another way you would wish to proceed. Why don't we start, then, with Harriet Woods.

STATEMENT OF A PANEL CONSISTING OF HARRIET WOODS, PRESIDENT, NATIONAL WOMEN'S POLITICAL CAUCUS; MOLLY YARD, PRESIDENT, NATIONAL ORGANIZATION FOR WOMEN; ELEANOR SMEAL, FUND FOR THE FEMINIST MAJORITY; HELEN NEUBORNE, NOW LEGAL DEFENSE AND EDUCATION FUND; ANNE BRYANT, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AND BYLLYE AVERY, NATIONAL BLACK WOMEN'S HEALTH PROJECT

Ms. WOODS. Mr. Chairman and other Senators, I am really pleased to be here.

I am Harriet Woods, former lieutenant governor of Missouri, and now president of the National Women's Political Caucus, which is a national bipartisan membership organization that works hard to get women into elected and appointive office. I guess you could call us the bootstrap organization, an electoral organization for women, and we do it the hard way, one-by-one-by-one-by-one, sort of the way Clarence Thomas wants to provide relief for discrimination for women in the economic and civil areas.

Someone has estimated that, looking at the U.S. Senate and some of our other electoral bodies, that if we keep up this way, it could take 400 years to get gender equity in our electoral bodies, and, as someone else has remarked, justice delayed is justice denied.

So, I am here for justice and I am also, with due respect to the Senators, here to remind you that advice and consent is more than a prerogative of the Senate, it is a protection for the people.

Now, I have heard some talk about special interest groups, and I have to say right off to this panel that women are not a special interest group, we are the majority, a majority of the population, a majority of the registered voters, and a majority of those who do vote. Yet we continue to receive less pay for our work, we suffer indignities in the workplace, we have fewer opportunities for career advancement, we are the teachers, rather than the superintendents, we are often ignored at medical research, and paternalistically told that we can't even make our own reproductive decisions.

But when we do turn to legislative relief, as I have said, what do we find? We find 29 out of 435 Members of Congress. It is not for want of trying. Since the 20 years since the caucus was founded, we have guadrupled the number of women in legislatures, all the way to 18 percent. In Louisiana, when they passed what they probably boasted was the most punitive law on abortion, out of 144 members of that legislature, 3 were women.

So, it is important that when we come here, we come because we can't make those decisions ourselves, we have to petition for our rights. We need to look to the courts, and so Judge Thomas is important.

I thank those Senators who asked questions on our behalf and the behalf of women for us, but, I have to tell you, we weren't very happy with the responses. They seemed to be based on the notion

that we ought to trust him on the basis of his life story. I wish we could do that. His friends say he is a very nice man, and I do think it is important if we could get more diversity in the Court, particularly the presence of someone who has experienced the impact of racism in our society.

But this is too important for blind faith, and I think Senator Biden has indicated he is puzzled that he hasn't come out forthrightly on some of these positions elsewhere. I think there are a lot of clues to that, Senator Biden. I think he is a man who is running away from himself, but also has avoided taking positions on some issues, because he is insensitive to some of them.

Well, what can I add to these already rather lengthy deliberations? I know that other members of the panel will be speaking to some of our frustrations in his testimony. I can remember—with painful clarity—a debate in the Missouri State Senate in 1977, when certain male legislators successfully argued that it would violate the natural order of the universe, if wives, as well as husbands, could be held liable for criminal support. You know, it is not just esoteric legalese, when we talk about the way some people want to apply natural law when it comes to women.

I can remember a frustrated investigator for the EEOC, in St. Louis, who came to me and said he had an air-tight case of systemic sexual discrimination—discrimination in a St. Louis corporation—and the case was taken up to the central office and died, and was pigeonholed under Clarence Thomas. So, I don't care what the statistics say, actions were taken to block relief.

There is a new phenomenon in this country called political homelessness, because people in this country have lost faith in their Government. The millions who are watching this process, what are they going to think about advice and consent, if a nominee can appear before you, and stonewall you, and refuse to answer, be evasive, and yet be confirmed?

I want to say to you that you may be dooming us to a similar game plan for all future nominees. Will we ever again hear forthright responses? They also wonder what we are talking about in terms of costs of these campaigns for nomination.

I would like to conclude with a quote from a play, "A Raisin in the Sun," where some of you may recall how Langston Hughes described the story of a black family struggling to pursue the dream of escaping the ghetto, by the way around the dream of a strong woman: "What happens to a dream deferred?" he wrote.

> Does it dry up like a raisin in the sun? Or fester like a sore—and then run? Does it stink like rotten meat? Or crust and sugar over—like a syrupy sweet? Maybe it just sags like a heavy load. Or does it explode?

Senators this Nation can't afford a Supreme Court Justice who fulfills his own dreams, but accepts detours and delays for those pursuing dreams of their own. We urge you to vote against the confirmation of Judge Thomas.

Thank you.

The CHAIRMAN. Thank you very much, Governor.

Ms. Yard.

STATEMENT OF MOLLY YARD

Ms. YARD. Good morning.

The CHAIRMAN. Good morning. Welcome back.

Ms. YARD. Thank you very much for affording us this opportunity to speak once again on a nomination for a Supreme Court Justice.

My name is Molly Yard. I am president of the National Organization for Women, an organization of women and men dedicated to equality and justice for women in this country. I am please to be here today. I am particularly grateful to you for accommodating my time constraints.

You may be aware that I am recovering from a stroke that I suffered several months ago. I am still working on physical and speech therapy. Despite that, I was determined to present this testimony. I feel that I must make yet one more appeal to you to stand up for the rights of women and other oppressed groups. My commitment to women's rights is as strong as ever and I have suffered nothing in intensity due to my illness.

NOW is adamantly opposed to the nomination of Clarence Thomas. Mr. Thomas has demonstrated none of the qualities necessary for a member of this Nation's highest Court. While a Supreme Court Justice must be compassionate, Mr. Thomas has shown scorn for the oppressed. While a Justice must have respect for the law, Judge Thomas has demonstrated a willingness to promote his conservative personal agenda in defiance of the law of the land. While a Justice should be forthright, Judge Thomas has been evasive. Clarence Thomas has simply not shown himself to be worthy on the Supreme Court.

Judge Thomas seems to be doing his best to imitate the Teflon candidacy of David Souter. Perhaps he feels that a blank slate is an unimpeachable one. Yet, how can the good of this country possibly be served by a man who has spent weeks backing away from his own record?

Perhaps the most blatant example of Mr. Thomas' attempt to rewrite history is his claim that we should not take seriously his public praise for Lewis Lehrman's antiabortion polemic. Mr. Thomas now would have us believe that he did not agree with the piece, but was only citing it to gain the support of his conservative audience.

Frankly, I don't believe that story, and neither should you. But even if I did, Mr. Thomas' defense that he says things that he doesn't believe in order to win an audience, does not inspire confidence in the statements he has made before your committee, and certainly does not make me secure that he will be a strong and zealous guardian of our constitutional rights.

Similarly, even if we were to accept Judge Thomas' astonishing claim that he has never given much thought to *Roe* v. *Wade*, this lack of interest in one of the crucial civil rights issues of the last 20 years would show Mr. Thomas to be so disengaged from modern legal and social debate as to disqualify him from sitting on the Supreme Court.

In fact, Clarence Thomas is not the enigma he would like to be. Both his words and his actions show him to be cold and callous.

Mr. Thomas compiled a record of neglect at the EEOC, particularly with regard to women's rights. This man insulted women who have suffered discrimination in employment, by calling their legitimate complaints cliches. He said that women avoid professions like the practice of medicine, because it interferes with our roles as wives and mothers. This type of medieval claptrap would doom any politician running for electoral office. Now, then, can it be considered acceptable for a Supreme Court nominee?

It is always easy to cut through people's pretensions by looking at how they treat their families. Many saints have been unmasked as sinners in the privacy of their homes. Clarence Thomas used his own sister, Emma Mae Martin, as an example to denigrate people on welfare. Yet, Mr. Thomas' sister overcame a life of poverty, to graduate high school and enter the work force.

After she was deserted by her husband, she supported her young children by working at two minimum wage jobs. She was indeed on welfare during a period when she was forced to leave her jobs to take care of her and Mr. Thomas' aunt, who had had a stroke. She now works as a cook on a shift that starts at 3 o'clock in the morning. As is too often the case, it appears that in Mr. Thomas' family, the male child was given the opportunity to get a college education and a professional career, while the girl accepted the responsibility of caring for the family. To me, Emma Mae Martin sounds like a brave, strong, admirable woman, committed to her family and fighting to do the best she can. Yet, Clarence Thomas sees her as dishonorable.

Mr. Thomas' cruel remarks would be bad enough when said of a total stranger. That he would use his own sister as the butt of such an insult is shocking. Mr. Thomas has been nominated for a position that requires, above all, sensitivity and concern about all those who come before the courts seeking justice. Rather than demonstrating those qualities, he has, instead, shown himself to be cynical and cold.

This nomination is particularly poignant for me, because of the man that Clarence Thomas has been nominated to replace. Had Thurgood Marshall never spent 1 day on the bench, his brilliant career as an activist civil rights lawyer would have guaranteed him a place in history and in the hearts of all people who believe in quality and justice.

Yet, Thurgood Marshall went on to champion the rights of the oppressed from the Supreme Court, tirelessly fighting to uphold the very principles that Clarence Thomas sees as outmoded and unnecessary. While nothing can extinguish the light that Thurgood Marshall lit, it would be sad to replace him with a man who is committed to dousing the torch that Justice Marshall carried so proudly.

I am glad President Bush nominated an African-American. I still remember the excitement, when President Johnson nominated Thurgood Marshall to the Court. Here was a man who epitomized the civil rights battle and the yearnings of African-Americans to be free. On the Court, Marshall has shown a concern for all those who suffer discrimination. He represents the best of the American dream. He makes the promise of the Declaration of Independence and the Constitution live. We need another on the Court of his caliber.

It has become increasingly difficult to come here on each succeeding Supreme Court nomination and beg for women's lives, only to have our pleas ignored. We urged you, in the strongest terms, to understand that the confirmation of Justices Kennedy and Scalia would lead inevitably to the erosion of women's right to safe, legal abortion.

Those predictions proved true 2 years ago, as the Court severely undercut *Roe* v. *Wade* in the *Webster* case, and went on a year later in the *Akron* and *Hodgson* decisions to take away the rights of young women to control their bodies. We warned that David Souter, silent though he was on many significant issues, would be yet another conservative, antiabortion vote. As we feared, Justice Souter was an instrumental part of the majority last term, when the Court took the incredible step of holding that women had no right to be informed by their physicians and other medical personnel of even the fact that abortion exists.

Senators many of you and your colleagues in the House have spent time in recent sessions trying to restore the civil rights that the Court has undercut, fighting to reverse the gag rule that the Court has upheld, and working to guarantee the right to abortion that the Court has imperiled.

Yet, had you held fast against the unsuitable nominees put before you by the Reagan-Bush administration, these efforts would not have been necessary. Your constitutional role is not to be a rubber stamp for the President.

Instead, you must look into your hearts and judge what is best for this country, before you advise and consent on nominations. It is not just your prerogative, but your duty to protect the fundamental constitutional rights of all of the people. How can you in good conscience consent to an increasingly unbalanced court that represents one judicial philosophy, a philosophy that ignores the needs of the majority of this country?

You have the chance with this nomination of restoring the promise of America, which for too many is an empty promise. You will live in history, if you give life to the promise. President Bush has ignored the chipping away of the dream. You can restore it, and we beseech you to do so. The history of this country has been one of developing individual rights. The courts have been crucial to this, but in the recent years we have been going backward. We must move forward, and you can set us on that path, so, once more, I appeal to you on behalf of women's rights.

In April of 1989, we pledged to the women of America that not one life would be lost due to illegal back-alley abortions. Unfortunately, some lives have been lost, but the end to that must come and we depend on you to make this possible.

The conservative tide has swept over the Supreme Court. With each Reagan-Bush nominee that the Senate confirmed, you entrench still more firmly a Supreme Court that is at best indifferent and, at worse, hostile to the rights of women, people in color, lesbians and gays, the handicapped, the elderly, the poor—all those who most need protection from the Nation's highest court.

You still have some ability to stop that tide, to give the dispossessed and disenfranchised a faint glimmer of hope that someone

cares about them, that the entire Government of the United States is not a cynical enterprise run by the privileged for the privileged.

I use you, once again, to stand up for equality for justice and for compassion. Vote against the confirmation of Clarence Thomas and assure that women will not once again face death from illegal back-alley abortions, and will assure that women will not suffer discrimination on the job. Nothing that has happened in this country, in my estimation, in the last 50 years has been as important as what Congress has done to guarantee the civil rights of all. The Civil Rights Acts of the 1960's were tremendous steps forward for this country. They gave hope to all of us.

I sit and read every day letters from women who are discriminated against in every way on the job. I can imagine what Ben Hooks' desk must be like, in terms of letters he gets from African-Americans who are discriminated against.

The time has come to put a stop to discrimination. It is in your hands to do that. You can absolutely affect the history of this country, and you can live in the history of this country as those who dared make the American dream a reality, and we ask that you do that by rejecting this nomination.

Thank you very much.

The CHAIRMAN. Ms. Yard, your commitment is never doubted, and you have never been more eloquent than you were today. I thank you, and I am impressed—we all are—that in light of what you have recently undergone physically that you would be here. I can assure you, you don't need any more speech therapy. You did incredibly well.

Ms. YARD. Good. That is very kind of you because——

The CHAIRMAN. That is true.

Ms. YARD. I listen to my own voice, and it doesn't sound like me. It sounds like someone else. So if I sound OK to you, that pleases me a lot.

The CHAIRMAN. You sound all right to everyone, and I thank you for being here. I mean that sincerely. I know it is not easy to be here.

Ms. Smeal.

STATEMENT OF ELEANOR SMEAL

Ms. SMEAL. Thank you, Senator Biden.

I am Eleanor Cutri Smeal, president of the Fund for the Feminist Majority, and I come before this committee to express strong and unequivocal opposition to the nomination of Clarence Thomas as Associate Justice for the U.S. Supreme Court. I am submitting into the record formal testimony that was prepared with the assistance of Erwin Chemerinsky, who is a distinguished professor of constitutional law at the University of Southern California.

The CHAIRMAN. Without objection, it will be placed in the record.

Ms. SMEAL. Thank you.

I would like to summarize that testimony but more importantly, in a very short time, to give a feeling of why it is that we have come before you. Molly Yard has come with great determination, although certainly under trying times. I have come in some ways worried that what I would say is redundant, because so many dis-

tinguished civil rights leaders and women's rights leaders have already testified in opposition. I felt, though, that I should come as part of a duty. I was president of the National Organization for Women during part of the time that Clarence Thomas was Chair of the EEOC. Over the past decade, while Judge Thomas was in various public offices, I have held a leadership position in this preeminent women's right organization.

