And then, if he decides he cannot, he has to give some reason why, from the record, why he is not accepting the findings of the court below that saw the witnesses.

Now, I think if you have a pattern of doing that, and it always comes out against rights, this is some evidence of a preconceived notion against those rights.

Senator SIMON. You mentioned the sensitivity to the Bill of Rights, and I agree. You mentioned three specifics areas: *Roe* v. *Wade,* church/State, and the whole civil rights, affirmative-action area.

The one that has not come under discussion here is the church/State area. I have four decisions that he has made in this area, and they are fairly narrow decisions.

Do you have any sense of where he is in this church/State sensitivity on the Bill of Rights?

Mr. RAUH. There is not much evidence one way or another, I would admit. The best evidence I know is this piece in the McGeorge Law School paper. There was an interview there, and I think Judge Heflin referred to the interview.

Let me just read this. It was an interview back in 1968. His views may have changed. I simply do not know. It was disturbing then and still is.

This is an interview with Judge Kennedy before he was a judge.

He concedes the difficulty of justifying tax exemptions for churches under recent Court rhetoric, but "I would hope"—and this is a quote from Judge Kennedy—"the Supreme Court finds some way to allow them to continue to promote freedom of religion."

And then continuing the quote, "And the Court should leave room for some expressions of religion in State-operated places".

The public school is the most obvious State-operated place. I think at that time his view would not have been for a very strong separation of State and church, but I do not think there is very much after that, that I know about. That was the only thing I know anything about.

Senator SIMON. If I may ask one more question here. If I may ask it of Ms. Yard and Ms. Ross.

In the *Beller* v. *Middendorf* decision, Judge Kennedy cited *Roe* v. *Wade* with approval, and I am told that there are some groups now who are not pleased with the Kennedy nomination because of that.

Any observations that either of you have on that?

Ms. YARD. That is not my impression, that he cited it with approval. Patricia Ireland, who is our vice president, and is a lawyer, and has read many of these cases, her reading of it was that he simply cited it, not with approval, but just cited it.

Professor Ross. I do not have anything to add to that.

Mr. RAUH. It was the law, Senator Simon. It is the law, and it was his obligation to, if it was relevant, to cite it. I do not think that gives any evidence that he would have voted that way, or will vote that way when it comes up again.

Senator SIMON. All right. I thank you very much. I have no further questions, Mr. Chairman.

The CHAIRMAN. Now, in your statement, you say:

Judge Kennedy, yes, and even Judge Bork, might have been acceptable risks on the Court with the majority clearly devoted to the Bill of Rights. Their differing views might have sharpened the deliberations of the Court, but the Supreme Court is balanced, four to four, on the primary rights issues of the day. Only this week the Court split four to four on an abortion issue.

It requires a ninth Justice who has evidenced clear devotion to the rights of all, especially at a time when our nation is demanding that other countries respect human rights. We cannot afford to play Russian roulette with our own dedication to the Bill of Rights. A vote to confirm Judge Kennedy is a vote to take that risk with the very fabric of our society.

And then you indicated, in response to Senator Kennedy, as you were explaining the difference between your view and some others, that those who would—in order to show your respect and concern for the Bill of Rights, you should vote against him, and those who might vote for him, would vote for him, would be evidencing the fact they had less concern for the Bill of Rights.

Is that correct?

Mr. RAUH. Almost. It is substantially correct. I was simply distinguishing on the basis of how much devotion to the Bill of Rights one would demand. Essentially what you said is a fair statement, sir.

The CHAIRMAN. You have known Professor Tribe for a long time. Do you think he lacks devotion to the Bill of Rights?

Mr. RAUH. I think Professor Tribe, who also happens to be a good friend of mine, has real devotion to the Bill of Rights. I think Professor Tribe did not have adequate time to study the cases.

The CHAIRMAN. He indicated to me he had plenty of time to study the cases. He indicated to the committee he had plenty of time to study the cases.

Mr. RAUH. Well, he just, for example, was wrong on a case this morning, the first case I cite. That is the *San Fernando* case, where Larry said that it was in effect a dissent that Judge Kennedy gave. That is not true at all.

The issue there was whether you should have at-large or district elections. Well, what Judge Kennedy said, and what Larry Tribe bought, was that the remedy of district elections was not related to the discrimination there in addition to the fact the Mexicans never got elected.

"Well," the Judge said in effect, "I would have given them a remedy other than district elections." But the things that were happening there, like polling places in white homes, and all the other discriminations against Mexican-Americans there—they were relevant to at-large elections versus district elections.

In other words, Tribe mis-read that case. All I am saying is that it seemed to me that it was not his normal, thorough preparation. Maybe if that is an inadequate explanation of our differences, maybe there are just differences here.

The CHAIRMAN. I am not asking for an explanation of differences. I was asking directly, do you think that Professor Tribe is less committed to the Bill of Rights than you are?

Mr. RAUH. I plead the fifth amendment.

The CHAIRMAN. Do you think I am less committed to the Bill of Rights than you are?

