Finally, my wife Mary, who has the love and admiration of our family and also of her 30 students in the Golden Empire School in Sacramento. They most appreciate your invitation to be with us here today, Mr. Chairman.

Thank you very much.

The CHAIRMAN. We welcome you all here. I surely do not envy your tuition bill. [Laughter.]

Judge KENNEDY. I am glad that is part of the record, Mr. Chairman.

The CHAIRMAN. It is a sacrifice you are making, and I mean that sincerely.

Please move forward, Judge, if you would like.

Judge KENNEDY. That concludes my opening remarks, Mr. Chairman. I am ready to receive questions from you and your committee members.

The CHAIRMAN. Judge, let me explain to you, and to my colleagues, how the ranking member and I would like to proceed today. That is, as has been the custom in the recent past, we will allow each Senator to question you up to a half an hour, hopefully to have some continuity to the questions, and allow both you full time to answer the questions and they to flesh out the line of questioning they wish to pursue.

It is my hope, although not my expectation, that we will complete one round of questioning today. We will stop, though, at 6 o'clock, or as close to 6 o'clock as we can get. And at approximately 3:15, we will take a break for 15 minutes or so to give you an opportunity to stretch your legs and maybe get a cup of coffee or whatever you would like.

Judge, I will begin my first round here by telling you at the outset that I would like to pursue or touch on three areas in my first round. One is the question of unenumerated rights, and if there are such, if they exist under our Constitution. Secondly, as a matter, quite frankly, more of housekeeping and for the record, with you under oath, I would like to question you about your meetings with Justice Department, White House and other officials, and whether or not any commitments were elicited or made. I quite frankly must tell you at the outset I have had long discussions and full cooperation from the White House in this matter, and I am satisfied; but I think we should have it under oath what transpired and what did not.

Thirdly, if time permits—which it probably will not—I would like to discuss with you a little bit about your views on the role of precedent as a Supreme Court Justice. Ofttimes, it is mentioned here that we unanimously voted for you when you came up as a circuit court appointee, and that is an honor. You are to be congratulated. But as you well know, we unanimously vote for almost everybody who comes up. Ninety-eight percent of all those that come before the Congress are unanimously approved of. That is in no way to denigrate the support shown to you by us in your previous appearance here, but it is to indicate that, as you know better than most of us, the role of a lower court judge and the role of a Supreme Court judge are different. They are both to seek out and find justice under the Constitution, but lower court judges are bound by precedent. They do not have the authority, the constitu-

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tional authority to alter Supreme Court decisions. But as a Supreme Court Justice, you obviously will have that authority, and I would like at some point to discuss to what extent you think that authority resides in a member of the court.

Judge Kennedy, let me begin, though, with the unenumerated rights question, which occupied a great deal of our time in the prior hearing—not your prior hearing, but the prior hearing with Judge Bork.

Judge Kennedy, in your 1986 speech on unenumerated rights which, if I am not mistaken—I have a copy of it here—was entitled "Unenumerated Rights and the Dictates of Judicial Restraint," in that speech you place great emphasis on the specific text of the Constitution as a guidepost for the court. You said, for example—and I quote from the concluding page of that speech—

> I recognize, too, that saying the constitutional text must be our principal reference is in a sense simply to restate the question what that text means. But uncertainty over precise standards of interpretation does not justify failing to attempt to construct them, and still less does it justify flagrant departures.

What we find out today, or at least I do, is how you go about attempting to construe such standards of interpretation. As I read your speech you were concerned that unenumerated rights articulated by the Supreme Court, such as the right of privacy, but not exclusively limited to that, in your words "have a readily discernible basis in the Constitution." But you also recognize, Judge Kennedy, that the text of the Constitution is not always, to use your phrase, I believe, "a definitive guide."

On two separate occasions, in August of 1987 and February of 1984, you have described the Due Process Clause, which, of course, contains the word "liberty," the 14th amendment. You described that as a spacious phrase. That seems to—well, let me not suggest what it suggests.

The point I want to raise with you is there seems to be an underlying tension here; that you talk about liberty as being a spacious phrase, and you insist at the same time that the constitutional text must be our principal reference.

Although I have my own view of what you mean by that—and they are not incompatible, those two phrases, as I see it—I would like you to give us your view of the liberty clause. Do you believe that the textual reference to liberty in the 5th and 14th amendments and in the Preamble of the Constitution provides a basis for certain fundamental unenumerated rights?

Judge KENNEDY. Senator, of course, the great tension, the great debate, the great duality in constitutional law—and this has been true since the court first undertook to interpret the Constitution 200 years ago—has been between what the text says and what the dictates of the particular case require from the standpoint of justice and from the standpoint of our constitutional tradition. The point of my remarks—and we can talk about the Canadian speech in detail, if you choose—was that it is really the great role of the judge to try to discover those standards that implement the intention of the framers.

The framers were very careful about the words they used. They were excellent draftsmen. They had drawn 11 constitutions for the separate states. This, they recognized, was a unique undertaking.

But the words of the Constitution must be the beginning of our inquiry.

Now, how far can you continue that inquiry away from the words of the text? Your question is whether or not there are unenumerated rights. To begin with, most of the inquiries that the Supreme Court has conducted in cases of this type have centered around the word "liberty." Now, the framers used that, what I call "spacious phrase," both in the fifth amendment, almost contemporaneous with the Constitution, and again in the 14th amendment they reiterated it.

The framers had an idea which is central to Western thought.

The CHAIRMAN. Western thought?

Judge KENNEDY. Thought. It is central to our American tradition. It is central to the idea of the rule of law. That is there is a zone of liberty, a zone of protection, a line that is drawn where the individual can tell the Government: Beyond this line you may not go.

Now, the great question in constitutional law is: One, where is that line drawn? And, two, what are the principles that you refer to in drawing that line?

The CHAIRMAN. But there is a line.

Judge KENNEDY. There is a line. It is wavering; it is amorphous; it is uncertain. But this is the judicial function.

The CHAIRMAN. It is not unlike, as I understand what you have said, one of your predecessors—if you are confirmed—discussing shared traditions and historic values of our people in making that judgment, and another of your predecessors suggesting that there is a right to be let alone, left alone.

Let me ask you, Judge Kennedy, Justice Harlan, one of the great true conservative Justices, in my view, of this century, had a similar concern; and as I understand it—correct me if I am wrong—expressed it not dissimilarly to what you are saying when he said no formula could serve as a substitute in this area for judgment and restraint, and that there were not any "mechanical yardsticks" or "mechanical answers."

Do you agree with the essence of what Justice Harlan was saying?

Judge KENNEDY. It is hard to disagree with that. That was the second Mr. Justice Harlan. Remember, though, Senator, that the object of our inquiry is to use history, the case law, and our understanding of the American constitutional tradition in order to determine the intention of the document broadly expressed.

One of the reasons why, in my view, the decisions of the Supreme Court of the United States have such great acceptance by the American people is because of the perception by the people that the Court is being faithful to a compact that was made 200 years ago. The framers sat down in a room for three months. They put aside politics; they put aside religion; they put aside personal differences. And they acted as statesmen to draw a magnificent document. The object of our inquiry is to see what that document means.

The CHAIRMAN. Judge, it will come as no surprise to you that one of the storm centers of our last debate and discussion was

whether or not there were unenumerated rights and whether the document was expansive.

Would you agree with Justice Harlan that, despite difficult questions in this area, the Court still has a clear responsibility to act to protect unenumerated rights, although where it draws that line depends on the particular Justice's view?

Judge KENNEDY. Yes, although I am not sure that he spoke in exactly those terms.

The CHAIRMAN. No, I am not quoting him.

Judge KENNEDY. I am not trying to quibble, but it may well be the better view, rather than talk in terms of unenumerated rights to recognize that we are simply talking about whether or not liberty extends to situations not previously addressed by the courts, to protections not previously announced by the courts.

The CHAIRMAN. Let us be more fundamental than that. There are certain rights that the courts over the years have concluded that Americans have either retained for themselves or have been granted that do not find specific reference in the Constitution—the right of privacy being one, as you pointed out in your speech, the right to travel.

So what we are talking about here, what I am attempting to talk about here and you are responding, is that whether or not in the case of the 14th amendment the word "liberty" encompasses a right that maybe heretofore has not been articulated by the court and does not find residence in some text in the Constitution, and whether or not the ninth amendment means anything.

Could you tell me what the ninth amendment means to you? And for the record, let me read it. I know you know it well. "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Can you tell me what you think the framers meant by that?

Judge KENNEDY. I wish I had a complete answer. The ninth amendment has been a fascination to judges and to students of the Constitution for generations.

When Madison—and he was the principal draftsman of the Bill of Rights—wrote the Bill of Rights, he wanted to be very sure that his colleagues, the voters, and the world understood that he did not have the capacity to foresee every verbal formulation that was necessary for the protection of the individual. He was writing and presenting a proposal at a time when State constitutions were still being drafted, and he knew that some State constitutions, for instance the Virginia Bill of Rights went somewhat further than the Constitution of the United States.

In my view, one of his principal purposes, simply as a statesman, was to give assurance that this was not a proclamation of every right that should be among the rights of a free people.

Now, going beyond that, I think the sense of your question is: Does the ninth amendment have practical significance——

Senator THURMOND. Please keep your voice up so we can hear you.

Judge KENNEDY. Does the ninth amendment have practical significance in the ongoing determination of constitutional cases?

As you know, the Court has rarely found occasion to refer to it. It seems to me the Court is treating it as something of a reserve

clause, to be held in the event that the phrase "liberty" and the other spacious phrases in the Constitution appear to be inadequate for the Court's decision.

The CHAIRMAN. Judge, I do not want to hurt your prospects any, but I happen to agree with you, and I find comfort in your acknowledgement that it had a purpose.

There are some who argue it has no purpose. Some suggest it was a water blot in the Constitution. But I read it as you do. It does not make either of us right, but it indicates that there is some agreement, and I think the historical text, and the debate surrounding the Constitution sustains the broad interpretation you have just applied.

And is it fair to say that in the debate about unenumerated rights, and the right of privacy in particular, that there is a question of crossing the line, acknowledging the existence of unenumerated rights, and the existence of the right of privacy? The real debate for the last 40 years has been on this side of the line, among those who sit on the bench and the Supreme Court, who acknowledge that there is, in fact, for example, a right to privacy, but argue vehemently as to how far that right extends.

Some believe that extends only to a right of privacy to married couples. Others would argue, and will argue, I assume at some point, that that right of privacy extends to consensual homosexual activity. But the debate has been on this side of the line, that is, as to how far the right extends, not if the right exists.

Do you have any doubt that there is a right of privacy? I am not asking you where you draw the line, but that it does exist and can be found, protected within the Constitution?

Judge KENNEDY. It seems to me that most Americans, most lawyers, most judges, believe that liberty includes protection of a value that we call privacy. Now, as we well know, that is hardly a self-defining term, and perhaps we will have more discussions about that.

The CHAIRMAN. Well, I would like to go back to that, if my colleagues have not covered it. I only have about 10 minutes under my own rules, and I would like to settle, if we can at the outset here, the question of whether or not any commitments were given, or were asked for.

In your questionnaire, you identified at least seven different sets of meetings, and a number of phone calls that you had with White House staff, or Justice Department personnel before you were actually nominated by the President.

Let me ask you this first. Since completing your questionnaire, have you recalled any other meetings, or conversations of any type, that have not already been identified, and that took place before your actual nomination?

Judge KENNEDY. No, I have not recalled any such additional instances.

The CHAIRMAN. To be absolutely clear, I am asking you here about direct communications of any type with the White House or Justice Department, as well as indirect communications such as through some third party or intermediary. That is, someone coming to you, asking your view, and that view being transmitted

through that person back to anyone connected with the Administration.

Judge KENNEDY. I understood that question in the sense that you describe when I answered the questionnaire, and I understand it that way now. The conversations that I described were the only conversations that occurred.

The CHAIRMAN. Judge, I appreciate your cooperating in this matter, but I hope you understand why it is important.

Let's look at, if you will, the October 28th meeting that you identified. According to your questionnaire, that meeting was attended by Howard Baker, Kenneth Duberstein, A. B. Culvahouse, Mr. Meese, and Assistant Attorney General William Bradford Reynolds.

Were you asked at that meeting how you would rule on any legal issue?

Judge KENNEDY. I was not; I was asked no question which came even close to the zone of what I would consider infringing on judicial independence. I was asked no question which even came close to the zone of what I would consider improper. I was asked no question which came even close to the zone of eliciting a volunteered comment from me as to how I would rule on any particular case, or on any pending issue.

The CHAIRMAN. Judge, were you asked about your personal opinion on any controversial issue?

Judge KENNEDY. I was not.

The CHAIRMAN. Did anyone ask you what, as a personal matter, you thought of any issue or case?

Judge KENNEDY. No such questions were asked, and I volunteered no such comments.