I have reviewed his words and his acts, but more importantly I have witnessed the devastating impact of his philosophy in action on the efforts to curb discrimination. As a person who has spent too many years now working actively to eliminate that discrimination, I know firsthand what his record in office has meant for trying to eliminate discrimination on the basis of race or age, or sex, or sexual orientation, or a whole host of discriminatory factors.

In his record, his performance, and his writings, there is not one shred of evidence in any of this that indicates any willingness on his part to protect the civil liberties or the civil rights of women. In fact, his record is chilling. It represents the furthest rightwing fringe of our Nation.

I believe that his being sworn in represents yet another major threat to the civil rights and liberties of Americans. I will focus my comments simply on women's rights, but, believe me, in my heart I am just as disturbed at his record on the other major areas of civil rights and civil liberties of this Nation.

In the area of abortion—and so many have spoken to that. I do not want to repeat, but I cannot understand how any of you could think that this is a question mark. I cannot understand—when you review his record and his writings, he has gone out of his way, it seems to me, to state that he is opposed to this right of privacy. It is not just in the Lehrman article. It is in other articles that he has stated, that he has inferred that he is opposed.

In the areas of employment, you know his record. He has been a vigorous foe of affirmative action, of timetables and goals, of statistical analysis. And I do not for the life of me know how you enforce laws without having any measures at all.

But in these last minutes—and I know that I have presented very carefully in my testimony and others have presented very carefully in theirs his record—I would like to call attention to the record of this Judiciary Committee. I have testified repeatedly to people I know would stand in opposition to women's rights, and civil rights, and to the right of privacy. You have given the benefit of the doubt to people who, in their record and in their writings, have stood opposed. I plead with you: Do not give the benefit of the doubt yet again to a person whose record is replete with opposition to those very issues you stand for yourselves.

I do this for the process and for the integrity of this process. I think it is an honor to have a deliberative process. I think it does us no good—and I would like to submit into the record the Newsweek article that calls this process a charade. It says that the Thomas confirmation hearings reveal little about the nominee, but

a lot about a ritual process that becomes a caricature of itself. I would like to submit this to the record because I think that this is in the common domain.

The CHAIRMAN. Without objection.

[The article follows:]

Newsweek

September 23, 1991 , UNITED STATES EDITION

SECTION: NATIONAL AFFAIRS; Pg. 18

LENGTH: 1557 words

HEADLINE: Court Charade

BYLINE: DAVID A. KAPLAN with BOB COHN in Washington

HIGHLIGHT:
The Thomas confirmation hearings reveal little about the nominee -- but a lot about a ritual process that's become a caricature of itself

BODY:
Just imagine what the Soviets must have thought if they were watching the Clarence Thomas hearings on CNN last week.

Behold! In the crucible of the Capitol, in the marbled splendor of the Senate Caucus Room, was the world's oldest democracy in action, weighting who in the land should sit on the U.S. Supreme Court. Here is what a free people seemed to get for their faith in their government: an evasive, overcoached nominee; a cynical, manipulative White House; a windy collections of senators. And in the corridors just outside the hearing room were platoons of interest groups eager to characterize what Thomas was saying before he even said it; there haven't been so many spin cycles since the last Maytag convention. It was not exactly a glorious display of the American political process, notwithstanding how painfully accurate it may have been.

For the better -- and worst -- part of the four days of confirmation hearings last week, Clarence Thomas did all he could to disavow every controversial position he's ever taken. On abortion, on affirmative action, on natural law -- no speech or article was sufficiently tame not to repudiate. He didn't read it, he didn't mean it, he wouldn't do it as a judge. On a few matters, such as church-state relations and gender discrimination. Thomas committed himself in broad strokes to a centrist position. But on the question of Roe v. Wade, the 1973 court decision creating a constitutional right to abortion, Thomas went so far as to say that he had never discussed the case with anyone, even in private. "I can't imagine any lawyer in the last 17 years having no opinion on Roe," said Sen. Patrick Leahy, a Democrat.

All along, the administration maintained publicly that its nominee to the high court was the best man for the job and was selected for nonracial reasons. The latter claim, of course, can't be serious. Indeed, White House officials acknowledge privately what is clear circumstantially: picking a black conservative with a rags-to-robes life story was a political bonus. The former claim is undercut by the fact that Thomas wasn't even the runner-up in 1990, when David Souter was nominated. The American Bar Association last month gave Thomas its lowest approval rating, in part because of his lack of judicial experience. His unfamiliarity with constitutional law was highlighted last Friday when Leahy asked him to name "a handful of the most important cases"

decided by the court since he entered law school in 1971. After a long pause, Thomas mentioned only Roe and one other case. Leahy repeated the question twice, but Thomas came up empty.

Despite Leahy's foray, most senators were a study in docility. Except for the prosecutorial Arlen Specter, the Republican members of the Judiciary Committee saw themselves as speechifying cheerleaders for the nominee. Orrin Hatch asked Thomas this mind twister: "When you become a justice on the U.S. Supreme Court, do you intend to uphold the Constitution of the United States?" At times, Alan Simpson didn't bother with questions; on Wednesday he went on for 15 minutes seemingly without even indicating where one sentence stopped and the next one began.

The Democrats promised better. Ever since Thomas was named, they warned that this time they wouldn't let a nominee slide by without answering specific questions about abortion and the right to privacy. They said they had learned their lesson over the past five years by confirming Antonion Scalia, Anthony Kennedy and Souter -- only to see reticent nominees become Hard Right loyalists on the high court. The result? Some senators certainly have pressed Thomas. Joe Biden of Delaware scolded him, calling one answer "the most unartful dodge I have heard." No one, though, would confuse any of the interrogators with Perry Mason. And nothing close to a committee majority has indicated that Thomas's evasiveness would cost him when it comes down to a vote; Thomas is expected to win committee approval by a 9-5 or 10-4 vote. With that lack of fight, the senators will have little power to influence whom the White House nominates for the court in the future.

Much of the hypocrisy from the Senate, the White House and Thomas himself is based on a set of myths about the confirmation process that were trotted out yet again last week:

Answering questions about current issues compromises a nominee's impartiality. Thomas has used this bromide to avoid discussing Roe (just as Thurgood Marshall did at his confirmation hearings 24 years ago, when he was asked by conservatives about Miranda warnings). Even Thomas's toughest questioner, Sen. Howard Metzenbaum, insisted (unpersuasively) that his questions were merely about privacy and not a specific case. The platitude has visceral appeal; after all, judges wouldn't seem able to rule fairly on matters they've already worked out. The fallacy, though, is that nominees presumably have thought about the vital constitutional issues of the day. (If they haven't, it suggests they've been practicing law on Neptune.) Why are those ruminations less prejudicial simply because they remain unspoken? And what about the objectivity of, say, Justices Harry Blackmun or Scalia, who already have taken extreme, opposite positions on the viability of Roe? Should they be required to recuse themselves from future abortion cases? The truth is that nominees refuse to answer controversial questions because they're concerned about hurting their confirmation chances, not their veneer of impartiality.

A nominee's personal views have nothing to do with his or her constitutional philosophy. Thomas refused last week to divulge even nonlegal opinions on abortion. He said such views were "irrelevant" to any court decisions he would reach. While that sounds great, the days are long past since we believed jurists were special beings endowed with the power to reach into the sky and pull out neutral principles to resolve dispute. Seventy years ago, Benjamin

Cardozo, later to become a justice, put it well. Judges "do not stand aloof on these chill and distant heights," he wrote, "and we shall not help the cause of truth by acting and speaking as if they do." In 1981, at her confirmation hearings, Sandra Day O'Connor said she personally opposed abortion.

There is a presumption in favor of the president's pick. This, obviously, is the view of all presidents. But it has support in neither the text of the Constitution nor the words of its authors. The purpose of the Senate's "advice and consent" role is to act as a check on the chief executive, not simply ratify his choice based on a review of credentials. In the modern era, the test has become whether the nominee is woefully incompetent (G. Harrold Carswell, rejected in 1970) or way out of the philosophical mainstream (Robert Bork, rejected in 1987).

Don't worry. You never can tell what kind of justice you'll wind up getting. Thomas's supporters have tried to show their man has a libertarian streak and could wind up voting with the court's liberals (both of them) sometimes. True enough, even Scalia isn't a robot; for example, he voted in favor of a protester's right to burn the flag. Still, presidents typically get what they want. Their justices are their legacy. All five appointed by Ronald Reagan and George Bush have been consistently conservative.

Politics is a dirty word. The process of filling Supreme Court vacancies surely contemplates politics: cajoling, calculating, counting Senate heads. That's why the two dominantly political branches were given the joint power to pick justices. Politics can produce consensus, compromise and even wise policy on occasion. But before the Bork summer of 1987, confirmation hearings rarely resulted in the sideshow we now take for granted. "The process isn't working well," Sen. Herbert Kohl, a Democrat, told NEWSWEEK. Because the nominee prepares so long with politicians rather than scholars, "We are almost assured of getting a less-than-totally candid performance." Hatch laments the process, too, but blames "single-issue politics," meaning abortion.

Both explanations ring true, but neither is complete. The problem is perception: What is the Supreme Court about? In the past, presidents and senators paid at least some attention to the stature of nominees and the prestige of the court as the principled branch of government. A Cardozo wasn't required, but some distinction and diversity in public life or academe or the judiciary was usually a prerequisite. Today, ideology drives all actors in the process, and it usually takes us down the low road. Until that changes, confirmation hearings like Thomas's will remain a September charade.

The Abortion Side Step

Democratic Sen. Howard Metzenbaum: "I must ask you to tell us here and now whether you believe that the Constitution protects a woman's right to choose to terminate her pregnancy."
Clarence Thomas: "I think that to take a position would undermine my ability to be impartial."

Democratic Sen. Patrick Leahy: "Have you ever had a discussion of Roe v. Wade, other than in this room?"
Thomas: "If you're asking me whether or not I've ever debated the contents of it, the answer to that is no, Senator."

Ms. SMEAL. I believe fundamentally in the process of hearings, of a judicial review system of the Senate Judiciary Committee. I believe fundamentally in the right to confirmation, and I believe fundamentally that if these hearings are to have any meaning, a nominee cannot be allowed to come before you and to make statements that strain the credibility so much that a mainstream magazine would scoff at it. When a man says that he has not reviewed *Roe*, he has not spoken to anybody on it in the last 17 years, but it is the only case—I guess he mentioned two when Senator Leahy asked him what cases he thought were important. He could muster up *Roe* and another one. Yet he has never discussed it? Who is to believe this?

His silence does not, in my opinion, give us dignity. It just makes this whole process seem not sincere. I believe in this process. We have got to have a check and balance. And for all of us who have no place else to turn, we come before you again, not in drama, not trying to give good speeches, just trying to say we are about to lose the Supreme Court. I have no doubt where this man stands, and I don't think any other reasonable person could.

[The prepared statement of Ms. Smeal follows:]

THE FUND FOR THE
FEMINIST
MAJORITY

1600 Wilson Blvd., #704, Arlington, VA 22209
(703) 522-2214

Testimony of

Eleanor Cutri Smeal

President, The Fund for the Feminist Majority

Before the Senate Committee on the Judiciary

on the Nomination of Clarence Thomas

for Associate Justice of the Supreme Court

September 20, 1991

Testimony of Eleanor Cutri Smeal
President, The Fund for the Feminist Majority
Before the Senate Committee on the Judiciary
on the Nomination of Clarence Thomas for the Supreme Court

I am Eleanor Cutri Smeal, President of the Fund for the Feminist Majority, and I come before this Committee to express strong and unequivocal opposition to the nomination of Clarence Thomas as an Associate Justice for the United States Supreme Court. My testimony was prepared with the assistance of Erwin Chemerinsky, distinguished professor of constitutional law at the University of Southern California.

The Fund for the Feminist Majority in its very name raises the conscience of the nation that today in national public opinion polls a majority of women identify as feminists and a majority of men identify as supporters of the women's movement. The Fund for the Feminist Majority specializes in programs to empower women and to achieve equality for women in all walks of life.

During part of the period Clarence Thomas served in the government, first at the Office of Civil Rights and then as Chair of the Equal Employment Opportunity Commission (EEOC), I was President of the National Organization for Women. Over the past decade, Judge Thomas repeatedly expressed his views in numerous law review articles, speeches, and essays in newspapers. I carefully have reviewed his words and acts. And as a leader of the pre-eminent women's rights organization during his presence in government, I have done more than reviewed his words and acts. I have witnessed the devastating impact of his philosophy in action on the efforts to curb discrimination.

There is nothing in his record, performance, or writings -- not a shred of evidence -- that indicates any willingness to protect civil liberties or civil rights for women. Quite the contrary, his record is chilling; for the past decade, he has expressed the views of the farthest right fringe of the Republican Party.

Although I believe that Clarence Thomas poses a threat to constitutional rights in many areas, my testimony will focus on women's rights. At the outset, it is important to emphasize that the rights of more than half of the population must not be dismissed as merely the concerns of a special interest group. I hope that every member of this Committee, Democrat and Republican, liberal and conservative, agrees that an individual who is hostile to women's rights under the Constitution has no place on the United States Supreme Court. A person should not be confirmed for the Supreme Court unless he or she evidences commitment to certain basic constitutional values; reproductive privacy and gender equality must be among them.

Four years ago, this Committee rightly rejected Robert Bork for a seat on the Supreme Court because of his views, especially on privacy and gender discrimination. Clarence Thomas expresses almost identical opinions and frequently has aligned himself with Bork's judicial philosophy. In fact, Thomas' performance as Chair of the EEOC makes his hostility to civil rights even clearer and less abstract.

My testimony will focus on two areas of vital importance to women: reproductive privacy and employment discrimination. Clarence Thomas' views and performance on these issues make him unacceptable for a position on the Supreme Court which ultimately is responsible for protecting the civil rights of women and men.

A person is unsuitable for the Supreme Court unless he or she expresses a commitment to basic constitutional freedoms. Reproductive privacy is one of these guarantees. Indeed, reproductive freedoms are not simply one right among many. No civil liberty touches more people on a daily basis or more profoundly affects human lives than access to contraceptives and safe, legal abortions. Virtually all people -- at one time or another -- will use contraceptives. Studies show that forty-six percent of all women will have an abortion at some point in their lives. Without constitutional protection of reproductive freedom, women will die and suffer from unwanted pregnancies and illegal abortions.

Senators, each of you knows that the next person you confirm for the Supreme Court will be the decisive vote on reproductive freedoms for decades to come. Thus, a key question -- perhaps the crucial question: will Clarence Thomas follow precedents such as Griswold v. Connecticut, Eisenstadt v. Baird, and Roe v. Wade which establish the right of each person to choose whether to exercise fertility control?

