

Ms. MICHELMAN. We did not take a position on Justice Kennedy. I am not sure that I would say that was the best decision NARAL ever made, given what we know about Justice Kennedy right now.

Ms. WATTLETON. We opposed his confirmation, but did not launch an active campaign against him.

Senator GRASSLEY. Do either of you remember whether your organizations supported Judge Stevens in 1976, when he was before—

Ms. MICHELMAN. I do not remember.

Ms. WATTLETON. I was not head of Planned Parenthood.

Senator GRASSLEY. Mr. Chairman, I have no further questions.

The CHAIRMAN. Thank you very much.

The Senator from Alabama, Senator Heflin.

Senator HEFLIN. The issue of *Roe v. Wade* is a national issue and certainly on our minds. In the future, the question of whether it will or will not be reversed will bring into consideration two major elements for the Court to look at. One is the issue of prochoice/prolife, and the other issue is stare decisis, the precedent which Senator Grassley referred to. There may be other elements that would enter into it.

Would you give us your evaluation of what you have read and heard relative to Judge Souter's writings and statements pertaining to stare decisis?

Ms. MICHELMAN. Well, before I get to that point, Senator, I would just like to say that the issue really is not prolife/prochoice, it is who decides, it is who decides what is the right thing to do, the individual or the State.

As far as stare decisis, he did not indicate how he would rule, how he would use the issue of precedent as it relates to *Roe v. Wade*. He did not discuss—

Senator HEFLIN. He spoke generally pertaining to—

Ms. MICHELMAN. He spoke generally.

Senator HEFLIN. Well, give us your evaluation of his general statements and writings relative to stare decisis.

Ms. MICHELMAN. Well, his general statement, he said that he has respect for precedent.

Ms. WATTLETON. I believe in his statement he also said that stare decisis was but one element that should be considered—

Ms. MICHELMAN. Right.

Ms. WATTLETON [continuing]. In whether the earlier decision had been right or wrong in its impact on the American or the people and that he would evaluate what impact it would have on the people, before making a decision to overturn it.

Ms. MICHELMAN. And he also went further in the area of privacy, to say that this whole area is open for reevaluation and, in fact, it would be years before it would be settled. So, there is a mixed review on the precedent view, his view of precedent as it relates to *Roe v. Wade*.

Senator HEFLIN. That is all. Those are all the questions I have.

The CHAIRMAN. Thank you very much.

The Senator from Pennsylvania, Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

I would start with the very basic question as to whether you think that President Bush will submit a nomination more to your

liking. He has taken a position of prolife, against abortion. He has submitted a nominee who leaves the question open. The evidence is compelling, if not conclusive, that President Bush did not look for a litmus test. Do you think that it is realistic, if we turn down Judge Souter, to find President Bush submitting to the Senate who will give you a flat commitment to uphold *Roe v. Wade*?

Ms. WATTLETON. Well, I hope that President Bush will, in future nominees or nominations, rather, recognize that he was elected by the American people, that his personal views on these questions are those, his private views. And we have every hope to believe that this nominee and future nominees will uphold the protections of the Constitution and to suggest that the President would make a nomination of someone who believes that our constitutional protections should be eroded seems to me to be a very troubling development in the direction that this country might take.

I have come of age in a period of time in which the Court has made it possible for me to realize the American dream, as a member of a minority race, as a woman, as a poor child growing up in this country, and so I understand the meaning in a very personal way of the enlargement and enfranchisement of groups of people in this country. And to disenfranchise women and for a nominee not to make clear his position with respect to the enfranchisement of women in this country is indeed a very disturbing development.

Ms. MICHELMAN. I think, Senator, President Bush is part of the legacy that I was talking about, the 10-year legacy of using the judicial process—in fact, he ran on a platform very strongly committed to using this process to take away this right, and he never repudiated that when he made this nomination.

I think it is possible for President Bush to say that he is not standing on his platform commitment and that he is not submitting a nomination that is not litmus tested and the litmus test was generated by the Reagan-Bush administration, not by us. I think it is possible, and we cannot allow our views about this important right to go undiscussed, because we might think we might get someone worse, as everyone keeps saying. The issue is what is before us now and what is at stake in this.