The CHAIRMAN. And were you asked anything about cases currently before the Court?

Judge KENNEDY. No, sir.

The CHAIRMAN. I realize there is some redundancy in those questions, but is important, again, for the record.

Now, Judge, there was—if I can move to the end here—there was some newspaper comment about a meeting that took place after you had been nominated.

Let me ask you the question. Did you meet with any sitting United States Senators prior to your being nominated by the President?

Judge KENNEDY. No.

The CHAIRMAN. Now let me turn to that period, now, after the nomination.

Judge KENNEDY. Now let's be precise, however. I think the nomination was sent to the Senate some weeks after it was announced.

The CHAIRMAN. I beg your pardon. From the time the President had announced his intention——

Judge KENNEDY. At the time I had already met with you and a number of Senators, but if the demarcation in your question is as to the time the President made the announcement in the White House——

The CHAIRMAN. That is what I mean.

Judge KENNEDY. The answer is no, I had not met with any United States Senators prior to that time.

The CHAIRMAN. Now I would like to speak with you about the same issues, subsequent to the President standing with you and announcing to all of the world that you were going to be his nominee.

Have you made any commitments or promises to anyone in order to obtain their support for your nomination?

Judge KENNEDY. I have not done so, and I would consider it highly improper to do so.

The CHAIRMAN. So just to make the record clear, you made no promise to any Member of the Senate on anything?

Judge KENNEDY. Other than that I would be frank and candid in my answers.

The CHAIRMAN. Judge, I am not doubting you for a minute. As I am sure you are aware, though, one of my colleagues is reported to have spoken with you about the issue of abortion on November the 12th at a meeting at the White House.

Let me read to you—and I am sure you have seen the text—from a newspaper article by a columnist named Cal Thomas. And Mr. Thomas says the following happened. I am quoting from his article.

Republican Senator Jesse Helms of North Carolina told me that he and Judge Kennedy met in a private room at the White House on November the 12th.

Then a quote within a quote.

"I think you know where I stand on abortion," Mr. Helms said to Judge Kennedy. Judge Kennedy smiled and answered, "Indeed I do, and I admire it. I am a practicing Catholic."

The article then goes on to say:

Judge Kennedy did not elaborate, but Mr. Helms interpreted the response to mean that Judge Kennedy is opposed to abortion and would look favorably on any case in which the Court's earlier decisions striking down the abortion laws of all 50 States might be overturned.

A bit later in the column, Mr. Thomas continued:

"I am certain as I can be," said Mr. Helms, "without having heard him say I shall vote to reverse *Roe* v. *Wade*—which of course he wasn't going to say—on what he called this 'privacy garbage'—recent Supreme Court decisions involving not only abortion but civil rights, protections for homosexuals—Mr. Helms indicated a certain collegiality with what he believes to be Judge Kennedy's views."

Ultimately though, said, Mr. Helms, quote, "Who knows?," but, quote, "That's where we are with any of the nominees." End of quote. End of column.

Could you, for the record, characterize for us how accurate or inaccurate you think that column is.

Judge KENNEDY. I have not seen that column, but I have absorbed it from what you have said, Senator.

To begin with, I think it is important to say that if I had an undisclosed intention, or a fixed view on a particular case, an absolutely concluded position on a particular case or a particular issue, perhaps I might be obligated to disclose that to you.

I do not have any such views with reference to privacy, or abortion, or the other subjects there mentioned, and therefore, I was not attempting, and would not attempt to try to signal, by inference, or by indirection, my views on those subjects.

The conversation that you referred to was wide-ranging, and of a personal nature. The Senator asked me about my family and my

character, and I told him, as I have told others of you, that I admire anyone with strong moral beliefs.

Now it would be highly improper for a judge to allow his, or her, own personal or religious views to enter into a decision respecting a constitutional matter. There are many books that I will not read, that I do not let, or these days do not recommend, my children read. That does not prohibit me from enforcing the first amendment because those books are protected by the first amendment.

A man's, or a woman's, relation to his, or her, God, and the fact that he, or she, may think they are held accountable to a higher power, may be important evidence of a person's character and temperament. It is irrelevant to his, or her, judicial authority. When we decide cases we put such matters aside, and as—I think it was—Daniel Webster said, "Submit to the judgment of the nation as a whole."

The CHAIRMAN. So Judge, when you said—if it is correct—to Senator Helms: "Indeed I do, and I admire it, I am a practicing Catholic," you were not taking, at that point a position on the constitutional question that has been and continues to be before the Court?

Judge KENNEDY. To begin with, that was not the statement.

The CHAIRMAN. Will you tell us what——

Judge KENNEDY. We had a wide-ranging discussion and those two matters were not linked.

The CHAIRMAN. Those two matters were not linked. So the article is incorrect?

Judge KENNEDY. In my view, yes.

The CHAIRMAN. That is fine. I thank you. My time is up. I yield to my colleague from South Carolina.

Senator THURMOND. Thank you, Mr. Chairman.

Judge Kennedy, a fundamental principle of American judicial review is respect for precedent, for the doctrine of stare decisis. This doctrine promoted certainty in the administration of the law, yet at least over 180 times in its history, the Supreme Court has overruled one or more of its precedents, and more than half of these overruling opinions have been issued in the last 37 years.

Judge Kennedy, would you tell the committee what factors you believe attribute to this increase in overruling previous opinions.

Judge KENNEDY. That is a far-ranging question, Senator, which would be an excellent law review article, but let me suggest a few factors.

First, there is a statistical way to fend off your question, by pointing out that the Supreme Court hears many more cases now than it formerly did. You will recall, in the early days of the Republic, when some cases were argued for days.

The CHAIRMAN. He may be the only one able to recall the early days of the Republic, here, on the committee. [Laughter.]

Judge KENNEDY. I was using "you" in the institutional sense, Senator. And that has changed.

Secondly, the Court has taken many more public-law cases on its docket.

And thirdly, there are simply many, many more precedents for the Court to deal with, and so the adjustment, the policing, the shaping of the contours of our law simply require more over ruling, as a statistical matter.

That does seem, though, to be not quite a complete answer to your question, because your question invites at least exploration of the idea whether or not the Supreme Court has changed its own role, or its own view of, its role in the system, or has changed the substantive law, and it has.

In the last 37 years, the Supreme Court has followed the doctrine of incorporation by reference, so that under the Due Process Clause of the 14th amendment, most of the specific provisions of the first eight amendments have been made applicable to the States, including search and seizure, self-incrimination, double jeopardy, and confrontation. Many of these cases, many of these decisions, involved overruling. So there was a substantive change of doctrine that did cause an increase in the number of overruled cases, Senator.

Senator THURMOND. Incidentally, Judge, if I propound any question that you feel would infringe upon the theory that you should not answer questions in case it might come before the Supreme Court, just speak out, because I do not want you to feel obligated to answer if I do.

Judge KENNEDY. Thank you very much, Senator.

Senator THURMOND. Judge Kennedy, we have recently celebrated the 200th anniversary of the Constitution of the United States.

Many Americans expressed their views about the reason for the amazing endurance of this great document. Would you please share with the committee your opinion as to the success of our Constitution, and its accomplishment of being the oldest existing Constitution in the world today.

Judge KENNEDY. Well, the reasons for its survival, and its success, Senator, are many fold. The first is the skill with which it was written. Few times in history have men sat down to control their own destiny before a government took power; in the age of Pericles, and in the Roman empire, just before Augustus, and again, in 1789. The framers wrote with great skill, and that is one reason for the survival of the Constitution, for the survival of the Constitution despite a horrible civil war, a war arguably, and I think probably, necessary to cure a defect in the Constitution.

Then there is the respect that the American people have for the rule of law. We have a remarkable degree of compliance with the law in this country, because of the respect that the people have for the Constitution and for the men who wrote it.

My third suggestion for why there has been a great success in the American constitutional experience is the respect that each branch of the government shows to the other. This is a vital part of our constitutional tradition. It has remained true since the founding of the Republic.

Senator THURMOND. I had a question on the ninth amendment, but you have already been asked about that.

Judge Kennedy, under the Constitution, powers not delegated to the federal government are reserved to the States, and to the people.

Would you describe, in a general way, your view of the proper relationship between the federal and State law.

Judge KENNEDY. The framers thought of the States as really a check-and-balance mechanism, operating, obviously, not on the national level.

The idea of preserving the independence, the sovereignty, and the existence of the separate States was of course critical to the Constitution, and it remains critical.

Now there are very few automatic mechanisms in the Constitution to protect the States. If you read through the Constitution you will see very little about the rights and prerogatives of the States.

At one time, as you all well know, United States Senators were chosen by State legislatures, which gave the States an institutional control over the national government. That has long since disappeared, and I am sure no one argues for its return.

But that was one of the few automatic mechanisms for the States to protect themselves. The Congress of the United States is charged, in my view, with the principal duty of preserving the independence of the States, and it can do so in many ways; in the way that it designs its conditional grant-in-aid bills, in the ways that it passes its statutes.

The courts, too, have a role, and the courts have devised some very important doctrines to protect federalism. The idea of abstention in *Younger* v. *Harris,* the Erie rule, the independent State ground rule, have all been designed by the courts out of respect for the States.

But in my view, this is the job of every branch of the government.

Senator THURMOND. Are you of the opinion that our forefathers had in mind, as I understand it, that the federal government, the central government, the national government, was simply to be a government of limited powers?

Judge KENNEDY. It is very clear that that was the design of the Constitution.

Senator THURMOND. I am glad to hear you say that, and I wish more people in this country would recognize that. I see you are a good student of the Constitution.

Judge KENNEDY. Well, I am glad you give me a good mark, Senator.

Senator THURMOND. Judge Kennedy, the Supreme Court's decision in *Marbury* v. *Madison* is viewed as a basis of the Supreme Court's authority to interpret the Constitution, and issue decisions which are binding on both the executive and legislative branches.

Would you please give the committee your views on this authority.

Judge KENNEDY. *Marbury* v. *Madison* is one of the essential structural elements of the Constitution of the United States. As we all know, the doctrine of judicial review is not explicit in the Constitution. I have very little trouble finding that it was intended. Federalist Number 78 makes that rather clear, and I think that this vital role is one of the critical structural elements of the Constitution, and that it is essential to the maintenance of constitutional rule.

Senator THURMOND. Judge Kennedy, would you please tell us your general view of the role of antitrust today, including those

antitrust issues which you believe most seriously affect competition and the consumer.

Judge KENNEDY. I am not a student of the antitrust law. I try to become one whenever I have an antitrust opinion.

This is an area which is one of statutory law, and it is an interesting one because the Congress of the United States has essentially delegated to the courts the duties of devising those doctrines which are designed to insure competition.

I have no quarrel with the Congress doing that, because if the courts do not perform adequately, if they do not follow the intent of Congress, there is always a corrective. And I think it is somewhat reassuring that the judiciary has performed well under the antitrust laws.

The particular elements that are necessary to preserve competition are of course vigorous enforcement of the law against illegal practices, particularly price fixing, and other prohibited practices.

Senator THURMOND. Judge, do you believe the Court has given sufficient consideration to a relevant economic analysis in evaluating the effects of restraints of trade, and are you satisfied with the guidance that the Court has provided on the proper role of economic analysis in antitrust laws?

Judge KENNEDY. An important function of the courts, Senator, is to serve as interpreters of expert opinions, and the courts of the United States have received economic testimony, have studied economic doctrine, and have formed these into a series of rules to protect competition.

Now economists, like so many others of us, have great disagreements, and we have found—for instance—that economic testimony tells us that some vertical restrictions are actually pro competitive, and the courts have accepted this economic testimony.

And I think the courts, all in all, have done a good job of articulating their reasoning in antitrust cases, and identifying when they are relying on economic reasoning. Sometimes that reasoning is wrong, but at least it is identified.

Senator THURMOND. Judge Kennedy, recent Supreme Court decisions, such as *Illinois Brick, Monfort,* and *Associated General Contractors,* have, for different reasons, restricted standing to bring private antitrust suits.

Generally, what is your view of these decisions, and how do you assess their impact on access to the courts by private parties?

Judge KENNEDY. Well, the Court has struggled to draw the appropriate line for determining who may recover and who may not recover in an antitrust case. As we know, if there is an antitrust violation it has ripple consequences all the way through the system.

Antitrust cases are ones in which triple damages are recoverable, and therefore, the courts have undertaken to draw a line to allow only those who are primarily injured to recover.

Not only is this, it seems to me, necessary simply as a matter of enforcing the antitrust laws, but it reflects, too, the underlying value of federalism, because to the extent to which federal antitrust laws apply, State laws are displaced.

Where that line should be, how successful the *Illinois Brick* doctrine has been in terms of promoting competition, and permitting,

at the same time, antitrust plaintiffs to sue when necessary, is a point on which I have not made up my mind.

