and it isn't easy to listen to all of us expound on judicial matters, particularly when you are an expert on it and we pretend to be. Some are, but I pretend to be.

I do have some questions, however, that have, oh, I wouldn't say troubled me, but which deal with areas that I think are important enough to elicit a response from a nominee, and I have asked them of many nominees before. They deal with an area that you truly are an expert in, and that is the equal protection clause of the 14th amendment, and particularly as it relates to gender.

Judge Ginsburg, throughout the 1980's I have asked Reagan and Bush Supreme Court nominees their views on gender discrimination. It was my belief that because of the integral role that the equal protection clause has performed in advancing women's equality, a Supreme Court nominee must be committed to those principles. I had concerns that the standards of review developed in the 1970's for gender discrimination analysis under the equal protection clause were at risk at times by nominees that were here. However, you, more than anyone else, any other individual I know, guided the Court into the direction of applying greater scrutiny to laws that discriminate on the basis of gender.

Yesterday I was quite moved by your exchange with Senator Kennedy when you shared the details of the cases that you litigated and some of your personal experience. Having, myself, had two daughters and even a mother who was discriminated against a long time ago, almost 70 years—and she raised me reminding of that—it is on my mind. And your discussion demonstrated to me, and I think the public, how abstract principles of constitutional law affect everyday people in the most fundamental way, including the basic rights to sit on the jury, administer the estate of a deceased family member, or to claim survivor's benefits for a deceased spouse.

Now, the heightened scrutiny test has made an enormous difference in combating laws that discriminate against women in our society. Earlier in this effort to change the law, you argued to the Court that gender-discriminatory statutes should receive the highest level of scrutiny. But then you revised your strategy, I believe, and steered the Court toward the middle-level scrutiny. And in a speech you gave in 1987, you praised the intermediate-scrutiny approach as a stable middle ground; that is, "an effective blend between responding to social change and actually driving it."

So my question, Judge, to you is: Will an intermediate level of scrutiny for gender discrimination statutes always be satisfactory, or does the area need to be constantly developed further?

TESTIMONY OF RUTH BADER GINSBURG

Judge GINSBURG. Senator DeConcini, I don't recall the words that you read. It was always my view that distinctions on the basis of gender should be treated most skeptically because, historically, virtually every classification that, in fact, limited women's opportunities was regarded as one cast benignly in her favor.

I tried yesterday to trace the difference between racial classifications, Jim Crow laws—which were not obscure in the message that one race was regarded as inferior to the other—and gender classifications that were always rationalized as favors to women. My

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constant position was that these classifications must be rethought. Are they genuinely favorable, or are they indications of stereotypical thinking about the way women or men are. And that——

Senator DECONCINI. Well, Judge, to be a bit more specific, are you saying that you have to look at each case in determining whether or not the strict scrutiny or the intermediate scrutiny is applied? Is it on that basis or—first of all, am I correct that generally you believe that the intermediate scrutiny, as the Court has, I think, clearly established, is the right area for gender discrimination cases? You don't commit yourself to always be there? Is that what I think your position is, or can you expound on what your position is, please?

Judge GINSBURG. Senator DeConcini, as an advocate, I urged the highest level of scrutiny and——

Senator DECONCINI. All the time?

Judge GINSBURG. After it became clear as a strategic matter that there was not a fifth vote soon to declare sex a "suspect" category, I tried to establish a middle tier. In fact, I did that even earlier—the *Frontiero* (1973) Brief was the first time. Briefs I presented gave the Court two choices in *Reed* (1971), three in *Frontiero* and in Capt. Susan Struck's case.

As you know, I was an advocate of the equal rights amendment. I still am.

Senator DECONCINI. So am I.

Judge GINSBURG. So I think that answers your question about the level of scrutiny that——

Senator DECONCINI. But absent that amendment, Judge, then your position is that the strict scrutiny should be the beginning point on any gender issue brought before the Court?

Judge GINSBURG. I will try to answer your question this way. The last time the Supreme Court addressed this question, as I mentioned yesterday, was in the *Mississippi University for Women* (1982) case. The Court struck down a gender-based classification and said in a footnote that the question whether sex should be regarded as a suspect classification was one not necessary to decide that day; we don't have to go that far, the Court explained, to resolve the case at hand. It thus remains an open question before the Supreme Court.

Senator DECONCINI. And before you?

Judge GINSBURG. I can't, sitting where I am now——

Senator DECONCINI. I understand.

Judge GINSBURG [continuing]. Say anything more than what is in my briefs and my articles and my advocacy of the equal rights amendment, which is part of the record before you.

Senator DECONCINI. Well, thank you, Judge, and I will supply you the reference material I used here in your speech of 1987 where you praised the intermediate-scrutiny approach as a stable middle ground. And if you care to or can give any clarification—maybe that is taken out of context, and I have not read the entire remarks that you made, which might be unfair. But if you can give me a little more explanation, I would appreciate that. It doesn't have to be right now.

Judge GINSBURG. I would be glad to respond regarding that particular piece. At the moment, I don't recognize the words as mine.

Senator DECONCINI. And I appreciate that.

Yesterday, Judge Ginsburg, in reflecting to Senator Kennedy on a number of personal encounters that you had relating what brought you to where you began to press these issues in a legal forum, you had stories behind the reasons on how it affected you. One of the stories that I would like to know is the reason why you refer to this area as "gender discrimination" instead of "sex discrimination." Is there a history to that?

Judge GINSBURG. Yes, there is. I hesitate every time I say "gender-based discrimination" because I have been strongly criticized by an academic colleague for whom I have the highest respect. He tells me, "That term belongs in the grammar books; the word for what you have in mind is 'sex' and why don't you use it?" And I will tell you why I don't use it.

In the 1970's, when I was at Columbia and writing briefs, articles, and speeches about distinctions based on sex, I had a bright secretary. She said one day, "I have been typing this word, sex, sex, sex, over and over. Let me tell you, the audience you are addressing, the men you are addressing"—and they were all men in the appellate courts in those days—"the first association of that word is not what you are talking about. So I suggest that you use a grammar-book term. Use the word 'gender.' It will ward off distracting associations."

Senator DECONCINI. That secretary obviously was a woman.

Judge GINSBURG. Yes. And, Millicent, if you are somewhere watching this, I owe it all to you. [Laughter.]

Senator DECONCINI. Well, it shows that good advice can come from staff people, as we all know working here.

Judge, with regards to the issue of standard of review for gender discrimination laws, you once wrote that a society changed and evolved with respect to the role of men and women; so, too, did the force of the grandly general clause of the Constitution that provides for equal protection of the law.

Now, the Constitution has open-ended and broad clauses such as the one we are discussing, the equal protection clause. And as you have stated, as society changes, so do the meaning of those clauses.

Now, as Senator Feinstein noted in her opening statement yesterday, in the first 100 years of the equal protection clause of the 14th amendment, not a single gender-based challenge was sustained. And as you mentioned yesterday, even the Warren Court, which has been criticized for their activism, upheld restrictions on jury service for women.

So as our society changes and evolves, so do our interpretations of these open-ended clauses. Indeed, you have also written that our 18th century Constitution is dependent on changes in societal practices, constitutional amendments, and judicial interpretation.

Now, were the gender discrimination cases that you brought in the 1970's reflecting social changes, or were they leading social changes, from your viewpoint?

Judge GINSBURG. From my viewpoint, they were reflecting social changes and putting the imprimatur of the law on the direction of change that was ongoing in society. Yesterday I described the *Hoyt*

(1961) case, Gwendolyn Hoyt's case, the case of the woman who, in an altercation with her husband, hit him over the head with a broken baseball bat, her son's broken baseball bat, and as a result, ended up being prosecuted and convicted of second-degree murder. When I mentioned that 1961 Supreme Court decision, I said there was no possibility of winning that case at the time it arose. No one would listen to the argument that this exemption from jury service wasn't pure favor to women.

One of you mentioned yesterday—I think it was Senator Kennedy—the case of *Goesaert* v. *Cleary* (1948). That was about a mother and daughter who owned and operated a bar in the State of Michigan. The mother owned the bar. The mother and the daughter wanted to tend the bar that they themselves owned. But Michigan law, as was said yesterday, declared that a woman could not tend bar unless she was the wife or the daughter of a male barowner.

That mother and daughter found that Michigan's law effectively put them out of business. The rationale for the law was that bartending wasn't safe; rather, it was a risky occupation. So women were being protected. They were being sheltered from working in such a setting, absent a father figure, or a husband, as the owner.

In my law school constitutional law casebook, I remember the *Goesaert* case being treated simply as an illustration of the Supreme Court's retreat from the *Lochner* (1905) era, in which the Court regularly struck down economic and social legislation. Hardly a word was said about the mother and daughter, the people Michigan's law put out of business. That was 1948. The case was regarded as a typical example of the Court's retreat from a body of decisions that interfered with legislative judgments about economic and social legislation.

So there really was no chance that any court in the land, and certainly not the Supreme Court, was going to move until there were pervasive changes in society. Change in the mid-1900's perhaps started during World War II, when women took jobs that had been considered, up until then, jobs only men could do. You remember Rosie the Riveter. There was a time after the war when women were told to go back home, don't compete with men for jobs. But then many things came together. One factor was inflation. The two-earner family became a pattern people accepted out of necessity, out of caring for—wanting to provide the best for—their children. Factors that coalesced included women's opportunity to control their reproductive capacity, the two-earner family pattern, longer life spans, the woman having a life at home and at work.

A number of factors came together to change women's lives, to alter and expand what they were doing.

Senator DECONCINI. Societal changes you are referring to, primarily.

Judge GINSBURG. Yes.

Senator DECONCINI. Well, let me pursue it just by asking you, Judge, when you are confirmed and you sit on the Supreme Court, when and how do you determine whether to lead or follow societal changes?

Judge GINSBURG. That sounds like a question Mr. Chairman asked me yesterday.

Senator DECONCINI. Yes, he was kind of asking that question.

The CHAIRMAN. I am glad you remember, Judge.

Judge GINSBURG. And I would like to ask all of your indulgence to help me with this, because I must deal with the question in terms of past history. I can't predict in terms of cases that might come up.

Senator DECONCINI. I don't want you to do that, and I understand the sensitivity of that question. But I am interested in just how you approach it. I mean, it isn't some kind of a score I am keeping here, yes or no, that you fail or flunk.

Judge GINSBURG. I will give you the answers I attempted to give in the Madison lecture, a lecture I was afraid would put the audience to sleep, but has turned out to prompt a quite different response. [Laughter.]

I gave in that lecture two examples. One was *Baker* v. *Carr* (1962). That was a State legislative reapportionment case. I quoted from a law professor who said the rationale for that decision and the ones that followed it, the one-person, one-vote line of decisions, was that when political avenues become dead-end streets judicial intervention in the politics of the people may be essential in order to have effective politics. *Baker* v. *Carr* came up from Tennessee, I believe. The comment concerned the composition of Tennessee's legislature at the time of *Baker*. At that time there was a history of many years of unsuccessful State court litigation and unsuccessful efforts to get the State legislature to reapportion itself. So that is one example.

When is the political avenue a dead-end street? The other example, the historic example, of course, is race discrimination, which we talked about yesterday. It was not simply the schools. I referred to a talk that Judge Constance Baker Motley gave about Thurgood Marshall's leadership and litigation campaign. It was not simply separate education. She spoke of other cases, the restrictive covenant cases, most notably *Shelley* v. *Kraemer* (1948), interstate travel, the teacher salary cases, and most of all, I think, in terms of your question, the early voting cases.

Remember the white primary cases. The last case in that line, *Terry* v. *Adams,* was decided in 1953, just one year before *Brown.* People were shut out of the political process. There was——

Senator DECONCINI. Well, Judge, let me interrupt you, if I may. Are you saying that if there is a dead end on the political process—maybe you don't want to commit yourself to this, but a Supreme Court judge may very well decide that is more of a time to lead than to follow, which has got to be more of a subjective decision as to when the political dead end has come? For instance, the equal right amendment, you are a strong advocate of that, and others are not. I happen to agree with you and have supported that, but it appears to be at a political dead end, which would lead me to conclude, if that is accurate—because the States are not going to ratify it, as we can see—that in that area of equal rights for women the Court should lead.

Judge GINSBURG. Senator DeConcini, first let me clarify what I meant by a dead-end street. I meant that blacks couldn't vote. We know what the history of the white primaries and literacy tests were. Women became galvanized in the 1970's. I think we are

going to see more and more political activity for advancement of women's stature. Some of the results of that activity are visible in this room. I don't think it has stopped.

That doesn't mean that I am not an advocate of a statement in our fundamental instrument of government that equality of rights shall not be denied or abridged on account of sex. I am and I——

Senator DECONCINI. Well, Judge, I would classify you as a leader. And I am not going to put words in your mouth, but that is how I interpret what you have told us. My observation of what you have told me here is that, certainly in the area of gender discrimination, you lead. You don't follow. That is what you have done, though on occasion, on many occasions, you have concurred with other judges, but you certainly have been a leader there. That is really what I wanted to know, and that doesn't trouble me.

I think the Court should lead, particularly in that area, and I was only trying to develop when you should follow, if there is any philosophy you have that there is a time to follow and a time to lead. It sounds to me like you are going to lead, and I think that is fine with me.

Judge GINSBURG. I won't comment on that. As I said, I have given you examples from the past.

Senator DECONCINI. That is fine. You have answered it sufficiently for me, Judge, unless you want to make any other clarifying statement.

Judge GINSBURG. If you are satisfied with my answer, I will be glad to move on.

Senator DECONCINI. I am. Thank you for pursuing it.

Judge you have written extensively on the judicial role in our constitutional system, and as you have stated, throughout its history the Federal judiciary has been attacked repeatedly for exceeding the bounds of its authority. The term that is usually bandied about is "judicial activism." The committee questionnaire that we sent to you when you were nominated asked you to comment on the role relating to judicial activism, and you stated that the term judicial activism "seems to me much misperceived, a label too often pressed into service by critics of the Court results rather than the legitimacy of Court decisions." I tend to agree with that.

In the past, conservatives have used it to criticize decisions by a liberal court, and now today's liberals are using it to criticize the conservative Court decisions. Nonetheless, going back to your quote, "The Court can and does exceed the bounds of its authority."

Can you name any instances where you think the Court exceeded the bounds of its authority in the past?

Judge GINSBURG. Are you pointing to something in my answer to the questionnaire?

Senator DECONCINI. Yes. Well, in your answer to the questionnaire regarding judicial activism, you are quoted as saying, "seems to be much misperceived, a label too often pressed into service by critics of Court results rather than the legitimacy of Court decisions." And I am just interested in knowing if you have any specifics where you felt the Court in the past might have exceeded the bounds of its authority. Perhaps you don't.

Judge GINSBURG. The examples I gave were of the cases in which the courts have been most criticized. Frankly, I criticized in return

the legislatures and the executives who wouldn't take action when they should have. I spoke primarily of the school cases, the institutional cases, hospital and prison cases. These are cases, I observed, that courts do not like; judges feel extremely uncomfortable having to deal with them. But I gave the example, I think, of Judge Johnson in Alabama who was severely criticized for attempting to run the prisons in Alabama. He gave this account of it. He said, "The State's attorney stood up in my court and said that every prison in this State is in violation of the eighth amendment." At that point, what the law required him to do was clear. His own competence to do it, he was most doubtful about that, but he was bound by the law—by the Nation's highest law—to supply a remedy.

He explained how he tried in every way to have that remedy come from the State officials, but in the end, when it didn't, the Court has to supply it.

Senator DECONCINI. Judge, you don't have any cases that you cite where you think the Court has gone beyond its bounds of authority? You can't think of any or that you have mentioned in your lectures or your writings?

Judge GINSBURG. As I said, I think the courts have gotten the most heat for that institutional litigation—for trying to run schools, for trying to run hospitals.

Senator DECONCINI. But in your opinion, you don't cite any as going beyond what your quotient or ratio or judgment might be as the bounds of the Court's authority to do so.

Justice Holmes, to whom you made reference in your Madison lecture, talks about judges who do and must legislate. Do you agree with that?

Judge GINSBURG. Then he said they must do so interstitially.

Senator DECONCINI. That is right.

Judge GINSBURG. I think I gave an example. One of the Senators referred to it; perhaps it was Senator Specter yesterday. It was in an article I wrote about a series of cases in which the Court acted, in effect, as an interim legislature. The article concerned the appropriate remedy when someone is challenging a classification that affords benefits and says, "I want in."

Sharron Frontiero's suit was such a case. So was Stephen Wiesenfeld's.

Senator DECONCINI. You think those were proper that the Court——

Judge GINSBURG. Either way, the Court is, in effect, legislating. Let me explain what I mean.

The *Frontiero* (1973) case involved housing allowance and medical facilities for a spouse, benefits automatically available for the spouse of a male member of the military, but not available for the spouse of a female member unless she supplied effectively three-quarters of the family's support, all of her own plus half of his.

The Court said that the gender line was invalid. Now, if at that point the Court had said, "And until the legislature convenes again, there shall be no housing allowance, no medical benefits for anybody," that would have been far more destructive of the legislative will than letting in the women members who had been left out.

The same is true in Stephen Wiesenfeld's case. The benefit he sought was labeled a mother's benefit. He never would——

Senator DECONCINI. So you draw the line as to how far the Court goes beyond just deciding the issue as to the particular individual or the class that is before you and whether or not they extend themselves, as you just pointed out. Is it your position that that would have been going too far?

Judge GINSBURG. No. My position is one should be honest about what the Court has to do in that situation. And either way, the Court can be said to be legislating. If the Court strikes down what the legislature has ordered, it is legislating by removing benefits Congress clearly wanted there to be.

If the result in the *Wiesenfeld* (1975) case had been to strike down the mother's benefit until Congress acted, that is the last thing I think the sensible person would say Congress wanted to do.

In the cases to which I referred, the Court has to make a decision. Its remedy was essentially legislative. The legislature has a next session and can change it. The legislature can say we don't want any parent to have benefits, we want every parent to have benefits, or we want to do something in between, for example, have an income test. But a court, on the spot, of necessity, must serve as a surrogate legislature. Courts can't say, we don't want to decide this case, we are going to leave it and do something else.

Senator DECONCINI. Thank you, Judge. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator DeConcini. And thank you, Judge, for answering Senator DeConcini's question. I now understand much better.

Senator Grassley is next.

Senator GRASSLEY. From Iowa. [Laughter.]

The CHAIRMAN. I understand that part. I just wasn't sure whether Senator Simpson finished yesterday. But Senator Grassley from Iowa and the Judiciary Committee.

Senator GRASSLEY. The State where you campaigned for President.

The CHAIRMAN. I might add the obvious: very unsuccessfully.

Senator GRASSLEY. Well, good morning again, Judge Ginsburg.

Judge GINSBURG. Good morning, Senator.

Senator GRASSLEY. I would like to continue some of the discussion of judicial philosophy with you this morning, with particular emphasis, a little later on, on things that interest me about the speech or debate clause in Congress and the application of laws of general applicability to the Congress, laws that we have exempted ourselves from.

But before I ask my first question, I would like to make one observation from some of your statements yesterday. You spoke very eloquently about the obstacles that you encountered as a woman and particularly as a Jewish woman. You faced many hurdles in your very distinguished career, and you mentioned them very clearly.

These barriers that you were speaking about yesterday remind me of the compelling stories that Justice Clarence Thomas told us almost 2 years ago about facing segregation in the South, about drinking from a water fountain reserved only for blacks.

I think that it is very useful for us, and the country as a whole, to know how discrimination has influenced your life. There are similarities in life experiences but, of course, in the final analysis they may not influence you and Justice Thomas in quite the same way. Just an observation I wanted to make from yesterday.

In the article that you wrote for the Rutgers Law Review—and I believe it was based on a speech that you gave—you expressed a view that the courts are not the solvers of all society's problems. Your view seems very consistent with the belief held by Justice John Marshall Harlan that the courts cannot solve all the ills of our society. He expressed that very eloquently in the 1964 reapportionment case.

There Justice Harlan wrote, "The Constitution is not a panacea for every blot upon the public body, nor should this Court, ordained as a judicial body, be thought of as a haven for reform movements."

Judges after all, are not elected, nor are they accountable to the people. Would you agree that judges need to exercise self-restraint and not endeavor to reform society? Isn't that a task better left to the political branches?

Yesterday you made reference to Fifth Circuit Judge Irving Goldberg, who said that "Judicial fire fighters must respond to all cases." Those are his words. However, in responding, judges sometimes get carried away, it seems, by not only putting out the fire, but also trying to rebuild the whole house.

So my question, as well as those that I have generally stated here, is: Shouldn't some of the fires and all of the rebuilding be left to the Congress?

Judge GINSBURG. Judge Irving Goldberg, when he made that comment, was talking about cases of a judiciary nature. The courts hear only such controversies as the Constitution and the laws provide that courts shall hear. Courts may not hear cases for which the Constitution does not provide, for which legislation does not provide. But when the laws do provide for controversies of a judiciary nature, the judges must decide them. They have no choice.

That is what I sought to convey. Justice Harlan would agree. He is one of my heroes as a great Justice because he always told us his reasoning—he never hid it; it was always spelled out with great clarity. But he might have been accused of legislating because he is responsible for paving the way for the cases I mentioned earlier, in which the Court chose extension rather than invalidation to cure a constitutional infirmity in a law. It was Harlan's concurring opinion in a case called *Welsh* v. *United States* (1970) that prompted me to be bold enough to say to the Court, we are asking you to extend not invalidate this law. I don't know that anyone has ever called Harlan an activist for that, but this is the case I have in mind. I will try to state it as briefly as I can.

Welsh was a case of a conscientious objector who was denied CO status. His conscientious objection to military service was based on a deeply held philosophical belief, but it wasn't tied to a religion. And the Congress, some thought, had pretty clearly limited CO status to people whose religion dictated the position they were taking.

Some of the Justices read the language of Congress, which seemed to say the nontheistic observer isn't covered, nonetheless to be broad or vague enough to cover Mr. Welsh. Justice Harlan said

I can't do that. Congress was clear in saying this objection is available only to one who has a deeply held religious belief. That means Congress has left out this man, a nontheistic conscientious objector. That means I must grapple with the constitutional question, Is it a violation of the first amendment to exempt from military service only theistic objectors—to limit the exemption to one whose objection is tied to a belief in a Supreme Being? Harlan answered that question, Yes. He than said, having read the law as Congress wrote it, and having decided that that law is unconstitutional, I reach the next step. Should that be to say there is no more CO exemption until the legislature meets?

