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

appear before the Supreme Court, but for those that may be left out or behind. That covers a wide range of groups.

It is in the areas of civil rights where we reviewed with him his thinking on *Circle Realty* and found out that that reasoning that he had was overruled by a very substantial group in the Supreme Court, seven to two. We had the *Mountain View* case involving handicapped children, and that was overruled in the Supreme Court by a unanimous court.

Then his view about the various class action suits, which are really rather basic to individuals to be able to continue to redress their grievances—in the *Pavlac* case his view was overruled.

So these points which you raise, I just would hope that you recognize, are enormously troublesome and disturbing. We have reviewed the *AFSCME* case, the *Beller* case to some extent.

We have got very short time. I would like to take each of those areas that we have spent the better part of a couple of days coming at, perhaps in different ways, by members of this committee. But say in those cases involving civil rights; I think we already have heard a good deal on comparable worth in response to other questions.

But with regards to minorities and women, and perhaps the handicapped or those that want to have their day in court and redress their grievances through the court system, how concerned should they be? How concerned should they really be if this nominee is advanced to the Supreme Court?

I will ask the question to Mr. Rauh, and then any of the others, if you want to comment on it. I think they are going to use all my time.

Mr. RAUH. I guess I may in part have answered that question out of my own very deep concern. I believe that minorities and women have a deep concern, and properly have that concern, about where he is going to come out.

It is not that I know for sure that he is always coming out wrong on the Bill of Rights. It is that, with a four-to-four split which we had as recently as the day before yesterday, a four-to-four split in the Court, he becomes the number one man in the legal world: Where is he going to come down?

Should we not have a better reading now? It is not that we should have a hundred percent certainty. But should we not have the feeling that it is more likely that he is coming down on the side of minorities and women than he is coming down on the other side?

I would say that, looking at the cases—the ones I referred to and the ones that you referred to, Senator Kennedy—looking at all those cases, that amounts to nine, if you add to my six the three that you referred to. If you take all those nine cases, is it not fair to say that the probabilities are against minorities and women? Or even if it was only 50–50 that he would come down against minorities and women, I think we ought not take the risk.

It all comes down in the last analysis this way: How much do you care about the Bill of Rights? If you care about it as much as the "rights" groups do, the women's groups, the minority groups, then you are coming down one way. If you have a lesser priority for "rights," you are coming down the other way. This is not a par-

tisan or mean battle. It is getting clearer and clearer that it is a question of what test you are going to use. If you are going to use the test that the President can do pretty much anything, then obviously you are going to confirm Judge Kennedy. On the other hand, it seems to me that Judge Bork was defeated because you did not want to re-fight the battles of the past and that is still the question here.

Do you want to take a chance that you are going to have to refight the battles of the past? I think you should not.

Ms. YARD. I would just like to add that, like Joe, I have spent my entire life on working to end discrimination. He has done it brilliantly in law; I have simply worked to educate and to organize people so that this country shall become a place of equality.

I think the meaning of the whole last 25 to 30 years of this country is that we are moving to a more just society. I can see much progress, and much of it has been because of the legislation which Congress has passed and much of it has been because of the decisions made by the courts of this country.

Senator KENNEDY. If you want to come, fine. We thank you.

Thank you.

The CHAIRMAN. The Senator from Pennsylvania.

Senator SPECTER. Thank you very much, Mr. Chairman.

Mr. Rauh, I support the Chairman's decision in starting these hearings at the time he did. There have been some 5 weeks between November 11th and today.

My staff and I have had a chance to review the opinions; read his speeches; prepare; talk to Ms. Yard and her associates; do follow up work on the AFSCME case.

But it is important that the court be filled. I believe the Supreme Court sent us a message on Monday. I do not think it was a matter of coincidence that they handed down that four to four decision the day they started these hearings.

They need to have a full court to get on with the business of the court.

Professor Ross, I compliment you on a very fine brief. I only had a chance to read it earlier today. It was filed yesterday. And there are some matters there which I find very helpful, and it was a very thorough job.

Mr. Levi, in the interests of equal protection, nobody has asked you a question yet. Let me start with you. And there is not much time to ask questions on the very important subjects which this panel has raised.

And you have commented about Judge Kennedy's views on privacy. He wrote a speech, delivered a speech, last year before this vacancy occurred, where he expressly recognized the right of privacy, and commented on it extensively, among other rights which are not specifically enumerated in the Constitution.

And in that speech he made an analysis of the *Bowers* case, and a case decided by Canadian courts on the issues of privacy, homosexuality, in a way which I consider to be very sensitive and very thoughtful.

And in that same speech, he raised the issue that there might be a different conclusion on *Bowers* if the issue was raised in an equal protection context.