

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 penumbræ?

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. "Penumbra 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."