Professor TRIBE. With the specific subjective intent, yes. At variance with the general purpose that the framers had, as expressed in the general language they chose, no.

I think that judges are bound to enforce the Constitution, and that doing that requires—and here is where I think Judge Kennedy's subtlety is really very powerful—it requires recognizing that we can learn from the history and the tradition of interpreting the Constitution.

It is not as though, by getting further from the moment at which they wrote, we somehow lose our understanding of what they did. By getting further from it, by looking at it in the light of what has transpired since, we can develop a clearer understanding of the meaning of the grand promises that they wrote into the Constitution.

I think it was really very insightful for Judge Kennedy to formulate it that way. I have not read it formulated that way.

Senator SPECTER. That is news to you?

Professor TRIBE. Well, the idea is not entirely new, but for those who often say of Judge Kennedy, he is not as brilliant, not as articulate as some others, they are wrong.

This man is capable of articulating a powerful, coherent vision, and of making it understandable and appealing.

Senator SPECTER. I agree——

Senator KENNEDY. The Senator's time is up. The Senator from Ohio has indicated he is ready for questioning, so I will recognize him, and then return. The Senator from Ohio.

Senator METZENBAUM. I just have a few questions, Mr. Tribe. I am happy to see you before our committee again.

You did testify, quite eloquently, in connection with the earlier nominee. What would you say is the most important difference between Judge Kennedy and Judge Bork?

Professor TRIBE. If I had to reduce it to a single, most important difference, I suppose it would be that Judge Kennedy is not an ideologue with a clear agenda of revisionism.

He is an openminded person with a commitment to an evolving Constitution. He is more cautious, more respectful of tradition, more flexible in his understanding of the Constitution, and I think he means it when he says, in response to—I think it was a question from Senator Humphrey—he has no list of major constitutional advances that he would like to see undone.

Then there are a lot of specific differences, about liberty, about free speech, where he says that the free-speech clause protects all ways in which we express ourselves as persons. With respect to equal protection, with respect to Congress' power to enforce the Constitution. With respect to the role of the Court as an umpire of disputes between the legislative and the executive branches.

There are enormous, specific differences, but the fundamental, the most general difference is that, in the nominee that the President has sent to this committee now, I see a fundamental, principled commitment to an evolving constitutional understanding and not a clear agenda of going back to some narrow concept of specific original intent, and wiping away a number of very fundamental, important gains in our understanding of constitutional justice.

Senator METZENBAUM. Do you see a potential leadership role for Judge Kennedy with respect to the rights of individuals under the ninth amendment?

Professor TRIBE. Well, Judge Kennedy was very careful in expressing his views of the ninth amendment. He described one theory of it, that it was primarily designed to protect the ability of the States to confer and create rights beyond those of the Bill of Rights.

He, on the other hand, also explained that he thought it was designed to make clear that the specific rights of the Bill of Rights do not completely exhaust all of those rights that are protected.

But what was most important, I thought, was his statement in response to the Chairman's question about Chief Justice Burger's opinion in the *Richmond Newspapers* case.

Chief Justice Burger said it does not matter if the basic right of the press and the public to attend criminal trials is not spelled out "in fine print," to use your phrase.

It is basic to liberty. And Chief Justice Burger pointed to the ninth amendment as what he called a "savings clause," in order to bolster that conclusion.

Judge Kennedy referred to the ninth amendment as a "reserve clause", but importantly, he said you do not necessarily need it if you have a broad enough understanding of that spacious word, "liberty," and I do see a possible leadership role in the broader understanding of liberty, that Judge Kennedy articulated.

Senator METZENBAUM. This calls for an opinion only, because it is easy to speculate.

But sitting there, as you do, and having been involved in this issue, and other issues having to do with Supreme Court nominees, do you have an opinion as to what special contribution, if any, you think Judge Kennedy might make to the Supreme Court?

Professor TRIBE. Senator Metzenbaum, I think he would bring to the Court a distinctive combination of intellect, openmindedness and experience.

He has had experience as a practicing lawyer dealing with ordinary human problems. He has had an experience as a distinguished judge.

He has shown in his writing that he is searching, that he is searching for an understanding of the Constitution. In that sense he would differ from those members of the Court who think they have already found it.

He would also differ, I think, from those members of the Court who have a very *ad hoc* approach to particular problems, who are not engaged in quite the same intellectual quest for a set of principles that is faithful to an evolving understanding of the original intent of the Constitution.

What was most distinctive about the vision, as he described it, was that as we develop, and as we build up decisions interpreting the Constitution, we can perfect an understanding of the principles implicit in that document.

It is not as though, by getting further from the founding moment, we become somehow lost at sea, and that we need to be returned to a "golden age" of constitutional truth. I think that

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 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?