

cases before us, for a brief on that subject. That office would be best qualified to address the issue for a Senate audience.

Senator GRASSLEY. Well, I believe before long you will be addressing it sometime. Obviously that would keep you from responding to a specific question, but—

Judge GINSBURG. If and when the question is presented, I would have the benefit of briefs on both sides. That is the difficulty that I confront in this milieu. I am accustomed—as a judge, it is the only way I can operate—to considering cases on a full record, with briefs and often oral arguments. I am not accustomed to making general statements apart from a concrete case for which I am fully prepared, taking into account the arguments parties present on both sides.

Senator GRASSLEY. Well, it seemed to me like you did address the issue pretty thoroughly in your 1987 speech to the 92d Street Y in New York. You noted Congress exempts itself—and you referred to this just a little while ago—from title VII of the Civil Rights Act of 1964 and prohibition of race and sex discrimination. You said, drawing on John Locke and Madison's *Federalist* 10 that "One might plausibly contend that Congress violates the spirit if not the letter of the constitutional doctrine of separation of powers when it exonerates itself from the imposition of the laws it obliges people outside the legislature to obey."

Maybe you are even afraid to elaborate on those remarks.

Judge GINSBURG. I did say "spirit," but there is a much simpler way of stating the point. It is that one should practice what one preaches.

Senator GRASSLEY. I am sorry. Would you repeat that?

Judge GINSBURG. I used the words "violates the spirit if not the letter." But there is a much simpler way, without referring to Locke, to express that idea: One should practice what one preaches with respect to equal employment.

Senator GRASSLEY. It seemed to me like something that you would be very concerned about on your present court or even on the Supreme Court, that the applicability of these laws to Congress is surely a check on legislative tyranny, and you have got to be concerned about legislative tyranny.

Judge GINSBURG. Yes.

Senator GRASSLEY. I think my time is up.

Senator KENNEDY [presiding]. Thank you, Senator.

I want to acknowledge Senator Grassley's leadership in this area of public policy, on the applicability of statutes to the Congress. He has been interested in it for a long period of time. Quite frankly, I think we have made impressive progress in the Civil Rights Act of this last year and some of the recent statutes, but it is obviously an issue which we are grappling with. And I think your comments in the *Walker* case give at least some indication about your own views on this issue, one that I think is of enormous importance, obviously to the institution and I think to the American public generally.

Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

Judge actually I want, a little later on, to get back to *Murray v. Buchanan*. I think that you were critical of Judge MacKinnon's

concurrence in the sense that he is citing the political question doctrine as a way out. And I will go into that a little bit further.

I must say, though, sometimes when I approach these nomination hearings, the only enthusiasm that I can get up is because I wasn't able to find something more interesting like a root canal to go through. You have been entirely different. As I said last night at the close, I have enjoyed this very much because of your obvious love of the law and what I discern to be a very real interest in having the law do what it is supposed to do to protect the rights of individuals.

There was some discussion yesterday of *Lemon*, and I have with past nominees gone into that question at some length. A lot of it was covered yesterday, but I just want to make sure I fully understand your answers.

First off, do you feel the Supreme Court today has a clear test for deciding establishment clause cases?

Judge GINSBURG. The *Lemon v. Kurtzman* (1971) test remains the test that the Court has.

Senator LEAHY. Is that their test today, in your estimation?

Judge GINSBURG. They have no other that the Court has ever announced. The test has been criticized by some of the Justices. Senator Metzenbaum read yesterday from a dissent with rather strong criticism. But the Supreme Court has not supplanted that test.

Senator LEAHY. Well, let's go back to yesterday because you had said that before a judge or Justice tears down a—

Judge GINSBURG. Yes.

Senator LEAHY. Or "deconstructs," I believe was your expression, deconstructs an established test, he or she should ask, Well, what is the alternative?

Judge GINSBURG. Right.

Senator LEAHY. Today, what do you think the appropriate test for establishment clause cases should be?

Judge GINSBURG. Senator, I don't have a satisfactory alternative. This is a very difficult area. I can say only that I am open to arguments, to ideas, but at this moment, as I said yesterday, I have no solution to offer. I do know that it is easy to criticize. It is not so easy to offer an alternative.

Senator LEAHY. Have you given thought to the alternative? Because you know you are going to be faced with these questions.

Judge GINSBURG. Yes. I haven't had much establishment clause business—

Senator LEAHY. You are going to.

