

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—