



EDWARD M. KENNEDY ORAL HISTORY PROJECT

INTERVIEW WITH LAURENCE H. TRIBE

April 27, 2009  
Boston, Massachusetts

**Interviewer**  
Janet Heininger

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TRANSCRIPT

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**Heininger:** This is an interview with Professor Laurence Tribe on April 27, 2009, in Boston. Why don't we start at the beginning? Tell me when you first met [Edward] Kennedy and what your first impressions were of him.

**Tribe:** I believe I first met the Senator through my friendship with Bob Shrum and [Robert Sargent] Sarge Shriver. Whether it was Sarge who introduced me to Teddy, or Bob, I don't really remember. It was in the mid-1970s, and it was in connection with a trip that I had taken with Sarge when he was a candidate for the Presidency at a time when people took his candidacy quite seriously.

He was invited by the Premier of the Soviet Union, [Leonid] Brezhnev at the time, to do a tour through the USSR [Union of Soviet Socialist Republics], as it then was. I had somehow impressed him in a meeting or two at Fried, Frank, where he was a partner, and he invited me, the only non-family member apart from a priest, who went with him and Eunice [Kennedy Shriver] and Bobby [Sargent Shriver, III] and Timmy [Shriver] and Maria [Shriver] and the whole clan. Both John [F. Kennedy, Jr.] and Caroline [Kennedy Schlossberg] were there, and a priest and I. We went for about five weeks through the USSR in a jet that was provided by the Soviet Union.

**Heininger:** Wow, five weeks.

**Tribe:** It was an amazing trip and I got to know them all very well. We stayed in some remarkable places, but that's not really relevant to this. Because I had gotten to know the family really well through that trip, my ex-wife and I were invited to go to Hyannis Port just to hang out. We didn't quite know what to expect. We thought it would be kind of cool. We would meet Ted. Somebody said we might meet Rose [Fitzgerald Kennedy].

We arrived, and I remember not really having seen the Senator before in any setting other than on television, and he was mixing drinks or something and we walked into this place and there he was. It was very interesting. He was a charismatic and compelling character. We had dinner with him and with his mom and with various other members of the family. Jackie [Onassis] was there.

From the very beginning, I was struck by what a complicated role he played in that family. Rose was merciless with him, joking in various ways, making fun of him. Although Carolyn [Kreye Tribe] and I were the only non-family members there, we faded into the background quite quickly and we just saw the family dynamic to the point where, after a few drinks he would say,

“Mom, you always left me behind,” or you did this or you did that. It was really remarkable to watch the family tensions.

By the end of a very long evening of having dinner with them, and there was some touch football and other stuff, we really had the sense that this was a very complicated family. I had the sense that this was a guy I would love to get to know. There was warmth and there was vulnerability and there was seriousness at the same time. From that point on I always thought, if there’s anything he wants, I’m there for him. And he wanted lots of things. He called me from time to time and asked for advice. But it was in that context that I first met him, at this family gathering in Hyannis Port.

**Heininger:** That’s unusual, too, because normally people come to him through—

**Tribe:** Through some more formal channel.

**Heininger:** Yes, a more formal connection. But that must have been a fascinating insight to have.

**Tribe:** It was. It was great.

**Heininger:** You see the baby of the family being treated as the baby of the family—

**Tribe:** Treated very much as a baby.

**Heininger:** While he’s still this very prominent political figure, a potential Presidential contender. Wow.

**Tribe:** Yes. And I very much saw him that way. From that point to 1980 when he gave this great speech that Bob Shrum wrote, that I was vaguely involved in helping to write, when he gave the speech at the Democratic Convention ending with, “The dream shall never die,” he was the guy that I thought would somehow carry on the tradition that I was so excited by.

I was a sophomore in college when I first had any inkling about the Kennedy family. I didn’t know them. I was a math major. I had no political connections, but I was at the Boston Garden when Jack Kennedy gave one of his great speeches during the campaign. I was a great fan of Kennedy’s at that point, and later on of Bobby Kennedy. I thought Bobby was the greatest possibility ever. Between them and Barack Obama’s ascendancy, Barack being a friend and a former student, I really had no deep conviction about anyone in politics except for Teddy, and I really thought he was a great possibility. I was definitely not a fan of Jimmy Carter, never have been, and when Teddy didn’t manage to wrest the nomination from Carter, I was deeply disappointed and disillusioned. I’m skipping around now.

**Heininger:** That’s quite all right. That’s what oral history is about.

**Tribe:** All right.

**Heininger:** In those first years before the ’80 election, did you have much contact with him then?

**Tribe:** Quite a bit. He would call from time to time, or he would have a staff person call, about my reaction to a statute that was being considered, or some possibility that was being debated, and he often wanted to know what I thought. I would sometimes come down to D.C. and talk to him. Other times there were dinners at McLean that he hosted. There were several that I was at. The intensive contact in those dinners really came in connection with the [Robert] Bork nomination. That's when there were a number of times that I went down to see him there and also met him in Boston. There were a few other occasions, and I wish I could remember on which particular issues he had sought my advice. There were a number of things on which there was some constitutional twist or spin that was relevant to something, and he wanted to know what I thought.

**Heininger:** Was it usually Kennedy, or was it usually staff that first approached you?

**Tribe:** It was both. Sometimes when it was a really important issue, he would call. I would always get very excited. "It's the Senator calling." I've always put him on quite a pedestal. Even seeing him as a friend, I still regarded him as an enormous hero. I've never gotten over the sense of enormous—I can't avoid thinking of him as one of the two or three greatest Senators in American history, and so whenever he wants help, I feel privileged to be helping him.

**Heininger:** Does he ask you for stuff in writing? Is it mostly orally, mostly at dinners?

**Tribe:** It was both. He would sometimes say, "Could you put that in a letter? It would be useful to have a short memo about that, or a letter." Other times it was just my reaction to things. "I'd really like to know what you think about *X* or *Y*," and I would either tell him instantaneously or I would say, "Let me give you a call back." There often was a lot of homework that he had done beforehand.

It was always impressive to me how seriously he took things, how much staff work there was. His staff was always incredibly impressive. He had terrific people: Carey Parker usually kind of orchestrating it all, but other people working with him, like Jeff Blattner. I can't remember all the people—certainly Melody Barnes in the more recent years. He's always deserved the reputation of having staffed everything up better than anybody. I really liked working with his staff, but he would often call himself just to ask for my view of something.

**Heininger:** So it was sometimes off the cuff: "What do you think about this?" And other times it was, "OK, let me see that in writing. That would be really helpful if you could put that in writing."

**Tribe:** Yes, both.

**Heininger:** In those early years, prior to Bork, did he ask you at any point to testify?

**Tribe:** Probably. I'd have to look back at my CV [*Curriculum Vitae*] to see when I testified about various things, but I certainly have testified at his suggestion or request on maybe a dozen things over the years—nothing as dramatic or as important as Bork, certainly. With Bork it was a combination of Teddy and Joe Biden asking me to work on it.

**Heininger:** When you get into a formal hearing with him where you are testifying, what's he like as a questioner, particularly in comparison to some of the other ones?

**Tribe:** A little stiff. He would have scripted questions, and when he was questioning someone who was essentially an adversary, someone that he really thought was a bad guy who needed to be put down, he would sometimes go for the jugular and follow-up spontaneously. When he would question me, it would always be the rehearsed question. You know, there were certain things that he needed to get to and he did.

There are very few people in the Senate that I've ever seen who actually use their brains in the process of questioning. There was [Daniel Patrick] Moynihan, and a very small number of others. Teddy was not among those who used the interrogation process as a way of actually thinking through something. It was a rehearsed exercise in which he wanted to get certain things on the record, wanted to make sure he covered certain bases. He did it well and he was well prepped, and he often had reasonably good follow-up questions, but that wasn't his greatest skill and that wasn't where he was at his best. He was at his best in thinking through who he needed to have on the stand, who needed to be there, what things we needed to establish. The questioning process was not one where you could see his mind at work, particularly.

**Heininger:** But you could probably see the staff mind at work.

**Tribe:** You'd see a good bit of that, right.

**Heininger:** Through the years, I assume you have also made recommendations for staff to him, and recommended either former students or acquaintances.

**Tribe:** Right.

**Heininger:** Who are some of those that you have recommended to him who have gone on to work for him?

**Tribe:** Bob Shrum certainly is the best. Bob was somebody that initially I recommended to Teddy, and he made the mistake of not hiring him. John Lindsay hired him instead, and there's a big joke between them about all of that. Bob later on worked for Teddy a lot and wrote a lot of his best lines. Jeff Blattner was another. Tom Rollins was another. I'm trying to remember. Patti Saris was one of them. If I saw a list of names of people who worked for him, I could immediately react by saying, "Oh, that was a student of mine that I recommended." There must have been a dozen or more over the years.

**Heininger:** All of whom did go on and work for him?

**Tribe:** I think so.

**Heininger:** That's a lot.

**Tribe:** That is a lot, that's true.

**Heininger:** Would somebody from his office come to you and say, “We have a position open. Do you have anybody you’d recommend?”

**Tribe:** Sometimes that, or sometimes *X* has indicated an interest in working for him. “What do you think of *X*?” Or, “We have three people that the Senator might want to hire. What do you think of them? Do you know any of them?” That kind of thing.

**Heininger:** How did the Tom Rollins recommendation come about?

**Tribe:** He was a research assistant and student of mine, and one of the best. I’ve had a lot of really impressive research assistants and he’s one of the eight or nine best in 40 years probably. I thought he would be great, and so did Bob Shrum. Bob knew him very well. I think Bob coached him in debate at Georgetown. Tom was just an obvious choice. Tom loved him and they got along beautifully.

**Heininger:** In some ways it was a very odd choice because he came in as a minority staff director and he had had neither policy nor managerial experience.

**Tribe:** But he was brilliant and absolutely incredibly well organized, and I just knew he would do wonderfully. So he was an odd choice, I guess, but it didn’t seem odd to me.