Judge GINSBURG [continuing]. Apart from the standing issues which came up in two cases, *Murray v. Buchanan* (1983) and *Kurtz v. Baker* (1987).

The only case that I have had that touched at all on the establishment clause was the marijuana sacrament case, the *Olsen* (1989) case, where—

Senator LEAHY. This is the Ethiopian—

Judge GINSBURG. Right, the Zion Coptic Church case. So you are right that I will have to think in a harder, more focused way, as I always do when I have a case to decide.

Senator LEAHY. Well, I certainly don't want you to have to lay out a test here in the abstract which might determine what your

vote or your test would be in a case you have yet to see that may well come before the Supreme Court. But because there has been so much dispute over *Lemon* and other cases that seem to branch off or go at it since then, you know and I know that this is an issue that will be before the Supreme Court, if not next year, then the year after.

But I would like to get some idea of your feelings, and let me approach it this way: Under the first amendment's freedom of religion guarantee, people expect that if they send their children to public school, for example, that the establishment clause is going to prohibit the school from forcing religion on them. At the same time, they know they also have the free exercise clause, and we have a right to practice our religion, to have nonpublic religious schools. I think in my own experience my children have been both to private religious schools and to public schools, and there is no question in my mind that there are real differences in what is allowed or not allowed in the two.

Do you see a tension between the establishment and the free exercise clause?

Judge GINSBURG. There are cases that raise a tension. I am not prepared here to discuss those cases specifically, but you mentioned public schools, on the one hand, and private schools—that may be religious schools—on the other. Some crossovers do not create intractable problems, as the Supreme Court indicated fairly recently. For example, suppose a school facility is available after hours. Can the school board say we are not going to allow a religious group to use the facilities, because we don't want the State to be acknowledging religion in any way? The Supreme Court said if the facility is open on a first-come, first-served basis to anyone, the school's authorities can't exclude a group on the ground of religion. That position does not involve the State in establishing religion. Instead, it allows room for people freely to exercise their religion, as long as they are not being treated differently from any other group.

Senator LEAHY. Does that mean that the free exercise clause and the establishment clause are equal, or is one subordinate to the other?

Judge GINSBURG. I prefer not to address a question like that; again, grand principles have to be applied in concrete cases. My job involves reasoning from the specific case and not—

Senator LEAHY. Let me ask you this: Do you have a view whether the Supreme Court today has put one in a subordinate position to the other?

Judge GINSBURG. The two clauses are on the same line in the Constitution. I don't see that it is a question of subordinating one to the other. Both must be given effect. They are both—

Senator LEAHY. But there are instances where both cannot be upheld.

Judge GINSBURG. Senator, I would prefer to await a particular case and—

Senator LEAHY. I understand. Just trying, Judge. Just trying.

Let me move on a little bit, then, to free exercise. Let's take the *Leahy* case. *Leahy v. District of Columbia*, that is. In *Leahy v. District*, does your ruling mean that you are not going to let the first amendment right of the free exercise of religion be trampled on or

compromised just because there is legislation intended for public safety? Or what did you intend?

Judge GINSBURG. *Leahy* (1987), so it won't be a mystery to—

Senator LEAHY. It is a different Leahy. We ought to put that down. No relation to this Leahy.

Judge GINSBURG. And perhaps I should explain what that case involved.

Leahy applied for a driver's license in the District of Columbia. As District driver's licenseholders know, the license number here coincides with—it is the same as—one's Social Security number. Leahy's religious belief involved a rejection of identification with a Social Security number. If he were to use that number to identify himself, he would very substantially reduce his chances for an after-life. That was his religious belief.

The District said this is our system. Every driver must have a driver's license, and these are our numbers. But something else came out in that case. Because this city has many people who don't have Social Security numbers, diplomats, it did have another system of numbers it used for embassies. And Leahy's religious belief could have been accommodated by the city; at least we sent it back to determine why the city could not respect his religious belief—we said that in the interest of free exercise there had to be a compelling reason to require Leahy to choose between his faith and his driver's license.

Senator LEAHY. In fact, if I could quote from it, you said, that requiring a Social Security number was not “the least restrictive means of achieving the vital public safety objective at stake.” I interpret that as saying you would hold public safety legislation to a strict standard of review if first amendment freedoms are implicated.

Am I reading your opinion correctly?

