fact have no place in the selection of a Justice to the U.S. Supreme Court.

Thank you.

The CHAIRMAN. Dr. Willke, we will be glad to hear from you.

TESTIMONY OF DR. JOHN C. WILLKE, PRESIDENT, NATIONAL RIGHT TO LIFE COMMITTEE, INC.

Dr. WILLKE. Thank you, Mr. Chairman.

I am John Willke, physician and current president of the National Right to Life Committee. I speak here for that committee, which is composed of the 50 State right-to-life organizations which contain almost 2,000 active chapters and an estimated millions of membership.

We are concerned. We exist as a movement because of the 1973 *Roe* v. *Wade* decision of the U.S. Supreme Court. Just as the *Dred Scott* decision of 1857 was a civil rights outrage in that century, so we see *Roe* v. *Wade* as a similar blot upon our Nation in this century. In *Dred Scott* the Supreme Court ruled that an entire class of living humans were chattel. This decision denied black Americans civil rights and equal protection by law.

Accordingly, let us flash back in time, if you please, to the post-Civil War era, and ask a question. Suppose a nominee to the U.S. Supreme Court at that time was being questioned and his qualifications examined. Suppose that that person as a legislator had previously voted for the continuation of slavery, not once but twice. Suppose also that he had voted on a memorial resolution asking the Congress to pass a constitutional amendment to abolish slavery, and that that nominee had voted against that resolution and for discrimination, not once but twice.

Would not then it be a proper question to that nominee to inquire whether that nominee still held those proslavery convictions? We believe so. We also believe that if such earlier actions were not totally repudiated by that nominee, that such person would be disqualified from sitting on the U.S. Supreme Court.

A century has passed. Another Supreme Court by a similar 7-to-2 decision—*Roe* v. *Wade*—has ruled that another entire class of living humans were to be reduced to the status of property of the owner—the mother; further, that the mother was given the newly created right to privacy, a right that allowed her to have her property—her unborn child—destroyed if she wished. Because of this ruling and because of the Court's interpretation of the word "health," we have a body count today of 1.5 million a year.

There are indeed some single issues which are so fundamental that they ought to be weighed very heavily in considering any lifetime appointment to the Federal bench, among these, racial justice. In 1948, G. Harold Carswell gave a speech in which he said, "I believe that segregation of the races is the proper and only practical and correct way of life in our States." During Senate consideration of his nomination 22 years later, he completely repudiated that position, and yet the matter weighed heavily upon the minds of many Senators, and quite properly so. Concern over that earlier commitment to racial injustice perhaps played an important role in the rejection of his nomination.

We believe that recognition of the right to life of the unborn child is also just such a fundamental issue. Those who do not recognize this right, we suggest, should be disqualified from sitting on the Federal court.

A nominee now sits before this distinguished body. You must decide whether she is qualified to sit on the Court, and there are serious questions. Her record as a State legislator is very disturbing.

In 1970, as a State Senator, at that time only one-third of the States had legalized abortion and most laws were highly restrictive. New York, in that same year, had passed abortion on demand until 24 weeks and was to be the second last State that legalized abortion through statute. Thirty-three States subsequently voted on the issue and voted down proposed abortion laws. The Nation had been shocked by this.

In this climate, Senator O'Connor voted for a bill that would have legalized abortion on demand in the entire 9 months of pregnancy. No statute remotely as radical had been considered elsewhere. This was not a casual vote on the floor; this was a vote on a committee, after having studied it.

Again, a year after the Supreme Court decision which did legalize abortion in the entire 9 months of pregnancy, she had an opportunity to vote against that sweeping decision. Again, on two occasions she voted to maintain what has been abortion permissive through the 9 months of pregnancy.

She has recently stated that she is personally opposed to abortion. In no way referring to the nominee, let me merely state that I have never met an abortion chamber operator or an abortionist who was not personally opposed to abortion. The simple fact is that such a personal statement does not in any way relate nor is an indicator of how such a person may view abortion for others, or in the case of a public servant, how they will vote or how they will rule.

Finally, the last point is that many legal scholars are quite convinced that the decision of the Supreme Court in *Roe* v. *Wade* was in fact raw judicial power and activism. The nominee here has been held up as a constructionist. It would seem to us that in fact, if she does not repudite *Roe* v. *Wade*, that that fact alone denies that title and should deny her the nomination.

Finally, in closing, I want to make one personal remark about the lady who sits next to me. She is probably no more or no less perfect than any of us. She probably has her faults. One fault, however, that she does not have, and none of us who know her could possibly imagine her having, that is, being vindictive.

Thank you, Mr. Chairman.

The CHAIRMAN. Are there any questions by any member of the committee?

If so, feel free to proceed. We will start with Senator Dole, I believe.

Senator Laxalt, did you have any questions?

Senator Dole.

Senator DOLE. Well, as I understand it, except for this one issue you have no quarrel with the nominee. Is that correct?