Senator THURMOND. Judge Kennedy, there has been much publicity and debate recently about corporate takeovers. What is your general view about the antitrust implications of these takeovers, and how do you view State efforts to limit takeovers?

Judge KENNEDY. The Supreme Court has recently issued a decision in which it approves of State statutes which attempts to regulate takeovers.

This is a tremendously complex area. It is highly important because business corporations throughout the United States have a fixed-capital investment, and a fixed investment in human resources. They have managers, they have skilled workers, and it is important that they be given protection.

Now it seems to me that the States might make a very important contribution in this complex area.

Senator THURMOND. Judge Kennedy, some of your opinions involve application of the per se rule of liability. Generally, when do you believe it is appropriate to apply the per se rule in antitrust cases, and when would you apply the rule of reason?

Judge KENNEDY. As to the specific instances, I cannot be particularly helpful to you, Senator. Let me see if I can express what I think are the considerations that the Court should address.

There is a continuum here, or a balance. On the one hand, there is a rule of reason, and this involves something of a global judgment in a global lawsuit. A rule of reason antitrust suit is very expensive to try. And once it is tried, it is somewhat difficult to receive much guidance from the decision for the next case.

Per se rules, on the other hand, are precise. They are automatic, in many cases, as their name indicates. The problem with per se rules is that they may not always reflect the true competitive forces.

The Supreme Court has to make some kind of adjustment between these two polar concepts, and it has taken cases on its docket in order to do this.

Senator THURMOND. Judge Kennedy, recently, there has been some discussion in regards to raising the amount in controversy requirement in diversity cases. If the amount is raised, it should reduce the current civil caseload in the federal courts.

Would you please give the committee your opinion on this matter.

Judge KENNEDY. On diversity jurisdiction, generally—I may be drummed out of the judges' guild—but I am not in favor of a total abolition of diversity jurisdiction. I have tried cases in the federal courts, and I realize their importance.

On the other hand, we simply must recognize that the federal courts' time is extremely precious. The Congress of the United States has vitally important goals that it wants enforced by the federal courts.

Rather than looking at jurisdictional limits, which can be avoided, and which are the subject of further controversy as to whether or not they have been adequately pleaded, it seems to me that perhaps Congress should look at certain types of cases which could be excluded from the diversity jurisdiction, say, auto-accident cases.

It seems to me that that is a better approach, generally.

Senator THURMOND. That question really involved a decision by Congress, but I just thought maybe your opinion would be helpful.

Judge KENNEDY. Well, it is somewhat tempting, with diversity jurisdiction, to think that we could take a byzantine area of the law, and simply make it irrelevant by abolishing the jurisdiction. Many lawyers, many judges, would think Congress had done them a great favor if they made that whole branch of our learning simply irrelevant.

On the other hand, I think the commitment to diversity jurisdiction, both in the Constitution and in many segments of the bar, is sufficiently strong so that the better approach is to find a class of cases that we can eliminate from the jurisdiction, rather than abolishing it altogether.

Senator THURMOND. Judge Kennedy, 20 years have passed since the *Miranda* v. *Arizona* decision which defined the parameters of police conduct for interrogating suspects in custody.

Since this decision, the Supreme Court has limited the scope of *Miranda* violations in some cases.

Do you feel that the efforts and comments of top law-enforcement officers throughout the country have had any effect on the Court's views, and what is your general view concerning the warnings this decision requires?

Judge KENNEDY. I cannot point to page and verse to show that the comments of law-enforcement officials have had a specific influence, but it seems to me that they should. The Court must recognize that these rules are preventative rules imposed by the Court in order to enforce constitutional guarantees; and that they have a pragmatic purpose; and if the rules are not working they should be changed.

And for this reason, the Court should pay close attention to the consequences of what it has wrought. Certainly comments of law-enforcement officials, taken in the proper judicial context, it seems to me, are relevant to that judgment.

Senator THURMOND. What did you say? Are relevant?

Judge KENNEDY. Are relevant.

Senator THURMOND. Thank you. Judge Kennedy, there are hundreds of inmates under death sentences across the country. Many have been on death row for several years as a result of the endless appeals process.

Would you please tell the committee your opinion of placing some limitation on the extensive number of post-trial appeals that allow inmates under death sentences to avoid execution for years after the commission of their crimes.

Judge KENNEDY. As to the specifics of a proposal, of course I could not and would not pass on it. It is true that when we have an execution which is imminent, say, 30 days, the courts, particularly at the appellate level, begin undergoing feverish activity, activity which is quite inconsistent with their usual orderly, mature, deliberate way of proceeding.

We are up past midnight with our clerks, grabbing books off the wall, and phoning for more information, where a man's life—it is usually a man—is hanging in the balance. And this does foster not a good perception of the judiciary. It is a feverish kind of activity

that is not really in keeping with what should be a very deliberate and ordered process.

Justice O'Connor who is the Circuit Justice for the Ninth Circuit is concerned about this. She has asked the Ninth Circuit to draft some procedures in order to make this a more orderly process. Any guidance that the Congress of the United States could give would, I think, be an important contribution to the administration of justice.

I really do not know how you are going to avoid it, but it is something that we should give attention to.

Senator THURMOND. Judge Kennedy, in the last several decades, we have seen a steady increase in the number of regulatory agencies which decide a variety of administrative cases.

I realize that the scope of judicial review of these administrative cases varies from statute to statute. However, as a general rule, do you believe that there is adequate opportunity today for the appeal of administrative decisions to the federal courts, and do you believe that the standard of review for such appeals is appropriate?

Judge KENNEDY. Generally, the answer to that question is yes. As I have indicated before, I think the courts play a very vital function by taking the expert, highly detailed, highly complex findings of an agency, and recasting them in terms that the courts themselves, the litigants, and the public at large, can understand. While with reference to particular agencies there may be areas for improvement by statute, I think generally the system of administrative review is working well.

Senator THURMOND. Judge Kennedy, in the past several decades, the caseload of the Supreme Court has grown rapidly, as our laws have become far more numerous and complex.

In an effort to reduce the pressures on the Supreme Court, an inter-circuit panel was proposed to assist the Court in deciding cases which involve a conflict among the judicial circuits.

In the 99th Congress, the Judiciary Committee approved such a panel on a trial basis. Similar legislation has been introduced in the 100th Congress. As you may know, former Chief Justice Warren Burger has been a strong advocate of this panel, along with many other current members of the Court.

Would you please give the committee your general thoughts on the current caseload of the Court, and the need for an inter-circuit panel.

Judge KENNEDY. Well, I hope, Senator, that some months from now I will have a chance to take a look at that firsthand. But it seems to me from the standpoint of a circuit judge that there are some problems with that proposal.

Circuit judges, I think, work under an important constraint when they know that they are writing for review by the Supreme Court of the United States, and not by some of their colleagues.

Furthermore, if you had a national court of appeals, it would not simply resolve particular issues; it would have its own case law, which would have its own conflicts.

And I am concerned about that.

Further, as I understand the statistics, this would save the Supreme Court about 35 cases a year, maybe 50. In all of those cases, the circuit courts have already expressed their views, and so the

Supreme Court has a very good perspective of what choices there are to make.

If those 50 cases were taken away, the nature of the docket of the Supreme Court might change. The Supreme Court might hear all public law cases in which the juridical philosophies that obtain on the court would divide them in more cases.

It seems to me somewhat healthy for the Supreme Court to find something that it can agree on.

Senator THURMOND. Judge Kennedy——

Judge KENNEDY. And incidentally, this was a suggestion made by Arthur Hellman in a very perceptive law review article that I read a few years ago.

Senator THURMOND. Judge Kennedy, at present, federal judges serve during good behavior, which in effect is life tenure.

Federal judges decide when they retire, and when they are able to continue to serve. Congress, in the Judicial Councils Reform and Conduct and Disability Act of 1980 provided some limited ability for the judicial council of the circuits to act with respect to judges who are no longer able to serve adequately because of age, disability, or the like.

The Supreme Court is not covered by this act. Judge Kennedy, do you feel the Supreme Court should be covered by the Judicial Conduct and Disability Act?

And would you give the committee your opinion on the need to establish by constitutional amendment a mandatory retirement age for judges and justices?

Judge KENNEDY. Well, Senator, in the past few weeks, most of my thoughts have been on how to get on the Supreme Court, not how to get off it.

But my views are that I would view with some disfavor either of those proposals. The Supreme Court is sufficiently small, sufficiently collegial, sufficiently visible, that I think if a member of the court is incapable of carrying his or her workload, there are enough pressures already to resign.

History has been very kind to us in this regard.

Senator THURMOND. So far as I am concerned, it is not age but it is health that counts.

Judge KENNEDY. I am with you, Senator.

Senator THURMOND. Judge Kennedy, and this is the last question, there have been complaints by federal judges regarding the poor quality of advocacy before the nation's courts, including advocacy before the Supreme Court.

Do you feel that legal representation is not adequate? And if so, what in your opinion should be done to improve the quality of this representation?

Judge KENNEDY. The repeat players in the legal system—insurance companies, in some cases public interest lawyers—are very, very good.

The person that has one brush with the legal system is at risk. I wish I could tell the committee that most of the arguments I hear on the court of appeals, and we come from a great and respected circuit, are fine and brilliant and professional arguments. They are not.

You gentlemen are the experts on what to do. I think we have to attack it at every level, in the law schools, with Inns of Court, with judges participating with the bar, and with an insistence that the highest standards of advocacy pertain in the federal courts.

It is a problem that persists. And it is a problem that should be addressed.

We had in the ninth circuit a committee study for 4 years on whether or not we should impose standards on the attorneys that practice in the federal courts of the ninth circuit. We finally came up with a proposal that they had to certify that they had read the rules. And it was turned down. So judges, as well as attorneys, must be more attentive to this problem.

Senator THURMOND. Judge, I want to thank you for your responses to the questions I have propounded, and I think they indicate that you are well qualified to be an Associate Justice of the Supreme Court.

Judge KENNEDY. Thank you, sir.

The CHAIRMAN. Judge, before I yield to Senator Kennedy, I want to set the record straight.

It has been called to my attention that I may have left the implication that on November the 12th you met with only one Senator, when in fact you met with about 10 Senators.

I was referring to a single conversation.

Judge KENNEDY. I was handed a note to that effect. And I did not understand your question that way. But it is true that I met with a number of your colleagues.

The CHAIRMAN. I didn't think it was that confusing, either. I am glad you didn't. But obviously, our staffs did. So now we have cleared up what wasn't confusing before.

And one last comment that I will make. I was at the White House with the President on one occasion with the Senator from South Carolina. And the President was urging me to move swiftly on a matter.

And he said to me, he said, Joe, when you get to be my age, you want things to hurry up. Senator Thurmond looked at him and said, Mr. President, when you get to be my age, you know it does not matter that much. [Laughter.]

I will yield to the Senator from——

Senator THURMOND. Mr. Chairman, I just want to say, experience brings wisdom. And as time goes by, I'm sure you will realize this is the case. [Laughter.]

The CHAIRMAN. I realize it now. That is why I follow you, boss. I yield to the Senator from Massachusetts.

Senator KENNEDY. Thank you very much.

Mr. Chairman, when I had the good opportunity, like other members of the committee, to meet with the nominee, I showed him in my office the seal of the name Kennedy in Gaelic.

And the name Kennedy in Gaelic means helmet. And I wondered whether the nominee was going to bring a helmet to these particular hearings. But I am not sure we are playing tackle. Maybe perhaps touch football.

But nonetheless, I do not know whether he is prepared to say whether he is really enjoying these hearings, like some mentioned earlier or not.

Judge KENNEDY. I will put on a helmet when you do, Senator. [Laughter.]

Senator KENNEDY. As I mentioned during the course of our exchange, we talked about the issues of civil rights and the progress that had been made in this country in the period of the last 25 years.

And I think it has been extraordinary progress. You have referred to it in a peripheral way in response to some of the earlier questions, but it has been progress which I think some of the American people have been proud of.

It has been progress which Republican and Democratic presidents have contributed to, and for which there's been strong bipartisan support in the House of Representatives and the Senate of the United States.

The role of the courts, both in interpreting and in enforcing this progress, has been important and virtually indispensable. That is certainly something that you have recognized in ensuring that we are going to get a fair interpretation of the laws, and that the laws are going to be vigorously enforced.

You made a number of speeches, but one of the ones that I find extremely eloquent was one you made in 1978, when you were talking about the independence of the federal judiciary.

And you said, and I quote:

> It was not the political branches of the government that decided *Brown* v. *Board of Education*. It was not the political branches of the government that wrought the resolution of *Baker* v. *Carr*, the apportionment decision, or that decided the right of counsel case in *Gideon* v. *Wainwright*. It was the courts.

And I submit that if the courts were not independent, those decisions might not have been made, or if made, might not properly have been enforced.

Some of the opinions you have written, Judge, do not seem to reflect that same sensitivity, and I would like to review some of those cases with you at this time.

The first area is fair housing. I think as you probably know the discrimination in housing is one of the most flagrant forms of discrimination, because it perpetuates the isolation and the ignorance that are at the roots of prejudice.

In 1985, the Department of Housing and Urban Development reported there are 2 million incidents of race discrimination in housing each year. In fact, a black family looking for rental housing stands over a 70 percent chance of being a victim of discrimination.

Your opinion in the *Circle Realty* case in 1976 raises a question about how you interpret the anti-discrimination laws in housing.

And in that case, the citizens had claimed that their communities were segregated as a result of racial steering by real estate brokers, that is, blacks were steered to black neighborhoods and whites were steered to white neighborhoods.

You ruled that those citizens did not even have standing to raise their claim of discrimination under a key provision of the Act because they were only testers, and they were testing the brokers to see if they were actually steering clients in this discriminatory way.

You threw them out of court because they weren't actually trying to rent or to buy a house. In 1978, the Supreme Court ruled

7 to 2, in an opinion by Justice Powell, that your interpretation of the law was wrong, and that the testers did have a right to go to federal court to remedy this blatant form of racial discrimination in housing.

My question is this; How do you respond to the concern that your opinion reflects a narrow approach to the civil rights laws as the Supreme Court has interpreted those laws?

Judge KENNEDY. Well, Senator, at the outset, it is entirely proper, of course, for you to seek assurance that a nominee to the Supreme Court of the United States is sensitive to civil rights.

We simply do not have any real freedom if we have discrimination based on race, sex, religion or national origin, and I share that commitment.

Now, in the particular case, what occurred was, plaintiffs who themselves were not homebuyers went to real estate agents and were turned down allegedly because of their color, or were not turned down but were shown a black community if they were black or to a white community if they were white.

This is, of course, of critical concern because brokers are a small channel in the stream of housing sales. And if there is discrimination at that point, that is a good point to attack it.

Now in a sense, I think it is incorrect, Senator, to say that I threw them out of court. There were two provisions in the law.

One provision provided for immediate redress from a court of law. Another provision, which I believe was Section 810, required that the plaintiffs must go first to the agency responsible for enforcement of anti-discrimination in housing laws.

Because there were some unresolved questions as to standing at the time of this litigation, we thought that Congress, in its scheme, had made a distinction based on the degree of injury that the particular plaintiff had shown.

We found no other way to explain the difference in the two sections. And we indicated in the opinion that administrative remedies may be superior in some cases to judicial remedies.

The lesson of the Voting Rights Act cases, and the Voting Rights Act statutes, is that courts can be very inefficient. One of the great lessons for courts taught by the Voting Rights Act statutes is that there are remedies other than courts if civil rights are being deprived.

We thought this was a creative, important, helpful statement of what Congress had in mind. The Supreme Court said we were wrong, and I certainly have no quarrel with the decision. I was puzzled by the statute. And so far as the Supreme Court's decision is concerned, I would willingly and fully enforce it.

Senator KENNEDY. I do not think you will get any argument, at least from Senator Specter and myself, with regards to using administrative remedies.

We have legislation that is cosponsored now by some 38 Senators to try to strengthen these administrative remedies. You point out that there are two possible remedies in this particular legislation, one that involved running through an administrative procedure and then being able to go to the courts; and another in which one could go directly to the courts.

My question is: how do you respond to the concern as to whether you were using a rather narrow, cramped, interpretation of that legislation, in an area where there is a good deal of discrimination in our society? And what kind of assurance can you give to people that are concerned about this, that you have a real sensitivity to the type of problem that at least the existing legislation was focused on?

Judge KENNEDY. Yes. You are entitled to that assurance. And I have the greatest respect for the lead that the Congress has taken in this area.

We had thought that this was really the appropriate way to explain why the two sections were different. In that respect, we thought we were being faithful to the drafting of the statute and the structure of the statute.

It is true, of course, that these laws must be generously enforced, or people are going to get hurt.

Senator KENNEDY. The reason I raise this, Judge, is because both the Supreme Court had reached a different decision than you had, and the four other cases that finally were decided by other courts had also reached a different decision than you had.

And to get your assurances about this issue, I think, is important.

Let me go to another area, and that dealt with the *Mountain View-Los Altos Union High School* case. As the Judge knows, we indicated to you prior to today that we were going to explore various decisions with you, and named the particular cases.

In recent years, Congress and the States have taken steps to protect the civil rights of handicapped persons. And we have much more to do to ensure that the disabled are not isolated, and can participate to the full extent possible in our society.

In our efforts to reach that goal, Congress enacted the Education for All Handicapped Children Act in 1975. The Act gives handicapped children the right to education, either in public schools if possible, or in private schools if necessary; and federal funds are made available to defray the cost.

Now, in the *Mountain View-Los Altos Union High School* case in 1983, you read the statute narrowly and held that parents who transferred their handicapped child to a private school, while an administrative proceeding was pending, were not entitled to reimbursement for tuition expenses.

And once again, the Supreme Court took a different view; and in a unanimous opinion by Justice Rehnquist, the Court read the statute broadly, holding that the parents were entitled to reimbursement. Justice Rehnquist recognized that Congress did not intend to put parents to the choice of losing their rights under the Act or doing what they think is best for the educational needs of their child.

So my question here again is, what can you tell the members of the committee to give us confidence that you will not take a crabbed and narrow view in construing these extremely vitally important and significant statutes?

Judge KENNEDY. This was a vitally important case. I reviewed it only last night, and didn't have the record in front of me. But I recall the case.

It was unfortunately an all too typical case in which a young man had emotional problems. He found it very difficult to adjust to school.

And his mother was distraught, not only over how her child was developing, but over the battle she had to have with the administrative agency to get him special care.

The question was whether or not, if the school disagreed with the mother initially and said, no, we will not pay for the special care, whether the school, after the administrative agency had ruled in favor of the mother, had to pay for the cost of the special instruction in the interim.

We thought that the normal administrative remedies rule and exhaustion rule were written into the statute. There was a so-called stay-put provision in the statute, which we thought required the parent to leave the child in the hands of the school authorities if the school authorities did not agree with the parent; and in many cases, school authorities agree with the parent. In many cases, there is an agreement, and they immediately send the child.

The fourth, the seventh and the eighth circuits agreed with us. The first did not and the Supreme Court unanimously did not.

I have seen the necessity for spending more money in the schools on education across the board. And we were being asked in this case to say that a local school district, an entity of the State, was required to pay this sum.

We thought a question of federalism was involved, in that school districts are strapped for every penny.

It is true that the Congress of the United States had a policy in favor of supporting education for these disturbed children, and of course that should be given full and vigorous enforcement.

I have absolutely no problem with the Supreme Court's decision. It said that exhaustion of administrative remedies was not necessary.

The Court also made another very important statement. We had said that these are damages against the State. And the Supreme Court of the United States said, well, these are not damages. These are simply payments that the State had to make all along, and the State is really not injured. I fully accept and endorse the reasoning in that case, Senator.

Senator KENNEDY. It was really the reimbursement of the tuition, was it not?

Judge KENNEDY. Well, of the cost of the special school, yes, sir.

Senator KENNEDY. But again, the question is: Congress developed that legislation to try and deal with the need for the handicapped and disabled children to get an education; the question is whether you are going to interpret this Act in what I would have considered as both the spirit and the letter of the law—a sense of generosity, or whether it would be in a more reshaped way.

And that is really what we are trying——

Judge KENNEDY. I do not think those statutes should be interpreted grudgingly. There is a certain amount of finger pointing that goes on here where the courts say the Congress did not write the statute clearly enough, and more or less saddles Congress with the duty of cleaning up the language. I have come to recognize that

the workload of the Congress is such that we have to interpret the statutes as they are given to us.

Senator KENNEDY. Well, I think as you know from the process, as a result of being a political institution we some how lack the kind of precision that a court might want.

Again, it seems that this particular issue, given the fact where the Supreme Court came out on this with a unanimous decision, it was appropriate to raise and have your comments today.

Let me move to another area, Judge Kennedy. And this is with regards to the memberships in various clubs. You are familiar with this issue.

As you know, in 1984, the American Bar Association amended the commentary to its Code of Judicial Conduct to provide, and I quote: "It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin."

It would seem from your questionnaire that you belonged to three clubs that discriminated against women, and that one or more of these clubs may have discriminated against racial minorities as well.

As I understand it, the Olympic Club is a country club in San Francisco which also has a downtown athletic facility with meeting rooms, dining, and residential facilities. And it has about 4,000 members.

And when you joined the Olympic Club in 1962, its membership was expressly limited to white males. And apparently, that explicit restriction on racial minorities was lifted in 1968.

Today there are still, as I understand, no active black members of the club, and women can still not be full members of the club.

You were a member of the Olympic Club for many years before you became a federal judge. You continued to be a member of the club for 12 years after you became a federal judge, even though it discriminated against blacks and women.

Now in June of 1987, the San Francisco City Attorney warned the Olympic Club that its discriminatory practices violated the California civil rights laws. So the issue was becoming a public controversy.

At this time you first expressed concern about the club's restrictive membership policy. And in August you wrote to the Olympic Club to express those concerns, and you resigned from the Olympic Club in late October, when you were under consideration for nomination to the Supreme Court, and after the membership of the Olympic Club had voted against the board of directors' proposal to amend the bylaws of the club to encourage the sponsorship of qualified women and minority candidates.

So Judge Kennedy you apparently didn't try to change the discriminatory policies of the Olympic Club until this summer, and you didn't resign until your name had evidently surfaced on the short list of potential nominees.

My question is a simple one. Why did it take so long?

Judge KENNEDY. Discrimination comes from several sources. Sometimes it is active hostility. And sometimes it is just insensitivity and indifference.

Over the years, I have tried to become more sensitive to the existence of subtle barriers to the advancement of women and of minorities in society. This was an issue on which I was continuing to educate myself.

I want to see a society in which young women who are professionals have the same opportunity as I did to join a club where they meet other professionals. I would like that opportunity for my daughter if she were a practicing lawyer or in the business world.

With reference to the Olympic Club, in part it has the atmosphere of a YMCA with its downtown facilities reserved for me. I used it and enjoyed it and found it helpful.

In the late spring of 1987, this year, the U.S. Open was sponsored at the Olympic Club. At that time publicity surfaced that it did not have some racial minorities as members.

That was not a policy of the club, as I understood it, but it was pretty clear that the mix was not there if you looked at the membership rolls. The club expressly excluded women.

There was an article in the New Yorker magazine which really triggered my action. A very fine sports writer wrote about the Open and talked about the egalitarian history of the club.

I wrote a letter to the club, which the committee has, in which I indicated that it was time to make the egalitarian spirit a reality.

I had discussions with the legal counsel for the club. I knew no directors of the club or officers. I indicated that in my view it was high time that the Olympic Club changed.

They did have a membership meeting, as you've indicated, in part as a result of my discussions, but in part as a result of the action of the city attorney, and concerns expressed by other members.

I actually had heard that the bylaw that you referred to had passed. The board of directors were optimistic that it would, and somebody actually reported back to me that it had passed. I was not a voting member and cannot vote and was not at the meeting.

When I heard that the bylaw had been turned down, principally the objection was women in the athletic facility, not racial minorities.

I thought that my position had become quite untenable. I therefore resigned before I talked to the members of the Administration, thinking that it was not fair either to the Administration or the Members of this distinguished body to make that an issue.

Senator KENNEDY. This is also a club where professionals gather, and have some business associations or meetings or entertainment?

Judge KENNEDY. No question about it. It is downtown. It is a luncheon club.

Senator KENNEDY. I think you probably answered the point that I am getting at, but let me just back up and see if you have responded to it.

In the questionnaire, when you were asked about your definition of invidious discrimination, you wrote, I quote:

> Invidious discrimination suggests that the exclusion of a particular individual on the basis of their sex, race, or religion or nationality is intended to impose a stigma upon such persons. As far as I am aware, none of those policies or practices were a result of ill will.

In talking about the Olympic Club, I gathered from the answer you just gave previously, when you were talking about this issue, you talked about insensitivity and indifference with regards to creating a stigma on professional people, women, minorities, and used the illustration of your daughter.

Judge KENNEDY. That is the distinction I drew.

Senator KENNEDY. I just want to make sure we have the whole response and answer here, so I have it correctly.

Judge KENNEDY. Thank you for giving me that opportunity. In my view, none of these clubs practiced invidious discrimination. That term is not a precise and crystal clear term. But as I understood it and as I have defined it in the questionnaire, none of the clubs did practice that, or had that as a policy.

Senator KENNEDY. But in terms of stigmatizing various groups, since this is a prestigious club, in what I gather was the general commercial life of the city, the fact that either women or minorities cannot belong to it, does that not serve to stigmatize those individuals?

Judge KENNEDY. There is no question that the injury and the hurt and the personal hurt can be there, regardless of the motive.

Senator KENNEDY. You resigned from the Sutter Club, as I understand.

Judge KENNEDY. Yes, sir.

Senator KENNEDY. Could you tell us the reasons—and that was in 1980, is that correct?

Judge KENNEDY. Yes. The Sutter Club is in downtown Sacramento. It is a club that is primarily used at luncheon by professional and business people.

I was always seen there as a judge when I went there. And I had concerns with their restrictive policies against women.

Again, some of the great leaders in Sacramento city life, some of my very best friends, people who have no animosity, people who have sensitivity and goodwill, are members of those clubs. I in no way wish to criticize them, because many feel as I do that the policy should be changed.

I, however, felt that my membership there was one where I was there only as a judge, and that it was inappropriate for me to belong. And I resigned in 1980 before the canons of ethics on the subject were promulgated.

Senator KENNEDY. And you resigned from there, as I understand, because of both its restrictive kinds of policies and because you were, as I understand it, a judge, and you didn't want to appear to have an inappropriate appearance, since it was more restrictive in terms of women and minorities.

Judge KENNEDY. Yes. Everybody knew me there as a judge, and would come up and greet me and so forth. And I felt uncomfortable in that position.

Senator KENNEDY. Well, if you felt uncomfortable with regard to the Sutter Club in 1980, why didn't you—and since you were meeting on the Circuit Court in San Francisco, and you had another club there that had similar kinds of problems, why didn't you feel uncomfortable with that club?

Judge KENNEDY. Probably because nobody knew me, and I basically used the athletic facility.

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?

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.

Justice Marshall, as you are aware, has proposed a sliding scale—I guess you would call it—approach to analyzing equal protection claims.

He suggests that instead of cases falling into neat categories, as the Court has so put them, a spectrum be used to review claims of discrimination, and this spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize, particularly classifications, depending, I believe, on the constitutional and social importance.

Now, when Judge Bork was here, it became very clear to many of us that there was a fundamental disagreement here. I am not here to peg you against Judge Bork at all.

What I would like to know, Judge, is some answers to some questions, if you would, please.

In reviewing the opinions you have written, I notice that in the equal protection area, you have had little opportunity to express yourself, I think maybe six opinions, the best that I could encounter.

Is that accurate or have we not found more decisions? Or do you know?

Judge KENNEDY. I have really not had the opportunity, Senator, to address, in any detail, the levels of scrutiny that apply to gender, or, to compare them to race.

I think you are correct. I have had Equal Protection Clause cases, mostly in the implementation phase rather than in defining substantive liability.

Senator DECONCINI. And it is roughly a half a dozen opinions, to your recollection?

Judge KENNEDY. I would think that would be correct, Senator.

Senator DECONCINI. I would like to explore with you the analysis you do apply, or the approach you take, and not to get into any particular case or circumstances that would be a potential case before you, but how you view the Equal Protection Clause.

Would you agree, first of all, that the Equal Protection Clause applies to all persons?

Judge KENNEDY. Yes, the amendment by its terms, of course, includes all persons, and I think was very deliberately drafted in that respect.

Senator DECONCINI. And of course women being in that category. As I understand, that the Court has developed some standards, and they refer to them in the race cases, considered a "suspect classification," I think is the Court's term, and the standard of review is known as strict scrutiny, as I mentioned.

Additionally, for the State to justify discrimination based upon race, would require a showing of a compelling interest. Is that your fundamental understanding of the strict scrutiny standard that the Court has referred to in various decisions?

Judge KENNEDY. That is my understanding of the standard that the Court has enunciated.

Senator DECONCINI. Can you conceive of any situation where discrimination based upon race would be legitimate under the Equal Protection Clause?

Judge KENNEDY. I cannot think, at the moment, of any of the standard law-school hypotheticals, that would lead to the conclu-

sion that a racial classification that is invidious would be sustained under an equal protection challenge.

Senator DECONCINI. Your record certainly indicates that you have not had any cases, that has squarely been presented to you, that I can find at least, but I just wondered if you had any hypotheticals, because I find I can make up some hypotheticals, but I just would like to see whether someone else has, if they have thought about it.

With respect to this standard of strict scrutiny, analysis employed by the Court today, is it your understanding that a fundamental right, such as the right to interstate travel or freedom of speech, are protected in the same manner as the race discrimination? Or non-race discrimination?

Judge KENNEDY. Yes, and sometimes those cases are difficult, because if you have a first amendment case, it often can really be explained on its own terms. The first amendment sits on its own foundation, so it is sometimes puzzling why we even need an equal protection analysis in such cases, although the Court has had first amendment cases in which it uses an equal protection analysis.

Why that is necessary is not clear to me, since one of the essential features of the first amendment is that we cannot engage in censorship. Censorship involves choice, so the first amendment does seem to have its own foundation in this regard.

Senator DECONCINI. Focusing, Judge Kennedy, on gender discrimination, discrimination based on sex, I understand that the Court has developed what is popularly known as the heightened scrutiny test, as I mentioned, or intermediate scrutiny for this type of discrimination case brought before the Court.

Do you recognize that, or agree that is the standard the Court now has set out.

Judge KENNEDY. That is my understanding of the case law. The Court, as an institution, and the judicial system generally has not had the historical experience with gender discrimination cases that we have had with racial discrimination cases. The law there really seems to me in a state of evolution at this point. It is going to take more cases for us to ascertain whether or not the heightened scrutiny standard is sufficient to protect the rights of women, or whether or not the strict standard should be adopted.

Senator DECONCINI. There is no question in your mind, that the Supreme Court is very clear—and whether they are termed conservative, or liberal judges, or moderate—whatever they may be—that the judges recognize those standards, and you also subscribe to the standards in general principle?

Judge KENNEDY. Well, it may be that in resolving one of those cases, I would give attention to Justice Marshall's standard and make a determination whether or not that is a better expression than the three-tier standard that the Court seems to use, although it seems to me, on analysis, that those are very close.

Senator DECONCINI. Now I also understand that classification based on gender must serve as an important governmental objective, and must be substantially related to the achievement of certain legislative goals.

Have you delved into that, or have any thoughts on that?

Judge KENNEDY. No. I understand what the Court is driving at, and as I have indicated, it is probably because the Court simply lacks the historical background to feel that it can impose the strict-scrutiny standard without causing problems for itself down the line.

Senator DECONCINI. Without committing you on anything that you might do as a Supreme Court Justice, do you think, generally thinking, that that is a proper legal conclusion that the Court has come to in this area?

Judge KENNEDY. Well, I think the Court has, as I say, recognized the fact that the law is in a state of evolution and flux, and is proceeding rather cautiously.

Senator DECONCINI. You do not have some personal hostility towards the way the Court is proceeding in this particular area of gender discrimination as it relates to the Equal Protection Clause?

Judge KENNEDY. The cases seem to me a plausible and rational way to begin implementing the Equal Protection Clause.

Senator LEAHY. I am sorry. I did not hear that.

Judge KENNEDY. The cases seem to me a plausible and a rational way to begin implementing the Equal Protection Clause.

Senator LEAHY. I thought you said plausible and irrational. Thank you.

Senator DECONCINI. And of course with reference to other forms of discrimination we have what is known as the rational basis, which, if you accept the different standards we have—and I do not make those decisions, but I certainly have read enough cases—that it seems clear to me, that even if you feel, a judge feels that a set of facts may not fall into the heightened scrutiny, or into the rational basis, that there is so much precedence here—and as you say, it may be new, and does not have a long history of it—it appears to me to be very fundamental, that the Court is set, at least on a course, to help guide lower courts, to help guide legislative bodies, where these scrutinies are going to be placed.

As to the rational basis test for other discrimination, do you recognize that as a given standard that the Court has pretty well settled on for other discrimination, other than gender and race?

Judge KENNEDY. Yes, it is, and as we know, all laws discriminate.

Senator DECONCINI. That is right.

Judge KENNEDY. You can get a driver's license if you are over 16 but not if you are under 16. Yet we know that there are some drivers who are under 16 who are much better than many drivers who are over sixteen. But we have a fixed and arbitrary standard. That is the way laws must be written in order to have an efficient society and an efficient legislative system.

Senator DECONCINI. Have you delved at all, either in your job as a judge, or as a teacher, with Justice Marshall's sliding scale?

Have you written anything or done anything in that area?

Judge KENNEDY. I have not written on it.

Senator DECONCINI. You are aware of it yourself?

Judge KENNEDY. I ask my students to explain to me why there is any difference between that and the three-tier standard, and I am not yet satisfied what the correct answer to that question should be.

Senator DECONCINI. Then there is the proposition that has been mentioned—I believe it is Judge Stevens—about a reasonableness standard as a sole standard, and of course the Court has not accepted that, although I believe Stevens is the only one that has mentioned that, and of course as we said, Marshall, a sliding scale standard.

The reasonable standard poses problems to this Senator, but I welcome people who might disagree with that.

Have you formed either a preference, or do you have any distinction in your mind between a three-tier standard that we have been talking about, and the importance of it, particularly as it relates to gender, and a reasonableness standard for all discrimination cases?

Judge KENNEDY. I do not have a fixed or determined view. I would offer this observation: one beneficial feature of a tier standard is that the court makes clear the substantive weight that it is giving to the particular claim before it, and the court can then be criticized, or vindicated as the case may be.

It sets standards. And the lower courts have a certain amount of guidance. The Supreme Court is in the difficult position of hearing 150 cases a year, and in doing so, providing the requisite doctrinal guidance and supervision of the lower courts.

This is a very difficult task, and not much has been written on the difference between an intermediate appellate court judge, such as I am, and the responsibilities of the judge of a supreme court of a State or the Supreme Court of the United States.

Judge Sneed of our court is always careful to point out that this is an area of academic inquiry that should be explored. I think the requirements, and the duties and the obligations, and the concerns of those two different courts may be quite divergent.

Senator DECONCINI. The interesting thing, as one views this—and I think you make a good point, the history behind the Court's struggle as it relates to the sex-discrimination cases—is the importance to the lower courts to see something coming from the Court that is a bit consistent, even though it may fall into different standards as they come.

Judge, as an appellate judge, how helpful is that when the Supreme Court has these fundamental cases, if you want to call them, where they start to become consistent in their holding and a standard starts to emerge?

Is that as obvious to the federal judges, yourself, as it is to me, that that would be extremely helpful, or is it difficult to implement?

Judge KENNEDY. It is tremendously helpful. We wish that the Supreme Court could review most of our cases.

As you know, the Supreme Court takes only about 2 percent of the judgments of the circuit courts, and within that case mix it has the duty to give us the necessary guidance.

This of course is the way the case law method evolves, but we wish we could have more guidance from the Court.

Senator DECONCINI. I would like to turn to another subject matter. The Chairman touched on it somewhat this morning, regarding your Canadian Institute speech that you made in December of 1986, and as it relates particularly to the privacy question.

On page 9 of that text, you state that:

It is difficult for courts to determine the scope of personal privacy when it is specifically mentioned in a written constitution, and that courts confront an even greater challenge when the Constitution omits language containing the word privacy, or private.

Now in discussing the legislation, and the legitimate sources for the right of privacy, you mentioned the Supreme Court cases, the *Bowers* case, and the *Griswold* case.

And it appears from reading your speech, that you have concluded, without question, that there is a fundamental right to privacy. And I think the Chairman had you state that, and that is your position, correct?

Judge KENNEDY. Well, I have indicated that is essentially correct. I prefer to think of the value of privacy as being protected by the liberty clause; that is a semantic quibble, maybe it is not.

Senator DECONCINI. But it is there, is that——

Judge KENNEDY. Yes, sir.

Senator DECONCINI. No question about it being in existence?

Judge KENNEDY. Yes, sir.

Senator DECONCINI. Now the Chairman also touched a little bit on the ninth amendment, and just out of education for this Senator, do you have an opinion why the Supreme Court seems to shy away from using that ninth amendment for some of these unspecified rights that have been, I think quite clearly enunciated by the Court, vis-a-vis the right of privacy?

Judge KENNEDY. Again, I am not sure. I think the Court finds a surer guide in the 14th amendment or the fifth amendment, because the word liberty is there. In the ninth, of course, it is simply an unenumerated right.

I think also that the Court has this problem: as we have indicated, Mr. Madison, and his colleagues, were concerned with the ninth amendment to assure the States that they had adequate freedom for the writing of their own constitutions, but under the incorporation clause that is flipped around.

Under the incorporation clause, the ninth amendment would actually be used as a constraint on the States, and I think the Court may have some difficulty in moving in that direction. I do not think the Court has foreclosed that, and I do not think, for reasons—as I have indicated—that it should address the issue until it has to.

Senator DECONCINI. It just quite frankly fascinates me—not being a judge—and I ask that question purely for myself, just wanting to know what a judge thinks. If we were sitting in my office or at a social function, I might just ask you that question, because I have never quite understood why the Court has ruled as it has. I think you probably have as good an observation, or better than I do.

You have asserted, Judge Kennedy, that the opinions in the *Griswold* case and the *Bowers* case, that they are in conflict, and on, I think it is page 13 of your Canadian Institute speech, you discuss whether a right is an essential right in a just system, or an essential right in our own constitutional system.

You state that, quote: "One can conclude that certain essential or fundamental rights should exist in any just society." End of quote.

But then you say, quote: "It does not follow, that each of those essential rights is one that we, as judges, can enforce under the written Constitution. The due Process Clause is not a guarantee of every right that should inhere in an ideal society." End of quote.

How would you define the enforcement power given to the judiciary?

Judge KENNEDY. Well, the enforcement power of the judiciary is to insure that the word liberty in the Constitution is given its full and necessary meaning, consistent with the purposes of the document as we understand it.

There are many rights, it seems to me, that you could put in a charter if you were writing a charter anew. The right to be adequately housed and fed, and education, and other kinds of affirmative rights.

You see this in the European Convention on Human Rights, which is what I was trying to contrast in the Canadian speech with the Canadian constitution. We had three documents. It seems to me an important point, that the Constitution works best if we have a stable and a just society.

The political branches of the Government can do much to insure that these preconditions exist for the responsible exercise of our freedom. And I think the courts are subjected to constraints, obviously, that the political branches are not, especially in that the courts cannot initiate those programs and those requisites that are necessary to insure that some very basic human needs are met.

Senator DECONCINI. Some of those, quote, "basic human needs of society," are you saying, really rest with other branches of government, to see that they are available?

Judge KENNEDY. That would be my general view.

Senator DECONCINI. In your 1986 speech, you also advance, or you said that the right to vote, quote, "is not fundamental in the sense that like the privacy right, it supports substantive relief of its own. It operates, instead, as a fundamental interest that triggers rigorous equal protection scrutiny." End of quote.

Am I correct to conclude from this statement, that you think the right of privacy is a right, freestanding, which though not found in the Constitution, requires similar consideration as those rights that are indeed enumerated in the Constitution?

Judge KENNEDY. I think that is——

Senator DECONCINI. Is that a right interpretation?

Judge KENNEDY [continuing]. Generally correct to the extent that we can identify that is a privacy interest. It struck me, as I was preparing this speech for the Canadian judges, that the voting rights cases are very interesting. I think most of us think of voting as absolutely fundamental, and it is so listed in the Canadian constitution. This is a new constitution that the Canadians have adopted, and their judges were there to see what benefit federal judges in the United States could give them in interpreting the document.

I found, doing the research for this, that although we think of voting as a quintessential fundamental right, the Supreme Court has not recognized it as a right that necessarily supports an action. Though you may think that you have a right to vote for a sheriff because in some States they are elected, the Supreme Court has

not so far recognized that you have that right. That is why it is not a fundamental right on which one can base a cause of action.

It is a right that we recognize so that the vote cannot be diluted.

Senator DECONCINI. You mean that specifically the right to vote for sheriff is not the same right as the fundamental right to vote? Is that where you are drawing a distinction, that that is a political subdivision, whether or not the right to vote for sheriff, or whether there is a vote for sheriff——

Judge KENNEDY. Yes. As I understand the case law, the Court has been very cautious about stating that there is a fundamental right to vote that stands on its own foundation, simply to avoid having to make this kind of inquiry.

Whether or not one of those cases will arise in the future, I am just not sure.

Senator DECONCINI. You have written a very interesting case, your opinion in *Beller* v. *Middendorf* case, dealing with the right of privacy and homosexuality as it relates to certain regulations.

The analysis of that case, if I understand it, was of some distinction as to the regulation vis-a-vis the actual right of a homosexual act. Is that correct?

Judge KENNEDY. I think that is a beginning point.

Senator DECONCINI. And where your opinion zeroed in on. Now criticism has been levied against your decision in the *Beller* case, particularly the National Women's Law Center, asserting that in the *Beller*, you incorrectly rejected a fundamental right, or the analysis of a fundamental right in favor of a more easily met balance test when applying substantive due process analysis to this particular set of regulations, and vis-a-vis, that it was relating to the military.

Can you address the distinction of this case for me, and your thoughts, when you came to the conclusion that the military regulations demanded a different view as to the right of regulating that right of privacy, assuming that the right was there?

Judge KENNEDY. Yes.

Senator DECONCINI. As we know, just for the record, Judge, that case has gone to the Supreme Court and no longer is one that would be pending for you to have to decide on.

Judge KENNEDY. Yes, this was really, I think, the first case in the circuits on the question whether or not the armed services, in this case the Navy, could dismiss its personnel for having engaged in homosexual conduct while in the military. This case required the court to undertake a rather comprehensive study of what the Supreme Court had said on the issue to that point. We reiterated what we thought the Supreme Court had taught us with reference to substantive due process, to the rights of privacy and to the rights of persons, and we set forth there our understanding of the rules. We assumed arguendo, made the assumption, that in some cases homosexual activity might be protected.

We did not say it would be because that issue was not before us. We decided instead only the narrow issue of whether or not in the specific context of conduct occurring in the military the Navy had a right and an interest which was sufficient to justify the termination and the discharge of the personnel.

Senator DECONCINI. And that is because the regulation was only before you and not the question of whether or not there was a right of privacy for this activity; is that what you are saying?

Judge KENNEDY. Well, that is correct except that you might have argued that this right was so fundamental and so all-embracing that the military could not——

Senator DECONCINI. Could not infringe on it.

Judge KENNEDY. Could not abridge it in any event. For analytic purposes, we simply left to another day the question whether or not there is this fundamental right. In other contexts, we assumed that there could be. We said that in the context of the military there were adequate, stated, articulated reasons for the enforcement of the policy.

Senator DECONCINI. I read that case very carefully more than once because of the significance of what I consider judicial restraint, and my compliments about the case, but it seemed to me a great temptation for a judge who wanted to express an opinion for or against there being a fundamental right for the homosexual activity not to do so. I think the greatest compliment I can pay you, Judge, is that you stayed with the issue there that I think was very clear. But quite frankly, if a court had gone off the other way I might have disagreed with him or I might have agreed with him, and sometimes the court does. And I really wanted to say that that opinion, as many of your opinions, have impressed upon me your real strict understanding of what you think judicial restraint is, and trying to exercise it.

I may disagree with it or someone else may, but I think it is fundamental and very complimentary to you and the President for choosing someone who has that restraint in their mind.

Judge KENNEDY. Thank you, sir.

Senator DECONCINI. Thank you. I am finished for now. I do want to talk to you about judicial tenure, a subject that you and I have shared some fun over the last years, and we will do that tomorrow I guess.

Judge KENNEDY. I am looking forward to that, Senator.

Senator DECONCINI. Thank you, Judge Kennedy.

Recognize Senator Simpson because Senator Biden isn't here.

Senator SIMPSON. I thought maybe we were going to take over there for a minute. With the Chairman gone, it was marvelous opportunity, but I see you were prepared.

Like Senator DeConcini, I found that case fascinating for its clarity and getting just to where he wanted to get and not one whit further. It was a superb decision, the one that Dennis speaks of. Dennis and I come at each other occasionally in this league, but he is a fine lawyer. I have a great respect for him. But I have exactly the same feelings about that case in reading it and knowing what a hot one that was.

You know, you could have at any point gotten off onto a little Hindu, some philosophy or something else, or morals or everything else, but you really did a beautiful job with that.

Well, I am interested in you doing very well in the surveillance that is being performed here. I don't know if I—I sometimes forget, but I can't help but tell you that in the last such proceedings there was a gathering of various groups who said that they wanted to

find the transcript of the law school records of all the members of the judiciary to see just how well we all did.

The CHAIRMAN. I sent mine. Did you send yours? [Laughter.]

No, I make it a habit of not picking mine up. I never have.

Senator SIMPSON. I am going to move right on now. I have nothing more.

But I was interested, I told them, I said, I am glad you asked that question because, I was in the top 20 of my class. And there was a scribbling and that was the end of that, and they went off, I guess, to check.

But the interesting thing was, then I think I turned to Joe and I said, "That is going to be great." I said, "There were only 18 of us in our class." [Laughter.]

So we get the surveillance. Indeed, we do, and there will be ever more of that, and is, in this league. But with that the light comes back to privacy. What is this right of privacy? We talked about it a lot with regard to Judge Bork, an awful lot. This right to privacy, what is it? You know, and you get into it. It is a detonator, and you have answered that very well so far.

I think the most pungent comment on it was Judge Griffin Bell, our former Attorney General, who said that the right of privacy is the right to be left alone. He really cut through the fog as we were dissecting the right to privacy and where it was with *Griswold* and whether it was written or unwritten, or in the Constitution or out of the Constitution, or innate or conditional, is the right to be left alone. That is something that really means something I think to the American people. At least the average guy, he likes that.

And then as I say, I shared with many my frustration that at the very time these very high-blown probes were going on with regard to that there were few worthies who were finding Judge Bork's video rental records to find out what he was renting, hoping to find all sorts of things. My mother has written me about that and talked to me about that, and I won't go into that. It was a rather smart phrase.

But I commend the ACLU who rallied to that in a moment. The District of Columbia is now dealing with a statute on that. There is a House bill in on that, and I am certainly going to be looking into that from the Senate side. So there's some positive results—but those are more real examples than, you know, law school theories out there on the right to privacy. In my mind they are.

Then I was interested in your comments on the two cases, *Topic* v. *Circle Realty* and the *Mountain View-Los Altos Union High School District.*

Judge KENNEDY. Yes, sir.

Senator SIMPSON. Hearing your explanation of those was very important to me. You used the phrase "we ruled," and I think that we don't want to forget that, as I understand it, and you can respond, that those were both unanimous decisions of a three-judge group. I mean, I don't know what you call that in your——

Judge KENNEDY. That is correct, Senator. It was a three-judge panel on each of those cases.

Senator SIMPSON. Panel.

Judge KENNEDY. And, as you know, each judge researches the record independently and we usually come to the bench not having

conferred with one another in order to ensure both the fact and the appearance of fairness for the litigants. We confer only after the oral argument.

Senator SIMPSON. In the *Topic* case, there was Justices Chambers and Trask and yourself.

Judge KENNEDY. Yes.

Senator SIMPSON. And in the *Mountain View* case, Justices Trask and Poole and yourself.

Judge KENNEDY. Yes.

Senator SIMPSON. And those were unanimous decisions and, as you say, an interesting finding as to how you come to those, giving every evidence of fairness in that; isn't it?

Judge KENNEDY. That is correct. We thought both of them were close cases in which we were trying to divine the will of Congress.

Senator SIMPSON. I had a feeling that one on the disabled child would be a very important one and probably will be reviewed again, so I was particularly interested in that, you know, because it is so easy to pick an issue and say how will you vote on this or—for us, how do you vote on this, Simpson? You can't vote "maybe", you have to vote yes or no. It is a very precise activity here.

I was very interested in how you did decide because you obviously were impressed, and you have said it here. The facts of that case were rather unique in a sense. This boy, this son who was involved here had some extreme behavioral problem. It said, while the assessment was taking place the boy was excluded from school for repeated misconduct. It went on, they stopped the process then. They stopped, and no one knows why.

Then there was the offer to send a teacher to the boy's home for instruction. District personnel recommended private schools. The appellant placed the boy in one of the schools and he was expelled for continued misbehavior and then he attended another. He was a very disruptive young man apparently is what I gather. It is a very short opinion.

And then it was determined that he be placed in a resource classroom in a regular public school program, and the appellant, still dissatisfied, requested an administrative hearing under the Act and the administrative law judge determined the parents were entitled to reimbursement.

The school district then brought the action and the appellant was saying that—the district court, of course, adopted that and held the appellant had violated the so-called "stay put" provision—I wouldn't want that to get left out here—by placing the boy in this other school before the administrative proceedings were concluded.

That is a very important thing because it says very clearly that during the pendency of any proceeding conducted pursuant to this section unless the State or local education agency and the parents or guardians otherwise agree the child shall remain in the then current educational placement of such child until all such proceedings have been completed.

I was fascinated by the precision of that. She was saying that her actions were not unilateral and they were saying they were, it was that simple, I guess. And you were saying something that is said to us all the time as Congresspersons. Why do you pass laws that

leave the burden on the local districts or the local county or the municipality?

Your decision said that the threat of damages in a case like this would not make compliance any more likely and would subject school districts to contingent liabilities hardly foreseeable when the annual school budget is prepared.

Now, with disabled children and the disabilities and special education, one of the most serious problems in the United States is that the school districts can't afford it. And they tell us that when they go home, but who is going to come back here and say you can't afford to take care of disabled children, so we don't say much about it. We just pass another law and ship it back to the local district.

Some districts are paying out $100,000 and $200,000 for maybe one person in one year, and we just sit and say go ahead, that is your job. Now that won't last much longer. They can't stand that burden.

