

The CHAIRMAN. Before I yield to my colleague from Wyoming, let me do a little bit of housekeeping. It will take 30 seconds. For those witnesses who will come later, I asked yesterday if one panel, the only panel we know that is in dissent, wanted to go earlier in the day. They said they did not want to go earlier in the day.

They have now requested that they go earlier in the day. In keeping with the tradition that we go with a panel that is for, and then one that is against, and one that is for, I am going to move the dissenting panel up after Mr. Griswold testifies.

So they should be read. And then we will move with the panel that is listed as next on the agenda, and we will end with a panel that is for.

So the panel including National Organization for Women, and ADA, who are against, will go after Mr. Griswold.

I yield to my colleague from Wyoming.

Senator SIMPSON. Mr. Chairman, I thank you. I do want the record to reflect that—you know—as we bring up the similarities and differences of this nomination, and Robert Bork, that it is not confined to just those of us on this side of the table.

I think we can already determine that. That it comes from both sides of the table, because that is the thing that is seared closest in our minds, and so it is not coming from this side, or, from the right. It is coming from that side, and the left.

So I just want to kind of get that out, for whatever purpose it is, for the record, because I think it is very vital.

It is good to see you, sir. We had a very lively and interesting exchange during the—I was going to say the Bork hearings—but we will just say, from now on, the previous matter.

Professor TRIBE. I enjoyed that exchange too, Senator.

Senator SIMPSON. Yes, the previous matter. And I enjoyed that because I have the greatest respect for you, and I really believe, hopefully, God willing, and the voters, that you will be here at that table with an opening statement in a different capacity, if there is a different President, a President of the Democratic Party. I think you would be one of the first choices.

And you are a spirited and articulate man, and we did differ, but I enjoyed that very much. And now, you are here to testify for Judge Kennedy. Now when you add that to your support of Judge Scalia and Justice O'Connor, you are batting 750.

Professor TRIBE. I think it is more like a thousand, Senator.

Senator SIMPSON. Well, not quite, you see. We have the other matter to refer to.

Professor TRIBE. Yes. We have a difference on the other matter.

Senator SIMPSON. The other matter.

Professor TRIBE. Right. I thought I was right and you thought I was wrong.

Senator SIMPSON. That is right, but you are batting 750 which is better than Ted Williams ever did, and that is good, and that shows your balance, and, indeed, it is so.

You have referred to in your remarks, and in your oral presentation, to "sensitivity," the sensitivity, the passion of this man, and I see that, too, and I agree with you, and it is very evident.

And indeed his writings, his opinions, do show that important willingness to go as far as he can without necessarily going any further into his own philosophies, or own opinions, if you will.

But I was struck—and I agree with you, totally—that is a very critical thing for a judge to have, or a politician to have, and that is “sensitivity,” and it is something that is very important to me, and to you, obviously, and to Judge Kennedy.

I was interested, as I have reviewed the transcript of “the other matter,” and this. Let me just share a couple of phrases with you. It is kind of a quiz. Now they never gave me true or false quizzes in law school, I needed them to get through—I can tell you—but I never got them.

But here are a couple of comments, and just tell me which one, if you can, the nominee in the other proceedings, or this one, who said: “The framers wrote a Constitution and well understood it was to apply in circumstances they could not foresee.”

Professor **TRIBE**. That is Judge Bork speaking, as I recall.

Senator **SIMPSON**. That is Judge Kennedy.

Professor **TRIBE**. Well, you got me once.

Senator **SIMPSON**. No, wait. I know. We are not—

Professor **TRIBE**. But actually, Judge Bork said exactly that in a couple of articles.

Senator **SIMPSON**. You are right.

Professor **TRIBE**. We all start with that premise. The framers were not prophets.

Senator **SIMPSON**. I know, and I am not going to do that. I do not want to be, you know, a smart ass.

Who said this? “Constitutional law is not static. It will evolve as judges modify doctrine to meet new circumstances.”

Professor **TRIBE**. Well, I do not think I want to fall for this a second time, Senator.

Senator **SIMPSON**. No, and don't fall for it.

Professor **TRIBE**. What are you trying to ask me?

Senator **SIMPSON**. I am just saying that the same things that were said in “the other matter,” under oath by this other man—

Professor **TRIBE**. Yes, but out of context, perhaps.

Senator **SIMPSON**. Well, out of context or not, they were said under oath, rather meaningfully.

Professor **TRIBE**. Let me stipulate that Judge Bork has said many very fine things. I said that when I testified.

Senator **SIMPSON**. Let's get back, just quickly, to the right to privacy, because it keeps coming up again and again and again, but I still think nobody has said it any better than Judge Griffin Bell, when he said: “It's the right to be left alone.”

Professor **TRIBE**. Actually, Louis Brandeis had said that.

Senator **SIMPSON**. Was that his?

Professor **TRIBE**. That was his line. That was his line. [Laughter.]

Senator **SIMPSON**. All right.

Professor **TRIBE**. Are you keeping score?