Dr. GERSTER. We are a one-issue organization, and that issue is human life. That is, as an organization, our only objection. Yes.

Senator DOLE. What about your personal opinion, then?

Dr. GERSTER. As I said in my earlier letter to the Attorney General of the United States—to which I received no answer—criticizing the Starr memorandum, I said that I believe that Judge O'Connor, then Senator O'Connor, is highly intelligent, capable, very dedicated, and a likable person.

That, of course, is beside the point. We are not speaking of personalities. We are speaking of issues.

Senator DOLE. I think somebody mentioned to me the other day, I guess the last time we had a hearing of this kind was in 1973 with Justice Stevens. Was the abortion question raised in that hearing?

Dr. GERSTER. No, it was not, to my knowledge.

Dr. WILLKE. To our knowledge, no, not to our knowledge.

Dr. GERSTER. It was not an issue, of course, in 1973 that it is today. Also, we did receive the commitment. I personally——

Senator DOLE. Excuse me, 1975.

Dr. GERSTER. In 1975 it certainly was an issue, yes. No, I think the reason that the—the prominence of the question——

Senator DOLE. The point I make here, you are talking about a vote she made in 1970; but here in 1975 we had a nominee before the committee. As I understand there was not a single question directed to the nominee concerning abortion.

Dr. GERSTER. That is true.

Senator DOLE. It was an issue in 1975, at least it was in my 1974 campaign.

Dr. GERSTER. That is true. You are very correct. In 1973 it was not the issue that it was in 1975 but it was an issue in 1975. I think the reason it has become what some individuals have referred to as a litmus test is because of the assurance that we were given by the present administration and by the platform. It was made a litmus test.

Dr. WILLKE. Senator Dole, I might also suggest that there has been a considerable enlightenment of the people of this Nation, a rather substantial, sweeping, slow change in public opinion, and this has come to the fore in the minds of vast numbers of people today, as our last election campaign indicated only so well. It was not such a major issue before the minds of many of the public.

We have abortion on demand until birth in this Nation today because of nine Supreme Court Justices. The most crucial nomination that this group is going to sit for in terms of approval is that person, those people who sit on that very Supreme Court. They hold within their hands the power to stop the killing of the unborn in this Nation, and for this reason it is a major and, we feel, the most fundamental issue that should be considered.

Senator DOLE. Right. I guess in essence, then, for your group to support the nominee it would take a statement by her to in effect repudiate that decision.

Dr. WILLKE. Senator, we are quite aware that a person might feel personally opposed to abortion. We are quite willing to accept that that same person might feel that laws should be passed to permit abortion. It would also be possible for that same person, however,

to view the *Roe* v. *Wade* decision as an extreme and destructive example of judicial lawmaking and be in favor of the reversal of that, as a frankly unconstitutional amendment.

We had hoped that Judge O'Connor would take that position. In listening, however, for 2½ days, we have heard nothing that would give us an indication that that would be so, and we did believe that she would be willing to speak to that issue. At least to our ears, she has not.

Senator DOLE. Again the question is, it would take that, a repudiation of that decision—not a statement about judicial restraint or strict constructionism or not being a judicial activist—it would take an outright statement by her that she would in effect repudiate that decision before your organization would support her. Is that correct?

Dr. WILLKE. We would want something of that type of assurance, and we have received none.

Dr. GERSTER. I think even the assurance that she now would have voted differently on any of the other votes other than the 1970 vote—that was an extreme, radical measure, and that is the only one to which she has addressed actually a regret of the vote. I think that she has been very clear on other issues as far as busing, capital punishment, and has stated that the vote in 1970 to 1974 expresses her view today. She said that on a number of other issues but we have not heard this with abortion.

Senator DOLE. Now is that the same requirement you make of candidates you endorse, that they repudiate *Roe* v. *Wade?*

Dr. WILLKE. In fairly direct language, we ask—our political action committee does, as we sit here do not represent—we represent the National Right to Life Committee, Inc.—we ask that candidate to give us a clear statement if possible that they are in favor of law change or constitutional change that would provide for equal protection by law for all living Americans, whether they live inside the womb or not.

If said candidate feels that they do not wish to disturb the status quo and will allow the killing to continue, then it is our opinion that that position disqualifies that person from holding public office. Just as I drew the analogy with slavery and feel that rightly so, a proslavery position—regardless of whatever other position a candidate or a judge candidate would hold—that position was so ugly and so fundamentally evil that it disqualified that person from being a public servant, so we feel that a position that allows the continued killing of innocent unborn is just such a disqualifying issue.

Senator DOLE. Well, I think my record, my prolife record is good but I——

Dr. WILLKE. Senator Dole, we are not worried about you.

Senator DOLE [continuing]. But I am not the nominee. That is the problem. It is not a problem, probably a benefit.

However, I can recall situations, though—I might say just as a matter of an aside—where I was not even permitted to be heard by the prolife group in Iowa, for example, so I am not suggesting that any of us are perfect.

