

But in the Olympic Club, people didn't really know me so it didn't make any difference. It made a difference, because it said what he believes about discrimination, and he believes it is unimportant.

And that—I look at what he has done on cases affecting women. And I think he will come down on the side that it is unimportant what happens to our lives.

Senator **METZENBAUM**. Thank you, Mr. Chairman. Thank you, Molly.

The **CHAIRMAN**. The Senator from Alabama.

Senator **HEFLIN**. Mr. Chairman, I have had to be absent because of a commitment I made. Therefore, I yield my time to Harry Truman Simons next to me.

The **CHAIRMAN**. The Senator from Illinois. Welcome back.

Senator **SIMON**. Thank you, Mr. Chairman. I thank the Justice from Alabama here, too.

Joe Rauh, you said that Judge Kennedy has, in making decisions, failed to take into consideration the previous decisions of the court—and I am quoting—you say “He has a preconceived notion of what the decision should be.”

Are you suggesting that he has an ideological agenda?

Mr. **RAUH**. I would not use the words “ideological agenda.” The quotation is right. It is taken from my answer to Senator Specter. What I said there was, if you take the cases where he has ruled against rights, you will find a pattern in them of Judge Kennedy running rough shod over findings of the lower courts.

Now, if you will indulge me. I have read those cases, and there is such a strain of overruling, rough shod, the findings of the district court. He would not state the finding and then give the evidence to the contrary. He simply would not mention the finding. He would just state the facts the other way.

I said if you have a pattern of continuous overruling of the findings below, always resulting in holding against rights, this is a tendency that could only come from some preconceived notion.

If you really were grappling with the problem, if you really were grappling with the effort to get the right answer on the facts, you would either accept the finding below, or state it, and give the reasons why you are rejecting it. It is on that basis that I said that this was some evidence of a possible preconceived notion against the rights.

I think in that context, it is a perfectly correct statement. I do not think it proves that he has an ideological agenda, and I would not make that assertion.

Senator **SIMON**. Let me rephrase it. There is not an ideological predisposition toward a certain decision? Or is there?

Mr. **RAUH**. There may be. I suggested this based on the unfair, inadequate, and erroneous treatment of the findings below in these cases. On that basis, there must be some preconception.

The ordinary appellate judge—and gee, I am going to get it from Judge Heflin because he probably knows more about this than I do—but I have always thought that the first thing the appellate judge has to do is decide whether he can accept the findings of the court below.

And then, if he decides he cannot, he has to give some reason why, from the record, why he is not accepting the findings of the court below that saw the witnesses.

Now, I think if you have a pattern of doing that, and it always comes out against rights, this is some evidence of a preconceived notion against those rights.

Senator SIMON. You mentioned the sensitivity to the Bill of Rights, and I agree. You mentioned three specific areas: *Roe v. Wade*, church/State, and the whole civil rights, affirmative-action area.

The one that has not come under discussion here is the church/State area. I have four decisions that he has made in this area, and they are fairly narrow decisions.

Do you have any sense of where he is in this church/State sensitivity on the Bill of Rights?

Mr. RAUH. There is not much evidence one way or another, I would admit. The best evidence I know is this piece in the McGeorge Law School paper. There was an interview there, and I think Judge Heflin referred to the interview.

Let me just read this. It was an interview back in 1968. His views may have changed. I simply do not know. It was disturbing then and still is.

This is an interview with Judge Kennedy before he was a judge.

He concedes the difficulty of justifying tax exemptions for churches under recent Court rhetoric, but "I would hope"—and this is a quote from Judge Kennedy—"the Supreme Court finds some way to allow them to continue to promote freedom of religion."

And then continuing the quote, "And the Court should leave room for some expressions of religion in State-operated places".

The public school is the most obvious State-operated place. I think at that time his view would not have been for a very strong separation of State and church, but I do not think there is very much after that, that I know about. That was the only thing I know anything about.

Senator SIMON. If I may ask one more question here. If I may ask it of Ms. Yard and Ms. Ross.

In the *Beller v. Middendorf* decision, Judge Kennedy cited *Roe v. Wade* with approval, and I am told that there are some groups now who are not pleased with the Kennedy nomination because of that.

Any observations that either of you have on that?

Ms. YARD. That is not my impression, that he cited it with approval. Patricia Ireland, who is our vice president, and is a lawyer, and has read many of these cases, her reading of it was that he simply cited it, not with approval, but just cited it.

Professor Ross. I do not have anything to add to that.

Mr. RAUH. It was the law, Senator Simon. It is the law, and it was his obligation to, if it was relevant, to cite it. I do not think that gives any evidence that he would have voted that way, or will vote that way when it comes up again.

Senator SIMON. All right. I thank you very much. I have no further questions, Mr. Chairman.

The CHAIRMAN. Now, in your statement, you say: