Senator KENNEDY. But it really isn't a question just of being known, is it? It's a question about what you basically represent or your own beliefs on this.

Judge KENNEDY. Yes, although I think sometimes continued membership can be helpful. In California the rule is that judges should remain in those clubs and attempt to change their policies and resign only when it becomes clear that those attempts are unavailing.

Senator KENNEDY. Don't you think the club's rules did actually then stigmatize women and minorities?

Judge KENNEDY. Well, they were not intended to do so. I think women felt real hurt, and there was just cause for them to want access to these professional contacts.

It is most unfortunate, and almost Dickensian, for a group of lawyers to meet at 11:30 and to settle a case and to celebrate and say, well, let's all go to the club. And suddenly there is a silence, and they cannot go because there is a woman there. That is stigmatizing. That is inappropriate.

Senator KENNEDY. Mr. Chairman, I understand my time is up. In my next questioning, I would like to come into the area of the voting rights issue.

I think I have indicated to you that I had hoped to be able to get to that at another time.

Judge KENNEDY. Yes, sir.

The CHAIRMAN. Thank you, Senator. Senator Hatch.

Senator HATCH. Again, I welcome you, Judge, before the committee. Let's revisit for a few minutes the question of club membership. Just a few questions do linger from that.

First, as I understand it, you joined the Olympic Club back in 1962; is that correct?

Judge KENNEDY. That is correct, sir.

Senator HATCH. You have described the club a little bit, but could you describe it a little further with regard to some of its public service and charitable activities that it supported?

Judge KENNEDY. Well, it has been a club that is principally prominent in athletics. And it has promoted athletics for young people in the community for over 100 years.

It is recognized as a club with a strong sense of civic obligation. It has athletic meets and so forth at its facilities.

Senator HATCH. As I understand it, the club came into being about 2 years before the Civil Rights Act of 1964.

Judge KENNEDY. The Olympic Club was founded in the 19th century and I joined in 1962.

Senator HATCH. And in 1962, I think it's fair to say, a lot of clubs did have the same policies as this club, and that was one of the reasons why Congress enacted the 1964 act to begin with.

So it took only a few years for individuals to understand this.

As I understand it, you mentioned that the Olympic Club was the site of the U.S. Open, and this was a great honor, as I understand it, for that particular club at that time.

Judge KENNEDY. Yes, sir.

Senator HATCH. What preparations did the club make for this national event?

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Judge KENNEDY. I was not involved in it at all. I know from the press that it was a great event for the club, and they made arrangements to serve all of those who purchased a ticket to come in and watch the golf match, and they wanted to put their best foot forward, of course, because it is a great event.

Senator HATCH. And when the press learned that the club, according to its bylaws, was open only to, quote, gentlemen, unquote, what was the reaction, if you recall?

Judge KENNEDY. Well, the reaction in the community is one I can only gauge by the press. There were press stories on it. It did not seem to dampen attendance at the Open or interest in the Open.

But I thought there was a problem disclosed by that, and that problem was not going away. That was very clear.

Senator HATCH. Well, the reaction some thought might have been somewhat unexpected. Because as I understand it there were over a thousand women who had privileges at the club and had the regular use of its facilities.

But am I correct that they did that through their husbands or through some male members?

Judge KENNEDY. I cannot answer that question, Senator.

Senator HATCH. That was my understanding.

Judge KENNEDY. That is plausible.

Senator HATCH. Well, apparently, some of this heightened scrutiny that the press brought out and others brought out came to your attention. Was that about at the time when you began to discuss with the club leaders some of these problems?

Judge KENNEDY. Yes, sir.

Senator HATCH. You referenced that discussion in your letter dated August 7th, 1987, and you asked to be notified of the results of the poll of the membership, as I recall.

In fact, you said that—in your letter, you said, the fact is that constitutional and public morality make race or sex distinctions unacceptable for membership in a club that occupies the position the Olympic Club does, unquote.