It just seems to me that those of us who sit on this committee and also will be voting in the Senate certainly are concerned about

the very statements both of you have made. I think many of us on this committee have consistently supported those ideas.

We consider that to be a very vital matter in our decisionmaking process but I am not certain we can suggest that, if, for any reason there is not total repudiation of *Roe* v. *Wade,* that we must vote against the nominee. I cannot subscribe to that. I am not certain what that does to me but I believe, based on what I have heard, that she deserves strong support from this committee.

Dr. WILLKE. Mr. Dole, all we can do is suggest that we feel it is just that basic an issue. We can only suggest it to the distinguished members of this body for your consideration, and we can only hope that you will weigh it heavily enough to give it its just due.

Senator DOLE. Thank you. I appreciate your testimony but it seems to me that I would have hoped that you might have, after 2½ days, found it possible to support the nomination.

Dr. GERSTER. Senator, I wanted that with all my heart, I really did. You have no idea of the burden that this has placed on me as an Arizonan and as an acquaintance of Judge O'Connor. I listened to every minute of testimony on public television and took extensive notes, looking for some word.

Highly disturbing to me, particularly was the answer to Senator Kennedy's question, that intimated that more knowledge had been gained but not a change of view. I thought that was a very unfortunate answer.

I felt, in answer to Senator DeConcini, her very strong personal view was voiced very sincerely that this was personally abhorrent to her, and then when Senator DeConcini asked if this had been a recent change of heart and she said no, that this had been a view she had held for "many, many years" based on her own family and experience. I am sure that in conversations with her earlier, during 1973 and 1974, this was a view that she held then, that abortion was personally abhorrent to her, but at the same time, of course, her legislative record is consistently proabortion. That is what disturbs me.

Senator DOLE. However, I think finally that less than 6 years ago the question was never raised, and today you are suggesting that not only should it be raised but we should not vote for a nominee who does not have the right position on abortion. That is a big change in a 6-year period.

I assume that nominee Stevens was carefully examined. I was not on the committee at that time. I do remember the Carswell nomination. You correctly indicated one of his problems but there were others, and I supported that nomination. The vote on the Senate floor, I think, was 55 to 45.

I guess that is an indication that either somebody was not alert in 1975 or that we have moved a long way in 6 years to say that if you are not exactly correct on this one issue you should not sit on the Supreme Court. Six years ago have the question not raised at all.

Dr. WILLKE. Senator Dole, might I suggest that it was being raised. It simply was not being raised very loudly by very many people, and it was not being heard. Also, Justice Stevens as I recall did not have a legislative record and had not ruled on any significant prolife or proabortion cases.

I recall being a leader of the movement, as was Dr. Gerster at that time, and we simply did not have the strength, the organization to approach it at that point.

Dr. GERSTER. I am sorry. If I could just add one comment, I think were this a Cabinet appointment, were it an appointment to any other position we would not show the concern that we have. However, as has been pointed out, the U.S. Supreme Court has taken unto itself awesome power.

The power that enabled seven men to strike down the law of all 50 States, including Arizona, that is power, and there is no legislative recall, not the ordinary form of legislative recall. We may anticipate 20 to 30 years in this particular position of power. That is why the Court appointment is so important to us, Senator.

The CHAIRMAN. Senator Metzenbaum.

Senator METZENBAUM. Dr. Willke, it is nice to see you again and welcome you back to Washington.

Dr. WILLKE. Thank you, Senator.

Senator METZENBAUM. Dr. Gerster, it is nice to have you before us.

I have concerns, whether it has to do with right to life or any other single issue, as to what happens to the fabric of our democracy if we are to elect or defeat people, or nominees to the Supreme Court, based upon any one single issue. When Judge Mikva was before this committee the issue was gun control. Now Judge O'Connor is before this committee; the issue is right-to-life.

Both of you are very intelligent people. Both of you, I am sure, are good Americans, but I truly question whether you or anyone else should judge any particular individual for elective office or appointive office based upon one issue. The woman who is up for appointment does not meet my criteria as to what I think a Supreme Court Justice should be. I would not necessarily have appointed her, but that, in my opinion, is not the issue.

She has indicated by her comments that she and I differ strongly on the scope of the first amendment, which I hold very high. Should I, on that basis, vote against her? She has indicated her views with respect to capital punishment, busing, a number of other issues. She was not asked about gun control but, regardless of what the particular issue is, should any member of this committee vote for or against this woman and her confirmation based upon one single issue?

I asked her in the last couple of days about the question of access to the courts, I am concerned about whether or not the poor can get into the courtroom, whether or not they should be denied the right to be in the courtroom because a case is below $10,000 in value. She and I are diametrically opposed on that issue. She wrote an article in which she made that very clear. Should that be a basis for me to vote against her confirmation?

She belongs to some clubs that, in my opinion, are discriminatory. Should that be the basis on which I vote against her confirmation? She has different views than I do as to the role of the Government as it pertains to proper Government surveillance. Should that be the basis on which I vote against her confirmation?