Clarence Thomas' writings leave no doubt as to his views. In fact, no nominee for the Supreme Court -- not even Robert Bork -- has so consistently expressed opposition to reproductive freedoms as Clarence Thomas. In notes for a speech, titled "Notes on Original Intent," Clarence Thomas wrote: "Restricting birth control devices or information, and allowing, restricting, or (as Senator Kennedy put it) requiring abortions are all matters for a legislature to decide; judges should refrain from 'imposing their values' on public policy." (Undated manuscript, p. 2).

Thomas specifically discussed Griswold v. Connecticut and Roe v. Wade in a footnote in a law review article. (Thomas, "The Higher Law Background of the Privileges and Immunities Clause of the Fourteenth

Amendment," 12 Harvard Journal of Law and Public Policy 63, 63 n. 2 (1989)). After stating the holdings in Griswold and Roe, Thomas wrote: "I elaborate on my misgivings about activist use of the Ninth Amendment in [a chapter of a book published by the Cato Institute.]" In this chapter, Thomas defended Robert Bork's view that reproductive privacy is not worthy of constitutional protection. Thomas called Griswold an "invention" and argued that it is inappropriate for the Supreme Court to protect rights that are not expressly enumerated in the Constitution. (Thomas, "Civil Rights as Principle, Versus Civil Rights as an Interest," in Assessing the Reagan Years 398-99 (D. Boaz ed. 1988)).

Thomas' restrictive views about reproductive freedom were also reflected in the conclusions of a White House Working Group on the Family, of which Thomas was a member. The report sharply criticizes Roe v. Wade and several other Court rulings on privacy as "fatally flawed" decisions that should be "corrected" either by constitutional amendment or through the appointment of new judges and their confirmation to the Court." White House Working Group on the Family, The Family Preserving America's Future 12 (1986). The report also calls for the overruling of such basic decisions as Eisenstadt v. Baird, which held that every person has the right to purchase and use contraceptives; Moore v. City of East Cleveland, which held that a city cannot use a zoning ordinance to keep a grandmother from living with her grandchildren; and Planned Parenthood v. Danforth, which held that a state may not condition a married woman's abortion on permission from her husband.

There is nothing -- not a paragraph, not a sentence, not a word -- in Thomas' writings that indicates a willingness to protect reproductive freedoms and women's lives. To the contrary, Thomas may well be the first

Justice in American history even willing to prohibit states from allowing abortions. As you know, Clarence Thomas gave a speech in which he praised an article written by Lewis Lehrman as "a splendid example of natural law reasoning." Thomas, "Why Black Conservatives Should Look to Conservative Policies," Speech to the Heritage Foundation, June 18, 1987.

The central thesis of Lehrman's essay is that fetuses are human lives entitled to protection, from the moment of conception, by the Declaration of Independence and the Constitution. (Lehrman, "The Declaration of Independence and the Right to Life," American Spectator 21 (April 1987)). Lehrman called Roe a "spurious right born exclusively of judicial supremacy" and "a coup against the Constitution." Lehrman maintained that human life under the Declaration of Independence and the Constitution starts "at the very beginning of the child-to-be."

It is imperative to realize that Lehrman's views, endorsed by Thomas as "splendid," would justify more than overruling Roe v. Wade. Lehrman's argument is that the Constitution should protect fetuses from the moment of conception. From this perspective, abortion would be constitutionally prohibited. States would not even have the authority that existed before 1973 to allow abortion in their jurisdiction.

Simply stated, it is difficult to imagine a nominee with a more documented record of hostility to a basic civil liberty than Clarence Thomas' opposition to reproductive freedom. If a nominee for the Supreme Court expressed an unwillingness to protect freedom of speech, would not each and every one of you vote against confirmation? If a nominee expressed an unwillingness to safeguard free exercise of religion, would not each and every one of you vote against confirmation? Right now you are considering a nominee who has expressed an unwillingness to protect privacy. Surely,

if the word "liberty" in the Constitution means anything it must include privacy and the right of each person to choose whether to have a child.

This is not just about a legal abstraction. It is about women's lives. The confirmation of Clarence Thomas almost surely would create a majority on the Court to overrule Roe and condemn thousands of women to death and suffering. Because he has expressed unqualified hostility to a basic constitutional freedom, Clarence Thomas should be denied confirmation to the Supreme Court.

Independently, Clarence Thomas' views and record on the crucial issue of employment discrimination make him unsuitable for a seat on the high Court. Women in this society continue to face serious discriminatory treatment in the workplace. If a man and a woman hold the same job, the woman earns, on the average, 68 cents of each dollar paid to a man. Countless jobs remain closed to women. In many businesses and industries, discrimination against women remains the norm not the exception.

Clarence Thomas was Chair of the Equal Employment Opportunity Commission, the federal agency responsible for enforcing the laws protecting women from discrimination in the workplace. I ask you, when in Thomas' almost eight years at the agency, did he use his position to condemn discrimination against women and to fight in any meaningful way for gender equality in the workplace? As you read through Thomas' numerous speeches and articles, it is telling that he virtually never even mentions the civil rights of women.

The Equal Employment Opportunity Commission had a dismal record under Clarence Thomas' leadership in fighting discrimination. A study by the Women Employed Institute found that under Thomas'

leadership, 54 percent of all cases were found to lack cause, compared with 28.5 percent under the Carter EEOC in fiscal year 1980. The study also found that less than 14 percent of all new EEOC cases resulted in some type of settlement under Thomas, compared to settlements in 32 percent of the cases at the beginning of the Reagan administration. And these statistics do not even reflect the fact that Thomas' EEOC allowed 13,000 age discrimination claims, many by women, to lapse.

Thomas repeatedly has expressed hostility to the use of statistical evidence to prove employment discrimination. In Griggs v. Duke Power Company, in 1971, the Supreme Court held that evidence of disparate impact against women or racial minorities establishes a prima facie case of discrimination. Because it is so difficult to prove that an employer acted with a discriminatory intent, statistical proof is the basic and essential way of establishing a violation of Title VII of the 1964 Civil Rights Act.

But Clarence Thomas has strongly criticized allowing statistical evidence to prove discrimination. He stated that "we have, unfortunately, permitted sociological and demographic realities to be manipulated to the point of surreality by convenient legal theories such as 'adverse impact' and 'prima facie cases.'" Thomas, "The Equal Employment Opportunity Commission: Reflections on a New Philosophy," 15 Stetson Law Review 31, 35-6 (1985). Thomas, thus, would go even further than the current Supreme Court in preventing the use of statistical evidence to prove discrimination. The effect of Thomas' position would be effectively to drastically lessen Title VII's ban on employment discrimination.

In fact, as Chair of the EEOC, Thomas proposed to eliminate the use of statistical evidence to prove discrimination by the federal government. The Uniform Guidelines on Employee Selection Procedures were adopted in

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1978 by the EEOC, the Department of Justice, the Labor Department and the Civil Service Commission. The Uniform Guidelines follow Griggs and allow statistical proof of employment discrimination. Thomas as Chair of the EEOC sought to revise these guidelines to eliminate such statistical evidence. If Thomas' position prevails on the Supreme Court, the fight against gender discrimination in employment would be immeasurably damaged.

Likewise, Thomas repeatedly has opposed the use of hiring timetables and goals which are an essential to gender equality in the workplace. The Supreme Court, in cases such as United Steel Workers v. Weber and Local 28 of the Sheet Metal Workers' International Association v. EEOC, approved hiring timetables and goals to remedy workplace inequality. But Thomas has strongly criticized these decisions. Thomas, "Civil Rights as a Principle Versus Civil Rights as an Interest," at 395-96. In fact, in Fall 1985, the acting general counsel of the EEOC, under Thomas' leadership, ordered regional counsel not to enforce goals or timetables in consent decrees, nor to seek them in the future.

Countless other examples exist of the failure of Thomas' EEOC to enforce Title VII and other laws protecting women from discrimination. It must be emphasized that Thomas was not simply an employee in the agency; he was the Chair. He was not simply following preset policies; he was the architect of the Reagan Administration's effort to lessen civil rights protections. As Chair, he was charged with working to end discrimination against women. But he did nothing constructive in this regard.

At the very least, his poor performance at the EEOC should disqualify him for a "promotion" to the Supreme Court. Moreover, his documented

record of hostility to protecting the civil rights of women and minorities make him a grave threat to equal justice if he is confirmed.

Senators, I ask you to look past all of the rhetoric on both sides and focus on simple questions. Is there any place in Clarence Thomas' record where he has ever supported constitutional protection of reproductive freedoms? Is there anything in Clarence Thomas' record as Chair of EEOC to indicate that he would be a force for advancing civil rights and women's rights on the Supreme Court? Can you point to any evidence -- any speech, any article, any judicial opinion -- where Clarence Thomas has expressed a meaningful commitment to reproductive privacy or civil rights for women?

The rights of millions of women rest on this nomination. I urge you to vote against Clarence Thomas' confirmation.

The CHAIRMAN. Thank you very much.
Ms. Neuborne.

STATEMENT OF HELEN NEUBORNE

Ms. NEUBORNE. Mr. Chairman and members of the committee, my name is Helen Neuborne. As executive director of the NOW Legal Defense and Education Fund, I thank you for this opportunity to express our view that Judge Clarence Thomas should not be confirmed as an Associate Justice of the Supreme Court.

We appreciate the efforts of the committee, especially its Chair, to develop a complete record on which to base the Senate's decision whether to confirm the nomination of Judge Thomas.

That record, as developed before this committee, contains three troubling components:

First, Judge Thomas' past record, including his articles, speeches, and performance as EEOC Chair;

Second, his decision at the hearing to stonewall and to present the committee with a selective silence concerning his views on the constitutional issues surrounding abortion; and

Third, his disavowals of most of his past record.

There is no need for me to detail the record at length. Among the items that raise the most serious concerns are Judge Thomas' signature on a White House report calling for the repeal of *Roe* v. *Wade*; his praise for a speech calling for the criminalization of abortion; his adamant, and selective, refusal to discuss the legal issues surrounding abortion; his record at the EEOC; and his utterly unconvincing disavowals of his past statements on topics ranging from the competence of Congress to the separation of powers.

Viewing the record in the light most favorable to Judge Thomas, the best you can say is that serious doubt exists concerning his commitment to existing constitutional rights of critical importance to women and minorities.

The real issue, therefore, is what is the role of a Senator under the advice and consent clause when he or she is confronted with a nominee whose commitment to the constitutional rights of millions of Americans is seriously in doubt. Should you defer to the President, or should you exercise an independent judgment under the advice and consent clause?

We have now listened to Judge Thomas' testimony before this committee and have heard nothing to calm our fears about the effect Judge Thomas' personal philosophy would have on the existing constitutional and statutory rights of women. His assertions that he has set aside his most dearly held and often expressed views in the name of judicial impartiality simply do not ring true. He has stated that he praised extremist rightwing articles he says he has never even read in an effort to convince conservatives to accept his agenda. And he is apparently ready to disavow almost all his prior statements if it will convince this committee to vote for his confirmation.

His sudden and unconvincing confirmation conversion is not the only reason for our negative position. We are also profoundly troubled by his retreat during these hearings into silence on crucial issues affecting women, in stark contrast to his open and forthcom-

ing discussion of numerous other controversial legal issues that will undoubtedly arise during his tenure on the Supreme Court. Judge Thomas has sought to defend his selective refusal to reveal his judicial philosophy in the abortion area as necessary to maintain his impartiality as a judge. However, a similar concern with impartiality did not prevent him from discussing the equally controversial legal issues of church and state, the binding quality of precedent, and the balance between the rights of the accused and the rights of victims—issues that will certainly arise before the Court during his tenure.

His selective refusal on the issue of abortion does not, therefore, foster an appearance of impartiality. Quite the contrary, it sends an ominous message that Judge Thomas has views on the subject that he dare not reveal because they would jeopardize his nomination, an ominous message of covert partiality that is reinforced by his numerous public statements and actions in the area.

Just 1 year ago, I urged this committee to refuse to permit then-Judge Souter to avoid discussing his legal philosophy in this area with the committee. Unfortunately, in the absence of clear prior statements from Justice Souter, a majority of the committee elected to gamble on Justice Souter's silence. American women suffered the first consequences of the committee's gamble when Justice Souter cast the crucial fifth vote in *Rust* v. *Sullivan* depriving poor women of desperately needed information from their doctors concerning the availability of abortion as a lawful treatment option. President Bush, who nominated both Justice Souter and Judge Thomas, threatens to veto any bill which undoes the Supreme Court's handiwork in *Rust*. We are asking you not to gamble with the lives of women yet again.

The Constitution vests advice-and-consent power in the Senate precisely to prevent the President from stacking the Supreme Court with nominees that reflect a single, narrow judicial philosophy. When, as now, a profound national division on many issues has resulted in a sustained division in control of the Presidency and the Senate, the Senate's advice and consent power takes on extraordinary importance since, unless the Senate fulfills its responsibility in the confirmation process, the resulting Supreme Court may exclude the mainstream philosophies that have broad support in the American people.

The closest analogue to the Senate's advice-and-consent power is the President's power to veto legislation passed by both Houses of Congress. Both the veto and the advice-and-consent power permit one political branch of the Government to check the other in order to assure an accurate reflection of the Nation's democratic will.

President Bush has vetoed congressional legislation 21 times in 3 years. He never defers to Congress' role. It is inconceivable that the Senate, exercising its veto power over Supreme Court appointments, will defer to the President's drive to stack the Supreme Court with nominees hostile to the rights of women and minorities.

If the advice-and-consent power is to fulfill its constitutional role, Senators must be prepared to exercise the same independent judgment in vetoing a Supreme Court nominee as the President exercises when he repeatedly vetoes the will of Congress. Many of you

have spoken out before on the importance of this role to ensure that the Court reflects the core values of our society today.

If, after reviewing the record before this committee, you have no doubt about Judge Thomas' willingness to support and defend critical constitutional rights of women and minorities, you should vote to confirm him. If, however, after reviewing the record, you believe—as so many witnesses before you have stated—that Judge Thomas poses a risk to the rights of millions of Americans, you should oppose his confirmation. Thank you.

[The prepared statement of Ms. Neuborne follows:]

NOW Legal Defense and Education Fund
99 HUDSON STREET • NEW YORK, NY 10013 • (212) 925-6635 • FAX: (212) 226-1066

Testimony of Helen Neuborne, Esq.