Judge KENNEDY. That was my position. And I urged the board to go ahead with the membership poll and see if the bylaw change could be effected.

Senator HATCH. In other words, by your letter, by what you were doing, you were strongly urging the club to end the process of discrimination, or its policy of discrimination?

Judge KENNEDY. Yes, Senator.

Senator HATCH. Okay. I think another point that is worth repeating, it occurred in the first week of August—at that point Judge Bork was President Reagan's nominee. The hearings had not yet begun for Judge Bork, and most commentators felt that he would have a rough time, but they felt that he was going to make it through and that he was going to be confirmed. Moreover, your name had not yet surfaced as one of the leading candidates for the Supreme Court nomination in the way your colleague Cliff Wallace's name had arisen at that time.

I only mention this because we ought to be completely clear that you were acting, it seems to me, out of a sense of constitutional and public morality, as you said, not on the basis of any hint that there

might be a higher calling in your future when you wrote that letter.

So what was the outcome of the vote at the club?

Judge KENNEDY. I don't know what it was; three to two is my guess. There are some 7,000 members of the club. I had better not guess what the vote was.

I'm not allowed to come to meetings: I'm not a voting member, but apparently it was a great debate. The membership was divided on it.

Apparently the board of directors are going to continue to try to press for this change.

Senator HATCH. I see. When were you informed of that particular vote?

Judge KENNEDY. Well, I was originally informed that the vote had been successful, that the measure had been successful to change the by-laws.

So I congratulated myself for having played a small part in bringing the membership meeting about. It came to my attention about a week later that my information was wrong. The proposal had actually been turned down.

So I wrote a letter saying that my position had simply become untenable.

Senator HATCH. I see. Are you now a member of the club?

Judge KENNEDY. No, sir.

Senator HATCH. Well, it seems to me that under the circumstances your actions are basically above reproach. The most you could be faulted for is not recognizing the problem earlier, but then nobody else had recognized it either. Many other clubs have had similar policies and they have gone unnoticed as well. I am aware of a number of popular clubs here in the Washington, DC area, for instance, that have this same kind of policy. So I just wanted to bring that out because I think that is important.

Will you describe for us the Del Paso Country Club and its activities in support of worthy community ventures?

Judge KENNEDY. It is a country club in Sacramento with a golf course and a swimming pool. I had been a member of it when I was a boy. My family and children enjoyed it. And again, I have the greatest respect for the members of that club.

The by-laws of the club, in 1975 when I became a judge, used male pronouns and led to the inference that it was male-only membership, although there were some women members. I objected to the by-laws being written in those terms and the board of directors changed the by-laws.

My purpose in making the recommendation was so that it would be clear that women would be admitted to the club. Women are admitted to the club as members, but a quick look at the roster shows there is not any kind of a representative mix based on the professional community.

However, the club does not have a policy or a practice of excluding on the basis of sex or race as far as I know.

Senator HATCH. In fact, there have been women members of the club since the early 1940's, as I understand it, according to my records.

Judge KENNEDY. Yes.

Senator HATCH. Well, once again I can only say your actions demonstrate nothing it seems to me but heightened sensitivity to any perception of bias. You know, even when the by-laws might have been technically complied with, or might have technically complied with the law you urged an effort to remove any residual sense of difficulty there or problems. So I think that is an important point, too.

Judge KENNEDY. Thank you.

Senator HATCH. Your attention to your judicial and ethical duties I think is particularly underscored by your activities with respect to the Sutter Club. Can you describe that club again, and its activities?

Judge KENNEDY. That is a downtown club primarily used for luncheon. It is a very well-known club used by many in the government and in business. The club sometimes has grand functions in the evening which are open for parties that are sponsored by members, and persons of all races and gender are welcome.

Senator HATCH. I see. You joined that club in 1963, as I understand it?

Judge KENNEDY. Yes.

Senator HATCH. About then?

Judge KENNEDY. That is about right.

Senator HATCH. That also is one year before the 1964 Act, Civil Rights Act. In that case, however, the club's by-laws did not bar women but the club's practice seemed to exclude females.