No, Harlan reasoned. Instead, I must legislate a bit. I must include Mr. Welsh in the category of people who qualify for conscientious objector status, because Congress wanted there to be such an exemption. In Justice Harlan's judgment, Congress would have chosen to include Mr. Welsh in the catalog of exempt people, rather than to do away with the category CO, conscientious objectors, altogether.

Senator GRASSLEY. But you can agree, though, that sometimes the courts get carried away with rewriting the law, and isn't it still better to let Congress act? You have noted that in your Rutgers article, I believe. Am I misinterpreting——

Judge GINSBURG. Congress makes the policy, it writes the laws. Judges believe, as everyone else does, that that is what legislators do in a democracy.

Senator GRASSLEY. I suppose even judges get tired with the way that it sometimes takes political branches so long to act. It takes a long time, and we in this Congress certainly do not operate and legislate with lightning speed.

I think your Rutgers article expressed an understanding of this. You just stated it. You were talking specifically there about civil rights, and you advocated pressing in the legislatures and the bureaucracy and in the arena of public education. You noted that this effort would "require more patience, planning, and persistence than campaigns aimed at sweeping victories in the court, but success may be more secure."

Is this because the courts are conservative and you see them as inhospitable to reform? Or is it because policy made by the legislatures is often more widely supported within society and, therefore, more accepted and probably even more enduring?

Judge GINSBURG. Senator Grassley, for a host of reasons. One, is courts are not equipped to get the kind of information that legislators can get. You are addressing a problem, for example, what kind of legislation you should have to prevent air pollution. You have tremendous resources you can use to investigate, to find out about the problems you are confronting. Legislatures can engage in the kind of fact-finding that courts are not set up to do.

Of course, the fundamental policy decisions are entrusted to the legislative branch. The Court hears a controversy, one of a judiciary nature, generally between two parties.

Senator GRASSLEY. Obviously, the Constitution requires us to write the law, but is it your feeling that the people are more apt to accept it than if a court would make that decision?

Judge GINSBURG. People elect Members of Congress to make laws for them, and if people don't like those laws, they can vote out the people who made them.

Senator GRASSLEY. I believe that you have been very clear in establishing Congress as the fundamental law-making branch and that you don't want the courts to be assuming that role.

I would like to contrast the view I think you express with an admittedly older law review article that you wrote, one based more on your experience as an advocate of gender equality. It comes from the 1979 Cleveland State Law Review article on repairing unconstitutional legislation. There you said the Court would have to "serve as a short-term surrogate for the legislature in rewriting laws."

I have some concern with such a viewpoint. Sometimes it can get into dangerous territory. Senator Thurmond yesterday pointed out some of that danger, like in *Missouri* v. *Jenkins,* when the Court ordered a tax increase. Can you tell me what you will do in the face of a statute you find inconsistent with the Constitution? Will you be more inclined—and I think the key words here are "more inclined"—to rewrite the law, or simply to strike it down and let the legislature do the rewriting?

Judge GINSBURG. The line of cases I examined in that Cleveland State Law Review article are the ones I have been talking about. *Frontiero* (1973), would Congress have wanted at that moment for the Court to remove housing allowances and medical and dental benefits for all dependents of servicemen? In the *Wiesenfeld* (1975) case, would Congress have wanted the courts to say there shall be no mothers' benefits until the legislature meets again?

In the latest case in that line, *Califano* v. *Westcott* (1979), Congress passed a law that originally was an unemployed parent law—one parent that once had an attachment to the work force, but was out of work for a prolonged period. There was an unemployment benefit for such a person. It was discovered that in many cases the person signing up as the unemployed parent was the mother, not the father.

Congress, apparently surprised, changed that law from an unemployed parent benefit to an unemployed father benefit. That law was challenged by a few unemployed mothers whose husbands had lost their attachment to the work force so long ago that they didn't qualify, but the mothers did. The plaintiffs in that case were effectively asking the Court, until the legislature meets again, to change the benefit back to one for an unemployed parent, rather than an unemployed father.

And the Supreme Court, in 1979, faced up to what Justice Harlan had said much earlier in *Welsh* v. *United States* (1970). It said yes, we have a choice to make. Either way, whether we extend or we invalidate, we are temporarily legislating. The question for us is this: If Congress knew the line it drew was unconstitutional, would Congress want us to take away the benefit totally, or would Congress want us to extend it to the small class that had been left out. The Justices were trying to divine congressional intent. And the opinions in that case plainly show that members of the Court agree there is a choice. In the particular instance, the *Westcott*

case, the Court divided on whether extension or invalidation was the proper remedy.

But Harlan's point was accepted by the entire Court. In *Califano* v. *Westcott* (1979), on the question of the existence of a choice, all of the Justices, in 1979, agreed. They said yes, we must choose; at this moment we are the surrogate legislature. I didn't mean to carry my point any further than that kind of case, one in which Congress legislates a benefit for a large class, the benefit is constitutionally infirm, because it leaves out a group of people similarly situated. What, then, is the remedy? I endeavored in that Cleveland article to talk about that discrete category of cases.

Senator GRASSLEY. You might consider that if the courts act too broadly, that legislatures might not fulfill their responsibilities. With the answer you just gave me, then, I think you are inclined to tell me that you are very willing to strike down a law and not very willing to rewrite it, if it is in conflict with the Constitution.

Judge GINSBURG. I think all of the judges in those cases, in all of the courts, agreed that the one thing we couldn't do is rewrite the law in detail. Legislators might come up with something in between, or redo the law entirely. But a court in such cases has just the stark choice between extension or invalidation. Courts can't craft something finer as the legislature might do when it looks at the matter again.

Senator GRASSLEY. I would like to move on to the subject of speech and debate. Your circuit, of course, hears many cases invoking the Constitution's speech or debate clause, which provides, as you know, that no Member of Congress can be questioned in any other place for any speech or debate in either House. The clause, of course, has long been a popular basis for Congress and individual members to avoid liability under a variety of criminal and civil laws.

I have often debated with my colleagues the clause when I proposed amendments to apply employment laws to the Senate. Opponents of such coverage hide behind the speech or debate clause or claim that sexual harassment or racial discrimination in a congressional office is completely immunized. Congressional employees, unlike private sector workers, or even people employed by the Federal bureaucracy, have, for instance, no statutory right to unionize or earn a minimum wage or overtime pay.

Because of my interest in this provision of article I, I was, of course, delighted to read your opinions narrowly construing the clause. I was particularly impressed with your opinion in *Walker* v. *Jones*. In that case, you rejected, as I read it, the House's argument that the clause immunized the House Services Subcommittee from a sex discrimination action. As you remember, that was the case where the subcommittee chairman declared that a House restaurant director's $45,000 a year salary was "ridiculous for a woman." Those are his words.

Am I correct in concluding, based on your opinions, that you see no speech or debate clause problem with the application of civil rights or labor laws to the administrative aspects, as opposed to the legislative aspects of Congress' work and its employees?

Judge GINSBURG. Senator Grassley, I think I will stay with Ella Walker's case, because the question you ask conceivably could come

up in a live case. I am delighted that you think well of our decision. I can tell you some people in the House of Representatives didn't. As you know, they regarded the speech or debate clause as sacred, and they said, well, of course our restaurant has a connection to legislating. How can you legislate if you are not well-fed?

In Ella Walker's case, we said we don't have to deal with anything other than auxiliary services. In contrast, concerning members of a representative's staff working on legislation, one could make an argument for connection to the job of legislating that one could not make regarding auxiliary services. We thought we could draw a clear line between legislating and going to the gym, having a meal, going to a parking lot. I don't know if there are any attendants in the restrooms. But those areas we said were beyond the zone of legislating covered by the speech or debate clause.

I think you know of the case of *Davis* v. *Passman* (1979). That case shows why I don't want to talk about administrative staff. That case involved a Member of Congress, a Representative who wrote a letter to a woman who had been his legislative assistant on a temporary basis. The letter praised the temporary assistant, but then said, you're so sweet and lovely and this job is so hard, it's really a job for a man. Davis charged Congressman Passman with sex discrimination, in violation of the equal protection component of the fifth amendment. One of Passman's defenses was the speech or debate clause.

The Supreme Court, in deciding that the plaintiff in that case had stated a claim, left open the speech or debate question, because it hadn't been decided by the court below. When the case went back for a decision on speech or debate immunity for Passman's action, the case was settled. So that question was never decided by the Fifth Circuit or by the Supreme Court. That is why I would like to stay with my auxiliary service case, Ella Walker's case, and not go beyond that.

I do think, and have expressed this in writing, that when Congress enacts a measure like title VII, it should set a good example by saying we are not simply going to ask the private sector to end discrimination, we are going to do it ourselves, we are going to hold ourselves to the same standards we expect of the public.

Senator GRASSLEY. Let's follow on with what you just said there, because I think the speech or debate clause necessarily leads us to the issue of the doctrine of separation of powers.

As I debate congressional coverage, I am repeatedly told by my colleagues that the separation of powers precludes some Federal agencies from investigating claims against a Member of Congress. The argument tends to be that it would be unconstitutional for an executive department, it would be an unconstitutional infringement, I suppose, on legislative power to have, for instance, an OSHA investigator check out this hearing room, to see whether or not there were any safety violations here, or to have the Civil Rights Division or EEOC pursue remedies for discrimination against congressional employees in a Federal trial court.

First of all, do you see any separation of power problems with an agency that has expertise in an area insuring that Congress complies with laws?

Judge GINSBURG. Again, Senator Grassley, I think I must avoid expressing anything concerning——

Senator GRASSLEY. I can appreciate that. Let me just ask you if you could generally discuss how you might determine a separation of powers boundaries in the Constitution in such a case?

Judge GINSBURG. May I offer an example from real life, something that happened to me. It explains why I am sensitive on this subject.

There was a case before my court, titled *Murray* v. *Buchanan* (1983). It was a challenge not to the offices of the chaplains in the House and Senate. The case, in some accounts, has been inaccurately portrayed. There was no challenge to opening the sessions of the Senate and the House with prayer. There was never any challenge to having a chaplain. But there was in that case a challenge to using taxpayer money to fund the offices of the chaplains.

The people who brought that suit were not very popular people—Murray was the name, the son of Madeline O'Hare Murray was the lead plaintiff. The only question before my court was whether the plaintiffs had standing to raise their objection in court, or whether it constituted a political question.

The standing question seemed to me governed by a case clearly on point, *Flast* v. *Cohen* (1968). We asked the lawyers in the argument of that case—because there seemed to be a straight-forward legal question with no fact record to develop—if we should hold that there is standing, that the case is justiciable, can we get supplemental briefs and proceed to decide the merits? Both parties said, no, if you are going to hold that the case is justiciable, send it back to the district court because there are historical materials we would like to place in the record. So we were told by the parties that they did not want the court of appeals, at that stage, to decide the merits of the case.

A panel on which I served—a divided panel, it was 2 to 1—held that the plaintiffs had standing to bring the case. There was a strong reaction. The House of Representatives adopted a resolution saying that the court had acted improperly, had encroached on the legislature's domain, had meddled in a matter covered by the House Rules. There was no nay vote in the House. Representative Conyers abstained; otherwise, the House was unanimous. That resolution was indeed a telling legislative reaction to a decision perceived as an improper judicial incursion on legislative turf.

My court, the full court, vacated the three-judge panel decision, so it does not appear in the Federal Reporter. It was in the advance sheet, but the decision was vacated before the opinions could be put in the bound volume. You have the opinions before you, however, in the collection of my decisions.

I recount that episode to indicate how sensitive these questions are, how——

Senator GRASSLEY. Well, there wouldn't be any question about separation of powers protecting Members of Congress from applicability of criminal laws. What principled distinction can there be made with having employment laws or civil rights laws applied to Congress?

Judge GINSBURG. You might ask the counsel to the Senate, who argued very effectively in a number of speech or debate clause

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

problems finding employment, I actively recruited women as assistant district attorneys in Philadelphia, starting with my election in 1965, and at one time had as many as 17 women, mostly as assistant district attorneys, and some as legal interns moving up to the rank of assistant D.A.

We had a rather remarkable case in 1968 in which we had an indeterminate sentence for women, a day to life, as opposed to a determinate sentence for a man, say 5 to 10 for robbery. And it was challenged on constitutional grounds, and I was the district attorney of the county, and I refused to defend it. I said it was wrong, confessed error and the State attorney general had to come in to handle the case.

When Henry Wade, the district attorney of Dallas, was sued in *Roe* v. *Wade*, I was sued by Ms. Ryan, *Ryan* v. *District Attorney Arlen Specter*. And I entered a statement, among others, that given all the serious crimes I had to prosecute, I wasn't going to get involved in the tough remedy of criminal sanctions on the abortion issue.

When you talk about the role of the Court and judicial activism, the concern that I have is that if the Court is with you, it is great; but I think about the *Dred Scott* Supreme Court, which perpetuated slavery, and the *Plessy* v. *Ferguson* Supreme Court, which kept discrimination and segregation in effect for more than a half-century. I think of the Supreme Court in the 1930's, where the strong conflict existed between the Court and Congress when legislation was invalidated by a super-legislature Supreme Court on substantive due process grounds. I think about some who today challenge *Marbury* v. *Madison*, with the Supreme Court being the ultimate decider of cases, some saying very seriously that the President and the Congress have as much authority to interpret the Constitution as the Court does, and some saying that there ought not to be judicial review by the Federal courts unless you adhere to original intent because there is no legitimacy.

Two of the Justices now sitting declined to answer questions on what I consider a rockbed principle about whether the Congress can take away the jurisdiction of the Supreme Court of the United States to decide constitutional issues. That is one of those matters for me on which there is no alternative answer, but two of the Justices have declined to respond when questions were asked of them.

When I read your writings—and I make a sharp distinction between your writings and your work on the court as I read your opinions, but it is a concern I have, and not exclusively as to what you would decide as a Justice but what you as an advocate would argue to the Court to decide as being within the range of the Court's power.

I am only going to pick one, perhaps two, and get to a very short question.

When you commented in the Washington Law Quarterly to this effect: "A boldly dynamic interpretation, departing radically from the original understanding, is required to tie to the 14th amendment's equal protection clause, a command that Government treat men and women as individuals, equals in rights and responsibilities and opportunities." And then concluding, referring to the judi-

cial anxiety, the "uneasiness judges feel in the gray zone between interpretation and alteration of the Constitution."

And after that unduly lengthy introduction, the narrow question I have for you is: Is it the role of the courts to upset decisions of legislators based on the jurist's own ideas about enlightened policy by bold, dynamic interpretation of the Constitution?

Judge GINSBURG. Senator Specter, may I first join in what the chairman has said, what your colleagues have said. I am so pleased that you showed the care and concern to be here and that you are looking so well.

Senator SPECTER. Judge Ginsburg, you were an inspiration to me, hastened my recovery. There was a real motivation.

The CHAIRMAN. Judge, there is no possibility we could hold a major hearing and Senator Specter not be here.

Judge GINSBURG. I could also say that I believe *Marbury* v. *Madison* (1803) was rightly decided. I said already yesterday that *Dred Scott* (1857) was wrong the day it was issued. There was no justification for it.

Senator SPECTER. I am glad to hear you say that because one nominee would not affirm *Marbury* v. *Madison,* and one nominee in the discussion in my office said, when I started off talking about *Marbury* v. *Madison*, "You know, Senator, that case wasn't very well reasoned." And I said, "No, I didn't know that."

Judge GINSBURG. Then I would also like to say that I prize the institution of judicial review for constitutionality. We have become a model for the world in that respect, and that is one of the reasons why I resist labels like "activism" and "restraint." I think it is a very precious institution that we have, and it should not be abused.

After World War II, nations in other parts of the world that never had judicial review for constitutionality as part of their tradition adopted models compatible with their own systems but inspired by what our Supreme Court has been in our society. That role needs to be guarded; it should be exercised with great care.

Now, the Washington University Law Quarterly article you mentioned was about the need for, or utility of an equal rights amendment. Why do we need an equal rights amendment when so many people have said the equal protection clause suffices? That was the topic of that article, was it not?

Senator SPECTER. Judge Ginsburg, it went beyond that, and it went to the point about having the Court extend what you categorized as a host of rights. It really was more in line with a statement you made at the second circuit judicial conference in 1976, where you put it this way: "The Supreme Court, by dynamic interpretation of the equal protection principle, could have done everything we asked today," and then, as an advocate, you had articulated a number of rights which you were looking for. So that I think it was beyond ratification of ERA. It was in your role as an advocate.

Judge GINSBURG. I don't know if my article in the Washington University Law Quarterly is here. I do recall the second circuit conference, and I do know that was a conference focused on the need for the utility of an equal rights amendment. I recall that that was a debate with Gloria Steinem and myself on one side and two gentlemen on the other side.

The Washington University Law Quarterly article, which somebody is going to try to get for me, was part of a series in the Washington University in St. Louis on the topic of equality. My specific topic was gender discrimination. I think the title indicated that the article dealt with the equal protection clause and the equal rights amendment as safeguards of the fair and equal treatment of women in our society.

Senator SPECTER. Judge Ginsburg, the title is "Sexual Equality Under the Fourteenth and Equal Rights Amendments."

Judge GINSBURG. Right. That is——

Senator SPECTER. The 14th amendment as well.

Judge GINSBURG. Right, yes. The article contrasted having an Equal Rights Amendment as distinguished from the equal protection clause as a guarantee of the equal citizenship of women before the law.

Senator SPECTER. Let us give you a copy of the article. We have an extra here.

Judge GINSBURG. Yes. This article is, as I said, an article in a symposium on the quest for equality. There was one on race, one on equal employment opportunity, one devoted to sexual equality under the 14th amendment and the Equal Rights Amendment.

That article, like the Second Circuit Judicial Conference talk, focused on two things: the equal protection clause as a guarantee of the equal citizenship of women versus the Equal Rights Amendment. That was the entire context of the article, and what I said there was this: It is part of our history—a sad part of our history, Senator Specter, but undeniably part of our history—that the 14th amendment, that great amendment that changed so much in this Nation, was not intended by its framers immediately to change the status of women. And it is part of history that the leading feminists of the day—Susan B. Anthony, Elizabeth Cady Stanton, Lucretia Mott—campaigned against ratification of the 14th amendment because it allowed a system to persist in the United States where women couldn't vote, they couldn't hold office, if they married they couldn't hold property in their own name, they couldn't contract for themselves. That is what life was like for women in the middle of the 19th century.

Times changed, and eventually, after nearly a century of struggle, women achieved the vote. They became full citizens. And many people thought that when women became full citizens, entitled to the vote, they had achieved equality. The vote should have qualified women as full and equal citizens with men, entitled to the same equal protection before the laws.

The position was that, yes, it took bold and dynamic interpretation in view of what the framers of the 14th amendment intended. The framers of the 14th amendment meant no change, they intended no change at all in the status of women before the law. But in 1920, when women achieved the vote, they became full citizens, and you have to read the Constitution as a whole, changed, as Thurgood Marshall said, over the years by amendment and by judicial construction. So it was certainly a bold change from the middle of the 19th century until the 1970's when women's equal citizenship was recognized before the law.

I remain an advocate of the Equal Rights Amendment for this reason. I have a daughter and a granddaughter. I know what the history was. I would like the legislators of this country and of all the States to stand up and say we know what that history was in the 19th century; we want to make a clarion announcement that women and men are equal before the law, just as every modern human rights document in the world does, at least since 1970. I would like to see that statement made just that way in the U.S. Constitution. But that women are equal citizens and have been ever since the 19th amendment was passed, I think that is the case. And that is what the Washington University Law Quarterly article is about. That is what the second circuit debate was about. And I do not think my statements should be applied out of context. This was a precisely focused article about women's entitlement to equal citizenship before the law.

Senator SPECTER. Judge Ginsburg, I quite agree with you about the equality principle as a matter of values and have been a sponsor of the Equal Rights Amendment for the time that I have been in the Senate. But I refer to the bold interpretation or your language on the alteration of the Constitution as raising the issue of the appropriate role of the Court because my concern is where we are going to be in the future. We can see the 21st century on the horizon. We have had a Constitution which has worked marvelously for 200 years, and we have to maintain it. And I know you are dedicated to that principle.

But a vital aspect of it is maintaining the appropriate role of Congress, and part of the language I read you was from your questionnaire where you limit later the Court's constitutional authority, but you start on the answer as to judicial activism by saying, "Beyond question, a judge has no authority to upset decisions of legislators or executive officials based upon the jurist's own ideas about enlightened policy or a personal moral view on what content an ambiguously phrased legal text should have."

Now, I am concerned about legislating a bit, which is the language which you had used in your article in the Cleveland Marshall Law Review. And when you talk about the doctrine of extension, I wonder why it wouldn't be a sounder course—and you got into this extensively with Senator Grassley—to do what courts do in many situations; that is, stay execution of their judgment for 90 days or 180 days, giving the legislative body, the Congress, an opportunity to decide whether husbands of servicewomen ought to have the same benefits as wives of servicemen.

I certainly would vote for that, but it would make me a great deal more comfortable so that you don't get involved in legislating a bit and a movement in the direction which may lead to an imbalance between the Court and the Congress.

Judge GINSBURG. Senator Specter, that technique is necessary and, as you know very well, has been used in situations like the *Marathon* (1982) case, where the Supreme Court upset the arrangement Congress thought it could make with respect to bankruptcy judges. It was used also in a case upsetting a jury system because it discriminated on the basis of sex, by leaving out women. I think it was a case from Alabama, it was *White* v. *Crook* (1966). The three-judge Federal district court said we obviously are not

going to stop all trials. Instead, we are going to give the legislature until the next session to come up with a new plan for calling jurors so that women will not be excluded. In settings like that, where it takes more than just temporarily putting someone in, or temporarily putting someone out, your point is essential.

I mentioned as the model for the decisions the Supreme Court made in this area Justice Harlan's opinion in *Welsh*. Justice Harlan didn't say, Mr. Welsh, you lose until Congress decides what it wants to do. I took the position I did as an advocate. It is a position nine Justices of the Supreme Court explicitly accepted in 1979. It is an area that is tightly cabined. It reaches only benefits conferred on one group, but denied to a similarly or identically situated other group.

There is a denial of equal protection that the Court has unanimously decided must be dealt with one way or another. It is not like constructing a new system for bankruptcy judges. It is not like having the clerk gear up to call more people to serve on juries.

I stand by the Supreme Court's unanimous decision on this point in *Califano* v. *Westcott* (1979), I ask you to read it, and I tell you that I go no less far and no further than the Court did in that case.

Senator SPECTER. Well, I know the *Welsh* case and I know Justice Harlan's concurring opinion, and I would only ask that, as a matter of deference among branches, that consideration be given to the stay concept, because you can leave the existing benefits in effect for a period of time, but I think we have explored it.

