during the Souter hearing, and they are already to take their pictures, is that all right with you guys? [Laughter.]

All right, if it is all right with the photographers, that is the way we will do it. We will recess for the approximately 15 minutes it will take us to make both votes and come back. We will recess until then.

[Recess.]

The CHAIRMAN. The committee will come to order.

We are prepared to proceed, and I thank our fifth panel for being so gracious. As I indicated, our panel is made up of a very distinguished group of Americans: Ms. Eleanor Smeal, president of the Fund for the Feminist Majority; Molly Yard, president of the National Organization for Women; Gloria Allred, a Los Angeles attorney, Ms. Allred is accompanying her client, Ms. Norma McCorvey, who was a plaintiff in the landmark case of *Roe* v. *Wade*; Helen Neuborne, executive director of NOW Legal Defense and Education Fund; and Elizabeth Holtzman, former U.S. Representative from New York and now the comptroller of the city of New York, who is not representing the city, but is here representing herself.

It is nice to see you, Liz.

I welcome you all and appreciate your great concern and interest, and I for one am going to have a number of questions, but let me begin by inviting opening statements. Unless you all have agreed to another way to proceed, I would like to suggest that we begin with you, Ms. Smeal, if you would go first, and then we will just work our way across the table, if that is appropriate. Is that the way you would like to do it, or does anybody have a preference?

Ms. YARD. Unless you want our former Congresswoman to go first.

The CHAIRMAN. OK. We will start with Liz and we will work our way down the other end of the table, then.

Again, welcome. It is good to see you back here. I wish you had never left.

PANEL CONSISTING OF ELIZABETH HOLTZMAN, COMPTROLLER, CITY OF NEW YORK, NY; HELEN NEUBORNE, EXECUTIVE DIRECTOR, NOW LEGAL DEFENSE AND EDUCATION FUND, NATIONAL ORGANIZATION FOR WOMEN; GLORIA ALLRED, LOS ANGELES, CA, ACCOMPANIED BY NORMA McCORVEY; MOLLY YARD, PRESIDENT, NATIONAL ORGANIZATION FOR WOMEN; AND ELEANOR CURTI SMEAL, PRESIDENT, THE FUND FOR THE FEMINIST MAJORITY

STATEMENT OF ELIZABETH HOLTZMAN

Ms. HOLTZMAN. Thank you very much, Senator Biden. Mr. Chairman and members of the committee, I am very grateful for the opportunity to testify here today, and it also gives me particular pleasure to be here to see a number of colleagues with whom I had the great privilege of serving together with at the time that I was in the House of Representatives.

The vacancy left on the U.S. Supreme Court by the resignation of Justice William Brennan, Jr., is slight, compared to the deeper void felt by the people of America throughout these confirmation proceedings. There is too little in these hearings, and in the past

record of the nominee, to reassure those concerned about civil rights, human rights or women's rights that Judge David Souter is suited to interpret our constitutional rights on the highest Court in the Nation.

For women, Judge Souter has failed to pass muster in three basic areas, three R's as fundamental as any subject in modern-day life: rape, *Roe*, and the right to be free from discrimination. Because he has failed to assure us of his fitness in these three basic subjects, he should not be confirmed.

Nothing exposes Judge Souter's sentiments more clearly than his attitude toward rape. In this regard, I refer to an opinion that he authored in 1988, as a Justice on the New Hampshire Supreme Court, *State* v. *Colbath* (130 N.H. 315, 540 A.2D 1212). As a former district attorney, and the first woman district attorney in New York City, I have overseen the prosecution of more than 1,000 rape cases. Judge Souter's opinion demonstrates a lack of understanding of the human dimensions of rape.

Rape is a crime that for too long was shrouded in myths. For many years, rape was a word barely mentioned in polite company. After all, it was thought, nice women did not get raped. Rape was perceived as something that happened to women who asked for it. Women, it was thought, brought rape upon themselves by being in a public place, wearing certain clothing, or conducting themselves in a certain manner.

Alternatively, it was believed that women falsified claims of rape to preserve their reputation. A woman's word was not considered trustworthy and corroborating testimony was necessary for conviction. And the woman's prior sexual activity was considered probative to showing that she consented to the conduct in question on the theory that once a woman said "yes," she would not be likely to say "no."