NOW Legal Defense and Education Fund

Presented at the Senate Judiciary Committee Hearings

on the Confirmation of Judge Clarence Thomas

as an Associate Justice of the U.S. Supreme Court

September 20, 1991

Helen Neuborne, Esq.
Executive Director

Alison Wetherfield, Esq.
Director, Legal Program

Mr. Chairman and Members of the Committee:

My name is Helen Neuborne. I am the Executive Director of the NOW Legal Defense and Education Fund, a women's rights legal and educational advocacy organization founded in 1970. Thank you for this opportunity to express our view that Judge Clarence Thomas should not be confirmed as an associate Justice of the Supreme Court.

We appreciate the efforts of the Committee -- especially its Chair -- to develop a complete record on which to base the Senate's decision whether to confirm the nomination of Judge Thomas.

That record, as developed before this Committee, contains three troubling components:

(1) Judge Thomas' past record, including his articles, speeches and performance as EEOC Chair;

(2) Judge Thomas' decision at the hearing to stonewall and to present the Committee with a selective silence concerning his views on the constitutional issues surrounding abortion; and

(3) Judge Thomas' disavowals of most of his past record.

There is no need for me to detail the record at length. Among the items that raise the most serious concerns are Judge Thomas' signature on a White House report calling for the repeal of Roe v. Wade; his praise for a speech calling for the criminalization of abortion; his adamant -- and selective -- refusal to discuss the legal issues surrounding abortion; his record at the EEOC; and Judge Thomas' utterly unconvincing disavowals of his past

statements on topics ranging from the competence of Congress to the separation of powers.

Viewing the record in the light most favorable to Judge Thomas, the best you can say is that serious doubt exists concerning his commitment to existing constitutional rights of critical importance to women and minorities.

The real issue, therefore, is what is the role of a Senator under the "advice and consent" clause when he or she is confronted with a nominee whose commitment to the constitutional rights of millions of Americans is seriously in doubt. If you are in serious doubt, should you defer to the President or should you exercise an independent judgment under the "advice and consent" clause?

It's clear that the record in this case creates an inescapable doubt concerning Judge Thomas' commitment to the protection of existing constitutional liberties.

We have now listened to Judge Thomas' testimony before this Committee and have heard nothing to calm our fears about the effect Judge Thomas' personal philosophy would have on the existing constitutional and statutory rights of women were he to be confirmed. Judge Thomas' assertions that he has set aside his most dearly held and often expressed views in the name of judicial impartiality simply do not ring true. Judge Thomas has stated that he praised extremist right wing articles he says he has never even read in an effort to convince conservatives to accept his agenda and he is apparently ready to disavow almost all his prior statements if it will convince this Committee to vote for his

confirmation.

His sudden and unconvincing confirmation conversion is not the only reason for our vote of no confirmation. We are also profoundly troubled by his retreat during these hearings into silence on crucial issues affecting women, in stark contrast to his open and forthcoming discussion of numerous other controversial legal issues that will undoubtedly arise during his tenure on the Supreme Court. Judge Thomas has sought to defend his selective refusal to reveal his judicial philosophy in the abortion area as necessary to maintain his impartiality as a judge. However, a similar concern with impartiality did not prevent him from discussing the equally controversial legal issues of church-state, the binding quality of precedent and the balance between the rights of the accused and the rights of victims - issues that will certainly arise before the Court during his tenure. His selective refusal to talk about a woman's constitutional right to choose whether to continue a pregnancy does not, therefore, foster an appearance of impartiality. Quite the contrary, it sends an ominous message that Judge Thomas has views on the subject that he dare not reveal because they would jeopardize his nomination - an ominous message of covert "partiality" that is reinforced by his numerous public statements and actions in the area.

One year ago, I urged this Committee to refuse to permit then-Judge Souter to avoid discussing his legal philosophy in this area with the Committee. Unfortunately in the absence of clear prior statements from Justice Souter on this issue, a majority of the

Committee elected to gamble on Judge Souter's silence. American women suffered the first consequences of the Committee's gamble when Justice Souter cast the crucial fifth vote in Rust v. Sullivan depriving poor women of desperately needed information from their doctors concerning the availability of abortion as a lawful treatment option. President Bush, who nominated both Justice Souter and Judge Thomas, threatens to veto any bill which undoes the Supreme Court's handiwork in Rust. We simply cannot afford to allow you to gamble with the lives of women yet again. Please do not permit Judge Thomas, who, unlike Judge Souter, has a public record of hostility to Roe v Wade, to single out abortion rights as the only matter he refuses to discuss.

Judge Thomas signed a White House report calling for the overturning of Roe v. Wade. Judge Thomas publicly praised an article that urged the recriminalization of abortion, despite Roe v. Wade. Given that public record of hostility, for the Committee to accept Judge Thomas' silence and his incredible explanations that he never read that report or article as adequate exploration of the issue would be to break faith with America's women and with your own obligations as Senators.

The Constitution vests "advice and consent" power in the Senate precisely to prevent the President from stacking the Supreme Court with nominees that reflect a single, narrow judicial philosophy. When, as now, a profound national division on many issues has resulted in a sustained division in control of the Presidency and the Senate, the Senate's "advice and consent" power

takes on extraordinary importance since, unless the Senate fulfills its responsibility in the confirmation process, the resulting Supreme Court may exclude the mainstream philosophies that have broad support in the American people.

The closest analogue to the Senate's "advice and consent" power is the President's power to veto legislation passed by both Houses of Congress. Both the "veto" and the "advice and consent" power permit one political branch of the government to check the other in order to assure an accurate reflection of the nation's democratic will.

President Bush has vetoed Congressional legislation twenty-one times in three years. He never defers to Congress' role. It is inconceivable that the Senate, exercising its veto power over Supreme Court appointments, will defer to the President's drive to stack the Supreme Court with nominees hostile to the rights of women and minorities.

If the "advice and consent" power is to fulfill its constitutional role, especially in eras of divided government, Senators must be prepared to exercise the same independent judgment in vetoing a Supreme Court nominee as the President exercises when he repeatedly vetoes the will of Congress. Many of you . . .

If, after reviewing the record before this Committee, you do not harbor significant doubts concerning Judge Thomas' willingness to support and defend critical constitutional rights of women and minorities, you should vote to confirm him. If, however, after reviewing the record, you believe that Judge Thomas poses a risk to

the rights of millions of Americans you should oppose his confirmation. Senators exercising the "advice and consent" power have no right to gamble with the lives of women.

The CHAIRMAN. Thank you very much.
Ms. Bryant.

STATEMENT OF ANNE BRYANT

Ms. BRYANT. Thank you, Chairman Biden, and good morning to other members of the committee. I am Anne Bryant, executive director of the American Association of University Women—as many of you know—135,000 members strong in 1,800 communities, working for education and equity for women and girls, recently focusing on the whole issue of girls in education but historically working on reproductive freedom, civil rights, and workplace discrimination. I have submitted written testimony. You will be grateful to know I am not going to use it, and what I am going to say is shorter.

The CHAIRMAN. The entire statement will be placed in the record.

Ms. BRYANT. Thank you.

It is because of AAUW's deep concern for education and equity issues that I am here today. We are very disturbed by Judge Thomas' record, and we understand that you have a tough choice before you. You can decide to make this choice based on his writings, his track record, his action, or on 5 days of testimony when he, in many cases, reversed what many of those opinions were.

Over the past several days, I have been struck—as I have a feeling some of you have been—with the great contrast between those who have come before you to oppose him and those who have come before you to praise him. I have noticed, as you may have, that those who have come to oppose him have brought careful documentation, have used cases, articles, speeches. Those who have come to praise him have much more often used childhood stories, personal character traits. I will read some of them.

Judge Gibbons called him receptive to persuasion. "Open-minded" said Sister Reidy. Dean Calabresi, who spoke for him, ended his testimony by saying that there was a significant chance that Clarence Thomas would be a powerful figure in the defense of civil rights. But at the end he said, "However, I am not confident of that." But the phrase he used in talking about the youth of Judge Thomas was that he believed he had a significant chance for growth.

A chance for growth? Is the Supreme Court of our land going to be a training program?

So we have learned about Clarence Thomas, the man. We have actually learned a lot about Clarence Thomas, the politician. But the question before us is Clarence Thomas, the jurist.

Patricia King so eloquently said last Tuesday that the issue is not one person's individual struggle. Actually the issue is what Clarence Thomas will do on the Supreme Court for others' struggles. The major principle in this great democracy is the principle of equal opportunity; that inalienable right, in fact, that we are in this country to ensure equal opportunity for all people, which in essence is making sure that all Americans have greater odds of success.

It is becoming increasingly clear, too, that equal opportunity is not just a principle of justice. It is an economic and social necessity

when 80 percent of the entering work force are women and minorities by the year 2000.

Does Judge Thomas understand that equal opportunity in the workplace means holding businesses accountable for providing a climate which is open, accepting of all cultures, nurturing of disparate talents? Has Clarence Thomas demonstrated at EEOC that he would enforce the laws of this land which reward businesses for reaching out to those different populations, punishing those who do not, but, most importantly, protecting the rights of individuals who are treated in a discriminatory way? Does he understand the right and the responsibility of the Court to protect these individuals?

The American Association of University Women fears he does not. And what about equal opportunity in education? Does Clarence Thomas, who himself received an excellent and selective education, understand that to develop a vibrant educational system for all of our children has huge obstacles? Does Judge Thomas understand the critical role the Court will have to play to ensure that public education survives and flourishes in the future? Does he understand how quickly our Nation's public schools could decline even further if precious resources were funneled off to private and religious schools through tax credit and tuition voucher systems?

From his actions and his words and his record, the American Association of University Women fears he does not understand this.

One of the fundamental tenets of a democracy, stated in the Constitution, protected by the Supreme Court, is the separate of church and state. Throughout all of AAUW's long history, our members have found for that principle.

Does Clarence Thomas understand the long-term effects of allowing a simple Christian prayer, seemingly harmless, at the beginning of every school day? Does he feel the discomfort, the insecurity that a Jewish, Muslim, or Buddhist child has when forced, even by peer pressure, to join in or listen to words she doesn't believe?

The American Association of University Women fears that Judge Thomas would rather legislate morality than protect religious freedom.

You do have a tough decision to make, and with tough decisions you have got to weigh the evidence, the facts and Judge Thomas' record. We believe that Judge Thomas' actions speak louder than his recent words. If you vote against this confirmation, it will be another battle for the next nominee. We know that. If you confirm him, will the battles that you have to fight in Congress to protect equal opportunity, individual rights, privacy, and religious freedom be even longer and tougher?

The eyes of the American Association of University Women are on the future, and we think all Americans deserve a better future than is promised by putting Clarence Thomas on the Supreme Court.

Thank you.

[The prepared statement of Ms. Bryant follows:]

AMERICAN
ASSOCIATION OF
UNIVERSITY
WOMEN

Opposition to the Nomination of Clarence Thomas to the United States Supreme Court

Testimony Submitted to the
Senate Judiciary Committee

September 19, 1991

by

Anne L. Bryant, Ed.D.
Executive Director

American Association of University Women
1111 16th Street, N.W.
Washington, DC 20036

202/785-7788

I am Anne Bryant, executive director of the American Association of University Women (AAUW). It is a privilege to testify on behalf of AAUW's 135,000 members: women and men who are committed to equity and education for women and girls.

On behalf of our membership, I urge the Judiciary Committee to reject Clarence Thomas' nomination to the United States Supreme Court. In his testimony before this Committee, Judge Thomas has suggested that statements he made and views he expressed prior to 1990 are not necessarily positions he would hold as a Supreme Court Justice. AAUW believes that the Senate has a responsibility to consider the public record of a Supreme Court nominee in assessing a nomination. We believe that Judge Thomas' record as chair of the Equal Employment Opportunity Commission and his tenure as Assistant Secretary for Civil Rights in the Education Department raise grave concerns about his commitment to equal opportunity and provide examples of his failure to enforce federal law.

AAUW opposes Clarence Thomas' nomination for five reasons.

First, we believe that in his positions at the EEOC and the Department of Education, Judge Thomas showed a blatant disregard for the law of the land. As Chair of the EEOC, he allowed more than 13,000 age discrimination complaints to lapse by failing to investigate them within the legal time limit. Congress had to pass the Age Discrimination Claims Assistance Act to assist those

individuals whose complaints of age discrimination had been ignored by the EEOC.

Although Judge Thomas served in the Education Department's Office of Civil Rights for less than a year, a similar pattern of failure to enforce the law was present there. In 1981, the Women's Equity Action League filed suit against the Department charging improper enforcement of Title IX of the Education Amendments of 1972. In 1982, a District Court judge ruled that the Department was both misinterpreting the Title IX regulations and providing inadequate remedies when a Title IX violation was determined.

This pattern of failure to enforce the law casts grave doubts on Judge Thomas' judicial temperament. We are particularly disturbed that he has been unwilling to enforce key federal laws intended to guarantee individual rights in employment and education.

Second, AAUW opposes Judge Thomas' nomination because of his record of vocal opposition to efforts to ensure equal opportunity in the workplace. While heading the EEOC, he undermined the effectiveness and credibility of the agency by publicly expressing his personal opposition to affirmative action programs, even those ordered as remedies following a finding of discrimination.

Judge Thomas was also vocal about his opposition to Title VII class action suits, despite Congress' mandate that his agency

initiate such cases. His negative comments about a class action suit filed by the EEOC against Sears led attorneys to explore calling him as a defense witness. By calling into question the validity of lawsuits involving claims of disparate impact, Judge Thomas contravened both the intent of Congress in passing Title VII and the Supreme Court's ruling in the 1971 Griggs case.

In 1985, the EEOC ruled that federal law does not require equal pay for jobs of comparable value, and the agency stopped investigating complaints involving pay equity claims. This ruling contradicted the Supreme Court's 1981 decision in the Gunther case. Again, Judge Thomas directed EEOC activities based on his own beliefs, rather than abiding by relevant federal law.

Third, AAUW is distressed by Judge Thomas' apparent hostility to the constitutional right to privacy as outlined in Griswold v. Connecticut. In an article published by the Cato Institute in Assessing the Reagan Years, Judge Thomas stated that the unenumerated rights specified in the Ninth Amendment were not intended to be cited by the Supreme Court in overturning laws.

By stating his opposition to the constitutional basis of the fundamental right to privacy, Judge Thomas has given evidence of his willingness to restrict individual liberties, including the right to reproductive choice.

Fourth, Judge Thomas' support of a "natural law" concept is deeply disturbing to AAUW. In speeches and articles, Thomas has

maintained that judges should be guided by a "natural law" philosophy, the belief that the "inalienable rights" cited in the Declaration of Independence are a higher authority than the U.S. Constitution.

Thomas has said he believes in the existence of moral norms derived from "nature's god," and that those norms can be used to critique and even invalidate civil law. Thomas' statements about "natural law" raise serious doubts about his commitment to maintain separation of church and state.

