

It is a thankless job. And I think they have done well.

It is interesting, Mr. Chairman, at this point in the course of the hearings on Judge Kennedy that the real controversy is still Judge Bork.

And I think that the American people are beginning to understand it. Because in the course of the two days of hearings, they have seen that Judge Kennedy's America is quite different from Judge Bork's America.

The American Bar Association understood that. This Senate Judiciary Committee understood it. The United States Senate understood it. And America understood it.

And because of that, I believe that the cause of justice in America is better served. In spite of, quite frankly, the sour grapes of some of our friends on the right about a battle that has been long ago fought and decided.

And I just want to express my own appreciation for the work of these witnesses. And I have hope that after Senator Specter has an opportunity to speak, that we can get on with the other witnesses who will speak of the qualification of the nominee who we are charged to evaluate as members of this Senate Judiciary Committee.

I thank the Chair.

The CHAIRMAN. I apologize to the Senator from Pennsylvania for the two interventions. I will go back to the Senator from Alabama upon conclusion of the Senator from Pennsylvania's 15 minutes or less of questioning.

Senator SPECTER. Thank you, Mr. Chairman.

At the outset, I want to agree with both Senator Kennedy and Senator Grassley. [Laughter.]

Senator METZENBAUM. No wonder you got elected.

Senator SPECTER. Speaking as a long standing member of the American Bar Association and as a member of this committee, I do applaud your work.

But I think that Senator Grassley has raised some questions which are very, very important. And I do disagree just slightly with Senator Kennedy. I do not think we are talking about Judge Bork here today on this issue; I think we are talking about Judge Ginsburg on this issue.

Judge Tyler, with all respect, not just due respect, because I have tremendous respect for what you have done in a public service way, and especially what you are doing now pro bono, I do not think that it really advances our interest here to say that it ill behooves the committee to spend more time on the issue of the disclosure by the anonymous ABA member, or to say to Senator Grassley that you cannot imagine anybody missing the point.

I do not believe that on this record the point has yet been established. And I believe, without being unduly repetitious, that it is a very important point. And I took the time to write to you separately back on November 11 concerning this issue.

And I will ask that my letter and your response be made a part of the record at the conclusion of our discussion.

The CHAIRMAN. Without objection, it will be.

Senator SPECTER. And just a couple of lines from my letter. I said, as hard as it is to do, I hope that you will make every effort to

find out if that was actually said, referring to the Post article, and if so, who said it.

If it turns out that a member of the ABA screening committee actually said that, I believe some action should be taken.

I would appreciate knowing what action if any you have taken or do take on checking out the accuracy of that quote from the anonymous source.

And I won't take the time now, Judge Tyler, to read your response. But as I read your response, you did not respond.

When Senator Hatch asked the question of you earlier this morning, you said, as I wrote it down: The usual dispute occurred as to who said what. But in response to Senator Hatch you didn't state whether you had identified the person; what the person said; or what action you took.

Senator Grassley pursued the issue, asking you if you tried to find out. I don't think he ever quite asked you if he did find out, but I do believe that you said you did find out.

And then the question or the comment was made by you that you do not have the authority to appoint, you do not have the authority to fire. And then you did get around to saying that you hadn't asked the president, who had the power to appoint, and presumably the power to fire, what had taken place.

Now, the American Bar Association has enormous standing, and I think it would be a mistake for this committee not to invite your participation, and not to listen carefully to what you say.

And in saying that, I immediately say that it is our responsibility to make the judgment. We listen to what you say, but you have great standing. You have great tradition.

And there will exist a lot of concern, if not a bitterness, about what happened in the previous proceeding.

And to have the comment about a Bork or a Bork-let appear in the paper I think requires that we know what the process is and what you have done about it.

For years, I dealt in a business, as you gentlemen do, of interrogatories, the ad nauseam interrogatories, and the motions to compel more specific answers.