**Heininger:** The other odd thing about it, too, was how he got hired.

**Tribe:** You may know more about that than I do.

**Heininger:** I’ve been in the process of talking with him. It is so atypical for a Kennedy hire for such a high-level position, because he never met with the chief of staff. It was really the strength of two recommendations, yours and—

**Tribe:** And Bob Shrum’s.

**Heininger:** And Bob Shrum’s. He never met with anybody. He’d never met with Carey Parker, and he didn’t meet with Kennedy, and he didn’t meet with Larry Horowitz, who was the chief of staff at the time.

**Tribe:** Right.

**Heininger:** He got hired on the strength of two recommendations.

**Tribe:** Well, I think Kennedy did trust both Bob and me a lot.

**Heininger:** I would think so, because he—but it still was an unusual hire.

**Tribe:** Interesting. See, I didn’t know any of that.

**Heininger:** That’s very interesting, yes. And he did come in and did very interesting things too. Have there been any similar staff recommendations that have not been accepted?

**Tribe:** I can’t remember any. It’s possible, but I can’t remember any.

**Heininger:** So you're a pipeline and a good one. Can you think of the range of issues that he has asked you for advice on, besides Supreme Court nominations?

**Tribe:** Sure. Most of them had to do with Congressional enforcement of civil rights, civil liberties things: rights to vote, rights to be protected against sex and race discrimination, rights of access to abortion clinics, about fighting off proposed amendments to the Constitution—an amendment that would give Congress the power to outlaw flag burning.

**Heininger:** I was going to say, did he consult you on flag burning? That's an obvious one.

**Tribe:** Yes, flag burning. I know we talked about the school prayer amendments. Some of them were things in which he and I were very much aligned with somewhat more conservative interests. There were people who wanted to do some of the legislation that resulted in equal access to schools for prayer, so that groups that wanted to pray would not be discriminated against, as compared with other groups who wanted to use school facilities after the school closing hours.

There were several categories. There were things that related to the power of Congress to take steps that would enforce constitutional rights through the enforcement clauses of the Civil War Amendments. There were things that related to the exercise of Congressional power under Article 1, *vis-à-vis* claims of state sovereignty. Federal preemption measures, I'm sure a lot of those we discussed. There were questions about whether it was a sound or a dangerous thing to amend the Constitution to provide leeway for certain things that various groups wanted, whether it was prayer in school or the power to ban flag burnings, things like that. There were eight or nine different categories and they all had to do with the intersection of constitutional principles and Congressional authority. Very little had to do with foreign policy or with any of the other things that he was interested in. I was very much involved in advising him on constitutional authority and constitutional limits.

There were occasional just purely political things, but I don't remember them as well, or when they came up. They were things about confirming [John] Tower, or filibusters on various people, but they were just very random requests. "What do you think of this and that?" The ones that were systematic, where I would end up doing memos and following up, had a lot to do with constitutional issues. And it was always impressive to me how seriously he took them. He really thought it through. What was most impressive, and I'm glad in a way that this is—I mean, he won't be hearing this for a while, right?

**Heininger:** Right. In fact, he might never hear it, depending on his health.

**Tribe:** What I admire most about him is the extraordinary way—how much he made of what he had. He's not a brilliant guy. He's bright but he's not brilliant. But he is so serious and so dedicated. It's really impressive. And the way he would really think through things, even though he didn't necessarily have the raw intellectual horsepower to make them easy. He really was serious and thoughtful and worked at issues with a dedication that I've just not seen other people do.

**Heininger:** What I'm hearing you say is a very important distinction between having really high-caliber staff who can really prepare him and provide him with the information, and then applying

what talents and gifts he has to working through these issues himself, and thinking them through. Taking that excellent staff work but then working through the process himself, not being somebody who would necessarily instantaneously just get it.

**Tribe:** That's part of it, but you're describing it in terms that have to do with a deployment of staff resources. I'm thinking in terms of how he chose to organize his moral and intellectual energy, period. There are people who have natural gifts in terms of analytical skills, who are intellectually lazy, or who don't focus their energies around really important issues and who take advantage of the fact that they are very quick and get the structural problem instantaneously. That's one extreme. And then there are people who have certain core insights and deep values, and also the commitment and energy to take those insights and values, and figure out, What kind of staff and help do I need? What do I need to learn? How could I move this issue?

What's impressive to me is how perfect an example of the leader he is. He could so easily have been lazy intellectually or morally, could so easily have rested on his laurels or just had a good social life. Instead, he was so serious about trying to figure out what really matters in people's lives, what will effect important change in the direction of the country's constitutional trajectory, and then translating those insights into serious decisions about staffing and priorities and energy. It's the translation of the vision about what matters into a strategy for what should be done, and carrying it all out without having necessarily the intellectual horsepower somebody else might have. It was so impressive. I mean, someone like Moynihan, who is quicksilver smart but drunk in the middle of the day—that's just a very different model.

Kennedy took the abilities that he had and deployed them with such persistent effect and, over the years, caring about the same issues deeply. He didn't just drop issues he cared about. Part of what I did, for example, occasionally would have to do with healthcare. Healthcare would sometimes intersect with constitutional issues. There are things he cared about that he just never dropped: civil rights, civil liberties, human dignity, healthcare, certain ideas of equality. That kind of commitment over that long a career, in a way that built coalitions and actually got stuff done, deserves a lot of respect.

**Heininger:** Let's talk about what we have seen as his core constitutional values. Do you feel that he has a coherent judicial philosophy?

**Tribe:** I think he has a coherent constitutional philosophy, which is deeper and broader than the question of the precise role that courts should play. He has a philosophy about the Constitution as a growing set of protections for human dignity and a sense that its precise meaning is not fixed at any moment in time, and that claims about original intent are largely circular or empty and excuses for not protecting people who are vulnerable and need protection.

He has a fairly clear sense of the importance of certain core constitutional values about free speech and equality, but they don't translate into detailed doctrinal tests and all this stuff about whether you use strict scrutiny or some other kind of scrutiny for something. Those he could deploy when he needed to, with the right talking points, but the real core was much more basic. At a basic level he has an aggressive, [William] Brennan–[Thurgood] Marshall-like vision of what the Constitution should be, and a clear sense that people who are dedicated to it belong in positions of power and authority, and people who are hostile to it don't.



The examples of people like Bork were very clear and easy for him, unlike people like Biden. Biden is a good guy and I like him a lot and I've worked with him, but he gets there much more hesitantly than Kennedy does. Kennedy has an instinctive, clear sense that anybody who has doubts about *Brown v. Board* or who is tortured over women's equality is really not the kind of person that we should have on the Supreme Court, that kind of thing.

**Heininger:** Have you seen an evolution in him, in these core values?

**Tribe:** I don't know for sure. I've sensed more constancy than evolution. For example, on some issue like gay rights—I imagine but I don't know for sure that he had a harder time with that earlier and probably is much more comfortable with it now, but I simply extrapolate that from what I know of his character. I can't say that I've observed it myself over time.

**Heininger:** But I'd say there are a couple of them on which that observation might be relevant. One of them is equality for women, because he came later to a support for the ERA [Equal Rights Amendment].

**Tribe:** That's right, but it was clear that the support was absolutely deep. And reproductive rights as well.

**Heininger:** Given the background that he came from, and the fact that even with his own family—

**Tribe:** I know. He fought with Eunice enormously over that. I was there during a lot of their fights. He would humor her in various ways and he would turn it into a source of some kind of family joke. "Oh, Euni, you're always saying that," or something like that. She was very much against *Roe v. Wade* fundamentally and he was always for it. I say "always for it," but I don't know how he felt in '73. I hadn't met him yet.

**Heininger:** There are those who would say that was one that, as a Catholic, he had to—

**Tribe:** Struggle with.

**Heininger:** Struggle with, yes, but once he got to the point that he did, then, as you described it, it fit within that core constitutional value.

**Tribe:** Right. And it wasn't an awkward fit when you think about it. Pushing against the grain of family is a hard thing for him, and certainly his mother and his sister. Sarge actually was pretty helpful in that respect, because he also had a difficult time, to some extent, with things like *Roe v. Wade*. He concluded it really should be up to the woman, and when he did he was very strong about that.

**Heininger:** But it took a while for him to get there. You distinguish with Kennedy a difference between core constitutional values and a judicial philosophy. When it comes to nominations like to the Supreme Court—Well, let's get something else out of the way first. We know about the times when he's consulted you on the big Supreme Court nominations. Did you also get consulted on lower court nominations?

**Tribe:** A few times, but I don't remember particular ones. There were a few, particularly controversial ones that he wanted my views of, but I can't remember which ones. It wasn't a regular matter.

**Heininger:** Where the real stakes were for him was when it got to the Supreme Court. Describe for me what Kennedy would view as being the kind of person he would want to see on the Supreme Court, recognizing that what he might want to see on the Supreme Court is going to differ from what necessarily gets nominated or proposed.

**Tribe:** He wanted to see people who were extremely smart and able to handle themselves in that very refined arena. It wasn't enough that they have great instincts; they had to be really well armed. He had a sense, a very good judgment of who was sufficiently articulate and powerful intellectually. And it was important that the person have a compassionate vision of human suffering and what human problems were all about, and how law intersected with them.

That's why he liked people who were fairly pragmatic and had a sense of what works in the world and what doesn't. He liked [Stephen] Steve Breyer a good bit, partly because Steve seemed to be compassionate and he cared about people, and for Kennedy it mattered. It's very much like Obama. Obama cares about someone's ability to appreciate where the rubber hits the road and how doctrine actually affects people in practical terms. When, for example, Bork talked about wanting to be a Justice because it was an intellectual feast—that was one of the lines that grated with Kennedy the most.

**Heininger:** Well, I think it would, wouldn't it? Not the right 30-second sound byte.

**Tribe:** Not quite the right note, right.

**Heininger:** I guess we should blend into Bork. Bork created real problems because here you have somebody who clearly had the intellectual firepower, who clearly could operate within that arena but failed in other ways.