In those instances, a rape defendant was permitted to show that the victim was not "chaste," "upon the theory that it is more probable that an unchaste woman would have consented to intercourse than one of strict virtue"—this is Richardson & Prince, "The Law of Evidence." Or, as Judge Cowan said in an 1835 rape case in New York: "Will you not more readily infer assent in the practiced Messalina, in loose attire, than in the reserved and virtuous Lucretia?"

Over the years, rape began to be recognized for what it was: a crime of assault and violence. Courts and legislatures began to recognize that the attention at trial should focus on the activity of the offender in causing the rape, not on the activity of the victim. Rape shield laws were specifically enacted to prevent the mistreatment of rape victims and to protect juries from the introduction of evidence that fostered the myths of rape.

The premise of rape shield laws is that a woman has an absolute right to say "no" to any man at any time. Forced sex is rape. Whether or not a victim said "yes" to some man at some time should be irrelevant to whether or not a man attacked and raped her.

In 1977, as a Representative in Congress, I introduced the Federal rape shield law, which became rule 412 of the Federal Rules of Evidence, still in force. Today, all 50 States have rape shield laws.

Yet, in the *Colbath* case in 1988, Judge Souter cast the rape shield aside. His opinion is disturbing, because it resounds with the very myths that the rape shield was designed to remove.

Colbath was an appeal from a rape conviction under a charge of aggravated felonious sexual assault. The defendant argued on appeal that the trial judge improperly excluded from jury consideration the activities of the rape victim in a bar several hours before the rape. At worst, the prior activities consisted of very flirtatious behavior. The trial judge barred consideration of the victim's conduct under the rape shield law, but the normally pro-prosecution Judge Souter overturned the conviction.

In language reminiscent of Judge Cowan and without any analysis, Judge Souter found that the victim's "openly sexually provocative behavior" was crucial evidence and highly relevant to an assault by the defendant hours later. Judge Souter said that a defendant was entitled to show that the woman had earlier in the day invited "sexual attention." The victim may have alleged rape, the Judge wrote, as a way "to explain her injuries (she was beaten around the breasts and arms) and excuse her undignified predicament."

Judge Souter draws entirely upon the myths of rape—from the view that the victim had a motive to falsify a rape claim to the idea that she "asked for it." In a "blame the victim" stance, he states that the victim's flirtation was "provocative" behavior—as if that would justify the attack upon her.

While Judge Souter is promoted as a scholar, in the *Colbath* opinion, examples of such scholarship are lacking. References are not current and the many relevant, then-current Law Review articles and cases are ignored. For example, he dismisses as trivial the possibility that admission of the victim's prior activity could prejudice the jury, despite numerous studies that prove otherwise. But what is striking about this opinion is the willingness—even as late as 1988, only 2 years ago—to rely upon an antiquated and demeaning view of women.

The Supreme Court has yet to rule on the constitutionality of a rape shield law, but it might find an unreceptive audience, if Judge Souter were among the Justices.

Judge Souter has also been unwilling to discuss *Roe* v. *Wade*. It is no secret that Judge Souter could be the vote that would send abortion to back alleys, across borders, or to endless statehouse battles. Judge Souter's refusal to respond to repeated inquiries on this subject suggests a further remoteness from the reality of women's lives. We cannot play hide and seek with the fundamental right of women to privacy and to the control of their bodies.

Unlike Judge Souter, women do not find the right to choice to be distant. To women and girls, reproductive rights are not faraway memories of a conversation in a dorm room 24 years ago. They are right here, right now; they are teenage pregnancy; they are poor women who cannot find family planning services; they are women who have become pregnant through rape and incest. Yet, Judge Souter will not so much as endorse the result of *Griswold* and acknowledge the right to use birth control.

Enforced pregnancy will never be acceptable to women. Nations around the world—Italy, Spain, France—have changed their laws.

Like the people of those countries, the women of America have torn down that wall and they do not want it erected again by a hostile Court. For many women, a life without reproductive freedom is a life of limited freedom.

Appeals from decisions striking down restrictive legislation in Pennsylvania and Guam are working their way to the Supreme Court. Already on the docket is *New York* v. *Sullivan,* which will review the ability of federally funded family planning agencies to furnish information about abortion.

In the area of civil rights, Judge Souter once again has demonstrated a cold technocratic approach to matters of vital concern.

