tion. We need a revolution to change what is happening. You could be the agents for that change, by turning down this nomination.

Believe you me, we need change desperately in this country, not just for women, but for many, many people who are discriminated against and are oppressed. Their greatest champions, Brennan and Marshall, are gone, and we need to feel that we can have some hope in the Court in the future, and really that hope depends on what all of you do.

Thank you.

Senator SIMON. Thank you. I thank all of you.

Thank you, Mr. Chairman.

The CHAIRMAN. Ms. Yard, the likelihood that this President will ever nominate a Brennan or Marshall is about as likely as me nominating a Scalia, or our President. I think that is——

Ms. SMEAL. Yes, but if this Judiciary Committee turned back appointments, the likelihood of him continuing to nominate Scalias would decrease.

The CHAIRMAN. I am not suggesting that is not true, but getting a Brennan or a Marshall is another story.

Let me make it clear one other thing, and then I yield to my friend from Pennsylvania. This Judiciary Committee does not have the right, in my view, to turn back anyone. All it has the right to do is make a recommendation to the U.S. Senate, and I have been clear since I have been Chair of this committee, even if the vote on this committee were 14 against and 0 for, I would still report the nomination to the floor of the U.S. Senate, because nowhere in the Constitution does it say this committee shall advise and consent. This committee shall recommend. I know you were not implying that, but I want to make that clear for the record for those who may be listening.

Let me yield to Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

I think this panel has been very informative in going beyond the cases, on the issues, to the whole approach of procedure. Historically, nominees have been turned down for ideology, at least as far back as Judge Parker in 1930, and perhaps all the way back where there were considerations on Jay.

But the matter of questioning is new. I think it wasn't until Justice Frankfurter in the late 1930's that we started to question the nominees. Justice Douglas was supposed to have been outside the room waiting to see if anybody had a question for him. Justice White was supposed to have answered 8 questions. And when Justice Scalia didn't answer anything, there was great concern, and Senator DeConcini and I were preparing a resolution to structure the kinds of questions and answers which the Senate should expect, when Judge Bork came up.

Although Newsweek Magazine is sharply critical of the Senate for their characterization of the charade, they do acknowledge that it was in the Judge Bork nominations hearings that we first began to ask some questions. I have long believed that nominees answer as many questions as they have to for confirmation. I think we saw that with Chief Justice Rehnquist.

I think we have seen it right along, and the process has changed, because now it is like an NFL football game, where we trade tapes

in advance of the game. They look at our questions of the predecessor and we read their speeches, so it comes in fairly heavily scripted, with a lot of opportunity for coaching and for preparation, and it does eliminate a lot of the candor, because we know a lot about each other's positions and the kind of approach.

Judge Thomas has answered a fair number of questions and he has also refused to answer a fair number of questions. He answered questions about freedom of religion. Ms. Bryant, you commented about school prayer, he did answer pretty forthrightly on separation of law and state. He probably didn't know that case was pending on the docket for next term. He answered a pretty good question on the exercise clause and was pretty strong on stare decisis.

You may not have liked his answer on death penalty, but he answered it. On the right to privacy, marital privacy, single person's privacy, three-party equal protection clause test. He wouldn't answer about *Bowers* v. *Hardworth,* wouldn't answer much about *Rust* v. *Sullivan,* wouldn't answer *Paine* v. *Tennessee,* and mostly he wouldn't answer about *Roe* v. *Wade.*

The *Roe* question—and, Ms. Smeal, you really had it on the nub, I think, to what a lot of it comes down to, wanting to know in-depth his position on *Roe* v. *Wade.* Maybe he should answer that question, but I frankly can't quite see it, because that really has to come up in the context, in my judgment, of a specific case where you have facts. There are a lot of different approaches and argument, briefs and deliberation, and then a decision.

Let me go to that issue, Ms. Smeal, and any one of you could answer it. As I understand your position, you really want assurance—and we went through this with Justice Souter last year, and I don't think that *Rust* v. *Sullivan* is conclusive as to what Justice Souter is going to do on *Roe* v. *Wade.* There are a lot of different issues in the cases, and I make that point, because I think Justice Souter may be watching. They have a lunch break over there now, and this is about the time to watch.

