I think many members of this panel misconstrued Judge Bork's approach towards original intent, as though it was some sort of a Neanderthal approach to just a literal interpretation of the Constitution, when in fact it was far more complex and far more difficult than that.

Let me just say the cases may evolve, circumstances may change, doctrines may change, applications of the Constitution may evolve, but the Constitution itself does not evolve unless the people actually amend it. Do you agree with that?

Judge KENNEDY. Yes.

Senator HATCH. That is all I have, Mr. Chairman. Thank you for the time. Thank you.

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. Thank you very much, Mr. Chairman.

We reviewed, Judge Kennedy, yesterday, some of your decisions on the handicapped, and on fair housing; and we exchanged views about whether the decisions you had made were particularly narrow.

We talked a little bit about the question of sensitivity on cases affecting minorities' rights, women's rights in the clubs issue, where you had been involved and participated in club activities, and then eventually resigned.

I do not want to get back into the facts on those, but I want to get back into related subjects in terms of you, if you are confirmed and because a Supreme Court Justice, whether those who are either left out, or left behind in the system, can really look to you as a person that is going to be applying equal justice under law.

And there are some concerns that have been expressed through the course of these hearings, and I want to have an opportunity to hear you out further on some of these issues.

I come back to one of the cases that was brought up earlier today, and that is the *Aranda* case.

Judge KENNEDY. Yes, sir.

Senator KENNEDY. We discussed that earlier in the day, and I just want to review, briefly, the evidence in that particular case. You are familiar with it.

—Ten of the fifteen polling places in the city were in the homes of whites living in a predominantly white section of town.

—Although Mexican-Americans constituted 49 percent of the city's population, and 28 percent of the registered voters, only three Hispanics had been elected to the city council in 61 years.

—During a voter-registration drive conducted by the Mexican-American community, the city clerk issued statements alleging irregularities, and the mayor issued a press release charging that unnamed activists were trying to take control of the city government.

—In the preceding election there was evidence of harassment of Mexican-American poll-watchers by the city police.

—And Mexican-Americans were significantly under-represented in the ranks of election inspectors and judges, the membership of city commissions, and the ranks of city employees.

Now, the lower court indicated that they did not find that there was any violation of the law. It was appealed to you. You wrote a separate opinion, and I believe in the exchange earlier today, you had indicated that even if there had been a finding that all of these

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facts had been true, that you did not believe that that would justify the kind of relief that was requested by the petitioners, which would have been a change in the whole citywide election process.

Am I correct up to this point?

Judge KENNEDY. I think that is correct. Yes, sir.

Senator KENNEDY. I am not trying to fly-speck you on this, but I want to get to the substance of my concerns.

Judge KENNEDY. I think that is a fair beginning.

Senator KENNEDY. The concern that I would have, and I would think most of those Hispanics would have, is that discrimination today, whether it applies to women or minorities, does not appear on signboards. It is often hidden, and, given, if all of these facts were true, that there had been harassment of the poll workers, that there had been the conscious positioning of those polls in white homes that perhaps did not include Hispanics—given the record—if there had been the harassment of the Mexican-American poll-watchers, why wouldn't you believe that it would have been wise to let the jury, or judge hear out the facts on that, to make a judgment on whether that whole election process and system was sufficiently corrupt and sufficiently discriminatory, so that the kind of relief that the petitioner wanted might be justified?

Judge KENNEDY. In that case, I thought an adequate showing had been made to survive a summary judgment motion. I said that to conclude, "That plaintiff's evidence could not justify striking down the at-large election system, does not, in my view, necessarily mean that the plaintiffs may not be entitled to some relief. For example, plaintiff's statistics regarding placement of polling places in private homes"—this is a very long paragraph.

Senator KENNEDY. Right. The point is, don't you think if you heard, or that a jury heard, the testimony with these kinds of serious allegations about poll-watchers being harassed, and about irregularities by the city clerks, other kinds of these types of activities which obviously, if they are true, and you say even if they are true, might indicate that the whole system, the whole system within that community is sufficiently tainted, that the opportunity for a true election would be virtually impossible? Don't you think if a jury heard and listened to those witnesses that made those allegations, and heard their cross-examinations, given the significance and the importance of discrimination that exists in my own community, in the City of Boston, and in other parts of our country—did you ever think for a moment that we really ought to try to hear that out, or send it back and let a jury or a judge find out how invidious this really is, before we deny, effectively, these petitioners their day in court?

Judge KENNEDY. Yes, it would be a judge in this case, and I thought that the action did justify further pursuit in the courts. I have indicated that I thought that a complaint would lie for these actions.

I did think, Senator, that because of the insistence of the plaintiffs that they wanted only the at-large election remedy, that a judge could not reasonably conclude that the at-large remedy—or pardon me—that the maintenance of the at-large system was intentionally caused, because I did not think that the evidence supported that inference.

