

that he knows are presently and currently on the Supreme Court's list.

It's an ethical obligation, and I think that he should not prejudice his right to be able to rule in those matters by telling us in advance how he is going to rule. I would be very upset if he did, in fact, I might not support him if he did do that.

So, that's the problem and he knows that the *Russ* case is on that list and so does everybody else. That is not the only one that is going to come up. There are going to be all kinds of cases until this matter is resolved by elected representatives rather than unelected judges.

It will never go away until it is, and it may not go away then, but at least people are going to say a majority has ruled one way or the other and you may very well win.

Ms. ALLRED. Senator, I have additional—

The CHAIRMAN. I'm sorry, I am not going to allow the answer. You can maybe figure out the answer in response to a non-question from the next person. [Laughter.]

The CHAIRMAN. I didn't mean that quite the way that sounded. You may answer the question, Senator Hatch, in avoiding an answer from Senator Simpson but we have to move on.

Senator Simpson.

Senator SIMPSON. Mr. Chairman, I appreciate it. I have seen these women here before as we dealt with issues. It is a particular pleasure to see Elizabeth Holtzman, who I always enjoyed working with on various issues. We worked together on illegal immigration reform legislation and I have great regard and respect for you. I do not know the other women that well.

But obviously, you know, we're in it deep right now. And I look at the testimony of Ms. Yard. A statement of Judge Souter's, you quote on page 8, that "I don't think unlimited abortion should be allowed." That was Souter's statement, "I don't think unlimited abortion should be allowed."

Then you go on to say that "Senators, this is the language of the right wing." And then you go on to right wing it some more.

As you know, I am pro-choice. I strongly support a woman's right to choose and however, I'm always concerned about sweeping statements. You show me a 100 percenter and I will show you a person I like to stay away from. I don't care what the issue is. That's my view of life, just mine, my personal opinion.

So I see sweeping statements, filled charged statements, emotional statements and all of you are very skilled at this. You do more talk shows than we will ever do on the U.S. Senate floor. You are very good at your work.

So is Faye Wattleton and so is Kate Michelman. So let's get that out. There is power and potency in what you say, but you know how to get it across and you know just exactly what you're doing here. There is no naiveness here, no naivete. You are it. So now, let's just go forward here.

So, I'm always concerned with that. If you support unlimited abortion rights I do think you do a disservice to the cause we share, to ensure that women do have this freedom to choose. Because even *Roe v. Wade*—don't shrug, I see that all the time. I get

tired of watching shrugs and kind of looking up at the ceiling when Strom Thurmond says something courteous.

Let's just stay in this picture and just listen for a minute. Maybe that wouldn't be an untoward and maybe it might even be a courteous thing to do, without casting a glance and a shrug and "who are these boobs?" And "how did they not listen to what we say to them and can't they hear us?" That is a tiresome arrogance.

So *Roe v. Wade* presents limits on abortions, ladies, such as when pregnancy is in its third trimester. I think that limitation happens to be reasonable. I am also not very enthusiastic at all about abortions performed simply because the sex of the fetus is not the sex that the parents wanted. I don't really go for that one.

Could not you discern that opposition to unlimited abortion rights might not just be a position of the right wing, but a position of many of us who support the right to choose as well? I will ask you that, Ms. Yard?

MS. YARD. I don't read my testimony, Senator Simpson, as saying that we are supporting unlimited abortions, one-after-another. What I am saying is that that is the charge of the right wing and I am pointing out how ludicrous the charge is. That is all I'm saying.

Furthermore, if you object to abortion for sex selection I invite you to join the National Organization for Women. We do not believe that there should be distinctions between men and women, boys and girls. We want an integrated society and we want everyone to be treated equally, so that I invite you to join us in our struggle to have people treated equally.

And I would——

Senator SIMPSON. I don't know what that has to do with it.

MS. YARD [continuing]. Through you, if I might, apologize to Strom Thurmond if he didn't like my glances but we are greeted every time we come before him as ladies, you are all so attractive. Somehow it does not sit well. Maybe you could explain to him that we would like to be treated the way you treat everybody else. You don't say to men, gentlemen, you all look lovely. [Laughter.]

Senator SIMPSON. Well, you know, we don't have to whack around in that stuff.

