The CHAIRMAN. Thank you very much. Let me point out that you did exactly what I asked; you limited your comments to 10 minutes. I made a mistake, as has been pointed out by my staff and by the distinguished Senator from South Carolina, in that we had allegedly told every witness that they would be limited to 5 minutes because we have somewhere near 90 witnesses. And my physical constitution—that is one of the reasons why I would never want to be a judge.

Now, having said that, because we gave the first two panels 10 minutes, we will let the next panel as well go 10 minutes. But everyone else should be on notice from this point on that they are limited to 5 minutes. That little light will go off in 5 minutes.

Now, we will not be offended, Professor Michelman, if you get closer to 5 minutes than 10. But I will not cut you off, and I will not cut the next panel off either if they are under 10 minutes. But I would appreciate it if you would make it as short as possible.

The Senator from South Carolina keeps telling me to tell you what I have already told you, but I will tell you again. Your full statements will be placed in the record.

STATEMENT OF FRANK I. MICHELMAN

Mr. MICHELMAN. Thank you very much, Mr. Chairman. I think I get your message, and I will aspire to comply.

My name is Frank Michelman. I have been a member of the Harvard Law School faculty since 1963. That is 28 years there, and I am proud to say that I have survived.

What I would like to talk about is the one-issue issue; that is, the question that has been raised so many times about whether it is right or sensible for you to give a central place in your deliberations to the nominee's record on the question of abortion rights and your colloquies with him about that question.

Let me say first that we have to distinguish between the ideal and the actual. As an ideal matter, I would agree that there are strong reasons for striving to keep the process of nominating and confirming Justices from being used for purposes of packing the Court with friendly ideologues or with people who you think are going to decide one or another issue as you would prefer.

The independence of the judiciary may be in some ways an unachievable ideal. It is, nevertheless, a central tenet of our constitutional system. It aims at noble ends. It is an idea well worth reinforcing. And it does seem clear that this ideal may be compromised and eroded by deliberate, sustained attempts at court-packing through the process of selecting judges. And if that is true, then that concern certainly applies to your part of the process—that is, advising and consenting.

That is the ideal. What about the actual? Well, we all know that responsibility begins at home, and in this case it seems to me that home means 1600 Pennsylvania Avenue. Presidents Reagan and Bush both ran and were elected on platforms openly avowing a purpose to pack the Supreme Court with a view to overturning *Roe* v. *Wade*. Many Americans think they have good reason to believe that Presidents Reagan and Bush have had that plank in mind when choosing judicial nominees; maybe not in each and every

case, but at least as a general policy. Moreover, Clarence Thomas' particular record of speeches and publications surely gives Americans reason to think the plank had a bearing in his selection at this time, and that impression, I have to say, is not dispelled by the President's assurance that he simply chose the best qualified person.

The trouble with that assurance is that it simply doesn't seem to be true that Judge Thomas is, by the traditional standards, a truly—outstandingly a truly exceptionally well-qualified nominee. By the traditional understandings of qualifications for the Supreme Court, that would be rich and broad and tested experience as a constitutional lawyer or judge, notable accomplishment, admired mastery of the materials and methods of constitutional law, Clarence Thomas does not stand out as exceptionally well qualified for the Supreme Court. And I note that not one member of the ABA panel has said that he does through the obvious means of awarding Judge Thomas the highest rating.

Now, I want to say here that I am one who believes that it is very proper and desirable to consider in this process the Supreme Court's representativeness of the American people, and that does not change my assessment that Judge Thomas cannot reasonably be called the best qualified person for this job.

So the question for Senators doesn't arise in the abstract, but in the actual situation I have described, and I asked myself this question: Suppose a Senator comes conscientiously to the conclusion that this particular nomination really is very hard to explain or justify by the traditional standards. And the selection, therefore, seems to have been influenced by the nominee's record of prior declarations regarding a particular issue or set of issues.

Suppose that a Senator believes that for a President to nominate on such a basis is no less wrong than for the Senate to grant or withhold consent on such a basis. How does that Senator in this situation act effectively and in accordance with that judgment and that conviction? The only way I can see would be to refuse to lend his vote for the support of the nomination.

I have some additional thoughts about the one-issue question—am I close to the 5 minutes?—that I would like to offer. The question often is asked in such a way as to imply that abortion rights are just one neatly isolable issue among countless similarly isolable issues that come before the Court, important in its own right certainly, but still just one bone of contention among many others.

But that way of thinking involves a serious misunderstanding of how constitutional law works. Issues of constitutional interpretation don't come in separate packages like items on a store shelf, among which we arbitrarily, as fancy moves us, pick and choose. It is one Constitution that the Justices expound, and interpretations regarding one topic inevitably, and often unpredictably, interconnect with interpretations regarding others.

Your colloquies here make clear your understanding of how the issue of a woman's procreational freedom is inseparable from issues about contraception, about the privacy of marital intimacies, about the intimacies of unmarried persons of whatever sex, about family privacy and self-determination. *Rust* v. *Sullivan* unfortunately illustrates how issues of procreational freedom spill over into ex-

tremely momentous questions of freedom of expression and unconstitutional conditions.

What a judge thinks about *Roe* and how a judge thinks about *Roe* is inseparable from how that judge thinks about the whole tissue of constitutional law. It is inseparable from how that judge thinks about constitutional liberty, how he thinks about freedom of conscience, how he thinks about the status and place of women in our society, and what the Constitution has to say about that, how he thinks about natural law.

In our times and circumstances, we cannot fully know how a judge thinks about those matters if he refuses to engage us in earnest on the subject of constitutional protection for a woman's procreational freedom.

Finally, let us understand that apart from everything else I have said, the practical question of abortion rights is very far from being just one practically important legal issue among many. For many, many Americans, it is the issue of their lives—and I mean that literally in the sense of life and death, for the many whose lives or health would be sacrificed to their pregnancies by some of the extremely restrictive abortion laws we are seeing, and for many others whose life circumstances would force them to the back alley or to self-mutilation as the alternative to Government dictation.

For many, many more, the procreational choice is the issue of their lives in the sense in which life means running your own life, choosing responsibly for yourself who you will be and what you will do in life, rather than having the Government assign you a role.

Mindful of the Chair's request, I think I will leave it at that point and let others proceed.

[Prepared statement follows:]