Finally, AAUW believes that the Judiciary Committee should not confirm Clarence Thomas' nomination to the Supreme Court because of the critical need for judicial balance on the most important court in our nation. The recent appointments of Anthony Kennedy, Antonin Scalia, and David Souter solidified a strong conservative shift in the Supreme Court. With the resignation of Justice Thurgood Marshall, the Court swung dangerously out of balance.

Confirmation of Clarence Thomas, a probable sixth conservative vote on the Court, threatens to unleash the sweeping change we have glimpsed in the Rehnquist Court. Replacing Justice Marshall with a judicial conservative like Clarence Thomas will effectively eliminate the Supreme Court as an instrument for ensuring continued progress and protection of individual rights for decades to come.

The American Association of University Women believes that the Senate has a responsibility to ensure an ideologically balanced Supreme Court and must, therefore, defeat the Thomas nomination.

On behalf of AAUW, I thank you for the opportunity to testify.

The CHAIRMAN. Thank you, Ms. Bryant.
Ms. Avery.

STATEMENT OF BYLLYE AVERY

Ms. AVERY. Thank you. Good morning. I am Byllye Avery, founder and president of the National Black Women's Health Project, and our organization opposes the nomination of Judge Clarence Thomas and we base that position on the following areas: first, the area of self-help.

The National Black Women's Health Project is a self-help advocacy organization committed to improvement of conditions that affect the health status of black women. The organization's philosophy is based on the concept and practice of self-help and mutual support through which members obtain vital information on the prevention and treatment of illness, as well as emotional support and practical assistance. It is largely composed of those sisters who struggle on lower incomes in our society.

Judge Thomas' reference to public statements about self-help as the answer to social ills for black people implies that we have not been using self-help approaches to problem-solving. Rather, the achievement of African American people and the history of self-help development in this country are inextricably bound.

Black people extensively practice self-help today and have done so throughout our history. Slaves worked together to buy each other out of slavery. The first black hospitals were the result of black people pooling their resources to assure the availability of medical care. The list goes on and on; schools, trade and credit unions, banks, newspapers, and other basic services were initiated by black people.

There are many new forms of self-help today, like the ones of our organization. They are a part of a growing tradition. It is not self-help we are lacking, but commitment to the vigorous enforcement of laws protecting our freedoms. That is the piece that is not in place.

Those of us who promote self-help and practice it daily recognize that such activities cannot secure rights and freedoms. No one can self-help themselves to employment, housing, education, or health care when basic access is denied based on discriminatory practices or employers.

The second area is affirmative action. As chairperson of the EEOC, Clarence Thomas was openly hostile to the guidelines developed during the 1960's to prohibit employer practices which have a disparate impact on minority workers and applicants and that cannot be justified as measures of job performance.

These guidelines were also the basis for hundreds of class action suits in the 1970's and 1980's attacking systemic barriers to job opportunities. Thomas said he believed the guidelines encouraged too much reliance on statistical disparities as evidence of employment discrimination, and although he didn't carry through on his threat to repeal the guidelines, he did muzzle efforts by the EEOC to enforce them through suits attacking institutionalized practices of discrimination.

The third area is age discrimination. Hundreds of senior African-American women have suffered in silence as the result of Judge Thomas' violation of the rule of law in failing to act on over 13,000 age discrimination cases. These senior African American women are our mothers and our grandmothers, women who have traditionally held the dirtiest jobs, worked the longest hours for the lowest wages, and received the least amount of praise and recognition, and who have paid a heavy price in order that we might stand here today, and indeed a heavy price that Judge Thomas would be able to sit before you.

The fourth area is reproductive rights. Clarence Thomas' stated belief in—and advocacy of—natural law, which historically has been used to limit the lives and opportunities for women in crafting and applying law principles, and his expressed hostility to the fundamental right to privacy embodied in the *Griswold* v. *Connecticut* and the *Roe* v. *Wade* decisions, which protect and guarantee the right of married couples to use contraceptives and for women to choose abortion, is cause for great concern for all women in general and poor African-American women, in particular.

Historically, African-American women have had the least control of their reproductive choices, including if, when, where, and by whom we would have children. Before abortion was legalized in this country, the majority of women who died gruesome deaths from illegally performed abortions, or bore more children than they could adequately care for, were women of color.

Clearly, the right to safe, legal, and inexpensive abortions is critical to the health of African-American women and their families. Given the extreme nature of Judge Thomas' views, the possibility that, if confirmed, he will endorse extreme limitations on women's most fundamental, important right—the right to make their own reproductive choices—is alarming, and his nomination must be vigorously opposed.

The current health crisis in the United States is forcing the Nation to look to health care reforms. African-Americans need public servants who will ensure that health care is protected as a right, and that includes the right to abortion, and ensured by the nature of our birth. We need public servants who will enact legislation that will holistically improve the quality of life for African-Americans.

We reject Judge Thomas and strongly encourage you to reject others that are sent up until we get the right person for the job. We refuse to accept this person because he might be the best of the worst. We are Americans; we deserve to have the very best there is, and we demand that.

Thank you.

[The prepared statement of Ms. Avery follows:]

POSITION STATEMENT
OF THE

NATIONAL BLACK WOMEN'S HEALTH PROJECT
ON THE

NOMINATION OF CLARENCE THOMAS TO THE SUPREME COURT

The National Black Women's Health Project opposes the nomination of Judge Clarence Thomas to the Supreme Court of the United States. We oppose Judge Thomas' nomination based on his record of performance as Assistant Secretary for Civil Rights in the Dept. of Education (1981-1982), as Chairman of the Equal Employment Opportunity Commission (1982-1990); and based on the content of a substantial number of speeches, writings and interviews, which clearly reflect a disrespect for and lack of commitment to the enforcement of constitutional and statutory protections/federal laws protecting civil rights and individual liberties.

Our position justification is based on a review and discussion of Judge Thomas' position in the following five areas:

1. SELF HELP

The National Black Women's Health Project is a self-help, health advocacy organization committed to improving the conditions that affect the health status of Black women. The organization's philosophy is based on the concept and practice of self-help and mutual support through which members obtain vital information on the prevention and treatment of illnesses as well as emotional support and practical assistance.

Our organization's opposition to Judge Clarence Thomas in this area is based on his assertions that self-help approaches should be favored over other government policies to correct the historic injustices which continue to negatively effect the quality of life for Black Americans. It is inappropriate for any government official to suggest that self-help activities can secure basic rights and freedoms in a democratic society. The Constitution of the United States created the government as the vehicle to insure that the protection of the Bill of Rights would be extended to all Americans.

Judge Thomas' reference in his public statements to self-help as the answer to the social ills of Blacks implies that we have not been trying self-help approaches to problem solving. Rather, the achievements of African American people and the history of self-help development in this country are inextricably bound. Black people extensively practice self-help today and have done so

throughout our history. Slaves worked together to buy each other out of slavery; the first Black hospitals were the result of Black people pooling their resources to assure the availability of medical care. The list goes on and on - schools, trade and credit unions, banks, newspapers and other basic services were initiated for Black people, by Black people when no other resources were available to us. Today many new forms of self-help, like the National Black Women's Health Project, are part of this growing tradition. It is not self-help that we are lacking, but commitment to the vigorous enforcement of laws protecting our freedoms that is not in place.

Those of us who promote self-help and practice it daily recognize that such activities cannot secure rights and freedoms. No one can self-help their way to employment, housing, education or health care when basic access is denied based on the discriminatory practices of employers, lenders and service providers. Promoting self-help solutions as the logic to resolve the issues of lack of access and opportunity in a free society, leads to the faulty conclusion that the victims of discrimination are somehow to blame for the outcomes of the practices and policies that have been used against them. For example, it suggests that if people do not enjoy basic opportunities in the work place it is their own fault rather than the discriminatory practices of employers. Political strategies like blaming the victim exacerbate racial tensions and derail efforts for needed structural reforms.

The conditions affecting the health status of Black women in the United States are among the worse of any industrialized nation and, in fact, many nations in the developing world have more favorable outcomes for infant mortality than urban U.S. Blacks. The continuing social and psychologic stress which results from the combined inequities based on race, sex and class dramatically alters the quality of life and enjoyment of basic freedoms for Black Americans. Any person desiring a seat on the highest court in the land, ought, at a minimum, be able to articulate the basic issues of life, liberty and the pursuit of happiness for such a significant population group - especially when it is his own referent group in question.

2. AFFIRMATIVE ACTION

As Chairperson of the Equal Employment Opportunity Commission, Clarence Thomas was openly hostile to the guidelines developed during the 1960s to prohibit employer practices which have a disparate impact on minority workers or applicants, and that, cannot be justified as measures of job performance. These guidelines were a basis for the Supreme Court's unanimous decision in Griggs v. Duke Power Company in 1971, holding that such practices were violations of Title VII when they were not justified by business necessity. These guidelines were also the basis for hundreds of class action suits in the 1970s and 1980s attacking systemic barriers to equal job opportunity. Thomas said he

believed the guidelines encouraged "too much reliance on statistical disparities as evidence of employment discrimination".[1] Although Thomas did not carry through his threat to repeal the guidelines, he did muzzle efforts by the EEOC to enforce them through suits attacking institutionalized practices of discrimination. Systemic charges decreased while he was Chair of the EEOC.[2] Thomas opposed the use of goals and timetables as a part of conciliation agreements and court approved settlements, and demolished the EEOC's unit set up to secure systemic relief including goals and timetables.[3]

Thomas has attacked the two most important Supreme Court decisions approving voluntary affirmative action by private and public employers to overcome past patterns of exclusion or limited representation of minorities and women. He called these decisions an "egregious examples" of misinterpretation of the constitution and legislative intent.[4] Thomas attacked a Supreme Court decision upholding the authority of Congress to assure qualified minority contractors a share of government contracts as remedy for past exclusion, terming the law an improper creation of "schemes of racial preference where none was ever contemplated".[5]

Of grave concern is Thomas' across-the-board and all encompassing attack on affirmative action to remedy systemic discrimination. Unlike some proponents of judicial restraint, he gives no deference to the will of the majority as expressed in Congressional legislation (Fullilove), nor would he permit private employers to act voluntarily to remedy their past practices (Weber). Additionally, he would restrain the authority of the courts to order race conscious remedies even in the most egregious cases of systemic discrimination (Paradise).

While Thomas recognized the absurdity of the once-debated notion that the "American ideal of freedom" included freedom to own slaves, he failed to recognize that powerful activist government intervention was required to address the effects of the bitter history of slavery. Thomas' conservative view is an outgrowth of his attempt to relate nature law to the Constitution and expand the Constitution's original intent. He would have us believe in the absence of government intervention, fairness and equal opportunity would exist. Unfortunately, Thomas is out-of-touch with 20th century discrimination in the United States and should be denied a seat on the Supreme Bench of the Land.

3. AGE DISCRIMINATION

Hundreds of senior African-American women have suffered in silence as the result of Judge Thomas' violations of the "rule of law" in failing to act on over 13,000 Age Discrimination cases while Chairman of the EEOC.

These senior African-American women are our mothers and grandmothers, women who have traditionally held the dirtiest jobs,

worked the longest hours, for the lowest wages, received the least amount of praise and recognition and who have paid a heavy price in order that we might stand here today. These same women represent one of our richest resources, the elders of our communities and our churches. Judge Thomas has demonstrated by his actions, far beyond any works we can say, why he should not be seated on the Supreme Court of the United States.

In America, those who rise to sit in judgement of others have traditionally been noted for their extraordinary ability to provide incisive insight into issues, compassion, caring, wit and must be the possessor of an unshakable system of principles, values and beliefs in which we could all be proud -- a value system which was distinguished by its ability to provide equity and equality to all human beings but especially those most vulnerable and/or unable to protect themselves.

In our view, Judge Thomas fails each of these tests. His speeches, rulings, actions and refusals to act, all portray a lack of incisive insight, a lack of compassion and caring and, perhaps most important, a lack of an unshakable system of principles in which we could all be proud. Instead, it would appear that the ebb and flow of politics is his guiding principle.

As America becomes grayer and grayer, it will become more important, not less so, that our Supreme Court justices have an overall appreciation of the need to protect and defend those who have spent their lifetimes contributing to the welfare of this nation. Sadly, we find no evidence that Judge Thomas has reached that stage in his development and that he can only contribute his own narrow, flawed view of all of America's senior workers regardless of race and gender.

Given these views, we do not believe that it is only senior African-American women who are in danger but anyone who attains the age of 60 and attempts to force an employer to treat them fairly and equitably under the current Age Discrimination laws.

4. REPRODUCTIVE RIGHTS

Clarence Thomas' stated belief in and advocacy of "Natural Law" (which historically has been used to limit the lives and opportunities of women) in crafting and applying law principles and his expressed hostility to the fundamental right to privacy embodied in the Griswold v. Connecticut and Roe v. Wade decisions (which protects and guarantees the right of married couples to use contraceptives and for women to choose abortion) is cause for great concern for all women in general and poor African American women in particular. Historically, African American women have had the least control of their reproductive choices, including if, when, where and by whom we would have children. Before abortion was legalized in this country, the majority of women who died gruesome deaths from illegally performed abortions, or bore more children

than they could adequately care for were women of color. Clearly the right to safe, legal and inexpensive abortions is critical to the health of African American women and their families. Given the extreme nature of Judge Thomas' views, the possibility that if confirmed, he will endorse extreme limitation on women's most fundamentally important right, the right to make her own reproductive choices, is alarming, and his nomination must be vigorously opposed.

5. ACCESS TO HEALTH CARE

We hold valuable the right of individuals to have equal access to the best health care that our society can provide, and that cost not be a determining factor in the quality of services rendered.

A vast majority of African-American women are single heads of families, underemployed, undereducated and challenged with rearing children. The interconnections between education, economics and health are so entwined that in order to break the cycle of poverty the working and non working poor need to receive the best services available.

Health care coverage that is employer based, which is limited at best, and coverage that is subsidized by the government, sets up two classes of care. A lack of access and coverage of preventive services means that it is difficult for poor families to promote healthy lifestyles. This is evident when examining infant mortality statistics of African-Americans, which clarify the medical and social implications of health care. The current approach involves increased technology when increased access to service and improved quality of life are needed.

The current health care crisis is forcing the Nation to look to health care reforms. African-Americans need public servants who will ensure that health care is protected as a right and ensured by nature of birth. We need public servants who will enact legislation that will holistically improve the quality of life for African-Americans. We hold evident that every decision, every law, affects the quality of current life and future generations.

ENDNOTES

1. New York Times, December 3, 1984, p.1

2. Committee on Education and Labor, U.S. House of Representatives, Ninety-Ninth Congress, Second Session, A Report on the Investigation of Civil Rights Enforcement by the Equal Employment Opportunity Commission, Serial N. 99-Q, May 1986.