I did not think that inference could be drawn. Now, if you want to hypothesize, saying that because of this injury there should have been a remedy of district elections, then that is another point, and under the 1982 amendments to the Voting Act, I think that may very well be the case.

Senator KENNEDY. Well, it was because we went into an effects test. But we do not want to leave the record to suggest that you remanded for further proceedings. You affirmed the earlier decision. You could have remanded for further proceedings which——

Judge KENNEDY. Well, I was a single judge. I did not have the dispositive power over the judgment.

Senator KENNEDY. Let me go into, again, this question about a different type of discrimination. We talked about it, briefly, yesterday, and that is the whole question of stigmatization and invidious discrimination, particularly with regards to women in our society.

And we addressed that issue as it related to your former club memberships, and I do not want to go back over that ground. But I want to get back to what you think is necessary in terms of finding invidious forms of discrimination, again against a background where we have seen, with regards to women and minorities, that issues of discrimination are now much more sophisticated.

They certainly have become so in recent times, and I think the American people understand that. Now as a practical matter, blacks were excluded from the Olympic Club because of their race, or sex, and during our discussion yesterday, you agreed that it is stigmatizing for a woman to be excluded from a club where business is conducted.

In fact you said it is "almost Dickensian" and inappropriate, but, at the same time you indicated that in your view—and I quote: "None of these clubs practiced invidious discrimination."

Now the Bar Association, in its commentary, does not require that there actually is an evil intent, in its restrictions of membership in various clubs. And I am just wondering whether you think that there can be invidious discrimination—without trying to reach back into the mind of the particular drafters of a statute, or by-law, or regulation—whether the effects of that type of a by-law, or regulation or statute effectively can discriminate invidiously, or whether you find that you have to go back to the mindset of the individual who either voted for or drafted that particular by-law or statute?

Judge KENNEDY. Invidious is the term that the ABA used, and it is the term that the Judicial Ethics Committee uses as well.

It is not a term that so far as I know has a meaning that has been explored in the case law, and therefore, it is somewhat imprecise. I think that the dictionary definition would be evil or hostile.

Senator KENNEDY. I have got it here. I do not want to be spending the time on it, but you know the point I am driving at.

Judge KENNEDY. The law in torts says that you can be charged with the natural consequences of your own acts. It is clear, to me, that if a discriminatory barrier exists for too long, if it is visible, if it is hurtful, and if it is condoned, that the person who condones it can be charged with invidious discrimination. I would concede that.

Senator KENNEDY. I think I will leave that there.

Let me go on to another area, if I could, that involves both the availability and the sensitivity and the usefulness of statutes and laws to correct wrongs. What I am talking now is access to the courts.

I am sure all of us understand the importance of having our day in court. It is part of our national heritage, but courts are especially important for those that lack the financial resources and the skills to be able to protect their rights. So as you know, class actions are often a means used by large groups of victims to pool their resources and bring a lawsuit for the benefit of all the members of the class. It may be women, it may be blacks, it may be senior citizens in terms of Social Security, which we saw reflected during previous nominations.

In a decision in 1982, in the *Pavlak* v. *Church* case, you held that the fact that a motion to certify a class action was pending did not stop the clock from running on the statute of limitations on the claims of members of the class. The approach you took would severely undercut the usefulness of the class actions because each victim, effectively, would have to file intervention papers in the class action in order to protect his or her rights if the courts denied the motion to certify the class.

So in the hypothetical employment discrimination suit I referred to, every person who was discriminated against would have to file intervention papers. They, in effect, would have to get a lawyer and file in case the court decided not to treat the case as a class action.

Now, the Supreme Court in 1983 vacated your decision because in two cases that year the Supreme Court unanimously rejected the view you expressed.

Would you address the concern that your decision in the *Pavlak* case reflects a very technical and narrow view in terms of the access to the courts to American people, who may be poor or handicapped?

Judge KENNEDY. To begin with, you have to remember that the class action failed there. So the question is whether a person who has an individual injury can sue.

Senator KENNEDY. That is right.

Judge KENNEDY. And the Supreme Court decision does make it easier for those persons who are injured to file an individual suit after the class has failed.

Senator KENNEDY. Right.

Judge KENNEDY. Our concern was that by the pendency of the class action, of course, the defendant has an open-ended contingent liability, and there is some interest in terminating those contingencies and in encouraging people with individual claims to come forward so the defendant knows what it has to defend against.

Senator KENNEDY. Sure.

Judge KENNEDY. And in this case, the plaintiff did not seek to intervene even after the court gave leave to intervene. The court gave leave to intervene at the conclusion of the class action, and the plaintiff did not. That was our rationale for saying that the statute has run. I certainly do think it is a close case, and I am quite willing to accept the decision of the Supreme Court. I forget

where the other circuits were on that point. I think we followed the decision of the second circuit, but I am not sure.

Senator KENNEDY. This is with regards to whether you have got individuals who have a grievance, and they are trying to find out if there is going to be certification of a class action.