More broadly, the polls indicate that there are a substantial block of Americans—I do not know whether it is a majority, I am

told that it is a majority—who approve of abortion under certain circumstances. Should all of those people be denied appointment to the Supreme Court of the United States, or be denied the opportunity to be elected, because of the position that your organization has taken?

Frankly, it disturbs me, not because I do not respect full well your right to take any position that you want—to me, that is fundamental in this country—but what concerns me is that any group holds itself out and says that on the basis of this issue, this is more important than any other issue. That, I believe, is enough to disturb all of us because I think it strikes at the very heart of the system of government under which we live.

Since I do respect both of you as good Americans, I find something un-American about any particular candidate or any particular appointee being judged on the basis of one issue and one issue alone.

Dr. WILLKE. Senator——

Dr. GERSTER. I would like to address myself to that also.

Dr. WILLKE [continuing]. I think we have to make a distinction between single issue and disqualifying issue. It is our opinion that only once or twice in a century does an issue raise itself in our society that is of such overweening and overwhelming importance, that strikes so clearly to the very heart of the basis of our society and the basis of the freedoms that this Nation has been built upon, the most basic right of all, that unalienable one, to live.

In the last century I mentioned one that arose, and I am sure we have no disagreement here. For someone to have been proslavery after the Civil War was certainly a single issue but I do believe it would have been a disqualifying issue.

For someone today, to pick another example, to be in favor of killing of 2-year-old girls, would disqualify them from holding public office. We would hold that so evil and abhorrent that we would say that simply disqualifies a person.

We have seen members of legislative bodies disqualified for lesser issues—theft, charges of various irregularities—and our Nation has turned them out of office on the basis that this issue was disqualifying. Even certain personal actions, after hours, if you please, have taken members of various legislative bodies out of office, have been viewed by the voters as disqualifying issues.

I would suggest that the killing of 1.5 million innocent unborn babies a year is such an intolerable evil that it is that once-in-a-century issue. You must respect—and you have said you do and we appreciate the respect—that vast numbers of people in this Nation view that as such an abominable evil, so utterly intolerable, that in fact while being single issue it is that once-in-a-century issue. It does in our minds disqualify a person from holding public office.

Senator METZENBAUM. It does not bother you that the gun control people think that is the most important issue? It does not bother you that the single issue prayer-in-the-school people think that is the most important issue? It does not bother you that there are so many groups who think that their issue is the only issue? Now you say that this has become the overriding, the paramount issue, but the fact is that a majority of people in this country have not indicated in the polls they agree with you, and seven Supreme

Court Justices have not indicated that they agree with you. Yet you feel that by reason of your position that that is the paramount issue, and that should disqualify this woman from being confirmed to the Supreme Court.

Dr. GERSTER. Could I address myself to that, Senator.

Senator METZENBAUM. Please do.

Dr. GERSTER. I think that this can only be supported in the context of civil rights, in other words, by law, to deny the right to life, liberty, or the pursuit of happiness to a group of individuals. Like you, I have many other interests. I am much more interested in ecology than the present administration would indicate. Like you, I am opposed to capital punishment, though I see it as a separate issue.

There are certainly other issues, very important issues. I would not call them disqualifying issues. Only a civil rights issue, I think, is disqualifying.

I think that you would agree that individuals should be disqualified if they wish to legislate the return to racial segregation. I think you would agree that an individual who carried the anti-Semetic feelings so far as to believe in the superiority of one race over another, with the legal implications that this suggests, those I think are disqualifying issues.

There is only one reliable poll, and that is the ballot box. When you use the exception "for life of the mother" which National Right to Life and most of the amendments before both Houses contain, most polls agree that 60 percent of Americans would favor an amendment that contained a "life of the mother" exception.

However, what we want is not to impose our morality on the rest of the Nation. We want the American people to have a right to choose. We want this out of the committee so our elected legislature, the House and the Senate, have the right to choose. If two-thirds so choose, then we want the people of America, three-fourths of the State legislatures, to have that right to choose.

We are not trying to impose a law on the Nation, but what we did was have the imposition of a morality by seven men who imposed their morality on some 210 to 214 million people at that time. I think that this is the tragedy, that one individual or seven individuals or nine individuals have that power. This is an extremely important position, and we cannot minimize that importance.

Senator METZENBAUM. I understand it is an extremely important position but my question really pertained to the fact that, you see, I may feel a little stronger than you do about the right to life. I am talking about those who are living. I am concerned about those who cannot feed their families and who cannot clothe their families and house them.

I am concerned about that aspect of the right to life for those who are the living, and yet I do not believe that because this woman is far more conservative than I and probably would not be willing to vote for many measures that I would be willing to vote for, that that justifies on the basis of the right to life—whether it is your concept of right to life or my concept of right to life—I do not believe that that justifies my voting against her.