Senator SPECTER. Those are very interesting comments, but they do not answer my question. I am very sympathetic, Ms. Wattleton, to everything you say about women's rights and about the rights of Afro-Americans.

And as I listen to you, Ms. Michelman, I hear the word "hope," I hear the word "litmus test," but it is totally unrealistic to expect President Bush, on this state of the record, to submit to the Senate a nominee who is committed to reverse *Roe v. Wade*. That would just fly in the face of everything that President Bush has said and done.

In submitting a nominee like Judge Souter, where the judge has stated that he was not asked the question, and there is no evidence that he was asked the question, and he has withstood repeated questioning and has come here with an open mind and not taken a position, I just think it is not realistic to expect that, if Judge Souter is turned down, we will find a nominee who will pass your test that is a commitment to uphold *Roe v. Wade*.

Ms. WATTLETON. Well, you may think it is unrealistic. The answer to your question is would we expect that, and the answer was—the question was would we expect it, and the answer is that, yes, we do expect a nominee to the Supreme Court to uphold our constitutional protections in procreative matters.

Senator SPECTER. Ms. Wattleton, that is too high a level of generalization. When you come down to saying you expect President Bush to submit a nominee who will commit in advance to upholding *Roe v. Wade*, I for one just have to say that is not realistic.

Mr. WATTLETON. But, Senator Specter, I think it was realistic for this committee to ask Mr. Souter whether he believed that the Constitution extended to the protection of individuals or women not to be pregnant. I think that this is a question that was not asked by us, but by this committee, and that particular candidate or Judge Souter chose not to answer that question, and so that is the reason that we are here before you today, because we think that implicit in that question is the question of whether there are constitutional protections for the use of contraception, as well as the constitutional protections to terminate an unwanted pregnancy.

Senator SPECTER. When you testify that there is not a great following in this country to end legal abortion, my own sense is that Senator DeConcini has raised a very good point when he says—I think in his terms, and I do not necessarily agree with his characterization—that a majority of Americans are against abortion, but it is a complex question.

The polls come out in favor of a right to choose, if there is an absolute prohibition that anyone can choose under any circumstance, the right to life of the mother or the incest or the rape questions, and then you have the further gradation about the right to choose over the husband's objection.

Many people think women ought to have the right to choose, but you say, well, suppose they have been married 15 years and it is the first pregnancy and the husband objects, and then you get to a 15-year-old girl living at home and the question of whether her parents have input. When you get down to these levels, there are many gradations as to what public opinion says on this question.

As I think both of you women know, I have supported choice and have supported public funding, because I do not think that there is any way for government to get into this complex question. I do not like abortion, but if the Government is going to try to put a road map on this, it is just impossible to do, with all of the variations, so I have taken the position that I have.

But coming from a State which has passed a very restrictive abortion law and facing large groups of prolife constituents of mine every January 23, and going to Pennsylvania's 67 counties, it is a dominant issue. An interest against abortion—I have told Ms. Michelman, when she asked for a chance to talk with me, and we did not get together, Ms. Wattleton—but the people on your side are not nearly as active politically, not that that is the end-all, but we have a responsibility above and beyond those whom we hear from.

But there are other very vital issues here. The right to die issue is one comparable to the right of a woman to choose. Senator Humphrey is not here and maybe he will come, but he would talk about

the right of the fetus, potential life. He would not say potential, he would call it a life in being, but I would say the right of a fetus or potential life. If you think that our constituents are on your side, I think you misjudge the tone of the people.

Senator Kennedy gave a statement about separation of church and state, while Judge Souter did not make a statement on the separation of church and state that Jefferson talked about or that Justice Black talked about. Should I vote against Judge Souter because I didn't get a flat assurance on that important issue?

Ms. MICHELMAN. Well, Senator, I would like to speak to your characterization of the polls. First of all—

Senator SPECTER. Well, do that after you answer—

Ms. MICHELMAN [continuing]. I think you should vote against—

Senator SPECTER [continuing]. The pending question, if you would.

