

was pretty good back then. So all of a sudden, natural looks like it's just a matter of how you apply natural law and what your framework is, from my perspective. But at any rate, you all thought that was pretty good back then to take on Bork's positivist view that there was no such thing as unenumerated rights—"you all" I use in an editorial sense; not any one of you in particular.

With that, let me yield to my colleague from Wyoming.

Senator SIMPSON. Mr. Chairman, I do indeed remember that, but I can understand your frustration because it was a different reception to those remarks.

But just quickly, we want to get on, and I have not delayed the issue; I've taken just maybe 20 minutes all day, but I'll take these 5.

It really is fascinating to me to hear this continual reference to the word "balance"—balance, balance, balance. It is my opinion that no nominee could ever pass your test of George Bush, and I wouldn't be too sure about the views of Clarence Thomas and George Bush and where they'll end up when it's all up on the scorecard. I wouldn't go into that one at all.

But I don't think any nominee could be both conservative and the best person in your view, period. That's the way it is, and we'd just as well maybe start from there. But if you really do believe in balance—and you said you did—what about the balance in the U.S. House of Representatives where, under the remarkable preponderance of Democrats, nearly all of my life there has been no balance whatsoever? How about a little balance there?

Does anyone—I'm sure that's an absurd idea, but I just thought I'd throw it in. We have an abused minority over there called Republicans. Don't you think it would be good to unleash them and allow them to have a little staff and do the other things that other people get to do in society, and that is produce papers and writings, and it's called "balance".

What do you think of that absurd and totally nutty idea?

Mr. RAUH. Well, it's only nutty because of the fact that one is an appointed body and the other is an elected body. The appointed body, it is easy to have balance. The elected body, it is much harder to have balance.

Senator SIMPSON. Well, Joe, I would say—and I know you have a bit of disregard, I would say, for Presidents Reagan and Bush—they went out and told the American people when they ran, as they campaigned for President, that if they were nominated and elected that they would nominate judicial candidates who shared their views. That's exactly what they said when they were out on the stump. They were elected, they made the appointments, and they were reelected based sometimes on those appointments. So that's the way that is, too.

Mr. CHAMBERS. But the Senate didn't run on that same platform, and the Senate has a constitutional responsibility as well.

Senator SIMPSON. Of course.

Mr. CHAMBERS. So when the President makes his nomination, one hopes that the Senate exercises its responsibility.

Senator SIMPSON. Well, I think we have. I have been here under Presidents of the Democratic faith and the Republican faith, and I don't think I ever got tangled up in any judge of Jimmy Carter on

any issue except were they competent, capable, had judicial temperament, and so on. This is bizarre. This guy is a conservative. You don't like him—

Mr. RAUH. Jimmy Carter didn't have an appointment to the Supreme Court.

Senator SIMPSON. I know. There were many judges that Jimmy Carter appointed to the Federal district court, and some I helped get through, to the detriment of my own party support.

But I think there is one that has to be settled, because I have heard Mr. Lucy now speak several times on this issue of women in the workplace. Let's get to that.

On page 11 of your testimony, you speak of Judge Thomas' "disturbing record on women in the workplace". That is your quote. Then you give an example of his record, and you say the following: "the EEOC under Judge Thomas' leadership rejected the concept of pay equity, eliminating the hopes of many women in seeking comparable pay with their male counterparts."

Now, every one of us in Congress knows that "pay equity" is a euphemism for "comparable worth". The comparable worth doctrine attempts to intervene in the marketplace and decides that nurses and truck drivers, for example, ought to be equally paid, with absolutely no attention at all paid to supply and demand or to other relevant economic and social factors.

My question is this. You speak of Thomas' criticism of comparable worth as if this were a mainstream, well-accepted concept, this comparable worth. And yet most Federal courts have been absolutely unwilling to extend title VII to cover comparable worth claims. We have case-after-case in the Federal court rejecting comparable worth—not just Clarence Thomas. Let's get serious here. The following cases have rejected comparable worth's validity under title VII of the Civil Rights Act: *Christianson v. Iowa* was the eighth circuit; *Lemons v. City of Denver*, the tenth circuit; *Spaulding v. University of Washington*, the ninth circuit.

Aren't you really, honestly asking Judge Thomas to endorse an agenda of yours which is already shown to be out of the mainstream by every court that has yet dealt with it?

Mr. LUCY. Well, Senator, that's not quite true, I think, and while I don't know every specific case you cited, most of the opposition to comparable worth flows from the economic consequence of in effect supporting it.

What we have, and particularly at State and local Government levels, and particularly within the marketplace, is systemic discrimination against female workers.

Second, you've got the notion, appearing to flow from Mr. Thomas' own comments, that women make employment judgments on the basis of family life as opposed to the need to work.

Comparable worth and the evaluation of the relevant value of jobs—there is a procedure that can supply the proper analysis. And if that analysis is justified, then support of it and decisions supporting it ought to be justified. I don't know the cases you cited, but by and large the resistance is the resistance to change to make economic justice in the marketplace for female workers a reality. And whether it is Mr. Thomas or even the courts, the fact is systematic

discrimination exists against female workers in the workplace, be it the public sector or be it the marketplace.

Senator SIMPSON. Well, I am just saying to you that comparable worth is so complex, so difficult to deal with—

Mr. LUCY. So is discrimination, Senator.

Senator SIMPSON [continuing]. That the courts haven't decided to do it at all. It can't be dealt with.

Mr. LUCY. But that's the point.

Senator SIMPSON. Well, the point is that to put that all on Judge Thomas, eliminating the hopes of women, you have to talk about every other court and talk about us—we can't deal with it. Comparable worth in this body would be like an impossible dream to figure out what to do with comparable worth. We all agree that women should have these rights. Who challenges that? It's trying to put it together—

Mr. LUCY. But Senator, could we not have found a different way to describe it? I mean, Mr. Thomas' comments of "loony tunes" does not quite reflect—

Senator SIMPSON. What did you say?

Mr. LUCY. His comment was that the concept was "loony tunes".

Senator SIMPSON. Well, there are a lot of Congressmen who feel the same thing about comparable worth, that it is "loony tunes", but there are a lot of them who think that women should have the same equity in pay as men, but they don't know how to get to it, and they can't get it through this crazy business of whether nurses and truck drivers and not paying attention to the other issues can't even be decided. It can't, or we'd have done something about it long ago. And they tried.

But finally, many people have asked why do these judges, these potential nominees do this. Why are they mute? Why do they duck these questions? That answer should well be understood after what happened to Judge Bork. Who can even challenge that? The man was on the bench for 5½ years, and I never heard a single comment about his 5½ years on the bench while I sat here for days. All I heard about was some goofy Indiana Law Review article written in 1971, and I had to watch that and then to watch the advertising that came in the face of this man, and see where it came from—powerful, hysterical, extraordinary national television, irresponsible beyond comprehension. And you are wondering why nobody is going to say anything. I have a thought for you all: Stop smearing them, stop ridiculing them, stop tearing their past lives to shreds and their past comments to shreds, made when they were 10, 20, 30 years back down the line, and they will start talking. Until then, they won't—and who would?

Mr. RAUH. Is that a question?

Senator SIMPSON. That's not a question.

The CHAIRMAN. Are you finished, Senator?

Senator SIMPSON. Yes, I am, all finished, for the day, or for a while. I may rise again.

The CHAIRMAN. Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

I just want to welcome you distinguished people to this hearing. We thank you for your presence. I have no questions.

The CHAIRMAN. Thank you.