Now that is a question, and then you can respond in any way you wish, but I mean, I get my time to talk, too. Shoot.

Mr. RAUH. I will leave to Molly Yard or Professor Ross the answers to your point on comparable worth because they know more about it than I do. But I would like to answer the earlier part of your discussion where you said that we had broken our pick because there was nothing there.

Nothing was asked that would have shown what was there. But secondly, you were criticizing us for saying, well, we would like to know what Mr. Meese knows. I am not a great advocate or lover of Mr. Meese, but I would like to know what he knows about Judge Kennedy's views.

Furthermore, you made two mistakes of fact.

Senator SIMPSON. Please. What are they?

Mr. RAUH. We did not oppose Stevens. We did not oppose——

Senator SIMPSON. Well, I was talking about the National Organization for Women. They did oppose Justice Stevens. I have a quote from there——

Mr. RAUH. You were talking to me at the time. And you also said we opposed Justice O'Connor, that we would oppose anybody that President Reagan sent up. We did not oppose Justice O'Connor. We did not. There was very little opposition to Justice O'Connor, and, as a matter of fact, did you oppose her, Molly?

Ms. YARD. We testified on her behalf. We supported her nomination.

Mr. RAUH. So your statement that we would not support anybody, or would oppose anybody from the Reagan administration, is simply erroneous, sir.

Senator SIMPSON. Well, I will split the difference with you. We have a quote from the National Organization for Women which says, "We oppose the confirmation of Judge Stevens. His antagonism to women's rights is clear." Now, that is what the National Organization of Women did, and that is a quote.

On the other one, I still think that I do not know who would please you from this President. I hold that view.

The CHAIRMAN. Would anyone else like to comment?

Ms. YARD. I would like to say quickly that it is the National Organization for Women. We are an organization of men and women for women's rights. We did support Sandra Day O'Connor. Eleanor Smeal testified on her behalf.

To play out Joe Rauh's belief that you can know where a person stands on rights, her record was very clear, and that is why we supported her.

On the comparable worth, the pay equity case, which is the *AFSCME* case, it is common practice in business and industry to do job evaluations, to classify them, and to assign wages and salaries according to the classifications. And the evaluation is based upon educational requirements, skill requirements, experience, and judgment.

The State of Washington did study three percent of their many, many jobs in the marketplace to find out what the marketplace was paying them. Then not doing a job evaluation, they simply assigned the rest of the jobs according to a system which they set up. That was that if you were, for instance, in one example, a school

security guard, female, you got assigned to the clerical classification. And if you were a school security guard, male, you got assigned to the security classification. Needless to say, the security classification paid a much higher rate of pay, and it was filled by men.

It is very clear from the studies which the State of Washington made over and over again and from their very own admission, in the words of Governor Dan Evans and, subsequent to that, Governor Ray, that they did discriminate in jobs that were simply women's jobs. And they did it because they wanted to keep the peace. They wanted to keep the historical alignment. They did not want to make any adjustments.

Judge Kennedy totally ignored the findings, which showed sex discrimination, because I guess he has problems with the whole concept of equality for women.

The CHAIRMAN. Professor Ross?

Professor ROSS. I do think there is some academic criticisms that can be leveled at his opinion in AFSCME, and in particular a failure to follow Supreme Court precedent and, I think, a real distortion of Supreme Court precedent. That is what concerns me very seriously about his opinion.

I lay it out somewhat in my written testimony. I think there are two basic criticisms that can be leveled. One is that in terms of intentional discrimination, he is trying to use this new higher standard that I referenced in my oral statement a moment ago. Without really discussing the difference between the two standards, he starts by quoting from 14th amendment law, dealing not with facial sex-based classifications, but rather with neutral classifications where the court has imposed a special requirement as to how to show intent. He suggests that that higher level of intent has to be shown in a case which is about facial discrimination, about discrimination based on sex, where you are not alleging a neutral practice.

Second, he suggests that the Supreme Court in title VII areas has required that statistical evidence of discrimination which is used to show intent to discriminate must be corroborated by other additional evidence of discrimination. Well, that is flatly untrue. The holding of the Supreme Court in *Teamsters* was precisely that statistics alone were sufficient to make out a prima facie case of intentional discrimination.

Having said that he had to have corroborative evidence, he then went on to discount the corroborative evidence that was, indeed, put forth in that case. Now, the corroborative evidence was very strong, but it was the kind of evidence that, as I said earlier, I think he tends to discount the significance of. The corroborative evidence was that the State had for many years officially segregated jobs on the basis of sex. Women were not allowed to apply to some jobs, and men were not allowed to apply for others. Jobs were kept as sex segregated.

And in addition to that evidence that the jobs were officially segregated by sex—it was an official policy—they brought in expert witnesses to say that the effect of segregation is to carry over on to wage discrimination that often persists long after sex segregation is discontinued.

He ignored all that evidence, basically, and said that the corroboration of the statistical evidence was not sufficient. Now, I think the statistical evidence alone should have been sufficient, but statistics plus this corroboration of a long-standing practice of segregating workers on the basis of sex has to be read to say something about the State's intent to discriminate within the meaning of intention under title VII.

Indeed, the Supreme Court in another case, *McDonnell-Douglas,* which is a very early and landmark case, has said that you can take an employer's general practice of discrimination and reason from that that, in some other act committed by that same employer, it makes it more likely than not that the employer has discriminated.

Okay. So that is a whole area of law where I think he was distorting existing Supreme Court precedent to reach a result he wanted. That is only one area.

The second area was this new doctrine he came up with, with no support in Supreme Court law at all, that disparate impact doctrine does not apply to wage discrimination cases. There is simply no support in the Supreme Court cases for that notion. In fact, I show in my written statement that many of the criticisms he levels at using disparate impact analysis for wage discrimination can be applied to the kind of employment testing decision in *Griggs,* that was involved in *Griggs,* the very first disparate impact decision by the Supreme Court. He says, gee, wage systems take account of a multi-faceted number of factors. That is true of tests. He says employers go through a lot of different steps to arrive at the final result. That is true of tests. It is true of both tests and a wage system that there is a final number; you pass or you do not pass the test. You have a wage. Those numbers can be used to quantify the effects on a certain sex or race of the particular system.

So I do not think there is any support in the Supreme Court doctrine for the result he reached, which was: I refuse to apply this doctrine at all. I just will not apply it. So I think it is very seriously attackable for not following existing Supreme Court precedent, and it gives me great concern that in an area of wage discrimination, when we are dealing with a statue which says simply employers may not discriminate on the basis of sex in compensation—that is the broad, comprehensive language of title VII—that he is interpreting it in such a narrow and hostile way.

The CHAIRMAN. You answered two of my questions.

Senator Kennedy.

Senator KENNEDY. Thank you. Mr. Chairman, I want to express real appreciation for the testimony that we have received, and I think any fair listening and viewing of our witnesses would have to show that they have spent a great deal of time in reviewing the writings and reviewing the cases and identifying these issues for this committee. I think they have given us much to think about.

I must say that these are always—well, in this case—a close question and a close call. The areas which have been reviewed here, perhaps as stated by Mr. Rauh, touch on many of the areas which I have been most concerned about. There are those words "equal justice under law." This nominee is important not for those that are going to have the well-financed lawyers who are going to