Judge KENNEDY. That is my understanding, that the practice was fairly clear.

Senator HATCH. Well, when and why did you leave that club?

Judge KENNEDY. I was concerned about the policy of excluding women. I went to the club for lunch and was known, really, only as a judge. Although I had many close friends there, it seemed to me I was really there in my professional capacity. I was concerned about the appearance of impartiality.

Senator HATCH. Okay. Well, again I think your actions show extreme sensitivity to these problems, and I think that is much in your favor and I just want to compliment you for it.

Let me ask you about the Sacramento Elks Lodge. The propriety of your actions with respect to club memberships I think is bolstered with respect to the Elks Lodge. Can you describe the Sacramento Elks Lodge and its charitable and service activities?

Judge KENNEDY. Again, I simply used the club for its athletic facilities. I really was not an active participant in the club, but I know that they undertake any number of civic and charitable activities and that membership in the club is viewed by all who are in it as a privilege and as a way to furthering charitable and civic purposes.

Senator HATCH. What is that organization's policy with respect to women?

Judge KENNEDY. I do not know, Senator.

Senator HATCH. Okay. When did you join that club, and when did you resign?

Judge KENNEDY. It is in my questionnaire.

Senator HATCH. Okay.

Judge KENNEDY. I just do not have the dates. I believe I resigned shortly after I became a judge.

Senator HATCH. Well, I just submit to anybody looking at it carefully that that also is an instance of your responding to at least a perception problem back in 1978, and that was years before President Reagan was elected. And I think your actions as a whole on all of these matters are very commendable with respect to upholding your ethical duties as a judge. I just want to commend you on that.

Let me turn to another, totally different subject. Few provisions of the Constitution are more important to Americans and our way of life than the free speech guarantees of our Constitution, our first amendment. Accordingly, I would like to inquire a little bit about your record on free speech.

In the first place, let me just ask you what is your view of the importance of the speech clause and its role in our society?

Judge KENNEDY. The first amendment may be first, although we are not sure, because the framers thought of it as the most important. It applies not just to political speech, although that is clearly one of its purposes. In that respect it ensures the dialogue that is necessary for the continuance of the democratic process. But it also applies, really, to all ways in which we express ourselves as persons. It applies to dance and to art and to music. These features of our freedom are to many people as important or more important than political discussions or searching for philosophical truth. The first amendment covers all of these forms of speech.

Of course, the first amendment also protects the press. One of the unfortunate things about the case law is that the great cases on the press are *New York Times* v. *Sullivan* and *United States* v. *New York Times and The Washington Post.* But the press is not monolithic. In Northern California I believe that there are 37 small papers that in many cases are literally "mom and pop" operations where the editor has to stop writing at noon because he has to start working the printing press. These papers simply must have the protection of the first amendment if they are to be vigorous in reporting on matters of interest to their readers insofar as their locality is concerned. They vitally need the protection of the first amendment. It is not just for The Washington Post and The New York Times.

Senator HATCH. Well, our first amendment under American jurisprudence, of course, is a model for the rest of the world because it provides rights and privileges and it actually forbids any prior censorship or restraints on speech except in the most extenuating circumstances. And one of your cases dealt with an attempt to place a restraint on the broadcast of a TV program, and that was the 1979 case of *Goldblum* v. *NBC.*

Now would you explain why the privacy and fair trial interests of the petitioner, an executive officer implicated in the equity funding scandal, were not sufficient to block the broadcast of the TV program, if you remember that case?

Judge KENNEDY. What happened in that case, as I recall it, was that a person who was the subject of what is called a docu-drama was concerned that his rights were being infringed by the publication, or by the broadcast of the television show. He was a some-

what celebrated figure who had allegedly committed serious wrongdoings in a financial scam.

The trial judge was sufficiently concerned about the allegations that he ordered the television network to bring the tape to the courtroom and show the tape. This was a matter, really, of hours or maybe a day or so before the broadcast was to go on nationwide TV.