3. See Interview with Michael Middleton, St. Louis Post-Dispatch, February 26, 189, p.1B.

4. Thomas, "Civil Rights as a Principle Versus Civil Rights as Interest," Assessing the Reagan Years, ed. by Cata Institute, 1988, supra note 2 at 388-99.

5. Ibid, at 396.

The CHAIRMAN. Thank you very much. Let me begin the questioning by asking first of Ms. Yard, are you concerned that, from your perspective, Judge Thomas' failure to recognize a woman's reproductive rights as being fundamental—that not only will it deny women the right to abortion, but it will also affect the other end of the spectrum, and that is that it could require women to be in a position where they would have to choose between not bearing children and having a job, like the case involved where a majority of the Supreme Court ruled that the practice of a business saying that if a woman wished to continue to work in this particular department of the business because, "it might endanger the fetus," she had to make a choice? She either had to do something, which would be sterilization, or she had to move to another department, which would be in many cases a lower-paying job. Is your concern at both ends of this?

Ms. YARD. Yes, I am.

The CHAIRMAN. Well, let me ask you, Ms. Neuborne—as usual, in my experience with dealing with you on legislative matters, you have put things very succinctly and to the point. And, to you, as I understand this, it breaks down into basically one of two choices for this committee. We either look at his record and conclude from his testimony, where he has moved away from that record, that he has changed, or we conclude that a combination of the changes he has enunciated and his silence requires us to rely on the record prior to his testimony. Is that the essence of what you are telling us? Is this a credibility issue?

Ms. NEUBORNE. Some of it is a credibility issue, and indeed as to what you can do now, you could bring him back and you could insist that he answer the questions he has not answered, which left you and certainly left us unsure of his position. So we are forced to either—among us, the witnesses and the Senate, to perhaps argue over certain words and what those words meant in past statements that he has attempted to disavow rather than dealing with his honest statement now of what he believes about the constitutional rights that are at risk here.

So, yes, I think you do have an enormous responsibility here. You are faced with a record that is equivocal at best, and indeed we believe it is a very negative record. That is our perception of it. You could bring him back to ask the questions that you—indeed, Senator Hatch said he was asked 60 times to tell us his position on the issues about the woman's constitutional right to choose, and he did not answer 60 times.

You could bring him back; you could insist that he answer that question and tell the American people where he stands. At that point, I think you then have to decide are his views appropriate views; is that where we want our Supreme Court to be going.

When he makes statements about affirmative action and about women's rights—and we have seen that for 40 or 50 years we have been moving in one direction on those issues. We have understood the need to expand the rights of women and blacks because they have not shared in the equality that this Constitution promises. Do we want to turn that around?

The CHAIRMAN. Well, I don't mean to cut you off, but my time is about up and I want to ask Ms. Smeal a question, if I may. I was

impressed with your precision, and I am not being solicitous. You said that his writings have inferred that he has opposed, and I don't know anybody who could quarrel with that. At least I don't quarrel with that. And you joined the legitimate chorus of those who talk about the process.

Now, I have two questions, if I may, and a preface. It wasn't until relatively recently—as a matter of fact, if I am not mistaken, it wasn't until a speech I made to the American Bar Association about 4 years ago out West, or 5 years ago, that the editorial writers of this country even acknowledged we had a right to take into consideration philosophy.

This committee used to dance around about character and dance around about judicial temperament rather than frontally say we have a right to know what the philosophy, what the jurisprudence, what direction the nominee would take this country in. The irony is once we have crossed that threshold finally, now we find ourselves in a position where the process is viewed as a caricature of itself when for the first time it is being honest in terms of attempting to—whether it gets it or not, whether it makes the right judgment or not, a different question.

And I don't say that in defense of the committee. I say that as a preface to the question. First, should this committee, in your view, ask a nominee explicitly what his or her position is not just on choice but on whatever issue is of interest to a committee member, and be entitled to get a specific answer as to whether they would uphold, or whether they would modify, or whether or not they would overturn any existing case based on constitutional interpretation, not statutory.

And, second, the flip side of that: is there any limitation at all, if not a constitutionally prescribed limitation, a practical limitation, on how far a committee or a Senate should go in demanding to know every thought that a nominee has about any issue that is before the country.

Ms. SMEAL. Well, I think that it is in the purview of this Judiciary Committee and the Senate—I think it is their right and their obligation to know the philosophy of a person who is being nominated. I have argued continuously, I think, that it serves no one well to have a pig in a poke with something so vitally important as interpreting the Constitution.

Obviously, a person sitting here could not give his or her particular opinion on a particular case that is future-oriented, something that is coming before them in the future in that particular case. But for them to tell us how they stand on the right to privacy with some depth, how they stand on *Roe* v. *Wade* or *Griswold* or *Eisenstadt* with some depth—those are cases in the past. We already know how the rest of the Supreme Court Justices who are sitting on the Court feel on this. They ruled on it. I mean, Rehnquist and White were on the body and ruled on *Griswold*. We know how they stood.

We have a right to know where a person stands, and it is not credible to believe that they have no position, not even a personal position, on a subject like abortion. I think it makes a mockery of the process when you allow that kind of answer.

But more important than that, I think that we all have such limited vision. Maybe Molly or Senator Thurmond could say this; certainly, they have been here longer. But it seems to me that when Abe Fortas was opposed to be raised to Chief Justice, his philosophy was at issue.

The CHAIRMAN. But no one ever said that.

Ms. SMEAL. What?

The CHAIRMAN. The point is no one ever directly said that. They all said it related to his credibility and his honesty. No one flat out said until recently, until Bork, that explicitly, in the last 40 years that I am aware of—explicitly.

Ms. SMEAL. What about Carswell and Haynesworth?

The CHAIRMAN. Look at the record. It was all based on this notion of qualifications, were their educational backgrounds sufficient, did they have enough experience, did they have a judicial temperament.

I am not being critical in any way. My point is it is a dilemma for me as the Chair of this committee. I think the Senate has an obligation to respond. Historically, what the Senate has done—when a President has not made it clear that he is responding in a way to put his ideological view on the Court, the Congress—the Senate, in particular—has never responded. When, in fact, the President says, I am attempting to remake the Court in my own likeness, whether it was a Democratic President or a Republican President, the Senate has responded and said, OK, now we understand the game.

Now, my only point is, for a combination of reasons, I would argue—my friends on my physical right would probably disagree, but I would argue that for a number of reasons, in part because Eisenhower, and Kennedy, and Nixon even were not as frontal in their attempt to remake the Court—they appointed people whom they thought were, "the best qualified lawyers," and it was not into issues of what is your view on A, B, C, or D, whether it was explicitly asked or implicitly implied by the nominee or those seeking to find a nominee.

I teach a class on constitutional law at a law school on Saturday mornings, a relatively conservative class. I asked the people who originally, immediately, like most law school students do, bridle at the notion that we should be able to ask nominees where they are on specific issues—that tended to be the instinctive response of most people in my experience, since I have been on the other end of that criticism.

Then I asked the question of the class, I said, how many of you believe the President of the United States said the following: look, there is a vacancy on the Court, go and find me a woman or man who has a very strong record academically, who is honest and decent, and who has a depth of knowledge about the law, period? I said, how many of you believe that went out from the White House; don't do anything else, just go out and find that? Not a single student raised their hand, almost all of whom rejected my view as well, I might add.

The point I find interesting—as a matter of fact, I tell you very bluntly and tell everyone here, after this is over, regardless of whether or not Judge Thomas is elevated to the Supreme Court, it

is my instinct and inclination—and I have been working with my staff on this—to hold a series of hearings on the process to determine whether or not new ground rules have to be set for a process, and debate it in this committee and with the leading intellectuals of this country who are for and against the way it runs now, but it frustrates me.

Ms. SMEAL. It totally frustrates me. I mean, that is why I decided to move to the process because those of us who are participating in it and, in fact, are being questioned, as well as you, as the Senators—how can we be more effective—basically, there is a hopelessness now that is setting into the opposition mainly because there don't seem to be any game rules.

And, basically, I don't know who established these game rules on philosophy, but even on that it falls so shallow and so flat. But then there is the bottom line that our opposition on certain key issues has said they are going to stack the Court and now are proceeding to stack the Court. We cannot act in a vacuum. That is why I decided to bring in this magazine. We are not in a vacuum; we are all living right now, and we know that is the opposition's tactic.

I think that you Senators who are opposed to having the Court stacked must use every power that you were given, including the power to filibuster an appointment. You don't need to take what the president gives you on blind faith. I don't see why anybody would have to do that.

You were given a power of confirmation. We beg you to use that power with all of its might to protect our rights.

The CHAIRMAN. I apologize to my colleagues. I have run over my time. Again, I thank you for the precision of your statement and for raising an issue that is perplexing, I think, everyone for and against and undecided. But I yield to my colleague from South Carolina.

Senator THURMOND. Thank you, Mr. Chairman.

I want to welcome these distinguished ladies here today. I am glad to see Ms. Yard again. I hope your health is better. We have been concerned about you. I have no questions. I appreciate your presence.

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. Thank you very much.

I too want to join in welcoming the panel and to welcome back Molly Yard, who has had a difficult struggle fighting and continues the battle. We welcome your continued fight and courage.

In the testimony of Judge Thomas on the issue about women's rights, he indicated to a question that he had no quarrel with the heightened scrutiny test and indicated that he might even apply a more rigorous test. Why doesn't that give you some assurances that he would be more sensitive to the range of different issues involving gender?

Ms. NEUBORNE. Well, one of my thoughts, Senator, is that while he may use those words, in his actions and in his other discussions about women's rights he has not shown that he acknowledges the need for a heightened scrutiny test. In his treatment of women, for instance, in his discussion of the *Santa Clara* case where there were 258 male road workers and one female applied, he saw abso-

lutely no reason why she should be given even the most marginal voluntary preference by an employer in that situation. That to me says that he does not understand the need to move forward on women's equality, to have heightened scrutiny.

I think when we look back at what he did on the fetal protection policy that the EEOC basically sat on for several years while women were not able to get jobs in companies because the companies were excluding them because of the possibility of some injury to the fetus; again there he didn't move forward quickly. He sat on that policy for many years, and then came out with a very weak policy favoring women.

I don't believe that he truly understands the need for heightened scrutiny. He may say it, but when it comes to his making a decision that would resolve the issue against the Government and in favor of the women's right, I am not convinced that he will act that way.

Senator KENNEDY. Are you concerned about his quoting of Sowell about stereotyping women in terms of employment?

Ms. NEUBORNE. I think that was the most devastating, when he stated that he thought that women—he was very comfortable with Sowell's statement that women were not achieving—or not in particular jobs because they chose to remain at home, that they chose not to take the more difficult jobs. And then he again wanted to sort of wave that statement away and said he really was just addressing the issue of statistics and that we mustn't always count on statistics.

We must look at statistics because the numbers of women that have achieved in the workplace and the difficulty of women and minorities to move forward are still vital issues for us, and the numbers are very low. And it cannot be just on an individual basis that we would identify discrimination.

Senator KENNEDY. Is this one of the central concerns of women, that the stereotype is very alive and real out there in the job market?

Ms. WOODS. I was in my opening remarks talking about the one-by-one-by-one approach, and then citing the specific example in St. Louis at the EEOC office. We heard statistics back and forth, and everyone is going to cite them. But the fact is that most women are not in a position to seek individual redress, and you don't hear about it. But the overall impact is to depress their earnings, to make it less possible for them to support their families at a time when—what is it?—two-thirds of the new hires in the next decade are going to be women and minorities, and we are sitting around, instead of trying to get the final redress for women to make it possible for them to support their families. We are trying to find the excuse why we can justify casting a vote for a man whose record has been in the opposite direction.

That is why I think you hear this theme. We didn't consult on this at all about concern for the advice-and-consent process and our skepticism about it, because listening out there you can't believe this is happening.

Senator KENNEDY. Let me just ask a final question of Anne Bryant on title IX and the *New Haven* case, the application in terms of employment for women. What is your own sense about

how if Judge Thomas had been on the Supreme Court he might have ruled in that extremely important case involving employment for women?

Ms. BRYANT. The record of Judge Thomas at the Department of Education is one that I have in my written testimony in greater detail. But the case that you are referring to, the *North Haven Board of Education* v. *Bell*, was a very important case, coming after a series of events that I think are important. One is, Judge Thomas comes to the Department of Education and announces, when he is at the Office of Civil Rights, that he in fact has it in his future plans to undermine the enforcement of title IX regulations.

He comes in after the *Weil* case has been decided, and in fact that case and a court order has determined that certain time lines and policies need to be monitored, and he in fact does not—he basically goes against that court order and does not enforce the Title IV regulations.

So what the *North Haven Board of Education* case confirms again is that within title IX, as it was intended from 1975 on, it should, in fact, also include job discrimination and job protection for employees in schools and colleges, not just title IX regulations for students.

I think the connection that I worry about is the whole issue that I was talking about in terms of equal opportunity in education and employment.

Your prior question I think is important. The Department of Labor under Secretary Martin has come out with this major "glass ceiling" study. The fact is stereotyping is alive and well. Women are not moving up in the work force into jobs where there is a greater wage than minimum wage. And I think the Department of Education study, Cliff Adelman's study on "Thirtysomething," where he studies masses of women in the class of 1971—the fact is that we have a discriminatory workplace, and we need these laws to protect women.

Senator KENNEDY [presiding]. Thank you.

Senator Simpson.

Senator SIMPSON. Thank you, Mr. Chairman.

Welcome to the committee. Ms. Yard, I do indeed wish you well and healing. You and I have had a couple of good rounds together in the past, both here and in private—spirited would be the word, I guess—and then once in the hall, too. I don't agree with you on many things, but I want to tell you I deeply admire your courage, and I told you that before. That is not some obsequious statement or fawning statement. I really do. It does take one to know one. You are a very courageous lady, and you have passion, true passion, for your causes. I wish that more people had passion for their causes. Maybe some of the Justices, if they showed that passion, they would never get by this committee, though. That is the problem—for them. And so we have to have the passion from the citizens, and you certainly are one of those.

You make that passionate defense of a woman's right to abortion, and I have said before to you I fully agree with that position on reproductive choice. And I grilled him pretty extensively on that in private when he was making his visits. I asked him, you know, I said I feel very strongly on this issue. And he answered

much as he did here. There was nothing different he said in private than what he said here publicly.

And he knows, like all of them know, whatever decision he would make in public he would get torn to pieces. I mean, that is the way it works. If he sat on one side, the other side would tear him to shreds. If he goes one way, the other side tears him to shreds. Suddenly this procedure, which I earnestly say to you is very fair and very expansive—and that is the way the chairman does his work. Chairman Biden is fair. And this is rather tedious, protracted, prolix. We help make it so. That is part of our lives. It is a long procedure. It is not news of the hour procedure or news of every half-hour procedure, and that is what I think some seek in it. They are over—they expect something that cannot be in a procedure like this.