**Tribe:** As soon as he was nominated I got calls very quickly from both Ted Kennedy and from Joe Biden. Kennedy's immediate reaction—I mean, he basically said, "Is this guy as bad as I think he is?" He had already obviously heard a lot of things about Bork's views of various things. I said, "I think he is just about as bad as you think. He's extremely smart, but I think he will put his brains to use destroying values that you care deeply about." Then we talked about it. And this was before Kennedy made his somewhat intemperate statement about the America for—

**Heininger:** "Robert Bork's America."

**Tribe:** "Robert Bork's America would have women with coat hangers..." That wasn't actually as inaccurate as people may think, but it came across as demagogic and it probably was not the right thing to say at the right moment. In any event, I told him I thought that the only way to oppose Bork was to be quite forthright about the way his values were not just far from the mainstream, but would generate a set of principles that would be dangerous to women and to minorities. Then I kind of elaborated, and that fit very much with what he had already heard. He had no difficulty from the very beginning thinking that Bork's mere intellect and his objective

qualifications were somewhat beside the point. He was a dangerous man and his views did not belong on the Supreme Court.

I had written a book a little before that, which I had shared with Kennedy and others, that had been published by Random House, called *God Save This Honorable Court*. I think maybe Kennedy actually had a blurb on it. Let me just quickly see, because it's here. There's a statement from Brennan and from [Mario] Cuomo. Anyway, Kennedy had seen it. It made the case that throughout our history the Senate had in fact exercised a significant role in reviewing the ideological composition of the Court, and that thinking about whether a Justice would move the Constitution in a fundamentally wrong-headed direction from the perspective of whatever Senator was evaluating it was an appropriate role for the Senate to play.

I think he asked me, "Well, what about all this stuff about how Presidents are surprised that Justices change?" [Dwight D.] Eisenhower was shocked by Brennan and [Earl] Warren and I had written about how those were misunderstood, or were anomalies. Warren was put on the Court by Eisenhower really to get him out of the way in California politics, not with a view to his ideology. Brennan was chosen because he was a Catholic from the Northeast, not because Eisenhower had any illusions about his judicial philosophy. But when Presidents have in fact carefully selected someone to carry out their vision of the Constitution, it's usually worked about the way the President expected. So there was very little reason to expect that Bork would be something other than the kind of guy that [Ronald] Reagan wanted him to be and assumed he would be.

I have a chapter in that book called, "The Myth of the Surprised President," and I think Kennedy found that reassuring. It fit his idea that when a President selects somebody in order to move the Court and the Constitution in a direction that a particular Senator conscientiously thinks is wrong, the Senator shouldn't hesitate to oppose on that ground. In fact, it was kind of an over-determined decision, because all of the groups that Kennedy generally listened to would have pushed him in the direction of opposing Bork. What I said gave him kind of an intellectual armature within which to fit it.

Actually, I met with him a number of times to go over some of the questions that should be asked of Bork. We went through a rehearsal: "What if Bork says this?" "What if Bork says that?" I played a role both with him and with Biden, but with Biden I went to much greater lengths and actually played the role of Bork in some murder board sessions, at Biden's house. With Kennedy it was a little less formal.

**Heininger:** Well, there's a lot in what you say here. Let's compare Bork to some of the earlier and some of the later nominees, in terms of what effect this might have had on Kennedy. Did you expect [William] Rehnquist to turn out to be as he did?

**Tribe:** I did.

**Heininger:** Did Kennedy? The fight against Rehnquist was not very intense.

**Tribe:** Right.

**Heininger:** There is a prevailing sentiment in the Senate that Presidents have the right to name who they want for the Supreme Court, which makes it harder to go up against.

**Tribe:** Let me try to remember what happened originally. Before [Richard M.] Nixon named Rehnquist and [Lewis Franklin, Jr.] Powell, he floated a number of trial balloons; among them were Mildred Lillie and Herschel Friday. That's when I first became publicly notorious in various ways that I hadn't really expected. I was an assistant professor at Harvard and I wrote a memorandum about how Mildred Lillie would be a terrible judge, that she was both right-wing and stupid, and that she had written seven opinions in a short period that were unpublished, but all of which were unanimously reversed by the California Supreme Court in a short time.

This memo made it to the front page of the *Washington Post* in an article by Jack McKenzie. I hadn't expected that he would write a big deal about it. I had met him when I was clerking for Potter Stewart in the Supreme Court. The FBI [Federal Bureau of Investigation] showed up at my office at the law school at Harvard to grill me on who put me up to writing this memorandum about Mildred Lillie. I explained no one had. Harvard President Derek Bok then protested to Attorney General John Mitchell about harassment of Harvard professors. We discovered that my office had been wiretapped—all sorts of weird stuff that happened during the Nixon period.

The bottom line was that, for reasons quite independent of my opposition, although my opposition helped, Mildred Lillie sank like a stone, as did Herschel Friday, who was problematic for other reasons. Instead, there floated Rehnquist and Powell, and they were widely regarded as a relief after the combination of mediocrity and conspicuous, mindless right-wing-ism represented by the alternatives. So I think people really didn't oppose Rehnquist much.

I had an inkling, to answer your earlier question, did I expect him to be quite what he was? I may be confusing what I expected later on when he was promoted to Chief, based on things I have learned in the interim, from what I expected originally. Originally I didn't know that much about him. I knew he was head of the Office of Legal Counsel. There were rumors that he had done some scary things to Hispanic voters who were in the line and he would challenge them on behalf of the Republicans in Arizona. Some of that only became clear later, when Teddy opposed him in his promotion to Chief. The original nomination was somewhat a stealth nomination. People didn't quite know him. And if you listen to the Nixon tapes, Nixon at one point refers to "that clown, Renschburg." He didn't really know very much about him.

**Heininger:** This happens repeatedly. You get the same process that takes place after Bork goes down, with two subsequent nominees, and you end up with [Anthony M.] Kennedy and again, people not knowing him.

**Tribe:** I testified for Kennedy.

**Heininger:** I know, and we'll talk about Kennedy. But it's again the intersection between politics and Presidential intent, where you start off with someone where there are either competency issues, or there's a mindless ideologue, one side or the other, and it's, Who do you end up with? And everybody has to take a deep sigh of relief and just go, "Well, this is about the best we can get. OK fine, we're exhausted, we can't keep doing this."

**Tribe:** Can't keep it going.

**Heininger:** We can't keep it going. So that has happened, and you get that same process with [Clement] Haynsworth and [George Harrold] Carswell. You get, "Oh, my God, we've had two where you've got ideology and racism and competency issues. Fine, we'll just take this one." And sometimes you end up with a good one and sometimes you don't.

**Tribe:** You know, in hindsight, Rehnquist wasn't all that horrible.

**Heininger:** No?

**Tribe:** And Powell certainly wasn't, whereas Carswell and Haynsworth or Lillie or Friday would have been abysmal. Bork would have been terribly dangerous, I mean, there would be no *Roe v. Wade* if Bork had been nominated.

**Heininger:** What makes Bork so much more dangerous than others?

**Tribe:** He is more extreme than [Antonin] Scalia, and more rigid. Scalia at least has some—He voted that flag burning was protected by the Constitution. He did a number of things that Bork wouldn't have done. Bork really would have been the real article, all the things that were troublesome about Scalia, but even more. And it would have been both of them. It wouldn't have been Bork or Scalia. If you had Bork instead of Kennedy, flash forward to all the things where Kennedy is the swing vote on everything still. Just imagine.

It became clear when Bork finally wrote his book, *The Tempting of America*, that he was every bit as bad as the worst projections about his views suggested, although maybe his embitterment of being defeated made him even more extreme than he originally would have been. But I think he would have been a very powerful force for a very retrogressive view of the Constitution, not an unintelligent view but one that really would have eliminated its capacity to embrace fundamental human rights.

**Heininger:** There were those who had taken courses with him who had found him quite engaging on a personal basis.

**Tribe:** No question that he's engaging.

**Heininger:** But he wasn't in his hearings.

**Tribe:** No. In his hearings, he was his own worst enemy. He was terrible. But evidently he was very charming and if you knew him you would tend to like him. I find Scalia engaging and I like him and I find him charming. I think it's not bad for there to be one or maybe two members of the Court like that, if there are also one or two real liberals. Right now there are no liberals. There's no Brennan, there's no Marshall, there's no [Harry] Blackmun. [John Paul] Stevens is remarkable, but the bottom line is that Breyer and [Ruth Bader] Ginsburg and [David] Souter are moderates at most. Steve is fine, and on issues of race he's very good, but he often has a very hard time coming to progressive conclusions, and when he does they're not always very powerfully articulated.

**Heininger:** So along comes Bork. You say you were consulted before Kennedy gave his speech?

**Tribe:** I can't remember, honestly, whether it was a day before or immediately after, whether I heard his speech and then he asked me whether I had similar reservations. I certainly wasn't consulted on what he said. I would have strongly urged him to moderate it.

**Heininger:** When you first heard it, what was your reaction to it? Then versus subsequently. There's been much water under the dam since.

**Tribe:** My immediate reaction was a combination of "Good for you, Teddy. You've really socked it to him," and "Boy, I wish you had thought of a more nuanced way to say it, because people are going to rip this apart and claim that you are demonizing Bork and are simplifying the issues." Right away I thought there must have been a way to say this that would not be so easy to caricature, because it sounded as though he was painting—I guess this is anachronistic because *Star Wars* hadn't come out yet, but it sounded as though he was painting Bork as a kind of Darth Vader character who is evil through and through, rather than that he had a judicial philosophy that would in fact lead to some terrible results.

**Heininger:** Was it fair?

**Tribe:** Was it fair? Comparatively so. Given the way that political rhetoric tends to simplify things, it was not particularly unfair; that is, it was somewhat two-dimensional compared to the reality. It helped to get people to see what the issues were. The issues really were: Would racial integration be set back significantly, and would women's reproductive rights be in danger? The answer to both questions was yes, and this helped people see it in ways that a more nuanced statement might not have. Would it have been a fair way to summarize Bork's views in a law journal? No, because one would have wanted more nuance. But did it really inform people more than it misinformed them? I would say yes.

