The CHAIRMAN. I thank you both for your testimony. Obviously, it is testimony you both not only gave but feel very strongly and deeply.

Let me probe a couple things, if I may. It is obvious that you did not make your decision immediately. I expect that you were both hoping you wouldn't come to testify. But let me be the devil's advocate with you for a moment.

Where do you think, based on his testimony, Judge Souter, if confirmed, will sit on the spectrum of the Court on which he will sit? Will he be a Scalia on your issues? Will he be a Kennedy? Will he be an O'Connor? Will he be a Marshall? Clearly, you do not think he will be a Marshall.

Ms. MICHELMAN. No.

The CHAIRMAN. All kidding aside, I am very serious. Based on his testimony, do you have any clear sense of how antagonistic from your perspective to your views he will be? Because clearly, if we said to you you can have another O'Connor on the bench or another Scalia, I don't have any doubt which you would pick if you had to take one of the two. Where do you think he will fit on the spectrum of reproductive rights as guaranteed by the Constitution based upon how the Court is now configured?

Ms. MICHELMAN. Well, Senator Biden, you have to remember that Justice O'Connor has indicated most recently in the *Hodgson* case her willingness to join the others in overturning *Roe* v. *Wade.* So even if I were to say that I think Judge Souter——

The CHAIRMAN. Well, I am not suggesting you would like either. I just am trying to get a sense of where, based on—since I only have 10 minutes, I don't have the time to go in and probe each of the statements. For example, I'd like to ask—well, I will. I will ask you, Ms. Wattleton. You indicated that Judge Souter's assertion toward the end of his testimony in response to a question—I think by me, but I am not certain who it came from—he made the comment that if, in fact, *Roe* were overruled, it would undo the fabric of privacy cases all the way back to and through *Griswold.* I am paraphrasing. Whereas, the Solicitor General, Mr. Freed, argued it was just one thread that could be pulled out.

It has always been your assertion that if *Roe* goes, the whole progeny of cases that preceded it, the whole line of cases that preceded it would go. And I drew, quite frankly, some comfort from that answer. You obviously were distressed by the answer. Tell me why you found that distressful since he had gone on record as saying he strongly recognizes the right of marital privacy, and the core of that right is reproductive freedom or, specifically, the right to use contraceptives, to choose whether or not to procreate.

Now, you found the answer disturbing. I found it encouraging. Here the guy says the anchor to *Roe* I agree with, and if you pull out *Roe,* then that anchor may go. I read that as leaning toward, well, maybe the fellow won't go that way. But I don't know any more than I guess anyone knows. Tell me why it disturbed you.

Ms. WATTLETON. Well, it disturbed me, Senator Biden, for several reasons. One, Mr. Souter did not say that he believed that there was a constitutional foundation for *Griswold.* He said that he felt that there were privacy protections for marital procreation. And

when taken to *Griswold,* as I listened to him in the Senate hearing room that day, he was reluctant to comment on it.

It further disturbs us because, while Mr. Fried and *Webster* chose only to take a threat out of privacy in the *Hodgson* and *Ohio* cases, the Bush administration called the whole question of privacy into—felt that the Supreme Court should call the whole question of privacy as a constitutional protection. And so we felt that that was quite disturbing. But, more, we believe that *Roe* is built on a foundation of constitutionally protected rights of privacy. And if you can find no right in the Constitution to protect privacy with respect to *Roe*, then clearly it calls into question other reproductive rights cases from which *Roe* emanated.

It was an evolution of cases—*Eisenstadt* being one that the judge chose not to comment on—leading up to the *Roe* decision in 1973.

The CHAIRMAN. Well, we will go back and check the record. Obviously, none of us—I shouldn't say none of us. I know I don't know how he is going to rule. I know you don't know for certain. Maybe somebody over here knows, but I don't.

My recollection was that he said he didn't want to comment on specific cases, but he was pressed hard by me and others—by Senator Kennedy and others—on the principles, and he did firmly subscribe to the principles.

Ms. WATTLETON. Well, I think that there was a question that was asked about whether, if he support privacy for procreation—and I believe that was your question—whether he saw the constitutional protection extended to the right not to procreate. And he declined to answer that question, and that was very disturbing to us.

I think another aspect of it that I think places him out on the wing with Scalia and Justice O'Connor was the question of strict scrutiny and his tier evaluation of various State-imposed restrictions, which is quite disturbing to us because, before the most recent Supreme Court decisions, the standard had been strict scrutiny, not whether the States could show that their restrictions were unduly burdensome, or were not unduly burdensome.

The CHAIRMAN. Again, I will not press that, not because you are not fully capable of responding to it, but because I don't have the time. But I will look into the record. My recollection was he refused to comment at all on what tier he would use relative to that issue. And he did acknowledge—which isn't telling us much, I acknowledge. He did acknowledge that there was a liberty interest that prevailed after pregnancy.

Now, that doesn't tell us much at all because Justice Scalia acknowledges there is a liberty interest that prevails.

Ms. MICHELMAN. Right.

The CHAIRMAN. Did you want to say something, Ms. Michelman?

Ms. MICHELMAN. Yes; I just wanted to add to what Faye has said; that Judge Souter, also in discussing the area of privacy, suggested that this area is absolutely open for reevaluation; and, in fact, he said that it will be many years before this area of law is, in fact, settled—which raises tremendous concern.