Were we to do that, I am not certain what kind of Supreme Court we would have. I am not certain who would choose that perfect person who would be as acceptable to Mr. East and Mr. Grassley, and Senator DeConcini and Senator Metzenbaum and Senator Thurmond. I am not sure how you could do that.

However, what bothers me is that your group feels that this issue, this issue is so paramount that you have a right—and you do have a right to testify against her, and I respect that right—but I do question the Americanism of any group in this country which says that one issue is enough of a basis to be for or against an appointee to the Supreme Court or an elected public official.

Dr. GERSTER. You say that you support the rights of living Americans. Senator, the baby within the womb is living. If the baby within the womb was not living, it would not be necessary to kill that baby.

Now the Court decision has led to a bloodbath of 1.5 million. Of that, in the last year tabulated, 130,000 were second and third trimester. Now those are big babies; those are babies you can hold in your arms. We had 13,000 of those that are babies 21 weeks and over. These are babies that could survive in a prenatal unit of a hospital.

We have had experiments which have been described in medical journals, 6 months after the Court decision, one of which involved cutting the heads off 12 babies born alive by hysterotomy abortion up to 20 weeks. The heads were then connected to a heart-lung machine; the internal carotid artery was cannulated. The 12 little heads were kept alive. I do not know how many days. When seven men on a high court declare a child a nonperson, that places that child in a separate category, and these individuals then can be substituted for the rhesus monkey.

Senator METZENBAUM. Dr. Gerster, I can only tell you that this Senator does not approve of killing, whether it is of people in El Salvador, whether it is of children in Colombia, whether it is of starving children throughout the world, whether it is by somebody's gunshot or some terrorist's effort. I believe that these, too, are important issues, but the law does not always go the way I think it ought to go.

The country's actions do not always go the way I think they ought to go, and yet I do not believe that we have the right to say that any one single issue—whether it has to do with something in this country or some far-off country—should be the basis on which you or Dr. Willke or those you represent or I should vote for or against the confirmation of a nominee. It will not be the determinant for this Senator.

Dr. WILLKE. Senator, I think it is important to note that the leaders of this movement are, far and away beyond the norm of this culture, caring people in the sense that they are concerned and are activists in many of the concerns about people, welfare, children who need homes, and so forth. We share much of that with you.

Our problem is that we simply—and let me put it very bluntly—do not think we can solve poverty by killing the unborn children of the poor. We do not think that the violence that you speak of,

which we are concerned about, can be cured by the violence of the destruction of the unborn. We must find other ways.

Senator METZENBAUM. Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from North Carolina, Mr. East.

Senator EAST. Mr. Chairman, I appreciate the opportunity to speak very briefly.

I would like to welcome Drs. Gerster and Willke. We had the pleasure of having them testify before our subcommittee dealing with the human life bill, and we are delighted to see you back this morning.

Just as one single Senator who is a part of this confirmation process, I would like to underscore something that they have said, and try to put it in the context that the distinguished Senator from Ohio has put it in. I would agree with Senator Metzenbaum that ultimately Senators on this committee do have to weigh the whole, as they do in the Senate as a whole body.

However, having said that and acknowledged it, I would like to underscore what Drs. Willke and Gerster have said, that on occasion—whether it is this issue or any other—there can be matters that become of such overriding importance that they could well up as, if not the litmus test, at least as a critical and decisive test in making that determination. I am not suggesting for my colleagues that this is so in this case but I am saying it is not an unreasonable position to take, and that is the position you have taken.

For example, if we had a nominee—which we have not had—but if we had a nominee who had a tainted record, let us say, on their attitude toward race, or if they had a tainted record in their attitude on blacks or Jews or any other prominent group in the great American melting pot, that would be looked upon as deeply and profoundly suspect and perhaps infecting the whole, and it would not suffice to come in and say, "Yes, but they are rather strong on other things," or "They seem to make good sense on other things." If we had, for example, a nominee here who had very primitive attitudes in terms of the role of women in American society, I am sure we would have distinguished colleagues up here today saying, "That alone is enough to disqualify."

Now the single issue problem some say today plagues and haunts American politics, but yet I think Dr. Willke is correct. It is not an uncommon phenomenon. We know in the sixties the antiwar movement—frequently in a great, pluralistic democracy certain things well up and people wish to express themselves on it. They feel if it is not the litmus test, it is a dominant and overriding concern.

I would like to say that I feel these two very distinguished people come in that spirit, and with that kind of message. Whether it solves the problem for any given member of this committee, let alone for the whole committee, I do not know and I do not profess to speak to that. However, I would like, as one member of the committee, to underscore that their putting it in that perspective is reasonable. It is not wholly inconsistent with American history, previously, today, or in the future.

I did want to just make that statement for the record. I know time presses upon us, Mr. Chairman. I shall cease and desist, and

allow my other distinguished colleagues to pursue what line of reasoning they think is pertinent.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

The Senator from Arizona.