So it is such a well-focused opinion. A very well-centered and reasonable decision, and I don't think it should have any kind of flavor that somehow you are not sensitive to the disabled in our society. And I don't think that was the intent but we surely wouldn't want it to be at all expressed in that form because that is not what it dealt with as I see it. Compassion was there but this was, under the fact situation, a most difficult person.

And we do that with our new asbestos law. We passed a dazzling law about asbestos in the schools and then just sent it back to the States and said go to it. We don't know where you are going to get the money to do two or three hundred grand worth of ripping asbestos out of a school built in 1930, but get at it. And this is the same kind of thing that we do well, and I think you called attention to that.

Well, that is just my view of that. Some of that of that case.

Then with regard to discrimination, that certainly came up and it has come up again here today. Discrimination based on gender, I don't like to harp here but I think it is so important that we just try to keep a continuity. We have a situation where six members of this 14-member panel have voted to cast a vote specifically to discriminate against women based solely on their gender. That may be a bit surprising but it is very real and you can't describe it any other way; and that is, to exclude women from the draft.

And six members of this panel, three from each side of the aisle, so we don't get into sloppy partisanship, voted to exclude women from the draft, which is obviously and patently a discrimination against women based solely on their gender. There is no other way to describe that that I know, as a lawyer.

So that is interesting, when we get into those tough issues that seem so good when they appear in law review articles, but in real life they are just plain tough.

You cited a very interesting thing about, I think you were talking about advocacy before the courts. The quality of advocacy has gone down, I hear you saying, or is not what it should be. Would you develop that a bit more? Tell me a little more about that. How do you feel about that?

Judge KENNEDY. Well, Senator, sometimes one asks the question, does a good lawyer really make a difference? The questioner I think, may think it a trick question because if you say yes, then you are not listening to the law, and if you say no, then you are just wasting your time listening to the oral argument.

But these cases are very, very difficult, and the law draws its sources from many places. Judges listen to many voices. The constraints and the compulsions of the facts of the particular case, and of the legislative history, all have to be brought to bear on the specific case before the court. Far more often than most people realize, the three judges on that panel all have their minds made up during the oral argument.

It is the time that I use to make up my mind. I wait until that oral argument. It is a tremendously important half hour or hour. It is very important that counsel be skilled.

Oh, sometimes we know that the counsel just has not seen the problem, and we will see it for him and save the case. But really, we have to impress upon the bar that the duty of the lawyer is to the client, and he may not let the court do the work for him or her. There should just be no shoddy practice in the federal courts; and there is too much of it.

Senator SIMPSON. Well, I think it was former Chief Justice Burger who made some statement years ago that we were doing 747 litigation with Piper Cub pilots, or something like that, and I think that is true. I admired Justice Burger, a Chief Justice, in so many ways a superb human being. He is a delightful gentlemen. I have come to know him personally and that has been my great gain.

Would you, if you were on the Supreme Court, and I honestly and sincerely hope you will be, would you hesitate to write and speak on that subject of lawyers when you are addressing the American Bar Association or the federal bar? Is that something you would like to get involved in, making our profession better and speaking as one who has heard these men and women before you?

Judge KENNEDY. I am committed to that. The former Chief Justice, Mr. Chief Justice Burger, did a marvelous service to the Constitution and to the rule of law when he insisted on this throughout the country. This is not to denigrate the legal profession or the law schools. They are doing a magnificent job.

But one of the frustrations of being a judge is that we get away from the practice somewhat. I see or hear of things going on in the practice, and conclude the ethic is changing out there. The law practice has become much more of a marketplace than of an ethical discipline, and I am concerned about that. But I am so far removed from the practice that I am not sure there is a whole lot I can do about it, other than to talk about the problem.

Senator SIMPSON. But you would be talking about that if you were on the Supreme Court bench?

Judge KENNEDY. I think it is vital.

Senator SIMPSON. That is very important to hear you say that. I think it is critical. I practiced law for 18 years and I loved it, and I did everything from the police court to the federal district court—everything. And now in the marts of trade, the law school students are interested only in what they will receive on their first job.

Those who recruit them are interested only in those who are in the top 8 percent of their class. They must come from the best schools, whoever makes those descriptions, and they must I guess have an overwelming desire for pure greed. Because I think greed is overwhelming our profession. I think they are not practicing law, they are practicing money, and that disturbs me.

And, if you are placed on this Court, it will be a delight to see you with your tremendous ability to deal with young people as you have in your law school, in McGeorge, that you can get them back on track as to what it is. And what it is is not to see how many depositions you can Xerox during the discovery proceedings, you know, by the metric ton, or how to make discovery to put your children through college. The first and only rule under Rule 1 of the Rules of Civil Procedure is that the rule shall be construed to secure the just, speedy and inexpensive determination of every action. That is what it says, and it says that in every State rule, under the State rules of civil procedure.

So as we talk about dissecting cases, and that is critically important, we all do that in our law careers, and in theory and philosophizing the issue we are forgetting what has happened to the little guy. He can't even afford a lawyer anymore.

What are your thoughts about that?

Judge KENNEDY. Just to go back one moment——

Senator SIMPSON. Please.

Judge KENNEDY [continuing]. To your first comment, the bar of the ninth circuit and the leaders of the bar in every circuit in the country do work with the courts very, very closely to assist their colleagues in understanding the rule of courts. They have helped us implement rule 11 on sanctions. They sometimes forget, though, the very critical point that the first duty of the lawyer is really to the law. He has an ethical obligation.

The greatest privilege that a lawyer has is counseling a client. I think we all miss that from our practice.

Every lawyer every day acts as a judge, telling his client what the facts are and insisting that his client or her client conforms their conduct to an ethical standard. That is what the law should be about. I am afraid we have lost some of that ideal in the profession, and part of the reason is money.

You can not have it two ways. You can not complain about poor representation and then, on the other hand, complain about the cost of legal services. There is a relation between the two. Law is so complex now that it takes lawyers longer to do the job. What the answer is so far as legal fees are concerned, I don't know. But it is quite true that if a wage-earner, a person in the middle-class is hit with a lawsuit and does not have an insurance company to defend him or her, they are in big, big trouble.

The repeat players in the system and, as I have indicated, including some public interest groups are very adequately represented. But the person that has one brush with the law sometimes has a problem.

Senator SIMPSON. Yes, that is an interesting part of our profession, counseling a real live, human being client who is in extremity usually. Because they have already talked to their spouse and said, "I wonder if I should go get a lawyer," and they think "I don't

think so. Better watch out." Then they go to their brother and then their uncle and finally they walk in to see a lawyer, and they know they are in trouble and they go only in extremity.

You know, that is the way law really is practiced in the world. It is not like here where there are 33,000 lawyers who, if you turn them loose with an anguished and tearful human being, they would hope they could find somebody down in the lower bowels of the office to take care of the poor old soul.

Well, I haven't asked many questions yet, have I? But I have been certainly launching around in them. Another thing though I wanted to—it is so good to hear someone saying that, and be on the Court saying that where you will be heard and have a forum. But, again, take the issue of clubs. You stated your position I thought very clearly. There is a discrimination based on hostility. And then there is a discrimination just based on plain old, you know, indifference, not paying attention. Joining a club and you don't know what is in the by-laws. You just were looking for a place to play squash.

We have been through some remarkable exercises here. We nearly torpedoed a guy because he was a member of the Masons. And everybody sobered up real quick and the word went around that there were about 20 of us in the Masons in the U.S. Senate and 60 or 70 over in the other body, or more than that, and it is really not too sinister an organization. Their tenets there are based on a fierce protection of wife and mother and daughter and son and brother. Probably like the Knights of Columbus in that respect. But we had to go through all that. I mean you really would have been dazzled by that.

And groups that care for the needy, and there is, you know, a secret society that believes in love of fellow man and woman. Interesting.

But the Elks Club now is really getting to be the epitome now. I joined the Elks Lodge in Cody, Wyoming, so I could get a suds on Sunday. That was the original reason. Since then I learned what they did, and their order is based on charity and brotherly love and helping their fellow man. That is what it is. It is not some sinister outfit.

I don't know about the Sutter Club but they must have some purpose. Charity—you know, they actually take Christmas baskets and do little silly things like that in real life in Cody, Wyoming, and help people. Give scholarships to boys and girls.

So, it really is fascinating. I did bring this up and I want to bring it up one more time because we had a group that wrote to us in strident terms during the last hearing, the National Women's Law Center, I believe was the name, in Chicago. There is a forum there of women lawyers. There is not a single man on the letterhead. And they really raised hell with us. And I asked if they had any men members, and they said no. But there wasn't much more to be said about that.

But, you know, come on. You can't have it both ways in this game. You reach the height of absurdity, and that is what gets reached in this exercise.

Well, I will hear from someone on that subject, but it is important to me to know that you have done the human practice of law

for 13 years and apparently with distinction that testimony from your neighbors, Vic Fazio, to hear him speak, I have great regard for him, Bob Matsui, Pete Wilson. Those things are very important to us as we make our decisions.

I understand you have represented minority groups. You were in the Judicial Administration for the Pacific Territories of American Samoa, were you not?

Judge KENNEDY. I am still on that committee, Senator.

Senator SIMPSON. And what is the nature of that work— I have 4 minutes remaining? Wait. Forget it. Don't bother with that. [Laughter.]

You were a member of a union, yourself?

Judge KENNEDY. I am trying to—I believe that I was. I had summer jobs where I did manual labor, usually in the oil fields, but one summer I worked in a lumber mill and I believe I was a member of the Millworkers union. At least I remember paying the money. I do not know if that made me a member or not.

Senator SIMPSON. If you paid money, we will talk to Lane Kirkland. I think you are all right if you paid in. But you are sensitive to those rights of unions and minorities and women and pro bono activity and fairness. Those things have all been forged in you. Would you say that that is a very important thing as you go on to this new duty, which I hope you will?

Judge KENNEDY. No judge comes to the bench as a clean slate and completely free of all compulsions and restraints from his background. Therefore I think the background of a person, his temperament and his character, or her background, temperament and character, are of relevance to your consideration. I have been pleased to make available to you my life so far as I can remember it, Senator.

Senator SIMPSON. Well, we will do that sometime. I would like that. And it has been a real treat to almost watch your cognitive processes as you deal with the issues and the questions presented to you. You handle the inquiry very well, and it is interesting to hear the verbalization of that cognitive process after you churn it, and it comes out in a way that is very understandable. And as I have always said, what good is our whole practice or profession if those we are supposed to serve can't understand what we are doing for them, can't read the lease you prepare, don't understand the will you did, can't understand the property settlement that you drafted. Clarity will save us yet. But I think you are going to be a great advocate of that. Thank you, sir.

Judge KENNEDY. Thank you very much, Senator.

The CHAIRMAN. Judge, do you realize how difficult you are making this for Senator Simpson? He spent a whole half hour defending you against charges no one made. [Laughter.]

You know, he is so much in the mode from the last confrontation that I hope that Senator Heflin says something nasty so we get something going here.

Senator SIMPSON. You have been always good with equal time.

The CHAIRMAN. You are the only one I would take the liberty to kid with because I know you have a sense of humor that exceeds mine.

And I want to say one other thing while we are on this. And that is, that things haven't changed all that much, Judge. I remember my first case as a young lawyer in the Court of Common Pleas in New Castle County, Delaware. I was assigned to—I was sent a client who was accused of driving under the influence, and my first thing that I did was to go in and to ask for a continuance.

And, as I stood there waiting in line, a fellow named Switch Di Stefano, God bless him, the clerk of the court, turned to Judge Gallo and he said, and I could hear him say, "Ask him if rule 1 has been complied with?"

And he asked me, and I looked and I panicked. I thought I knew what rule 1 was but I couldn't see how it related to this. And I said, "Your Honor, I am embarrassed. I am not sure what rule 1 is."

They called me to the bench and Switch Di Stefano leaned over and he said, "Before we grant the continuance, have you gotten the fee?" [Laughter.]

I am sure that never happened in your life, Judge, but it happened in mine. And I want to yield now to the Senator from Alabama.

Senator HEFLIN. Judge Kennedy, have you found the teaching of law while being a judge rewarding?

Judge KENNEDY. I have to say since I am under oath that teaching is the most enjoyable day of my week. I love it.

Senator HEFLIN. Would you plan if you go to the Supreme Court to do some teaching, too, on the side?

Judge KENNEDY. From what I hear about the workload, I think the answer must be no, Senator.

Senator HEFLIN. Does teaching cause any problems with predetermination of issues?

Judge KENNEDY. I fear that if I were appointed to the Supreme Court that it might. In the ninth circuit there would be maybe two or three times a year in which I would get a little close to a case that was before me, and so I thought I would stay away from it. But you know what the usual drill is. You simply ask the student the question and then you take the opposite side.