MS. YARD. I wish you would explain it to him because it doesn't do him any good.

Senator SIMPSON. He's a man of great civility and a southern gentleman of the first order and if you don't like the way he expresses himself, what business is that of yours? You ought to roll your eyes at it.

The CHAIRMAN. Maybe we could kind of move on. I'm not being facetious when I say, I think it would be useful for us to get to the issue, if we could.

Senator SIMPSON. Well, I would like to get back to page 10 of your testimony. You quote Professor Alan Dershowitz saying that "Judge Souter was nominated, in effect, by John Sununu, a strident opponent of a woman's right to choose."

Could you please tell us what qualifications or experience Alan Dershowitz possesses in the area of White House politics or what evidence does the professor base his speculation? I know that Professor Dershowitz jumps in with both feet in all of these issues.

I have shared a talk show or two with him. I won't ever do one by remote control, he takes that talk show word literally, no one else gets to talk. I would like to do it face-to-face with him the next time.

But what is the qualification, how does he know this? This has been refuted by many already. What is the old saw here, with this one?

Ms. YARD. Well, Alan Dershowitz is a respected professor of law—

Senator SIMPSON. Of course he is.

Ms. YARD [continuing]. At Harvard University.

Senator SIMPSON. I didn't say he wasn't.

Ms. YARD. And I suspect he knows very well what he is writing. Now, if you would like us to do a study of John Sununu and submit it to this body, we would be happy to do that.

Senator SIMPSON. But you see, what I'm saying is that your statement is filled with flash words, and flash statements and that, somewhere that breaks down. I think you do yourself, my personal opinion, a disservice in a cause that I believe in too.

But I would like to ask—well, let me just put it this way since we are sharing some emotion here. We have now a claim by Ms. Smeal that this person is unsuitable to the Supreme Court unless he or she expresses a commitment to basic constitutional freedoms.

And then the ABA has given a unanimous well-qualified rating to the nominee who does not believe in basic constitutional freedoms? That seems odd, because that is exactly where that logic leads, they have given Judge Souter their highest ratings.

Why would it be so that they would give that rating if there were any credibility to that assertion that there is nothing in his record that he would assure basic liberties? I am going to finish the whole question because I know that probably I won't get any more.

But there is a question that you asked on page 12 of your testimony. You stated there, and back to Ms. Yard.

Why Judge David Souter? What was the basic purpose in advancing this nomination of a man with no substantial discernable record.

Well, I respectfully say, ladies, or women, that the answer to that question is that because of the job and the work you went to on Judge Robert Bork, the White House had to do a different kind of proposal. If I may add, it was a hatchet job, where we turned a man into a racist, a sexist, a sterilizer of women, that was all part of it.

I sat and listened to it. I have a little institutional memory. So the White House now has to find bright, thoughtful, intelligent, skillful, qualified judges who do not have a paper trail of any kind.

That is what they have to find. This is my view, not the White House, I have not talked with them. And Judge Souter certainly fits that description, except that I would place the word "very" in front of each adjective to describe Judge Souter: very intelligent, very qualified, very bright. So you know, I think you have been hoist on your own petard.

You have only yourselves to blame for the nomination of someone with "no substantial discernable record." You took one that was discernable in the form of law review articles and things that

had never even appeared, never even paid one whit of attention, and ignored 5.5 years of a man on the bench, with 104 opinions—and six of his dissents became majority opinions of the U.S. Supreme Court—and none of his decisions was ever overturned and you turned him into a gargoyle right before this committee.

So, that's why. Thank heaven though, we do have this man, Souter. How fortunate we are to have a man of his caliber. So if you hadn't hung old Robert Bork so high up in the cottonwood trees, you wouldn't be here asking that question you did on page 12 of your statement.

Ms. ALLRED. Senator Simpson, may I respond briefly to some of the points you just made?

Senator SIMPSON. I would like it, you bet.

Ms. ALLRED. Thank you, very much, sir.

First of all, I really think it is very unfair to blame the victims. To blame women for the fact that Judge Souter has no paper trail and has not been forced to answer, by this committee, where he stands on abortion, and therefore, we have to go into that dark night with little or no information of where he stands on this issue is not, it is patently unfair to blame women for this.

