

The CHAIRMAN. And Judge Tyler, you think you have a problem with Senator Hatch, that you came in 10-4. If you had come in—or 10-5. If you had come in unanimous against Bork, he really would have been upset.

I yield to the Senator from Vermont.

Senator LEAHY. Thank you, Mr. Chairman. I will only take a few minutes. I am going to have to leave. The Agriculture committees have two conferences, one on farm credit, and one on the Reconciliation Bill. The latter one is even more important, I would say to my colleagues here, because I understand, from the Majority Leader, depending upon what I and my committee do on that, will affect whether we will recess, or adjourn this weekend, or whether we will go into next week. So I will be urging my other colleagues here to leave to go to that committee conference.

The CHAIRMAN. We urge you to leave, Senator.

Senator LEAHY. Probably the quicker the better.

I would note, because of the comments that went on just in the past few minutes, there seems to be some kind of a feeling here that the ABA sunk the Bork nomination, or advertising groups sunk the Bork nomination, or pressure groups sunk the Bork nomination. That is not so. Judge Bork is the one witness that really counted on the Bork nomination, and it was his testimony—and I think he was candid and honest—but it was his testimony that determined that he was not going to go on the Supreme Court. It was not the testimony of the ABA, or of anybody else.

If you watched the public-opinion polls during that time, and the American public during the time when Judge Bork was testifying, the majority of people stated that they did not want him on the Supreme Court. I have not heard of any Senators who voted either for or against Judge Bork who said they based their decision on anything other than his testimony here.

Now I think the ABA was helpful, and I think you are helpful in all of these. I think you are helpful here today. And the other witnesses for and against Judge Bork were helpful. But ultimately it was his testimony that was the only one that really counted.

So I said at the beginning of these hearings, the same with Judge Kennedy. He is the one indispensable witness, and the one witness that makes or breaks the case. Now many have said that he will be confirmed. If so, it will be because of his testimony. Your testimony is valuable, certainly. It substantiates and buttresses the impressions many have of Judge Kennedy.

Others will testify against him, and that may also speak to concerns that some members of this panel will have. But he really is the one who makes or breaks it. I think all of you would agree with that, that it is the candidate himself, or herself, that affects the final determination. No nefarious group, no cabal, no collective conspiracy sunk the Bork nomination.

After the testimony was heard from Judge Bork, the Senate, with the largest vote against a Supreme Court nominee in history, voted against him, Republicans and Democrats alike. That was not because of some action behind closed doors at the ABA, and it was not because of ads that ran either for or against him, and a lot did. It was because of him himself.

And that is really something we should not lose sight of—that each Senator ultimately has to make the judgment for himself, or herself, on the testimony and the background, and the character, and the judicial philosophy of the candidate. That is what we have always done.

Of course, none of us got to vote on Judge Ginsburg. There, the determination was made by the White House, which sent him a very pointed message to get out, and to his credit he did. But that was not because of the ABA or anybody else.

Now let's not lose sight of the fact that the same thing will happen here; Judge Kennedy will be confirmed, or not confirmed, based on what he has said, his background, his capabilities, and his judicial philosophy.

And let's not put up red herrings, or straw men, to say this is why the administration lost this particular one, or this is why they won this particular one. I do not think the ABA would want to think that they would have some kind of a power, that they could automatically declare who would or would not go on the Court. You do a very valuable service in giving us your information, and I am pleased with that.

You were split on Judge Bork. So was the United States Senate. So were the people of this country. There were people passionately for Judge Bork. There were people passionately against Judge Bork. There were Senators strongly for him, there were Senators strongly against him, and there were people within the administration, on both sides. Is it any wonder that the highly talented, completely competent—and I have every reason to believe—totally honest lawyers on the American Bar Association—would also be split? You know, it is only realistic to expect.

Now I commented as I came in—if you will allow just a second of parochialism—you were mentioning the Vermont law school and their environmental program, and I am delighted to hear you mention that. With the new dean, Doug Costle, I suspect that they will probably even be more strenuously environmental, and I am glad you called on them.

Mr. Chairman, I am sorry to take so long, but I just do not want anybody who is watching this hearing, or watched the last hearing, or listened to it, or read about it, to think that the groups for or against a nominee are here for anything other than to give guidance or to give information to the Senators. But the Senators, each one of us, have to ultimately make up our minds, based on the candidate, himself or herself.

And that really is what decides whether the candidate, himself or herself, will go on the Court or will not. And I think that this committee will be pretty much reflective of the views of the American people. It has in the past, I think it was in the Judge Bork nomination, and I suspect it will be with Judge Kennedy. Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you. I hope your conference goes quicker than the statements, so we can all get out of here.

Senator LEAHY. I tried not to take more time than Senator Hatch did.

The CHAIRMAN. You were well within your time and took about a third as much time as Senator Hatch.

Nonetheless, I hope we move this along, and I am sure Judge Tyler enjoys knowing what we think of him, we all love him with great affection, and I imagine he hopes he does not have to be back in this room for another year. The fact of the matter is, Judge, your committee has had the dubious distinction of having to process more judges in a shorter amount of time, of greater controversy and consequence than probably any standing committee the ABA has in the history of the committee.

I think you have done it with great dispatch. I will not speak to it any more. I yield to my colleague from South Carolina who asked to intervene for a moment, and then I am going to make a particular request.

Senator THURMOND. Mr. Chairman, I am going to ask you to excuse me until this afternoon, to attend a funeral in South Carolina. J.P. Strom, the chief of the South Carolina Law Enforcement Division passed away the day before yesterday. He happens to be a cousin of mine as well as a friend, and I will return as soon as I can this afternoon.

Now I just want to say before leaving, on this question of discrimination, that I am bitterly opposed to discrimination.

An organization that deals with issues, and deals with the public, and so forth, is one thing. A purely personal group that wants to meet, whether it is women or men, it seems to me would have a right to meet.

So I just want to pass on to you what I think. I do not think there ought to be any discrimination on account of race or color, sex, religion, or national origin. As I say, I am greatly opposed to it.

A few years ago, Senator Kennedy and I wrote a letter to Judge Bailey Brown opposing invidious discrimination. Invidious discrimination, as I interpret it from the dictionary—and I have a copy of the dictionary here—is harmful or injurious. No rightful person should favor discrimination of that kind.

Now, I do want to say that some time ago we had a judge before us who was a member of the Masons. I took the position that that should not bar him from being a judge. George Washington was a Mason. Many prominent people in the past were Masons. Six members of this committee are Masons. A large number of the members of the Senate and the Congress are Masons. The Majority Leader of the Senate is a Mason, for instance. I do not think anyone should be discriminated against on that account.

Now, some time ago I believe the Federation of Women's Lawyers wrote in. I understand that they do not have any men lawyers. Well, I am looking into that organization to see whether it deals with issues and deals with the public and should be in the category of where there should be no discrimination. But just purely personal, it seems to me, any group of persons could get together in a personal way, that does not have to deal with the public, does not ask for any tax exemption, and does not take an active part that involves the public, I see no reason why they should be discriminated against.

Now, Mr. Chairman, again, I want to thank you, and I will be back as soon as I can.