

Judge KENNEDY. Mr. Justice Van Devanter. He was one of the greatest justices on the court for achieving a compromise among the justices.

When they were searching for a common point of agreement, Mr. Justice Van Devanter could find it.

He did not produce a lot of the opinions of the Court, because he found it very difficult to write; he was a slow writer.

But he was valued very, very highly by all of his colleagues.

Senator SIMPSON. That is very interesting. Thank you so much, Judge.

Judge KENNEDY. Thank you, Senator.

The CHAIRMAN. Let me ask you a question about history, and I am not being facetious when I ask this.

Didn't Justice Black, when he was Senator Black, also carry a book with a list of all his supporters and contributors? A little book?

I am told that Justice Black, when he was a Senator, literally carried a book—was it Black? He was Senator Black from Alabama that had a list of all his supporters.

So every county he went into, he would take out his little book. And he would know exactly who had helped him in the previous election. He carried that with him all the time, I was told.

Judge KENNEDY. I am not aware of that. He was from Clay County in Alabama.

The CHAIRMAN. Maybe our Alabamian at the end of the row could clarify it when we get to that.

Senator HEFLIN. It would have had to have been the Encyclopedia Britannica.

The CHAIRMAN. Well, I was told it was his contributors, but I will move on to the great State of Vermont. Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman. I do not want to delay, but when Judge Kennedy and my friend Al Simpson talk about Hugo Black, I remember when I was in law school. I'm sure you remember a lot of things about law school, we all do, but for me one thing really stands out the most of all the matters in law school. Because we were right here in town, Georgetown, the law school, decided to have a luncheon inviting all the Supreme Court justices. They all accepted on one condition: there not be a head table. We were going to be in a bunch of small, round tables, and it would be run by either the student bar or something of the law school. They would draw lots, and different justices would sit at different tables. And that was the only way they would do it, so they could sit with the students.

So we drew lots, and I ended up sitting next to Justice Hugo Black whom I had never met but just seen in the Court. And at the last minute one of the other students was sick. My wife came with me. And it was the most fascinating thing in 3 years of law school. He had no idea I was going to sit there. I mentioned I was from Vermont. And he said, oh yes. He said, Franklin—the first time he said it, I didn't realize he meant, of course, President Roosevelt—he said, Franklin sent me to Vermont to campaign during a contested election.

He told me the towns he went to—this was back in the 1930s. Who he campaigned for. And what the votes were, the numbers.

We went back and checked with the Secretary of State's office subsequently, and he was absolutely right. Remember, they picked their lots as they came in, and ended up at their particular tables.

But during the course of the thing, a couple of times when questions came from different students, the hand went to the inside pocket. Out came the copy of the Constitution. It was more worn than the one I carry. And he would refer to it.

And it was a remarkable experience. I felt that it was worth at least one full year of law school, that one luncheon, just listening to this man.

Senator HEFLIN. He had a remarkable memory. He could remember the score of every tennis game that he beat me. [Laughter.]

Senator LEAHY. Well, that really was not fair, him beating you, because he was younger, wasn't he, Senator Heflin?

But let me just go back, and I will try to brief but to go back to this morning. You have been asked a lot of questions about your views on privacy, and you have answered me and other Senators.

And those answers appear to establish that you recognize the protection of privacy as a value that the country should enforce in constitutional litigation, even though the word, privacy, is not mentioned in the Constitution; even though the boundaries of privacy or of the right to privacy may be unclear. Nobody is asking you to say here today just where those boundaries are, nor I suspect from your testimony, do you feel that anybody could say today just where those boundaries are. Am I correct so far?

Judge KENNEDY. I think that is correct, Senator.

Senator LEAHY. You have also said that there are other rights not specified in the Constitution that you think the courts can enforce. You have given some clue as to where you go to look for those—to history, precedent, national values.

Now, let us turn to an area where the issue is not what unenumerated rights should be recognized, but what the specific bill of rights means, and that is the area of criminal law.

You have ruled, as I read your cases, you have ruled for the defendants in about a third of the criminal cases you have heard. You have done it for the government in about two-thirds of the cases. And going down—and I'm not suggesting anything by that number. One of the nice things about being a prosecutor rather than a defense attorney is that prosecutors win most of their cases, if they are at all smart about what they bring, and defense attorneys, by the same nature, would have to lose most of them.

You gave a speech at McGeorge Law School in 1981, a commencement address, and you said, and I quote: "We encourage debate among ourselves and with anyone else on the wisdom of the rules we adopt. I question many of them myself. For instance, some of the refinements we have invented for criminal cases are carried almost to the point of an obsession. Implementing these rules has not been without its severe costs."

Now, are you referring when you talk about the point of obsession to some of the detailed refinements that have been made in the application, for example, of the fourth amendment to warrantless searches?

Judge KENNEDY. Well, I suppose I had the fourth amendment in mind generally. This is pretty broad rhetoric.