Let me ask you, Ms. Smeal or anyone—I am not lobbying, he can do anything he wants, he has got a life position—but you really are looking for a commitment, as I understand you, that the nominee is going to uphold *Roe* v. *Wade,* and——

Ms. SMEAL. Actually, I think I was careful in what I——

Senator SPECTER. Let me give you the second part of the question, because the light is on and I can't ask this later. Maybe I can, as the Chairman has just nodded——

The CHAIRMAN. You go ahead.

Ms. SMEAL. I was very careful, when I said that what was happening here is what he was answering was challenging credibility. He says that he never discussed this issue since 1971. I think that is a character answer. I mean, do you believe that? How can anybody believe it? He only named two cases that he thought were important since 1971, and this is one of them. He never discussed it? He has no personal opinion on the subject of abortion? That is a credibility question. How could a grown man of this age, in this day and age, not have a personal opinion?

Judge O'Connor had a personal opinion. She testified that she was personally opposed. I happen to have testified, incidentally, to make the record, I testified for her. I feel very strongly that he

could tell us his reasoning on the right to privacy. Obviously, he can't tell us of a case that is either pending, like *Pennsylvania*, but, my goodness, he can say more and I think he has to say more, and I think that this decision should be a part of your confirmation process, because this is not just any vote. This is a vote that will determine for women a crucial, crucial civil liberty which many of the Senators, not only on this Judiciary Committee, but the full body are pledged to, and they should know and we should know how important they view it.

Senator SPECTER. Let me ask you a question bluntly: Do you think he should answer whether, had he been on the Court when *Roe* v. *Wade* was decided, whether he would have been with the majority or minority?

Ms. SMEAL. Yes, I think he should tell us where he stands on *Roe* v. *Wade* and the right to privacy.

Senator SPECTER. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Let me ask one last question, before I let the panel go. Again, as usual, Ms. Smeal, you are direct and to the point. You point out to the committee that you believe those of us who took a chance on Justice Souter, that we made a mistake, we should not have taken a chance, et cetera.

The point I was making earlier with regard to the way in which the process has developed and evolved wasn't that people in the past did not consider ideology, did not consider philosophy, and not that there weren't some like the Senator from South Carolina who very forthrightly stated it, but the Senate as a whole, at a minimum, danced around that subject for the last 30 years, as a whole.

Now, since you mentioned it, you testified on behalf of Justice O'Connor. She did not answer directly what she would do on *Roe*, when asked. She said she would not comment, to the best of my recollection, and we had to make a judgment based on faith. I assume you made a judgment based on faith, and I assume that then Judge O'Connor—no, Senator O'Connor—Judge O'Connor, she was on the State court at that time, she went from Senator to State court—then Judge O'Connor, I assume she didn't confide in you before she testified how she would rule on *Roe* v. *Wade*.

So, is your standard changing, as well? Not that it shouldn't. I am not being critical, I am just trying to figure out how this process moves. You were prepared, you came as a leader of the largest women's organization in America, if not the world, came forward and said we are for this person, she refuses to answer how she would rule on *Roe*, we are still for her. Would you do that again for any nominee who would not explicitly tell you whether they were for *Roe*?

Before you answer, Harriet, let Ms. Smeal answer this question, and then you can make whatever comment you want.

Ms. SMEAL. The reason I put in the testimony on Judge O'Connor is that she did say she is personally opposed. I think that she was more forthright than this nominee.

The CHAIRMAN. I agree with that.

Ms. SMEAL. There is no question in my mind. We made the decision on supporting her, not because of her sex alone, although she was the first woman to be confirmed. We did it, because her entire

record up to this point had shown moderation, had shown that she could rule with us in some cases. We knew that she was going to rule against us in others, from the record, but at least we felt that coming from Ronald Reagan at that time, that we had a chance with this nominee.

I think history shows that, in fact, she has not been consistently one way or another, frankly, more conservative than we maybe had thought, but there still was some chance. We don't feel that way with this appointment at all.

The CHAIRMAN. If I can stop you, I understand how you feel about this appointment. What I am trying to work through here is that I doubt whether there is any nominee—correct me if I am wrong, any of you—the next nominee, and, God willing, there will be no more as long as I am chairman, but I expect that won't be the case. This is becoming an annual event.