Judge GINSBURG. Yes, you are reading my opinion correctly. I was applying the test then effective, looking closely at such a restriction and requiring the State to come up with a compelling justification for not making an accommodation. The decision suggested in a footnote that perhaps there could be no compelling justification given this alternate system of license numbers the city had. But we remanded the case on that point. We said it wasn't enough to say every driver must have a driver's license and so either you get one that we provide or you don't drive.

Senator LEAHY. Again, for anybody who tunes in late, so that everybody won't go off and try to check my bio to see who my relatives are, the Leahy referred to here is no relative, and obviously a different religion. [Laughter.]

Judge, let me follow a little bit from that, and I think these are related. I would like to go to the *Goldman v. Secretary of Defense* case, in which we had an officer who had served, I believe, 14 or 15 years with distinction. He was threatened with a court-martial because he wore a yarmulke. You wanted to make the military explain why it was necessary to prohibit the wearing of the yarmulke, and I recall reading in your decision basically that he served with distinction all these years and nobody had questioned it, and all of a sudden it became an issue. But the majority of the

judges on the District of Columbia Circuit and the Supreme Court sided with the military.

You wrote that the military showed callous indifference to the officer's orthodox Jewish religious faith by denying him the right to wear a yarmulke.

How much accommodation should the military be required to make to protect the freedom of religion in the first amendment?

Judge GINSBURG. Senator Leahy, may I say first that the majority of the District of Columbia Circuit did not uphold that classification. What we did was vote to deny a rehearing en banc. The Air Force regulation was upheld by a three-judge panel. As I recall, the writing judge was a visiting judge, and two of my colleagues voted with him to uphold the military uniform regulation.

Senator LEAHY. I am concerned with what your views were. You had written that the military showed callous indifference to Goldman's religious beliefs. My basic question, though, without going into that case, is how much accommodation should the military be required to do to make the freedom of religion guarantees of the first amendment real guarantees, or how do you determine how much accommodation?

Judge GINSBURG. There was a divided decision in the Supreme Court upholding my court's decision that a uniform regulation has to be applied uniformly. That was the decision of the majority of the Supreme Court.

Our Constitution is the Constitution for all of us. It is the most fundamental law for this body and for all of the people. The end of Capt. Simcha Goldman's case was that this body, Congress, passed a law that said the Air Force can accommodate to the yarmulke. By that action, this body was implementing the free exercise clause in an entirely proper way, in my judgment.

Senator LEAHY. Let me ask you this in a very general way: Whether it is the military or public safety departments, is it not a fact that they have to make accommodations to free speech? There may be special circumstances, because of the nature of the military or the nature of public safety, but at least they must start out assuming there has to be accommodation to the right of free speech or the right of religion?

Judge GINSBURG. Yes, I think that is quite right. Our tradition has been one of many religions, one of tolerance and mutual respect.

Senator LEAHY. What about right of association?

Judge GINSBURG. In what context? We also have first amendment protection for that, and the right to petition the Government to redress our grievances.

Senator LEAHY. Simply serving in the military or in a public safety organization does not remove your rights of association.

Judge GINSBURG. I think that is quite correct. It doesn't mean that you have the same rights of association in the military that you would have in civilian life. There are undoubtedly restrictions, if you are a member of the military, that control you, but your constitutional rights don't end. They are fitted to the setting in which you are placed.

Senator LEAHY. Obviously, if we follow this to its logical conclusion, we are going to get into what is going to be a major debate

before the courts within the next year, so I will stop at that point. I would note for the record, for those who might, that they should review your dissenting statement in *Goldman* and your citing of Judge Starr's dissenting opinion.

To go back to your discussion with Senator Grassley and Senator Metzenbaum yesterday, you talked of the case of the professor who challenged the House and Senate on who was allowed to give prayers. You pretty well knew his first amendment claim would be denied, because of a prior Supreme Court case, but you wanted him at least to be heard. I believe the court of appeals dismissed his case, without hearing his constitutional arguments. Why did you think it was important for him to have that day in court?

Judge GINSBURG. I don't think it is a political judgment. I don't view the issue in terms whether I think it's important. Anyone who comes to court with a justiciable controversy has access to the court.

Senator LEAHY. Politically sensitive or otherwise?

Judge GINSBURG. Yes, judges in the first instance are not supposed to have any choice in that matter. If the case is of a judiciary nature, it is the judiciary's obligation to hear it, and it seemed to me that the professor qualified under the precedent that governed.