Senator DECONCINI. Mr. Chairman, thank you very much.

Welcome, Dr. Willke and Dr. Gerster. We indeed are pleased to have you here, to have your expert advice. The research that you have done and the commitment of your position here I think is unquestionable.

I have the greatest respect, Mr. Chairman, for these two individuals, having worked with them in this cause and which many of us profess and have a deep commitment to. I thank you for your excellent articulation, Dr. Gerster, of the feelings and of the significance behind the right-to-life movement.

I wonder if, in the process of the testimony that we have had before us today, realizing your dissatisfaction with the answers from the nominee, you did give thought to the Arizona Legislature's very firm position of supporting memorial 2001 with only three dissenting votes—many of those who cast votes are identifiable in their prolife position, and committed people to it. Also, if you have had an opportunity to assess the significance of that particular memorial or of the witnesses that have appeared here, primarily from Arizona, who are identified as prolife?

I find it a difficult situation, quite frankly, that your organization has taken the position it has. I respect that, and yet many other people for whom I have the deepest respect on that same issue are coming to the conclusion that Judge O'Connor has made as firm a commitment, either to them personally and quietly or before this committee on how she feels about abortion. I wonder if you understand the reservation that she or any other nominee would have on saying how they would vote on a certain issue.

I wonder if you would like to comment on that?

Dr. GERSTER. Yes. I certainly respect the six members of the Arizona Legislature that testified. Four of the six are outstanding prolife leaders in the State, and certainly friends, one of them a patient. I was listening very closely to their testimony.

I had previously called Tony West and asked if the abortion question had been personally communicated to him, that there had been a change. I think his answer was what you saw reflected, particularly in answer to Senator Grassley's question, "How do you believe, based on what you know now, how do you believe that Judge O'Connor would vote on an abortion-related case coming before the U.S. Supreme Court?" All three of the representatives to whom that question was addressed said that they had no idea how she would vote, so they have literally taken this on faith.

Senator DECONCINI. Excuse me. I think Tony West made it very clear that he felt that she would vote a prolife position or he would not be there, if that——

Dr. GERSTER. Well, no, not in his answer to Senator Grassley's question. I wrote it down as each one answered. He said that he hoped that if she had not, thus far, changed her mind, that she would in the near future change her mind. I know, particularly with that one representative, this is the paramount issue——

Senator DECONCINI. Yes; indeed it is.

Dr. GERSTER [continuing]. And I respect him greatly. I think that they have gone on faith and trust and I hope that they are right. I hope it deep in my heart. However, I really had to have some assurance other than good will, which is all that they had.

Senator DECONCINI. Thank you, Mr. Chairman. I have no further questions.

The CHAIRMAN. Thank you.

Senator Grassley.

Senator GRASSLEY. Dr. Willke, you stated in your prepared testimony that in *Roe* v. *Wade*, the Supreme Court—and I quote from your statement—"actually legalized abortion through the entire 9 months of pregnancy." As far as I know, the popularly held belief is that the case did not go that far, so I would like to have you elaborate on your statement.

Dr. WILLKE. Thank you. There is a general misunderstanding, Senator Grassley, out there, and it is incredulous to us that the true facts of the matter have not emerged. Everyone agrees that the Court ruled that there would be abortion on demand in the first 3 months. This was to be at the request of the mother, who had to have a licensed physician to do the job; no reason need be given.

Senator GRASSLEY. Yes.

Dr. WILLKE. Their second phase spoke of the time from the end of the first trimester until viability. The Court at that time estimated viability at being 24 to 28 weeks. In fact, it is down close to 20 weeks now, so that phase of time is roughly from the end of the first 3 months to about 4.5 or 5 months.

During that time, the Court allowed the same freedom to request and to perform the abortion to those two individuals but stated that the State could insert certain regulations. The thrust of those regulations had nothing at all to do with any protection for the unborn child. Again, no reason need be given. The thrust of those regulations in that phase was to make the procedure safer for the mother.

The third phase spoken to in the Court was from viability until birth, and if my memory serves—and I will quote from memory—during that time the Court said that the State may if it wishes proscribe—forbid—abortion but went on then to say that it was not allowed to forbid abortion if one licensed physician stated that this abortion was necessary to preserve her life—few would argue—or her health, and that was very clearly stated. If one physician saw it necessary to preserve her health, abortion was legal until birth.

Now the Court went to great pains to define the term "health." The Court speaks of that particular definition in three different places. It includes under that the woman's age; it includes under that—let me see if I even have this particular quote with me. I think I do. I will quote *Doe* v. *Bolton*.

> The medical judgment may be exercised in the light of all factors: physical, emotional, psychological, familial, and the woman's age, relevant to the well-being of the patient. All these factors may relate to health.

In the other decision, the definition of "health" was broadened to include if she were unmarried, if child care was to be a problem, if she faced a distressful life and future, and a number of others. In a

concurring decision by Mr. Justice Douglas, which does not have the force of the decision but is certainly read, he included if it caused her to abandon educational plans, sustain loss of income, endure the discomfort of pregnancy.