Ms. NEUBORNE. We know that.

The CHAIRMAN. We may be here next August, assuming we are all in good health and I am here, we may be here next August doing the same thing.

What I sense is changing, as the deck changes, the deck on the Court changes, is less latitude—I don't say this as a criticism—less latitude in terms of a nominee being able to give generalizations about his or her view—this is not a criticism—less latitude in terms of a nominee being able to give generalizations about his or her view, and a requirement explicitly that unless a nominee sits before us, a Bush nominee next year if it occurs, or if this nominee is defeated and another nominee is sent up, I suspect—I may be wrong—unless there is an explicit recognition by the nominee from his or her past writings that he or she supports choice or a willingness of the nominee to explicitly say that before this committee, that you would urge us to vote against that nominee. Is that right or wrong?

Ms. NEUBORNE. I think there is some truth to that, but it is not the entire story. I think there are two issues here. First, we have seen two administrations that are so ideologically focused in one direction that we have lost the sense of process, Senator, and I think that's what you are saying, that there is no question that they are not appointing the best nominees, and Presidents in the past—and I think you heard this from the law school deans from Harvard and Yale—appointed Republican and Democratic. We know the process has changed. What we are facing now is a Court that is going to reverse constitutional rights that we have worked for 30 or 40 years to develop for women and for people of color. It is not just choice.

Clearly, the affirmative action and——

The CHAIRMAN. No, I know it's not——

Ms. NEUBORNE. So I think the answer is yes, we have to know and you have to know whether the Supreme Court precedent of the last 30 or 40 years is going to turn around——

The CHAIRMAN. Right. Notwithstanding the fact that in the recent past, we did not do that. That's the only point I'm making.

Ms. NEUBORNE. Well, and the other point—and I think you made it, or—I can't remember; I heard it late at night—someone said it—

maybe the first or maybe the second or maybe the third nominee——

The CHAIRMAN. It was I.

Ms. NEUBORNE. It was you, Senator, and I was listening even though it was very late at night when I was hearing it. We are on the fifth or the six nominee. We are at a point where the Court is irreversibly going to change——

The CHAIRMAN. Don't, don't——

Ms. NEUBORNE. No, I'm not arguing.

The CHAIRMAN. Your response seems to be—I am not being critical. I am just trying to point something out——

Ms. NEUBORNE. But that is the truth.

The CHAIRMAN [continuing]. And ask a question about process. When it was the first nominee of Ronald Reagan, and there was a Court where no one feared that there was a legitimate prospect of *Roe* being overruled, you, the leading women in America, speaking for the leading women's organizations in America, said, "We'll take a chance," and that's what you did, and O'Connor was a chance. O'Connor said, "I am"—what was her comment, so I don't misspeak—what was her comment?

Ms. SMEAL. My understanding was she was personally opposed.

Ms. NEUBORNE. Personally opposed.

The CHAIRMAN. Yes. So she explicitly said, "I, Sandra Day O'Connor, am personally opposed to abortion," first. I imagine any nominee—we didn't even get Clarence Thomas to say that. Nothing in his record explicitly says that—implicitly—nothing explicitly said that.

Had Clarence Thomas said in any of his writings, "a) I personally oppose abortion," there would be a crescendo that would have occurred—I think.

Ms. NEUBORNE. Senator——

The CHAIRMAN. Let me finish. The reason I mention it is not that that is bad, not that it is good, but that what has happened now is the Court is no longer a pro-choice Court with the possibility of adding an anti-choice nominee, Sandra Day O'Connor. The choice looks like it is an anti-choice Court, or about to be firmly an anti-choice court, and now the threshold is raised. And that is part of the process I think the American public doesn't understand—not that they agree or disagree with it—doesn't understand and that we, in terms of process, have not accurately articulated.

You would not, I suspect, Eleanor, or Ms. Smeal—I doubt whether the nominee—if the Court were exactly like it is now in terms of its make-up ideologically, and Sandra Day O'Connor came before us now, I would be very surprised if you would be here to testify on her behalf, her having said under oath, "I am opposed personally to abortion," and her then refusing, as she did, to answer any questions about *Roe* v. *Wade*. I suspect you all would be here saying as much as we want a woman on the court—no—or am I wrong?