So it works, and I think it is good that we do have some hearings on the system and what it is, and maybe we can make it better. But we can't make it better by limiting people from both sides, who feel very, very strongly on both sides.

I have been asked—I come from Wyoming, and I get my lumps on the reproductive rights issue. But I get another one. They say, Why don't you ask him about something that really is important to us, and that is ask him about how he is on the 2d amendment and gun control. Because if he is not right on that, Simpson, junk him. Get him. We are counting on you to do that.

Well, I am not going to do that. I have asked him about that, and he said, you know, he wasn't going to get into anything of high controversy. No Justice ever has, and especially Justice Thurgood Marshall when he avoided all questions with regard to the *Miranda* decision when he was seeking confirmation. He never responded to the passion of Irwin, to the passion of Eastland who wanted to nail Thurgood Marshall and find out what he was going to do with that decision, *Miranda*, which so irritated them and they wanted to do something through him. He responded just as Clarence Thomas has responded to us.

Let me just ask one question. I appreciate your forbearance, Mr. Chairman.

I think it was Anne Bryant—and my wife is very active in AAUW for many years in a chapter in Wyoming, and I know what work you do. It is very special. But you spoke of the characterization of the testimony of those in opposition as being very detailed and specific. It wasn't the same hearing I have been at all these days. You say the testimony in support of him was just mainly stories about his personal life from his childhood and so on.

I respectfully say that that isn't so. Some of the law professors who testified against the nomination had not even read his opinions. One lady last night, a lady lawyer, had not read his criminal decisions and was speaking about how terrible they were. And I said every one of his criminal decisions was concurred in by Judge Ginsburg, by Pat Wald, and by Abner Mikva, so please let's have honest remarks. If you don't like him, that is a different matter. I can understand that.

But all of the highly qualified witnesses that studied his record spoke authoritatively of his skill. The American Bar Association said that to give him this rating he had to have "outstanding legal

ability and wide experience and meet the highest standards of integrity, judicial temperament, and professional competence." That is the ABA. A thousand lawyers were polled to give that decision.

It just seems to me that it is, I think, not correct when we have been here all these days and found that these things are just not so. I guess that is what makes the hearing vexing.

Well, I haven't asked any questions. I have done that again.

Ms. BRYANT. Senator Simpson, let me just respond to that.

Senator SIMPSON. Yes, please.

Ms. BRYANT. I can speak for my colleagues here and for those that I have worked with as they prepared their testimony in opposition to Judge Thomas. And I will tell you that the kinds of case analysis, his speeches, his writings have been in great detail. So we may disagree on the nature of everyone's testimony, but I was talking about the highlights and simply referring to the comments that were made to the panel before us about what a wonderful person he was. And I think he probably is. But I am talking about his record as a jurist, his record in EEOC, and the Office of Civil Rights, which is what I focused on.

So we may have a disagreement about all of the different people who came before you, but I think the homework has been done, at least by my colleagues here.

Senator SIMPSON. Well, I do appreciate that, and I think the homework has been done by those of us here, too, respectfully. And I think if you can read the decisions about the accusations about the EEOC, hear what he did for women in the *Meritor Savings Bank* case, hear what he did for them with regard to the U.S. Navy and the woman with the sex discrimination case—these things were done by Judge Clarence Thomas, not by some surrogate. And it seems to me that it is so easy to overlook those things, and my purpose is to try to address them.

The *Adams* v. *Bell* litigation was clearly defined by the man that was his predecessor. He said there was amassed a tremendous backlog of complaints and that Clarence Thomas was the one who just happened to move into the cross hairs at the time that the trigger was pulled.

Now, Singleton wrote about that. That is in the record. I would just say for everything that you can present to us, almost without exception today, everything has been covered and responded to.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Simon.

Senator SIMON. Thank you.

First, I want to join everyone else in welcoming Molly Yard. They didn't take any fire out of you in the hospital. One great advantage of having been there is that even Alan Simpson is good to you now. [Laughter.]

Senator SIMPSON. She kind of got to me.

Senator SIMON. Harriet Woods started off by saying advice and consent is more than a prerogative, it is a protection for the people. If I may modify that excellent statement, by saying it is more than a prerogative, it should be a protection for the people. Whether it is a protection for the people depends on what we do.

If I may differ just slightly—and I am not sure I am differing with the Chairman—in terms of philosophy, that has always been

a consideration. If I may quote Senator Strom Thurmond, in 1968, the Abe Fortas nomination:

> It is my contention that the Supreme Court has assumed such a powerful role as a policy-maker in the government, that the Senate must necessarily be concerned with the views of the prospective Justices or Chief Justices as they relate to broad issues confronting the American people and the role of the Court in dealing with those issues.

In 1971, three legal scholars prepared an excellent memorandum for Senator Birch Bayh, and let me just read their summary at the beginning of their memorandum:

> Our conclusion, briefly, is that although a nominee's experience, legal ability and personal integrity are necessary conditions for his confirmation to the Supreme Court, they are not and they have never been considered sufficient conditions. It is the Senate's affirmative responsibility to examine a nominee's political and constitutional philosophy, and to confirm his nomination only if he has demonstrated a clear commitment to the fundamental values of our Constitution, the rule of law, the liberty of the individual and the equality of all persons.
>
> That seems to me to be just fundamental, in terms of our responsibility.

If I may ask any of you who cares to respond, I notice that later today we have one group, Concerned Women for America, who is going to be speaking for Judge Thomas. Is it fair to say that the majority of independent women's organizations who have taken a stand have taken a stand in opposition to Judge Thomas?

Ms. WOODS. Yes, and I think it is important to notice the bipartisan nature, too, because there has been a suggestion that the opposition to him is because of his party or political philosophy, and I think that many of these groups are either bipartisan or nonpartisan groups.

Ms. AVERY. I think it is also important to look at income levels. Our membership, as I said, is composed mostly of women who live on lower incomes, and when our board made a decision to see if our membership was interested in testimony in opposition, we received overwhelming responses from women in opposition. I thought that was quite significant for us.

Ms. NEUBORNE. I would just add that I think, you know, there are many women in the Republican Party—indeed, Republican Women for Choices, and organizations like that—who speak out very strongly in favor of a woman's constitutional right to choose, and there is clearly no secret that President Bush has on his agenda appointment of judges who will reverse that policy.

So, I think when Senator Simpson says that, whichever way Clarence Thomas would go, it would be difficult for this committee to decide. I think this committee has to think about the constitutional right of a woman to make that choice, and that is the issue that is up before the Supreme Court, and if this nominee is that fifth vote against that constitutional right for women, that decision will have been made here when this body votes.

Senator SIMON. If I may get one quick question in before that light turns red, and I see it just has——

The CHAIRMAN. Go right ahead.

Senator SIMON. Each of your organizations has taken a stand before the hearings commenced. Has Judge Thomas' testimony in any way ameliorated your feeling? Do you feel better about his nomination than you did before his testimony?

Ms. BRYANT. I would like to address that. The American Association of University Women treads carefully and lightly in decisions like this, because our members are Republican, Democrat, and go across the spectrum. In fact, in the last 5 days, the kind of outpouring from our members, when they have heard and listened—mostly on NPR, because they don't all get C-SPAN—to the testimony, it has become even clearer to them that the record, the track record is what we are afraid of, and that the hearings and listening to Thomas have made them even more afraid of the potential that he would overturn some basic rights for women when he gets on the Court.

Ms. SMEAL. Frankly, the hearings brought up a new issue, and that is his credibility, because there is no question that some of the statements he has made have stretched any reasonable person's credibility. So, if anything, you see more determination and more feeling that this is a vote that is going to be extremely hostile to those women's rights that we hold so dear.

Ms. WOODS. Briefly, I found many women are offended, because, for example, in the whole issue of that White House report, where he responded very quickly on *East Cleveland* and said, oh, I wouldn't want that in. And when the question was, what about these other issues that are more related to women; it was hem, it was haw, it was finally saying, well, of course, I really feel they should have restricted this report; but it wasn't the same sensitivity or respect for those concerns and it reinforced the record which you might have assumed was sort of a get-along, go-along, that's what the administration wanted of the EEOC kind of thing. This now showed that he seemed to be really unresponsive on women's issues.

Senator SIMON. Molly Yard, you have the last word.

Ms. YARD. Senator Simon, what I think you need to understand about the National Organization for Women is that this decision was not made by me nor by our national board. It was made by our entire membership assembled in a national conference, a delegated body selected by their peers back at the grass roots level, and this decision was of the membership of NOW to oppose Judge Thomas.

Listening to the testimony, frankly, I was totally puzzled at the beginning as to why being born into poverty qualified anyone to sit on the Court, why was that such a big to-do. I suppose it may make a person more compassionate, which would be good, but I don't think it qualifies one to sit on the Court, and the more I listened, the less impressed I was with his possible promise for the Court.

Remember that the only people we really have had to count on on the Court are Brennan and Marshall. They are both gone and we need to have a replacement of that caliber, otherwise, women will not have any faith in the Court and we need to have that faith, so that we don't consider what is happening in this country to be a totally hopeless situation as far as women are concerned.

We are discriminated against everywhere, constantly, and now we are being told by the Court that we can't even control our own lives, because of the abortion question. What is going on here is really a very serious development, in terms of our futures and the future of our children, and we are dead serious when we say we want the Judiciary Committee of the U.S. Senate to lead a revolu-

tion. We need a revolution to change what is happening. You could be the agents for that change, by turning down this nomination.

Believe you me, we need change desperately in this country, not just for women, but for many, many people who are discriminated against and are oppressed. Their greatest champions, Brennan and Marshall, are gone, and we need to feel that we can have some hope in the Court in the future, and really that hope depends on what all of you do.

Thank you.

Senator SIMON. Thank you. I thank all of you.

Thank you, Mr. Chairman.

The CHAIRMAN. Ms. Yard, the likelihood that this President will ever nominate a Brennan or Marshall is about as likely as me nominating a Scalia, or our President. I think that is——

Ms. SMEAL. Yes, but if this Judiciary Committee turned back appointments, the likelihood of him continuing to nominate Scalias would decrease.

The CHAIRMAN. I am not suggesting that is not true, but getting a Brennan or a Marshall is another story.

Let me make it clear one other thing, and then I yield to my friend from Pennsylvania. This Judiciary Committee does not have the right, in my view, to turn back anyone. All it has the right to do is make a recommendation to the U.S. Senate, and I have been clear since I have been Chair of this committee, even if the vote on this committee were 14 against and 0 for, I would still report the nomination to the floor of the U.S. Senate, because nowhere in the Constitution does it say this committee shall advise and consent. This committee shall recommend. I know you were not implying that, but I want to make that clear for the record for those who may be listening.

Let me yield to Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

I think this panel has been very informative in going beyond the cases, on the issues, to the whole approach of procedure. Historically, nominees have been turned down for ideology, at least as far back as Judge Parker in 1930, and perhaps all the way back where there were considerations on Jay.

But the matter of questioning is new. I think it wasn't until Justice Frankfurter in the late 1930's that we started to question the nominees. Justice Douglas was supposed to have been outside the room waiting to see if anybody had a question for him. Justice White was supposed to have answered 8 questions. And when Justice Scalia didn't answer anything, there was great concern, and Senator DeConcini and I were preparing a resolution to structure the kinds of questions and answers which the Senate should expect, when Judge Bork came up.

Although Newsweek Magazine is sharply critical of the Senate for their characterization of the charade, they do acknowledge that it was in the Judge Bork nominations hearings that we first began to ask some questions. I have long believed that nominees answer as many questions as they have to for confirmation. I think we saw that with Chief Justice Rehnquist.

I think we have seen it right along, and the process has changed, because now it is like an NFL football game, where we trade tapes

in advance of the game. They look at our questions of the predecessor and we read their speeches, so it comes in fairly heavily scripted, with a lot of opportunity for coaching and for preparation, and it does eliminate a lot of the candor, because we know a lot about each other's positions and the kind of approach.

Judge Thomas has answered a fair number of questions and he has also refused to answer a fair number of questions. He answered questions about freedom of religion. Ms. Bryant, you commented about school prayer, he did answer pretty forthrightly on separation of law and state. He probably didn't know that case was pending on the docket for next term. He answered a pretty good question on the exercise clause and was pretty strong on stare decisis.

You may not have liked his answer on death penalty, but he answered it. On the right to privacy, marital privacy, single person's privacy, three-party equal protection clause test. He wouldn't answer about *Bowers* v. *Hardworth,* wouldn't answer much about *Rust* v. *Sullivan,* wouldn't answer *Paine* v. *Tennessee,* and mostly he wouldn't answer about *Roe* v. *Wade.*

The *Roe* question—and, Ms. Smeal, you really had it on the nub, I think, to what a lot of it comes down to, wanting to know in-depth his position on *Roe* v. *Wade.* Maybe he should answer that question, but I frankly can't quite see it, because that really has to come up in the context, in my judgment, of a specific case where you have facts. There are a lot of different approaches and argument, briefs and deliberation, and then a decision.

Let me go to that issue, Ms. Smeal, and any one of you could answer it. As I understand your position, you really want assurance—and we went through this with Justice Souter last year, and I don't think that *Rust* v. *Sullivan* is conclusive as to what Justice Souter is going to do on *Roe* v. *Wade.* There are a lot of different issues in the cases, and I make that point, because I think Justice Souter may be watching. They have a lunch break over there now, and this is about the time to watch.

Let me ask you, Ms. Smeal or anyone—I am not lobbying, he can do anything he wants, he has got a life position—but you really are looking for a commitment, as I understand you, that the nominee is going to uphold *Roe* v. *Wade,* and——

Ms. SMEAL. Actually, I think I was careful in what I——

Senator SPECTER. Let me give you the second part of the question, because the light is on and I can't ask this later. Maybe I can, as the Chairman has just nodded——

The CHAIRMAN. You go ahead.

Ms. SMEAL. I was very careful, when I said that what was happening here is what he was answering was challenging credibility. He says that he never discussed this issue since 1971. I think that is a character answer. I mean, do you believe that? How can anybody believe it? He only named two cases that he thought were important since 1971, and this is one of them. He never discussed it? He has no personal opinion on the subject of abortion? That is a credibility question. How could a grown man of this age, in this day and age, not have a personal opinion?

Judge O'Connor had a personal opinion. She testified that she was personally opposed. I happen to have testified, incidentally, to make the record, I testified for her. I feel very strongly that he

could tell us his reasoning on the right to privacy. Obviously, he can't tell us of a case that is either pending, like *Pennsylvania*, but, my goodness, he can say more and I think he has to say more, and I think that this decision should be a part of your confirmation process, because this is not just any vote. This is a vote that will determine for women a crucial, crucial civil liberty which many of the Senators, not only on this Judiciary Committee, but the full body are pledged to, and they should know and we should know how important they view it.