Senator LEAHY. Do you think the political question doctrine should not be used? Should the question be whether a person has a right to be heard?

Judge GINSBURG. I think the political question doctrine is much misunderstood. There are so many cases where what the Court is saying is, essentially, we look at this issue and it has been committed, textually committed, to another branch of the Government. You don't have to label that a political question. The Court has to examine the question to determine if the Constitution has given it over to another branch.

What I said in my discussions and debates with my colleague Judge MacKinnon on this subject is, you are really taking a merits-first approach to these questions. You are deciding on the merits that the Government is right, and then you are saying that it's a political question or there is no standing. But really, you have taken more than a peek at the merits. You have resolved the merits against the plaintiff and then justified the result as a door-closing decision.

Senator LEAHY. If it is any consolation to you, I am one member of the more political branch of the Government who agrees with you on that. I think you are right and I think the Court should not shy away from those issues.

Do you think there is a core political speech that is entitled to greater constitutional protection than other forms of speech?

Judge GINSBURG. That there is some kind of speech that is more protected than other kinds, I think there is no question about that. One kind of speech that is entirely outside the first amendment under current doctrine is obscenity. Commercial speech doesn't get quite the same protection as core political speech. Various expressions fall somewhere in between, like indecent, but not obscene speech.

So if you are asking me the question, is there only one kind of speech and is all speech protected to the same extent, I think the case law is clear that, no, that isn't the case.

Senator LEAHY. Senator Simpson and you touched a little bit on this yesterday, exploring whether Government can require recipients of Federal funds to express only those views that the Government finds acceptable.

In an FEC case last year, you said that: "Decisionmakers in all three branches of Government should be alert to this reality: Taxing and spending decisions—even those that might appear to offer the individual a choice or to leave her no worse off than she would have been absent Government involvement—can seriously interfere with the exercise of constitutional freedoms."

Let's take a few examples. Could the Government, for example, to further a policy in favor of promoting democratic participation, give out subsidies only to, say, Republican voters or only to Democratic voters?

Judge GINSBURG. Senator, I am so glad that you brought that up, because that issue came up yesterday at a point when I was, to be frank, very tired. I gave a glib answer that I should have qualified, an answer inconsistent with what I said in the *DKT* (1989) case. I said yesterday that the Government can buy Shakespeare and not modern theater. That answer still stands, but what the Government cannot do is buy Republican speech and not Democratic speech, buy white speech and not black speech, and that—

Senator LEAHY. Let's take it a little bit further, then. I thought you might want to elaborate on it a little bit, and that is why I thought I would ask the question today. Could the Government, to further a policy in favor of protecting the public from sexually explicit material, for example, prohibit libraries that receive public funds from making Alice Walker's "The Color Purple," or J.D. Salinger's "Catcher in the Rye" available to patrons, but allow something else?

Judge GINSBURG. I must avoid giving an advisory opinion on any specific scenario, because, as clear as it may seem to you, that scenario might come before me. Some of these matters are in a state of flux now, for example, what falls within this category of indecent speech, to what extent can it be regulated. I can state quite comfortably what is, to the extent that I comprehended what the current law is, but I must avoid responding to hypothetical, because they may prove not to be so hypothetical.

Senator LEAHY. Let's go into that a little bit. Hypothetically, could you give funds to a college and say, because we want to maintain the family, we don't want you to put anything in your sociology course about divorce or illegitimacy, and so on and so forth? We could pick up a dozen kinds of examples that have great sounding names from whatever funding body is using taxpayers' money. Or could the Government, to protect the integrity of a new computer highway or the Internet, say, well, you can use the network, but you can't put this type of political speech on it. Those are tough questions and I can see them coming before the Court.

But what general standard do you feel today, at least, the Government should apply to Government restrictions on speech tied to Federal funding? Is there a standard today?

Judge GINSBURG. We know that the most dangerous thing the Government can do is to try to censor speech on the basis of the viewpoint that is being expressed. We are uncomfortable with content regulation, generally, but particularly uncomfortable with attempts to certain statements of particular point of view.

I might mention the military base case, the *Spock* (1976) case: The Court said it was all right for the military to say no political speech on the base. But suppose the question had been, we will allow Republican and Democratic Party speech, but not Labor Party speech.