I always made it clear to my students that I did not care what they thought but I did care passionately how they came to that conclusion, within certain broad limits of tolerance, of course.

Senator HEFLIN. In the case of *U.S.* v. *Alberto Antonio Leon*, which is now a famous case—and was heard by the Supreme Court—you dissented from the opinion of the ninth circuit and you closed your dissent with this language:

> Whatever the merits of the exclusionary rule its rigidities become compounded unacceptably when courts presume innocent conduct when the only common sense explanation for it is ongoing criminal activity. I would reverse the order suppressing the evidence.

Now I would assume as a teacher after the Supreme Court decided the *Leon* case, you and your students discussed this decision and also your dissent in the ninth circuit's decision. Did that occur?

Judge KENNEDY. Well, Senator, the constitutional law course as it is now composed no longer includes criminal procedure, so I was not able to discuss that with my students. As you have indicated, I get somewhat, at least by inference, more credit for the *Leon* case

than I deserve, because I did not find that there had been an illegal search in that case.

Senator HEFLIN. You looked at the conduct and felt it was continuous conduct and therefore that the information was adequate for the warrant, but you did use the word "good faith" in one aspect——

Judge KENNEDY. Yes, sir.

Senator HEFLIN. So you at least have some claim for that. You also mentioned the rigidities of the exclusionary rule. Do you see in other areas, say in warrantless cases, that the good faith exception could be applied?

Judge KENNEDY. I was on a panel and authored the decision in a case called the *United States* v. *Peterson* in which drug enforcement agents relied on the statement of Philippine law officials for the proposition that they could tap a telephone.

They interdicted a ship some 100 miles off the coast of California with a huge volume of illegal drugs on it. We held that the good faith exclusionary rule applied in the circumstances on the theory that the officers acted reasonably in relying on the assurances of their foreign counterparts. So I have addressed that issue. There was no warrant there.

Whether or not it should apply to warrantless searches in the United States is a question that I have not addressed, and I would want to consider very deliberately whether or not the rule should be extended to those instances because you then get, as you know, into the problem of objective versus subjective bad faith. You must be very careful to ensure that by the exception you do not swallow the rule.

Senator HEFLIN. Now let me ask you about the interpretation of the freedom of religion and the Establishment Clause. Over the past several years many have accused the Supreme Court of interpreting the Establishment Clause in an overly expansive manner. You are quoted in a 1968 interview with McGeorge School of Law newspaper as saying that the Court should leave room for some expressions of religion in State-operated places. There should be a place for some religious experience in schools or a Christmas tree in a public housing center.

Now, without speaking to any specific case, can you elaborate a little on your thoughts pertaining to this issue?

Judge KENNEDY. I can not recall that article or that interview. I saw another article about it just yesterday or the day before. I would say that the law would be an impoverished subject if my views did not change over 20 years.

As I understand the Establishment Clause doctrine, the Court has a very difficult problem because, as you know, the Establishment Clause, which tells us that the Government should not aid or assist religion, in some senses works at cross purposes with the free exercise clause. The classic example is the furnishing of a chaplain to the military. If the Government furnishes the chaplain, it is in a sense assisting religion. If it does not it is denying soldiers whose conduct is completely controlled by their officers the free exercise of their religion. So the clauses sometimes point in different directions.

Now, the test the Supreme Court has for Establishment Clause cases is whether or not the particular legislation or governmental program adopted has the purpose or the effect of aiding religion or of hurting religion and whether or not there is a forbidden entanglement of religion. The Court is struggling with that test on a case-by-case basis. The decisions are difficult to reconcile, Senator.

In this area more than in almost any other one the Court has relied on the historic practices of the people of the United States, and has found in history a guide to a decision. In that respect in this area history has been helpful to the Supreme Court. It seems to me that that is an appropriate reference in those cases.

Where I would draw the line in any given case is a question that I have not addressed in my circuit decisions so far. I have no really fixed views on the subject other than to say that the framers were very careful about this. Many of the framers were religious people, but they were careful not to allow that to enter into the debates in the Constitutional Convention.

Madison was very concerned about religious intolerance and so when Alexander Hamilton asked for the protection of contracts, Madison asked that the test oath clause be put in the main body of the Constitution. The main body of the Constitution contains religious protection and the framers were very, very conscious of this. It is a fundamental value of the Constitution of the United States that the Government does not impermissibly assist or aid all religions or any one religion over the other.

Senator HEFLIN. Going to another subject, media reports have indicated that your relationship with President Reagan came as a result of your assistance in writing proposition No. 1, which was a tax limitation measure. Would you tell us about your circumstances in relationship to now Attorney General Edwin Meese and now President Ronald Reagan when he was Governor and the circumstances concerning that?

Judge KENNEDY. In those halcyon days, Senator, when our current President was Governor of the State of California and Edwin Meese, I suppose his executive secretary, I am not sure exactly of the title, the Governor's administration concluded that it was time to propose to the people of the State of California an amendment which would limit the spending of the government of the State of California. It was a rather complex proposal designed to impose a spending limit. It was hoped that tax reform would follow from that. The spending limit was based on a percentage of the total gross product for the State of California, and the permitted spending, expressed as a percentage, was to decline each year. It was a highly complex measure.

The Governor at the time believed very strongly that the citizens of the State of California should be able to control their government. He and Mr. Meese asked if I would be the draftsman for this complex proposal. One of the reasons the proposal failed of adoption, I am told, is it was too difficult for people to understand. I understood it, but it was an exceptionally complex document. It was very interesting to work on.

Senator HEFLIN. Well, your judicial writings have improved.

Judge KENNEDY. Well, thank you.

Senator HEFLIN. In this Canadian Institute speech you deal with unenumerated rights, and in that speech you state that most rights in the Constitution are enforced as negatives or prohibitions, not affirmative grants, and you list as examples, Congress shall make no law respecting the establishment of religion, no warrant shall issue but upon probable cause, or nor shall any State deprive any person of life, liberty or property without due process of law.

You seem to view these prohibitions in the Constitution as limiting the expansion of judicial power. Are they also, though, a means of preventing government from denying individuals their fundamental rights?

Judge KENNEDY. I would agree that they certainly are, Senator. And in the negative form they are easily understood well, not always easily enforced, but I think easily understood.

Senator HEFLIN. In Judge Bork's hearing, I think we questioned him for a long time before we finally got around to asking him about *Roe* v. *Wade*. I suppose if there is any one issue, that issue is probably within the spotlight the most.

He answered by saying that his position relative to reviewing *Roe* v. *Wade*, if it came up for a review and if he was on the Supreme Court, would be directed in three different areas. One is looking to the Constitution to find whether or not there was any specific authorization for an abortion; second, whether or not he could find a general right of privacy by which he would base a decision relative to *Roe* v. *Wade;* and, third, stare decisis.

There was no question that he had been quoted as saying that that decision was a unsatisfactory decision of the U.S. Supreme Court. He had previously been quoted and he admitted that he thought it was a wrong decision, and that he thought that the reasoning of the decision was defective.

He outlined, not in specific terms the criteria that he would use, but in general terms the criteria that he would review relative to stare decisis. In all fairness I think the American people would like for you to give an expression pertaining to that case, your views, how you would approach, without specifying how you might hold, but how you would review and how you would approach that issue.

Judge KENNEDY. In any case, Senator, the role of the judge is to approach the subject with an open mind, to listen to the counsel, to look at the facts of the particular case, to see what the injury is, see what the hurt is, to see what the claim is, and then to listen to his or her colleagues, and then to research the law. What does the most recent precedent, the precedent that is before the Court if it is being examined for a possible overruling, and what does that precedent say? What is its logic? What is its reasoning? What has been its acceptance by the lower courts? Has the rule proven to be workable? Does the rule fit with what the judge deems to be the purpose of the Constitution as we have understood it over the last 200 years? History is tremendously important in this regard.

Now, as you well appreciate, and as you certainly know, Senator, stare decisis is not an automatic mechanism. We do not just pull a stare decisis lever or not pull it in any particular case. Stare decisis is really a description of the whole judicial process that proceeds on a case-by-case basis as judges slowly and deliberately decide the facts of a particular case and hope their decision yields a general

principle that may be of assistance to themselves and to later courts.

Stare decisis ensures impartiality. That is one of its principal uses. It ensures that from case to case, from judge to judge, from age to age, the law will have a stability that the people can understand and rely upon, that judges can understand and rely upon, and that attorneys can understand and rely upon. That is a very, very important part of the system.

Now there have been discussions that stare decisis should not apply as rigidly in the constitutional area as in other areas. The argument for that is that there is no other overruling body in the constitutional area. In a stare decisis problem involving a nonconstitutional case, the Senate and the House of Representatives can tell us we are wrong by passing a bill. That can not happen in the constitutional case.

On the other hand, it seems to me that when judges have announced that a particular rule is found in the Constitution, it is entitled to very great weight. The Court does two things: it interprets history and it makes history. It has got to keep those two roles separate. Stare decisis helps it to do that.

Senator HEFLIN. Let me ask you about the death penalty. If you believe that the death penalty is constitutional, and some of the speeches you have made indicate that you believe that it is, what safeguards do you think are necessary to prevent the use of the death penalty in a discriminatory manner?

Judge KENNEDY. I, at the outset, Senator, would like to underscore that I have not committed myself as to the constitutionality of the death penalty. I have stated that if it is found to be constitutional it should be enforced.

With reference to its being used in a discriminatory manner, there are at least two safeguards. The first is that the legislature itself defines the category of crimes that deserve the ultimate punishment. The second is that courts develop, articulate, and pronounce rules for instructions to the jury so that the jury's decision is properly channeled. You know better than I because of your experience in the trial courts, Senator, the tremendous power of that jury. Juries simply must be given clear guidelines so that they can apply the death penalty on a consistent basis.

It is not clear to me that under the existing law that requisite has been satisfied in some of the cases that I have reviewed. On the other hand, I recognize the difficulty in formulating these standards that I so blithely recommend.

Senator HEFLIN. In 1980, you gave a speech in Salzburg, Austria, which focused on the power of the Presidency. In that speech you stated:

> I think that the accepted view is that while Congress can instruct the President in most matters there are some inherent powers in the office exercisable in an emergency but their nature and extent are still not fully understood. These answers must wait an evolutionary process in the continuing traditions of the Presidency. My position has always been that as to some fundamental constitutional questions it is best not to insist on definitive answers. The constitutional system works best if there remains twilight zones of uncertainty and tensions between the component parts of the government. The surest protection of constitutional rule lies not in definitive announcements or power boundaries but in a mutual respect and deference

among all the component parts. This furthers recognition of the need to preserve a working balance.

Would you elaborate on the inherent powers you believe might be exercisable by the President in an emergency?

Judge KENNEDY. As you know, Senator, if you look at article II of the Constitution, it is much different in style than article I.

Article I, which specifies the powers of the legislative branch, is quite detailed. Article II is not. It is almost as if it were written by different people. It was not, but it looks that way.

It is a text in which you have to isolate phrases in order to pick out what the President's powers are. The President's power is to exercise the executive power; that is the way article II begins; he has the powers of the commander in chief; he has the power of appointment, the power to receive ambassadors, and the duty faithfully to execute the law. Duty has translated to power by the tradition of the office. I am not quite sure how that happened.

Youngstown Sheet and Tube tells us, or it begins to discuss, the critical question, whether or not the President is simply the agent of Congress, bound to do its bidding in all instances, or whether or not there is a core of power that lies at the center of the presidential office that the Congress cannot take away.

As I understand current doctrine, and the *Youngstown* case, there is that core of power. The extent to which it can be exercised in defiance of the congressional will is a question of abiding concern, I know, to the Congress and to the judges.

My point in those remarks was that these power zones are perhaps best defined as each branch accommodates the other, and expresses deference to the legitimate concerns of the other branch.

The history of the development of the presidency has been one of evolution. One suggestion given for the different textual treatment in article II was that the framers knew that Washington would be the president. They trusted him, indicating that the framers thought there would be an evolutionary component to the presidency as it evolved.

The extent to which the presidency can be controlled by the courts is not yet clear. We know that in the *Youngstown* case, where the president seized the steel mills, and in the *Nixon* tapes case, where the President was ordered to turn the tapes over to the prosecutor, there was immediate compliance by the president with the mandate of the Court.

To date, the court's authority to review the acts of the president has not been questioned by the president. Lincoln questioned the authority, because of the necessity of the Civil War.

Whether or not the courts are the appropriate body for the reconciliation of all of the disputes between the political branches of the government is a question as to which I have some doubt. In some disputes, it may be unclear there is a case and controversy which the courts can adequately and meaningfully interpret consistent with the case-by-case method.

Senator HEFLIN. Have you expressed in your opinions or speeches or statements a position on congressional standing?

Judge KENNEDY. No, sir, I have not. It has been an issue that has arisen principally in the District of Columbia circuit. It is an issue on which I have not expressed myself, and have no particular fixed

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.]