

The CHAIRMAN. Thank you.

Ms. YARD. Mr. Chairman, I made a grievous omission. Can I correct my opening?

The CHAIRMAN. Certainly.

Ms. YARD. I spoke on behalf of the National Organization for Women, which is a membership organization of women and men, but I also am here on behalf of the National Women's Political Caucus, who joins us in opposing the confirmation of Judge Kennedy.

The CHAIRMAN. Thank you for that clarification.

We are, on our first round, going to limit ourselves to 5 minutes. I have an umber of questions. To the extent you can help me keep within my 5 minutes, I would appreciate it very much.

Professor, did you find any solace at all—and I, quite frankly, am most disturbed by the flight attendant decision. That one I find—I do not know how you explain that one.

But did you find any solace, when Judge Kennedy was pressed on what standard that he would seek to apply in making decisions based on gender discrimination? He indicated that he wanted a higher scrutiny standard, and he said although he was not sure—correct me, if your recollection is different, and my staff I ask to correct me—somewhere between Marshall's sliding scale and the existing standard that has been used by the Court, and the majority of the Court.

What did you read from that, if anything?

Professor Ross. My concern is how a standard is applied, not the standard that is articulated. I think it is easy to articulate a given standard. The difficult and tough question comes up when you look at how somebody applies it.

It happens that he has written a couple of minor equal-protection decisions which are cited, and discussed very briefly in my longer, written statement.

The thing that struck me, in looking at those, is that they did not exhibit a thorough kind of analysis, and the second one is a rather peculiar situation where the challenge was to a criminal statute which resulted in heavier penalty for rape of a man than for rape of a woman.

He cited the——

The CHAIRMAN. The heavier penalty for the rape of a man rather than the rape of a woman?

Professor Ross. Yes. That is right. That is right. It was challenged, and he upheld the distinction. I found his reasoning a little difficult to understand. He seemed to be implying that it was more painful or traumatic for a man to be raped than for a woman to be, and so that was the justification. He cited——

The CHAIRMAN. And that case is cited in your statement?

Professor Ross. Yes. It is. It is *U.S. v. Smith*. And he started by citing the language from *Craig v. Boren*, but if you look at the concluding paragraph—it is not a very long excerpt—he is really using rational relationship language.

He is saying that there is a rational distinction between the two forms of rape. He does not really explain why it necessary to have a sex-based classification.

So my concern would be, how does he really apply it? And that is the question that I have, too, in terms of the other sex-discrimination cases that we have looked at. There is verbal adherence to the correct standards, but when you look at how it has actually been applied, he justifies obvious sex discrimination.

The CHAIRMAN. Based on what you have read—and I presume you have read all his speeches, and a number of his cases—obviously you will not know the answer to this but I would like your professional judgment as to what you think would be the outcome.

Do you have a sense of how he would rule on *Roe v. Wade*, a similar case, if it came before the Court?

Professor ROSS. I am afraid I have no sense at all of that.

The CHAIRMAN. Neither do I. You have provided me no solace, which takes me now to Mr. Rauh.

Mr. Rauh, you seem to be suggesting that—and you may be right—that none of us should vote for any Justice with whom we have any doubt about how he would rule, or she would rule on the case.

In other words, in *Roe v. Wade*, unless I was certain that he would not vote to overrule *Roe v. Wade*, are you suggesting that members of this committee should therefore not vote for the Justice? Is that what you mean by “Russian roulette”?

Mr. RAUH. No. I do not mean that, Senator, and I am sorry that I did not make myself clear enough. I believe you should not vote for anybody who has not demonstrated support for the Bill of Rights.

You cannot have certainty on how a person is going to go on a particular case. But you can satisfy yourself, Senator, that you have someone before you who has demonstrated that support, who has done things in this world for rights, who has stood up in court and argued for the Bill of Rights, who, as a judge, in the lower courts, argued for the Bill of Rights.

I am saying there should be some demonstrated support for the Bill of Rights. Then you can take your chances. You are not going to get certitude, but it is Russian roulette—

The CHAIRMAN. And what part of the Bill of Rights do you have uncertainty about with regard to Mr. Kennedy?