**Heininger:** What do you think his intention was in giving the speech?

**Tribe:** Oh, I think he wanted to galvanize people. He sensed that the amount of deference that Presidents get in nominating justices was such that, unless he said something that would really send an electric jolt up the spine of the various groups that were often pretty spineless when it came to actually opposing people, it would be hopeless. So he really felt he needed to put some juice into the thing.

**Heininger:** Do you think it was aimed at other Senators, or was it aimed at the outside groups, or was it aimed at the public, or all of them?

**Tribe:** All of them, but mostly the outside groups, and secondly the Senators, and thirdly the public. There were some of his fellow Senators that he thought were going to be kind of slothful and he wanted to wake them up. He wanted to raise an alarm to the media and he definitely wanted the various groups to be energized. It wasn't so clear that they were starting out being energized.

**Heininger:** So a calculated, politically expedient step.

**Tribe:** Well, expedient suggests that he realized that there was something about what he was saying that was a distortion. I don't think he did. I think he believed every word of it, that the

kind of America that Robert Bork—The difference is that it made it sound as though Bork actually wanted women to die of unsafe abortions, that Bork was personally indifferent to the human plight of people. Who knows what he personally thought?

**Heininger:** To a certain extent, you can look at some of his testimony and he did come across as being—

**Tribe:** He came across that way.

**Heininger:** He came across as being either uncaring or unaware of what the effects would be.

**Tribe:** Of what the human consequences of his views would be.

**Heininger:** The human consequences, yes.

**Tribe:** That could be, but I guess the point is, I don't think Kennedy thought to himself, *I'm going to paint Bork as more of an ogre than he is, in order to move political opinion.* He thought, *Bork is a dangerous guy. His views would lead to a scary world. I want to describe what that world would be like.*

**Heininger:** Has there been any long-term effect on Supreme Court nominations, on who gets nominated, because of that speech, for the process?

**Tribe:** Well, the process has become more ugly and polarized, and it's been harder to nominate liberals. Really, the whole process post-Bork has been one in which people who have dramatically expressed views, liberal or conservative, are quite immediately filtered out, so the only people who can be seriously considered for Supreme Court nominations are people who either are not very passionate about their commitments to anything, or who are passionate but are so calculated that they always hedge their bets and express themselves mildly.

The extremes are—and by extremes, I don't mean people who are off the chart and irresponsible in their views; I mean people whose views are anything other than in a fairly safe middle. People who have ventured to write things that are more dramatically—that can be more easily caricatured as quite far right or quite far left, are just assumed to be out of the question. I think that the Bork confirmation process over the years has generated a world in which you get — People like Scalia, for example, could never get on the Court now. He sort of sneaked on because Rehnquist was promoted to Chief.

**Heininger:** Right.

**Tribe:** Alan Simpson used to say something in a number of public hearings. When I would testify before him on something, he would sort of veer off into saying, "It would have been great if Bork had been confirmed; if we could have both you and Bork on the Court it would be much better than a Court with just these milquetoast people in the middle." Setting aside whatever ego involvement I might have, I do think it would be better if there were a Court with strong liberals and strong conservatives that would really argue with each other, rather than a Court that has a couple of dramatic conservatives who sneaked on for extraneous reasons: Scalia because the

focus was on Rehnquist; and [Clarence] Thomas because race threw a wildcard into it; and no real liberals.

**Heininger:** But then how do you explain [Samuel] Alito and [John] Roberts, who were known as conservatives?

**Tribe:** Well, the Senate had become worn down. It just didn't have the balls, basically, to fight them. They should have realized how conservative they were; the records were there. In the case of Roberts, he was so affable and polished and smooth about presenting himself that it didn't really produce any vivid recognition of how much his views were just about as dangerous as those of Scalia or Bork, to the values that at least those people cared about.

In the case of Alito, who knows? By that time, Biden had basically given up and the Senate didn't have the votes to really stop anybody.

**Heininger:** Tell me about the process that Kennedy used, because it's an extraordinary one, on this nomination. We hadn't seen it before. We haven't seen it work as well afterwards, either.

**Tribe:** Right. He pulled together a number of people: me and Cass Sunstein and Kathleen Sullivan and several others, to go down and have dinners with him, long, long dinners and conversations in McLean, where we would go over all of the issues in great detail. He would ask each of us to speak about what we thought, and what kinds of questions we thought should be asked, and what would be said in response.

On top of that, he asked me to come into his office in Boston, where we went through rehearsed questions, and so on. It was pretty extraordinary. Because Biden knew that Kennedy was doing that, Biden as chair at that point knew he needed to go through at least as elaborate a process, and so it became even more elaborate. With respect to Biden, I spent several days at his house in Delaware. We went through a process in which I played Bork and I answered questions that Biden put to me. I think Kennedy was the main inspiration for the detail with which Biden did it.

**Heininger:** How did Kennedy galvanize the groups, and how much effort, from what you could tell, was he putting into galvanizing the groups?

**Tribe:** That I don't know. I know he called Ralph Neas and a lot of other people, and was in constant contact with them. I think he was galvanizing them much more than they were galvanizing him. It was kind of a symbiotic process too, in which they knew that they had a champion in him that made it sensible for them to put all kinds of energy and money into the process. But not having been present at most of those conversations, I really can't speak to that.

**Heininger:** Given that competency was not an issue with Bork, did you expect his nomination to be defeated?

**Tribe:** No, I actually didn't. In fact, I was quite reluctant in many ways to play as central a role as I did in testifying against him. I felt that he would be confirmed and that I would have the awkward experience of arguing cases in front of a guy I had worked very hard to defeat. So I was quite shocked when he was defeated. I wasn't as good a vote-counter, I guess.



**Heininger:** Or weren't able to assess the extent to which this process, this train, got running and took off.

**Tribe:** Right. And I didn't know how much he would defeat himself. He was just his own worst enemy. His own testimony made him seem so scary.

**Heininger:** I have seen and read that you made a better Bork in the mock hearings than Bork made for himself when he testified.

**Tribe:** Maybe, maybe.

**Heininger:** How did he defeat himself in his own testimony?

**Tribe:** Through coming up with phrases like—"Why do you want to be a Supreme Court Justice?" "Because I want to feast on the lives of the people that I will be dissecting in my analytical rigor."

**Heininger:** I recall that was one of the last things that he left the committee with too.

**Tribe:** Right.

**Heininger:** You've got to be very careful about what you open with and what you end with, because that's what gets remembered.

**Tribe:** Right. But also he just somehow—his physical appearance, the Mephistophelian beard. It was not made for television. He was not very telegenic, and his demeanor or whatever it was that students found endearing or fascinating came across as not avuncular but highly stilted. He just was a bad witness and he couched his answers in ways that were more frightening than reassuring. And his stuff about how the Ninth Amendment was a mere inkblot—do you remember that?

**Heininger:** Yes.

**Tribe:** It was so amazing that he could say things like that.

**Heininger:** Well, having watched many nominations since, it is a real standout for a remarkably blunt, uncensored, open exposition of what somebody really believes.

**Tribe:** Much better in that respect.

**Heininger:** You don't see that. Yet, in that sense, this is what it should be.

**Tribe:** All of this airbrushed pablum that you get from Alito and Roberts, where they say, "Oh, I can't comment on that because it would be too close to the issues that would come before me."

**Heininger:** Or from Thomas, "I've never once thought about *Roe v. Wade*."

**Tribe:** "I've never once talked about *Roe v. Wade*." Those things are pathetic, and the Senate has not been very good at pushing back. With Kennedy taking a backseat in the judicial confirmation

hearings and focusing entirely on Labor and Human Services, it just—The recent hearings have been quite terrible, and they've been terrible partly because Kennedy has not played much of a role. I guess there's a sense in which he's been marginalized by things that have made it harder for him to press people hard on various issues. I'm not quite sure. There was some sense, in the recent hearings—I'm trying to remember what exactly it was, some embarrassment. It had nothing to do with Chappaquiddick, but there was some embarrassment about his personal life that made it hard for him to press Roberts and Alito as well as he might have hoped.

**Heininger:** The obvious one in that regard was Thomas. There are many observers who said it was just way too dangerous for him—

**Tribe:** To go after Thomas.

**Heininger:** To go after Thomas, that not just being black, but the whole sex thing just was a minefield potentially for him to wade into, and so his voice was in many ways effectively stilled.

**Tribe:** I felt at the time that someone had gotten to him in a way that they shouldn't have, that he was inhibited and silenced in ways that were inappropriate. If he had felt freer to press the way he would have instinctively pressed, it would have been better. But I wasn't on the inside of that at all.

**Heininger:** Do you have the sense, with nominees, that he has any kind of a litmus test? Or are there any qualities that he would view in a nominee that are disqualifying?

**Tribe:** Yes, I do think so. I think everybody in fact does, although people disclaim having litmus tests. Almost everybody thinks that if a nominee believes *Brown v. Board* was wrong, that's out of the question. For him, *Roe v. Wade* is like that. If you think *Roe v. Wade* was just completely wrong—You could have a disagreement strategically the way Ruth Ginsburg did, that it should have been done more slowly, but if you think women's reproductive freedom should not have been protected constitutionally, I think he would regard that and has always regarded it as just as serious a disqualification as if you think that the Constitution should not have integrated schools.

There are other issues of that sort but that's the principal one. The other ones would probably be: If you think that the Constitution is absolutely colorblind and that we can't pay attention to race in order to cure the problems of racism, then you're just on a different planet and you don't belong on the Court. Or if you think Congress' powers are so limited, that the Court made a wrong turn in 1937, and really the nine old men were right and the Congress should not have the broad power to regulate interstate commerce—Those are several lone stars.

**Heininger:** What about the issue of privacy and unenumerated rights?

**Tribe:** Abortion is simply the tip of that iceberg—the general idea that there are rights that the Constitution does not specify, and that those include rights of personal autonomy, and that the precise boundaries of them are unclear but they certainly include the right to control your own reproductive destiny. That whole complex is a litmus test. So when I refer to *Roe v. Wade*, I mean not just *Roe v. Wade* but the whole issue of privacy.

