

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

made into judicial philosophy with Judge Kennedy and also with Judge Bork. Contrast it, for example, with the very limited responses given by Justice Scalia during his confirmation process.

Mr. GRISWOLD. Well, Senator, I think that is a very important and a very difficult question. As a matter of fact, when I appeared in support of now Justice Scalia, I referred to the fact that until Felix Frankfurter was nominated, it had been the practice that the candidate did not appear before the committee.

For example, Justice Brandeis' confirmation was strongly opposed, an extensive hearing, and he never left Boston. Then Professor Frankfurter did come. He was questioned rather extensively, and since that time it has been done more widely.

Senator SPECTER. Do you recall or know, aptly stated, the circumstances surrounding Justice Frankfurter's appearance before the Judiciary Committee? Did he think he had to appear to get confirmed?

Mr. GRISWOLD. That I could not say. I do know that Dean Acheson was his counsel, and he came with his counsel and had advice, I assume, from Mr. Acheson. But having known the Professor very well, I am quite sure he acted on his own determination.

Senator SPECTER. With the kind of tug and haul we have around here, it has been my thinking that the nominees answer the questions they think they really pretty much have to. When Judge Scalia was before the committee, he answered very little, almost nothing. Chief Justice Rehnquist, Justice Rehnquist in his confirmation proceedings answered some questions but not too many. I think in Judge Bork's situation, with his extensive writings and his extensive opinions, he felt that there had to be responses.

I think we have carried it forward with Judge Kennedy in somewhat different circumstances, where Judge Kennedy did not approach the Judiciary Committee with a vast array of writings that had to be explained, so to speak; and that had he chosen not to answer so fully, that might have proved to have been acceptable. But he did answer, I think, virtually every question put to him, expansively and I think appropriately.

I would be interested in your conclusion as to how firmly you think this precedent has been established for future nominations.

Mr. GRISWOLD. Well, I think, Senator, there is a fine line. Certainly, the nominee should not be asked how he will decide a specific case. There should be no effort, even by intimation, to get anything which is or can seem to be a commitment from him with respect to a decision.

Having said that, I think that has been honored as I have followed fairly closely the recent confirmation hearings. Then it seems to me to be entirely appropriate to interrogate the nominee with respect to his outlook, his approach, to anything he has done in his writings which he may want to explain or enlarge or maybe correct.

So with careful regard to the limits which I think this committee has followed, I think this not only is an important part of the confirmation process, but I think that it has been an extraordinary educational event for the American public.

Indeed, at this meeting with the Canadians I went to last summer, I found that all of the Canadian lawyers and judges had

been watching the previous hearings on television and were filled with questions and learned a considerable amount about the American Constitution and approach from those hearings.

Senator SPECTER. Thank you very much, Dean Griswold.

Thank you, Mr. Chairman.

The CHAIRMAN. Dean Griswold, thank you very much. Your testimony is always sought and much appreciated when given. It means a great deal to us. We thank you very much for coming today.

Mr. GRISWOLD. Thank you, Senator.

The CHAIRMAN. Before we move on, let me explain what will be the remainder of today's schedule.

We will break very shortly for lunch until 2 o'clock. We will begin, then, with a panel that has announced it wishes to testify against the confirmation of Judge Kennedy: Ms. Molly Yard, president of the National Organization for Women; Joseph Rauh, Jr., vice chairman of the Americans for Democratic Action, Inc.; Susan Deller Ross, professor, Georgetown University Law Center, NOW Legal Defense and Education Fund; and Jeffrey Levi, executive director of the National Gay and Lesbian Task Force.

Then we will move to a panel immediately after that that has come to testify on behalf of Judge Kennedy: Gordon Schaber, dean of McGeorge School of Law, University of the Pacific; Leo Levin, professor, University of Pennsylvania Law School; Paul Bator, professor, University of Chicago Law School; Susan Westerberg Prager, dean, University of California at Los Angeles School of Law.

Then we will have our concluding panel for the day, those who have come to testify, raise questions, but as I understand it, not take any position—although it is their right between now and then to take a position if they wish. I am just trying to explain why we have it in this order: Mr. Martinez, the national president, Hispanic National Bar; Audrey Feinberg, consultant, the Nation Institution; and Antonia Hernandez, president and general counsel, Mexican American Legal Defense and Educational Fund.

Several witnesses have indicated, depending on the time, who were scheduled for tomorrow, may decide they wish to testify today. We will make a judgment as the day goes on whether or not that is possible.

The hearing will now recess and resume at 2 o'clock.

[Whereupon, at 1:10 p.m., the committee recessed, to reconvene at 2 p.m., the same day.]

#### AFTERNOON SESSION

The CHAIRMAN. I apologize for the delay in getting started again. We are having a moveable witness list here today, in terms of witnesses who indicated they wanted to testify, or might want to testify, who are now reconsidering that and deciding they may submit statements.

So it only relates to tomorrow's witness list; not to today's.

Our next panel consists of four witnesses. Molly Yard is the president of the National Organization for Women. Joseph Rauh is the vice chairman of Americans for Democratic Action. Susan Deller Ross is a professor at Georgetown University, and is here