Let me move on to the subject matter of achieving the expanded women's interest in ways other than through constitutional interpretation, such as through legislation which would look to the remedies and the establishment of the values that we agree on in terms of having the Congress make the judgments.

I was interested in a comment made by Catherine MacKinnon and a group of women's rights activists which have been brought together by Jeffrey Rosen in an August issue of the New Republic, commenting that, in the 1980's, and then referring to your work in the seventies, "A new generation of feminist legal scholars have argued that the law should emphasize women's differences from men, rather than their similarities." And Catherine MacKinnon, in the Buffalo Law Review, in 1985, says, "You can be the same as men, and then you will be equal, or you can be different from men, and then you will be women."

There is a line of contention that more protections are necessary for women from bans on pornography to child-rearing benefits for mothers, but not for fathers, not equally for fathers, the greater protection that women need from child sexual molestation, where they are more frequently the victims, assaults and battery against the person, a form of rape or assault with intent to ravish. I would be interested in your thinking as to use of the legislative branch as some of the other women's advocates have articulated the views in the 1980's.

Judge GINSBURG. I think it is grand to use the legislative branch. What you discuss, Senator Specter, I think reflects a large generational difference.

If the legislative branch really knew what women needed * * *. The lawmakers thought they did in the days of protective legisla-

tion. The legislative branch was used extensively, and the legislative branch said we will restrict the hours for women, but not for men, we will restrict night work for women, but not for men, we will restrict the jobs women can take, but not men, because we know better, we can protect women; they need to be protected from unhealthy and unsafe conditions, especially jobs that pay doubletime and the like.

The legislature was all over the place protecting women. My generation of women knew about that style of protection and suspected it. We had the sense, my generation had the sense, that that old-style protection was protecting men's jobs from women's competition.

So I come to legislative protection of women with a certain skepticism. I do so even today, because, although Senator Moseley-Braun is sitting there, most of the faces I see are not women's faces. I suppose if the legislature were filled with women and had only one or two men, and it was the women's judgment that the protection Catherine MacKinnon advocated was in order, I might trust that judgment to a greater extent than I would trust the old-style protective legislation. All that legislation, and there was a lot of it, was similar to old-style maternity leave, that said it's unsafe for you to be working when you are pregnant, so we will take away your job and send you home. That legislation was not genuinely protective, although "protection" was the label lawmakers used for it.

Senator SPECTER. Well, Judge Ginsburg, there are certainly a lot of efforts made by many of us in the Senate. Senator Biden is a leader on the protection of women against violence. We do have more women now. We do listen. I have a very activist wife who is a Philadelphia City Council member who is the toughest lobbyist I know, has more access to me. But I am interested in your thinking.

Let me move on to another line, because my time is close to expiring. The issue of law enforcement is a very important one, and I hope we have time to discuss some of those concepts. My own view is that we need to curtail the lengthy Federal habeas corpus proceedings, where the death penalty is not imposed or other penalties are not imposed, because of the deterrent effect of the death penalty, although I understand there are many people who have scruples in the other direction.

Let me ask you a question articulated the way we ask jurors, whether you have any conscientious scruple against the imposition of the death penalty?

Judge GINSBURG. My own view on the death penalty I think is not relevant to any question I would be asked to decide as a judge. I will be scrupulous in applying the law on the basis of the Constitution, legislation, and precedent. As I said in my opening remarks, my own views and what I would do if I were sitting in the legislature are not relevant to the job for which you are considering me, which is the job of a judge. So I would not like to answer that question, any more than I would like to answer the question of what choice I would make for myself, what reproductive choice I would make for myself. It is not relevant to what I would decide as a judge.

Senator SPECTER. The yellow light is still on, so I will ask you one more question, Judge Ginsburg. And that is, coming back to the Equal Rights Amendment—again, I emphasize my own cosponsorship and support for it consistently—every Congress since 1923 has considered the Equal Rights Amendment. It was passed by the House of Representatives in 1971, passed by the Senate in 1972, but it did not attain the requisite 38 votes for ratification.

Your writings consistently look to the ERA to solve some of the problems in adjudicating the interests of women, and my question to you is: Do you have any concern about an issue of legitimacy for the Supreme Court to identify new rights in the equal protection clause, in light of the failure of the passage of ERA, which is the way identified in the Constitution itself to establish new rights?

Judge GINSBURG. Senator Specter, I tried to answer that question before. I will try once more. The 14th amendment says that no State shall deny, neither the United States nor any State shall deny to any person within its jurisdiction the equal protection of its laws.

Before women were full citizens, before they could vote, maybe one could justify the lack of equal treatment. Ever since the 19th amendment, women are citizens of equal stature with men. The Equal Rights Amendment is a very important symbol, in my judgment, because it would explicitly correct the unfortunate history of the treatment of women as something less than full persons.

However, the Constitution has been corrected by the 19th amendment to make women full citizens. I can't imagine anyone not reading the equal protection clause today to mean that women and men are persons of equal stature and dignity before the law. I don't think that is at all an activist position with regard to the proper interpretation of the equal protection clause of the 14th amendment.

Senator SPECTER. Well, what you have just said appears to me to suggest that we might not need the Equal Rights Amendment.

Judge GINSBURG. I think Martha Griffiths, when she first supported the Equal Rights Amendment in a big way in the House, said if the courts had properly construed the equal protection clause of the 14th amendment, there would be no need for this Equal Rights Amendment.

In fact, the first Commission on the Status of Women, which I think Eleanor Roosevelt headed, was not enthusiastic about the Equal Rights Amendment. The Commission said it was not needed, because the courts would come in time to recognize that decisions holding that the State need not allow women to practice law, the State need not put women on juries, that those decisions are just wrong, incompatible with the statement that no State shall deny to any person the equal protection of the laws.

So the supporters of the Equal Rights Amendment, even when it passed Congress—Martha Griffiths and others—made the point that, if the courts had interpreted the equal protection clause to cover all of humanity, females as well as males, there would not have been a need for the amendment.

As time went on, when the Burger Court began to move in this area, the need for the amendment lessened in the practical sense. It still is important, I believe, in the symbolic sense. As I said be-

fore, every modern human rights document has a statement that men and women are equal before the law. Our Constitution doesn't. I would like to see, for the sake of my daughter and my granddaughter and all the daughters who come after, that statement as part of our fundamental instrument of Government.

Senator SPECTER. Thank you very much, Judge Ginsburg. I will work with you to try to get the Equal Rights Amendment passed.

Thank you, Mr. Chairman.

The CHAIRMAN. Judge, the last thing you need is a lawyer, or me, as your lawyer. But another way of saying what you said, as I have read all that you have written, I think about everything you have written, that if there were an Equal Rights Amendment, it clearly would have ended the debate as to what the 14th amendment meant. There would be no need to discuss it.

It is not incompatible with the 14th amendment to extend to women, as persons, the same rights as men. It would have ended the debate from the—I was going to say right, but that would not be correct—it would end the debate from those who suggest it didn't extend to women. There would be no argumentation left that they would have even for purposes of political discussion, let alone outcomes of cases in Federal courts or in the court system. Is that accurate?

Judge GINSBURG. That is exactly right, Mr. Chairman, and, on the legislature's part, it would have been a good way of keeping cases out of court, cases that should never have had to become Federal cases.

The CHAIRMAN. The last point I will make—and I thank the Senator from Pennsylvania for not only mentioning the violence against women legislation, which I drafted and have been fighting to get passed for 3 years now, and also being so incredibly helpful with me in that effort—I want to make it clear that the purpose of that—and I am going to ask you some questions about it when my turn comes—is to break down the barriers that continue to exist in the unequal application of the law.

A case in point: Police officers need not have someone swear out a warrant to arrest two people in a fight. If two men are standing on a corner in a fist fight, the police officer is going to arrest them both, regardless if either one swears out a complaint. In the vast majority of cases where a woman is bleeding from an orifice and a man is standing over her and the police are called, they turn to the woman and say do you wish to swear out a warrant. And when she stands there at 110 pounds, looking at a 230-pound man, knowing that if she says yes, once he gets out on bail he may beat the living hell out of her again, they demand of her before they arrest, to swear out a warrant. They don't do that with men.

There are a lot of things that aren't law, but practice. The Violence Against Women Act is intended to level the playing field. It is not intended in a paternalistic way to protect our women. That is not the purpose of it.

I will get back to that. I just didn't want to let that go in terms of being compared to other attempts in the past by all-male legislative bodies to protect women.

Judge GINSBURG. You know the historic origin of the current absence of genuine protection. She, according to the common law, was under his wing and cover.

The CHAIRMAN. That's exactly right.

Judge GINSBURG. The law assumed that he took good care of her. He was allowed to beat her, but only mildly.

The CHAIRMAN. That's right. It was pointed out to me, Judge, as you well know, in the first hearing I had years ago on this issue. One of the witnesses looked at me and said, Senator, do you know where the phrase rule-of-thumb comes from? And I admit I did not know. She said let me tell you. She said under our English jurisprudential system, in the common law the woman was property—I knew that—and a chattel—I understood that. And she said, but at one point in the development of the common law, we reached a point where there were too many complaints about men beating their wives to death and/or crippling them, and so they thought they had to do something. So the rule adopted by the English courts was you could beat your wife with a rod, as long as it was no bigger than the circumference of your thumb. That is real progress.

I want to point out one other thing: Senator Moseley-Braun, you keep wondering why I flew to Chicago and helped unpack your apartment and move in, and to plead with you to come on this committee. Can you imagine what the Judge would have said, if both of you were not on this committee?

So I am working hard substantively to change it, but also so I don't get unfairly tarred.

Senator MOSELEY-BRAUN. Mr. Chairman, I must say that you once again showed stunning brilliance and insight in making that invitation at the time. I have been delighted to serve on this committee.

The CHAIRMAN. Well, I am glad you are, Senator. And I want to point out, I promised the Senator—excuse me for this digression, I will yield to my friend from Alabama—I promised the Senator, if you come on the committee along with Senator Feinstein, there won't be controversial nominees. The first 29 or so were controversial. But I have kept my promise, we finally have one. OK.

Senator Heflin.

Senator HEFLIN. Thank you, Mr. Chairman.

First, let me say that we are all delighted to see Senator Specter back. He looked a little peaked and I can understand why, but his questioning and his comments were erudite, scholarly and incisive, as they always have been. He is pretty much his old self, except he is wearing a cap and we understand why he is having to wear a cap. But let me warn you that if he comes back on his second round of questions, you had better be fearful if he is wearing a football helmet. [Laughter.]

I am going to try to get into some issues and things that you have not been asked about. I think we have gone over a great number of things, and I have tried to follow the line of questioning and will attempt to go into some areas that have not been inquired about.

You wrote an amazing dissent in the case of "In Re: Sealed Case" which dealt with the independent counsel law. When it went to the

Supreme Court and it came down as *Morrison* v. *Olson*, the Court in its opinion basically adopted your analysis relative to the issue of whether the Independent Counsel Statute was constitutional or did violate the separation of powers doctrine.

I wonder if you would give us some insight into what your thinking relative to this issue. It is still an issue that is being discussed a great deal today and will be an issue that will perhaps be looked at legislatively again. Would you give us basically your thinking from a judicial basis relative to the independent counsel law?

Judge GINSBURG. The independent counsel law was attacked on the ground that it was an improper derogation from the full authority of the executive branch; the defendant, in the case before my court, argued that prosecution belonged to the executive branch and that Congress had improperly curtailed the executive's role in choosing prosecutors.

I featured in my dissent in that case two mainstays of our constitutional system: First, separation of powers, and second, tempering the first, checks and balances. Centrally at stake was the principle that no person should be judge of his or her own cause. The independent counsel law provided for the designation of a prosecutor for the highest executive officer, the President, and those who immediately surrounded that officer. The President and his people could not be judge of their own cause without sacrificing the appearance of detachment, and reducing the prospect for a thorough investigation.

It would have been a very dangerous thing, a very different thing, if the legislature had said, President, you are disabled and we are going to be the prosecutors. The Founding Fathers worried most about legislative encroachment on other domains. But the legislature enacted a law that did not assign authority to Congress. The independent counsel law took away some, certainly not all, of the Executive's authority. The process starts with the Attorney General, whose responsibility it is to ask for the appointment of an independent counsel, and there were other safeguards.

But the appointment authority was placed in the courts. The law did not present the kind of question that was involved in the challenge to the Gramm-Rudman Act. In that case, it was an officer allied with the legislature could be seen as encroaching on the Executive's domain. Independent counsel, however, were to be appointed by judges. In my view, the legislation responded to a grave concern on the checking side, and was constitutional on that account. I thought the law should have been upheld by my court, as it eventually was by the Supreme Court.

Senator HEFLIN. Let me ask you about stare decisis. We had some questions on this, but in the past few terms, the Supreme Court has sharply been criticized for abandoning certain recently decided cases. Two examples are both in the area of criminal law. During the past term, the Supreme Court overruled a 3-year-old precedent on double jeopardy. In *United States* v. *Dixon*, the Court overturned the 1990 holding in *Grady* v. *Corbin*, which held that the double jeopardy clause barred a second prosecution for any offense based on conduct for which a defendant had already been prosecuted.

Two terms ago, the Court reversed a 5-year-old precedent in *Payne* v. *Tennessee*, and in its opinion, the majority reasoned that stare decisis is less vital in cases that don't involve property or contract rights because litigants have not built up reliance on the current state of the law.

In your judgment, is this a sound theory of stare decisis? Would you prefer some other version such as the test that may have been hinted at in *Dixon,* which would inquire into the soundness of the reasoning in a prior opinion without regard to the substantive area of the law?

Judge GINSBURG. The soundness of the reasoning is certainly a consideration. But we shouldn't abandon a precedent just because we think a different solution more rational. Justice Brandeis said some things are better settled than settled right, especially when the legislature sits. So if a precedent settles the construction of a statute, stare decisis means more than attachment to the soundness of the reasoning. Reliance interests are important; the stability, certainty, predictability of the law is important. If people know what the law is, they can make their decisions, set their course in accordance with that law. So the importance of letting the matter stay decided means judges should not discard precedent simply because they later conclude it would have been better to have decided the case the other way. That is not enough.

If it is a decision that concerns the Constitution, as did the double jeopardy decision you mentioned, then the Court knows the legislature, in many cases, can't come to the rescue. If the judges got it wrong, it may be that they must provide the correction. But even in constitutional adjudication, stare decisis is one of the restraints against a judge infusing his or her own values into the interpretation of the Constitution.

Perhaps an apt example of when the Court should overrule a precedent is Justice Brandeis' decision in *Erie* v. *Tompkins* (1938), which overruled *Swift* v. *Tyson* (1842). Brandeis addressed the question whether the Federal courts could divine and declare general common law. The thought originally was that the Federal courts, being fine courts and knowing a lot about commercial law, would come up with better rules, and that Federal judgments would inspire the States and to fall in line.

But that is not what happened. Instead, you not infrequently had within the same jurisdiction—the same State—two "common laws." Which one applied depended on whether you went to Federal court or the State court. Some lawyers may love that kind of situation because it gives them choices. But such duality isn't good for a society; it generates instability, uncertainty, insecurity.

One of the things Brandeis said when he overruled *Swift* v. *Tyson* in *Erie* was that the *Swift* regime had proved unworkable. "Is it working" is a major consideration regarding stare decisis.

Reliance interests did not support retaining *Swift* because there was no stable law to rely on. What had been generated was confusion and uncertainty. Private actors didn't know whether the law governing their transaction would be the law as declared by the Federal court or the law declared by the State court, until they had a disagreement and litigation commenced.

So how has a precedent worked in practice? What about reliance interests? Those things count, as well as the soundness of the decision. Stare decisis is also important because it keeps judges from infusing their own value judgments into the law.

Senator HEFLIN. Well, in *Erie* you have the situation, too, of where really, in effect, it goes to the 10th amendment in reserving to the States certain aspects of the law relative to that, as well as a confusion that might exist with two sets of laws in regards to it. Do you agree that——

Judge GINSBURG. Yes, Brandeis said that even though *Swift* wasn't working as anticipated, and even though one couldn't justify retaining the precedent on the basis of reliance, he would hesitate to overrule. What led him finally to do so was the recognition that the Federal courts were embarked on an unconstitutional course, and that was——

Senator HEFLIN. I noticed in your answer you didn't really touch on the issue of the reasoning that stare decisis is less vital in those cases involving property or contract law because of the comparison that in the more commercial field they have built up more of a reliance. Do you have some feeling that criminal law ought to be put on the same par and on the same equal basis as commercial or property law?

Judge GINSBURG. I don't think that reliance is absent from the criminal law field. Recall that precedent is set for the way the courts will behave, the way the police will behave, the way prosecutors will behave. One can't say that, in criminal law, reliance doesn't count.

Adhering to precedent fosters the stability, the certainty, the clarity of the law; stare decisis across the board serves those purposes. We have distanced ourselves from the British practice which, until very recently, so solidly entrenched stare decisis that the House of Lords, the Law Lords, would not overrule any precedent. That rigidity became unworkable and the Law Lords today admit some leeway. But stare decisis is a firm principle of our law and important in all areas.

Senator HEFLIN. Let me ask you this question. Have you given any thought to televising court proceedings?

Judge GINSBURG. Yes, I gave thought to it just the other night when C–SPAN was replaying a clip of an interview with me taped some years ago, and I was trying to explain appellate court procedure. And I used many words to convey the picture. One minute filmed in the courtroom, during the argument of an appeal, would have been so much clearer than my attempt to explain to an interviewer in chambers how we proceed in the courtroom. Yes, I did give thought to the matter.

As you know, Senator Heflin, the Federal courts are just now embarked on an experiment on a volunteer basis. Some courts have volunteered, some district courts—trial courts—and some courts of appeals have volunteered to take part in televising proceedings. A report will be published evaluating the experiment. Based on that report, the U.S. Judicial Conference is going to come up with some proposals for the future.

Some of the judges are apprehensive about who will control the editing of videotapes, because one can take a snippet out of context and give the public a false or distorted impression of what goes on.

The CHAIRMAN. We know the problem.

Senator HEFLIN. Well, of course, I have served on the court, and we were one of the first States to allow it at the appellate level, and locating places for cameras where it was not any disruption in the court proceedings, and our experience was excellent.

Now, let me ask you about the issue of standing. In the case of *Wright* v. *Regan,* or Reagan, in 1981, you held that the parents of black children attending public schools had standing to challenge IRS failure to deny tax-exempt status to private schools that discriminated on the basis of race. The Supreme Court later overruled you in *Allen* v. *Wright* in 1983. Your decision has been cited as your willingness to be more receptive to citizens' access to our Nation's courts.

In your various opinions, you have granted standing in cases to allow a woman's organization to challenge disbursing Federal funds to educational institutions discriminating against women and to allow local organizations to bring an action enforcing the Fair Housing Act. Yet you have denied standing to a trade association alleging injury for law enforcement of EPA laws in the case of *Petrochemical* v. *EPA* and denied standing to copper manufacturers challenging a Treasury regulation reducing the copper content in coins in the case of *Copper & Brass Fabricators* v. *Treasury Department.*

How do you distinguish these cases, and what are your basic notions and principles on the issue of standing?

Judge GINSBURG. I believe I followed precedent in every one of those cases, including *Wright* v. *Regan* (1981). It was Regan. The suit was against the Secretary of the Treasury, not against the President. Perhaps I should explain why I say that I followed precedent in face of the Supreme Court's judgment reversing my decision.

In *Copper & Brass* (1982), I wrote a concurring opinion. It was about the "zone of interest" test. I said I was bound by precedent to rule as I did, as long as that test governed.

In *Allen* v. *Wright* (1984), I confronted two lines of cases involving standing. *Wright* was modeled on a case brought in the 1960's. That case was called *Green* v. *Connally* (1971). It involved as plaintiffs parents of black school children in the State of Mississippi who objected to the then Secretary of the Treasury's granting tax-exempt status to private institutions regarded as white-flight schools, schools whose existence was threatening the implementation of *Brown* v. *Board.*

The *Green* case reached the Supreme Court. The lower court's decision for plaintiffs was affirmed. It was a summary affirmance. The Court didn't write an opinion. But the affirmance counted as precedent for the lower courts.

Wright v. *Regan,* as I remember, was a rather long decision. It discussed the recent precedent, some of it pointing away from standing. The strongest "no standing" precedent on point was made in the *Eastern Kentucky Welfare Rights Organization* (1976) case, which involved a challenge on the part of poor people to the Treas-

ury Department's regulation allowing a hospital to retain its tax-exempt status even if it didn't provide full care for indigents. The Supreme Court held that plaintiffs lacked standing to sue in that case. *Eastern Kentucky* was argued as the controlling decision for *Wright* v. *Regan.*

I said there were two relevant lines of cases. One line was indicated by the *Eastern Kentucky* case. The other line of cases had two elements. They were about race, and they fell in the area of education. Whenever there was the combination of race and education, in every one of those cases, the Supreme Court had found standing, most recently in an Alabama case. I think that case arose in Montgomery County.

I found the two lines of cases in tension. As an intermediate court judge, I had to pick the line of precedent closest to my case. *Wright* v. *Regan* involved race and education, so it fit with *Green* v. *Connally* and the race/education cases that followed it.

The Supreme Court rejected the disparate lines, and said *Eastern Kentucky* controlled across the board. That meant "no standing" for the plaintiffs in *Wright.* But at the time I wrote, I tried to follow the precedent as it then existed. The cases on which I relied were all race/education cases, decisions that up until that point had not been questioned by the Court itself.

So my answer regarding those standing cases is that I have tried to apply precedent faithfully, allowing access to the courts in cases like *Wright* v. *Regan,* but not in the *Copper & Brass* case, where the zone of interest test was dispositive. I wrote a concurring opinion, not the main opinion, in *Copper & Brass.* Even though the copper and brass manufacturers had a very strong economic interest in keeping up the copper content of the penny, even though they had an undeniable economic interest and an injury if Congress reduced the amount of copper, still they were not within the relevant "zone of interest." Congress didn't care about the copper manufacturers when it passed the regulation saying how much copper versus how much zinc should be in coins. Congress did not think the interest of the manufacturers relevant to the congressional determination of how much of each metal should be in the penny. That was the *Copper & Brass* case, and I think *Petrochemical* was a similar case.

Senator HEFLIN. You commentated, when your announcement as the nominee came out, frequently said that you would be a consensus builder—I don't think anybody has asked you about this yet—with the idea that on the court that you have attempted to get judges together without necessarily affecting their integrity but moving them towards an institutional approach. And in an article you have written, you speak about the individualistic approach as opposed to the institutional approach.

Would you tell us how you feel or what are the parameters that you feel should be followed relative to trying to reach a consensus as opposed to a feeling that you should dissent or you should disagree, even in concurring opinions? This is sort of a nebulous idea, but I think it is an area we ought to explore a little bit relative to your thinking on consensus building as opposed to perhaps an individualistic approach towards decisionmaking.

Judge GINSBURG. This is an area where style and substance tend to meet. It helps in building collegiality if you don't take zealous positions, if you don't write in a overwrought way, if you state your position logically and without undue passion for whatever is the position you are developing.

Think of this way: Suppose one colleague drafts an opinion and another is of a different view. That other says, "Here's what I think, perhaps you can incorporate my ideas in your opinion, then we can come together in a single opinion for the court; otherwise, consider this a statement I am thinking about making for myself." That is one way of inviting or encouraging accommodation.

Another way is to ask, "Is this conflict really necessary?" Perhaps there is a ground, maybe a procedural ground, on which everyone can agree, so that the decision can be unanimous, saving the larger question for another day.

Willingness to entertain the position of the other person, readiness to rethink one's own views, are important attitudes on a collegial court. If your colleagues, who are intelligent people and deserve respect, have a different view, perhaps you should then pause and rethink, Am I right? Is there a way that we can come together? Is this a case where it really doesn't matter so much which way the law goes as long as it is clear?

Now, with one of the people sitting behind me, I am hesitant to say this, but let's say a tax provision is at issue. And I think Congress meant x, while my colleague thinks Congress meant y. But either one will do for the purposes of getting on with the world.

The CHAIRMAN. Close enough for Government work, right? [Laughter.]

Judge GINSBURG. In such a case, I might then say I am going to squelch my view of how the Internal Revenue Code subsection should be interpreted and go along with my colleague.

Senator HEFLIN. I noticed in your article pertaining to this individualistic institutional approach that you seem to—from your knowledge of the internal operations of the Supreme Court, I got the impression that you feel perhaps that there are too many written memorandums and that there is a little too few discussions, that further discussions might aid in reaching a consensus. I suppose that is based on the fact that if somebody put something in writing, they have some sort of a pride or a defendership of a written document.

None of us knows exactly what goes on in the Supreme Court, but I do find that sometimes oral discussions can lead to the consensus rather than a flurry or a great number of written memorandums that might be circulated back and forth.

Do I interpret that maybe that was something that you were driving at in your article?

Judge GINSBURG. Yes, Senator Heflin. I understand the problem. It is easier to talk among three than it is among nine. I had a lesson in my own circuit. When we confer after a case is argued, we have a conference before the judges exchanged written memorandums. We have an immediate, oral conference. I understand that the practice in the Second Circuit—I came from New York—was once different. Judges there, at least in the 1970's, exchanged written memorandums before coming together to decide the case. And

I considered that way better. If you had to put pencil to paper, you had to think about the case, get your ideas together.

But my colleagues' view was different. It was that, just as you said, if you put something on a circulated paper, you have kind of committed yourself to it. It becomes a little harder to shake loose from what you wrote, to retreat, than if the first discussion of the case, the first encounter, is just in conversation. It is easier to back off and to modify your position.

Senator HEFLIN. Well, thank you. I am really impressed with your knowledge of the whole history of jurisprudence. I have witnessed a great number of confirmation processes, but I believe you show more of a comprehensive knowledge than any other nominee that I have seen. Maybe we didn't ask all the questions, and maybe they were at that stage that it wasn't developed certainly in regards to some of the earlier ones. But I congratulate you on your response and your knowledge relative to the law.

Thank you.

Judge GINSBURG. I thank you for your kind words.

The CHAIRMAN. That is a good note on which to go to lunch, Judge.

[Whereupon, at 1:27 p.m., the committee recessed, to reconvene at 2:30 p.m., this same day.]

AFTERNOON SESSION

The CHAIRMAN. The hearing will come to order. Welcome back, Judge. I hope you had time to have a cup of coffee and a sandwich.

I now yield to our distinguished friend from Colorado, Senator Brown, for his round.

Senator BROWN. Thank you, Mr. Chairman.

Judge Ginsburg, I look forward to a chance to chat with you, both now and later on as we go through this. I must say your performance and responses have been impressive, and I appreciate the candor that you have demonstrated here.

I wanted to direct your attention to what I think is an interesting development through the years. I suppose every first-year law student learns quickly that ignorance of the law is no excuse. I am not sure many schools really explore that. But it struck me as a very important concept as we go forward, one that perhaps is at the foundation of our jurisprudence.

The first case decided by the Supreme Court in which that doctrine was applied was *Res Publica* v. *Betsy*. It is a 1789 case. As near as I can tell, it is a reflection of the thinking in our common law and, before that, the Norman law, and even had foundations in the Roman law.

In thinking about the concept, though, that you are responsible whether you are aware of the law or not, or liable for violating it whether you are aware of the law or not, it appears that there are a variety of reasons for it. One is the philosophy that I think was reflected in our common law that basically laws reflect common sense, or at least moral mandates; that someone, while they may not be aware of the statute number, they are aware that murder or robbery or other crimes are wrong. So that while people may not be aware of the exact law, they are aware at least of moral mandates which guide us in our daily lives.

I suspect another basis for it is simply that it is tough to function in society without this assumption. It would be tough to get convictions without it.

But I noticed in the original case, the 1789 case, that at the time that was ruled, there were only 27 Federal statutes on the books. Clearly, that is different than our circumstances today. At last count I think there were some 26,000 pages of the United States Code, which, of course, excludes State laws. There were 128,900-some odd pages of the Code of Federal Regulations, and my impression is that this year the Federal Register will print 70,000 pages of notices and regulations that are new.

In doing a quick calculation, if one were conscientious and concerned with their duties as a citizen to know what the law was, and thus to abide by it, I thought if you read 300 words a minute, which is a pretty good pace for regulations, 60 minutes an hour with no breaks, 8 hours a day with no coffee breaks, 5 days a week with no holidays, 52 weeks a year with no vacations, you would have read somewhere in the neighborhood of 31,980 pages of the Federal Register, leaving you well short of half of the new pages printed every year.

The CHAIRMAN. Just think how long that hearing would take. [Laughter.]

Senator BROWN. I give you this background because I would be interested in your thoughts as to whether or not it is fair to insist that ignorance of the law is no excuse, when clearly what was once accomplishable by a conscientious citizen when that doctrine was first applied in the United States is beyond even remotely being possible now.

Judge GINSBURG. That question, Senator Brown, should be addressed first and foremost to people who sit in your forum and not in mine; that is, you can, in the statutes you pass, write in intent and knowledge requirements, and you often do. Sometimes courts have to determine what intent Congress meant, what knowledge the individual must be shown to have had. Sometimes you do speak with a clear voice, and judges appreciate it when you do. Other times we are not clear on exactly what intent requirement Congress contemplated, and then we do our best to try to determine what you meant.

But lawmakers surely should advert to and address the matter. When they expose individuals to a regulatory regime, they should be explicit about the intent or knowledge requirement. A difference based on the consequences may be in order. It is one thing to send someone to prison for violating a law that person didn't know existed. It is another simply to subject a person to an injunctive order requiring compliance with the law. In between those would be some kind of monetary exaction.

In this area, courts take their instructions from the legislature, which has a choice on state-of-mind issues—absolute liability, liability without fault, negligence, knowledge, intent, all that is for the legislature to say. But every citizen should be mindful that we are subject to so much more law than we once were.

Senator BROWN. I appreciate that. Of course, the Romans, when they looked at this question, they came with a little different view, I think, than perhaps our common law developed. The Romans rec-

ognized that someone in society might have an obligation or the ability to understand what the laws were, and others who had not been educated or had other problems would not have the same level of knowing what the law was ascribed to them.

I guess my question is not necessarily the wisdom of this body or of Congress making those decisions. I guess my question is: In light of the deluge—my own words—of statutes and regulations, where we as a Congress have assumed that people are aware of the law, does that trouble you, and do you see any avenues of relief in the Constitution?

Judge GINSBURG. Well, one thing is information, and it depends whether we are talking about the business community or individuals. From time to time, I receive from various law firms in town newsletters describing the latest developments in labor law or ERISA law, for example. Such law firms endeavor to keep their clients informed about new developments in the law.

In other areas, the flow of information is less satisfactory. We talked about Stephen Wiesenfeld's case involving the mother's benefit which became a parent benefit. When Wiesenfeld's case was reported in the press, I received many letters, not simply from fathers but from mothers, who didn't know that benefit was available. The Social Security Administration has tried to increase the availability of knowledge of what the law is—not only what the law requires of you, but the benefits the law provides for you.

Nowadays at funeral homes, at banks, information is accessible about benefits available on death. But I was disconcerted about the number of people who didn't know and, therefore, missed out on benefits because the limitation period for filing had passed.

We now have modern means of communication to spread information. Public service announcements on TV can be useful in that way. All involved with the law—government officers and private persons—should attempt to find solutions to the problem of individuals not knowing what the law is, what the law requires of them, and the benefits provided for them.

Senator BROWN. I understand that, and I guess my inquiry was a little more focused in light of 26,000 pages of the United States Code and 129,000 pages of Federal regulations in force. We can all understand it is a useful legal fiction if you are a law writer to assume that everyone is assumed to know the law.

I guess my question is: Does the Constitution afford any protection against that legal fiction because of the voluminous nature of the laws, the incredible breadth of laws on the books now, and regulations on the books? Does the Constitution provide any protection to citizens that may inadvertently violate a law that they had no idea existed?

Judge GINSBURG. I can't answer that question in the abstract. If it were to come before Court in the guise of a specific case where a party said the law is exposing me to a penalty, it is unfair, unjust, it violates due process, I would have the concrete context and the legal arguments that would be made on one side or the other. But, again, I would like to emphasize that this Constitution is the Constitution for the Congress of the United States, and before any law is passed, every legislator should be satisfied that, in his or her judgment, the law that has been proposed is compatible with con-

stitutional limitations. The Constitution is our fundamental instrument of government, and it is addressed to this body before it is addressed to the courts. We get it only when a citizen or person complains that Congress has, in effect, violated the highest law.

Senator BROWN. I appreciate the nature of your answer and the limitations, and I suspect one of the reasons we have a Court is that the Founders of our country knew the limitations of the legislative body, or at least suspected them.

But are you intrigued with this? I don't mean to bother you with abstractions, but it strikes me that with the very volume of what we have attempted to do in the way of regulating, to me it is an intriguing question that is a difficult one that I think at least raises substantial issues. I don't mean to put words in your mouth, but are you troubled by the breadth of what we have attributed to people in the way of knowledge?

Judge GINSBURG. And not simply in the way of laws. Think of what this body puts out, think of the massive regulations put out by the agencies. Even at the court level, each year the courts produce more volumes of the Federal Reporter than they did the year before. There was a day—when I was in law school and, later, when I was a law clerk—when I skimmed all the Federal advance sheets, the F.Supp.'s and the F.2d's. That would be impossible for me to do nowadays. I can just about manage U.S. Law Week each week.

Yes, we continue to make more and more law, both in the legislatures and the courts, and the agencies produce more than both of those put together.

Senator BROWN. I always suspected that those who came in number one in their class at Harvard or Columbia did things like that, but I didn't know. [Laughter.]

You have attracted some attention by observing with regard to *Roe* v. *Wade* that perhaps a different portion of the Constitution may well deserve attention with regard to that question; specifically, if I understand your articles correctly, the equal protection clause of the Constitution rather than the right to privacy evolving from the due process right contained in the 14th amendment.

Would you share with us a description of how your writings draw a relationship between the right to choose and the equal protection clause?

Judge GINSBURG. I will be glad to try, Senator. May I say first that it has never in my mind been an either/or choice, never one rather than the other; it has been both. I will try to explain how my own thinking developed on this issue. It relates to a case involving a woman's choice for birth rather than the termination of her pregnancy. It is one of the briefs that you have. It is the case of *Captain Susan Struck* v. *Secretary of Defense* (1972). This was Capt. Susan Struck's story.

She became pregnant while she was serving in the Air Force in Vietnam. That was in the early 1970's. She was offered a choice. She was told she could have an abortion at the base hospital—and let us remember that in the early 1970's, before *Roe* v. *Wade* (1973), abortion was available on service bases in this country to members of the service or, more often, dependents of members of the service.

Capt. Susan Struck said: I do not want an abortion. I want to bear this child. It is part of my religious faith that I do so. However, I will use only my accumulated leave time for the childbirth. I will surrender the child for adoption at birth. I want to remain in the Air Force. That is my career choice.

She was told that that was not an option open to her if she wished to remain in the Air Force. In Captain Struck's case, we argued three things:

First, that the applicable Air Force regulations—if you are pregnant you are out unless you have an abortion—violated the equal protection principle, for no man was ordered out of service because he had been the partner in a conception, no man was ordered out of service because he was about to become a father.

Next, then we said that the Government is impeding, without cause, a woman's choice whether to bear or not to bear a child. Birth was Captain Struck's personal choice, and the interference with it was a violation of her liberty, her freedom to choose, guaranteed by the due process clause.

Finally, we said the Air Force was involved in an unnecessary interference with Captain Struck's religious belief.

So all three strands were involved in Captain Struck's case. The main emphasis was on her equality as a woman vis-a-vis a man who was equally responsible for the conception, and on her personal choice, which the Government said she could not have unless she gave up her career in the service.

In that case, all three strands were involved: her equality right, her right to decide for herself whether she was going to bear the child, and her religious belief. So it was never an either/or matter, one rather than the other. It was always recognition that one thing that conspicuously distinguishes women from men is that only women become pregnant; and if you subject a woman to disadvantageous treatment on the basis of her pregnant status, which was what was happening to Captain Struck, you would be denying her equal treatment under the law.

Now, that argument—that discrimination, disadvantageous treatment because of pregnancy is indeed sex discrimination—was something the Supreme Court might have heard in the *Struck* case, but the Air Force decided to waive her discharge. Although the Air Force had won in the trial court and won in the court of appeals, the Supreme Court had granted certiorari on Captain Struck's petition. At that point, perhaps with the advice of the Solicitor General, the Air Force decided it would rather switch than fight, and Captain Struck's discharge was waived. So she remained in the service, and the Court never heard her case.

In the case the Court eventually got, one less sympathetic on the facts, the majority held that discrimination on the basis of pregnancy was not discrimination on the basis of sex. Then this body, the Congress, in the Pregnancy Discrimination Act, indicated that it thought otherwise.

The *Struck* brief, which involved a woman's choice for birth, marks the time when I first thought long and hard about this question. At no time did I regard it as an either/or, one pocket or the other, issue. But I did think about it, first and foremost, as differential treatment of the woman, based on her sex.

Senator BROWN. I can see how the equal protection argument would apply to a policy that interfered with her plan to bear the child. Could that argument be applied for someone who wished to have the option of an abortion as well? Does it apply both to the decision to not have an abortion, as well as the decision to have an abortion, to terminate the pregnancy?

Judge GINSBURG. The argument was, it was her right to decide either way, her right to decide whether or not to bear a child.

Senator BROWN. In this case, am I correct in assuming that any restrictions from her employer to that option, or to that right, would be constrained by the equal protection clause?

Judge GINSBURG. Yes. In the *Struck* case, it was a woman's choice for childbirth, and the Government was inhibiting that choice. It came at the price of an unwanted discharge from service to her country. But you asked me about my thinking on equal protection versus individual autonomy. My answer is that both are implicated. The decision whether or not to bear a child is central to a woman's life, to her well-being and dignity. It is a decision she must make for herself. When Government controls that decision for her, she is being treated as less than a fully adult human responsible for her own choices.

Senator BROWN. I also appreciate that you simply presented this not as the only approach, but as an option that was looked at.

With regard to the equal protection argument, though, since this may well confer a right to choose on the woman, or could, would it also follow that the father would be entitled to a right to choose in this regard or some rights in this regard?

Judge GINSBURG. That was an issue left open in *Roe* v. *Wade* (1973). But if I recall correctly, it was put to rest in *Casey* (1992). In that recent decision, the Court dealt with a series of regulations. It upheld most of them, but it struck down one requiring notice to the husband. The ruling on that point relates to a matter the chairman raised earlier.

The *Casey* majority understood that marriage and family life is not always all we might wish them to be. There are women whose physical safety, even their lives, would be endangered, if the law required them to notify their partner. And *Casey,* which in other respects has been greeted in some quarters with great distress, answered a significant question, one left open in *Roe; Casey* held a State could not require notification to the husband.

Senator BROWN. I was concerned that if the equal protection argument were relied on to ensure a right to choose, that looking for a sex-blind standard in this regard might also then convey rights in the father to this decision. Do you see that as following logically from the rights that can be conferred on the mother?

Judge GINSBURG. I will rest my answer on the *Casey* decision, which recognizes that it is her body, her life, and men, to that extent, are not similarly situated. They don't bear the child.

Senator BROWN. So the rights are not equal in this regard, because the interests are not equal?

Judge GINSBURG. It is essential to woman's equality with man that she be the decisionmaker, that her choice be controlling. If you impose restraints that impede her choice, you are disadvantaging her because of her sex.

Consider in this connection the line of cases about procreation. The importance to an individual of the choice whether to beget or bear a child has been recognized at least since *Skinner* v. *Oklahoma* (1992). That case involved a State law commanding sterilization for certain recidivists. Sterilization of a man was at issue in *Skinner,* but the importance of procreation to an individual's autonomy and dignity was appreciated, and that concern applies to men as well as women.

Abortion prohibition by the State, however, controls women and denies them full autonomy and full equality with men. That was the idea I tried to express in the lecture to which you referred. The two strands—equality and autonomy—both figure in the full portrayal.

Recall that *Roe* was decided in early days. *Roe* was not preceded by a string of women's rights cases. Only *Reed* v. *Reed* (1971) had been decided at the time of *Roe.* Understanding increased over the years. What seemed initially, as much a doctor's right to freely exercise his profession as a woman's right, has come to be understood more as a matter in which the woman is central.

Senator BROWN. I was just concerned that the use of the equal protection argument may well lead us to some unexpected conclusions or unexpected rights in the husband.

You had mentioned earlier, I thought, a very sage observation, that provisions that, if I remember your words correctly, provisions that limited opportunities have been sometimes cast benignly as favors, that we ought to take a new look at these things that are thought as favors in the past. I think that is a fair comment and a very keen observation.

I guess my question is: If you look at these provisions of law that treat women differently than men and decide that they genuinely are favorable, not unfavorable, or practices that are favorable, not unfavorable, does this then mean that they are not barred?

Judge GINSBURG. Senator, that sounds like a question Justice Stevens once asked me at an argument. I said I had not yet seen a pure favor. Remember, I come from an era during which all the favors in the end seem to work in reverse. I often quoted the lines of Sarah Grimke, one of two wonderful sisters from South Carolina, and they said to legislators in the mid-1900's, I ask no favor for my sex, all I ask of my brethren is that they take their feet from off our necks. That is the era in which I grew up. I had not seen a protection that didn't work in reverse.

Many of today's young women think the day has come for genuinely protective laws and regulations. Were the legislature filled with women, I might have more faith in that proposition. But, yes, you can see the difference, you can distinguish the true favor from the one that is going to have a boomerang effect, maybe so. I reserve judgment on that question.

Senator BROWN. My time is out, but I look forward to chatting with you again. Thank you.

The CHAIRMAN. He's going to see if he can think of a favor for you, Judge.

Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

Judge, you are holding up very well in this endurance test that you are going through. I was pleased when Senator Biden, in his very first question, when you responded, you used the much neglected ninth amendment to the Constitution. I think it has a great many implications.

The ninth amendment, as I am sure you know, came about as a result of correspondence between Madison and Alexander Hamilton. Madison was persuaded that we should have a Bill of Rights, and Alexander Hamilton said if you spell out these rights, there will be people who say these are the only rights that people have, and so the ninth amendment was added—the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

When Senator Leahy asked you about privacy you mentioned the fourth amendment. I think that privacy is also clearly in the third amendment.

Judge GINSBURG. Yes.

Senator SIMON. Troops can't be quartered in your home. I think it is there by implication in the ninth amendment. But we had a nominee before us who said, when the ninth amendment says certain rights shall not be construed to deny or disparage others retained by the people, that they probably meant by the States, rather than the people. Now, that's a very, very important distinction. That nominee was not approved by this committee, I might add.

But when the ninth amendment says "by the people," do you believe it means by the people?

Judge GINSBURG. The 10th amendment addresses the powers not delegated to the United States and says they are reserved to the States. The 10th amendment deals with the rights reserved to the States. The ninth amendment—and you have recited the history—speaks of the people. There was a concern, as you said, that if we had a Bill of Rights, some rights would surely be left out. Therefore, it was better, some thought, just to rely on the fact that the Federal Government was to be a government of enumerated, delegated powers, and leave it at that.

The ninth amendment is part of the idea that people have rights. The Bill of Rights keeps the Government from intruding on those rights. We don't have a complete enumeration in the first 10 amendments, and the ninth amendment so confirms.

Senator SIMON. So that there is no misunderstanding, you believe, when it says "retained by the people," it means retained by the people?

Judge GINSBURG. It doesn't mean the States. That's the 10th amendment, yes.

Senator SIMON. I would like to also follow through on the public opinion question that Senator Biden and Senator DeConcini stressed. In your opening statement, you quote the great Justice Cardozo as saying justice is not to be taken by storm, she is to be wooed by slow advances, and a couple of other quotes that we heard here.

The *Dred Scott* decision was probably a very popular decision in 1857. President Buchanan said we have now solved the slavery problem. But Chief Justice Taney and the others in the majority made a mistake. In the *Korematsu* decision regarding Japanese-

Americans who were taken from the west coast, you had public opinion clearly on the side of the President of the United States, Congress, the military. You had a Lt. Gen. John DeWitt who, in explaining the need for taking 120,000 Japanese from the west coast, said the Japanese race is an enemy race, and while many second- and third-generation Japanese born on U.S. soil possess U.S. citizenship and have become Americanized, the racial strains are undiluted.

Then in one of the most unbelievable nonsequiturs in history, he said the very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken.

What we needed at that time and did not have was a Supreme Court that said we are willing to stand up to all public opinion. The gradualist approach simply would not work in the *Korematsu* decision, nor could the Court say, well, Congress can change this.

I am sure you agree the *Korematsu* decision was a tragic decision.

Judge GINSBURG. Yes, I agree entirely. I think *Dred Scott* (1857), by the way, was a tragic decision, a wrong decision. I don't think it was such a popular decision with a good part of the country that didn't believe a person who was in a place where he could be free could be returned to a state of bondage. I don't believe that *Dred Scott* was a popular decision throughout the United States.

Senator SIMON. It was divided opinion, but probably if polls had been taken at the time, it would have been a popular decision.

Judge GINSBURG. *Korematsu* (1944) was indeed a tragic decision. One of the dissenting Justices called it legalized racism. That might have a euphemism for what we now recognize that case represents. Americans of German ancestry and Americans of Italian ancestry were not treated that way.

Senator SIMON. But the basic point, and the one that I think by implication you are suggesting, is that there are times when the Court has to stand up to public opinion, and it may be 99 percent of the time on the other side. But the Court has to be courageous and lead. It cannot sometimes be gradualist in its approach.

Judge GINSBURG. That was certainly the position Justice Murphy took. As you know, Justice Black wrote the opinion for the Court.

Senator SIMON. Hard to believe, but he did.

Judge GINSBURG. His opinion upheld the racial classification.

Senator SIMON. Yes.

Senator METZENBAUM [presiding]. Pardon me for interrupting, Senator Simon. There is a rollcall vote on.

Senator SIMON. OK.

Senator METZENBAUM. We have 6 minutes to get there. Judge Ginsburg, I think we will take a 10-minute recess because obviously everybody else has left for the rollcall vote. I think we had better do so as well.

We will recess for a period of 10 minutes.

[A short recess was taken.]

The CHAIRMAN. The hearing will come to order, please.

Let me explain, for those who may be watching this proceeding, why we all got up and left. There is a debate on the Senate floor on President Clinton's national service legislation, and Senator Kennedy is what we call the floor manager of that legislation, re-

quired to be on the floor of the Senate during the duration of its consideration. That is why he is not here, and that is why all of us got up and went to vote.

We were not abandoning you, Judge. I know you know this, but for those who are in the audience, it may be useful for them to understand why we all started to trickle out of here. I was worried that some of them who are new to the Senate might think it was a fire drill and they weren't informed or something.

Senator MOSELEY-BRAUN. It is true.

The CHAIRMAN. It is true.

I also want to tell you, as I got up and left—I should do this, Judge, but as we got up and left, I was heading over in the subway car with everyone else to vote. Senators Moseley-Braun and Feinstein got in the car with me and said, "Now we know what you think about equal protection." I said, "What do you mean?" She said, "You got up knowing there was a vote, went to vote, and left us there." [Laughter.]

That was not my intention. We were supposed to work this out, Judge, that half of us would leave so you could continue the questioning and half would come back.

But, at any rate, none of that is on your time, Senator.

Senator SIMON. I thank you.

The CHAIRMAN. You have 22 minutes and 17 seconds left, and the floor is yours.

Senator SIMON. I thank you very, very much, and I will use all 22 minutes and 17 seconds.

The CHAIRMAN. And more if you need it, Senator.

Senator SIMON. All right.

You have been asked by both Senator Metzenbaum and Senator Leahy about the *Lemon* test on the question of religion and Government. Through the years, we have had nominees here who have all been asked and have all given answers one way or another. My staff checked out four nominees I have asked this question of who now sit on the Court. One was very critical of the *Lemon* test, and he continues to be critical of the test on the Court. One was very supportive, and he continues to be supportive. One said, "I have no personal disagreement with the test," but he has voted consistently in opposition to the *Lemon* test. And one was not clear, and he has not been clear since he has been on the Court.

And I guess I would put you down in the not clear position right now. Is that an incorrect assumption on my part?

Judge GINSBURG. Senator Simon, only to this extent: It is the governing test, and my approach is the law stays the law unless and until there is a reason to displace it. So I recognize *Lemon* v. *Kurtzman* (1971) as the governing test. It is the law that is, and I am not in doubt about that.

I do know that these are very difficult cases. They come to the Court with a record, with arguments. I have informed the committee that I have had only one case involving, on the merits, the establishment part of the religion clauses. So I am going to devote very careful thought to the matter. I am going to read a lot more than I have read up until now. I appreciate the values involved in making these decisions. More than that, I am not equipped to say.

Senator SIMON. Is it misreading what you are saying to say you have not had a chance to dig into this as thoroughly as you eventually will obviously have to, but that on the basis of your limited knowledge of it, you have no difficulty with the *Lemon* test now? Is that incorrect?

Judge GINSBURG. I think that is an accurate description. It is also accurate to say I appreciate that the United States is a country of many religions. We have a pluralistic society, and that is characteristic of the United States.

Senator SIMON. And if I could just add, it is not only characteristic, I think it is very, very important that we maintain this. Obviously there is some working together. When the local Methodist church is on fire, no one says separation of church and state, we can't call out the fire department. But we have been careful in avoiding some of the mistakes that some other countries have made.

The CHAIRMAN. Senator, on my time, because we have gone through this a number of times, may I ask a question off of the last question you just asked?

Senator SIMON. You certainly may.

The CHAIRMAN. Hopefully it will help clarify rather than confuse.

The *Goldman* case to which the Senator referred, the case which is popularly known by most people as allowing a soldier to wear a yarmulke while in uniform, you were a dissenting view in the circuit. Your view on appeal——

Senator COHEN. Mr. Chairman, would you clarify? Disallow the wearing of——

The CHAIRMAN. In other words, the judge took the position that a soldier could wear a yarmulke while in uniform, notwithstanding a military prohibition against such use, she arrived at that decision using reasoning I will not go into now, but it relates to this question.

Senator COHEN. Was that a majority or minority opinion?

The CHAIRMAN. Her opinion ended up being the majority opinion of the Supreme Court——

Judge GINSBURG. I wish it did. It——

The CHAIRMAN. No, I mean, excuse me. Your opinion ended up being the minority opinion when it hit the Supreme Court, when it was decided.

Judge GINSBURG. It was the majority opinion of Congress.

The CHAIRMAN. Yes. [Laughter.]

That is a good way of putting it.

Senator HATCH. I know.

The CHAIRMAN. But you reasoned and argued, reasoned in your opinion when it was before you, that the soldier in question should be able to, under the free exercise clause—explain the case to me. [Laughter.]

Judge GINSBURG. Captain Goldman had been in service for many years, and one day the base commander said, "You're out of uniform," because he was wearing a yarmulke, which was his religious observance. The failure of the service to accommodate to that deviation from the uniform regulation was made the basis of a case that came before my court. It came before a three-judge panel. I was not on that panel.

The panel unanimously ruled that uniform regulations are, by their very nature, arbitrary and that the courts were not to second-guess the military in this decision.

There was then a petition to rehear the case en banc. I voted to rehear the case en banc. Three people did, but the majority voted against rehearing the case.

I did not write a full opinion in the *Simcha Goldman* (1986) case. I wrote a statement saying the case should be reheard by the full court. I said the full court should not embrace the argument that a uniform is a uniform, so there could be no deviation. The case, I thought, was worth fuller attention.

The CHAIRMAN. So you ultimately did not reach a conclusion whether or not it violated his constitutional right.

Judge GINSBURG. I just said we should not leave the final word for our court with the three-judge panel; we should rehear the case; the full court should rehear it.

The CHAIRMAN. Would there have been any question in your mind about the need to rehear it had the *Lemon* test been in place?

Judge GINSBURG. Because this was a free exercise case, it involved the accommodation that the Government would have to make to the free exercise of Captain Goldman's religion.

The case fell in the military category. The panel reasoned that the military setting is different. Many rights people enjoy, including free speech rights, are curtailed for members of the military.

That was the main line of the panel's position in Captain Goldman's case. The question ultimately decided by Congress was: In the interest of allowing Captain Goldman to freely exercise his religion, could the military be called upon to make this accommodation to him? Congress realized the free exercise right more fully than the courts did in that instance, and that issue, I think, is now well settled.

The CHAIRMAN. Thank you, Senator.

Senator SIMON. Of course, Mr. Chairman. If I might just add, I spoke on the floor on that issue. The question is: In addition to the fundamental religious question, the free exercise question, does it in any way impair the military? It has not impaired the Israeli military. The Indian Army has Sikhs who wear a different headdress. They are among the finest members of the military of India. So that on a military ground, also, it did not have much validity.

If I may shift to a totally different subject so I get a little more of an understanding of where you are, in your opening statement you accurately described Judge Learned Hand as one of the world's greatest jurists. No other non-Supreme Court member has had as much influence in the history of our country as Judge Learned Hand. You had one unhappy experience with him, but you had the privilege of meeting him and knowing him—slightly, anyway. I wish I could have had that experience.

What made Judge Learned Hand such a distinguished jurist?

Judge GINSBURG. His tremendous learning, his facility with the English language so that he could describe things so extraordinarily well; his great love of the law as a craft; his genuine caring about people. Some people think he was too restrained and moderate in his judging, but he believed in the people and in the importance of keeping liberty alive in the hearts of men and women.

It is unfortunate that he had a blind spot, that he felt uncomfortable about dealing with a woman as a law clerk. I think you have heard the story of my acquaintance with Judge Hand.

Senator SIMON. I did. That is what I was referring to.

Judge GINSBURG. But he was a man of a different age. He had been brought up not to relate to women in that kind of setting. I have told the story many times of sitting in the back of the car when my judge drove Judge Learned Hand home. That great man would say, en route home, anything that came into his mind. He would sing songs with words I didn't even know. I once said to him, "How can you carry on this way with me in the car and yet not consider me to be your law clerk?" And he said words to this effect: "Young lady, I am not looking you in the face."

Those were ancient days. There was no title VII, people were up front about feeling uncomfortable dealing with women, and that was that.

Senator SIMON. One other aspect that you did not—and I agree with everything you said about Judge Learned Hand. I think the other aspect is he was a great champion of civil liberties.

Judge GINSBURG. Yes, he was, and his decision in the *Masses* (1917) case was one of the bright lights in what we see now as a very unhappy episode in the history of this country—the post-World War II days of the Red scare.

Senator SIMON. If you were to pick a role model on the Court, living or dead, what role model or composite role model would it be?

Judge GINSBURG. I will stay away from the living.

Senator SIMON. All right. [Laughter.]

Judge GINSBURG. We are just now doing a history of our Court, a circuit history. A question came up about talking to law clerks for this history. We drew a line with the living. We said to the author, you may talk to the law clerks about the judges who can't complain about it anymore, but not clerks who served the living, at least not without the judge's permission.

The CHAIRMAN. That is one of the incredible values of life tenure. [Laughter.]

Judge GINSBURG. I would also like to restrict my response to this century. That will make it easier, because if I didn't I would have to include Chief Justice John Marshall; he helped make us one Nation, indivisible. If we go on to liberty and justice for all, I would put together two people who spoke originally in dissent but whose position on the first amendment is well accepted today, Brandeis and Holmes.

I would like to include Cardozo, but as you know, his career was principally on the New York Court of Appeals. He was known for his common law judging, and less known for constitutional adjudication. He served only 6 years on the Supreme Court.

I would add to the list Justice Harlan because, as I explained before, of the judges in my time, there is no one—whether you agree with him or disagree with him—who was more honest in telling you the grounds of his decision, the competing interests, and why he came out the way he did. I spoke of his total honesty in my discussion of the conscientious objector case.

So if I could take those three and put them together, that would be some Justice, wouldn't it?

Senator SIMON. It would be. And I would like to add Learned Hand to that list, if I could, aside from that——

Judge GINSBURG. Yes; I thought we were limiting it to Supreme Court Justices, but certainly yes. I would like to put Henry Friendly there, too.

Senator SIMON. You have been a champion of the cause of women and civil liberties for women, and Senator Grassley earlier mentioned that in our laws we have finally included Congress which has set up its own provisions for enforcement of antidiscrimination. There are problems, and under the separation of powers I think it is proper for Congress to set up its own.

I serve on the Subcommittee on Disabilities, and my colleague, Senator Tom Harkin, has written me a letter, and let me just read two paragraphs from that letter. And I would like to enter the full letter in the record, Mr. Chairman.

It says:

Unfortunately, no Federal law prohibits discrimination on the basis of disability or, for that matter, race, gender, religion, or national origin by our Federal courts. It is my understanding that our Federal district and appellate courts have developed model policies regarding complaints of discrimination by applicants and employees. However, these policies do not specify the standards that must be used to determine whether discrimination has occurred, do not specify what remedies are available, assuming discrimination has been found, and do not include the right to appeal to the courts. Furthermore, there are no policies governing nondiscrimination with respect to access by the general public.

With respect to the Supreme Court, it is my understanding that there are no written policies or procedures whatsoever prohibiting discrimination in employment and in access to Supreme Court proceedings and for remedying discrimination.

[The letter of Senator Harkin follows:]

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC, July 14, 1993.

Hon. PAUL SIMON,
U.S. Senator, Dirksen Senate Office Building, Washington, DC.

DEAR PAUL: Over the years, we have worked together to broaden the civil rights and expand opportunities for individuals with disabilities. Section 504 of the Rehabilitation Act of 1973 (which, among other things, prohibits discrimination by Federal agencies in the conduct of their business) and the Americans with Disabilities Act are two of the most important pieces of legislation impacting on the lives of people with disabilities.

Unfortunately, no Federal law prohibits discrimination on the basis of disability (or for that matter race, gender, religion, or national origin) by our Federal courts. It is my understanding that our Federal district and appellate courts have developed model policies regarding complaints of discrimination by applicants and employees. However, these policies: do not specify the standards that must be used to determine whether discrimination has occurred; do not specify what remedies are available assuming discrimination has been found; and do not include the right to appeal to the courts. Furthermore, there are no policies governing nondiscrimination with respect to access by the general public.

With respect to the Supreme Court, it is my understanding that there are no written policies or procedures whatsoever prohibiting discrimination in employment and access to Supreme Court proceedings and for remedying discrimination.

I request that when Judge Ruth Bader Ginsburg comes before the Judiciary Committee next week regarding her nomination to serve as an associate Justice on the U.S. Supreme Court, you inform her about this situation and ask her what she will do to address it, if confirmed by the Senate.

Sincerely,

TOM HARKIN, *U.S. Senator.*

Senator SIMON. Now, I don't want to ask you to turn things around overnight. I would like to get any observations you have on this, and I would like to, 6 months from now, send a letter to the new Justice of the Supreme Court and ask her her response at that point and what you feel at that point maybe could or should be done.

Judge GINSBURG. I don't know what the Supreme Court regulations are. I do know that the Supreme Court in many respects has been treated differently by Congress. For example, I participated in the decision of a case involving picketing at the Supreme Court. The Supreme Court was not covered by the law that covered the rest of the Federal courts. The case was called *Grace* v. *Burger* (1985).

The decision, both in our court and the Supreme Court, upheld the first amendment claim of a woman who was standing, if I remember correctly, on the sidewalk in front of the Court carrying a sign that had the words of the first amendment written on it. She was removed for doing that.

I can't speak about what the Supreme Court's own rules are now. But, as you have said, Congress has accepted fair employment practices standards for itself. I hope, if we meet 6 months from now, I will be informed on the subject of your inquiry and can give you an enlightened answer.

Senator SIMON. And it does seem to me that not only the Supreme Court, but the lower courts ought to have some process by which, if a person feels that he or she has been aggrieved, that he or she can go to someone and know that there is some process established, some procedures established at all court levels. I will write to you, if my staff reminds me, 6 months from now.

Senator LEAHY. I will.

Senator SIMON. Senator Leahy will remind me.

I was pleased in reading your background about, first of all, the fact that you have gone through some things that have been tough, so that you understand the problems that people who face difficulties have, particularly your statement yesterday of riding along as a child and you saw the sign "no dogs or Jews," and your work in a social security office in Oklahoma, where you had to deal with the problems that the American Indians had.

Theodore Roosevelt, in a 1913 speech—this is after he had been President—said this:

> Our judges have been, on the whole, both able and upright public servants, but their whole training and the aloofness of their position on the bench prevent their having, as a rule, any real knowledge of or understanding sympathy with the lives and needs of the ordinary hard-working toiler.

I think that is a danger for jurists, and probably no place is at a greater danger than on the U.S. Supreme Court, where you really are isolated, and where, when you meet people, they will tend to be people of power and wealth, and not people who are unemployed, not people who have many of the problems that Americans face. Have you reflected on this at all, either in your present tenure or future tenure? How can this nominee make sure that she stays in touch with the real problems people have out there?

Judge GINSBURG. Yes, Senator, I have and I know just what you mean. You can even see the difference between the Federal court

on which I serve and the courts across the street. The U.S. Courthouse tends to be a rather quiet, empty place. If you go across the street to the District of Columbia Superior Court, you will see a great mass of people—all kinds of legal business, all kinds of problems, including heart-rending family problems. The place is teeming; it is quite a contrast to the quieter halls of the Federal court.

One of the things that I have done every other year with my law clerks, more often, if they are so inclined, is to visit the local jail and Lorton Penitentiary, which is the nearest penitentiary. We visited St. Elizabeth's, the facility for the criminally insane, when it was a Federal facility. Now it is a District facility, so we haven't gone there in the past few years.

I do that to expose myself to those conditions, and also for my law clerks. Most of them will go on to practice in large law firms specializing in corporate business, and won't see the law as it affects most people. That is one of the things I do to stay in touch.

Senator SIMON. I would simply commend that practice, first of all. And as you prepare to take that oath and when you get together with your family—your son from Illinois, particularly—I hope that you in some way plan to continue that kind of an exposure. I think it is important. I think it is important for the members of the U.S. Senate. I think it is important for Supreme Court Justices.

Judge GINSBURG. It took me a long time to arrange for a tour at Alderson, which is one of the nearest women's Federal facilities. That was also instructive and moving for me.

Senator SIMON. There are people who will have to assist you in that, because of the nature of your new position, but I think it is something that is a desirable thing.

In the case of *O'Donnell Construction Co.* v. *District of Columbia,* you voted against a set-aside, and that was done, as I understand it, on the basis of the *Croson* decision of the U.S. Supreme Court. The *Croson* decision has resulted in significant damage to opportunities for a lot of minorities and women in the field of business. We have come a long way in providing opportunities, but we still have a long way to go, as you know.

I had my staff dig out something from one of my books. Abraham Lincoln, incidentally, as a State legislator in 1832, came out for the women's right to vote almost a century before that happened nationally. But when he was in the legislature, one of the bills passed, fairly typical, was the act for the Wabash and Mississippi Railroad which included this provision:

> In case any married woman, infant, idiot or insane person shall be interested in any such land or real state, the circuit court or justice of the peace shall appoint some competent and suitable person to act for and in behalf of such married woman, infant, insane person or idiot.

We have made progress, but we still have progress to make. I was interested in your decision in the *O'Donnell* case, whether that is solely based on response to the Supreme Court, or is there a philosophical base to your decision also?

Judge GINSBURG. I concurred in a decision that was written for a unanimous panel. I think the author was Judge Randolph. Our decision was controlled by *Croson* (1989). The District's plan measured up even less than the Richmond plan did in *Croson* itself. As

you know, under current law, a different standard applies to Federal plans; it is a more tolerant standard than the one that applies to city plans like the Richmond plan.

Croson governs city plans, and *Metropolitan Broadcasting* (1990) governs Federal plans. There is certainly a role for Congress to play in this.

My concurring statement said *Croson* controls this case. I also recalled, in that separate statement, the position Justice Powell had taken in the *Bakke* (1978) case. He said that you could have a reason for an affirmative action program, for example, Harvard's preferential admissions program, that was not tied explicitly to proven past discrimination. But the *O'Donnell* (1992) case in our court did not fit that mold. It was a case totally controlled by the *Croson* precedent.

Senator SIMON. The second part of my question is, Do you have a philosophical disagreement with the idea of set-asides?

Judge GINSBURG. I tried to express my view yesterday that, in many of these cases, there really is underlying discrimination. But it's not so easy to prove. Sometimes it would be better for society if we didn't push people to the wall and make them say, yes, I was a discriminator. The kind of settlement reflected in many affirmative action plans seems a better, healthier course for society than one that turns every case into a fierce, adversary contest that becomes costly and bitter.

In many of these plans, there is a suspicion that underlying discrimination existed on the part of the employer and, sometimes, on the part of the unions involved. But, in place of a knock-down-drag-out fight, it might be better to pursue voluntary action, always taking into account that there is a countervailing interest, as there was in the *O'Donnell* case. Members of the once preferred class understandably ask, "why me," why should I be the one made to pay? I didn't engage in past discrimination. That's why these cases must be approached with understanding and with care.

I hope that is an adequate answer to your question.

Senator SIMON. Really candidly, it wasn't all I was hoping for, but I am getting your response and I appreciate that.

My time is up, and I thank you very much, Judge.

Judge GINSBURG. Thank you, Senator.

The CHAIRMAN. Senator Cohen

Senator COHEN. Thank you, Mr. Chairman.

Judge Ginsburg, during one of the breaks earlier today, I threw caution to the wind and agreed to go on a television program to comment on the proceedings that we are now conducting. I will be careful how I phrase this, because they are still covering me right now.

Two of the journalists indicated that there were several key points involved in these hearings. No. 1, Senators weren't as knowledgeable as Judge Ginsburg on constitutional decisions. No. 2, we weren't as prepared to followup your answers with an analysis of your judicial thought process. No. 3, we were too busy with other responsibilities and we were relying primarily upon our staffs. No. 4, we do not seem as passionate as a committee about your nomination as, say, the committee was during the Robert Bork hearings or those of Judge Clarence Thomas. No. 5, you man-

aged to deflect or, put more roughly, duck questions that might provide some insight into your thought process, because of the possibility, however remote, that those issues might come before the Court at some future, but indefinite time.

I pled guilty to all charges that were made, noting that there were several members of this committee who were expert in the field of constitutional law.

Nonetheless, it seems to me it called into sharp focus exactly why we are here, what is the purpose of this committee in its advice and consent role. We are supposed to determine whether you have the intelligence and the competence and the temperament to serve on the Supreme Court, and I think there is very little disagreement among the members of this committee that you have all of the requisites.

The additional question that we are seeking to probe is that of your judicial philosophy. Senator Biden indicated we crossed that line finally in this process of confirmation in looking at a judge's or a nominee's philosophy.

But even that examination of philosophy is not without its limits. For example, it is not incumbent upon you to agree with my interpretation of a law or what I think the law should be, or that of any other member. What I think we are trying to do, and are only really qualified to do, is to examine your philosophy to determine whether we find it so extreme that it might call into question those other requisites that I mentioned before. Barring that, I don't believe that the philosophical issue is one that would be appropriate for the committee. That is my personal view.

There are a number of reasons, in my judgment, why there are no fireworks in this hearing, and why the members may seem to be less prepared than they were, let's say, during Judge Bork's confirmation hearings, and perhaps those of Justice Thomas.

No. 1, your record as a jurist is not perceived to be outside the mainstream of current jurisprudence. That in my judgment is a major factor. There might be a different view, I would submit to you, if you had been nominated immediately following your string of victories before the Supreme Court in arguing on behalf of the expansion of equal protection. There might have been quite a bit of controversy on this committee at that time, because you might have been perceived as a political activist who would bring those activities to the Court.

Two things have intervened: No. 1, time, during which the American people have caught up to your views and now accept them as what we should have assumed would have been the law all along; and, No. 2, your service on the Court where you practice restraint, instead of pursuing a political agenda.

The reason that so many of the members have dwelled on the issue of whether you might do the right thing—you were citing Justice Marshall in the *Worcester* v. *Georgia* case—is that there is suspicion in some circles, at least, that you are basically a political activist who has been hiding in the restrictive robes of an appellate judge, and that those restrictions will be cast aside and you will don a much larger garment. There is fear and apprehension on the part of some that that might be the case, and there is the hope on the part of some that that is precisely what you will do.

So for all of those reasons, we are trying to probe exactly where it is you would likely take yourself and perhaps even the Court on any given decision.

I was struck by your comment in response to Senator Biden yesterday. You said every Justice and judge should do what he or she believes to be legally right. I looked over at Senator Biden and he was smiling, and he said, "You're good, Judge, you're real good." I jotted a note that said "delphic ambiguity."

I am sure you are familiar with Greek mythology about the delphic oracle, where people would go to this cave and they would ask the mouth of the cave a question, and the answer would come back, to be interpreted by the listener to whatever he or she wanted to hear at that time. I can recall one classic case where a leader of an army went to the delphic oracle and said, "Tell me what will happen if I invade Greece or a province tomorrow." And the answer came back, "If you invade tomorrow, a great army will fall." Buoyed by that, he went back, got his troops together and went in and got massacred. A great army did fall, his army.

So we have come to see those kinds of responses as perhaps delphic in their ambiguity.

It also struck me that the response that every judge should do what he or she believes to be legally right is something of a Socratic exercise. I thought of the Socratic dialog in which the question is posed, Is beauty pleasing to the gods because it is good, or is it good because it is pleasing to the gods?

In this particular case, I would ask, Is it the right thing because it pleases the Court, or does it please the Court because it is the right thing?

That is the kind of Socratic question that we are trying to resolve here. In the absence of established precedent, is what the Court believes to be the right thing based upon what is morally right or what it perceives to be socially right?

Judge GINSBURG. I have yet to see the case where the Court has nothing to guide it, where there is that kind of blank. There is always the text that we are interpreting. The text comes in a certain setting. There is in this day and age an abundance of case law and commentary.

I have not seen a case where the Court totally lacks way pavers.

Senator COHEN. Aren't there always questions where you call it a first impression?

Judge GINSBURG. Yes; that means the precise case hasn't been decided by the Court. But there are, almost always analogies. I have not seen a case without analogies. And there are often choices to be made. I described one when I spoke of *Wright* v. *Regan* (1981), where there were two lines of precedent; the case, the particular case, could have been placed in either category. We placed it in one category. The Supreme Court said we were wrong; it belonged in the other.

There are those kinds of choices. But I think every judge in this system is committed to the health and welfare of the Federal courts. When one compares to other systems what we have and the high position of our Supreme Court—a position unique in the world—the value of our system becomes clear, and we want to keep the system safe.

Senator COHEN. All right. Let me rephrase it a bit. Senator Biden asked you under what circumstances it would be appropriate to do the right thing; that is, to step out in front of the political process or perhaps even, indeed, public opinion. We can go back and look at the *Brown* case in which you felt there was a sufficient legal foundation for the Court to have stepped out, at least a little bit, in front of public opinion at that time.

There is the *Roe* decision in which I think you felt, in writing your analysis of that particular case, that there was an insufficient foundation, at least politically, to support that decision and that the Court might have reached a different result or perhaps the same result under a different rationale.

These are two cases where they stepped out in front to make a rather bold decision.

The question I have is: What if you have public opinion polls which delineate a fairly stable body of public opinion and Congress has taken either no action or has passed a law which you perceive to be inconsistent with public opinion? What would be your role as a Supreme Court Justice in doing the right thing under those circumstances?

Judge GINSBURG. If Congress has passed a law inconsistent with public opinion, then the public will react to it one way or another, and either accept it or not accept it. That is what legislatures——

Senator COHEN. No; I am asking it a different way. I am asking what if you have a situation in which Congress has taken no action in this area but public opinion polls show that there is a fairly solid majority in favor of a particular social objective. Congress has either taken no action or, in fact, passes an act which is inconsistent with what is perceived to be a solid body of public opinion. What do you believe the role of the Court should be under those circumstances?

Judge GINSBURG. We do not have a tricameral system. The courts don't react to public opinion polls. They do react to what Professor Freund described as, not the weather of the day, but the climate of the age. I tried to explain that when I talked about the 19th amendment and the 14th amendment.

Senator COHEN. Let me go ahead and quote what you did write, and perhaps you can clarify it for me. You indicated that you approve of a change in constitutional interpretation that has been brought about by a "growing comprehension by a jurist of a pervasive change in society at large."

So you believe the Court should acknowledge a pervasive change in society at large in reaching a constitutional decision.

What I am asking you is: What if society at large is ahead of the legislative branch?

Judge GINSBURG. Senator Cohen, I must ask you to place the statement that you read in context. It was made in a very specific context. The point was that, at last, the country had come to appreciate that women were full and equal citizens with men; that the perception of women's place that marked the 19th century and the 18th century had become obsolete; that when the 19th amendment gave women the right to vote, they became full and equal citizens entitled to the same protection men had under the 14th amendment.

I was speaking in that context. I was not addressing a grand, philosophical concept that would apply across the board. I spoke specifically and only of the growing understanding of society that women were equal citizens. That is the point I made in the writing to which you referred.

Senator COHEN. Right, but the language, I would assume, would apply to other situations as well, would it not? If there is a growing comprehension by that jurist of a pervasive change in society at large, that in your judgment would at least argue for or, indeed, perhaps even compel the Court to recognize that change, even in the absence of a statute or perhaps even in opposition to a statute, would it not?

Judge GINSBURG. Senator, I have spoken in the context of gender equality. There are other contexts in which people are making claims and will be making claims that will come before the Federal courts. I cannot say anything more than I have already said on that subject.

Senator COHEN. In other words, should I just take that argument and confine it only to the equality of women under the 14th amendment?

Judge GINSBURG. Take what I wrote and appreciate that I believe it would be injudicious of me to speak now about the many classifications that could come before the Court. May I recall what I said in my opening remarks, that I do not want to offer here any hints on matters I have not already addressed.

Senator COHEN. All right.

Judge GINSBURG. To avoid prejudgment, I must draw the line where I did.

Senator COHEN. Let me go on. I take it you do believe that the Equal Rights Amendment is still necessary to provide an explicit constitutional guarantee of equal protection for women. Do you still believe that?

Judge GINSBURG. I have said that I think the Equal Rights Amendment is an important symbol. Our Constitution has survived for over 200 years with very few amendments. I appreciate that, and would like to keep it that way.

On the other hand, I do think that at the end of this century, the Equal Rights Amendment would be, even if only symbolic, an important symbol to add explicitly to the Constitution, because I would like the statement the amendment makes to be clear to every grade school child.

Senator COHEN. Let me explain to you why I am asking this question so you won't take offense that I might be quoting something out of context. My understanding is you have written that you believe the Equal Rights Amendment is necessary to provide an explicit constitutional guarantee of equal protection for women, that the Supreme Court has used what you call creative interpretations to accommodate a modern vision of sexual equality, and that such interpretation, however, has limits, but sensibly approached, it is consistent with the grand design of the Framers. I believe that is a pretty close paraphrase of what you have written.

Judge GINSBURG. Yes.

Senator COHEN. The question I have is: What are the limits that you believe are still in place? And would you wait for Congress to

eliminate those limits, or would you engage in creative interpretation to achieve the elimination of the limits?

Judge GINSBURG. I must return to my plea for understanding that a judge works from the particular to the general.

Senator COHEN. What are the limits you see that the Court has imposed in not granting full recognition to equal rights for women through this process of creative interpretation?

Judge GINSBURG. I don't think that the Court has imposed limits. The Court takes these matters case by case. In the most recent cases the Court struck down a gender classification. It said the standard of review is still open; the Court has not rejected the most stringent standard of review for gender-based classifications.

But I do want to clarify. I appreciate the compliment that you paid me, but you must understand how unfamiliar this milieu is to me. I haven't done anything as a teacher or an advocate without tremendous preparation, without a written outline or brief, without notes for oral argument. I never taught a class without hours of preparation, at least 4 hours for every 1 hour I spent in the classroom. So this milieu is much more familiar to you——

Senator COHEN. In other words, you would rather be up here asking us those questions, right? [Laughter.]

Judge GINSBURG. This questioning is a very healthy exercise, because you are making an indelible impression on me of what it is like to sit down here, on the receiving end and how much easier it is to ask the questions than to answer them.

Senator COHEN. I hope you will reciprocate in the event that any of us, when we leave this place, come before you and you are sitting on the Court. [Laughter.]

In any event, I would like to move on——

The CHAIRMAN. As counsel, he means. [Laughter.]

Senator HATCH. Not a defendant. Right. I just hope you won't reciprocate under some circumstances.

Senator COHEN. Judge Ginsburg, you were quoting, I believe, Judge Irving Goldberg yesterday. You quoted him as saying that the Court or judges were like fire fighters putting out fires that they didn't start. Some would argue that the Supreme Court from time to time has, in fact, started fires that might have remained either unignited or been smothered through what I would call supreme silence.

But assume that fire of controversy is now before you. I would like to know how you view congressional intent.

There are jurists who argue that the Court should disregard the tradition of looking to the legislative history of a law to determine how Congress intended that it be executed, and under this view they should look to the language in the four corners of the statute to resolve any ambiguities and not to committee reports, floor speeches, or any other items that might accompany a bill through the legislative process.

Now, the proponents argue, as one has said, that "judicial abdication to a fictitious legislative intent" would occur were you to look for congressional intent, and that legislative history itself is "the last hope of lost interpretive causes."

Do you agree with that statement?

Judge GINSBURG. It would be wonderful, Senator, if you wrote the laws so clearly that we knew what your intent was immediately on reading them. Our job is to interpret the laws as the legislature meant them to be interpreted. Best of all possible worlds for us would be that you speak clearly, you leave no doubt, and we can just read the text and say no reasonable person can disagree about its meaning.

But very often, my colleagues will look at a text, and one reasonable mind will say it means *x* while another reasonable mind will say it means *y*. We must then look someplace else.

In such cases, I turn to the legislative history. I do so with an attitude I can best describe as hopeful skepticism. Hopeful because I really hope I will find something genuinely helpful there and that everything will be on line, the committee report and any other statements made. It would be grand if they all coincide.

Senator COHEN. What happens when you find legislative ambiguity? Do you look to the statements of committee chairmen, the managers of the bill? Do you look to the majority and minority leaders? Do you look to language in the committee reports? Do you give any priority in that hierarchy of words that might be found in a legislative history, assuming there is ambiguity?

Judge GINSBURG. Not rigidly. I can say as a general rule, if you have a unanimous committee report, that is going to be more useful, more reliable, than a statement made by a member of the chamber after the bill has passed. The statement of a single legislator generally would count for less.

But I can't give you a definitive account and say it is always the committee report or it is always the statement of the sponsor that comes first. A very fine judge of my court, Judge Harold Leventhal, once said that visiting legislative history is like going to a cocktail party and looking through the crowd for your friends. There are some very recent situations in which the legislative history is so crammed that a statement saying the law means one thing can be matched by a statement saying it means something else.

So, yes, one must decide the case. A judge must decide what the legislature mean. If she can't tell from the words of the statute, she must resort to our sources of help. Sometimes a judge can reason by analogy. Perhaps a similar statute was passed that has a clearer statement either in the text or the history of that statute. But, yes, I do look at legislative history when the text is not clear, and I approach it with an attitude of hopeful skepticism.

Senator COHEN. I raise the issue because, No. 1, you have testified before this committee in the past, I believe in 1985, in opposition to the creation of a Federal intercircuit panel that would resolve the differences in statutory interpretation among the circuit courts. Another reason I raise the issue is that the Supreme Court traditionally upholds the executive branch's interpretation of a law unless there is a contrary congressional intent that has been established. That became of particular importance to us in the *Rust* v. *Sullivan* case in which the Supreme Court in a 5-to-4 decision upheld the Reagan administration's regulation that prohibited the grant recipients of title X family planning funds from providing counseling and referral or services on abortion. It seems to me it

was a reversal of longstanding tradition to achieve that particular end.

For the benefit of my colleagues, the language that I quoted earlier, about judicial abdication to a fictitious legislative intent, that was Justice Scalia who articulated that position.

Judge GINSBURG. I am well aware of his position.

Senator COHEN. Let me turn, if I can, to the issue of free speech. The case involved the Community for Creative Nonviolence or *CCNV* v. *Watt*. Do you remember that case?

Judge GINSBURG. Yes, I do, that was the sleeping in the park case.

Senator COHEN. Yes, the sleeping in the park case. It is not the same as "Sleeping in Seattle," but sleeping over in Lafayette Park.

Judge GINSBURG. "Sleepless in Seattle."

Senator COHEN. You saw the movie?

Judge GINSBURG. I did, yes. [Laughter.]

I don't get to see many movies, but I did get to see that one.

Senator COHEN. You enjoyed it, as well.

Judge GINSBURG. I did, especially the music.

Senator COHEN. Do you have the sound track to the music? [Laughter.]

Let me come back to the issue of conduct and speech. We have a somewhat ironic situation where conduct can in fact be interpreted as speech protected by the first amendment. For example, we know the Court's ruling on burning of the American flag. A number of people believe that to be an act which is not protected by the first amendment, but the Court ruled otherwise. So this is a case in which what I consider to be a violent act is construed to be speech.

We also have a situation in which speech can be construed to be conduct. You would agree with that?

Judge GINSBURG. That conduct——

Senator COHEN. That speech itself can constitute conduct.

Judge GINSBURG. Can you give me an example?

Senator COHEN. I could, but if I did, you couldn't answer the question.

Judge GINSBURG. Then you are tipping me off that I shouldn't——

[Laughter.]

You are starting me down the slope and I shouldn't put on the skis.

Senator COHEN. That is precisely where I want to take you. Let me see if I can camouflage my intent here for a moment and go back to the *CCNV* v. *Watt* case. In that particular case, the Government argued that protesters could not sleep in the park. They could demonstrate, they could parade in the park and they could stand in the park, but they could not sleep in the park. The Park Service argued it violated camping restrictions, and the district court ruled in favor of the Park Service.

The appellate court reversed, ruling 6 to 5 in favor of the protestors, and you, as I understand it, joined in the majority decision, but you did not join in some rather sweeping language about free speech—the on-site sleep of a round-the-clock demonstrator is

indistinguishable from leaflet distribution, speeches or flag displays—or something to that effect on the part of the majority.

You also rejected then Judge Scalia's position that the first amendment only protected speech and not conduct, and I think you called it or wrote that it was an arbitrary, less than fully baked theory. Do you remember writing those words?

Judge GINSBURG. Yes.

Senator COHEN. It would seem that the Supreme Court affirmed your position as far as the first amendment applying to conduct as well as speech. What you said is that "sleeping in symbolic tents" has a "personal non-communicative aspect" that bears a "close, functional relationship" to standing or sitting in such tents, that is, it guarantees that the demonstrator is physically present to sustain around-the-clock demonstration.

Then you went on to say it is not a rational rule of order to forbid sleeping, while permitting tenting, lying down and maintaining a 24-hour presence, and that "the non-communicative component of the mix reflected in CCNV's request of permission to sleep * * * facilitates expression."

I can see my time is running out here.

The CHAIRMAN. Finish your thought.

Senator COHEN. The question I have is whether you would give first amendment protection to any noncommunicative component of the mix in a case that involves a facilitation of expression. In other words, is that a test that we can apply in future cases that involve conduct that is in some way related to speech that would be protected, or is this the same situation where you are going to say don't take my words beyond the individual case?

Judge GINSBURG. The facilitative aspect of it is not entitled to the same protection as the expressive aspect of it. My comment in relation to my colleague's opinion is that one cannot draw a line between words and expression as he did, and say neatly, when you speak, that is speech, and otherwise it is conduct. I gave, as an example, this illustration: It is said that during World War II the King of Denmark stepped out on the street in Copenhagen wearing a yellow armband. If so, that gesture expressed the idea more forcefully than words could.

Senator COHEN. Let me just conclude. I have been struck by the irony in which one can burn the American flag and that is constitutionally protected speech, and yet, if one declares that one is gay in the military, that is not speech, that's an act. It is a paradox, perhaps, that exists, which you, Judge Ginsburg, in all likelihood will have to resolve.

My time is up, Mr. Chairman. Thank you.

The CHAIRMAN. Thank you. You have demonstrated several things. The first part of your question is that you are a much better commentator than those who ask you the questions.

Senator Kohl, I got it right this time.

Senator KOHL. All right. Thank you very much, Mr. Chairman.

The CHAIRMAN. Just so I let it be known, one of my colleagues passed me a note saying, "It's Kohl, not Feinstein."

Senator KOHL. I asked them to do that.

The CHAIRMAN. It comes with age and senility on my part, Senator. I apologize for yesterday again. I imagine I will be apologizing for the remainder of the year. Please go ahead.

Senator KOHL. Judge Ginsburg, a brief question.

First, earlier this year, as perhaps you recall, during the months when President Clinton was searching for a replacement for Justice White, one of Justice Scalia's law clerks, who was seeking to find out who he would prefer as a colleague, asked the Justice whether he would rather be stranded on a desert island with Lawrence Tribe or Mario Cuomo. And as I am sure you remember, Justice Scalia answered quickly and distinctively, perhaps, Ruth Bader Ginsburg.

I have two questions. First, Judge, do you want to be stranded on a desert island with Justice Scalia? Do you want to be stranded on an island with him? [Laughter.]

The second question is do you see yourself on the same island of legislative intent that Justice Scalia now lives on?

Senator HATCH. You can refuse to answer those questions, Judge.

Judge GINSBURG. I can say one thing about Justice Scalia: He is one of the few people in the world who can make me laugh, and I appreciate him for that.

On legislative intent, I think I answered the question earlier. We have had on our court interesting colloquies about the difference in our attitude toward legislative history. Wherever I am and wherever he is, I think we will continue to have that interesting difference of view on the appropriateness of seeking help from legislative history.

Senator KOHL. So I take it you don't feel safe on the same island, you don't see yourself on the same island of legislative intent as Justice Scalia?

Judge GINSBURG. I don't on the question whether conduct is expression.

Senator KOHL. All right. Judge Ginsburg, I am still trying to get a better sense of the way your experience as a person has impacted your vision as a judge and as a potential Supreme Court Justice.

As I reviewed your testimony and the conversation we had several weeks ago, I was struck by how directly you have been touched by injustice. You were, as we know, a victim of gender discrimination, and you told us yesterday of having been denied admission to some resort, because dogs and Jews were not allowed there. Of course, you told us your family left Europe, in part, to flee discrimination and persecution.

Now, up until Chairman Biden introduced me yesterday, I myself have never experienced gender discrimination. But I also remember seeing those "no dogs and Jews allowed" signs in the community where I went to camp as a kid.

As we all know, today, access to society's opportunities and institutions is still denied to many. For example, kids who can't vote, who contribute money to politicians, are still left out. The growing disparity between rich and poor in our country is barely being addressed. And while great progress has been made in civil rights, many minorities and women are still denied full equality.

I am in public life partly because I want to do what I can to ameliorate these conditions. What I would like to do is to discuss with

you your motives, your commitment, and perhaps some of your passions.

As an advocate, you, on behalf of all women in our society, slowly scaled the mountain of injustice. As part of that process, you turned to the courts, and it was there that you sought decisions to extend the current range of rights for women. So I am a little bit confused about the tension between the somewhat restrictive role you describe for judges and the much more dynamic role that you adopted as an advocate.

This now is the third confirmation hearing that I have been involved in, and in each of them, Judge Ginsburg, the nominee has told us or asked us to ignore certain aspects of their personality or their previous life-work experience, and you appear to be doing somewhat of the same thing. You ask us to judge you almost only as a judge, and not to consider very much of your experience as an advocate. But I think we need to judge you as a total person, a person who felt discrimination and fought against it, as a woman who cares about the future of her children and grandchildren, in short, as a whole person.

I, for one, don't believe that you can shed your total life experiences and your personality when you sit at the bench. I know you do not have and should not have an agenda in terms of specific issues, but I wonder if you have an agenda in terms of broad concepts.

When you were an advocate, you sought to persuade the courts to listen to what were then novel arguments about gender discrimination. And as a Justice, when you sit with your colleagues to decide what cases to hear, you will for that moment also be an advocate, seeking to persuade your colleagues to accept certain cases which raise certain kinds of issues.

As a Justice, will you, as you did as an advocate, encourage the Court to hear cases whose facts allow you to entertain novel claims and break new ground? Or will you be inclined to be a moderate incrementalist in that capacity, as well, encouraging the Court to hear cases whose facts raise more narrow issues and restrict the range of a decision?

Finally, what I am trying to say, Judge, is that, as a lawyer, you helped build a ladder which allowed women to climb into the courts and begin the process of achieving equality. As others seek to construct their ladder, do you feel any special obligation to help them get their day in court?

Judge GINSBURG. Senator, I have not asked you to overlook, nor have I apologized for, anything I have done. Some of the best work I have done is reflected in my briefs. But I am a judge, not an advocate.

I am reminded of the story that Judge Constance Baker Motley tells. She was once asked to recuse herself from a title VII case, because it was a sex discrimination case and she was a woman, so surely she should not sit on the case. She reminded the lawyer who made that application that there are only two choices, either you are a man or you are a woman. She said she would decide that case fairly and no one should think she is disqualified.

Of course, the role of a judge is different from the role of an advocate. An advocate makes the very best case she can for her cli-

ent. A judge judges impartially. A judge at my level takes what is put on her plate. We don't have a choice.

You are right in pointing out that the Supreme Court's jurisdiction is discretionary, and the obligation of those judges is to take the cases that most need a national solution. The Court doesn't sit there to take the easy cases. You don't need a Supreme Court for the easy cases. The Justices must look at what issues need to be decided most for the Nation, and that's the basis on which the judges make their decisions about what to take.

I can't answer any more precisely than that, but I think one of the reasons the Supreme Court was eager and urged Congress to remove the mandatory jurisdiction was that the Court then could take the cases that most needed a national solution.

Senator KOHL. Well, I think that is a very good answer. When you and your fellow Justices, in the event you are confirmed, will be sitting, you will be deciding every year collectively, and you will have the right and the obligation and the opportunity to exercise the judgment as to which cases the Court will take. Just as a simple matter of fact, I think we need to point that out and understand that, and when you make those decisions, you know you will be exercising judgments, of course. And you said you will take those cases which will most appear to need some national solution in our society.

