

tisan or mean battle. It is getting clearer and clearer that it is a question of what test you are going to use. If you are going to use the test that the President can do pretty much anything, then obviously you are going to confirm Judge Kennedy. On the other hand, it seems to me that Judge Bork was defeated because you did not want to re-fight the battles of the past and that is still the question here.

Do you want to take a chance that you are going to have to re-fight the battles of the past? I think you should not.

Ms. YARD. I would just like to add that, like Joe, I have spent my entire life on working to end discrimination. He has done it brilliantly in law; I have simply worked to educate and to organize people so that this country shall become a place of equality.

I think the meaning of the whole last 25 to 30 years of this country is that we are moving to a more just society. I can see much progress, and much of it has been because of the legislation which Congress has passed and much of it has been because of the decisions made by the courts of this country.

Senator KENNEDY. If you want to come, fine. We thank you.

Thank you.

The CHAIRMAN. The Senator from Pennsylvania.

Senator SPECTER. Thank you very much, Mr. Chairman.

Mr. Rauh, I support the Chairman's decision in starting these hearings at the time he did. There have been some 5 weeks between November 11th and today.

My staff and I have had a chance to review the opinions; read his speeches; prepare; talk to Ms. Yard and her associates; do follow up work on the AFSCME case.

But it is important that the court be filled. I believe the Supreme Court sent us a message on Monday. I do not think it was a matter of coincidence that they handed down that four to four decision the day they started these hearings.

They need to have a full court to get on with the business of the court.

Professor Ross, I compliment you on a very fine brief. I only had a chance to read it earlier today. It was filed yesterday. And there are some matters there which I find very helpful, and it was a very thorough job.

Mr. Levi, in the interests of equal protection, nobody has asked you a question yet. Let me start with you. And there is not much time to ask questions on the very important subjects which this panel has raised.

And you have commented about Judge Kennedy's views on privacy. He wrote a speech, delivered a speech, last year before this vacancy occurred, where he expressly recognized the right of privacy, and commented on it extensively, among other rights which are not specifically enumerated in the Constitution.

And in that speech he made an analysis of the *Bowers* case, and a case decided by Canadian courts on the issues of privacy, homosexuality, in a way which I consider to be very sensitive and very thoughtful.

And in that same speech, he raised the issue that there might be a different conclusion on *Bowers* if the issue was raised in an equal protection context.

And my question to you is, have you had an opportunity to read that, or hearing my summary of it, if that gives you any assurances of his sensitivity to these issues, and his thoughtfulness about them, and a rather careful judicious approach to them?

Mr. LEVI. Well, let me read you another passage from that speech that to some degree does not reassure me. It is fairly brief, so I will read the entire section.

One can conclude that certain essentials—

Senator SPECTER. Where are you reading from?

Mr. LEVI. This is from—I believe we are talking about the same speech, the speech entitled, "Unenumerated Rights and the Dictates of Judicial Restraint."

Senator SPECTER. Yes, just what page?

Mr. LEVI. I only have an excerpt from here. I can get you the—

Senator SPECTER. Okay, then I will listen.

Mr. LEVI. Okay. One can conclude that certain essential or fundamental rights should exist in any just society.

It does not follow that each of those essential rights is one that we as judges can enforce under the written Constitution.

The due process clause is not a guarantee of every right that should inhere in an ideal system. Many argue that a just society grants a right to engage in homosexual conduct.

If that view is accepted, the *Bowers* decision, in effect, says the State of Georgia has a right to make a wrong decision, wrong in the sense that it violates some people's views of rights in a just society.

We can extend that slightly to say that Georgia's right to be wrong in matters not specifically controlled by the Constitution is a necessary component of its own political processes.

Its citizens have the political liberty to direct the government process to make decisions that might be wrong in the idea sense, subject to correction in the ordinary political process.

In other words, he is kicking this issue back to the State legislatures. And we feel that this is an issue that should have been resolved differently than the Supreme Court.

Senator SPECTER. Well, he may be or he may not be. And I agree that there are passages of that speech, as there are passages of most speeches or most opinions, which lean in different directions.

I would, and have, noted his opinion in the *Beller* case where he recognizes that there may be some consensual homosexual behavior which may face substantial constitutional challenge.

So that it is not clearcut as to where he is going to go. And the question in my mind is, how much more we can ask for.

But I would like to ask Mr. Rauh a question at this point. Mr. Rauh, you have submitted also a very good statement, as did Ms. Yard. They have all been very helpful.

And you have taken up a number of cases that I questioned Judge Kennedy about extensively yesterday, the Pasadena school case, *AFSCME v. State of Washington, Aranda*. My concerns as to the fact finding process there.

