts.

The CHAIRMAN. Well, ironically, I think that it was, in fact, not designed, that amendment, in particular, to assuage the States as it related to the rights of the States. I think it was designed to assuage the representatives of the various States to allay their fears that any government—in this case, the only one they were dealing with at the moment, the central government—was going to, as a consequence of the first eight amendments, conclude that they were the only rights that, in fact, were retained by the people.

Judge KENNEDY. I understand that position.

The CHAIRMAN. That is a very tactful answer and you would make one heck of an ambassador. Maybe there are State Department representatives, but I do not think it is appropriate for me to push you any further on this because I, quite frankly, think you have left us all where I think it is proper to be left, quite frankly, and that is I do not think anybody here and anybody not here, including the President of the United States, and I suspect, Judge, not even you, knows how you are going to rule on some of these issues.

Quite frankly, I said at the outset when Judge Powell announced his resignation that, for me, that is just what I was looking for, as long as whomever came before us came with an open mind, did not have an ideological brief in their back pocket that they wished to enforce or move into law once they got on the Court, did not have an agenda.

The one thing that has come clear to me is that you are extremely bright, extremely well informed, extremely honorable, and open-minded. I suspect you are going to rule in ways that I am going to go, oh, my goodness, how could he have ruled that way. And I suspect you are going to rule in ways where Senator Humphrey is going to go, oh, my goodness, why did I let him get on the Court. But it seems to me that is the way it should be. We are not entitled

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 *Arnada* 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