Senator SPECTER. Let me ask you a question bluntly: Do you think he should answer whether, had he been on the Court when *Roe* v. *Wade* was decided, whether he would have been with the majority or minority?

Ms. SMEAL. Yes, I think he should tell us where he stands on *Roe* v. *Wade* and the right to privacy.

Senator SPECTER. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Let me ask one last question, before I let the panel go. Again, as usual, Ms. Smeal, you are direct and to the point. You point out to the committee that you believe those of us who took a chance on Justice Souter, that we made a mistake, we should not have taken a chance, et cetera.

The point I was making earlier with regard to the way in which the process has developed and evolved wasn't that people in the past did not consider ideology, did not consider philosophy, and not that there weren't some like the Senator from South Carolina who very forthrightly stated it, but the Senate as a whole, at a minimum, danced around that subject for the last 30 years, as a whole.

Now, since you mentioned it, you testified on behalf of Justice O'Connor. She did not answer directly what she would do on *Roe*, when asked. She said she would not comment, to the best of my recollection, and we had to make a judgment based on faith. I assume you made a judgment based on faith, and I assume that then Judge O'Connor—no, Senator O'Connor—Judge O'Connor, she was on the State court at that time, she went from Senator to State court—then Judge O'Connor, I assume she didn't confide in you before she testified how she would rule on *Roe* v. *Wade*.

So, is your standard changing, as well? Not that it shouldn't. I am not being critical, I am just trying to figure out how this process moves. You were prepared, you came as a leader of the largest women's organization in America, if not the world, came forward and said we are for this person, she refuses to answer how she would rule on *Roe*, we are still for her. Would you do that again for any nominee who would not explicitly tell you whether they were for *Roe*?

Before you answer, Harriet, let Ms. Smeal answer this question, and then you can make whatever comment you want.

Ms. SMEAL. The reason I put in the testimony on Judge O'Connor is that she did say she is personally opposed. I think that she was more forthright than this nominee.

The CHAIRMAN. I agree with that.

Ms. SMEAL. There is no question in my mind. We made the decision on supporting her, not because of her sex alone, although she was the first woman to be confirmed. We did it, because her entire

record up to this point had shown moderation, had shown that she could rule with us in some cases. We knew that she was going to rule against us in others, from the record, but at least we felt that coming from Ronald Reagan at that time, that we had a chance with this nominee.

I think history shows that, in fact, she has not been consistently one way or another, frankly, more conservative than we maybe had thought, but there still was some chance. We don't feel that way with this appointment at all.

The CHAIRMAN. If I can stop you, I understand how you feel about this appointment. What I am trying to work through here is that I doubt whether there is any nominee—correct me if I am wrong, any of you—the next nominee, and, God willing, there will be no more as long as I am chairman, but I expect that won't be the case. This is becoming an annual event.

Ms. NEUBORNE. We know that.

The CHAIRMAN. We may be here next August, assuming we are all in good health and I am here, we may be here next August doing the same thing.

What I sense is changing, as the deck changes, the deck on the Court changes, is less latitude—I don't say this as a criticism—less latitude in terms of a nominee being able to give generalizations about his or her view—this is not a criticism—less latitude in terms of a nominee being able to give generalizations about his or her view, and a requirement explicitly that unless a nominee sits before us, a Bush nominee next year if it occurs, or if this nominee is defeated and another nominee is sent up, I suspect—I may be wrong—unless there is an explicit recognition by the nominee from his or her past writings that he or she supports choice or a willingness of the nominee to explicitly say that before this committee, that you would urge us to vote against that nominee. Is that right or wrong?

Ms. NEUBORNE. I think there is some truth to that, but it is not the entire story. I think there are two issues here. First, we have seen two administrations that are so ideologically focused in one direction that we have lost the sense of process, Senator, and I think that's what you are saying, that there is no question that they are not appointing the best nominees, and Presidents in the past—and I think you heard this from the law school deans from Harvard and Yale—appointed Republican and Democratic. We know the process has changed. What we are facing now is a Court that is going to reverse constitutional rights that we have worked for 30 or 40 years to develop for women and for people of color. It is not just choice.

Clearly, the affirmative action and——

The CHAIRMAN. No, I know it's not——

Ms. NEUBORNE. So I think the answer is yes, we have to know and you have to know whether the Supreme Court precedent of the last 30 or 40 years is going to turn around——

The CHAIRMAN. Right. Notwithstanding the fact that in the recent past, we did not do that. That's the only point I'm making.

Ms. NEUBORNE. Well, and the other point—and I think you made it, or—I can't remember; I heard it late at night—someone said it—

maybe the first or maybe the second or maybe the third nominee——

The CHAIRMAN. It was I.

Ms. NEUBORNE. It was you, Senator, and I was listening even though it was very late at night when I was hearing it. We are on the fifth or the six nominee. We are at a point where the Court is irreversibly going to change——

The CHAIRMAN. Don't, don't——

Ms. NEUBORNE. No, I'm not arguing.

The CHAIRMAN. Your response seems to be—I am not being critical. I am just trying to point something out——

Ms. NEUBORNE. But that is the truth.

The CHAIRMAN [continuing]. And ask a question about process. When it was the first nominee of Ronald Reagan, and there was a Court where no one feared that there was a legitimate prospect of *Roe* being overruled, you, the leading women in America, speaking for the leading women's organizations in America, said, "We'll take a chance," and that's what you did, and O'Connor was a chance. O'Connor said, "I am"—what was her comment, so I don't misspeak—what was her comment?

Ms. SMEAL. My understanding was she was personally opposed.

Ms. NEUBORNE. Personally opposed.

The CHAIRMAN. Yes. So she explicitly said, "I, Sandra Day O'Connor, am personally opposed to abortion," first. I imagine any nominee—we didn't even get Clarence Thomas to say that. Nothing in his record explicitly says that—implicitly—nothing explicitly said that.

Had Clarence Thomas said in any of his writings, "a) I personally oppose abortion," there would be a crescendo that would have occurred—I think.

Ms. NEUBORNE. Senator——

The CHAIRMAN. Let me finish. The reason I mention it is not that that is bad, not that it is good, but that what has happened now is the Court is no longer a pro-choice Court with the possibility of adding an anti-choice nominee, Sandra Day O'Connor. The choice looks like it is an anti-choice Court, or about to be firmly an anti-choice court, and now the threshold is raised. And that is part of the process I think the American public doesn't understand—not that they agree or disagree with it—doesn't understand and that we, in terms of process, have not accurately articulated.

You would not, I suspect, Eleanor, or Ms. Smeal—I doubt whether the nominee—if the Court were exactly like it is now in terms of its make-up ideologically, and Sandra Day O'Connor came before us now, I would be very surprised if you would be here to testify on her behalf, her having said under oath, "I am opposed personally to abortion," and her then refusing, as she did, to answer any questions about *Roe* v. *Wade*. I suspect you all would be here saying as much as we want a woman on the court—no—or am I wrong?

Yes, Harriet.

Ms. WOODS. Senator, let me just jump in, because I know of jurists with records who would probably say "I am personally opposed" but who have, in the way they have administered justice, or in their cases in any number of issues, demonstrated a record where they approached those cases in a way to look at past law,

the precedent, the situation in society, the impact—I really don't know in the case of this Wichita judge what he stands for or what he doesn't, but in effect he said is "Whatever my personal belief, I am here to follow precedent and to follow what the rule of law is, the Federal law."

So I want to be very careful. I think it might very well be that personally, I could not stand before you and support anyone who said, "I am opposed," but I might very well, if that person had a record of showing their ability and were honest—that's the issue—here is somebody, when this is one of the greatest issues of our time, and he won't even say that he has thought about it. I mean, that——

The CHAIRMAN. I was trying not to focus this on Clarence Thomas. I was trying to focus on the process——

Ms. WOODS. I understand that.

The CHAIRMAN [continuing]. And maybe we should leave it for another hearing.

Ms. NEUBORNE. There is a process question. Can I make one comment on the process?

The CHAIRMAN. You can always make another comment.

Ms. NEUBORNE. The issue of separation of powers is something we have discussed a little, and I think that's a very important thing to look at. If in fact the President has the power to stack the court, to have an ideological court, and he has the veto power to stop Congress from trying to change what that court has done——

The CHAIRMAN. No question about it.

Ms. NEUBORNE. Look at the civil rights legislation and why it has been vetoed——

The CHAIRMAN. I am going to cut you off, because I don't disagree with that.

Ms. NEUBORNE. All right.

The CHAIRMAN. That wasn't the purpose of my question. I was just trying to find out whether the threshold is changing.

Let me leave you all with the following concern. Beware of being too critical of the notion of natural law, for if you are too critical of the notion of natural law, you will find it incredibly more difficult to find the notion of unenumerated rights within the Constitution, and you may find you have to swallow a concern that I don't think you may have thought through. And there is all kinds of natural law, but if you blanketly criticize the notion of natural law being any part of our historical and constitutional tradition, then I challenge you to find where you are going to find unenumerated rights, the very things that are the essence of what you believe most deeply in, for if there are no unenumerated rights, there is no privacy and there is no choice.

Because you look like you have the microphone, Ms. Yard, you will have the last word, including myself; no one else speaks. What would you like to say?

Ms. YARD. I just want to say, Senator Biden, I can't believe you are asking the question you are asking, because of course we aren't going to put on the court someone whom we believe will vote to overturn *Roe* v. *Wade*. We are talking about women's lives.

The CHAIRMAN. I know.

Ms. YARD. We don't take it that lightly. We can't, we can't possibly. That's our concern.

The CHAIRMAN. I appreciate that, and all I can say is I hope you or no one else thinks I or anyone else up here takes it lightly, because I don't.

Ms. YARD. I am sure you don't.

The CHAIRMAN. Anyway, thank you very, very much for your testimony.

Senator SIMPSON. Mr. Chairman.

Ms. YARD. Senator Biden, Senator Simpson reminded me of the altercation we had, and I wanted to say that when we came up here, I was very disappointed that Senator Thurmond wasn't there, because of all the days I would have been happy to have been greeted as "a lovely lady," today would have been one of them—but he wasn't there to do it. [Laughter.]

The CHAIRMAN. I think he did—well—[Laughter.]

Senator THURMOND. Well, as far as I'm concerned, you're all lovely ladies. [Laughter.]

The CHAIRMAN. With that, don't you think it's time we leave?

Senator SIMPSON. Mr. Chairman.

The CHAIRMAN. I think we're ahead, Al.

Senator SIMPSON. No, I don't.

The CHAIRMAN. I don't mean "we"; I mean the process.

Senator SIMPSON. No—I think that this is great for the process, and I thought what you just said was excellent. And when Senator Specter related the history of the questioning, I think another part of it, if I might put it in the record, is relating to the kind of questions which should be answered, and it was my colleague from Massachusetts who said it eloquently at the time of the hearing of Thurgood Marshall, when Ted said, "It is my belief"—this is our colleague, and I enjoy him thoroughly; we don't agree on a lot of things, and we enjoy facing off—but he said,

> It is my belief that it is our responsibility as members of the committee to which the recommendation has been made by the President in advising and consenting that we are challenged to ascertain the qualifications and the training and the experience and the judgment of the nominee, and that it is not our responsibility to test out the particular philosophy, whether we agree or disagree, but his own good judgment, and being assured of this good judgment, that we have the responsibility to indicate our approval or, if we are not satisfied, our disapproval.

Now, that's what we have to do here, and it is the way it is, and this chairman does it beautifully, and there is no other way to describe it. It just doesn't happen to hit your end of the spectrum this trip, and we have members here—Judge Heflin and Arlen Specter and others who come to listen and to hear the testimony before they make a decision. And I think this is where some of these groups make a tragic mistake.

If on July 9 or July 6, suddenly they say, "We're going to 'Bork' him; we need to kill him politically"—and those are quotes by people in the movement—and people say his nomination is "an insult to the life and legacy of Thurgood Marshall and everything that he stood for"—and that's a quotation of your national president—how in the world do you expect us to have the willingness to listen when you have already buried him alive in July, before you have ever heard a word—and that's our job.

The CHAIRMAN. Well, Senator, if I could cut you off there——

Senator SIMPSON. I'm through.

The CHAIRMAN [contining]. And just make the point that it seems to me if you all are not able to say you are against him before you heard the record, then Senators shouldn't here say they are for him before they have heard the record, and all the Senators said we are for him—that's not a problem. So what's good for the goose is good for the gander, and we are finding that the goose changes as time moves.

Thank you all very, very much. I appreciate it.

Ms. YARD. Thank you. Let's hope we're not here next August doing the same thing.

The CHAIRMAN. Believe me, Ms. Yard, I hope I get to see you next August, but I hope it's not at one of these hearings.

Let me move on, and I have received the proper admonition of my colleague from South Carolina that I allowed and encouraged and was part of going beyond the time, and I will try not to let that happen again.

Our next panel, testifying in support of Judge Thomas' nomination includes a group of distinguished professors. I apologize if I sound too familiar with the first names, but this is the list as the White House gave us the list, and it says "Joe"—I don't mean to sound familiar—but Joe Broadus—I don't know whether it is Joseph or Joe and I apologize for the familiarity, but it is the list we were given by the White House—a professor at George Mason Law School in Arlington, VA; James Ellison, a professor at Cumberland Law School, which I have had the great pleasure of speaking at as well, and it is a fine law school, at Samford University in Birmingham, AL; Shelby Steele, a professor at San Jose State University in San Jose, CA; Rodney Smith, Dean of the Capital University Law School in Columbus, OH; and Charles F. Rule, a partner in the law firm of Covington & Burling in Washington, DC.

Welcome to all of you, and professor, if you would begin.

STATEMENTS OF A PANEL CONSISTING OF JOE BROADUS, PROFESSOR, GEORGE MASON LAW SCHOOL, ARLINGTON, VA; JAMES ELLISON, PROFESSOR, CUMBERLAND LAW SCHOOL, BIRMINGHAM, AL; RODNEY SMITH, DEAN, CAPITAL UNIVERSITY LAW SCHOOL, COLUMBUS, OH; AND CHARLES F. RULE, COVINGTON & BURLING, WASHINGTON, DC

Mr. BROADUS. Thank you, Senator.

It is a pleasure to appear here before the committee today, and I thank you for this opportunity. Primarily, I will be giving a report that evaluates two reports that I made on Judge Thomas—one on his performance at the EEOC, and the other on his work as assistant secretary of education at the Office of Civil Rights.

Primarily, these reports were approached by taking earlier reports that were critical of Judge Thomas and attempting to verify their conclusions from the record and going to court cases, going to the records of the EEOC, and going to various others sources to see whether those charges could be confirmed.

In terms of the attitude of my report, I want to tell you that I tried to make a certain kind of decision. I tried to separate out