Now, that would have been a very troublesome thing for Government to be doing. It is one thing to ban the category, even though it is content-based regulation—no political speech. But if the Government were to say that we regard this speech as safe and that speech is unsafe, it would run up against the motivating force for the first amendment. Shortly after the Revolutionary War, there was a political cartoon that showed a Tory being carted off, and the caption read: "Liberty of speech for those who speak the speech of Liberty." That is what we have to be on our guard against. The message of the first amendment is tolerance of speech, not the speech we agree with, but the speech we hate.

Senator LEAHY. Some could say that is the underpinning of our whole democracy, to allow that kind of diversity, and no other country protects it as we do.

Senator Metzenbaum had asked you whether the right to choose is a fundamental right. Is there a constitutional right to privacy?

Judge GINSBURG. There is a constitutional right to privacy composed of at least two distinguishable parts. One is the privacy expressed most vividly in the fourth amendment: The Government shall not break into my home or my office without a warrant, based on probable cause; the Government shall leave me alone.

The other is the notion of personal autonomy. The Government shall not make my decisions for me. I shall make, as an individual, uncontrolled by my Government, basic decisions that affect my life's course. Yes, I think that what has been placed under the label privacy is a constitutional right that has those two elements, the right to be let alone and the right to make basic decisions about one's life's course.

Senator LEAHY. And absent a very compelling reason, the Government cannot interfere with that right?

Judge GINSBURG. Yes.

Senator LEAHY. I realize we are painting in broad strokes here, but am I correctly reflecting your answer?

Judge GINSBURG. The Government must have a good reason, if it is going to intrude on one's privacy or autonomy. The fourth amendment expresses it well with respect to the privacy of one's home. The Government should respect the autonomy of the individual, unless there is reason tied to the community's health or safety. We live in communities and I must respect the health and well-being of others. So if I am not going to accord that respect on my own, the Government appropriately requires me to recognize that I live in a community with others and can't push my own decision-making to the point where it would intrude on the autonomy of others.

Senator LEAHY. Judge, my time is up on this round, but I appreciate your answers, and I understand in some of them why you do not want to go further. I hope you understand, however, my reasons in asking them.

Judge GINSBURG. I do, Senator, and I thank you.

Senator LEAHY. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator.

Judge, I apologize for being out of the room for part of the questioning. The new nominee for the FBI came by to meet me and to see how quickly we could schedule a hearing, and it was suggested by one of my colleagues to whom I introduced the Director—as a matter of fact, my colleague from Pennsylvania—that, when we finish with you on Friday, we just start with him and keep going right through the weekend. But I do apologize for having been absent for about half an hour.

Let me suggest that in a moment we break until 10 after 12, break for 15 minutes, and then we will come back, with your permission, Judge, and Senator Specter will lead off the questioning, and then I believe Senator Heflin will follow. That will take us to about 1:15, at which time we will break for lunch until 2:30, and come back at 2:30 and continue with Senators Brown, Simon, Cohen, Kohl, Pressler, Feinstein, and Moseley-Braun, in a series of three.

Judge GINSBURG. With a break in between?

The CHAIRMAN. With a break in between, with a break every half hour or sooner, if you conclude that that would be preferable. As I said, we need to get up and stretch our legs. You are sitting there the whole time, and we appreciate it.

We will reconvene at 10 minutes after 12, in 15 minutes.

[A short recess was taken.]

The CHAIRMAN. Welcome back, Judge. The floor is yours, Senator Specter.

Senator SPECTER. Thank you very much, Mr. Chairman.

Judge Ginsburg, I was very much impressed with your opening statement yesterday when you talked about your background leading to your values. I would like to take just a moment at the outset to identify our commonality of background and values, because I think we may or may not have some differences as to the appropriate role of the Court on enforcing those values.

When you talked about discrimination, coming from a family background of one parent first generation and one the second generation, I understand that. Both of my parents were immigrants. When you talk about not having enough money to go to college, I can understand that. Neither of my parents went to high school.

And when you comment about having been in Pennsylvania and having seen the sign, "No Jews or dogs," I reflected as a 17-year-old graduating from high school in Kansas and the State university not having any fraternities which admitted Jews, or graduating from law school and finding employment opportunities shut off. The fact was that Jews were excluded. There weren't any references to dogs, however.

The concern about discrimination is one that I have always felt keenly on the issue of employing women. Shortly after you had