Mr. RAUH. That is a question—if you ask that question——

The CHAIRMAN. I did.

Mr. RAUH [continuing]. And you insist on an answer, my answer has to be yes.

The CHAIRMAN. Do you think Senator Kennedy is less committed to the Bill of Rights than you are?

Mr. RAUH. I do not want to say less committed, but I will say this. I have spent more of my life in the Bill of Rights area than even Senator Kennedy, and even you. I want to change my answer to the question about you.

The CHAIRMAN. You do not have to.

Mr. RAUH. Wait a minute. I want to do it because I want to be precise. You are asking me something that involves our relationship, which I treasure. I do not say you are less committed—I want to withdraw the answer that you are less committed. I want to put it this way.

I have devoted more of my lifetime to the Bill of Rights than you have, and that creates a feeling for the Bill of Rights that someone who has not devoted that much of their life to it cannot have.

I would rather state it that way than the way I stated it first.

The CHAIRMAN. Senator, my time is about up. I have more questions, but do you have more questions?

Senator HEFLIN. No.

The CHAIRMAN. Professor, I found your testimony, quite frankly, your written testimony particularly, fairly compelling, to tell you the truth, and I would like you to, if you would—I do not want to delay the hearing—but I would like you to explain, once again, for the committee, the essence of why you believe that Judge Kennedy was wrong, and apparently result-oriented in the *Washington State* case, the *AFSCME* case.

Professor Ross. Okay. Well, to start with, he, in *Washington State,* says this kind of case is inappropriate to apply disparate impact analysis at all to, and he cites the two major Supreme Court decisions on disparate impact analysis: *Griggs* v. *Duke Power Company,* and *Dothard* v. *Rawlinson.* And he purports to claim that those decisions require a single discrete policy.

And there is nothing in either of those decisions that says that. He is simply making that up. And if you look at the policy that was at issue in *Duke Power,* which is the very first case on the issue, in which the Supreme Court first articulated the doctrine, it involved employment tests.

Employment tests are, by definition, a device for taking account of a lot of different factors—trying to decide how a person does on a lot of different scales. And they are not a simple instrument to put together. An employer has to go through a fairly sophisticated process to decide what is the final employment test that he wants to use.

Now the criticisms that Judge Kennedy levelled at the use of disparate impact as applied to a wage case was that essentially it took account of multi-faceted information and therefore was inappropriate, and also, that the employer had to go through a lot of different steps in order to arrive at the wage disparity. I see no difference between the employment system which the Court applied disparate impact to in 1971 and the wage case.

So I do not find his citation at all persuasive, and I think he is really distorting existing Supreme Court law to arrive at a result he likes.

The CHAIRMAN. How have the other circuits ruled on similar cases?

Professor Ross. Well, there is only the seventh circuit that has ruled in the wake of the Supreme Court's decision in *Gunther,* and the relevance of the Supreme Court's decision was that it, for the first time said, we are not going to confine wage-discrimination cases to cases that are like Equal Pay Act cases.

That is, where men and women are doing exactly the same job. So, in the wake of the *Gunther* decision which says we are not going to confine cases to Equal Pay Act type cases—which is where the courts were going before that—there have only been two circuit court opinions since then, his and Judge Posner's in the seventh circuit.

And I personally just do not find his reasoning persuasive, and I see him distorting existing law. I found very troubling his importing of this 14th amendment standard for neutral rules, where the Court said that you have to show that something was done in order to have an effect on a certain group, and which is appropriate where you are talking about a neutral policy, not a facial policy.

He imports that into this title VII case where he is not dealing with that, and goes on to say, to suggest that the Supreme Court requires, to prove intentional discrimination, something more than statistics showing that men and women are treated differently.

But the Supreme Court, on the contrary, has ruled that statistics are sufficient. That was its holding in the Teamsters' case in 1977. The defendants, and Teamsters had said statistics are not sufficient to make out a prima facie case, and the court replied yes, they are.

So Kennedy says, well, statistics are okay but you have to corroborate. Not true. Okay. But even accepting his point that you have to corroborate, he goes on to say: oh, the corroboration we have here is meaningless. The corroboration we have here was a longstanding pattern of the State of Washington segregating its workers by sex, and he just discounts it.

Now what I am saying is that that is highly significant corroboration. It is an official State policy of sex segregation, and it is of a piece with his prior—you know, I went through his inability, apparently, to recognize facial discrimination.

He tends to use a line of analysis that the Supreme Court has come up with in a case called *Burdeen,* where the Court uses shifting burdens of proof to figure out if a policy is based on sex when the employer does not admit it. But you do not have to do that when you have got an explicit sex-based policy.

The CHAIRMAN. I understand.

Professor Ross. And that is what you had in the *Washington State* case.

The CHAIRMAN. Let me shift gears to another subject with you, and I will not trouble you much longer.