**Heininger:** The whole issue of privacy that goes behind that. How did you see Biden's role as different from Kennedy's in this process, on Bork?

**Tribe:** Well, with Bork, he worked even harder than Kennedy, ultimately. He really orchestrated everything, decided how the witnesses should go and in what sequence. They had a very similar view about what the appropriate range of questions was. I imagine, as I suggested earlier, that Kennedy's serious commitment to it pushed Biden very hard. Biden really couldn't get too far to Kennedy's right on the issue, and Biden did believe seriously enough in privacy, unenumerated rights, and so on. Since Biden was in charge of orchestrating the whole hearing, he was in some ways more central than Kennedy, but without Kennedy's fire under the whole process, I don't think it would have happened.

**Heininger:** When it got into the actual hearings, did they have different roles there?

**Tribe:** You know, I haven't reread the questions, nor do I recall them well enough to remember, so I can't say that for sure.

**Heininger:** What I've seen written has been more along the lines that their style of questioning was very different, that Biden consciously did not seek to inflame, but to let Bork speak as long as he wanted to speak and in effect to let him hang himself.

**Tribe:** Right. That's sort of true.

**Heininger:** And Kennedy took much more of a hostile approach.

**Tribe:** Actually, that was part of what I was advising Biden to do. I thought, having read Bork's article in the *Indiana Law Review* about free speech, and a few other things, that giving Bork a lot of rope and letting him hang himself was the best approach. It was also the fairest. I mean, who could complain about a candidate—

**Heininger:** Being able to talk as long as you want.

**Tribe:** —scaring the country about his own views. Kennedy was much more inclined to be pretty strident and also had more severe time limits because Biden, being chair, could talk as long as he wanted and let Bork talk as long as he wanted, and Kennedy needed to get to the jugular quickly.

**Heininger:** Why did the effort against Bork succeed? You didn't think it was going to, and many people didn't think it was going to.

**Tribe:** I think it turned out to be a referendum on whether the country as a whole, and there were lots of polls being taken all the time, was ready to roll back the Warren revolution and roll back a Constitution that protected rights like privacy that were not enumerated, and to question one person—one vote and much of the racial progress, including cases like *Shelley v. Kraemer*, involving racially-restricted covenants. It turned out to be a national referendum on the Constitution, on which Bork was on the wrong side, and his personality cemented it. In the end, what people didn't quite calculate, at least I certainly didn't, was that this was going to be a time when the country was going to take its own temperature on whether it thought a somewhat

progressive Constitution was the right way to go and whether it was ready to roll it all back. Bork turned out to provide a moment for having that kind of referendum.

**Heininger:** When you stop and think about it, it's very difficult to take things that for ordinary Americans are very esoteric—Supreme Court decisions are up here and what do they have to do with us? Lawyers understand, politicians can understand, but how do you communicate that to ordinary people, when you say this was a case of the country taking its temperature and saying, no, this is not the direction we want to go in?

**Tribe:** There wasn't much else happening that summer.

**Heininger:** That helps.

**Tribe:** It became the daily soap opera. There were lots of people watching. There seemed to be this scary dude with a funny beard who said, "I think your rights are an inkblot." What does he mean? And, "I want to have an intellectual feast over your life." And there were lots of ads that suggested that it really does affect you whether you have a legal system where you can count on certain protections. It was pretty well presented as an ad campaign.

**Heininger:** Did Reagan not fight strongly enough for him?

**Tribe:** I thought he fought pretty strongly. There was an awful lot of pushback. I don't know whether Mike Deaver and others were deeply enough involved. The case for him had to do with abstract principles. The President should have his way about the Supreme Court Justice. He's qualified, he's smart. That doesn't activate people too much; whereas, the case against him was, This guy's going to get in your bedroom and he's going to slow down racial integration. It was much more concrete, the things that were scary.

**Heininger:** The 30-second sound bytes are definitely on the opposing side.

**Tribe:** Right. And in a way, it may be that Kennedy's opening salvo about Robert Bork's America, though I'm among those who might criticize it in some ways, was the memorable moment. That was what echoed through the whole time, that we're moving toward a country that is really scary and he will help make it scary.

**Heininger:** There are many people who would argue that you can look at Reagan's first term in particular and say that here's someone who came in and wanted to dismantle the welfare state. He came in with a very clear ideology. He came in with sweeping changes to the tax code so that the wealthy could get wealthier, and wanted to turn back the welfare state. And the country said no. Somehow in that process there was a national temperature-taking and the country said, "Wait a minute, that's not—No. Maybe take down some things, but we're not going to do that." Then along comes Bork towards the end, and the country says, "Wait a minute, we're not going to do that either."

**Tribe:** Basically Reagan—it was like, "I'm going to dismantle FDR [Franklin Delano Roosevelt], and the country said no. "I'm going to dismantle Earl Warren," and the country said no. It basically said, "We like your 'shining city on a hill,' we're happy to fight the Soviet Union and maybe even have some weird Star Wars program, and we like the 'Morning in America,' but

we don't like taking away the safety nets or the constitutional safety nets." It was basically two referenda and on each of them, Reagan lost.

**Heininger:** How important was Ted Kennedy to that process?

**Tribe:** Vital, probably in both pieces. It's hard to imagine what it would have been like without him because, criticize as one might, the precise rhetoric, if you extract Kennedy's passion and his voice from all of that, you can see that it might have gone differently. It's hard to imagine. I wouldn't attribute to him the kind of Pied Piper role of moving the country dramatically against its own instincts, but he was able to energize and coalesce those instincts in a powerful way. It's interesting that, over all the years and all of the people who have been his detractors, the undercurrent of belief that this is a guy who really is worth listening to has to have been there or there wouldn't be the universal outpouring there is now for him. It's just staggering how loved he is across the board.

**Heininger:** That's true.

**Tribe:** There must have been a lot of that all along, because he's the same guy and it's the same country.

**Heininger:** Is he the same guy, or has he grown?

**Tribe:** He's certainly become even more adept at building coalitions. The way he's reached out to Orrin Hatch on many issues is very clever. He may have grown. He has grown. He has become more and more adept at reaching out, but it's still a sense in which people don't doubt where he's coming from. He's still very progressive, very liberal. No one doubts that. There's no triangulation about him and never has been.

**Heininger:** Don't dismantle the welfare state; don't dismantle FDR's America; don't remove the constitutional safety nets; don't remove the welfare safety nets.

**Tribe:** Right.

**Heininger:** And in fact, advance them.

**Tribe:** Right.

**Heininger:** So we get through Bork. Why didn't it work subsequently? Why didn't it work for Roberts and Alito? He undertook a similar effort with Roberts and Alito.

**Tribe:** It really wasn't a similar effort. I'm trying to remember all the different pieces that weren't in place any longer. I tend not to be very good at remembering the demographics or the political alignments and who had what majorities, but there wasn't the kind of—We had a Democratic majority to oppose Bork.

**Heininger:** It wasn't there for Alito and Roberts.

**Tribe:** And that's the key difference. It would have taken a dramatic—I'm not sure how they could have pulled it off, but they just didn't have the votes, and because they didn't have the votes—

**Heininger:** It wasn't there and the Republican members were also very different than they were.

**Tribe:** Right. The Republicans had moved steadily to the right. The idea of a moderate Republican Party just evaporated. There were very few left of that stripe. And Roberts and Alito were much more polished, and much more below the radar, and much more capable of saying, "Well, that's what I wrote when I was in the Justice Department. I was being an advocate and you can't equate that with my own views."

**Heininger:** The glib way of looking at Bork is to say that he had simply said too much before he ever got there, that he had too long a record and it was there for anybody to discover. Subsequent nominees have either much shorter records or records that can be disavowed as, "Oh, I wrote that when I was a staff member."

**Tribe:** That's right. And they didn't have the Saturday Night Massacre with Archibald Cox.

**Heininger:** That didn't help.

**Tribe:** There were several albatrosses around his neck.

**Heininger:** What do you think really sunk it? Do you have a sense that for Bork abortion really was a key issue in—

**Tribe:** I don't think it was so much abortion. I think you're right to have translated it into privacy. People really thought, *No right of privacy, what does that mean? Does he really mean that the government can tell me everything about what to do in my bedroom?* I really think people thought that he would not protect the right of birth control.

**Heininger:** Well the *Griswold* decision was at great issue here.

**Tribe:** Right, and he was definitely opposed to *Griswold*, whereas the later guys all were properly schooled and they said, "Oh, *Griswold*, that's a super precedent. We're not going to overturn *Griswold v. Connecticut*." And *Roe v. Wade* itself is always so complicated and controversial that people can say they don't have a clear position on it one way or the other.

**Heininger:** Well, with Bork then, do you think that the process got shifted somewhat? Because *Roe v. Wade* is so controversial and such a flashpoint, those who opposed him shifted it into, as you said, a bigger issue that resonated with the public. "Let's move this one aside but see what's really at stake." Abortion becomes *sub rosa*, and what becomes the face of it is that the government's going to be in the bedroom. You take somebody who would ostensibly seem very esoteric—Privacy?

**Tribe:** Right, but he made it dramatic by saying there's no difference between the government's power to tell you what to do in your bedroom and a government's power to tell a coal company what kind of coal to burn. He had all these examples about economic regulation being the same

as regulation of your intimate, personal life, and it made it seem as though he was inhuman, that he didn't understand that certain things mattered more deeply to people than other things.

**Heininger:** In some ways it was really an extraordinary time period because issues that you would think would be more esoteric than would capture the minds of ordinary Americans, in fact did become—

**Tribe:** Right. It became a national seminar of things that people would ordinarily have seen as subjects for a law school seminar.

**Heininger:** After Bork—Bork surprisingly goes down, and then we get another nominee.

**Tribe:** Doug Ginsburg didn't last long enough—

**Heininger:** He goes down very quickly.

**Tribe:** He didn't last long enough. With Nina Totenberg's journalism, he sank before anyone could really focus on him.