I presided over a three-judge panel in an emergency motion. He issued the order at 11:30 and we vacated it at 5 minutes to 12. We said that it was a prior restraint on speech and that for the district judge to order the film delivered was in itself an interference with the rights of the press. I wrote the opinion and issued it a few days later. That is the *Goldblum* opinion.

Senator HATCH. In my mind it is significant that the courts, too, have sometimes forgotten to protect the Constitution's prior restraint doctrine. Fortunately, other courts are available to correct those errors and that was a perfect illustration.

Although access to government records is not a first amendment speech issue, it is nonetheless related to the access which our citizens have to their government. In that sense, it is related to the very principles by which citizens participate in a government run by the people.

Now, in this regard, I was interested in your 1985 *CBS* v. *District Court* case. If you remember that case, I know sometimes it is awfully difficult, you have participated in so many cases. I don't mean to just isolate and pick these out of the air, but it is an important case. Could you discuss that with the committee? Would you also explain why the Government's effort to suppress the media's access to certain sentencing documents in a case related to the DeLorean trial was really rejected?

Judge KENNEDY. This was a case in which one of the coprincipals or accomplices in the DeLorean drug matter had entered a guilty plea and then applied to the district court, as is his right, to modify the sentence. The Government of the United States joined with the attorney for the defendant in asking that the documents be filed under seal.

The press objected. There was standing for the objection, and we ruled that those documents could not be filed under seal. We indicated that the public has a vital interest in ascertaining the sentencing policies of the court. I think I indicated that this is one of the least satisfactory portions of the entire criminal justice system and that the public ought to know if a sentence was being reduced and why.

Senator HATCH. One further first amendment issue arose in some of your past cases involving the operation of the Federal Election Commission. In the 1980 *California Medical Association* case, you decided that limitations on contributions to political action committees are not eligible for the full protections of the free speech clause.

When people contribute to a PAC they choose that committee in order to express themselves on political issues and they make the contribution to, in essence, advocate their views. Now can you explain why limiting this form of expression would not be a limitation on the free expression principles in the first amendment?

Judge KENNEDY. This was a case in which we were asked to interpret a new statute passed by the Congress. We thought we had guidance from the Court that controlled the decision. We expressed the view, as we understood the law of the Supreme Court, that this was speech by proxy. This was not direct speech by the person who was spending the money, rather he or she was delegating it to an intermediary. We thought that was a sufficient grounds for the Congress of the United States in the interest of ensuring the purity of the election process to regulate the amount of the contribution.

Senator HATCH. All right, let me turn for a few minutes to criminal law because you have an extensive record and background in criminal law and few people realize that no category of cases is more often litigated in the Supreme Court than criminal law cases. From my point of view, this is entirely appropriate because life and liberty, not to mention the order and safety of our society, are nowhere more at stake than in criminal trials. Accordingly, I would like to review with you a portion of your record on criminal issues.

Could you just give us the benefit of discussing with us generally how you approach the task of finding an appropriate balance between the procedural rights of the defendant and society's right to protect innocent victims of crime?

Judge KENNEDY. Well, Senator, I do not think that there is a choice between order and liberty. We can have both. Without ordered liberty, there is no liberty at all. One of the highest priorities of society is to protect itself against the corruption and the corrosiveness and the violence of crime. In my view judges must not shrink from enforcing the laws strictly and fairly in the criminal area. They should not have an identity crisis or self-doubts when they have to impose a severe sentence.

It is true that we have a system in this country of policing the police. We have a system in this country that requires courts to reverse criminal convictions when the defendant is guilty. We have a system in this country under which relevant, essential, necessary, probative, convincing evidence is not admitted in the court because it was improperly seized. This illustrates, I suppose, that constitutional rights are not cheap. Many good things in life are not cheap and constitutional rights are one of them. We pay a price for constitutional rights.

