

He talked beautifully here about how a judge should decide a case. But he did not play that game. He took findings and just paid no attention to them.

I can understand overruling a finding of the district court. That is what an appellate judge may have to do on occasion. But at least he should state the finding, and state his reasons and the evidence on which he overruled it.

He did not do that in these and other cases.

Senator SPECTER. Thank you very much, Mr. Rauh. Thank you all very much.

The CHAIRMAN. Ms. Yard, would you like to respond?

Ms. YARD. If I could, I would like to ask our vice president. She has a comment she would like to make in answer to your question.

Patricia Ireland.

Ms. IRELAND. The only thing I wanted to add is that in our reading of the cases, we certainly agree with Mr. Rauh that he does not have a respect for the lower courts' finding of facts.

But in the cases where he has ruled in favor of minorities and women we find to have a pattern; that is, basically, they are very narrow cases limited to the facts, and except—he rules if the statute is so clear, the Supreme Court precedent is so clear, that he is obviously going to be overruled if he does not rule that way.

We do not find a serious commitment in the broad view of his cases. And I do not know whether Professor Ross has seen that same pattern.

Professor Ross. Well, I would like to make a distinction between procedural and substantive decisions in the sex discrimination area.

You are correct that he did issue this finding on this procedural point.

I have not found a single decision where on the merits he has found a woman was a victim of sex discrimination. His only decisions that are favorable are at procedural stages on procedural issues.

Senator SPECTER. Well, often the procedural stages are critical. If you cannot stay in court, you cannot establish your substantive point.

Professor Ross. That is true, but when somebody gets to the point where somebody has won after a full trial and has won a verdict, and he goes to the trouble of remanding—in one situation he remanded on a really peripheral issue; the district court just changed the supposed wrong finding and sent it right back up. It went up to another ninth circuit panel which upheld the finding of the discrimination.

So it was sort of a pointless exercise which this woman had to go through.

And I think it shows that he has trouble finding discrimination where you had the full record available.

Senator SPECTER. Thank you very much.

The CHAIRMAN. The Senator from Ohio.

Senator METZENBAUM. Joe, you and I have been on the same side of many issues, which only goes to show your good judgment in the past.

But when you say to the Chair that the Chair has been taking a patty cake attitude in rushing the hearing, I want to say that that was not his decision alone; that was a decision that he arrived at after discussing the subject with those of us who serve on this committee.

And frankly, not only do I think it unfair, I think you are just offbase because we had a choice. The choice was to go 33 days after the announcement, or the other choice was to wait until we reconvene on January 25th, and that would have been 76 days after the announcement.

Now in all fairness, I must say that at that point we did not know that we would not reconvene until the 25th; we were supposed to reconvene on the 19th. So it would have been 69 days.

But I want to say that this matter did not require the same amount of time as we felt the Judge Bork case required. He certainly has not written as much. He certainly has not made as many speeches. Nor, in all candor, has he been as controversial.

And I would agree with your statement that we cannot afford to play Russian roulette with our dedication to the Bill of Rights.

And you have a perfect right to appear, and I respect your right to appear to oppose Judge Kennedy's nomination.

I challenge you, however, when you challenge that what I would consider to be the integrity of the committee in its hearing process.

I think this committee is determined to live up to its responsibilities, and it took some real heat with respect to the Bork nomination. I think we came out the right way. I think the public purpose was served.

But I am not willing to just sit back and see all of us attacked because you disagree with the conclusion which we might reach.

Mr. RAUH. Senator, I would cut off my leg before I would question your integrity. It was not a question of your integrity when I said you did not give us enough time to prepare, you did not give yourself enough time to prepare. I do not consider that a matter of integrity.

I would not ever consider doing that. I have the highest respect for you, my gosh, after all we have gone through together. As a matter of fact, I do not ever remember disagreeing with you before on anything.

My patty cake reference was to something else, sir. That was to asking questions. I do not think Judge Kennedy was ever pressed properly on his views on matters. I agree you cannot ask him how are you going to vote on *Roe v. Wade*, but you can ask, what did you say to your colleagues the day it came down.

That is a perfectly relevant question. I think those are the very kind of things the Justice Department knows when it sends up somebody that you would not want if you knew as much as they know.

But anyway, please do not get any idea that I ever had the slightest question about yours or anybody else's integrity on this committee.

I have fought with some of the people on the other side of the aisle in my lifetime, but I have never questioned their integrity either, and I wouldn't.

Senator METZENBAUM. Thank you.

The CHAIRMAN. Your expressions of affection, Joe, are unusual.

Senator METZENBAUM. Now, the one other question I have is for Molly Yard. Because it relates to something you just said, Joe.

