

On the other hand, his words even in his testimony had exceptions above and beyond, and I cited the mathematical statement as really a very, very strong statement and quite an unfortunate one. Also, the inconsistency even within the testimony is now record, and that as well evinces, I think, some very troubling concerns. I share this notion that one should perhaps explore these issues yet further. That, of course, was our stated position before the hearings, that the Senate must explore this candidate extremely, extremely carefully.

The upshot of this is really the basis of our position beforehand. Now it is more important to get a clear view from the testimony since the record was silent or unclear. In part, that is our concern with the nominee after the testimony.

Ms. RIOS. I would like to add one more thing, if I might, and I add this most respectfully to all of you. I think that if the nominee had been questioned as rigorously and in as exacting a manner as the panel of feminist women who were here yesterday, perhaps we would know a little bit more about him at this point than we do.

Senator SIMON. I thank all of you.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Mr. Ryder, you testified, and your written statement is the same, to the effect about the *Colbath* case, where you say that, "In *State v. Colbath*, on the other hand, Judge Souter granted an accused rapist a new trial because he considered that evidence of the victim's previous sexual conduct should have been admissible where consent was a defense." Then you go on to say, "In what may at best be described as insensitivity, Judge Souter suggested that a victim might have alleged rape as a way to excuse 'her undignified predicament.'"

When you testify that Judge Souter suggested that the victim might have alleged rape as a way to excuse her undignified predicament, I would raise the question with you as to whether he made that suggestion or whether he said that the evidence should have been submitted to a jury so that they could come to a conclusion. They are two very, very different things as to whether Judge Souter is stereotyping or drawing any conclusions as to the alleged victim, or whether he is saying that these are probative and relevant for a jury to consider.

In that case—and I read now from the opinion—"Before they"—referring to the defendant charged with rape and the woman who said that she was raped. "Before they left the trailer, the two of them were joined unexpectedly by a young woman who lived with the defendant, who came home at an unusual hour suspecting that the defendant was indulging in faithless behavior. With her suspicion confirmed, she became enraged, kicked the trailer door open, and went for the complainant, whom she assaulted violently and dragged outside by the hair."

Then the opinion goes on further on an analysis of the factual allegations. "The companion's furious behavior had a further bearing on the case as well, for the jury could have regarded her attack as a reason for the complainant to regret a voluntary liaison with the defendant and as a motive for the complainant to allege rape

as a way to explain her injuries and excuse her undignified predicament.”

Now, in your testimony, you refer to “her undignified predicament.” But isn’t the context of this case really a conclusion by the court, a unanimous court, that the jury should have been able to consider these facts as relevant—these allegations or this testimony as relevant testimony to decide whether there was consent or force in the admitted sexual intercourse, as opposed to any suggestion by Judge Souter as to what the woman did?

Mr. RYDER. Senator, I believe Supreme Court Watch recognizes the gravity of the conclusion we draw from this case. Put it its simplest, he didn’t have to use those words. He could have said, as you just said and ably paraphrased, this case should be sent back, this evidence should be discovered.

Judge Souter has said he is open, and he has further added, in describing his refusals to testify, that he could be wrong. We all go wrong. I think that sensitivity, which is the word that we used, requires that he be cognizant of the fact that just maybe he was wrong, just maybe the facts were different. Just maybe. In that event, I think it was very important to a rape victim, as she reads this opinion at another time, that she not be characterized in that fashion.

It is that simple. I agree with you entirely that there was discussion of whether it should be sent back, fact, et cetera. It is the words, and the words evince a temperament that we believe raises the gravest concerns about whether Judge Souter should be on the Supreme Court at this crucial time for our society.

Senator SPECTER. Mr. Ryder, aside from what you characterized as inappropriate selection of words, do you agree with Judge Souter’s legal conclusion for the unanimous court that this evidence should have been before the jury so that the jury could have considered the defendant’s testimony on the question as to whether there was consent or force?

Mr. RYDER. To be fair, I would want to have reviewed truly the record in that case and the briefs—I am sorry, I am certainly no judge—to come to that conclusion, and the history above all of the rape shield law. We believe strongly that a limitation of the rape shield law needs to be considered with the greatest care, but I really cannot sort of say up or down whether that decision was rightly decided, a majority though it might have been.

I must repeat our focus is on the fact that the record is so slim. We must grasp at every straw just to understand one or another way, and the language bespeaks something fearsome.

Senator SPECTER. Well, Mr. Ryder, if you find it necessary to review the record—that is, the actual testimony—to make a determination as to whether the court was correct in saying the jury should have considered this testimony as a jury issue on the question of consent versus force, wouldn’t it be equally necessary for you to review the record to make a decision as to whether Judge Souter used unnecessarily harsh language?

Mr. RYDER. I do not believe so.

Senator SPECTER. Why not?

Mr. RYDER. He stated those facts which he found necessary to support his conclusions, or he relied on those facts, let us say, in

the opinion. Excuse me. He relied on those facts stated in the opinion to use that choice of words. And I think on the face of that—and at least then one can read the opinion within its own four corners—one has the insensitivity.

And I must be frank. With all respect, I cannot see any circumstances, frankly, in which that use of language would be appropriate. I realize it is a very small point. It is one of many, many, many points in his record, hard points, which really come together to put us in the position of the conclusion that we draw in the end. But it is one of many, and I must say it is sadly eloquent.

Senator SPECTER. Well, I agree with you that it is only one. This has unusual context for us to really get at hard facts on judging Judge Souter and evaluating your conclusion of insensitivity. It is very hard on a lot of this to sink your teeth into something really tangible because there is so much which is unanswered and so much is speculative and so much is a matter of personal predilection. But when you have a case like this, it gives us a unique opportunity to really see if the charge of Judge Souter's being insensitive is accurate. Within the four corners of the opinion, you have objected in your testimony to his statement or his conclusion about "her undignified predicament," which arises from the facts within the four corners of the opinion that the defendant's live-in companion kicked the trailer door in, went for the complainant, assaulted her violently, dragged her outside by the hair, and it took the intervention of the defendant and a third woman to bring the melee to an end.

If that is not modestly described as an undignified predicament, how would you describe that?

Mr. RYDER. I wish I could summon some of our greatest Supreme Court Justices on the most basic subject that I believe every member of this committee would agree with, and that is judicial restraint. This is unrestrained language and he could be wrong. He has told us that we must all be wrong. We cannot all be wrong. It seems to me absolutely vital that one must not use—and I am sorry, we are dealing only with three words, I suppose, or two, but one must not use that kind of language, to my view, under any circumstance, unless he was there in the melee, then maybe, but—and not even that, I do not think, but certainly not in a situation where he is dealing with allegations and counter-allegations.

Please, Senator, I feel extremely uneasy and I am certain my organization would, as well, in focusing so exclusively on two or three words, and they have dwelt on at great length. There is more where they came from and it was in a reading, as best we could, of all the record available, slim it is in substance, voluminous it is, nevertheless.

This is not out of character. It is the most egregious or among the most egregious, and we should not apologize for choosing that.

Senator SPECTER. Well, I think it is an important point, because it is very tangible, it is a legal opinion, there are well prescribed limits for deciding what is relevant and what goes before a jury, and I think I have your point, Mr. Ryder.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.