Ms. NEUBORNE. He did not have to answer a question about a pending case, Senator. He was asked to discuss the concepts, the concepts that underlie the principles of the fundamental right that exists for 20 years. As he talked about fundamental concepts in other areas, on equal protection. He talked about where those underlying concepts came from.

And again, in—I take Senator Biden at his word that I can answer a nonquestion—when we talked about this being a single issue, I must say that when *Brown* v. *Board of Education* was the law very recently and Justice Stewart was being appointed to this Court, he was asked how he would have ruled on that case.

That was considered a reasonable question at that time. I would say that if that were the issue now, that is certainly a monumentally important single issue and if that answer were the wrong answer, I would say that he perhaps would not be sitting on the Court. It was valid to ask how the lives of African-Americans and people of color would be with that Justice sitting on the Court, given the change in the law on equal protection and it is just as important for women to know where their fundamental rights will be with another Justice sitting on the Court.

Senator SIMPSON. Mr. Chairman, you have been very kind, but there really is only one case that he was concerned about and could not speak on and it was because of ethics, not because of some great escape mechanism. If you don't recognize that then you don't recognize the portion of the ethics that you just read.

That's the difference here. This is not just some nominee. This is a sitting judge and the first thing that everybody wanted to know was about *Roe* v. *Wade* and there it is and that is why he couldn't respond.

I thank you, Mr. Chairman.

The CHAIRMAN. I thank you, Senator.

Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Controller Holtzman, I would like to discuss with you the *Colbath* case, because I think you have made a point that requires some analysis to determine substance because if your analysis is correct, and we have the opinion before us, then I think that has some substantial probative weight.

I agree with your statement that a woman has an absolute right to say no at any time to any man. And that forced sex is rape whether or not, well, forced sex is rape, we will end it there. In your statement, you say, "at worst, the prior activities consisted of very flirtatious behavior."

I would respectfully disagree with you about that characterization. There is a slightly different issue involved, in fact, a significant different issue involved as to the prior contact between the complaining witness and the defendant contrasted with other people. But when you say that it was only flirtatious I think that the contact with the defendant in the presence of the other men is all relevant but starting with the other men.

The testimony was more than the generalization of provocative attention. "A girl with dark hair hanging over everyone and making out with Richard Colbath." Then she had been sitting in the lap of one of the defendant's companions. Then "engaged in

close physical contact with at least one man besides the defendant."

Then, as to the defendant, himself—and I think this is relevant although there is that distinction that I mentioned—when you raise a question about provocation saying that the complaining witness provoked the rape—and this is somewhat delicate, but prosecutors like you and I know that you have to be specific in a courtroom.

I think it is important because I think you have raised a very significant issue here, and I think it has to be discussed. As direct as this is, I think the testimony has to be articulated.

So, I give some advance notice to those who are watching on television that this is what happened, as the opinion of the Court says, with respect to the defendant. He testified that he had engaged in "feeling the complainant's breasts and bottom, and that she had been rubbing his crotch before the two of them eventually left the tavern and went to the defendant's trailer." Now, I would say to you that, as I read that conclusively, it is a lot more than flirtatious behavior.

You raised the contention that Judge Souter had not made any analysis here and had not really considered the question of prejudice. I know you have the case before you, and at page 1216, this is what Judge Souter said, in part:

"Thus, this court has held that a rape defendant must be given an opportunity to demonstrate that the probative value of the statutorily inadmissible evidence in the context of that particular case outweighs its prejudicial effect on the prosecutrix.

Later on page 1216, the court says,

As soon as we address this process of assigning relative weight to prejudicial and probative force, it becomes apparent that the public character of the complainant's behavior is significant.

Now, this case is considered, as the opinion of the court says, in the context of the State and national constitutional rights that a defendant has to confront the witnesses against him and to present his own exculpatory evidence.

Now, district attorneys have an obligation to be scrupulously fair to everyone and it is a balancing test which he undertakes here. But as I read the opinion, Judge Souter relies on some pretty positive evidence as to physical contact and action between the defendant and the prosecutrix in the presence of the other men, and then the physical contact and the analysis as to prejudice, and he might be right or he might be wrong in his final conclusion.

You could write this opinion coming out the other way and say that it was too prejudicial, but it seems to me that it is a scholarly opinion and well within the ambit of reasonableness for his conclusion.

I would be interested in his comments.