There is a lot of concern, I think not only among the four of you, and all the members, from Senator Humphrey to Senator Simon on this committee—I say that in terms of seniority—the entire committee, about what the outcome of further decisions relating to the

right of a woman to control her reproductive rights, and in particular, whether or not—we always hear discussed and debated, longed for, or loathe the possibility that *Roe* v. *Wade* may be overturned. And I for one think if that occurs, if we think we saw demonstrations in the 1950's and 1960's in Washington, DC., I think we had better batten down the hatches in terms of the extent to which this issue is felt strongly by both sides, by hundreds of millions of people, 200 million people, probably.

And it is discussed in terms of the Court being split on *Roe* v. *Wade*, and that whomever comes along to fill the ninth vacancy will be the deciding vote on *Roe* v. *Wade*.

Is it your professional opinion that in fact the Court is split on *Roe* v. *Wade*, on the fundamental question of whether or not there exists a woman's right to privacy, to any degree, to control her body, her reproductive organs? Is there really a four to four split, now, or is it in fact not now a five to three split?

What is the state of play now as you see it?

Professor Ross. I do think it is split, four-four.

The CHAIRMAN. Do you think O'Connor would rule to overrule *Roe* v. *Wade*?

Professor Ross. It is impossible to predict for sure. So far, she has voted in every occasion against the right to abortion in the cases that have come before her.

I suppose——

The CHAIRMAN. Hasn't she used language—I am sorry. Go ahead.

Professor Ross. I suppose it is possible to read her language as saying perhaps she would not support criminalization of abortion. It is hard to tell. She doesn't articulate it very clearly.

The CHAIRMAN. In any of her decisions, does she recognize the right of privacy, the premise upon which the original decision was based?

Professor Ross. She talks about a substantial burden, that the substantial burden can not be placed on it.

The CHAIRMAN. On what?

Professor Ross. On the right to privacy. But as I said, as Mr. Rauh just pointed a moment ago, the decision came down four-four, just 2 days ago.

The CHAIRMAN. Well, that was a different decision.

Professor Ross. But you know, it is not——

The CHAIRMAN. It is very important, but a different decision.

Professor Ross. Well, it is not just the central decision that is important.

The CHAIRMAN. I am not saying that. Let me ask the question—I acknowledge that each of these decisions is important. I am asking you about the central decision, because when we discuss it here and you use the phrase "*Roe* v. *Wade*," most Americans watching this, any Senator reading the record, thinks of it initially in terms of the central decision.

All of these decisions are critically important. I am asking you about the central decision.

Professor Ross. Well, you see, I am not so sure I think there is a valid distinction between central and the others, because the essential question that is being decided in each of those cases is what

women are going to have the right to exercise their right to an abortion.

And my concern is that cases that are viewed as not central are in fact very central for the women affected by those decisions who might lose their right to abortion.

The CHAIRMAN. I think there is a semantic difference. Okay. Obviously you are not anxious to answer the question. I can understand why.

Mr. Levi, I would like to ask you one—I said that was my last question, but I want to ask you a question, if I may.

Do you find any solace, or do you think it was just a little bit of theater on the part of Judge Kennedy when he indicated that—when I pressed him on the right to privacy, and he indicated that the right to privacy may be in the state of evolution not unlike—and he made a comparison.

Do you read anything into that, or do you just think that was just——

Mr. LEVI. I think that is an almost an attempt to read tea leaves, or to extract a conclusion that is not necessarily there in the record. I think that certain rights are so fundamental that we shouldn't be talking about evolution; we should be talking about "they are there, and I support it."

The CHAIRMAN. I happen to agree with you, but let me ask you though—I am trying to get a sense of what—well, let me ask it another way, then.

Could a lower-court judge applying the existing Supreme Court law have ruled differently in the case you referred to, that concerns you about Judge Kennedy?

Mr. LEVI. I think in several of the cases he could have ruled differently, and particularly in the Civil Service cases, where he essentially rejected the notion, essentially stated that he disagreed with the notion that civil servants who are gay have a right to constitutional protection?

The CHAIRMAN. Thank you. Would anyone else like to make a closing comment?

Mr. RAUH. No, you have been very patient.

Ms. YARD. Very patient. Thank you very much.

The CHAIRMAN. That is good as I am ever going to get. Thank you very much. I appreciate it.

Our next panel is comprised of four witnesses. Gordon D. Schaber—Dean Schaber has been Dean of McGeorge Law School since 1957. He was a presiding judge of the Sacramento County Superior Court for several years in the 1960s, and has also been a member of the California—I am not sure why that is relevant—Democratic State Central Committee since 1974. That is nice to know, but I am not sure what relevance it has.

Mr. Leo Levin is the Leon Meltzer Professor of Law at the University of Pennsylvania Law School, where he has taught since 1949, and Ms. Wendy Collins Purdue is Associate Professor of Law at Georgetown University Law Center, and clerked for Judge Kennedy in 1978 and 1979.

And Dean Susan Prager is Dean of the UCLA Law School, and in 1986 was President of the American Association of Law Schools.