

The CHAIRMAN. Before we start the questioning, from this point on, anyone who goes over 5 minutes, I am cutting them off, except if my mother comes to testify.

Senator SIMPSON. Or my mother.

The CHAIRMAN. No, your mother, she wouldn't want you to hear her that long. [Laughter.]

Seriously, please, I say to all witnesses who follow, because if we do not, you are going to be testifying until 11 or 12 o'clock at night. I will be here, but no one else will be. I do not mean my colleagues, I mean no one else out there who you will want to hear will be, I suspect.

Let me get right to it. Ms. Lichtman, you indicated that the Judge is either running away from his record or he did not think it through. How about the possibility he changed his mind?

Ms. LICHTMAN. I will tell you why I have trouble with that as a theory, and it is that he had spoken so often and so completely and so recently into the 1988's and 1989's and 1990 about so many of the issues about which he either refused to respond or tried to distinguish his remarks, and I fear that just really is not believable.

Ms. GREENBERGER. Senator, if I might just jump in, I tried to listen to most of the hearings. I certainly did not hear every single word, but I do not recall his ever saying he changed his mind or that what he had said before was wrong. I think he said he did not mean to imply certain things that seemed very clear from the record, or he said that he had not read what he had signed.

But I do not recall, on these key principles that are of such concern to us, his coming in a straightforward way and saying, yes, I had said the following things about Thomas Sowell, but upon reflection, I have changed my mind about some of his theories, or, yes, I had praised the Lehrman article, but now that I have thought it through, as a judge, I see things differently. That is not what Clarence Thomas presented in the hearings, so far as I know.

The CHAIRMAN. Let me ask you, since you mentioned equal protection—you all did, but I mean you have spoken to it more than anyone else—Judge Thomas seemed to go further than Judge Souter had gone. He said in his testimony that heightened scrutiny should be the standard reply in equal protection cases affecting women. This is where the Court is, but Justice Souter would not acknowledge that standard.

Mr. GREENBERGER. I want to say that I listened very, very carefully and did try to look through the written transcript on this issue, because it is obviously of such central concern, and I think that there is real ambiguity about what Judge Thomas said.

In answer to a number of questions, he prefaced his remarks with "I have no reason to doubt or to question the standard," and that was as formulation that was similar to what Judge Souter used. But he later also said, in answer to a question to Senator DeConcini at the end of the hearings, when Senator DeConcini, in another context, asked him were those qualifying words meant as qualifying words, "I have no reason to believe," but he said yes, he did intend, in fact, to qualify his answer by that kind of preface. I do not know—

The CHAIRMAN. I will dig up the record, I may be mistaken, but my recollection is that he specifically said he accepts the Court's middle-tier scrutiny.

Ms. GREENBERGER. I just want to finish one point, because the gravamen of our objection, even if one assumes he did unequivocally accept it, which I think is ambiguous, is that the basis of his other testimony and his record called into question what he meant when he said he accepted the heightened scrutiny test.

Part of the heightened scrutiny test that he articulated was—

The CHAIRMAN. In other words, it called into question his credibility, whether he was telling you the truth that he accepts it?

Ms. GREENBERGER. Well, I do not know whether I would say his credibility on that particular point, but what his understanding was of the heightened scrutiny test, because an aspect of it is that, when the Government comes forward to try to justify some discrimination that they must show an important governmental interest, but that is not enough. It cannot be an important governmental interest that is based on stereotypes, that is based on fixed notions of what women and men—

The CHAIRMAN. I understand that. So you—

Ms. GREENBERGER [continuing]. And that is part of the heightened scrutiny test.

The CHAIRMAN. Well, it is part of the way this Court without saying they are changing the test, in effect, has changed the result by redefining what constitutes meeting the test.

Ms. GREENBERGER. Precisely, and we saw that—

The CHAIRMAN. I just want to be clear whether my recollection is correct about his accepting, the present test.

Let me yield to my friend from Wyoming.

Senator SIMPSON. Thank you, Mr. Chairman, I appreciate it.

Thank you for your testimony, which I read. I know that is shocking, but I did. I had a little time. We have so many witnesses and there is so much to do, I hope that we can have access to the testimony of the witnesses. I know you are trying very hard to do that, too, but that makes it easier for us to be able to ask questions and do our work, and I appreciate that.

If I might direct these remarks to Ms. Greenberger, because you were speaking of this issue of the intermediate scrutiny test, and you stated in your written testimony that you fear for women's protection and that there are only four members with this heightened awareness or heightened protection, and I think you specifically did say that Chief Justice Rehnquist does not apply that level of scrutiny to gender-based statutes.

But in the questioning by Senator DeConcini, Judge Thomas stated that he supported the intermediate scrutiny test for gender-based statutes. In fact, he said and the record shows that he said, "One could consider and be open to ratcheting up or applying a more exacting standard."

My question is this: Based on his answer there to Senator DeConcini, why do you persist in being critical of Judge Thomas' position on the protection of women under the equal protection clause?

Ms. GREENBERGER. Senator Simpson, I have two basic concerns: One, that this is a statement that is not as clearcut as some of the statements he has made in other areas, certainly, one could consid-