Ms. HOLTZMAN. Well, Senator, I am very well aware that there is a constitutional limitation with respect to the rape privacy law. The Federal rule that I wrote explicitly requires that judges take that into account. That is not the issue here, it seems to me.

It begs the question to say there was a constitutional right. There would be a constitutional right, if the evidence were relevant

and if the evidence were probative. Further than that, it is also a question of weighing the prejudice, because the State has an interest here, too, as cases have announced, States have an interest in rape privacy laws, because of the interest in encouraging women to come forward and testify.

You are certainly well aware, as a distinguished district attorney, of the history of the rape privacy law. The reason for it was that any time a woman took the stand, her entire sexual activity could be brought to the attention of the jury, on the theory that if a woman ever said yes, she was not going to say no.

It had another purpose, and that is building on the myths and prejudices about rape, trying to enflame the jury's feeling that a woman who was not chaste, was not believable, and fostering a perpetuation of the myths.

Now, what you have here is, No. 1, as I said in my testimony, the judge says, and I quote here, and this is on page 1217, "Because little significance can be assigned to"—let me skip here—"to a fear of misleading the jury." Why is little significance assigned to fear of misleading the jury, when the scholarly opinion, and research has been done on this, shows that prejudice to the jury is a factor. He didn't recognize that.

I am not saying that he could not have said, "I recognize that there is a possible prejudice here to the jury, but the defendant's rights overweigh that." He just ignored the little—dismissed this area of prejudice, which is very important.

Similarly, he did not say the evidence about her past behavior—by the way, I should say, Senator, that that is the defendant's version of her behavior. The complaining witness 'version of her behavior was very different.

Senator SPECTER. Well, Ms. Holtzman——

Ms. HOLTZMAN. In any case, let us assume for the moment and take the defendant's version——

Senator SPECTER. Wait a minute. This is a question of admissibility and weight to be given by the jury. You are not saying that because it is the defendant's version, that it is not entitled to be considered?

Ms. HOLTZMAN. Under the rape shield law, the decision is really to be made by the judge as to the question of relevance and the question of prejudice. That is to be made by the judge, not the jury. That is the whole purpose of having the rape shield law, it is to take this issue from the jury and then you—

Senator SPECTER. Well, that does not bear on whether the defendant can testify.

Ms. HOLTZMAN. No; I did not say the defendant, I said that the——

Senator SPECTER. Well, you said "his version," as if his version is entitled to less weight.

Ms. HOLTZMAN. No; I am just saying——

Senator SPECTER. Both versions are entitled to weight.

Ms. HOLTZMAN. Exactly, that is the point I am making and it is the point I am trying to make. We do not hear in Judge Souter's opinion anything about a different version of the facts, but let us assume the facts are the way the defendant, no matter how he presented that evidence, let us assume the facts were as the defendant

claimed them to be. Let us assume exactly what happened happened.

If the complaining witness behaved in this fashion with the defendant, would you call this provocative, in the sense that this provoked a rape? Is that the word you would use to describe it? That is what troubles me, the language that is used by Judge Souter here.

Now, this may be language suggesting—this may be conduct that——

The CHAIRMAN. Excuse me, I am confused. May I ask a question of both of you?

Ms. HOLTZMAN. Yes.

The CHAIRMAN. Is the issue whether or not the conduct provoked a rape or the conduct went to the credibility of the assertion that it was consent or rape?

Senator SPECTER. The latter.

Ms. HOLTZMAN. No, no, no. The question of prejudice goes to the——

The CHAIRMAN. I do not know, that is why I am asking.

Ms. HOLTZMAN. The question of the prejudice goes to the credibility, because if you can show that a woman is not "chaste," you have a chance of affecting the jury's view of her credibility.

The CHAIRMAN. Well, that——

Ms. HOLTZMAN. What troubles me is the fact that Judge Souter characterized her behavior, in his words, as sexually provocative, provocative meaning provoking something. Does that mean provoking the rape? Does that mean the victim is to blame?

The CHAIRMAN. No; I——

Ms. HOLTZMAN. That is what troubles me about this.

The CHAIRMAN. I understand. I am not sure I disagree with you. I did not realize that he was using the word in that way. I did not know how he was using the word, whether he was using it that it provoked a rape, or whether or not it was provocative and, therefore, went to the question of the credibility of the witness of the woman alleging to have been raped, as to whether or not she consented or she was raped, not whether or not it justified any action whatsoever on the part of the man.