Judge Souter asserted that new Hampshire could enact a voting literacy test, and tells us that the voting of illiterates would dilute the votes of literates. Judge Souter called that a mathematical statement. He is wrong. It is a statement of values, a statement that the system would do better without the votes of some of its citizens. Some would say it is a statement that is deeply anti-democratic.

Judge Souter tells us that the middle level of scrutiny for sex discrimination cases under the 14th amendment is too vague, but he cannot tell us what level of scrutiny he would consider appropriate in sex discrimination matters.

Judge Souter, in these hearings, refuses to affirm the power of Congress to address equal opportunity and affirmative action issues, unless, in his words, it involved "a specific remedy for a specific discrimination." This limited view does not promote broad-ranging legislative solutions to the rectification of discrimination.

Judge Souter has repeatedly stated that, if confirmed, he will listen, and I believe him. But his past has shown little indication that he can hear the voices of people. He did not hear the need in the voices of two elderly brothers in their late seventies, when he rejected their unemployment compensation claim, because they could only work 4 hours a day. He wrote, "It is neither common knowledge, nor do the plaintiffs claim, that a weak back, poor eyesight, or angina necessarily prevents an individual who can work four hours a day from working eight."

He did not hear the pain in the childhood voice of the only Jewish student in his elementary school class who was excused from class during the recitation of the Lord's Prayer when, years later, he fought for the use of the Lord's Prayer in schools.

He did not hear the voices of environmentalists when he refused bail and demanded jail sentences for Seabrook Power protestors, while the State was contemporaneously accepting funds for prosecution of the cases from the company.

And he does not hear the voices of women and their loved ones—women who could be injured, mutilated, killed or sterilized from illegal abortions—when he describes the possible consequences from overruling *Roe* v. *Wade,* merely in terms of political struggles, legislative battles and a tug of war over federalism.

Given this, we have no assurance that when he listens, he will hear the human voices—the pain, the trouble, the need. And how can we entrust him with a position on the most powerful tribunal in the Nation otherwise?

Watching these hearings, reviewing Judge Souter's record, has been a disquieting experience. People in general, women in particular, feel they have been left in a void.

A vote to affirm Judge Souter could be a vote against important rights, a vote against rape victims, a vote against a woman's right to control her body, a vote against birth control, a vote against the right to equal opportunity.

Instead of tearing down the walls of discrimination, Judge Souter's confirmation could mean the erection of new barriers, a step backwards into dark ages we will no longer accept. I urge the rejection of Mr. Souter as a Justice to the United States Supreme Court.

The CHAIRMAN. Thank you very much.

Before I move to you, Ms. Neuborne—by the way, I would like to thank you for all the help you have personally given me and the committee on the Violence Against Women's Act that you played a major part in helping us draft.

I say that and now I am going to say something else, that I would really appreciate it, if it is possible, to try to keep the statements to 5 minutes. We have roughly 20 or 25 more witnesses and a lot of questions, and so to the extent that you can all keep it at 5 minutes, we would appreciate it. I understand that may not be able to be done, and I am not going to go banging the gavel down, but it will give us a chance to ask some more questions, as well.

With that, Helen, why don't you proceed.

STATEMENT OF HELEN NEUBORNE

Ms. NEUBORNE. Thank you, Senator. We look forward to continuing working with you on this legislation which, we agree, is very important.

I will keep my statement to 5 minutes and would ask that a longer women's rights analysis that we have prepared on Judge Souter be placed in the record.

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

Ms. NEUBORNE. Thank you.

I am the executive director of the NOW Legal Defense and Education Fund, which is a women's rights organization founded 20 years ago. During those 20 years, the status of women in American society has advanced dramatically, not to the point where a woman sits on the Senate Judiciary Committee, but certainly to the point where concerns of women, half of the electorate, must be taken seriously by the Senate.

NOW Legal Defense and Education Fund is not a single-issue organization, any more than women are single-issue citizens. It is Judge Souter in these hearings who has arbitrarily singled out one issue, an issue of bedrock importance to all women, the scope of the right to privacy. He has refused to answer questions about this one issue, in the same forthcoming way that he has addressed all other questions. This selective refusal and Judge Souter's own imposition of a "litmus test" to determine what he will or will not tell the public about his opinions on prevailing law requires us to oppose him.