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-