

those perspectives are distinctive, and I would look forward to seeing the way he developed them on the Court.

Senator METZENBAUM. I have one last question. In your written testimony, you criticized Judge Kennedy's decisions in the *TOPIC v. Circle Realty* case, the *Aranda* case, and the *AFSCME* case.

What did Judge Kennedy do wrong in those cases? And what advice, if any, do you have for him when he encounters similar cases in the future?

Professor TRIBE. Well, if there are similar cases in the future, I suppose that that advice would be better presented in the form of briefs and arguments than in the form of testimony now. But what I think he may have done wrong differs from case to case.

In *TOPIC*, I think he read the relevant statute too narrowly in not providing access to court of a kind that the Supreme Court itself was willing later on to recognize.

In the *AFSCME* case, I think he was not as sensitive as he should have been to the factual findings indicating government complicity in a discriminatory structure.

And in the *Aranda* case about which you questioned him, I think perhaps he should have gone further and made his opinion a dissent. He should have suggested that, on the basis of the evidence before him, there was enough to at least have a trial with respect to narrower remedies. But at least he did move separately to suggest possibilities to the litigants. And I think that he is quite capable of getting along without my suggestions.

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

The CHAIRMAN. Thank you.

The Senator from Pennsylvania has a couple more questions.

Senator SPECTER. Mr. Chairman, one comment and one question.

I am intrigued, Professor Tribe, by your description of institutional intent, picking up on what Judge Kennedy testified to yesterday, and your statement that Judge Kennedy had a novel approach to institutional intent. It may be that realistically we have read out framers' intent as a doctrine that has to be observed in judicial interpretation, but sort of mythologically have left it in calling it institutional intent. We may have established some sort of a precedent here.

The one question which I have for you at this stage involves the appropriate practice of the Judiciary Committee in looking to judicial philosophy. And I note at the outset of your prepared statement you have quoted Chief Justice Rehnquist's recent speech which goes back to his approach in 1959, when as a lawyer he took the Senate Judiciary Committee and the Senate generally to task for not probing Judge Whittaker on judicial philosophy on equal protection of the law and due process.

I know from your statement you have concluded that it is appropriate to ask about judicial philosophy, and my question to you is: What value do you see from the back-to-back proceedings of Judge Bork and now Judge Kennedy, with both Judge Bork's detailed responses on judicial philosophy and Judge Kennedy's equally detailed responses on judicial philosophy on questions which were addressed to him in establishing a precedent, a solid precedent for the Judiciary Committee to insist on such answers from future nominees?

Professor TRIBE. Senator Specter, I think that there is enormous value, both to constitutional democracy and to public education, from the role that this committee has played in pressing the nominees before it to explain in some detail the way they think about legal and constitutional problems. And I think that both nominees, both the one who was rejected and the one who is currently before the committee, are to be praised for having cooperated in such detail.

Whatever one thinks—and I know there are differences between members of this committee—whatever one thinks of why the Senate ultimately did what it did with respect to Judge Bork—and I tend to think that it acted responsibly—whatever one thinks about that, it is impossible to deny that the spectacle of detailed, thoughtful questioning—questioning in which you played, obviously, a very important role, and questioning in which the Chairman and everyone played, I think, a very important role—the spectacle of that kind of questioning on national television, during the year of the Bicentennial, made an incredibly important impact in popular participation in the processes of constitutional democracy, and in popular understanding of what the Constitution is about and what the Court's role is.

There is no tension at all between that kind of give and take and the ideal of judicial independence. That is where I most particularly agree with Chief Justice Rehnquist when he said that this kind of inquiry serves as a way of "reconciling judicial independence with majority rule." The reason, in part, that we can entrust judges with life tenure to interpret the Constitution and make decisions of such great moment in our lives is that we do not leave it just to the President unilaterally to decide, "well, this is my kind of judge." We now engage—and I think the Senate has sometimes engaged in the past, but less consistently—in really close inquiry into what the philosophy is.

I think the committee is to be commended for it and the nation is better off for it.

Senator SPECTER. So that is a yes answer. We have a little stare decisis going for us now?

Professor TRIBE. A long yes answer.

Senator SPECTER. We have a little stare decisis going for us now on this issue?

Professor TRIBE. I think so, Senator.

Senator SPECTER. Thank you.

The CHAIRMAN. Professor, you have made a significant contribution to the establishment of that stare decisis, and I think your objectivity has been shown and reinforced. You are here today to testify on behalf of a nominee with whom you do not agree on everything, and you had the courage to testify in opposition to a nominee. You make complicated notions very explainable and understandable to people, and you have done a great service to the committee and, I think, to the country.

I want to thank you for being here, and I hope you are not offended by the fact you have not been kept on the stand for a half a day like you were last time.

Professor TRIBE. I am not offended at all. I am quite relieved, Senator. Thank you.