**Heininger:** Which of course is ironic, even though we now have a President who has not only really smoked marijuana, but done more than that. It just shows the difference in time.

**Tribe:** Things change over time.

**Heininger:** Things change over time. Then comes Kennedy.

**Tribe:** Now with Tony Kennedy I got calls quite quickly both from Ted Kennedy and from Biden, and I told them both that I supported his nomination strongly. I knew his record. It was very different on many issues from what Bork had been. I don't know to what extent that cemented where they came out, but very quickly I agreed to testify for him. Many of my liberal friends were outraged. They thought I was selling out, but I'm proud that I was on that side of the issue because I think he has made, on the whole—I mean, I wish he were somewhat different, but he's made a progressive difference.

[BREAK]

**Heininger:** This is a resumption of the interview with Larry Tribe on April 27, 2009. Before we go back into Kennedy, I want to go back to Bork for a second. You testified against him in the Senate, so you not only were on the record as having advised against him, but you were publicly testifying against him. What effect do you think that has had on your prospects of getting on the Supreme Court yourself?

**Tribe:** I think it ended them. It was pretty clear at the time and various people advised me that I would be making lots of enemies and there would be a lot of payback. I've learned through both

Carey Parker and Bob Shrum that when Kennedy proposed to [William J.] Clinton that he name me instead of—At one point it was either Ruth Ginsburg or Steve Breyer—Clinton didn't want the fight, and the fight was all about Bork. Kennedy indicated that he had done a kind of informal count of it and there'd be a fight but that I could be confirmed, and Clinton just didn't want to take it on. It was not a surprise to me. I realized that that was what was going to happen.

There have been times when I've wondered if it was worth it, but when I see things like all of the decisions in which Kennedy—and I now mean Anthony Kennedy rather than Ted—has cast the decisive vote in favor of something that I think is vital to human rights, I feel that I've made more of a contribution by opposing Bork than I really could have by becoming a dissenter on the Supreme Court. I've had a lot of opportunities as a law professor to teach people various things, some of them whose views are unlike mine, like John Roberts; others whose views are more like mine, like Elena Kagan and Barack Obama. I think I have made a contribution notwithstanding the fact that I was pretty much ruled out for the Court by making the enemies I did when I testified against Bork.

**Heininger:** Do you think it was your testimony, which was obviously very public, or was it your role leading up to the testimony? I guess what I'm really asking is, would you have been blackballed if all you had done is advise and consent?

**Tribe:** Merely testified?

**Heininger:** No, advise and consent, but then not publicly testified.

**Tribe:** I think it's almost the other way around. There were people who testified against him, including Kathleen Sullivan and Cass Sunstein and Walter Dellinger.

**Heininger:** None of whom are on the Supreme Court.

**Tribe:** No, but the point is that some of them could have been on the Supreme Court. I don't think that they were ruled out by virtue of what they did, because it was not quite as pivotal. Cass could still be on the Court someday. Walter could have been but he's too old now. Kathleen could have been but she's taken herself out of consideration, even for the Ninth Circuit.

I think that because I testified for about three hours by myself, and because I was publicly identified as the person who coached Kennedy and especially Biden, I was demonized as the one who gave intellectual respectability to the opposition in a way that the other people who testified against him publicly, but less visibly, and played a less central role, did not. I was regarded somehow as second only to Kennedy because of his dramatic statement about Robert Bork's America, as the engineer of the opposition, probably wrongly. I made less difference than people assumed, but it was just convenient to have someone to demonize and I was it.

**Heininger:** But they also consulted.

**Tribe:** They did, but I don't think any of them were painted with the same brush.

**Heininger:** Why did you get painted with such a—



**Tribe:** Because I played as prominent a role as I did. There was a whole symposium dedicated to trashing my philosophy, published in something called *Benchmark*; twelve or fifteen articles taking apart some of my views. But also I had written a whole treatise on constitutional law that was very widely cited, so I was a very large target. Kathleen had written only moderate things. Cass is quite conservative and minimalist. Walter has always been very calculated and not particularly dramatic in his views.

I was simultaneously the ring leader, people thought, of the anti-Bork forces, just because of the role I played in playing Bork in the murder boards with Biden. And because they testified as part of a panel and I testified by myself for a long time. I was publicly targeted much more than they were. I was the one that the *Wall Street Journal* editorials were targeting. I don't think anybody else got quite the hits that I did for it, partly because of my other writings making me an easier target, partly because of the particular role that I played in playing Bork, and because of the more visible character of the testimony. I really don't think that anybody else who was involved in all of that was as severely wounded, in terms of prospects of being on the Court, as I was, for better or for worse.

**Heininger:** Do you think it would have been the same if you had not testified but merely done the—

**Tribe:** Probably if I hadn't testified, it would have been much less visible. People wouldn't have had occasion to think, *Let's see, who was it that prepared Biden or Kennedy for their testimony?*

**Heininger:** How long did it take you to make peace with it?

**Tribe:** That's a good question.

**Heininger:** Or have you?

**Tribe:** I have. I definitely have. Five years, maybe ten.

**Heininger:** That's short. [*laughter*] That's a lot less than it would take me.

**Tribe:** I've made peace with it actually. I've had a good life. Being on the Court would have been great, but it really would have been a dissenting role so much of the time.

**Heininger:** You would really have rather been on the Earl Warren Court.

**Tribe:** That would have been interesting, yes, but I was a kid at the time.

**Heininger:** A minor detail. OK, so along comes Kennedy. What made Kennedy different?

**Tribe:** Part of it is just the accident that I happened to know him a little bit through mutual friends in Sacramento. There was a guy named Gordon Schaber, who was Dean of the Law School at McGeorge, who was a good friend of Barbara O'Connor, who is a good friend of mine and at that time was a friend of Bob Shrum's. Through Gordon and Barbara, I sensed that Kennedy was a pretty humane guy and he was not nearly as doctrinaire—I read his opinions. I've always read the opinions in lower courts of people who have been nominated to the Court,

and he was nothing like Bork. There was one particular contrast. There was a case—I think it was called *Dronenburg*—There were two cases and both of them involved gays in the military: one was written by Bork; one was written by Kennedy. They were worlds apart.

Kennedy was struggling with the implications of *Roe v. Wade* for the question of gays in the military. I don't remember how it all came out but it was obvious that he was somewhat tortured over the complicated constitutional questions of deference to the military versus rights of privacy, whereas Bork was out there slashing: "*Roe v. Wade* is a sacrilege, constitutional nonsense," slash, slash, slash. They couldn't have been more different, and I thought that anybody who, as a conservative, as a nominee of a Republican, takes *Roe v. Wade* seriously in the context of a gay in the Navy, has got to be somebody who at least has some respect for constitutional rights and is not just ready to trash things because they don't fit with his country club ideology.

And so I thought from the beginning that he was a person with a sufficiently open mind. And oddly, I thought from the beginning—this is an odd prediction but I kept making it quite publicly to my law students—that he was going to be the decisive vote in overruling *Bowers v. Hardwick*, which is a case that I lost, arguing on behalf of gays back in 1986 when Powell was the decisive vote. Powell was replaced by Kennedy, and some years later in *Lawrence v. Texas*, Kennedy wrote the opinion overruling *Bowers*. I felt quite vindicated with that. I happened to be in the courtroom the day that he announced *Lawrence v. Texas*.

**Heininger:** What gave you kind of a gut instinct that that was going to be the case?

**Tribe:** Partly because of the opinion he had written about gays in the Navy, in whatever the context was.

**Heininger:** Well, I don't know, maybe you should have credit for being very prescient.

**Tribe:** Somehow the data was pulled together. I knew from Gordon Schaber that Kennedy had some gay friends in Sacramento, that he didn't ostracize them, that he thought they were perfectly normal people. It just all hung together.

**Heininger:** When Kennedy was nominated—First of all, why did Reagan resort to Kennedy?

**Tribe:** I don't know how he turned to him, except I think [Edwin] Meese and Kennedy might have known each other from California politics.

**Heininger:** But Kennedy is not a Meese person.

**Tribe:** No, that's right, but he had supported him.

**Heininger:** This is the antithesis of Bork: someone who gets tortured over *Wade*, conflicting rights.

**Tribe:** But that was not the most conspicuous piece of his entire oeuvre. He clearly was something of a conservative. He had done something at Meese's request during the Reagan campaign, I guess.

**Heininger:** Or that they felt he was one of them.

**Tribe:** I think they did, yes.

**Heininger:** Which he didn't turn out to be.

**Tribe:** Right. I remember calling him shortly after the nomination and congratulating him and telling him that I hoped he would be confirmed and that I planned to testify for him.

**Heininger:** Was he surprised?

**Tribe:** He was cordial. He was very nice about it. I don't know if he was surprised or not.

**Heininger:** You didn't get the sense of, "Really, you're going to testify for me?"

**Tribe:** No, I didn't get that sense.

**Heininger:** So do you think that when he was nominated—and there were some questions about those who did support him, because Kennedy did end up voting for him—if you've got Meese saying, "He's one of us," and you had somebody like you saying, "Well, not really," and you get Kennedy voting for him—A plus B does not equal C, in this case.

**Tribe:** Right, that's right. People would have to watch.

**Heininger:** How did the nomination go? Through exhaustion?

**Tribe:** You know, I can't remember the dynamic.

**Heininger:** It was pretty fast.

**Tribe:** It was quite fast. People were so exhausted after Bork that it was like, "Oh, my God, finally somebody that is not obviously a constitutional terrorist."

**Heininger:** What would Ginsburg have been like?

**Tribe:** It's very hard to know. He's quite a libertarian, but at the same time he believes a little bit in something like the Constitution in exile in terms of federalism and certain other values. He would have been more like Kennedy than like Bork, I think.

**Heininger:** Which means that, when you add the three up together, you get the shot across the bow, with the assumption that he was going to be confirmed. When he doesn't get confirmed, it's as if Reagan retreats and goes, "I've got to find somebody," which Nixon didn't do. It took Nixon three tries before he got to, "OK, fine, I've got to give them somebody who's actually going to get confirmed." Those three were odd.

**Tribe:** The Bork process itself was so exhaustive and intense that it's sort of understandable that, having gone through all that, unless Reagan wanted to put his whole Presidency on the line for this, he would have retreated to some degree. He had blown his wad on this.

**Heininger:** I would agree with you. Politically, when you start counting the votes, yes, there's going to be a retreat, but it's been surprisingly a retreat farther than I might have expected, when Kennedy got confirmed.

**Tribe:** Right, right.

**Heininger:** Has he turned out the way you expected him to?

**Tribe:** Pretty much, yes.

**Heininger:** Has he turned out the way others expected him to turn out?

**Tribe:** I haven't really focused on what others expected. He's been considerably more liberal and moderate than the people who were very nervous about him expected. He has lived up to the hopes of at least some of the conservatives on issues of church and state, and a few others. He hasn't been as rigidly in favor of a colorblind Constitution, not quite as rigidly but almost. He is almost there, and I think we'll see in the New Haven Firefighters case this time that he's probably going to go all the way over to Roberts' position.

**Heininger:** Right. That's my expectation but we don't know at this point. Well, then comes David Souter. Talk about a stealth nominee.

**Tribe:** Although I was very much in favor of him because I had read his stuff in New Hampshire and on the First Circuit, and I thought he was a very subtle, quite moderate-to-liberal guy, I had no idea how they could possibly have come up with him. Obviously, [John] Sununu screwed up somehow. [Warren] Rudman apparently knew what he was getting and thought that he was quite moderate, and convinced Sununu that he was a true believer in the Right. I have no idea how he did it but there was no surprise there for me. Except, I didn't know that it would take him as long to become moderate-to-liberal as it did.

When he first got on the Court, he was very cautious about a number of things, and in fact there was one case that I argued and lost in the Court, that I'm quite confident would have come out the other way two or three years later. It was *Rust v. Sullivan*, the abortion counseling gag order case, where he had replaced Brennan and where I'm sure that several years later he would have seen that as unconstitutional, but, when the case reached him, he didn't.

**Heininger:** But the change of the Court had taken—There had been a greater shift in the Court at that point. He came in like a Granite State nominee; it took him a while to warm up. But Kennedy opposed him.

**Tribe:** Yes. I can't remember how that happened or why.

**Heininger:** Well, it was very interesting because when they really parsed his record, there were some issues that were of concern.

**Tribe:** I had forgotten that Kennedy opposed him.

**Heininger:** One of only four votes. But there were some things in his record. There were a couple of cases that he had argued as New Hampshire Attorney General, and there was a poll tax case that was of concern, and there were some things that just caused Kennedy to pause. Plus, the rest of his record was—When I say here he comes, the stealth nominee—

**Tribe:** Very blank, right.

**Heininger:** Very blank slate, ostensibly a blank slate by comparison with what they had seen before.

**Tribe:** Who was Kennedy's chief counsel at the time?

**Heininger:** Let me think. What year was it, '90?

**Tribe:** Ninety, I think.

**Heininger:** I can't remember whether Jeff Blattner was still there. I think he was. Carolyn Osolinik was still there.

**Tribe:** Right. I remember having some arguments with either Carolyn or with Jeff, probably about Souter, saying, "I just think it's a mistake to oppose him."

**Heininger:** Apparently the search wasn't as exhaustive as it had been for previous nominees, and there was enough to give Kennedy pause, in a line that I think was reiterated when [Robert] Byrd changed his view on Clarence Thomas, which is, "If there is doubt, the benefit of the doubt has to go to the country, not to the nominee," who was already in a place where there is a lifetime appointment. What struck me in looking at this was that Kennedy came down to, "I don't feel confident enough on him. I don't know enough, but I do know that there are some troubling things. And yes, I know I'm going to be rolled on this one." He apparently did go to Rudman and let him know that he was going to vote against him, but he had great respect for Rudman. So not a full-court press.

**Tribe:** Maybe it's easier to vote against somebody when you know you're going to be one in a handful of votes and you're just being a purist.

**Heininger:** That wasn't my sense. My sense is he was genuinely uncertain enough and thought there were troubling enough characteristics there, that he couldn't do it. He wasn't sure about Souter's core constitutional values.

**Tribe:** It was also that he was replacing Brennan.

**Heininger:** And that's a tough one.

**Tribe:** That's another one. If I were to be fully consistent with what I wrote in that little book, I might have voted the way Kennedy would have. I thought that the question of the composition of the Court, who you were replacing, where the burden of proof should lie, would make one cautious. But I guess by the time he was nominated, I had become more of a pragmatist about these issues and I thought, *Who are we going to get that's better?* There are good signs here. It's

true that there's no clear—There's certainly no sense that he's going to be anything like Brennan, but that's hoping for the impossible, and I think Kennedy was basically saying, "I'm ready to hold out for the impossible."

**Heininger:** Knowing he wasn't going to get it.

**Tribe:** Yes.

**Heininger:** You raise an interesting point, and that is, Who is being replaced at what stage? You have to wonder whether Sandra Day O'Connor wishes, given what subsequently has happened with her husband, that she had waited a few months.

**Tribe:** And she's obviously very distressed about Alito and about what's happened to the Court.

**Heininger:** And that it was the Alito appointment that was the key one, not the Roberts appointment.

**Tribe:** Right.

**Heininger:** And in this case with Souter, you're right, he was replacing Brennan.

**Tribe:** When someone has to replace Stevens it's going to be very difficult because even though Obama will find a progressive, it's got to be somebody—Nobody can do what Stevens has done. Stevens has been just astonishing in recent years, pulling together—

**Heininger:** But he wasn't when he came in.

**Tribe:** No, he wasn't at all. Pulling together these amazing, more or less liberal majorities on a very conservative Court at the age of 89 is just staggering.

**Heininger:** Well, it raises that whole question that you talked about initially, that there are not surprise conversions on the Court. But in fact you could argue that Stevens may not have had complete conversion but—

**Tribe:** No, but he's just become much more effective. It's not so much that he's moved to the left or anything, although on a few issues maybe slightly, but he's become so adept and he's actually cared more as the Court has moved to the right. He's had more reason to care about building coalitions and been less willing to be idiosyncratic and simply follow a lone trajectory. So he's become an incredibly effective coalition-builder and opinion-shaper on the Court, partly because he knows them all so well and they respect him so much. There's really nobody who could do what he's doing right now.

**Heininger:** Souter has turned out pretty much the way you expected?

**Tribe:** Yes, although I had no idea he would write so obscurely and all but incomprehensibly. I thought he would write in clear, straightforward, English sentences. That turns out not to be the case. He has a distinct language.

**Heininger:** Maybe that's because he's from New Hampshire.

**Tribe:** I don't know.

**Heininger:** Maybe there's a distinct language in New Hampshire.

**Tribe:** Also, I had no idea he'd hate the job so much. He hates it. He hates Washington. He hates everything about it, as far as I can tell.

**Heininger:** Well, we can only hope that he doesn't hate it so much that he goes back to New Hampshire.

**Tribe:** I'm afraid that that will happen sooner rather than later.

**Heininger:** Yes, sooner rather than later. Did you consult with Kennedy at all on Thomas?

**Tribe:** Not very much. His views were pretty clear and I didn't have to tell him very much about it. I consulted with Biden some, mostly through Ron Klain on the question of making sure that they allowed Anita Hill to speak so that they could ventilate the doubts that were emerging about Thomas' history at a personal level.

**Heininger:** It was a very traumatic time. If Bork was traumatic, this was almost trauma-squared, quadrupled, that created real angst everywhere. And yet what seemed to have gotten overlooked—

**Tribe:** Was how far right he was.

**Heininger:** Was how far right he was. And what many people continue to find perplexing is that he was backed by Jack Danforth, and that made a huge difference.

**Tribe:** Oh, it made a huge difference.

**Heininger:** A huge difference.

**Tribe:** It wouldn't have happened otherwise. Also, the NAACP [National Association for the Advancement of Colored People] did not oppose him at the outset, and that made a huge difference.

**Heininger:** Which in retrospect is just very surprising. And you get Kennedy effectively silenced.

**Tribe:** Right, that was the key.

**Heininger:** And nobody else is willing to—

**Tribe:** And Biden was not very effective.

**Heininger:** None of them were. It was a very tricky situation. Did you consult on Alito and Roberts?

**Tribe:** A little, but I didn't have anything special to say. I basically confirmed the view, taking seriously what they had written and not allowing them to hide entirely behind the fact that they had written it in their official roles in the SG's [Solicitor General] Office. One had to assume that they would be votes to whittle away at most of the things that people like Kennedy care about; there was no question about it.

They were not, at the same time, going to be flame-throwers, either of them. They were going to be cautious and thoughtful but they would, for all practical purposes, gut *Roe v. Wade* and leave in place things like *Griswold*, only because they were monuments that could no longer be toppled. But they clearly would be extremely conservative, more so than Rehnquist. I guess I confirmed the sense that both Kennedy and Biden and a few others had that that was the case, but I didn't get on any ramparts or testify against either of them.

[Arlen] Specter was very frustrated. I testified about Alito and explained how extremely right-wing I thought his views were on most issues, and Specter kept saying, "So you're testifying against Alito?" And I said, "No, I'm not. I'm simply trying to illuminate his philosophy. I'm not recommending a vote one way or the other." Specter couldn't stand that.

**Heininger:** Why were you not recommending a vote one way or the other?

**Tribe:** I guess I thought I had paid enough of a price, and it didn't matter; I wouldn't be able to stop him anyway. I was going to testify and he would surely be confirmed and I would be arguing in front of him, and why did I need to piss him off any more than otherwise?

**Heininger:** That is problematic, isn't it? That's putting you under a real Catch-22.

**Tribe:** It didn't stop me from testifying against Bork, when I thought that I would end up arguing in front of him anyway, but that was a time when I thought even though he was likely to be confirmed, there was still a hope; it was possible that he could be stopped. I didn't think there was any possibility of stopping Alito.