Ms. HOLTZMAN. He does not parse it that way, but there is no reason to think that it would not affect—and that is one of the reasons for the rape shield law, that it would not affect the jury's view of her credibility. In fact, as we quoted this judge in 1835, that a chaste woman is more likely to be believable, less likely to have given consent, and that is the problem and that is the problem of prejudice of using this evidence, and that is why there is a very careful balancing test that we urge on judges, and I do not see any real realization in this opinion of the care that is required and that is balancing test and that is my concern.

The CHAIRMAN. I apologize for the interruption.

Ms. NEUBORNE. Could I add a comment to that?

Senator SPECTER. You may, but let me finish this exchange with Comptroller Holtzman.

He does specifically put this in the context of consent and that is in the very first paragraph, at the conclusion, where the judge talks about the defense of consent. With all due respect, Ms. Holtzman, I think you are not on the central issue, when you talk about

the issue of being chaste raises a question of credibility. The issue of chaste—and chaste is the wrong concept, but I use your word, just to follow up with you——

Ms. HOLTZMAN. I am quoting from the judge and perhaps you were not here to hear the beginning of my testimony.

Senator SPECTER. If I can finish here, chaste raises the issue of consent. But never mind the question of chaste, where you pick on the word "provocative" and say that there is an issue here that her conduct provoked the rape. I do not believe that is what Judge Souter is saying at all.

He is saying that if you have a context where a woman in a bar, according to the defendant's testimony—and again, on a very basic point, it is not a question of whether you assume he is correct or not, we are talking about admissibility of evidence to go to a jury—as to whether the jury believes him or believes the woman, not a question of assuming it for purpose of this legal issue. It is a question of whether the jury hears it. We are not assuming it one way or another.

But when you talk about relevancy and you say you do not see the relevancy, if you have a situation where a man and a woman are in a bar and the critical testimony in question is that "he is feeling the complainant's breasts and bottom and that she had been rubbing his crotch" all in a consensual context, then the issue is, if sexual intercourse occurs later, is that relevant that the sexual intercourse was consensual as far as she was concerned.

Now, it may not have been, but the issue on relevance is does this kind of contact, where a man feels the complainant's breasts and bottom and she rubs his crotch, is that relevant as to whether a later act of sex was consensual or not, it seems to me to be directly relevant, especially in terms of the time sequence. You talk about it being hours later. It happened and they went directly to the trailer.

Ms. HOLTZMAN. Excuse me, Senator, I do not think the opinion is very clear on the issue of time. The fact of the matter is that they went to the bar apparently 6 hours before the alleged rape took place, according to newspaper reports about it, so the time sequence here is not at all very clear in that respect. It may have been a matter of 4 or 5 hours before this conduct took place, it may have been a matter of 2 or 3 hours before or 15 minutes before. We have no way of knowing from this opinion.

But as I said to you, Senator, it is not——

Senator SPECTER. If you have no way of knowing, why do you say that it is a long time?

Ms. HOLTZMAN. Because it could have been 6 hours. There is nothing to suggest that it was any closer than that, not from the judge's opinion. But the issue is not simply one—well, I will say that the rape evidence law, with all respect, raises two issues: One, is it relevant; and, then two, is it prejudicial.

One, on the issue of relevance, I do not necessarily agree with you. Because she may have engaged in flirtatious behavior with him, very flirtatious behavior with him——

Senator SPECTER. Ms. Holtzman, is it flirtatious for him to rub her breasts and bottom and her to rub his crotch? Is that what you call flirtatious?

Ms. HOLTZMAN. Well, I do not call that sexual intercourse, which is what happens in rape, which is——

Senator SPECTER. Of course, it is not sexual intercourse, but is it foreplay? Does that suggest that there is a consensual relationship here, if he did not force her to do that?

Ms. HOLTZMAN. It may——

The CHAIRMAN. Whoa, whoa, whoa.

Ms. HOLTZMAN. Senator, it may suggest a consent to those acts. It may not show consent to any other acts with respect to him. Now, you are assuming that and that may reflect your own view of the relevance, but I am not saying that anyone would necessarily do that.

The CHAIRMAN. Ms. Holtzman, this may help clear it up for me, and I say this to my colleague. We are way over time here, but let me ask you: If the Judge had said, instead of saying provocative conduct, if he had characterized the conduct as follows, "It was alleged that the following conduct took place," and then stated the conduct, without characterizing it as provocative, that would be a different story, would it not?