But I believe it is important to know, if it was said, sending us a Bork instead of a Bork-let, if you identified who it was who said it. And I do not ask you for the identity of the person. I am not sure whether you are right or wrong in keeping your minorities secret, but I respect that conclusion, and I think it would not be up to us to say on that.

And I am not asking you to disclose who said it. But I would like to know specifically what was done, either by the chairman, Judge Tyler, or by the committee.

And I think we are entitled to know the specifics so that we can be confident about the processes. And it is more than just taking the generalization that it is all fine for the future.

I think we are entitled to know more details on it

Judge TYLER. Well, let me start, point by point.

It appears that you think I did not answer all of these things, and I will try.

First of all, with regard to my letter, it is so long ago I have forgotten exactly when I sent it to you. But I do recall that I know more now than I did when I wrote it.

Second of all, I believe that I know the identity of the person.

Third of all, I said what I meant, and I meant what I said, that I have no right to appoint anybody to this committee, or to fire anybody from the committee.

When it appeared that this happened, and I certainly agree with you and Senator Grassley and anyone else that that kind of comment not only violated our rules, but conveyed the impression to any reader, as you point out, and Senator Grassley pointed out, that the person is proceeding with a preordained view before we had even begun to investigate the candidate in question.

And it appeared on a date, by the way, on which that inference was particularly clear cut.

We had a meeting. Not everybody could come, because we have lawyers who have court appearances and so on. Most everybody was there.

We talked it through. We made it very clear that the criticisms that we could contemplate as a result of this were serious; not just because of our own rules, but because of public perception of the work of this committee.

After some struggle, and conversations between me and the individual, that person took the position that the conversation with the press representative took place.

Then we had what I consider, Senator Specter, based on my long career in the executive and judicial branches of the United States, the inevitable problem: A difference as to who said what.

How do you answer that? I have never found there is any sure answer to that.

But we will pass that. I believe, and I reported to the president and through him the president-elect of the ABA that we had done what we could to try and seal off this kind of comment. Again, as I think I have already said, you have to keep in mind that I, at least, have never met a human being, no matter what his position in life, who doesn't occasionally sound off and say things that really he does not quite mean.

I suppose it will come as no surprise to you, with your experience, that the person who I think was involved in this, and certainly admits the conversation with the reporter, may have, you know, lost control and said things that ought not to have been said.

The CHAIRMAN. It has never happened to any of us.

Judge TYLER. I assure you that during the deliberations of our committee, this person was a responsible, careful, and direct investigator, in connection with the nomination of Judge Kennedy.

It would be easy for me to come before this committee with my colleagues today and say, oh, yes, as a result of that Post article, the president of the ABA or the president-elect has stripped that committee member of his post or position.

That is not so easy to do, at least at this point. I certainly agree with you, and I repeat—I thought I made this clear before, but I will repeat it—I am not happy about this. My colleagues are not happy about this.

This has been an enormous cross to bear during one of the busiest times in the history of this committee.

I wish I were a great solver of leak problems. Having been a resident of Washington, DC, I assure you, I doubt that we will ever be leakproof, but we are trying.

What I am trying to convey to Senator Grassley and others is, we come in and offer our opinion. I underscore the word opinion. There is no legal or practical reason why your committee has to accept our opinion as controlling.

I appreciate your concerns, which you are entitled to, about leaks. You are absolutely right. There is no good answer to that that we are proud of, or should be.

But believe me, it is very easy for me who has a lot of things to do everyday, having nothing to do with this committee, to say to this committee, well, you know, we will solve this.

I would be guilty of dissembling at best. But I think at the moment, we are in better shape than we were 5 months ago when I came to this committee, because we have struggled with this.

I assure you that if we cannot solve it now, I am going to go back to not only the president of the ABA, who appointed me by the way, and has the right to fire me, and the president elect.

Because if we have to change how we appoint people to avoid this problem, I for one would like to see it done.

But we are not quite there yet. This has been a high draft, high pressure, time consuming period, since July 1, for this committee.

I do not know if you were here when I reported that in the last 5 months we have done a lot of work. I do not want to boast about that, but I want to make the record clear that we are beset with a lot of work in a confined period of time of great importance to this country.