You said in your written testimony that you do not know Judge Kennedy's position on *Roe v. Wade*, and therefore, I gather, there is opposition to him.

On that basis, we would have to know what his position is on certain antitrust issues, certain civil rights issues, certain labor issues, certain human rights issues, and the whole panoply of issues.

And I do not think that you really mean that this committee is not meeting its responsibility if we don't find where a particular nominee stands with respect to any particular Supreme Court precedent.

Do you, Molly?

Ms. YARD. Well, what we are saying is that there is one case he has written on privacy that troubles us, and that is *Beller v. Midendorf*, when he says there may be a right to privacy.

We think there is a right to privacy, a constitutional right to control our reproductive lives. And I think it is a question of such overriding social importance to this country that I think you have to do a very careful job to figure out where he is.

Senator METZENBAUM. But we could not ask him, how do you stand on *Roe v. Wade*.

Ms. YARD. Well, all I can say to you is that we know very well, and you know as well as I do, that Senator Helms said I will filibuster this man until he is turned down, and clearly what he was talking about was the right of a woman to choose.

He talked to Senator Helms. Senator Helms is satisfied. And I read what the right to life people around the country are saying, and they are all satisfied.

And I am saying that this is such a serious problem that I do not think you can take the risk of putting somebody on the court who is going to bring back the days of illegal abortion to this country.

It will be total chaos. And I think the Senate Judiciary Committee better understand that. Women will not accept overturning of *Roe v. Wade*.

Senator METZENBAUM. Well, you are preaching to the choir when you are speaking to me, because I have taken my position on that.

Ms. YARD. I know you—I know well.

Senator METZENBAUM. But having said that, I do not know whether or not the Rights to Lifers are proceeding under a false assumption.

We certainly know that Judge Kennedy specifically disavowed the facts presented in that article which was referred to yesterday. And he was very categorical and very unequivocal in saying it just did not happen that way.

I think my time has expired.

Ms. YARD. Well, you have to look at the pattern, I think. He has not found really very much discrimination against women in this country in his cases. He certainly, I do not think, understands it.

His answer to Senator Kennedy on the club thing, I just—I thought he put his foot squarely in it. He said, well, I got out of the Sutter Club because everybody knew me there as a judge, and I was uncomfortable because of the exclusionary policy of the club.

But in the Olympic Club, people didn't really know me so it didn't make any difference. It made a difference, because it said what he believes about discrimination, and he believes it is unimportant.

And that—I look at what he has done on cases affecting women. And I think he will come down on the side that it is unimportant what happens to our lives.

Senator **METZENBAUM**. Thank you, Mr. Chairman. Thank you, Molly.

The **CHAIRMAN**. The Senator from Alabama.

Senator **HEFLIN**. Mr. Chairman, I have had to be absent because of a commitment I made. Therefore, I yield my time to Harry Truman Simons next to me.

The **CHAIRMAN**. The Senator from Illinois. Welcome back.

Senator **SIMON**. Thank you, Mr. Chairman. I thank the Justice from Alabama here, too.

Joe Rauh, you said that Judge Kennedy has, in making decisions, failed to take into consideration the previous decisions of the court—and I am quoting—you say “He has a preconceived notion of what the decision should be.”

Are you suggesting that he has an ideological agenda?

Mr. **RAUH**. I would not use the words “ideological agenda.” The quotation is right. It is taken from my answer to Senator Specter. What I said there was, if you take the cases where he has ruled against rights, you will find a pattern in them of Judge Kennedy running rough shod over findings of the lower courts.

Now, if you will indulge me. I have read those cases, and there is such a strain of overruling, rough shod, the findings of the district court. He would not state the finding and then give the evidence to the contrary. He simply would not mention the finding. He would just state the facts the other way.

I said if you have a pattern of continuous overruling of the findings below, always resulting in holding against rights, this is a tendency that could only come from some preconceived notion.

If you really were grappling with the problem, if you really were grappling with the effort to get the right answer on the facts, you would either accept the finding below, or state it, and give the reasons why you are rejecting it. It is on that basis that I said that this was some evidence of a possible preconceived notion against the rights.

I think in that context, it is a perfectly correct statement. I do not think it proves that he has an ideological agenda, and I would not make that assertion.

Senator **SIMON**. Let me rephrase it. There is not an ideological predisposition toward a certain decision? Or is there?

Mr. **RAUH**. There may be. I suggested this based on the unfair, inadequate, and erroneous treatment of the findings below in these cases. On that basis, there must be some preconception.

The ordinary appellate judge—and gee, I am going to get it from Judge Heflin because he probably knows more about this than I do—but I have always thought that the first thing the appellate judge has to do is decide whether he can accept the findings of the court below.