Ms. HOLTZMAN. That would be part of it, yes, that would have been a different story, in addition to other things in this opinion that also——

The CHAIRMAN. OK. I——

Ms. HOLTZMAN. We did not get into all of them, but I expressed them in my statement.

The CHAIRMAN. All right. And I——

Ms. HOLTZMAN. I suggest a similar concern that I have used——

The CHAIRMAN. I appreciate that.

Ms. HOLTZMAN [continuing]. The language that is used to express it.

The CHAIRMAN. I appreciate that. I am very reluctant to cut off what is a very informative debate, but we really are much over time. But I will, obviously, as I always do, yield, if the Senator wishes to continue, but I implore him not to ask me to continue.

Senator SPECTER. Well, I will not pursue that line. I will let the relevancy of that conduct speak for itself on the issue of consent, but I would like to ask what I consider to be a very important question for Ms. Yard to answer.

The CHAIRMAN. All right, and then we will cease.

Senator SPECTER. It is a question which I directed to Ms. Michelman and Ms. Wattleton this morning, and that is that if the Senate does not give consent to Judge Souter, what expectation is there that President Bush will nominate someone who will give you the kind of commitment that you are looking for to sustain *Roe* v. *Wade*?

Ms. YARD. Well, I think that there are two answers to that question. I remember very well, because I was part of it, the Haynesworth and Carswell battles. We were told we could never win Haynesworth, and I was very active in Americans for Democratic Action, and we were the only ones in the beginning who spoke out against him. We won that and we finally got Blackmun, and I think it is possible for President Bush to get a message. He can get a message that this country feels very strongly about this, and he has already changed his mind on the question of taxes, so I think it

is very possible for him to change his mind on whom he might nominate for the Supreme Court.

Senator SPECTER. Thank you very much.

The CHAIRMAN. I thank you all very, very much for your testimony and for the insight you provided to your position and to your view as to why the nominee is, from your perspective, one of a position that is opposed to *Roe,* not merely unknown, but opposed, and I thank you for it very much. That will be it for this panel. Thank you.

Now, let me suggest to my colleagues, I indicated that we would stop by 7 o'clock, but we have a problem and that is there are two panels that I would like to combine, because there are two witnesses who cannot be here tomorrow, even though they were told they may not come up until tomorrow. I will not state who those witnesses are, after having characterized it that way, but we will get instructions.

So, what we will do is we will bring up panel six and seven together. Now, on panel six, the names I am about to read are a panel of witnesses who are all four coming to testify on behalf of, in support of, Judge Souter; and panel seven, which will be combined with this panel, is made up of two witnesses, both of whom have not taken a position, but wish to express serious concerns.

Now, let me read the panels: R. Eden Martin, a partner in the Chicago law firm of Sidley & Austin; William L. Dunfey, director of Dunfey Group, in New Hampshire, a very prominent New Hampshire citizen; Robert I. Ruiz, president of the National Hispanic Bar, and that is the first panel; and then on the panel that wishes to express their concern, sharing a different view, Sophia H. Hall, president of the National Association of Women Judges; and Doris Coleman, president of the California Women Lawyers.

Now, I want to make it clear once again, in the interest of time and accommodation, we are putting these two panels together. The first three people who were called are testifying on behalf of, and the last two witnesses are taking no position, but are going to raise their concerns.

So, why don't we begin, and I am going to hold you to the 5-minute rule, even if it means I have to send Senator Thurmond down after you. He is assisting me.

It would be accommodating if we were to allow Mr. Ruiz to make his statement first, because of time constraints. Is that correct, Mr. Ruiz?

Mr. RUIZ. That would be fine, Senator. Thank you.

The CHAIRMAN. Welcome, and why don't you begin first.

PANEL CONSISTING OF ROBERT I. RUIZ, PRESIDENT, HISPANIC NATIONAL BAR ASSOCIATION; WILLIAM L. DUNFEY, DIRECTOR, THE DUNFEY GROUP; R. EDEN MARTIN, SIDLEY & AUSTIN, CHICAGO, IL; HON. SOPHIA H. HALL, PRESIDENT, NATIONAL ASSOCIATION OF WOMEN JUDGES; AND DORIS COLEMAN, PRESIDENT, CALIFORNIA WOMEN LAWYERS

STATEMENT OF ROBERT I. RUIZ

Mr. RUIZ. Thank you, Mr. Chairman and members of the committee. I am very happy to be here today.