I want to add one thing, which I will get in, as per Chairman Biden's instructions, which is this committee should know and I am sure does know that the ABA Code of Judicial Conduct Canon 7(B)(1)(c) does not stop or prohibit or prevent Judge Souter from answering any questions.

The proof of that is it talks about a candidate, including an incumbent judge for judicial office that is filled either by public election between competing candidates or the basis of a merit system election. It talks about election. It doesn't talk about a judge that is going to be there by appointment. It is clear by the language, you could ask him where he stands on these issues.

Senator SIMPSON. What were you reading from, Ms. Allred?

Ms. ALLRED. I am reading, sir, from the Georgetown Journal of Legal Ethics Article that I cited earlier, but I am reading the exact quote that I just read is from the American Bar Association's Code of Judicial Conduct specifically Canon 7(B)(1)(c).

Senator SIMPSON. Go to three please if you would, may I respectfully say, and you will find that a sitting judge cannot respond, cannot respond to questions about pending or impending legislation and I cite it for you right in the same document you have in your hand. That is the canon, also, at least among judges ethically.

Ms. ALLRED. Well, if that is the case, he has already done it, sir. He has done it talking about the War Powers Act. There is going to be a pending case before him on that. He has done it on the *Lemon* test, and on religious cases.

Senator SIMPSON. Ms. Allred, he is a sitting judge. He is not a simple, you know, it is not a simple nomination. The man is a sitting judge and if you will look at the Code of Ethics that you have in your hand, you will see that he cannot respond to questions, ethically, of a pending or impending nature.

Now, I don't know how clear—I have said that about four times since this started and everyone just shrugs and pooh-poohs that one. That is pretty real. It is right there, right there.

Ms. ALLRED. He has already done it on numerous issues.

Ms. NEUBORNE. He did not have to answer a question about a pending case, Senator. He was asked to discuss the concepts, the concepts that underlie the principles of the fundamental right that exists for 20 years. As he talked about fundamental concepts in other areas, on equal protection. He talked about where those underlying concepts came from.

And again, in—I take Senator Biden at his word that I can answer a nonquestion—when we talked about this being a single issue, I must say that when *Brown v. Board of Education* was the law very recently and Justice Stewart was being appointed to this Court, he was asked how he would have ruled on that case.

That was considered a reasonable question at that time. I would say that if that were the issue now, that is certainly a monumentally important single issue and if that answer were the wrong answer, I would say that he perhaps would not be sitting on the Court. It was valid to ask how the lives of African-Americans and people of color would be with that Justice sitting on the Court, given the change in the law on equal protection and it is just as important for women to know where their fundamental rights will be with another Justice sitting on the Court.

Senator SIMPSON. Mr. Chairman, you have been very kind, but there really is only one case that he was concerned about and could not speak on and it was because of ethics, not because of some great escape mechanism. If you don't recognize that then you don't recognize the portion of the ethics that you just read.

That's the difference here. This is not just some nominee. This is a sitting judge and the first thing that everybody wanted to know was about *Roe v. Wade* and there it is and that is why he couldn't respond.

I thank you, Mr. Chairman.

The CHAIRMAN. I thank you, Senator.

Senator SPECTER.

Senator SPECTER. Thank you, Mr. Chairman.

Controller Holtzman, I would like to discuss with you the *Colbath* case, because I think you have made a point that requires some analysis to determine substance because if your analysis is correct, and we have the opinion before us, then I think that has some substantial probative weight.

I agree with your statement that a woman has an absolute right to say no at any time to any man. And that forced sex is rape whether or not, well, forced sex is rape, we will end it there. In your statement, you say, "at worst, the prior activities consisted of very flirtatious behavior."

I would respectfully disagree with you about that characterization. There is a slightly different issue involved, in fact, a significant different issue involved as to the prior contact between the complaining witness and the defendant contrasted with other people. But when you say that it was only flirtatious I think that the contact with the defendant in the presence of the other men is all relevant but starting with the other men.

The testimony was more than the generalization of provocative attention. "A girl with dark hair hanging over everyone and making out with Richard Colbath." Then she had been sitting in the lap of one of the defendant's companions. Then "engaged in