So let me ask you: What do you think are the major problems and challenges that face our society? I just throw out things like racism, sexism, guns, crime, drugs. Give us some indication as to what you think some of these major unresolved problems are that we are facing in our society today.

Judge GINSBURG. You listed a number of the ones that would be on the top of anyone's list. But the Court doesn't deal with problems at large—crime or violence in our society. What comes to the Court is a particular case raising an issue in a particular context; unlike legislators, courts don't entertain general issues. They resolve concrete cases.

The Court also considers timing. Sometimes the Court believes it will be able to judge better, if it has more returns from the other Federal courts. That is, perhaps the first time an issue is presented, the Court shouldn't take the case. Perhaps the Court would benefit from the views of several judges on the question. If all of the judges who have heard the matter are in agreement, the Court might decide that it need not take up the issue.

If there is a division among lower court judges, then there may be a greater need for Supreme Court disposition. The idea is sometimes called percolation—having an issue aired in the lower courts for a time, having commentators speak to it, so that when the Court ultimately judges the case, it will be better informed to make the decision. In some areas, that is a wise thing to do.

One of the cases in which I participated—a decision the Supreme Court reversed—might serve as an example. The case involved the fourth amendment. The Supreme Court had decided that if police officers stop a car, open the trunk and find a suitcase in it, they can't open the suitcase without a warrant.

Cases then trooped before the lower courts involving other containers in cars—cardboard boxes and plastic bags, for example.

Lower courts began to draw a "luggage line"; some applied a "worthy container" doctrine to determine when police officers needed a warrant. One was needed for a leather suitcase, for sure; lower courts were not so sure about lesser containers.

My court, in that time of uncertainty, got the case of a leather pouch and a paper bag, side-by-side in a car trunk. The three-judge panel held that the police needed a warrant before they could open the leather pouch, but didn't need a warrant to open the paper bag, because it was a flimsy, unworthy container.

I wrote an opinion for the full court saying we have now seen an array of container cases, going from the leather suitcase to the lowly paper bag, and we can't expect police officers to make worthy container judgments on the spot. Either you can open a container or you can't without a warrant. Because the Supreme Court had held that police officers could not open a suitcase without a warrant, my court held police could not open any closed container without a warrant.

The Supreme Court said you have persuaded us that police officers should not be expected to draw luggage lines on the spot, but you are wrong about the ultimate solution. Once police officers have reason to stop a car, they can open the trunk and inspect anything in it without a warrant. That was a situation in which it was at first thought that police, and then courts, could distinguish between containers on the basis of their character. By the time the issue got to the Supreme Court, the Court saw that a "worthy container" rule would not work.

The Court might not have seen that in the very first case. It took a string of cases in the lower courts—there really were cardboard box and plastic bag cases—all kinds of container cases. So that is an example of percolation. The Supreme Court was better informed, I think, in making the ultimate decision because the issue had been considered in the circuits for some years and the Court could take the variety of lower Court opinions into account when it made its final decision.

Senator KOHL. I know how much you care for your grandchildren. It is perfectly obvious to all of us who have seen this confirmation hearing, and it is a great thing.

As you know, what we are doing without their ability to represent themselves is imposing an enormous tax burden on them. We are building it up year by year, and they have no way to respond, to react, to protest, to vote us in or out. They just sit there and see it happen. And we all know that someday they are going to have to pay a price for that.

How can they be represented by the courts? Is there any way that your court can represent them? There is taxation without representation, an enormous burden of taxation without representation. Does that in any way strike you as something that the courts might have a right to take a look at someday?

Judge GINSBURG. I think you must represent them and their parents must represent them, and we all must represent them. All persons should care about the next generation. In a democracy, the people and the legislators must care about what is happening to the next generation.

Senator KOHL. All right. Judge Ginsburg, Justice Brandeis once said that you can judge a person better by the books on their shelf than by the clients that they have in their office. So I am asking you what is on your shelf. Could you tell us a little bit about your reading habits, the kinds of books you read, what book you most recently read?

Judge GINSBURG. I can tell you the two books I most recently read. I don't know that these are representative, but most recently I read "Wordstruck" by Robert McNeil, and Marian Wright Edelman's book, dedicated to her children, "The Measure of Our Success."

I haven't been doing heavy reading in these last 5 weeks apart from reviewing over 700 of my opinions, to recall what I said in them, and refreshing my recollection of various areas of Federal law.

My husband is a voracious reader. He often selects books for me. He knows what I would enjoy. Every once in a while, I choose something for myself, like "The Bean Tree," which I recently read and enjoyed. But when my husband reads a book he knows I would particularly like, he says, "Read this one," like "Love in the Time of Cholera," which I adored.

Senator KOHL. Do you read a great deal of fiction or nonfiction, or is it equal?

Judge GINSBURG. I probably read more fiction because I deal every day with so much nonfiction.

Senator KOHL. All right. Judge Ginsburg, if confirmed, you will be replacing Justice Byron White, of course. What are your thoughts on Justice White's career on the Court? In what ways do you think you might be like or different from the person that you are most likely to be replacing?

Judge GINSBURG. The differences I think are obvious. I surely do not have his athletic prowess. [Laughter.]

He is very tall, and I am rather small. I have tremendous admiration for him. I hope I am like him in dedication to the job and readiness to work hard at it.

I can tell you that he has been so grand and thoughtful. He called me the day of the nomination, and called me at least twice while cleaning up—he is moving his chambers—to ask me whether I would like him to save for me this or that document, items he thinks would be particularly useful for a new Justice. He has already sent me some pages with the advice, "Don't read this now, but read it a month from now."

He is a very caring, wonderful person. I would like to say something about Justice White that few people appreciate. It has been said many times here that I argued six cases in the Supreme Court and prevailed in five. If it had been up to Justice White, I would have prevailed in all six because he voted for me every time. He was the only one who did, although I am happy to say that Justices Brennan and Marshall came close in that one case the Court decided against my client. So I feel a particularly strong affinity to Justice White.

Senator KOHL. That is very good. Since your nomination, Judge Ginsburg, there have been reams and reams of information that have been printed and impressions that have been printed about

you. Anything that you have read that has struck you particularly as being reflective of the kind of a person you are? Or don't you read these things? Don't they interest you? How would you describe, just in general terms, the person that you would like us to know today on the eve of what may be your confirmation as a Supreme Court Justice? Recognizing that this is probably the last time that the American people will ever have a chance to glimpse you as a person and what you would like them to think most of all when they think of you.

Judge GINSBURG. I would like to be thought of as someone who cares about people and does the best she can with the talent she has to make a contribution to a better world.

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

The CHAIRMAN. Thank you.

We will now take a brief break and then come back, and we will finish with our three distinguished colleagues. We will take these in the order of three, and then we will close down for the day, Judge. So we will take now a 10-minute break. Let's try to come back at 25 after, maybe about 13 minutes, and then we will start with Senator Pressler when we come back, then Senator Feinstein, then Senator Moseley-Braun.

[A short recess was taken.]

The CHAIRMAN. The hearing will come to order. Judge, welcome back.

Senator Pressler, the floor is yours.

Senator PRESSLER. Thank you very much.

Judge, as I mentioned to you in the meeting in my office, in my State and in the Western part of the United States there are a lot of questions about Indian jurisdiction and problems between non-Indians and Indians on or near reservations. And I subsequently sent you a series of questions that I might ask.

I might say that I also wrote to all the lawyers in my State and asked them for suggested questions, and they sent back lengthy responses about what I should ask. I have stacks of their letters here somewhere. I am going to have to write all of them a thank-you note. If they watch this, they might be disappointed if I don't ask their question. But I don't think I can ask you all the questions they sent because some of them have been covered. But many of the questions they sent did involve tribal jurisdiction and some of the problems that affect Native American people.

Now, the Constitution in article I, section 8, gave Congress the power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes. Over the years the Federal Government has employed various policies to structure its relations with the tribes. Federal policy toward the tribes has run the gamut from waging war against them to viewing them as dependent beneficiaries of a Federal trust relationship, creating reservations for them, allotting individual tracts of land to their members, attempting to assimilate them into the dominant culture, terminating their tribal status, to the present time affording them greater self-determination.

Apart from the right or wrong of any of these policies, the fact of the matter is that my constituents, Indian and non-Indian, must live with the present-day realities descended from these policies.

These realities lead to litigation that comes before the courts for resolution.

Let me say that it is not only in South Dakota, but I read in the paper that Connecticut even has a dispute over Indian lands, and I believe other east coast States have unresolved Indian questions. So it isn't strictly a Western issue.

But, first of all, do you take an expansive or restrictive view of tribal sovereignty?

Judge GINSBURG. I take whatever view Congress has instructed. Senator, Congress has full power over Indian affairs under the Constitution, and the Supreme Court has so confirmed, most recently in *Morton* v. *Mancari* (1974). Judges are bound to accord the tribes whatever sovereignty Congress has given them or left them, and as a judge, I would be bound to apply whatever policy Congress has set in this very difficult area. Control is in the hands of Congress, and the courts are obliged to faithfully execute such laws as Congress has chosen to enact.

Senator PRESSLER. Now, what type of analysis might you apply in deciding the legal boundaries of tribal sovereignty?

Judge GINSBURG. I am not equipped to respond absent information about the particular case. Without the benefit of briefs and arguments, all I can say is that I would attempt faithfully to follow the law as laid down by Congress, taking account of the precedent in point.

Senator PRESSLER. What weight would you give to each of the following when deciding cases involving disputes with the Indian tribes in view of what the Constitution says? Treaties between the tribes and the Federal Government that have been written over the years. We have a trust relationship between the Federal Government and the federally recognized Indian tribes. And, finally, the power of Congress to legislate matters relating to Indians and Indian tribes.

Judge GINSBURG. As far as treaties are concerned, Congress can abrogate treaties with the Indian tribes, and to the extent Congress has not done so, the treaties would be binding on the Executive.

And your next inquiry concerned?

Senator PRESSLER. There are treaties and there is the trust relationship. I believe the Secretary of the Interior is the trustee for the American Indians, and there is a special relationship between the Federal Government and federally recognized Indian tribes.

Judge GINSBURG. The Court made clear in the *Cherokee Nation* (1831) case that when Congress indicates in a treaty or a statute that the Government is to assume a trust relationship with a recognized tribe, the Court will then apply that policy. And with respect to the power of Congress to legislate, the Supreme Court has consistently recognized that Congress has full power over Indian affairs.

So my answer is that this is peculiarly an area where the courts will do what Congress instructs, recognizing that these are very difficult questions for the legislature to confront and resolve.

Senator PRESSLER. Perhaps the No. 1 complaint I hear from my constituents in Indian country, both Indian and non-Indian, is in the area of law enforcement. The Federal Government, while it has the authority in Indian country to prosecute minor crimes, chooses

not to do so given limited resources. Assaults, thefts, beatings, and vandalism, crimes falling outside the purview of the Major Crimes Act, which confers Federal jurisdiction, are routinely unpunished because of jurisdictional voids or checkerboard jurisdictions so complicated that it is impossible for the law enforcement officer to know who has jurisdiction to take action over any given crime. It varies given the type of crime, the legal description of the land it was committed on, and the Indian blood level or tribal affiliation of both the victim and the suspect.

Into this legal jungle, we have sent four different jurisdictional layers of law enforcement—local, State, Federal, and tribal—to keep order. The problem is that we have no set of rules with which to work. It is not practical to have a court hearing every time they need to determine who has the authority to take action. As a result, action is often not taken.

When I meet with tribal chairmen, which I do frequently, this frequently is cited as one of the most pressing problems facing Indian people today. They want tough law enforcement but cannot get it. I hear the same from non-Indians living in or near Indian country.

In a case which illustrates such problems, *Duro* v. *Reina*—it is a 1990 case—the Court held that Indian tribes could not exercise jurisdiction over Indians who committed misdemeanor crimes on the tribe's reservation if the violator was not a member of the tribe exercising jurisdiction. As the State had no jurisdiction over such individuals and Federal law enforcement generally declined to exercise jurisdiction in this area, many felt a jurisdiction void had been created by the Court. While Congress later abrogated *Duro,* the episode starkly highlights the jurisdictional problems that occur in law enforcement in Indian country.

I guess my questions are: Can you envisage a way State authorities might be able to exercise jurisdiction in Indian country in those instances where law enforcement voids appear to exist?

Judge GINSBURG. Congress can certainly give the States such authority. The example that you gave, the *Duro* v. *Reina* (1990), is a case on point. In Congress' judgment, the courts got it wrong and Congress corrected their error. And with respect to the question you just asked, if Congress so chooses, it can give the States that law enforcement authority.

Senator PRESSLER. Given the problems that the current patchwork jurisdiction nightmare presents for people living in Indian country, that is on or near reservations, do you feel it is possible to reconcile these disparate law enforcement situations through clearer Court rulings, or is specific congressional action required?

Judge GINSBURG. I can't address that question in the abstract. Clearer Court decisions are always desirable. But out of the context of a specific case, I am not equipped to give you a more precise answer.

Senator PRESSLER. Should there be limited Federal court review of tribal court decisions, as is the case with State courts?

Judge GINSBURG. Again, Congress has plenary authority over Indian affairs and it can authorize Federal courts to review tribal court decisions. Whether Congress should do so is a judgment the

Constitution commits to the first branch, not to the third branch, of government.

Senator PRESSLER. Now, Federal allotment policies around the turn of the century divided up Indian reservations, giving tracts of land to individual Indians. In many cases, these individual allotments were sold in fee to non-Indians. We now have the situation where many acres of non-Indian fee-own land lie within the borders of Indian reservations.

This has created a checkerboard ownership pattern, with non-Indians owning some land, Indians owning other parcels, and other land held in trust by the Federal Government for tribes. This situation has prompted many court cases which often must resolve the question of whether the State or the tribe has jurisdiction over non-Indians or non-Indian lands.

What is your view of how the courts can clarify issues arising out of the checkerboard jurisdictional patterns in Indian country?

Judge GINSBURG. Again, Congress prescribes the jurisdiction, and I would apply the law as Congress declares it. I can't offer any policy-based view on this issue, because the question is one that is committed to the Congress.

Senator PRESSLER. As you now, beginning in the late 1800's and continuing to the early 1900's, Congress and the President opened many of the reservations in the West to non-Indian settlement. In the process, non-Indians were granted patents in fee for their lands. According to the Supreme Court in the *Duro* case, the 1990 Supreme Court case, the population of non-Indians on reservations generally is greater than the population of all Indians, members and nonmembers.

This series of questions is intended to deal with the status of non-Indians on the reservations. Can you describe for me the importance of Indian self-government in the constitutional framework?

Judge GINSBURG. Congress has not been perfectly consistent in dealing with that question. Sometimes, as you pointed out in your opening statement, Congress has sought to eliminate or curtail tribal self-government, and other times, notably in more recent times, it has sought to strengthen tribal self-government. Fostering self-government seems to be the current trend, although some statutes still limit tribal sovereignty. Again, these are legislative decisions for the Congress to make.

Senator PRESSLER. Indian tribes do not allow non-Indians to participate in their elections, to serve in tribal office, or to serve on tribal juries, generally speaking. In view of these facts, do you see a principled basis for allowing an Indian tribe to impose civil fines and forfeiture against non-Indians who reside on the reservation with regard to activities on the land owned by non-Indians?

Judge GINSBURG. Again, this seems to me peculiarly a policy question committed to the judgment of Congress, and it is the function of judges to apply whatever solution the legislature chooses to enact.

Senator PRESSLER. Do you see a principled basis upon which Congress can delegate to tribes the power to exercise jurisdiction over non-Indians, especially non-Indians who are residents of the reservation?

Judge GINSBURG. This question, too, raises policy matter that calls for a judgment by the legislature. Judges would be obliged to apply whatever law Congress enacts, but I am not equipped to comment on a policy question that is so clearly committed to the legislative branch.

Senator PRESSLER. In the area of Indian civil rights, in the Supreme Court case of *Santa Clara Pueblo* v. *Martinez,* the U.S. Supreme Court held that suits against a tribe for violation of the Indian Civil Rights Act may not be brought in Federal court. As a result, individual tribal members, although citizens of the United States, are limited to relief, if any, in their respective tribal court systems. Many tribal governments do not provide for a court system independent of the executive, creating the possibility of intimidation by the executive leadership.

Several years ago, I cosponsored legislation with Senator Hatch which would have permitted individuals who had exhausted their remedies in tribal court for violation of the Indian Civil Rights Act to bring an action in Federal court. This measure did not become law. Thus, people turned to the Supreme Court. Should Native Americans be entitled to the same constitutional protections afforded to all Americans in our Federal courts?

Judge GINSBURG. Again, all I can say is that Congress has full power over Indian affairs, and the Federal courts will follow the policy Congress sets in this area.

Senator PRESSLER. Now, are you aware of any Supreme Court civil rights discrimination cases involving Indians? And what is your view of these cases?

Judge GINSBURG. In *Morton* v. *Moncari* (1974), it was argued that the category "Indian" was a racial classification. The Court held that, given the history of our country, the category "Indian" was not racial but political.

Senator PRESSLER. In a recent Supreme Court decision, *South Dakota* v. *Bourland,* decided a month ago, the Court held that Indian tribes did not have the power to regulate the hunting and fishing of non-Indians on fee-owned land within the boundaries of the Cheyenne River Indian Reservation that had been taken by the Federal Government when it constructed a flood control project. Do you have any comments on that case and its significance in the area of tribal jurisdiction?

Judge GINSBURG. That case is a precedent that may require interpretation in cases that will arise in the future. It would not be proper for me to comment on how that precedent will be interpreted in the next case, when the next case may be before a court on which I serve.

Senator PRESSLER. Do you feel the Court was correct in basing its analysis of the case of *Montana* v. *United States,* which is a 1981 case, which held that the tribal power did not extend to the regulation of hunting and fishing by nonmembers on reservation land owned in fee by nonmembers of the tribe?

Judge GINSBURG. Senator, I feel obliged to give the same response to that question. It calls for interpretation of a precedent likely to figure in a future case.

Senator PRESSLER. The ninth circuit, in *Washington Department of Ecology* v. *U.S. Environmental Protection Agency,* held that

States could not regulate the activities of an Indian tribe in operating a solid waste project, only the Federal Government can regulate the operation of such facilities on Indian reservations. Do you have any thoughts on whether an Indian tribe can be made to comply with environmental regulations of a State, whose regulations are more stringent than those of the Federal Government?

Judge GINSBURG. This is a matter that might come before me, if this nomination is confirmed. I would have to decide it in the context of a specific case, and I can't preview or forecast my decision.

Senator PRESSLER. The Indian Gaming Act mandates that the States negotiate in good faith with the tribes in establishing compacts regulating reservation gambling. The statute does not define good faith nor set out much direction for what is required by either party.

As you know, Indian gaming has become a controversial issue in many States. What are your views with respect to the ability of Congress to mandate that these two sovereigns negotiate in good faith, without providing significant direction to either?

Judge GINSBURG. The Indian Gaming Act is a new and much litigated law. Cases concerning that legislation may well come before me, so at this time I am not in a position to comment on it.

Senator PRESSLER. In the 1970's, when I was a member of the House, I was quoted by the Supreme Court, albeit in a footnote, because they wanted some legislative history. I had helped the Sioux Tribes by working for legislation that allowed them to go back into court enabling them to file suit in the Court of Claims for compensation for the Black Hills of South Dakota, the doctrine of res judicata and collateral estoppel notwithstanding.

After the passage of that legislation, the U.S. Supreme Court rendered a lengthy opinion, *United States* v. *Sioux Nation of Indians,* which held, in part that with passage of this legislation, Congress' mere waiver of the res judicata effect of a prior judicial decision rejecting the validity of a legal claim against the United States does not violate the doctrine of separation of powers.

The Court went on to rule in favor of the Sioux Tribes on the basis for the case, holding that an 1977 Act of Congress effected a taking of tribal property, property which had been set aside for the exclusive use and occupation of the Sioux by the Fort Laramie Treaty of 1868. That taking implied an obligation on the part of the Government to make just compensation to the Sioux Nation.

The money awarded for the Sioux claim to the Black Hills has been appropriated and placed in a trust account. The judgment, with interest, now amounts to more than $300 million. A plan to use and distribute the money must be agreed upon by the tribes, before the money can be put to good use by the Native Americans entitled to the judgment. I would like to see the award distributed, but the lack of unanimity on the part of the tribes as to whether to accept the award has prevented this from occurring.

What is your view of the importance of *United States* v. *Sioux Nation of Indians* in the area of Indian land claims?

Judge GINSBURG. Senator, *Sioux Nation* (1980) is a well-known and very significant case. As you mentioned, it resulted in one of the largest judgments for an Indian tribe in the history of our country, and it righted what many people considered to be a very

old and a very grave historical wrong. Also, it set down some clear guideline for handling Indian just compensation claims. It brought some clarity to an area that was notably murky.

With regard to the current situation—the distribution of the proceeds—that is a matter that may very well be back in the lap of the Court, so I can't comment on that part of it.

Senator PRESSLER. Do you regard monetary compensation as awarded by the Supreme Court as an equitable remedy to settle Indian land claims?

Judge GINSBURG. Again, that is the very issue that may be coming up. The adequacy of monetary relief is what some people are challenging.

Senator PRESSLER. Do you see any need to depart from the traditional approach the Court has used in deciding Indian land claims?

Judge GINSBURG. Again, that will be the very question at issue, if the case does come back to the Court. So I can offer no comment beyond recognizing the importance of that precedent, both in terms of the size of the award and the guidelines it laid down for just compensation.

Senator PRESSLER. Moving away from the Indian jurisdictional questions, another question that several lawyers in my State suggested I ask involves wetlands. The Federal Government frequently takes productive farmland out of production and classifies it as a wetland. Wetland determinations facilitate certain environmental and wildlife management objectives.

In my view, the application of wetlands regulations, the determination of what does and does not constitute a wetland approaches absurdity at times. However, the definition of what constitutes a wetland is not my concern today. Rather, the Federal Government's designation of wetlands causes farmers in my State to lose income due to the fact that their land has been taken out of production.

How do you square the Federal Government's regulation of wetlands with the fifth amendment's prescription against taking private property for public use, without just compensation?

Judge GINSBURG. Senator, we know that the Government cannot take, but it can regulate, and the point at which regulation becomes a taking is one of the hottest issues before the Court at the moment. The Supreme Court most recently said in the *Lucas* (1992) case that if the regulation effectively deprives the owner of the entire value of the land, then even though the law is phrased as a regulation rather than a taking, the owner would be entitled to just compensation.