**Heininger:** Do you consider Alito to be as dangerous, if not more so, than Bork?

**Tribe:** Oh no, nothing like that. I don't think he's nearly as extreme as Bork. He's thoughtful, subtle, and not a firebrand. He didn't have a programmatic desire to dismantle decades of precedent. He's just extremely conservative. I wouldn't think of him as terribly dangerous. I thought it was a sad thing that his views would replace someone with more nuanced views like O'Connor, but I didn't see him as working a dramatic sea change. In terms of counting votes, it certainly was a big difference, but it also seemed hopeless to oppose him.

**Heininger:** It probably was hopeless. When you looked at the composition of the Senate at that time, the fact that it was not catching—It didn't galvanize a fire under the country. And unfortunately they came one, two—They came so quickly.

**Tribe:** Right.

**Heininger:** They let Roberts go because they didn't think they were going to have to do this again, and then they had to do it again while they had already let Roberts go.



**Tribe:** I guess I really lost the sense of possibility about it.

**Heininger:** Have they turned out the way you expected?

**Tribe:** Yes.

**Heininger:** Not worse, not better?

**Tribe:** No, about the same, I guess—Roberts a little worse, Alito exactly what I expected. Roberts is actually quite a bit worse on matters of race. He’s a piece of work. He’s also rhetorically even more effective than I expected him to be. He’s very good at capturing in a simple and often simplistic phrase exactly what needs to be said to galvanize the right. “The way to end discrimination is to end discrimination,” basically somewhat mindless slogans that actually capture a sense of—

**Heininger:** There is much to be said for 30-second sound bytes, whether you’re a Justice of the Supreme Court or a Senator of the United States.

**Tribe:** That’s true, and he’s very good at that.

**Heininger:** He had a very polished performance.

**Tribe:** Yes, it was a wonderful performance.

**Heininger:** He seemed relatively innocuous.

**Tribe:** Yes.

**Heininger:** That hasn’t been the case. I think Kennedy would say it hasn’t been the case. Have you played any other role in educating Senators more broadly about the confirmation process? Did you participate in a retreat?

**Tribe:** I participated in a few retreats. A few years ago, Cass Sunstein and Kathleen Sullivan and I were all talking about the role of ideology in Court of Appeals appointments, and that was a Senate retreat in Virginia or somewhere; I can’t remember exactly. There were earlier things like that, but that was the main one.

**Heininger:** Do you have a sense that Senators really benefit from this kind of education?

**Tribe:** Over time they have. To the extent that the Senate has an institutional memory about it, it’s become more part of the marrow of the Senate to realize that the pretence that this is all a matter of neutral, technical expertise, or something else that is devoid of perspective and ideological content—that sense has been washed away pretty much. There’s perhaps a pretense that we should just look at “talent” or intellectual quality and not worry about the point of view, but there’s a recognition that that’s impossible.

Certainly in the mid-’80s when the Bork thing came up, there was kind of a wall that had to be pushed over, a wall of assumption that surely the President is entitled to people with his point of

view and it's not up to us to decide anything about how a Justice would approach things. I don't think there's that view at all anymore.

**Heininger:** Do you think that Bork really changed that?

**Tribe:** Yes.

**Heininger:** Well, I'd say probably that's the first argument that was ever made, that when a Supreme Court nomination is made, regardless of whose side, the President has the right to appoint someone to reflect his own views, and I suspect that every member of the Senate believes that is the case. The question then—and Kennedy has actually written on this at some point—is that doesn't mean that we don't have equal responsibility—

**Tribe:** To advise and consent.

**Heininger:** To advise and consent. And there are many of those who would say, "No, we should just let it go through."

**Tribe:** Right.

**Heininger:** It's a different approach. Did you advise Kennedy at all, or [Christopher] Dodd, on the daycare bill?

**Tribe:** No.

**Heininger:** About providing, allowing low-income families—I think we had seen that written someplace.

**Tribe:** Well, it could be, because there were a lot of times when I was asked to advise in some very limited way over some weekend, what did I think of something, and I would write a quick thing. I might have forgotten about it.

**Heininger:** This was a daycare bill that you had advised that it was OK for low-income families to use federal funding to send their kids to religiously-affiliated daycare centers.

**Tribe:** Right. There was that, and also the equal access for religious groups to public school facilities, or something like that. There were several things of that sort that I did advise on.

**Heininger:** The after-school pieces.

**Tribe:** Right. I now sort of remember it. Basically, I know that Americans United for Separation of Church and State and the ACLU and a few other groups were quite regularly opposed to a number of those things, and I had a much less strictly separationist view of it. That was one of them.

**Heininger:** Does that fit with Kennedy's view?

**Tribe:** Yes. I think he believes much more that the government can provide neutral aid in a form that indirectly benefits religious entities, along with others, as long as it doesn't become

entangled in the details of religion or provide direct support to religious institutions. And that's pretty much where I am as well.

**Heininger:** Have you maintained your relationships with the extended Kennedy family?

**Tribe:** Yes, especially with Eunice and her kids and Sarge, although unfortunately now he's got pretty bad Alzheimer's. I've got Joe Kennedy, Jr., Ethel's [Skakel Kennedy] grandson, in my class now. He's a great kid, with a great future.

**Heininger:** A revolving door here.

**Tribe:** Elizabeth [Tribe] and I went to Ethel's house—Was it Inauguration night? —Yes, to a party at her house, and Joe showed me this amazing thing that I had never seen before. It was a copy of the Emancipation Proclamation, signed by Abraham Lincoln, one of only four that are still out there that are not in the Smithsonian or somewhere, and it's right at the foot of the stairs in Ethel's house.

**Heininger:** They have it in the house?

**Tribe:** Yes, they have it hanging there.

**Heininger:** Not under archive glass?

**Tribe:** No.

**Heininger:** Oh, my.

**Tribe:** So there's a picture of me and my daughter Kerry standing there staring at it. I've maintained that connection. And [Stephen] Stevie Smith, Jr., and a few others.

**Heininger:** Well, tell me about Barack Obama. Did you have any influence on Kennedy's decision to back Obama, which was very instrumental?

**Tribe:** I can tell you one of the stories that is most moving for me, but it turned out not to have mattered. I called Kennedy's office a little bit before, maybe three days before he came out in support of Barack, and I said I really needed to meet with the Senator. I had never asked a favor of him before, and I really wanted to meet with him one-on-one. They said, "What about?" I said, "I just don't want to say, but I want to meet with him."

So they set up a meeting at one of the hotels in Boston when he was here for a fundraiser that Dick Durbin was doing, and Teddy and I—It was so strange. There we were, in a large ballroom at the Parker, one of the big hotels. I came in, and they ushered him in. We were sitting at a small table in a big room, and we exchanged some happy pleasantries and all the rest. I got right to the point. I said that there was something that mattered enormously to me and that I thought it was absolutely crucial, and I usually wouldn't undertake to advise him politically, but I thought it was extremely important, given how desperately the country needed the change that Barack Obama would represent, despite everything positive about Hillary [Clinton].

And he said, “Larry, you don’t have to say anything more. Caroline is coming out for him tomorrow and I am in three days.” I almost started crying, and I went over and hugged him and I said, “That’s all I need to know.” Because I was preparing to make a big pitch that he should endorse, and I know that it was not characteristic for him to do so, and all the rest. But he had already decided. So I can’t take the slightest bit of credit for it, but I can say that I was ready to try.

**Heininger:** You were ready to try. From everything that we know, it was Caroline. Well, it was actually her children who had the effect on her.

**Tribe:** And then him.

**Heininger:** And then him.

**Tribe:** We talked about it and he said, “But you know, Barack is very much in favor of turning the page.” Then he said, and this was an interesting comment, “That means turning the page on people like you and me.” It was kind of an interesting comment. But I don’t feel as though the page has been entirely turned on me; I still feel close to those guys. But it was such an important moment.

**Heininger:** Now that you can see where he’s coming from.

**Tribe:** That’s right, that this is a new period of history.

**Heininger:** It’s a new generation.

**Tribe:** A new generation. Yes, it was so great.

**Heininger:** It’s not the old line Democratic way of doing things.

**Tribe:** It’s hard to know what would have happened if he hadn’t endorsed. It’s very easy in hindsight to think that this was inevitable that he would defeat Hillary, but it was anything but inevitable.

**Heininger:** I don’t think it was inevitable until June—What was it? The 21st?

**Tribe:** Right.

**Heininger:** When it came down to the wire. Nor did we have any inkling at that point that the economy was going to implode.

**Tribe:** Right. Well, of course that affected the general election, but in terms of his getting the nomination, the Kennedy endorsement made a big difference just at a critical moment.

**Heininger:** What was it about Obama that made you feel that this was the direction the country needed to go in?

**Tribe:** Oh, I’m not so objective about that. I had known him since he was my student. I regarded him as just the most extraordinary student I’d ever had. I thought he was extraordinarily brilliant,

inspiring, calm, capable of guiding a very endangered vessel through a storm. It was just so clear to me from the beginning that he had what it took, if anyone did, to turn back a period where the country had gone into a really dark phase. I still think that. I'm not entirely happy with everything he's doing, and I worry about the bank bailout, and does he trust [Timothy] Geithner too much, and things of that sort, but I think he is just an amazingly adept politician and has a tremendous moral compass.

**Heininger:** Did you get a sense from Kennedy at the time as to why, after the fact—We know the story of Caroline's children and Caroline to Ted—What was he seeing there?

**Tribe:** What he was seeing was something visionary, that he had a capacity to lead, to inspire, to transform things. He was not just a transactional politician, but someone with the ability to bring out what was latent in the country in a way that Kennedy could see, in a way that no one since his two brothers had been able to do. I think he very consciously saw him as something like Jack and Bobby, and he was right.

**Heininger:** Plus, the vessel wasn't as endangered then as it is now.

**Tribe:** Right.

**Heininger:** Talk about a man for the times. Well, thank you very much.

**Tribe:** This has been great.