The CHAIRMAN. But isn't that just stating the obvious?

Ms. MICHELMAN. Well, no. It shouldn't be because it is our belief and contention that this is a 17-, 18-year-old law that is based on a

body of law that should, in fact, be as settled as *Brown* v. *Board* is. And it disturbs us that there is a suggestion that it is up for grabs.

The CHAIRMAN. When I pressed that issue in another context, I made the comparison to *Brown.* As a matter of fact, I went back when I first met with the judge and with people who were with him from the White House, and I asked him, I said:

If you were up for nomination immediately before the Civil War and immediately after the decision saying that black people could be viewed as property under the Constitution, would you vote for any Justice before you knew whether or not that Justice agreed or disagreed with that landmark case, the *Dred Scott* case?

And everyone in the room said:

No, I wouldn't do that.

And I tried to make the point that a number of people feel equally as strongly as about reproductive freedom.

But let me go back to the assertion by the judge, because I may have misunderstood him. And I am not being solicitous when I say I will go back and reread this portion of the testimony. When he said that this whole area is still open, my impression was he was attempting to make a clear distinction between whether or not he thought it should or should not be open, and whether or not, as a matter of fact, it was open; and that unlike *Brown,* there were no intervening cases between the time of the core decision—in this case, Roe—was decided and the time he had to testify, as there have been in *Roe;* i.e., *Webster;* and that he was merely stating the landscape of the law as it is today.

Your impression was, as I understand it, that he wasn't giving us a professorial analysis of the landscape of the law. He was giving us his opinion as to whether or not it should or should not. Am I correct?

Ms. MICHELMAN. I think he was saying he is open, he is open to listening rather than recognizing that there is a fundamental right to privacy, including the right to choose. And, you know, it is not just *Webster* that has happened. There is a whole line of cases—*Thornburgh, Aakron*—there is a whole line of cases where the Court reaffirmed strongly the principles established in *Roe* that a woman's right to privacy includes her right to choose. And he didn't acknowledge those. He just said this whole area is open.

I think the risk here is very great.

Ms. WATTLETON. I would further submit, Senator, that there have been cases that relate to *Brown* since *Brown.* The whole question of busing and how to effectively implement desegregation in our Nation's schools is by no means a settled issue. And yet this judge was willing to comment on the appropriateness of it, and we take no issue with that.

The concern that we have is that these are broad areas of concern—that is, privacy, reproduction—major areas that affect the lives of every single American. And to elevate a candidate to the position of Justice of the Supreme Court without knowing his judicial philosophy in these areas or with a vague or foggy idea of his thinking on this is very dangerous, in our opinion.

Senator METZENBAUM. Mr. Chairman, I apologize for interrupting. I just wanted to make a short statement, that I haven't been here and I won't be here, because I am handling a bill on the floor

and I don't want the witnesses, either these or others who preceded them or will follow them, I don't want them or others who will follow them to feel that it's a lack of interest, but if there's a bill of yours on the floor you must be there. I am saying to them as well as the other witnesses who will be here today that I'm absent, but not intentionally. It's just because of another responsibility.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Metzenbaum.

Ms. MICHELMAN. Thank you, Senator, we appreciate that.

The CHAIRMAN. My time is up. Let me conclude by saying this and you may not be able to answer this. Is the basis of your testimony here today that we know this man will overrule *Roe* v. *Wade,* therefore, we're against him, or because we don't know that he won't overrule *Roe* v. *Wade,* we are against him?

Ms. MICHELMAN. All the evidence points to the fact that he will overrule *Roe* and he has said nothing to allay our concerns.

Ms. WATTLETON. We're opposed to him because he has refused to answer the question straightforwardly and it is our fear that he would vote not to continue the constitutional protections of privacy that extend to the right to abortion.

The CHAIRMAN. Well, I have a number of other questions, but my time is up. Let me yield to my colleague from South Carolina.

Thank you, very much.

Senator THURMOND. Thank you, Mr. Chairman.

I want to welcome you ladies here.

Ms. WATTLETON. Thank you, Senator.

Ms. MICHELMAN. Thank you, Senator.

Senator THURMOND. A member of the Supreme Court must make decisions about hundreds, even thousands, of issues. Now, Judge Souter has been a judge for some 14 years. The American Bar Association has held him well qualified. They have given him the highest rating they can give any candidate for a judgeship.

Now, without regard to your specific concern on the abortion question, do you believe Judge Souter has the professional qualifications to serve on the Supreme Court?

Ms. MICHELMAN. Well, I certainly wouldn't quibble with the evaluation of the American Bar Association about his professional qualifications. We might note that the American Bar does not evaluate judicial philosophy. I mean that qualification does not concern itself with judicial philosophy which I think is very much at issue here, and judicial approach.

Senator THURMOND. Now, either one of you can answer these questions.

Do you feel he has the integrity to be on the Supreme Court?

Ms. WATTLETON. There is no evidence that there is any reason to besmirch this particular candidate's integrity.

Senator THURMOND. Do you feel he has the judicial temperament to be on the Supreme Court?

Ms. WATTLETON. The judicial what?

Senator THURMOND. Temperament?

Ms. WATTLETON. I find his judicial temperament very disturbing, both in the cases that——

Senator THURMOND. Disturbing, you say?

Ms. WATTLETON. Disturbing, yes. Both——