I have several questions, if I may. Let me begin where Senator Specter left off.

I see the point that you made, Mr. Ryder, and the point that was made yesterday by one of the witnesses relative to the language in this case, but I, quite frankly, have always looked to your organization, among others, when I have needed help on matters relating to equal rights——

Mr. RYDER. I am flattered.

The CHAIRMAN. Well, you know that to be true—on individual rights and basic civil liberties, and I hope you are not leaving the impression that there are not circumstances where conflicting rights of an individual under the Constitution might not be put in jeopardy, if they were not considered in tandem with the rape shield law.

Can you give me an example for the record, so the record is not left that way by someone representing an organization such as yours, can you give me an example where the conduct of a complainant would be relevant, notwithstanding the existence of a rape shield law, or is there none at all ever?

Mr. RYDER. Well, States have seen fit to adopt their rape shield laws and they do so variously. One of the most obvious examples, of course, is conduct of the defendant with the accuser is most obvious of examples. Generally, the rape shield——

The CHAIRMAN. If you would be more specific.

Mr. RYDER. Well, it is clear that rape shield goes from the first position, which is to argue that we must counteract stereotypes by refusing to admit irrelevant evidence, evidence going to the victim's sexual conduct totally extraneous to the case.

We do not disagree that the rape shield laws are in one of the toughest intersections—I think this is your point—between the victim's rights to privacy, to be shielded from unfair characterization, to make the process for the terrifying situation of a rape victim easier and more acceptable, to avoid being dragged over the coals in court is the core notion of rape shield. It is a line-drawing problem, though, absolutely, and we do not support and do not deny the defendant in such a case has a right to bring in relevant testimony.

The CHAIRMAN. Would you give me an example of any type of relevant testimony.

Mr. RYDER. That, of course, was my most specific example, the core is those actions that are directly relevant to the defendant's sexual conduct with the victim.

The CHAIRMAN. Give me an example. Give me an example, not a description, an example. What would be an example of relevant conduct?

Mr. RYDER. Of course, consent, that is——

Ms. VAID. A witness' statement that the woman said yes.

Mr. RYDER. I would like to defer.

Ms. VAID. That would be relevant.

The CHAIRMAN. Is there any circumstances where the woman's conduct would be relevant, without any reference by a third party as to whether or not it was the words "consent" came out?

Mr. RYDER. You have now switched to the victim's conduct.

The CHAIRMAN. Well, that is the issue here.

Mr. RYDER. Right, but the victim's conduct independent of actions with the plaintiff.

The CHAIRMAN. No, any conduct.

Mr. RYDER. Any time.

The CHAIRMAN. I am the author of a bill here that wishes to make rape a civil rights violation, I am the coauthor of the rape shield law, I am a strong supporter, but as someone who is also characterized as a civil libertarian in taking positions where many times I am only one of three, four, five, seven votes in the Senate, I found myself in a difficult position, because there are times where the rights of an individual defendant to be presumed innocent until proven guilty, as opposed to being presumed guilty, require there to be evidence admissible to a jury relative to the conduct of the complainant.

Mr. RYDER. Plainly, the victim's consent is the central issue——

The CHAIRMAN. Well, if the——

Mr. RYDER [continuing]. And the rape shield laws often specifically state that it is only where—and this is the problem with this case—the line is perfectly drawn, there is an allegation of consent.

The CHAIRMAN. Right.

Mr. RYDER. Then it becomes relevant. There is the line drawn. Is it relevant? How relevant, and——

The CHAIRMAN. And that is a question in most cases for the jury, is it not?

Mr. RYDER. Absolutely.

The CHAIRMAN. So, if a defendant said, "I allege that Mary X consented and was not raped, and as evidence to prove my point that it was consent, I want to show and introduce into evidence that Mary Smith and I, within full view of other people, prior to leaving to the scene of the alleged rape, were engaged in conduct that I believe most people would read as consensual," is that a circumstance under which that is arguably admissible, whether the conduct was—I do not want to be graphic—you know, conduct that related to a willingness to engage in sexual intercourse, is that admissible evidence?

Mr. RYDER. If it strictly goes to consent——

The CHAIRMAN. Yes.

Mr. RYDER [continuing]. Then plainly it is the defendant's right to attempt to adduce evidence of consent.

The issue in this case was much broader, and I realize that you are not questioning that specifically——

The CHAIRMAN. No, I am not questioning on that case.

Mr. RYDER [continuing]. But you have actually just reiterated the facts.

The CHAIRMAN. I just do not want to leave the impression here, coming from an organization such as yours, that there are no circumstances ever where the conduct of the complainant is not relevant, when the issue is consent.

Mr. RYDER. I see the point. I missed your point at the outset.

The CHAIRMAN. That is all.

Mr. RYDER. Absolutely, this is the defendant's right to a fair trial, for pity sake, and the defendant's rights to exculpate. The problem is the intersection and our principal problem is that duly

passed rape shield laws should only be circumscribed with the greatest of care.

The CHAIRMAN. As I understand your problem——

Mr. RYDER. I am sorry, if I may, I am not strictly expert in this situation.

The CHAIRMAN. Surely.

Mr. RYDER. I wanted to yield to my colleague for just an instant, if I could, as she also wanted to address your question.

The CHAIRMAN. Please, I welcome the——

Ms. VAID. Well, I do not know if I am walking into a lion's den here. This has been a line of questioning for two panels, and I will not claim to be an expert on rape shield laws. I think you had actually an expert in Ms. Holtzman and many other people, and I urge my colleagues to——

The CHAIRMAN. Some of us think we are.

Ms. VAID. Yes, as a former civil liberties lawyer myself, I share your concerns about the sanctity of the process of insuring a fair trial for everybody who is accused of a crime.

However, I think your questions and Senator Specter's questions, with respect, are best addressed to Judge Souter, as to what his views of the rape shield laws were, as to why he, you know—and if these concerns have come up as a result of our past study——

The CHAIRMAN. Well, they were.

Ms. VAID [continuing]. Again, we urge you to redirect them to him.

The CHAIRMAN. We do not need to, they were and they are on the record.

The problem I have with the law, with Judge Souter, is not so much the conclusion that he reached—I do not know enough, I did not go back and read the entire transcript of the trial, to make that judgment. I am concerned, as I thought Mr. Ryder was saying he was concerned, and I know Ms. Holtzman was concerned, in the use of certain adjectives connoting and giving to the alleged conduct a status that is one that the rape shield law is designed to avoid.

Mr. RYDER. Precisely.

The CHAIRMAN. And that is the only point I want to make here. I do not necessarily agree with my colleague from Pennsylvania. But what happens in this discussion, my concern has been it has gotten very blurred, and I just want to make sure that (a) you are not unintentionally overstating your concern, and (b) that the real problem, alleged problem, the real concern, at least the one I have, is identified, and that is the insensitivity in the use of certain adjectives to describe the condition or actions of the complainant. That is the issue.

I do not want to leave the impression for the public at-large listening to this that, on the issue of consent, conduct is never admissible, notwithstanding a rape shield law.

Mr. RYDER. Conduct that does go to consent, absolutely.

The CHAIRMAN. And does not always go to consent. For example, I have gotten myself in a little bit of trouble in drafting my Violence Against Women Act. I pointed out that there is no circumstance, no matter what, no matter how, no matter what the circumstances, no matter whether a woman is—whatever her prior

conduct is or her present conduct is, no woman, no woman ever gives up her right not to be raped, never.

Ms. VAID. Right. That is exactly correct, and I am so glad you said that, Senator, because——

The CHAIRMAN. I have been saying it and I have been criticized.

Ms. VAID. I have been on the edge of my seat.

The CHAIRMAN. I have even used the analogy that I have gotten letters from constituents not liking. If I walked out of here with a $1,000 bill in my hand and walked through one of the most economically depressed sections of town waving it and someone grabbed it from me, and then they were apprehended the next block and they went to trial, they could not offer as a defense they were tempted.

If a woman walked out of here and walked across, from here to the Capitol, stark naked, she is guilty of violating certain laws, but no one, no one, no one has a right to go up and rape her, and it is no defense to say that she was being provocative in that context.

