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