Now I would submit to you that that definition of health sweeps so broadly that it can rather be defined as social distress of the woman as regarded by herself, assuming she can get a physician to agree with her.

As evidence of the fact that these late abortions occur, the State of Colorado, reporting on a 24-month period recently, detailed a total of 22 abortions in the city of Boulder, Colo., alone that occurred in the eighth and ninth months of pregnancy, 2 of them at 38 weeks—that is, 2 weeks before her due date. Those are officially reported in the health statistics of the State of Colorado.

Now we do have abortion in all 50 States in the entire 9 months of pregnancy. All you need is a licensed physician who will do the job and a woman who wants it done.

Senator GRASSLEY. Dr. Gerster, in regard to the Arizona State Judiciary Committee's consideration of what is known as H.B. 20, could you expand on your knowledge of the committee's deliberations? For example, were there any amendments presented on the bill or was there a substitute bill considered?

Dr. GERSTER. That is the 1970 bill, right? Yes. That would have removed—would have stricken all legal restraints from the Arizona law which allowed for life of the mother, and left only the words "done by a licensed physician." Therefore, this would have had no reference to duration of pregnancy, to indications, and were it passed would have been the most radical of all State legislation 3 years prior to the Court decision.

This passed the house and then passed the judiciary, Senator O'Connor having voted for it. It then went to the rules committee, where it failed to pass, but she voted for it again in Rules. In explaining this on the first day of testimony, Judge O'Connor said that this was the one vote that she did say she regretted, or she would not have voted today for that particular bill but she did so then because there was no other bill available.

We have been given a copy of senate bill 216, introduced February 6, 1970, by then-Senator McNulty, which was a more moderate bill. It would have limited gestation of pregnancy to 4.5 months. It would have allowed for informed consent: The details of embryology were to be given to the woman. It would have allowed for a conscience clause, that the operation be done in a hospital, and that in the case of a girl 15 years or younger, that parental consent would have been required.

This was the bill that this morning Judge O'Connor referred to—acknowledging that she knew of its existence—that mechanically it was too cumbersome. Now this bill predated the other bill. It went to the judiciary committee, on which then-Senator O'Connor sat. It was introduced on February 6, 1970. It was held in judiciary and then, when the more radical bill came along, it was voted out of judiciary in April. Having the choice of the two bills, she voted out house bill 20 which would have removed all restraint through 9 months of pregnancy.

Senator GRASSLEY. One last question, and you have already referred to it in your comments to my colleague from Arizona, but I wanted your individual reaction to what the three members of the house of representatives said yesterday about their feelings of Judge O'Connor's opinion on abortion.

Dr. GERSTER. I think that they truly believe—I know those three individuals very well, and I think they would not have appeared, as Senator DeConcini said, had they not believed that she had changed her mind. I also know very well that they had been given no indication, regarding the abortion question, that she has. They were very clear.

In answer to your question—it was a very good question, by the way—particularly I thought that the statement of Tony West was very poignant when he said that if she had not now, that he knew that she would change her mind. I can only say that I know that they are being sincere. I know that they spoke absolute truth.

Senator GRASSLEY. Let me ask you: Obviously, Representative West has a very good feel concerning the basic instincts of Judge O'Connor, and he feels that he has some understanding of those instincts. Do you share any of those insights?

Dr. GERSTER. No. When I talked to him at length, about an hour and a half, I said, "Tony, please share with me what you have because I want so badly to support this nomination." I said, "Did she address herself to abortion when she spoke to you?" He said, "Well, she couldn't."

However, she told him words to the effect that she "would not embarrass him." I think those were the words used. I suppose if——

Senator GRASSLEY. Isn't there a camaraderie there among friends and among former colleagues that maybe says more than words can say? A statement like that, doesn't that impress you at all?

Dr. GERSTER. No, not in the light of the testimony here in the first 2 days. I was very hopeful coming here, and I thought I would hear in that testimony, and I was extremely disappointed. I felt that more could have been said. If *Roe* v. *Wade* is discounted, and I know there is much controversy whether she could have addressed herself to an amendment which is a part of history but which may come up again—however, I do believe that we could have had clearer answers to her feeling, for instance, on the memorial of 1974 against the human life amendment even when rape and incest had been added to "life of the mother." I think we could have gotten a clear indication of how she would vote today on that bill. That is what I was hoping for.

Senator GRASSLEY. Mr. Chairman, I am finished.

The CHAIRMAN. Senator Baucus?

Senator BAUCUS. Thank you, Mr. Chairman.

Dr. Willke and Dr. Gerster, I want to welcome you back to the committee. When we last spoke, none of us thought that we would be back under these circumstances quite so quickly.