Mr. RAUH. I have uncertainty on the three great current issues, and I would like to give two reasons why I have that uncertainty. First, let me say what I think we all agree are the three greatest issues before the Supreme Court. Number one, of course, is *Roe v. Wade*. Number two is separation of church and State. Number three is affirmative action and school desegregation.

Those are the three areas where you have a four to four split, and where Judge Kennedy is going to be the deciding factor—where Justice Powell was the deciding factor for the Bill of Rights.

Now those are the areas on which I would think you should assure yourself, because they are the—

The CHAIRMAN. And that is, you would have to know the answer to—

Mr. RAUH. No, sir. You have to have somebody who has spoken out for civil rights. Who has done something for civil rights in the courts as a lawyer. Who has done something for civil rights as a judge. There are thousands, literally thousands of lawyers in this

country—black, white, brown, everything—who would meet this test.

The CHAIRMAN. Are you saying there are people who have done something for civil rights who could be against affirmative action?

Mr. RAUH. There are people like that, certainly.

The CHAIRMAN. And there are people who have done something for women who could be against *Roe v. Wade*. Is that what you are saying?

Mr. RAUH. That could be true, although it is an unlikely event.

The CHAIRMAN. Aren't you playing games with me, Mr. Rauh? Aren't you really saying—

Mr. RAUH. On the contrary. I am very serious. And I think the standard, as I stated it in my prepared statement should be: "Judge Kennedy has not evidenced a devotion to the Bill of Rights that we deem the prime requisite for a member of the Supreme Court at this time."

The CHAIRMAN. And you have just defined that in terms of issues. You defined it in terms of *Roe v. Wade*, you defined it in terms of affirmative action, and you defined it terms of—what was the third issue?—separation of church and State.

Mr. RAUH. It is not that it is defined in those terms. Support for the Bill of Rights covers literally hundreds of different things, but these are the three areas where the Supreme Court is balanced, and therefore, you should want some assurance on them. I think you could have—

The CHAIRMAN. Assurance on what? The outcome?

Mr. RAUH. No. You are not giving me a chance to make it clear, and it is a difficult concept. The concept is that the nominee should be someone who has shown clear support for the Bill of Rights. I do not care where he has shown it. He might have shown it in some area involving the Japanese—on the internment—for example. I do not care where he showed it. If a person has shown some devotion for civil rights, I think you could then very well say we are confident in the other areas of civil rights.

Second, let me make this point because I think it is so clear. It is not guilt by association to say that the Justice Department has spent 7 years trying to reverse the Supreme Court in the three areas that I have mentioned where the court is balanced 4 to 4.

Don't tell me they do not know where Judge Kennedy stands. This is their last-ditch effort to reverse the Supreme Court's decisions. I think they know more about him than you know. I think this was a failure on your part. I want to second the suggestion of Professor Ross, that he be called back for some real questioning on this. The job has not been finished.

The CHAIRMAN. I asked him under oath, in great detail, about what commitments he had made, what questions had been asked.

Mr. RAUH. Oh, nobody is suggesting he made commitments. You do not make commitments in this world before going on a court. I am not suggesting he made commitments to the Justice Department.

I simply think they know how he feels, and I think you could have—

The CHAIRMAN. How would they know how he feels?

Mr. RAUH. By the various people they have spoken to. And I think you could have found out, not how he would vote, but how he feels, by asking him what he said when these cases came down. He is a man who lives in the constitutional field. He lives in that field as much as the Senators up here.

All of you live in that field. I will bet every one of you commented on all these cases when they came down. I will bet Judge Kennedy talked to people about these cases when they came down.

I think you ought to know what he said then. I think we ought to know. I think the public ought to know.

Professor Ross. If I could just add a note, I understand he did not turn over his teaching notes from constitutional law courses, and I would imagine there might be some very interesting explanations of his views in those notes.

Ms. YARD. I would also like to add another note. We know very well—you know better than I do—that Senator Helms has one issue on which he will not give an inch, and he is obviously satisfied with Judge Kennedy, and if you read the newspaper clips, which I do from all over the country on this whole subject, it is well established that the right-to-life people are convinced that he is one of theirs. All you have to do is read what they are saying.

