TESTIMONY OF LAURENCE H. TRIBE, PROFESSOR OF CONSTITUTIONAL LAW, HARVARD LAW SCHOOL

Professor TRIBE. Thank you, Mr. Chairman.

The prepared statement that I have analyzes Judge Kennedy's speeches and his principal judicial opinions. And I do not want to repeat it here.

With the Chair's permission, I will simply submit that for the record.

The CHAIRMAN. The entire statement will be placed in the record.

Professor TRIBE. Thank you. I want to talk more generally about Judge Kennedy's approach before answering whatever questions the committee might have.

From Anthony Kennedy's speeches and opinions and his testimony, there emerges a clear picture. But it is a picture in which a number of people, I think, wish they could see some harder edges, some sharper boundaries, and a more easily defined perspective.

What I find most appealing and promising about the picture that emerges is precisely the absence of any simplistic, single, fixed point of view.

There is, I think, great intelligence and fair-mindedness and commitment to principle; but not unitary vision. Nothing you could put on a bumper sticker.

Now, some of Judge Kennedy's detractors, or some who I should say damn him with faint praise, confuse the absence of simple slogans with a lack of clarity or brilliance. And with all respect, I think they are wrong.

What Judge Kennedy said to Senator Specter yesterday morning is extremely revealing. Let me just quote a few of his words.

He said: "It is somewhat difficult for me to offer myself as one with a complete cosmology of the Constitution. I do not have an overarching theory, a unitary theory of interpretation.

"I am searching for the correct balance."

That seems to me exactly right. I have written that I do not think any "unitary theory" of the Constitution is likely to reflect the complexity or the compromise of that document, or to accommodate evolution in our understanding about it.

Judge Kennedy is really quite eloquent when he testifies about an evolving understanding of the Constitution. In an exchange with Senator Grassley this Monday, Judge Kennedy said, "we can see from history more clearly now, I think, what the framers intended, than if we were sitting back in 1789.

"They had just written a constitution 2 or 3 years ago. They knew the draftsmen. And yet, they were, it seemed to me, more at sea as to what it meant than we were."

Judge Kennedy said, "we have a great benefit in that we have had 200 years of history."

Now, there is no dogmatism, no self assured ideology about that. Instead, there is, I think, the humility that marks the essence of true judicial restraint, and potentially, of genuine judicial greatness.

I take Judge Kennedy seriously when he said, and I quote him, "I think courts have the obligation always to remind themselves of

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their own fallibility." But we are not without guidance in his speeches and his opinions and his testimony here as to how he would go about resolving constitutional questions.

Again, he was quite eloquent in addressing that issue on Monday afternoon. He said, and I quote him: "When a judge hears a constitutional case, a judge gets an understanding of the Constitution from many sources: from arguments of counsel, from the nature of the injuries and claims asserted by the particular person; from the reading of the precedents of the court, from the writings of those who have studied the Constitution."

All of these factors, he said, "are, in essence, voices through which the Constitution is being heard."

And the Constitution says some things very loudly and very clearly to Judge Kennedy. Speaking with Senator Specter yesterday about why the specific subjective intentions of the Constitution's framers should not bind the judges of the present, Judge Kennedy said this.

He said, "the whole lesson of our constitutional experience has been that a people could rise above its own injustice, above the inequities that prevail at a particular time.

"The framers of the Constitution * * * knew that they did not live in a constitutionally perfect society, but they promulgated the Constitution anyway. They were willing to be bound by its consequences."

And he said, "I do not think that the 14th amendment was designed to freeze into society all of the inequities that then existed."

"It would serve no purpose," he added, "to have a Constitution which simply enacted the status quo." So that, even though some of the framers were fully aware that they lived in a segregated society, they promulgated grand words by which they were willing to be bound.

Now, I am frank to say that the aspirations to fairness and justice reflected in those words impress me, but that I am troubled by Judge Kennedy's prior memberships in some exclusive clubs.

I see a tension between the aspiration and some of the prior reality.

But I believe that Judge Kennedy has acted honorably; that he should be taken at his word on the subject of discrimination against women and discrimination against minorities; and I find in the opinions that he has written and the speeches and the testimony reason to take him at his word.

Now, those opinions and speeches contain much with which I agree; they leave me with no doubt that there is also some stuff there with which I disagree.

I do not doubt that as a justice, if he is confirmed, he will render decisions with which I sometimes disagree.

But I am left with no doubt that he shares this nation's core commitment to a Constitution that is broad enough and flexible enough to protect basic liberties, including "liberties that may not be spelled out in the fine print," to use a phrase that Senator Metzenbaum used a couple of days ago.

In an exchange on that subject with Senator Leahy, Judge Kennedy said this: "I think the concept of 'liberty' in the due process clause is quite expansive, quite sufficient, to protect the values of

privacy that Americans legitimately think are part of their constitutional heritage."

And when Senator Biden asked, "is there a right to marital privacy protected by the Constitution," Judge Kennedy unhesitatingly replied, "yes."

He does prefer the term, "liberty," but that term is in the Constitution. And of course, it is a capacious and a spacious term.

He adds, though, and I quote him: "Privacy is a most helpful noun in that it seems to sum up rather quickly values that we hold very deeply."

Now, Judge Kennedy fully recognizes, as I think all of us should, that privacy is not an unlimited right. It is a red herring to talk about a boundless, unlimited right of privacy.

Its contours and its limits are debatable. But that process of debate is what the judicial process is all about.

Judge Kennedy said, and I quote him, "with reference to the right of privacy, we are very much in a state of evolution and debate. The Constitution is made for that kind of debate.

The Constitution is not weak because we do not know the answer to a difficult problem. It is strong because we can find that answer through what he called the general and "gradual process of inclusion and exclusion." And he has not left us without some criteria of what he would include and what he would exclude in deciding what the word "liberty" means in our Constitution.

He testified that he would seek "objective referents" for how "essential" something is to "human dignity," how much "anguish" would result if Government were to deny it, how great would be the impact on a person's "ability to manifest his or her own personality," and to obtain "self-fulfillment."

When he was pressed by Senator Grassley, and others, on whether these were not fluid terms, he admitted they were, but he said that is the judicial task, to try to make them objective.

Now, at the same time, Judge Kennedy candidly and fairly testified—and his opinions make clear that he believes this as well—that the Constitution does not empower judges to "create" what, in their personal vision, happens to be "a just society."

It gives courts no mandate to enforce a general "right to happiness." I think he was surely right when he said that most of our material needs, the needs for adequate housing and education, represent a constitutional responsibility of legislatures beyond the power of courts to enforce.

But even there, I was gratified to see that Judge Kennedy understands a limited role for the judiciary. He referred, approvingly, to a Supreme Court decision holding that a State cannot altogether deprive illegal aliens of a free education, and he concluded that "even here, there is an area for courts to participate in."

So I want to stress that sometimes I agree with Judge Kennedy, sometimes I disagree. None of us is entitled to a Justice who mirrors our own legal or political perspectives, or even our own constitutional views. What I think we are entitled to, and what I believe the Senate of the United States has insisted upon in this Bicentennial Year, is a Justice who is deeply committed to an evolving understanding of the Constitution, and to the role of the Supreme

Court in the development of principles that make the Constitution live.

And I believe, from everything that I have read and heard, that Anthony Kennedy would be such a Justice. The fact that he is a conservative rather than a liberal does not prevent me from supporting his confirmation.

[Prepared statement follows:]