My view of interpreting these rules is that they should be pragmatic. They should be workable. We have paid a very heavy cost to educate judges and police officers throughout this country, and the criminal system works much better than many people give it credit for. In every courthouse at whatever level throughout the country, even if it is a misdemeanor traffic case, the judge knows the *Miranda* rule, he knows the exclusionary rule, and so do the police officers that bring the case before him. We have done a magnificent job of educating the people in the criminal justice system.

On the other hand, it is sometimes frustrating for the courts, as it is frustrating for all of us, to enforce a rule in a hypertechnical way when the police or the prosecutor have made a mistake in good faith. The good faith exception to the exclusionary rule is one of the Court's recent pronouncements to try to meet some of these concerns. It remains to be seen how workable that exception is.

Sometimes exceptions can swallow the rule, and the Court has yet to stake out all of the dimensions of this exception.

That is just a rough expression of my general philosophy in the area.

Senator HATCH. That is good. As I mentioned earlier, nearly one-third of the Supreme Court's time is consumed in criminal trials, criminal matters. It seems to me that this is very appropriate for another reason because studies have shown that the poor, the aged, women, the minority groups are disproportionately victimized by crime and when our criminal justice system fails these groups are the first to suffer. So what role do you think the plight of victims of crime ought to play in the criminal justice process?

Judge KENNEDY. You know, Senator, I went to one of the great law schools in the country—I am sorry Senator Specter is not here to agree with that—and I never heard the word "victim" in three years of law school, except maybe from the standpoint of an apology that a corpus delicti was not present. This is the wrong focus. We simply must remember that sometimes the victim who is required to testify, who misses work without pay, who sits in the courthouse hallway with no special protection, and who is stared at by the defendant and harassed by the defendant's counsel, undergoes an ordeal that is almost as bad as the crime itself.

The Congress of the United States has made a very important policy statement in passing the Victims Assistance Act. It has given the courts a new focus, and a focus that is a very, very important one in the system. Judges recognize that victims, too, have rights.

Senator HATCH. I think that is great. In October of 1987, the Bureau of Justice Statistics reported that the rate of violent crime dropped 6.3 percent in 1986. Now, of course, this was no consolation to the victims of crime, but it is important to realize that since 1981 the rate of violent crime has dropped nearly 20 percent; 7 million fewer crimes occurred in 1986 than in the peak year of 1981. That does not mean that the battle is being won. I am sure we will find statistics to show that drug abuse and its link to crime is definitely on the rise.

Nonetheless we are gaining ground on crime to some degree. Do you feel that the courts have a role to play in ensuring that this hard-won progress on crime continues?

Judge KENNEDY. Absolutely, Senator. They are the front-line agency for administering the criminal justice system, and we have much to do, particularly in the area of corrections, which judges do not know much about. But in so far as the enforcement of the criminal laws, the courts do have the responsibility to ensure that their procedures are efficient, that they understand the law, and that they apply it faithfully.

Senator HATCH. In this regard, I would like to discuss with you one of your death-penalty cases, namely, the *Neuschafer* v. *Whitley* case.

Judge KENNEDY. Yes, sir.

Senator HATCH. As I understand that case, an inmate had murdered another inmate, and when you first received the case, you sent it back to the lower court to make sure that the evidence in that case—it was a statement by the accused—was proper. Now

when that was established, the case returned to you, and several arguments were made against the State's decision to order the death penalty.

Could you recall some of the arguments and why they were insufficient in that case?

Judge KENNEDY. Senator, I have a little difficulty in answering that question because my characterization of the arguments might bear on the petition for rehearing.

Senator HATCH. Sure. All right. Then I will——

Judge KENNEDY. That case is still before us.

Senator HATCH. That is one of those cases that goes on and on, then.

Judge KENNEDY. I would rather not characterize an argument in a way that would seem either too generous, or too limited for the particular parties in that case.

Senator HATCH. Well, let me move to another capital-crime case in which you were involved, and that was *Adamson* v. *Ricketts*, and I do appreciate your sensitivity there, and this involved the murder of an Arizona newspaper reporter with a car bomb.