Ms. MICHELMAN. I think you should vote against Judge Souter because he has not established a recognition of this fundamental right to privacy to include the right to choose. That is my first answer. I think you would be in good conscience in voting against him because so much is at stake. The American public does have differing views on which circumstances personally they think are acceptable for having abortions, but they don't differ largely on who should make that decision. The majority of people do believe that Government cannot answer these questions, and they are also feeling very strongly, mind you, that this Government does not do nearly enough to help to reduce the need for abortion by advancing a very aggressive prevention program in this country. That is where the American public believes the effort around reducing the need for abortion should be, not in the area of taking away the right of a woman to decide once she faces a crisis pregnancy. But I think you would be absolutely right in withholding your consent to this nominee based on what is at stake in this process.

Senator SPECTER. Ms. Wattleton, may I ask you a question?

Ms. WATTLETON. Sure.

Senator SPECTER. This may seem arcane, the jurisdiction of the Court, but I think the most fundamental right that we talked about in this country on a nominee is the right of judicial review. If you don't have judicial review, you can't get *Roe v. Wade*. Judge Souter did not satisfy me when I asked him about the authority of Congress to take away the power of the Court to decide first amendment issues. If the Court doesn't have the power to decide a woman's constitutional right, then there can be no constitutional right.

Do you think it appropriate for me to vote against him—I am asking you, Ms. Wattleton—because he didn't answer the question as to Court jurisdiction to my satisfaction?

Ms. WATTLETON. I believe that if you have satisfied in your mind that this is not a candidate who will uphold the Constitution of the United States and the protections therein, then you should vote against him.

I might point out that I believe that one of the reasons that you are feeling the political churning around the abortion issue is because the Court, as it is now composed, has created an enormous potential for political turmoil on this issue by undermining *Roe* in

the *Webster* decision. When it upheld the Missouri law that granted State restrictions on abortion, that undermined the earlier rulings on *Roe* and its progeny.

So I think that, yes, it is unfortunate that we find ourselves in 1990 once again debating this issue politically, something that is settled in the minds of the American people but now is politically in a state of upheaval again.

Senator SPECTER. Well, my time is up, so I would like to conclude with this very brief comment. I understand your position, but the focus is very much on a single issue. I did not have an opportunity to ask you if you would vote against a Senator on a single issue. As a person who has to decide a lot of questions, I very strongly feel that a Senator ought to be judged on his entire record.

When I asked Ms. Michelman the question about should I vote against Judge Souter because he doesn't satisfy me on the separation, the wall, between church and state, I didn't get an answer to that. It comes right back to the abortion issue. When I asked Ms. Wattleton if I should vote against Judge Souter because he doesn't satisfy me on the vital issue of judicial review, I get a generalized answer that if he doesn't uphold constitutional rights I should vote against him and we come back to the abortion issue.

The abortion issue is a very, very vital one, but it is one issue of many which are before the Court and have to be considered by the Senate. I do not have a fixed opinion on Judge Souter at this point, and I am very interested in your testimony. But I do have to say to you that as sympathetic as I have been, there is a big constituency out there opposed flatly to your point of view, which has to be weighed politically, although I voted, as I have said, prochoice because I don't think Government can deal with this issue. But there is much more in America besides any one issue, however important any one issue may be.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Let me conclude with a comment and a question. I may or may not agree with your final recommendation. For me it rests upon my reading, literally rereading—I don't say that lightly. We sometimes hear Senators say I am going to go back and reread the record, and you look at them like—the press just smiled and everybody went, yes, they understand that one. But literally I will reread the record in about 15 to 18 places that I think are key in helping me determine whether or not Judge Souter's assertions recognize a right to privacy in this area.

Now, let me make sure. I am going to characterize your position as I have heard it here today, and I want you to correct me if I am wrong rather than take the time to go back and ask you a number of probative questions and try to get all the pieces of this. I don't expect you to agree with me if I in any way misrepresent what I understand to be your position.

It seems to me that what you are saying here today is that your opposition to Judge Souter is grounded on his unwillingness to acknowledge the existence of a fundamental right to privacy relating to a woman's decision whether or not to remain pregnant. His failure to recognize that as a fundamental right, you are arguing, puts him in a category and the issue in a category totally different than