

**TESTIMONY OF ERWIN GRISWOLD, FORMER DEAN, HARVARD
LAW SCHOOL; FORMER SOLICITOR GENERAL**

Mr. GRISWOLD. Yes, I have a few informal remarks.

My acquaintance with Judge Kennedy began just short of 30 years ago when I was Dean of the Harvard Law School and he came as a student in the fall of 1958. His mother and my wife had gone to Stanford together, and his mother wrote to my wife. And we had him out for Thanksgiving dinner. I mention that only to indicate that I had some reason for watching him among the many students that we had.

He was very successful in his first year and became a member of the Board of Student Advisers, one of the honor organizations at the law school. And he was a student in my tax class and was particularly interested in becoming a tax lawyer. He graduated in 1961 cum laude, which meant that he was well within the top ten percent of a highly selected class.

After that, he went to San Francisco where he practiced in a substantial law office for 3 years, and then came back to his home city of Sacramento where he had a quite wide-ranging practice including resolving problems for people and dealing with the State legislature, which, of course, met in Sacramento. So he had a very broad experience in the operation of the courts and of the Government.

Then in 1975, President Ford appointed him to the Ninth Circuit Court of Appeals. He was then 38 years old, not as young as Joseph Storey was when he was appointed to the Supreme Court at the age of 32, which now seems rather miraculous to us. But he was one of the younger judges.

I had followed him in his career at a distance. He was out on the West Coast, and I was on the East Coast. We have never been intimates. I have never been in his home, but I have seen him from time to time at Harvard Law School gatherings. Also, in the course of my practice the last 15 years—which has been largely appellate—I have had occasion to see his opinions, and I have read many of them and have been consistently well impressed by them. They seemed to me to be thorough and careful and narrowly written to deal with the specific issue. He does not write in sweeping terms. He does not lay down broad general propositions and then deduce his conclusion from what he has already assumed in stating his broad major premise. He does not have an agenda. He is not reaching out for goals. He seems to me to follow the true spirit of the case approach which is the heart of the common law; that is, take up this case, consider the facts which are applicable to this case, determine the law which you think applies to those facts, and decide this case. There are other cases out there, but do not decide them now. Wait until they come and see what the facts are when that time comes.

He interprets and applies the Constitution, including those many parts of it which are not stated in specific terms, like problems of federalism, the relations between the federal government and the States. That is nowhere spelled out in the Constitution. It is simply implicit in it. It is a federal government. Courts have to determine where the boundaries lie between federal power and State power.

The Commerce Clause is, in turn, somewhat sweeping. It says that Congress shall have power to regulate commerce. But it does not say what happens if Congress does not exercise that power. There is in that realm a wide range for judicial consideration not spelled out in specific language in the Constitution as to how far the States can regulate commerce in what the Supreme Court has referred to as the silence of Congress.

Then there are clauses like the Due Process Clause and the Equal Protection Clause and Cruel and Unusual Punishment, which I will not say are wide open but which are certainly not specific and which are subject to evaluation from time to time in the light of the circumstances which exist at that time.

There is one aspect of Judge Kennedy's work with which I was not familiar until he was nominated and some material was furnished me, and that is the speeches which he has given. I have read them in the past 2 weeks with great interest and with continued admiration for not only the clarity with which he writes, but for the views which he has expressed in them.

One of the speeches which I read recently was one he gave in 1986 to the Canadian Institute for Advanced Legal Studies which met that summer at Stanford. It just happens that this past summer, 1987, I was invited to speak to the Canadian Institute for Advanced Legal Studies, this time in Cambridge, England. As I read Judge Kennedy's speech, I must say I was chagrined. His speech is very much better than mine and had in it many things that I wished that I had thought of and had said.

He spoke particularly in that speech of rights which are not clearly stated in the Constitution: the right to travel, the right of privacy, and the right to vote. And by the right to vote, he did not mean particularly the 13th amendment, which is now quite widely applied in fact, though it was not when I was a boy growing up and learning about the law. He was speaking primarily of the decision in *Baker v. Carr*, the one-man, one-vote rule which came as something of a surprised—even occasionally, I guess, a shock—when it was announced by the Supreme Court, but which is now very widely accepted.

In my view, his discussion of these rights in that address is masterful, clear, yet never sweeping, never rigid. He writes well; in one sense I think much of his writing is brilliant. But not in the gaudy sense. I do not think he is a phrase-maker. He does not use things which have been used by some Supreme Court judges and which are quotable. But brilliant phrase-makers sometimes get carried away with their own rhetoric, and I see no sign of that.

It seems to me that all of the evidence shows that he is wise, careful, thorough, sound. In my opinion, he will be a great Justice of the Supreme Court, and I am glad to support his confirmation.

The CHAIRMAN. Thank you very much, Dean.

Senator SPECTER.

Senator SPECTER. Thank you very much, Dean Griswold, for appearing here today.

I just have one question for you, Dean, and that relates to the process that we are following here. I know you were present when Professor Tribe testified. I would be interested in your observations about the propriety of the kind of inquiry which the committee has