

The CHAIRMAN. Thank you, Professor. As I said, I have some prepared questions. I may submit them to you in writing, but I have one question at the top here.

I read with some interest yesterday, an editorial saying that Kennedy was the same as Bork. His views on unenumerated rights were no different than Judge Bork's. Some of my colleagues have suggested that.

How can you say, as you have here, that he is different? Summarize for me, if you can in a minute or so, so I will have a chance to ask you another question, in what fundamental sense is his view on unenumerated rights different than Judge Bork's?

Professor TRIBE. Well, I guess, Mr. Chairman, he put it rather well himself. Judge Kennedy said that, rather than talk about "unenumerated rights"—he does not like that phrase a lot either—we are simply talking about how far "liberty" extends, and the difference is that to him—and he has made this clear in several of his opinions, and his votes on the court, and clear in his speeches, and clear in his testimony—"liberty" extends beyond the substantive points that are marked out in the Bill of Rights.

It includes a substantive protection for privacy, it includes marital privacy, it includes an evolving understanding of what it is that makes us human beings, and where we draw what he called the "waving line" is between us and the State.

The CHAIRMAN. How did Judge Bork draw that line?

Professor TRIBE. Judge Bork said if the line wavers, if it is not clearly spelled out in the fine print, if it is not a liberty specifically mentioned, then he does not find it in the Constitution.

The CHAIRMAN. And if he cannot find it in the Constitution, therefore it does not warrant constitutional protection?

Professor TRIBE. And I think that is where they agree. You have got to find it in the Constitution, but the Constitution, as Judge Kennedy reads it, is considerably broader than the Constitution as Judge Bork seems to have read it.

The CHAIRMAN. Now much that Judge Kennedy said yesterday, and the day before, I found not only compelling but reassuring. I, like you, do not think I have a right to—and I have said this from the beginning, as long as I have been on this Committee—to insist that the person who goes to this Court, or any other court, share all of my views, or even the majority of my views on the substantive issues, but has some constitutional philosophy that resembles what I think should be on the Court.

But I have to tell you, I still have some concerns about Judge Kennedy, and I would like to list several of them for you, and then stop and let you respond.

In the area of privacy, as I said, I found much of what Judge Kennedy said to be within a tradition of evolving human dignity and human liberty that I find in the Constitution, and that the Supreme Court has protected and advanced over our 200-year history.

But frankly, Professor, Judge Kennedy has a point of view that you and I both know, may—at least I speak for myself—may challenge, may cramp what he may do in terms of the challenges the Court will face—not the ones they have already faced, but what they will face in the area of privacy.

And that I wonder whether or not he will continue to be part of this evolution that has taken place over the last 200 years regarding human dignity and human liberty.

These new problems will demand Justices committed to, I think, sustaining and promoting that tradition by being sensitive to the role of government in its confrontation with individuals, and those concerns of individuals' personal zones of privacy, to which he referred.

Do you see anything in his record that reassures you, that Judge Kennedy will be part of the continuing tradition of liberty as it applies to new situations and new problems that the Justices are going to have to face?

Professor TRIBE. Senator, I think we have no guarantees, but in the thoughtfulness, the articulateness, the openmindedness, the passion with which he expressed his vision of a Constitution that we come to understand better as we develop as a society—through that expression, I have as good a reason as I can to hope. He does seem, to me, to be openminded, and, in opinions that he has written, when he could have decided simply—in the case where, for example, a child was bribed to tell where his mother had hidden something—he could have said this shocks my conscience, but instead, he connected his decision with an evolving understanding of family privacy.

Now I do not know where he will go with that, but we are not entitled to that kind of guarantee.

The CHAIRMAN. In the area of affirmative action, Judge Kennedy has expressed what would seem to me to be a very cautious attitude toward remedies for discrimination.

We discussed his opinion in the *Aranda* case, in particular.

Do you see anything in Judge Kennedy's record, that reassures you that he will provide a moderating voice on the Court?

Will the Court, with a Justice Kennedy, continue to recognize the need for carefully considered affirmative-action programs and remedies? I know you cannot say for sure, but what does your instinct tell you?

Professor TRIBE. Well, my instinct is to hope so, and to think that this is an area where the Court has been cautious, and ought to be cautious. It ought not to run head-long into areas that are deemed terribly controversial.

But even in the *Aranda* case, where I am troubled by his ruling with respect to Mexican-Americans—even in that case, unlike the two colleagues that he had on the bench, he went out of his way to suggest—not just before this committee, but in the opinion that he wrote, a concurring opinion—that narrower remedies, including a movement in the polling places to places within the Mexican-American community, might have been appropriate.

Now I wish he had made that opinion a dissent rather than a concurrence. It would not have changed the outcome, but it would have sent a better signal.

And I am pleased that, in his list of heroes of Justices on the Court, he did not include only those who always go along in order to get along.

His list, as I remember it, to Senator Heflin, included at least five great dissenters—people like Holmes, and Brandeis, and Car-

dozo, and the first Harlan, and Black, in the early years of his career.

So it seems to me that there is reason to believe that we have here someone who is truly groping for justice, and who will be even more sensitive in the future than he has sometimes been in the past.

The CHAIRMAN. Well, I have more questions but my time is up.
[Response to question of the Chairman:]

QUESTION FROM SENATOR BIDEN FOR PROFESSOR LAURENCE TRIBE

1. One of the most significant controversies regarding Judge Bork's nomination involved his views on the role of stare decisis. Many of Judge Bork's critics argued that his record indicated that he would have little respect for Supreme Court decisions, and would not hesitate to overrule those decisions with which he disagreed. Some of Judge Kennedy's critics have questioned the strength of his respect for precedent. Do you see a substantial difference between the views of Judge Bork and Judge Kennedy's position on this issue?