As I understand it, the defendant had confessed to the murder but had escaped the death penalty in the first trial because of a plea bargain.

Now, would you briefly state the facts of that case, and how you became involved.

Judge KENNEDY. This case is also appearing before us—or, rather, is still before us on remand from the Supreme Court of the United States—so I will give only a capsule description.

A newspaper reporter was killed when a bomb was placed in his car by a person connected with the Mafia. The reporter lost both arms and both legs, but lived for 10 days.

He identified the defendant in this case, Adamson. Adamson was brought to trial, but the question was whether or not Adamson would tell who paid him to do this work. As part of a plea bargain, Adamson did agree to testify, and in exchange, the State of Arizona reduced the charge to second-degree murder. I think that is accurate; but, in any event, the State dropped the capital sentence demand that it had made earlier. Adamson did testify, the two were convicted. The Supreme Court of Arizona then reversed, so another trial was called for.

At this point Adamson said that he wanted to change the deal. The question came to our court whether or not his double jeopardy rights had been properly protected. Some of my colleagues thought they had not. Some of us thought that the plea bargain itself was clear warning to Adamson that he had certain rights that were being waived.

I was in the dissenting position. The Supreme Court of the United States agreed with the dissenters. The case has now been sent back to the ninth circuit on other issues.

Senator HATCH. Well, in other words—my time is up—but in other words, the Supreme Court overturned the majority of your court——

Judge KENNEDY. Yes, sir.

Senator HATCH [continuing]. And followed your dissent——

Judge KENNEDY. That is correct.

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Senator HATCH [continuing]. In finding that the plea bargain should not figure into the double jeopardy clause in this particular instance, so that resulted in the reinstatement of the death penalty for the cold-blooded car bombing. Is that correct?

Judge KENNEDY. Yes, sir.

Senator HATCH. All right. Well, I have a lot of other questions, but I have appreciated very much the responses you have made here today.

Judge KENNEDY. Thank you, Senator.

Senator HATCH. Thank you.

The CHAIRMAN. Thank you, Senator. As I indicated earlier, we will very shortly recess for 15 minutes, and then we will come back and stay at least until 5 and no later than 6.

So we will recess now for 15 minutes.

[Recess.]

The CHAIRMAN. The hearing will come to order.

Well, Judge, how is it so far?

Judge KENNEDY. It is very fair, Senator. Since I have been doing this to attorneys for 12 years, it is only fair that it be done to me.

The CHAIRMAN. Senator Simpson is worried about your students. He wants to make sure they are observing.

I will now yield to my colleague from Arizona, Senator DeConcini.

Senator DECONCINI. Thank you, Mr. Chairman.

Judge Kennedy, I appreciate your candidness and response to previous Members here. I think it is very helpful, and quite frankly, I think it tells us something about you, both as a jurist and as a lawyer, and as a family person of values and sensitivity, and that is important to this Senator, and I think it is important to the process.

I am very interested, Judge Kennedy, as I discussed with you briefly, the Equal Protection Clause in the 14th amendment, and I would like to review some of that.

Based on some of your decisions, and your teachings, I consider you an expert in it, and I do not consider myself in that vein at all. However, it is of great importance to me, for many compelling reasons. With regards to race discrimination, as you know, the courts have employed a strict scrutiny test, and require that a compelling interest be shown, in order for the statute to survive review.

Additionally, fundamental rights, such as the right to travel, the right to vote, the access to the judicial process, enjoy the benefit of a strict scrutiny analysis.

In gender discrimination cases the Court employs the heightened scrutiny test, sometimes called the intermediate scrutiny test. The classifications, by gender, must serve important governmental objectives and must be substantially related to achieving those objectives.

There is some suggestion that both alienage and illegitimacy enjoy the same type of analysis—intermediate scrutiny. All other forms of discrimination, economic and social, receive the lowest level of scrutiny known as the rational basis test.

I offer this abridged review to set the basis for the few questions I would like to ask you.