I have two lines of questions, both fairly brief. When Senator Dole asked questions concerning Justice Stevens, one of the questions was whether or not he was asked questions concerning *Roe* v. *Wade*. Apparently he was not asked any questions concerning that decision or concerning his position on abortion.

I am wondering whether in your view he should have been asked those questions by this committee during his confirmation hearing?

Dr. GERSTER. Yes, I believe so.

Senator BAUCUS. If, in answer to those questions, he at that time did not repudiate *Roe* v. *Wade* or did not take a strong position in opposition to abortion, would it have been your recommendation at the time that this committee should not have confirmed him?

Dr. WILLKE. I am sure that that would have been our recommendation, Senator Baucus. I could only repeat what I said a minute or two ago, and that was that the issue was certainly a much less discussed issue. The feelings of the Nation had not been nearly as aroused. We had not gone through the last two election campaigns in which this issue was decisive in replacing some members whose previous position had been proabortion.

I would suggest that there is a time in history when certain issues—when we can say that their time has come or is coming. There is certainly no question that the time for being concerned about the destruction of the civil rights of an entire class, the unborn, is here. I might suggest that the question will most certainly be relevant in the future.

Senator BAUCUS. Dr. Gerster, my second line of questions concerns your opposition to Judge O'Connor. I understand that one part of your opposition stems from her position on abortion.

I understand that the second part of your opposition stems from her lack of candor. Is that correct?

Dr. GERSTER. Yes. I think it is because she was attempting to be so honest to the committee, that she answered in the way she did. I believe that if you listen very carefully to her answers, we have only one statement of opposition. That would be to a sweeping law that would remove all restraints whatsoever during 9 months of pregnancy, the 1970 law she felt was a mistake.

I really, Senator Baucus, have to discount personal opposition. We have many Senators that we worked very hard against in our political action committees during the last election that were sincerely, personally opposed to it. The former President of the United States was personally opposed, and I really believe he was, personally opposed to abortion.

However, the distinction has to be made between being personally opposed and being willing to see restorations of the rights of the newborn. We are not insisting that an appointee to the U.S. Supreme Court be a prolife champion on a white charger. We only ask that they see the mistake of *Roe* v. *Wade*, even as constitutional law, and that we return this choice to the people of the United States, which I think is where the choice should have rested to begin with.

Senator BAUCUS. You apparently know the nominee fairly well, at least you are fairly well acquainted with her. In your opinion, what is her general reputation with respect to candor and honesty?

Dr. GERSTER. I think it is good. I have never had any reason to doubt it at all until the Starr memorandum, and I hope that that was due to the enthusiasm of Mr. Starr to present a good case for the candidate rather than——

Senator BAUCUS. Yes, that was the comment I was going to make. It is possible that the error was made by the author of the memorandum.

Dr. GERSTER. I would hope that is true. I was a little disturbed by the first few questions regarding the lack of memory of the vote, those two votes, in so radical a bill. We have no choice but to accept that but it is astounding that that could be forgotten.

Senator BAUCUS. Well, I must say in the short time I have been in the Senate, I would be hard pressed to remember some of the votes that I have cast in the past year or two. Thank you very much for your testimony.

Dr. GERSTER. Thank you.

Senator BAUCUS. Thank you, Mr. Chairman.

The CHAIRMAN. We have a witness who has to catch a plane right away. Dr. Willke and Dr. Gerster, would you mind keeping your seats, and we shall bring the other witness up for a minute or two?

The Honorable Joan Dempsey Klein, would you come forward. We understand you are with the National Association of Women Judges, and I understand you have to catch a plane right away.

Would you hold up your hand and be sworn?

Do you swear that the evidence you give shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge KLEIN. I do.

The CHAIRMAN. Have a seat, and you may proceed for 5 minutes.

TESTIMONY OF HON. JOAN DEMPSEY KLEIN, PRESIDING JUSTICE, CALIFORNIA COURT OF APPEALS, AND PRESIDENT, NATIONAL ASSOCIATION OF WOMEN JUDGES

Judge KLEIN. Thank you.

I understand my comments in their entirety will be made a part of the record, and so I shall summarize my remarks before this honorable committee.

The CHAIRMAN. Without objection, that will be done.

Judge KLEIN. Thank you.

It is with extreme pleasure that I appear before this committee to speak on behalf of the confirmation of the first woman nominee to the Supreme Court. I am before you in my capacity as president of the National Association of Women Judges, which is an association with which over half of the Nation's Federal and State female judges have affiliated, along with a number of male judges.

The purposes of the association include the discussion of legal, educational, social, and ethical problems mutually encountered by Women Judges and the formulation of solutions, and of course, efforts to increase the number of women judges so that the judiciary more appropriately reflects the role of women in a democratic society.

As you might well imagine, the appointment of a woman to assume a place on the highest court has had top priority on our agenda. It seems to have been such a long time coming but, when considered in a historical perspective, perhaps the 191 years is an understandable period of time.

The legal roots of this Nation are in the English common law, which law classified women in the same category as chattels, chil-