But what we are missing here, in my humble opinion, is that when there is a direct nexus between the alleged conduct of the complainant and the civil liberties and constitutional rights of the defendant to argue that that conduct went to consent, and juries should be able to determine whether or not it went to consent, that is a different issue.

And there is a third issue, and then I will drop this, but it is important, I think, we not misrepresent what is at stake here. The third issue is, in describing the alleged conduct of a complainant, whether or not it is admissible or inadmissible, whether or not it goes to consent, there is the question of sensitivity and pejorative terms that carry with them in the psyche of juries something that goes beyond what is being alleged, and that is, it seems to me, the central debate here, that this man, whether or not he was right on the facts, used language to describe the alleged facts in ways that would lead juries to suspect, to lean against, to not be sympathetic to, to lose their impartiality in the process.

That is the only point I want to make and I would be delighted if I never hear about this case again in my whole life.

Now, having said that, Mr. Burns, on a different matter, I must tell you that there are a number of things that Judge Souter has said that allayed some of my concerns. And ultimately, by the way, when a man or woman is before us, I give the benefit of the doubt to someone under oath, and that unless there is compelling evidence to the contrary, to say that this is now my view, to say that it is not their view, absent some evidence of that person not being trustworthy in the past, is a difficult thing.

So, there are certain things that the Judge has said that have allayed my concerns, but one that really has stuck in my craw, and I will just say it now, because you have raised it, and it goes to whether or not—not whether or not he believes whether there is a right of privacy, what his view on civil rights are, specifically, whether or not he believes the equal protection clause should be employed to the 14th amendment very narrowly or broadly, all those are still questions, but this goes to a different issue, and that is a sense that I have observed in my public and private life, as an

attorney, of certain people who may not have a racist bone in their body, but have an elitist attitude about democracy.

When he said that if there was—I am paraphrasing—no evidence of racial discrimination in the application of a test for voting, a literacy test, that the conduct was constitutional and had been ruled to be such, which is correct.

But the fact that he used the term "mathematical" and the precedent terms that he used, which came across to me as saying the following: "You know, smart people, educated people, they are the folks who should be able to vote, and as long as you are not discriminating based on race, sex or religion, I worried," the implication was, it may not be a bad idea to keep dumb people from voting," sort of this, you know, Plato's philosopher king, which I think is anathema to what our government, our form of government stands for.

Now, what I would like to discuss here, because my time is up, I would like to discuss with you very briefly, give me your views again, since you stated them and I was not here or you did not state them, about the extent of your concern relative to the literacy test issue. Was it that it evidenced racism, or was it that it evidenced a sense of elitism, or was it that it was unconstitutional and he did not know it was, or was it that it was constitutional, but, nonetheless, he should have gone a step further? Describe it for me, please.

Mr. BURNS. Gladly, Senator. It is my view, as I take it is yours, from your question, that law is not mathematics, so to say that it is a simple matter of math really leaves out values, and it was really a question of values that I was addressing, primarily, the idea that some people, because they cannot read, cannot participate in the democratic process. If that were the standard, I think many people at the beginning of the country perhaps would not have been able to participate in the democratic process.

I would not even go so far as to equate people who cannot read as being dumb.

The CHAIRMAN. Neither would I, but that, in the elitist view, that tends to be how it is equated, in my view. I am not sure that is his, but that is my concern.

Mr. BURNS. No, what came across from the arguments made was, in my view, a real lack of understanding and appreciation for the democratic process and respect for the citizen, and that was the base and the gravamen of my complaint. It was not that it was necessarily a racist position——

The CHAIRMAN. All right. That is the only point I was trying to make.

Mr. BURNS [continuing]. But I do feel that is an undemocratic position, it is a position that reflects an insensitivity to the operation of our democracy, and that is one of the primary concerns that I bring to these hearings.

The CHAIRMAN. I appreciate that, and then we have the same concern, as I understand your position, the same basic concern.

Now, let me ask—my time is way up and I will yield to the Senator from Alabama?

Senator HEFLIN. I only have one or two questions.

The CHAIRMAN. I am sorry, Senator, I did not know you came in.