But I wonder if you have seen other cases which he has read. I only took up the ones with him where I had some concern and some problem.

But have you had a chance to look at *Lynn v. Western Gillette*, where a case was brought by two female employees under title VII, sex discrimination. And Judge Kennedy found in their favor, saying that the statute of limitations had not begun to run.

Or the case of *Usury v. Lacey*, where there was a broad interpretation given to the interstate commerce clause, to uphold a remedial OSHA statute.

Or *National Labor Relations Board v. Apollo*, where Judge Kennedy found aliens covered by the National Labor Relations Act.

Quite a few cases where there is real concern about the rights, and about civil rights. And you talk about the Bill of Rights, and you have his support of *Mapp v. Ohio*, the *Miranda* decision.

And one of his cases, which had not been noticed or commented about, a fascinating case from the Oregon State courts, *Burr v. Sullivan*, where he reversed a conviction for arson on very highly technical grounds, I thought overly technical.

And I discussed this case with him at great length. But he gave the clue away in the opening statement that there was no physical evidence or corroborative evidence to support the conviction except for testimony by two juveniles.

And there was a complex question of cross-examination and motion to strike and so forth.

So that my question to you, Mr. Rauh, and I know how careful you are, aside from the cases that you cited in your memorandum, and the ones which I questioned Judge Kennedy on yesterday, when you view the totality of the cases, haven't you found a good many which are respectful of civil rights, and are extensions of the law to achieve justice in the OSHA cases and the title VII pay discrimination case and so forth?

Mr. RAUH. I have not read everything, and I would be the first to admit that. It really was not possible for me to read all of the cases. I have no staff and I just have not read everything.

I have read as much as I could. There are the six cases in my statement, and there are some others, many others, three of them were mentioned by Senator Kennedy.

Then there are some the other way. But my general impression has been that the cases he went with the plaintiffs were the clear minority. I am glad he did it. But I don't feel that they prevent one from saying this is not a man who has demonstrated support for the Bill of Rights.

I think more often Judge Kennedy has gone against "rights." And I wanted to be able to say this to you, because I think you have studied the cases as carefully as anyone. Of the six I mentioned on which you felt as I do, there is something that runs through them that is very troublesome.

He does not respect the findings below. He very often doesn't even mention the finding below, as he overrules it. He simply goes ahead and states the facts as he thinks of them.

This gives you a feeling of a preconceived notion of what the result should be.

If the district court makes a finding, and the appeals judge does not at least cite the finding and say I cannot accept it, but he simply rides roughshod over it, I think that gives a very bad impression of his judicial conduct.

He talked beautifully here about how a judge should decide a case. But he did not play that game. He took findings and just paid no attention to them.

I can understand overruling a finding of the district court. That is what an appellate judge may have to do on occasion. But at least he should state the finding, and state his reasons and the evidence on which he overruled it.

He did not do that in these and other cases.

Senator SPECTER. Thank you very much, Mr. Rauh. Thank you all very much.

The CHAIRMAN. Ms. Yard, would you like to respond?

Ms. YARD. If I could, I would like to ask our vice president. She has a comment she would like to make in answer to your question.

Patricia Ireland.

Ms. IRELAND. The only thing I wanted to add is that in our reading of the cases, we certainly agree with Mr. Rauh that he does not have a respect for the lower courts' finding of facts.

But in the cases where he has ruled in favor of minorities and women we find to have a pattern; that is, basically, they are very narrow cases limited to the facts, and except—he rules if the statute is so clear, the Supreme Court precedent is so clear, that he is obviously going to be overruled if he does not rule that way.

We do not find a serious commitment in the broad view of his cases. And I do not know whether Professor Ross has seen that same pattern.

Professor Ross. Well, I would like to make a distinction between procedural and substantive decisions in the sex discrimination area.

You are correct that he did issue this finding on this procedural point.

I have not found a single decision where on the merits he has found a woman was a victim of sex discrimination. His only decisions that are favorable are at procedural stages on procedural issues.

Senator SPECTER. Well, often the procedural stages are critical. If you cannot stay in court, you cannot establish your substantive point.

Professor Ross. That is true, but when somebody gets to the point where somebody has won after a full trial and has won a verdict, and he goes to the trouble of remanding—in one situation he remanded on a really peripheral issue; the district court just changed the supposed wrong finding and sent it right back up. It went up to another ninth circuit panel which upheld the finding of the discrimination.

So it was sort of a pointless exercise which this woman had to go through.

And I think it shows that he has trouble finding discrimination where you had the full record available.

Senator SPECTER. Thank you very much.

The CHAIRMAN. The Senator from Ohio.

Senator METZENBAUM. Joe, you and I have been on the same side of many issues, which only goes to show your good judgment in the past.