Judge KENNEDY. Yes.

Senator KENNEDY. That request or certification can be denied for any number of reasons—the size of the class dissimilar interest, any number of different reasons for which a class action, as I understand, can be dismissed. And we are talking about the statute of limitations, for example, that in some instances are not 7 years, but 60 or 90 days. Fair housing is 120 days. So we are talking about a relatively short period of time in areas, particularly in the area of housing, where there are some very serious, egregious situations and where this may have a significant effect. I hear your reasons for it.

Let me ask whether these narrow rules really effectively have a booby-trapping effect on individuals. Just again on the issues of the statute of limitations, in *Koucky* v. *Department of Navy* in 1987, you affirmed a lower court decision dismissing a handicap discrimination claim against the Navy on statute of limitation grounds because the complaint, that was filed on time, named only the Department of the Navy, not the Secretary of the Navy, as required by law.

Similarly, in *Allen* v. *Veterans Administration*, you affirmed a district court order dismissing a suit on statute of limitation grounds because the papers, filed on time, named the Veterans Administration, rather than the United States, as the defendant.

What I am looking for is some assurance that these and other cases do not reflect any predisposition on your part to look for ways to keep worthy cases out of court.

Judge KENNEDY. They do not. If you will look at our opinion in *Lynn* v. *Western Gillette*, I am tempted to say, you will see that I was quite capable of giving a generous interpretation to a statute of limitation in a Civil Rights Act case.

The claims cases you mentioned against the Government are ones where I wish the Congress would pass just a little bill——

Senator KENNEDY. That is asking a lot.

Judge KENNEDY [continuing]. To clean up the statute of limitations law. I could write it for you on the back of an envelope during a recess. We have been pleading with the Congress for years to give attention to this, to what we consider to be as the law of our circuit—the mandatory rule that you have to serve two different people. It is a trap. There is no question it is a trap. It is also, Senator, the law.

Senator KENNEDY. Well, I thank you. I would be interested in your recommendations on it, and I know that the time is flowing down. But at least in these cases affecting minorities, affecting the handicapped, affecting access and discrimination, we welcome your response. I think the real question that certainly members hear across the country, which is the most important aspect, people want to know whether—not only as a nominee, but should you be confirmed—whether you are going to live by those four words that are above the Supreme Court, which you know so well, and that is

"Equal Justice Under Law"; and whether they are going to feel, particularly those that have been left out and left behind, that in Justice Kennedy they are going to have someone that will not be looking for the technicalities and the narrow and crabbed or pinched view of a particular statute, but a justice who is going to be sensitive to the basic reasons for why that statute was passed.

That is something that we will be making judgment on. I do not know whether you care to comment.

Judge KENNEDY. Well, thank you, Senator. I think it is an important part of the advise and consent process that you make the judge aware of your own deep feelings and sensitivities. I would say that if I am appointed to the Supreme Court and I do not fully meet the great proclamation that stands over its podium, that I would consider that my career has not been a success.

Senator KENNEDY. Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you.

The Senator from Wyoming, Senator Simpson.

Senator SIMPSON. Thank you, Mr. Chairman. First, Mr. Chairman, let me say that yesterday I mentioned—and I want this very important matter to be heard—a group called the National Women's Law Center as a group who had spoken out against Judge Bork on issues of discrimination based upon sex, and that they had no men in their organization. That was incorrect and in error and unfortunate. The group was not the National Women's Law Center, which is a Washington, D.C.-based group. My confusion was occasioned by the fact that one lady named Marsha D. Greenberger is the managing attorney of the National Women's Law Center and a member of their board. She is also a member-at-large and on the letterhead of a group called the Federation of Women Lawyers Judicial Screening Panel, which is a Washington organization. My confusion was caused by that dual membership of this lady attorney on that National Women's Law Center and this Federation of Women Lawyers Judicial Screening Panel. This group, the Women's Law Center, did object to Bork, in fact, in a letter they stated that they had never before ever taken a position on a judicial nomination, but because of the extreme nature of Judge Bork's legal views and the dramatic effect on the rights of women, the center felt compelled to take that step.

But what I was referring to was the letter of the Federation of Women Lawyers with regard to Judge Sentelle where they were objecting to his being a member of the Masons because it was a male organization. I was saying there is the true irony because the letterhead of that group does not contain the name of any male.

Now, before sinking deeper into the morass there, I do indeed owe an apology to the National Women's Law Center. The remarks I made with regard to the Federation of Women Lawyers Judicial Screening Panel I would leave on the record, but I certainly want to apologize to the National Women's Law Center as an error on my part. I would like to clear that record, and especially to Marsha D. Greenberger. And my apology, surely due, is certainly hereby expressed, and I earnestly hope accepted.

With that, I shall move on.

Mr. Chairman, you know, regardless of what we say, sometimes the needle does get stuck here, and we have reviewed old ground,