The **CHAIRMAN**. This is not time to quibble about things like that.

Professor **TRIBE**. But Judge Bell did—I think he quoted him.

The **CHAIRMAN**. Did he attribute the quote? That is the question. That is the question. [Laughter.]

Professor TRIBE. I think he quoted him without attribution, as a matter of fact.

Senator SIMPSON. Well, this is going to deteriorate, terribly, but I want to just ask on privacy, because it is so critical, it comes up again and again, and again.

Here are the two phrases, and I will tell you who said what, but they seem similar to me.

Judge Bork said: "No civilized person wants to live in a society without a lot of privacy in it, and the framers in fact protected privacy in a variety of ways." That is what he said.

Professor TRIBE. But then he listed specific provisions of the Bill of Rights.

Senator SIMPSON. Yes, yes, I know. And then Judge Kennedy said: "It seems to me, to most Americans, lawyers and judges, liberty includes protection of the value we call privacy."

All I am saying is—and I have several others here—the sole task of a judge is his duty in judicial restraint. He said a judge has power over people, it is important since he is unelected, and probably unrepresentative of the American people, that he demonstrate by his reasoning that there is a law that he is applying, that he is not applying his personal values or principles. That was Judge Bork.

The sole task of a judge, according to Judge Kennedy, is to transfer the framers' or legislators' morality into a rule to govern unforeseen circumstances, that abstinence from giving his own desires free play, that continuing and self-conscious renunciation of power, that is the morality of the jurist.

So, it is interesting to me that there are similarities, to a great extent, in their philosophies, and in the process, those things were said under oath in the previous proceedings, and apparently disregarded.

Professor TRIBE. Senator.

Senator SIMPSON. You will win this test.

Professor TRIBE. Actually, it was not a test, Senator. I just wanted to ask if you remember a test that Senator Biden gave—I guess it was Judge Kennedy—when he asked about the *Griswold* case, and Judge Kennedy said:

Well, I can't tell you that particular case, whether I like the opinion, but I can say that if a hypothetical case were to be imagined that fits better within the privacy that I believe the Constitution protects, I couldn't think of a hypothetical better than *Griswold*.

Whereas, Judge Bork said that *Griswold*—you know—the right of a married couple to decide about birth control, and the right of a company to pollute, are the same to him. I mean, they take the test differently.

Senator SIMPSON. But Judge Bork said it was a "goofy law," too. We want to remember that.

The CHAIRMAN. Judge Bork also said—if I may interject here—that he could find no marital right to privacy in the Constitution, and Judge Kennedy said specifically he found a marital right to privacy in the Constitution. Fundamental difference.

Senator METZENBAUM. Is this a test this morning as to who remembers better what somebody said on a previous occasion?

The CHAIRMAN. Yes, and you are about to flunk if—

Senator METZENBAUM. No question about it, but I am going to attribute my flunking appropriately.

Senator SIMPSON. Thank you, Mr. Chairman.

Senator KENNEDY. Professor Tribe, I want to join in welcoming you back, again, to this hearing, and to our committee, and also to commend you for the work that you have done with our committee over a long period of time on a variety of issues; and we are always well-served by your appearance, and your responses to questions.

Just, again, quickly. In your formal presentation, at page 20, and continuing on for several pages, you express some concern about the Judge's decisions in the areas of civil rights.

I am wondering what you might tell us, given what he had written, and also, what his responses have been in the course of these hearings, whether it is the *Aranda* case, the *Circle Realty* case, some of the others that are related to the problems—I will come to the gender issue, the women's issues after. But one of the concerns that at least I was addressing is his sensitivity to those who have been left out, and really left behind, whether it is minorities, or the handicapped, or the poor, or women in our society.

You comment on that in a general way in your formal presentation. You have heard him speak. I want to hear you, briefly, on that, and then, if that bell goes off, I hope you will take a moment or two to talk about what assurances women should be able to reach, both in terms of the cases that he has decided—the *AFSCME* case—and also, his responses to the questions on discrimination, invidious discrimination, and his general comments in that area.

Those are really the things I would be most interested in, in the time that I have available.

Professor TRIBE. Senator, I think the primary assurance is an assurance that here is someone who listens, who has evidenced at least the sensitivity to grow.

He talked about the fact that he was not really proud of some of what he had done with respect to those private clubs. He talked about how much he has come to realize that, even if discrimination is not intended, that it can hurt, that it can retard the development of a fully integrated society, and the ending of discrimination.

A number of his quite narrow interpretations of some of the statutes, civil-rights statutes protecting minorities, protecting women, protecting the handicapped—interpretations in which the United States Supreme Court ended up going the other way, some times nine to nothing—these are cases in which he said he now fully accepts the correctness of what the Supreme Court did.

He said, in response to, I think a question that you asked, Senator Kennedy—"I do not think that those statutes"—referring to the civil-rights statutes—"should be interpreted grudgingly."

"There is," he said, "a certain amount of finger-pointing that goes on here, where the courts say the Congress didn't write the statute clearly enough." But he says: "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."