And to bedevil you or ourselves with these problems any more than we have tried to do has been impossible.

Senator SPECTER. Well, Judge Tyler, I understand what you are saying. I do not expect you to solve problems of leaks.

I do not think that is susceptible to solution in a democratic society, nor should it be. If there is one, all you can do is try to find out, and after you find out, if you have, take what action you consider to be appropriate.

That is all that can be done. Then, to respond to us on those limited questions.

Judge TYLER. And I am sorry I did not know as much when I wrote you as I know now.

Senator SPECTER. Well, you could have supplemented your answers to interrogatories.

Judge TYLER. I could have.

Senator SPECTER. But let us not go over that.

You said a couple of things on which I have just a small bit of follow up.

First you said that you believed you knew the identity. And later—

Judge TYLER. No one has come forward and gotten down on his bony knees or her bony knees and said, I did it.

Senator SPECTER. How about standing up?

Judge TYLER. They have not done it standing up or sitting down.

Senator SPECTER. There is a dispute as to what was said. But you commented, you testified, that a member of the committee admitted to the conversation, to a conversation.

Judge TYLER. That is correct, sir. Admitted to talking to that particular reporter about that—

Senator SPECTER. But disputed the substance of the report?

Judge TYLER. Right.

Senator SPECTER. So you're not sure that that person said Bork and Bork-let, et cetera. You don't have to be.

My only concern, Judge Tyler, is simply that you asked.

Judge TYLER. I surely did.

Senator SPECTER. Okay. You asked all the people who could have been the sources.

Judge TYLER. Right.

Senator SPECTER. And one said, he had a conversation with the reporter, and disputed the context as to what was said.

Judge TYLER. Precisely.

Senator SPECTER. Okay. I do not expect you to make a federal investigation of it beyond that point. And after that was done, you made a judgement that you had found as much of the facts as you could reasonably, and that no further action should be taken beyond the admonition for confidentiality for the future.

Judge TYLER. Well, at the time when this was going on, in between everything else, we had a meeting, that is, the committee. We sat with each other. It was really the only agenda item; this is that serious.

I hoped that by looking each other in the eye, it would finally come home that this is not a game we are playing, and it has very serious repercussions, for the very reasons that you wrote the letter.

We talked to each other. Inevitably, some people could not come. I talked to them, face to face, man to man, woman to man, or whatever.

Now, as a result of that, we got letters, not only from this committee or some of its members, but from other highly reputable people in this country, raising the same point, and legitimately so, once again.

That material was sent around to the committee, not just to the person I am dealing with.

I hope, in short, Senator Specter, that this will solve the problem. As I say, if it does not, then I plan to discuss this matter with the hierarchy of the ABA. Because it is offensive to all of us to have to work in this kind of atmosphere.

I cannot believe there is any doubt about that. It is not pleasant to do this kind of work, only to worry about people leaking or saying things that though they may not have meant them, they are embarrassing to our work and to our appearance before the Senate Judiciary Committee.

Senator SPECTER. Judge Tyler, I thank you for your explanation. I have accomplished my two purposes. One, to find out, to the extent possible, to find out what happened.

And second, I think that the exchanges with the committee today may help you on maintaining confidentiality in the future.

Because when the members of the committee, past and future, see the way this matter is viewed by the committee, and the concern, that we may be of some assistance to you in maintaining confidentiality in the future.

And I think that we should not conduct this inquiry further, and not even consider use of our subpoena power.

Judge TYLER. May I ask a favor of you, sir?

Senator SPECTER. Of course.

Judge TYLER. I noticed that Senator Grassley departed before I could answer your question. Would you convey to him what I said? Because I did not mean to avoid his question, number one, and number two, convey to him that I agree that the letters that he wrote, and the letter you wrote, individually, were a help in this exercise I was just trying to describe.

Senator SPECTER. I think he will be very pleased to hear of your request, and I shall do so man to man. [Laughter.]

[Information follows:]