Yes, Harriet.

Ms. WOODS. Senator, let me just jump in, because I know of jurists with records who would probably say "I am personally opposed" but who have, in the way they have administered justice, or in their cases in any number of issues, demonstrated a record where they approached those cases in a way to look at past law,

the precedent, the situation in society, the impact—I really don't know in the case of this Wichita judge what he stands for or what he doesn't, but in effect he said is "Whatever my personal belief, I am here to follow precedent and to follow what the rule of law is, the Federal law."

So I want to be very careful. I think it might very well be that personally, I could not stand before you and support anyone who said, "I am opposed," but I might very well, if that person had a record of showing their ability and were honest—that's the issue—here is somebody, when this is one of the greatest issues of our time, and he won't even say that he has thought about it. I mean, that——

The CHAIRMAN. I was trying not to focus this on Clarence Thomas. I was trying to focus on the process——

Ms. WOODS. I understand that.

The CHAIRMAN [continuing]. And maybe we should leave it for another hearing.

Ms. NEUBORNE. There is a process question. Can I make one comment on the process?

The CHAIRMAN. You can always make another comment.

Ms. NEUBORNE. The issue of separation of powers is something we have discussed a little, and I think that's a very important thing to look at. If in fact the President has the power to stack the court, to have an ideological court, and he has the veto power to stop Congress from trying to change what that court has done——

The CHAIRMAN. No question about it.

Ms. NEUBORNE. Look at the civil rights legislation and why it has been vetoed——

The CHAIRMAN. I am going to cut you off, because I don't disagree with that.

Ms. NEUBORNE. All right.

The CHAIRMAN. That wasn't the purpose of my question. I was just trying to find out whether the threshold is changing.

Let me leave you all with the following concern. Beware of being too critical of the notion of natural law, for if you are too critical of the notion of natural law, you will find it incredibly more difficult to find the notion of unenumerated rights within the Constitution, and you may find you have to swallow a concern that I don't think you may have thought through. And there is all kinds of natural law, but if you blanketly criticize the notion of natural law being any part of our historical and constitutional tradition, then I challenge you to find where you are going to find unenumerated rights, the very things that are the essence of what you believe most deeply in, for if there are no unenumerated rights, there is no privacy and there is no choice.

Because you look like you have the microphone, Ms. Yard, you will have the last word, including myself; no one else speaks. What would you like to say?

Ms. YARD. I just want to say, Senator Biden, I can't believe you are asking the question you are asking, because of course we aren't going to put on the court someone whom we believe will vote to overturn *Roe* v. *Wade*. We are talking about women's lives.

The CHAIRMAN. I know.

Ms. YARD. We don't take it that lightly. We can't, we can't possibly. That's our concern.

The CHAIRMAN. I appreciate that, and all I can say is I hope you or no one else thinks I or anyone else up here takes it lightly, because I don't.

Ms. YARD. I am sure you don't.

The CHAIRMAN. Anyway, thank you very, very much for your testimony.

Senator SIMPSON. Mr. Chairman.

Ms. YARD. Senator Biden, Senator Simpson reminded me of the altercation we had, and I wanted to say that when we came up here, I was very disappointed that Senator Thurmond wasn't there, because of all the days I would have been happy to have been greeted as "a lovely lady," today would have been one of them—but he wasn't there to do it. [Laughter.]

The CHAIRMAN. I think he did—well—[Laughter.]

Senator THURMOND. Well, as far as I'm concerned, you're all lovely ladies. [Laughter.]

The CHAIRMAN. With that, don't you think it's time we leave?

Senator SIMPSON. Mr. Chairman.

The CHAIRMAN. I think we're ahead, Al.

Senator SIMPSON. No, I don't.

The CHAIRMAN. I don't mean "we"; I mean the process.

