

makeup, but a very important one, and one that should be done thoroughly and completely.

Do you still feel that way, I hope?

Judge KENNEDY. Certainly, Senator, I do.

Senator LEAHY. I want to ask you questions in three different areas, primarily. One is in the privacy area; one is in the criminal law area—I spent about a third of my adult life as a prosecutor, so I have an interest there, and you have written a number of cases there; and then lastly in the first amendment area.

Normally, in these things, I take first amendment first, but a number of your comments to me privately, a number of decisions you have made in the past, give me a lot more comfort in those areas than a number of other nominees have.

To begin in the area of privacy, I wonder if I might just follow up on a couple of questions. Senator Biden asked you a number of questions in this area yesterday. In response to one, you said that you think, “most Americans, most lawyers, most judges, believe that liberty includes protection of a value we call privacy.”

You did not state your own view at that point. But slightly later you said that you had no fixed view on the right of privacy. Senator DeConcini followed up on that. And in response to a question from him, you said that you had no doubt about the existence of a right to privacy, although you prefer to think of it as a value of privacy.

Is this a semantic difference? Or is there a difference between right and value? And if there is a difference, what is your view?

Judge KENNEDY. I pointed out at one time in yesterday’s hearings that I am not sure whether it is a semantic quibble or not. I think that 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. It seems to me that sometimes by using some word that is not in the Constitution, we almost create more uncertainties than we solve. It is very clear that privacy is a most helpful noun, in that it seems to sum up rather quickly values that we hold very deeply.

Senator LEAHY. But you understand—

The CHAIRMAN. Will the Senator yield on that point?

Senator LEAHY. Certainly.

The CHAIRMAN. And this may save some time, because I had a whole round of questions on this.

Let me put it to you very bluntly. Do you think *Griswold* was reasoned properly?

Judge KENNEDY. I really think I would like to draw the line and not talk about the *Griswold* case so far as its reasoning or its result.

I would say that if you were going to propose a statute or a hypothetical that infringed upon the core values of privacy that the Constitution protects, you would be hard put to find a stronger case than *Griswold*.

The CHAIRMAN. That doesn’t answer the question. Is there a marital right to privacy protected by the Constitution?

Judge KENNEDY. Yes—pardon, is there a—

The CHAIRMAN. Marital right to privacy.

Judge KENNEDY. Marital right to privacy; that is what I thought you said. Yes, sir.

The CHAIRMAN. Thank you.

Senator LEAHY. Well, if I might follow on that, have you had any cases so far when you have been in the Court of Appeals where you have had to follow the *Griswold* case?

Judge KENNEDY. The *Beller v. Middendorf* case was one where we examined it and discussed it extensively. The case we discussed yesterday.

And I'm tempted to say that is the only one.

Senator LEAHY. But in that, what reference did you make to *Griswold*?

Judge KENNEDY. We tried, I tried, in the *Beller* case, to understand what the Supreme Court's doctrine was in the area of substantive due process protection, and came to the conclusion, as stated in the opinion, that the Supreme Court has recognized that there is a substantive component to the due process clause.

I was willing to assume that for the purposes of that opinion. I think that is right. I think there is a substantive component to the due process clause.

Senator LEAHY. And that is your view today?

Judge KENNEDY. Yes.

Senator LEAHY. When you first—

Judge KENNEDY. And I think the value of privacy is a very important part of that substantive component.

Senator LEAHY. The reason we spend so much time on this is that it is probably the area where we hear as much controversy and as much debate in the country about Supreme Court decisions as any single issue. Certainly I do in my own State, and I am sure others do. It is a matter that newspaper debates will go on, editorial debates will go on.

And in a court that often seems tightly divided, everybody is going to be looking at you. None of us are asking you to prejudge cases. But I think also, though, if we are going to respond to our own responsibility to the Senate, we have to have a fairly clear view of what your views are before we vote to confirm you.

I should also just add—something that obviously goes without saying—we expect you to speak honestly and truthfully to your views, and nobody doubts but that you will. Some commentators and some Senators seem to make the mistake of thinking that a view expressed by a nominee here at these confirmation hearings must, by its expression, become engraved in stone, and that a nominee can never change that view. You do not have that view, do you?

Judge KENNEDY. Well, I would be very careful about saying that a judge should make representations to the committee that he immediately renounces when he goes on the court.

Senator LEAHY. That is not my point, Judge Kennedy. What I am saying is that I would assume that your own views on issues have evolved over the years.

Judge KENNEDY. Yes.

Senator LEAHY. What I am suggesting is that even as to views expressed here, should you go on the Supreme Court, there is nothing