The CHAIRMAN. So the fact that they are convinced is evidence that we should be against?

Ms. YARD. I am very worried about what it means, and we are talking about women's lives, and it is not a laughing matter.

The CHAIRMAN. I understand. I am not laughing. No one else is laughing. I just want to make sure I understand exactly what you are saying, and what you are saying—

Ms. YARD. Well, I cannot prove what he said to Jesse Helms. Neither can you. He said he did not say—

The CHAIRMAN. Let me ask you another question. Do either of you, or Mr. Rauh, think there is any possibility you could be for any judge that would be sent up by this administration?

Ms. YARD. Well, you know, lightening might strike. They might nominate Barbara Jordan. I would sure be for her. I mean, who knows?

Mr. RAUH. I would like to answer that. The answer is that if this committee, and the Senate, were to make clear they will not confirm someone who has not shown a dedicated support for the Bill of Rights, you will either have a choice next year, or they will send up somebody who will meet that qualification.

Don't forget that President Nixon did that, after we had defeated—

The CHAIRMAN. That is a fine role model to follow.

Mr. RAUH. Well, it is a role model that I would not ordinarily propose, but it seems to me to be appropriate here. After Haynsworth and Carswell were beaten, President Nixon sent up a man who, on the eighth circuit, had evidenced great support for the Bill of Rights in a number of cases. There was no opposition to the judge in that third—

The CHAIRMAN. Who was that?

Ms. YARD. Blackmun.

Mr. RAUH. Judge Blackmun who ultimately wrote the great *Roe v. Wade* case. We did not oppose him. What we did was declare a victory because he was obviously pro Bill of Rights.

The CHAIRMAN. He was a member of the Cosmos Club, wasn't he?

Mr. RAUH. I have no idea.

The CHAIRMAN. He was.

Mr. RAUH. And the clubs were not quite the issue in 1970 that they are today.

The CHAIRMAN. That is a good point you just made. I am way over my time. I yield.

Senator SIMPSON. We could yield you some time from the senior Senator from South Carolina, if you would like a little more.

The CHAIRMAN. No. I think he is coming back to question Mr. Levi.

Senator SIMPSON. I would be glad to let you continue. I am fascinated by it, and I mean that. I think it is, you know, good—

The CHAIRMAN. No. I have many questions. I will come back. I yield.

Senator SIMPSON. Well, thank you, Mr. Chairman. I suppose it would have been a good time to duck, and let the chairman take all the lumps, but I am not going to let that happen.

The CHAIRMAN. Please don't help me too much, Alan. [Laughter.]

Senator SIMPSON. I know, Joe. Just relax. It is all right. You can just feel comfortable now. Just settle down. Don't let the meter run, though.

Anyway, to say that the Chairman has not been fair, and that somehow he has played "pattycake"—and that was the phrase—with this exercise, is just absurd, and it is offensive to me.

The reason it has not come to pass, I guess, like some of you would like it to come to pass, is that the digging has actually been done, but the diggers broke their pick during the last mother lode, and they cannot get it sharpened up again. It will not work. It is fascinating to watch.

I believe the Chairman is absolutely right. There is not any nominee that is going to pass your test, that comes out of this President. Why don't we just get right down to honesty on this one, at least from these two witnesses.

And to say that we should wait for the Justice Department, Mr. Rauh—and I have the greatest respect for you. I have been reading your material since I was a young lawyer in Cody, Wyoming—to say you want the Justice Department to enter in here before we go further, with some of the things you have said about Ed Meese and the Justice Department, is the "chuckle deluxe" of the whole year.

I mean, it has got to make you just gasp, and pitch forward on your ear.

Now, apparently Justice Stevens did not pass the test, O'Connor did not pass the test, Scalia did not pass the test, Rehnquist did not pass the test, and yet they are on the bench. Yes, they all are.

And so here we are, getting back to things about Rosa Parks, and the back of the bus, and into the kitchen, and *Roe v. Wade*. Wait a minute. You know, you all will get your shots here.

But this is not what we are talking about. We are trying to be reasonable. We are not going back and digging through the stacks