Senator SIMPSON. No—I think that this is great for the process, and I thought what you just said was excellent. And when Senator Specter related the history of the questioning, I think another part of it, if I might put it in the record, is relating to the kind of questions which should be answered, and it was my colleague from Massachusetts who said it eloquently at the time of the hearing of Thurgood Marshall, when Ted said, "It is my belief"—this is our colleague, and I enjoy him thoroughly; we don't agree on a lot of things, and we enjoy facing off—but he said,

> It is my belief that it is our responsibility as members of the committee to which the recommendation has been made by the President in advising and consenting that we are challenged to ascertain the qualifications and the training and the experience and the judgment of the nominee, and that it is not our responsibility to test out the particular philosophy, whether we agree or disagree, but his own good judgment, and being assured of this good judgment, that we have the responsibility to indicate our approval or, if we are not satisfied, our disapproval.

Now, that's what we have to do here, and it is the way it is, and this chairman does it beautifully, and there is no other way to describe it. It just doesn't happen to hit your end of the spectrum this trip, and we have members here—Judge Heflin and Arlen Specter and others who come to listen and to hear the testimony before they make a decision. And I think this is where some of these groups make a tragic mistake.

If on July 9 or July 6, suddenly they say, "We're going to 'Bork' him; we need to kill him politically"—and those are quotes by people in the movement—and people say his nomination is "an insult to the life and legacy of Thurgood Marshall and everything that he stood for"—and that's a quotation of your national president—how in the world do you expect us to have the willingness to listen when you have already buried him alive in July, before you have ever heard a word—and that's our job.

The CHAIRMAN. Well, Senator, if I could cut you off there——

Senator SIMPSON. I'm through.

The CHAIRMAN [contining]. And just make the point that it seems to me if you all are not able to say you are against him before you heard the record, then Senators shouldn't here say they are for him before they have heard the record, and all the Senators said we are for him—that's not a problem. So what's good for the goose is good for the gander, and we are finding that the goose changes as time moves.

Thank you all very, very much. I appreciate it.

Ms. YARD. Thank you. Let's hope we're not here next August doing the same thing.

The CHAIRMAN. Believe me, Ms. Yard, I hope I get to see you next August, but I hope it's not at one of these hearings.

Let me move on, and I have received the proper admonition of my colleague from South Carolina that I allowed and encouraged and was part of going beyond the time, and I will try not to let that happen again.

Our next panel, testifying in support of Judge Thomas' nomination includes a group of distinguished professors. I apologize if I sound too familiar with the first names, but this is the list as the White House gave us the list, and it says "Joe"—I don't mean to sound familiar—but Joe Broadus—I don't know whether it is Joseph or Joe and I apologize for the familiarity, but it is the list we were given by the White House—a professor at George Mason Law School in Arlington, VA; James Ellison, a professor at Cumberland Law School, which I have had the great pleasure of speaking at as well, and it is a fine law school, at Samford University in Birmingham, AL; Shelby Steele, a professor at San Jose State University in San Jose, CA; Rodney Smith, Dean of the Capital University Law School in Columbus, OH; and Charles F. Rule, a partner in the law firm of Covington & Burling in Washington, DC.

Welcome to all of you, and professor, if you would begin.

STATEMENTS OF A PANEL CONSISTING OF JOE BROADUS, PROFESSOR, GEORGE MASON LAW SCHOOL, ARLINGTON, VA; JAMES ELLISON, PROFESSOR, CUMBERLAND LAW SCHOOL, BIRMINGHAM, AL; RODNEY SMITH, DEAN, CAPITAL UNIVERSITY LAW SCHOOL, COLUMBUS, OH; AND CHARLES F. RULE, COVINGTON & BURLING, WASHINGTON, DC

Mr. BROADUS. Thank you, Senator.

It is a pleasure to appear here before the committee today, and I thank you for this opportunity. Primarily, I will be giving a report that evaluates two reports that I made on Judge Thomas—one on his performance at the EEOC, and the other on his work as assistant secretary of education at the Office of Civil Rights.

Primarily, these reports were approached by taking earlier reports that were critical of Judge Thomas and attempting to verify their conclusions from the record and going to court cases, going to the records of the EEOC, and going to various others sources to see whether those charges could be confirmed.

In terms of the attitude of my report, I want to tell you that I tried to make a certain kind of decision. I tried to separate out