There must be dozens or scores of cases in which litigants are seeking clarification of the line between regulation and taking. I can't offer now anything more than to say I appreciate that the issue is very much alive, and that the most recent decision, the *Lucas* decision is hardly the be-all-and-end-all. If confronted with such a case, I will do my best to prepare for it diligently and give it my best judgment.

Senator PRESSLER. In the area of small business, employer versus union rights, I know another Senator already has asked about this issue, but I will take it from a slightly different point of view. In the *Xidex Corporation* case, a 1991 decision, you voted in the

majority in a case involving a series of actions taken by Xidex Corp. following its purchase of a new plant that had been a union shop. The union alleged many of these actions constituted unfair labor practices.

An administrative law judge in the NLRB agreed with the union on several points, and you enforced their orders against Xidex, as I understand it. In *Xidex*, the circuit court relied on the holding in *NLRB* v. *Brown,* that antiunion motivation will convert an otherwise ordinary business act into an unfair labor practice. Please elaborate on what you understand this standard to mean.

Judge GINSBURG. Senator Pressler, may I ask, since the name of that case is not immediately familiar to me——

Senator PRESSLER. It is a long name, *Microimage Display Division of the Xidex Corporation* v. *National Labor Relations Board;* it is a 1991 case, 924 F. 2d, 245.

Judge GINSBURG. I have just asked for some assistance in finding the opinion. It is not one I wrote.

Senator PRESSLER. We can come back to it or you can address it later, if you want to, after you get a chance to look at it.

Judge GINSBURG. Thank you.

Senator PRESSLER. I have several followup questions regarding that case involving the relationship between labor and management, particularly in small business, but I will save them and either ask them later or ask them for the record.

Judge GINSBURG. Sorry. Even though I have written over 700 decisions, I usually remember the names. But I do not recall *Xidex* (1991).

Senator PRESSLER. That is all right. How do you feel about arbitrary caps on damages?

Judge GINSBURG. Senator, I think you loaded that question by calling them arbitrary. [Laughter.]

Senator PRESSLER. That was from one of the lawyers to whom I wrote and asked for questions, so I will only take partial responsibility. Let's just talk caps on damages.

Judge GINSBURG. If the legislature sets a cap on damages, then the matter will come before the courts, and judges will attend to the record, briefs, and arguments that the parties make with respect to it.

Senator PRESSLER. But you can declare them excessive or you can——

Judge GINSBURG. I can't express a view on that, apart from the contours of a particular case.

Senator PRESSLER. I guess the most commonly asked question by attorneys in my State is—and you have addressed this to some extent, but to boil it down—does the nominee wish to interpret the Constitution as a static document, or does she wish the Court to initiate creative changes or creative new approaches?

Judge GINSBURG. I have said that I associate myself with Justice Cardozo who said our Constitution was made not for the passing hour but for the expanding future. I believe that is what the Founding Fathers intended.

My assistants just handed me the case you mentioned. I was on the panel, but the decision was by my colleague, Judge Karen Henderson. In addition to the 700-odd decisions I have written, if I

were to review every case in which I was on the panel, I would confront thousands of opinions. I haven't even attempted to do that, and this decision by Judge Henderson is not now in the front of my mind. I will be glad to refresh my recollection and attempt to answer any questions you have about it. But when one is a concurring judge and doesn't do the actual writing, the——

Senator PRESSLER. OK, good. I will ask you about that in a future round of questions, because the small-business community feels that is an important case from their point of view, and there are two or three other questions about it which I will give to you in writing, and I will try to ask them in a later round.

Judge GINSBURG. Now that I have the case, I will certainly read it and refresh my recollection.

Senator PRESSLER. My time is up.

The CHAIRMAN. Thank you very much.

Now, Judge Ginsburg, one of the few things you have not done in your career is serve in an elected capacity. Now you know how we feel when we are debating in the middle of a campaign, after having cast literally 18,000 votes and a press person or an opponent says, "What did you mean when you cast the vote on S. 274 in 1968?" And so we can sympathize with your inability to remember every single solitary decision. I am amazed you remember as many as you do. If we remembered that many votes we had cast, we would all be better for it.

Judge GINSBURG. I recall that a lawyer once asked me, "But, Judge Ginsburg, in the such-and-such case in which you concurred, footnote 83"—and it really was footnote 83—"said * * *. Are you backing away from footnote 83?" At that moment I decided that I don't concur in footnotes, especially when they get up over 50. [Laughter.]

The CHAIRMAN. Believe me, I share your concern, your position.

Senator Feinstein, thank you for waiting.

Senator FEINSTEIN. Thank you, Mr. Chairman. You have now turned to the equal protection side of the table. We appreciate it very much.

The CHAIRMAN. I want to explain, by the way, for all who are watching, if the Senator will yield. The two women on the committee are sitting at the end of the platform. That is not because they are women; it is because they are the most junior members of the Senate on the Democratic side. And so I just want to—I was thinking about that today. As we are going through all this discussion of the equal protection clause and women's rights, as we should, I kept thinking, but they are probably home saying why don't they let the women ask any questions? It is purely because of seniority, a rule that when I arrived here as No. 100 in seniority I thought was horrible, and I now think has merit. [Laughter.]

Senator Feinstein.

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

Judge Ginsburg, not only have I found you a scholar, but you have also got incredible stamina. And I might say that one of the special things for me today has been to sit here and watch you, because I am not a lawyer, reduce things to kind of their basic, simple element and explain them so that they were much more easily

understood. I think that is a very special teaching talent, and it is very clear to me that you have it.

I want to talk to you about four subjects, if I may today. They are guns, choice, capital punishment, and quotas. And I don't know whether I will end up just thrusting and you will parry, but I want to do it as someone whose experience is that of a former mayor of a big city and also as a grandmother. And I am hopeful that we might just have a conversation with a few people listening on the side.

Let me begin with the second amendment. I first became concerned about what the second amendment means with respect to guns in 1962 when President Kennedy was assassinated, and then with Martin Luther King and Bobby Kennedy. And then I watched the evolution of serial murders in this country and then the growth of assault weapons and their prevalence on our streets.

We said we shared the same age, and on my birthday a gunman walked into a swimming pool and shot at six youngsters. And then I went home on our break, and I went to one of San Francisco's premier office buildings, and someone had just walked in and wounded six, killed eight, and shot himself.

Then I picked up a newspaper where a 3-year-old had pulled a loaded assault weapon from under a bed and fired three bullets into his sister.

And so I went back to the second amendment, and I read it again, and it said, "A well-regulated Militia"—capital M—"being necessary to the security of a free State"—capital S—"the right of the people to keep and bear Arms"—capital A—"shall not be infringed."

And then I understand that in 1939 in a decision called *United States* v. *Miller,* the Supreme Court held that the obvious purpose of the second amendment is to protect the viability of the organized State militia. Since *Miller,* the lower Federal courts unanimously have held that the second amendment protects the people's right to keep and bear arms only in connection with service in the organized militia, today's National Guard.

Now, as a mayor, I tried to do something about it through the law, found that the State had preempted the area of licensing, registration, and when we tried possession, the Supreme Court of the State of California said the State also controls the area of possession. This very committee—Senator DeConcini, Senator Metzenbaum—has legislation that aims to deal with assault weapons, and the chairman of this committee, very shortly, has consented to allow there to be a hearing, for which I am very grateful because several victims would like to testify.

And so I am somewhat puzzled, and let me ask this question: If the Federal courts, as I believe they have, have unanimously held that the second amendment protects the right of the people to keep and bear arms only in connection with service in the organized militia, today's National Guard, do you agree with this consensus judicial interpretation of the second amendment?

Judge GINSBURG. Senator Feinstein, I can say on the second amendment only what I said earlier. The Court has held that it is not incorporated in the 14th amendment; it does not apply to the States. What it means is a controversial question. The last time the

Supreme Court spoke to the issue was in 1939. You summarized that decision, and you also summarized the state of law in the lower courts. The matter may well be before the Court again. All I can do is to acknowledge what I understand to be the current case law, that the second amendment is not binding on the States. Given my current situation, it would be inappropriate for me to say anything more than that. I would have to consider, as I have said many times today, the specific case, the record, briefs, and arguments presented. It would be injudicious for me to say anything more than that with respect to the second amendment.

Senator FEINSTEIN. Thank you.

Mr. Chairman, my understanding is that a 15-minute rollcall vote has just been called.

The CHAIRMAN. Thank you. Yes, it has. I suggest maybe, Senator, you decide whether it is best to break now in your line of questioning or continue to the next line and then break when we receive the halfway—but it is up to you.

Senator FEINSTEIN. You are not going to recess so we are just going to keep going?

The CHAIRMAN. No. I will recess because there are few of us here now, and I will recess so we can all go and come back, because I am anxious to hear what you have to ask as well.

Senator FEINSTEIN. All right. Maybe it might be appropriate to go and vote and then come back, if that is agreeable with you.

The CHAIRMAN. All right. We will recess for the approximately 10 to 12 minutes it takes us to get over there and vote, and then we will come back, OK?

Senator FEINSTEIN. Thank you.

[A short recess was taken.]

The CHAIRMAN. The hearing will come to order.

As I said, Judge, we had two votes. They threatened we may have one more vote. Hopefully it will not occur before we finish the questioning tonight, but we will finish tonight on the first round.

The floor is yours, Senator Feinstein.

Senator FEINSTEIN. Thank you, Mr. Chairman.

Just to try to pursue that a little bit further, Judge Ginsburg, could you talk at all about the methodology you might apply, what factors you might look at in discussing second amendment cases should Congress, say, pass a ban on assault weapons?

Judge GINSBURG. I wish I could, Senator, but all I can tell you is that this is an amendment that has not been looked at by the Supreme Court since 1939. And apart from the specific context, I really can't expound on it. It is an area in which my court has had no business, and one with which I had no acquaintance as a law teacher. So I am not equipped to enlarge my response. If the Court takes a case involving the second amendment, I would proceed with the care that I give to any serious constitutional question.

Senator FEINSTEIN. Fair enough. Let's go on, then, to the next topic.

I was very interested in your discussion with Senator Brown, particularly—this is the issue of choice—because you began to touch on the *Casey* case, and then somehow got a little distracted.

If I understand what you are saying—correct me if I am wrong—you are saying that *Roe* could have been decided on equal protec-

tion grounds rather than the fundamental right to privacy. And I think you noted that *Struck* could have served as a bridge linking reproductive choice to the disadvantageous treatment of women on the basis of their sex. Is that fair so far?

Judge GINSBURG. Yes, Senator, except in one respect. I never made it an either/or choice. That has been said in some accounts of my lectures. It is incorrect. I have always said both, that the equal protection strand should join together with the autonomy of decisionmaking strand, so that it wasn't a matter of equal protection or personal autonomy, it was both.

Senator FEINSTEIN. I see.

Judge GINSBURG. I would have had added another underpinning, one I thought was at least as strong, indeed, stronger. But my argument was never equal protection rather than personal autonomy. It was both. I used the *Struck* case as an example, because it was the first time I fully expressed myself on this subject. I urged that it was a woman's choice either way—her choice to bear or not to bear a child. So the only amendment I would make in what you said is that it was never either/or; it was both.

Senator FEINSTEIN. So, in essence, there are two tests out there that could be used. One is equal protection, and the other is the right to privacy. Is that——

Judge GINSBURG. I would put it in terms of principles on which the decision could rest rather than tests to apply, but principles.

Senator FEINSTEIN. Right.

Judge GINSBURG. One of the underlying principles is the autonomy of the individual, the other is the equal dignity of the woman.

Senator FEINSTEIN. Right. Let's proceed on.

Then in 1992, in *Planned Parenthood* v. *Casey,* it was enunciated a new test, and as I understood it, the Court upheld various limitations on abortion because they did not unduly burden women seeking such services. And as I heard you earlier, statutes which limit fundamental rights get strict scrutiny by the Court. Statutes which classify on the basis of gender receive heightened or intermediate scrutiny.

My question is: Did the Court in *Casey* explicitly erode the protections previously afforded women under *Thornburgh* v. *American College of Obstetricians?*

Judge GINSBURG. I have two responses. One is, as I said before, that heightened scrutiny for sex classifications remains an open question. Justice O'Connor made that clear in the *Mississippi University for Women* (1982) case. Sex as a suspect classification remains open. It wasn't necessary for the Court to go that far in that case. The Court struck down the gender-based classification. So it is not settled that sex classifications will be subject to a lower degree of scrutiny than limitations on fundamental rights. It is just that the Court has left the question open, and it may some day say more.

If you are inquiring about the specific rulings in *Thornburgh* (1986) as against the rulings in *Casey* (1992), yes, I think there are respects in which *Casey* is in tension with *Thornburgh*. Restrictions rejected in *Thornburgh* were accepted in *Casey*. So I must say yes, the two decisions are in tension, and I expect that the tension is going to be resolved sooner or later. Similar issues are likely to

come before the Court again, so I can't say more than yes, the two decisions are in tension; that is where we are at the moment.

Senator FEINSTEIN. You said that they are in contention? Would you say that *Casey* is as reasoned as *Thornburgh*?

Judge GINSBURG. What I would say is that the two decisions are in tension, not in contention, because to some extent they overlap. These are decisions that are rather dense. I mean this—there are numerous opinions, and it is difficult to work through them all. The one thing I do sense is that this is a matter likely to come up again, so I believe it would be inappropriate for me to say anything more than what I have already acknowledged. There was no majority opinion in the *Casey* (1992) case. I think that is about what I can say.

Senator FEINSTEIN. Thank you very much. That was a help, and I thank you for that.

Let me turn to capital punishment, and let me speak as a Californian. I believe the people of California voted in 1978 overwhelmingly to reinstitute the death penalty. Since that time, there has been a very long delay before its carrying out.

It was recently carried out in one case, the case of Robert Alton Harris, which is a rather notorious case, and brings up the whole habeas corpus discussion.

I believe Harris had 6 Federal habeas petitions and 10 State habeas petitions. It is my understanding that the delay was due in large part because the ninth circuit took a while to decide.

Earlier in these discussions, you discussed the finality versus the fairness of habeas, and I think, if I understood you correctly, you said that you believed, yes, it was right to think that things had to be brought to a logical conclusion within finality.

If laws are going to work in this country, they have to have some finality to them. And the older I get, the more clearly I see that.

One of the biggest concerns that people have is that justice no longer seems just because it never happens, or it takes a long time for it to happen.

You also raised the fairness, which I guess is the competence of counsel issue. Would that be fair to assume?

Judge GINSBURG. That's a large part of it, yes.

Senator FEINSTEIN. With over 300 cases on death row, do you have concern that there is a lack of finality, because of Federal habeas review? Could you be more specific at all, when you speak of finality? It is interesting to me, because of the crime bill, major discussion on habeas, what is fair in terms of a wait. Is it 6 months? Is it 1 year? Is it 18 months?

The Attorney General testified before us earlier, she said as long as there was competency of counsel, she believed, too, that there had to be finality and, therefore—I am paraphrasing her, but I think I am accurate, and, Mr. Chairman, correct me if you think I am wrong—she said whether it is 6 months or 1 year or 18 months, really is not consequential, as long as there is competency of counsel.

The CHAIRMAN. That is correct, that is my recollection, as well, Senator.

Senator FEINSTEIN. Would you concur in that?

Judge GINSBURG. I do not know what her testimony was. I do know that Congress has before it Justice Powell's report, and that the first action to be taken with respect to this fairness/finality balance is going to come from Congress, based on Congress' study of that Powell Commission Report.

The CHAIRMAN. If the Senator will yield to me on that point——

Senator FEINSTEIN. Of course.

The CHAIRMAN [continuing]. The Judge is absolutely correct. As a matter of fact, I think we will be able to announce in the next day or so that, after literally 5 months—it is going to sound like an exaggeration—of close to around-the-clock negotiations with the Attorneys General and the District Attorneys Association, we have reached a compromise. So I hope with the support of the Senator from California, who has been deeply interested in this issue, we will be able, Judge, to pass a piece of legislation that gives some life to the thrust of the Powell Commission Report.

Senator FEINSTEIN. The reason I am asking this, as a nonlawyer, a former mayor who has a great deal of interest in the crime bill, as the chairman correctly stated, is because the issue of habeas is so very complicated, and any insight that you might have with respect to both fairness and finality, I would certainly appreciate hearing.

Judge GINSBURG. Senator Feinstein, I commented before that I realize this area is very complex. We don't have that kind of review in this district, because, unlike the State of California, the District of Columbia is not a State for this purpose. The District of Columbia has local courts created by Congress, and Congress has provided a postconviction remedy that is just like the Federal remedy, so if you are convicted in the District of Columbia courts, there is no habeas review in our court.

If I am confirmed, this is going to be altogether new business for me. I haven't had experience with habeas petitions and I haven't had experience with death cases, either. I know what the history is in California. Your State supreme court held that the death penalty was unconstitutional under the State constitution. That judgment, made in *People* v. *Anderson* (1972), was reversed by the people in a referendum, wasn't it?

Senator FEINSTEIN. That is correct, in 1978, I believe.

Judge GINSBURG. But the District doesn't have the kind of State-Federal review that you have proceeding from your State courts to the Federal district courts and the ninth circuit. I know something about what has gone on in the regional circuits. I have not had experience with these cases myself.

Senator FEINSTEIN. Thank you very much.

Moving right along to the third topic of the day, to another controversial issue, which is the issue of quotas in affirmative action. Again, let me go back to my mayor's experience. In 1979, there was a Federal case, concerning police officers consent decree, and I was mayor and did not support a consent decree which initially contained quotas, for the very reason that I have seen quotas used to discriminate against, as well as to prevent discrimination, and have never felt that it is a very good vehicle for bringing about affirmative action.

Instead, the consent decree that I did support and which became the law of the city was one that provided goals and timetables and a master to oversee the department as it moved along, and we made some very good progress, both with respect to people of color, first minorities, first gays in the San Francisco Police Department.

I know you have favored affirmative action, but you have generally taken a very restrained approach on the subject of quotas in local government hiring and contracting. I was wondering if you would care to comment on your decisions in that area and your judicial philosophy that brought about those decisions.

Judge GINSBURG. My circuit recently decided a set-aside case, the *O'Donnell* (1992) case. It was the same kind of case as *Croson* (1989). We followed the Supreme Court's precedent and said that the District of Columbia's plan was invalid.

Most plans I have had anything to do with are of the kind that you describe, not fixed, rigid quotas, but goals and timetables, which are really estimates of what the workforce would be, if there were fair employment practices. In so many of these cases, a whole range of items are implicated, including tests.

I remember some police cases involving tests, physical tests that women could not pass at the same rate as men, but that were not at all related to job performance. So some of the plans include new tests that are related to what the job requires, and do not include standards, unrelated to job performance, that men can meet more readily than women.

I remember one test particularly. The job involved was slide projectionist. As part of the physical test, the applicant had to carry a certain weight with arms raised above his head. That posture was much harder for women than for men, and women failed that portion of the test disproportionately. But the weight that had to be carried was something like 18 to 20 pounds, about the weight of a year-old child. Women have carried that weight from the beginning of time, but not with arms lifted over their heads. Once you eliminate that element of the test, the women begin instantly to pass at least at the same rate as men.

Many of these job classifications and tests were set up one way without thinking—with no thought of including women. Eliminating such tests is part of the kind of positive affirmative action that does not entail rigid quotas, but estimates of what one would expect the workforce to look like, if discrimination had not operated to close out certain groups.

Senator FEINSTEIN. Yes, that is certainly true. Of course, even though when the tests were revised for job related strength capacity, it was still difficult for some women, I must say that. There still was a rate where women could not pass it, but many women did and I think that really harkened the day where women could go into police departments and fire departments and have some degree of equal opportunity. We are not entirely there yet, but there has been a big change.

Judge GINSBURG. Yes.

Senator FEINSTEIN. Let me just change to the Japanese internment case, because this also is a major issue where I come from, and I very much appreciated your comment that the *Korematsu* case was wrongly decided. I would certainly agree with that.

With regard to the *Hohri* v. *United States* case, it is my understanding that you voted to permit victims of the internment to file claims for confiscation of their property during World War II. Because this might be useful in the future, could you elaborate on why *Korematsu* was wrongly decided, and why you believe so strongly that the plaintiffs in *Hohri* should be able to sue long after the internment policy was relegated really I supposed to the dust bin of history?

Judge GINSBURG. In *Hohri* (1987), our decision was not the final decision. The key question before us concerned the right court in which to bring that case. The Supreme Court, in a well-stated opinion by Justice Powell, held that the case belonged in the Federal circuit and not in the District of Columbia Circuit.

Justice Powell's decision, incidentally, said there was a tenable case to be made for either side. Congress had not been clear about whether the case belonged in our court or in the Federal circuit, the specialized Federal appeals court in this city.

The question on the merits in *Hohri* concerned when the statute of limitations began to run. The view my court took of that question was different from the view ultimately taken by the Federal circuit.

Korematsu (1944), as presented to the Supreme Court, involved a challenge to a race classification—people of Japanese ancestry—and a defense based on national security. We now know—it came out clearly in the fifties—that the pressing national security need urged before the U.S. Supreme Court didn't exist and never existed. An overwrought general wrote an affidavit that the Court relied on. J. Edgar Hoover, hardly someone who had no concern about national security, had said that there was no reason to have the kind of massive relocation program our country ordered during World War II. The FCC said that the alleged communications between the West Coast and Japanese ships at sea didn't exist, either.

The question was at what point in time the clock began to run. When did the people affected have a claim a court would hear. We said the clock began to run when it became clear that there was no national emergency justification for curfews and relocation.

Now, the end of the story is that Congress passed legislation providing compensation. Before that there was a congressional declaration recognizing that a wrong had been done. There were two dissents in *Korematsu* itself. I recall one, the dissenting opinion of Justice Murphy. Every judge, I believe, would like to think he or she would have joined Justice Murphy, had he or she been a member of the Court at that time. But no one can say for sure. History has certainly made it plain that there was nothing like the kind of emergency the Court was told of, nothing that required the kind of treatment to which people were subjected solely on the grounds of their race or ancestry.

Senator FEINSTEIN. Thank you very much. Judge Ginsburg, I just want you to know that, for me, it has been a very great pleasure and privilege to listen to this. You really are a remarkable person. I am also just very proud that you are a woman.

Judge GINSBURG. I appreciate your saying that so much.

Senator FEINSTEIN. Thank you.

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The CHAIRMAN. Thank you very much, Senator Feinstein.

Senator Moseley-Braun.

Senator MOSELEY-BRAUN. Thank you very much, Mr. Chairman.

The CHAIRMAN. Last, but not least.

Senator MOSELEY-BRAUN. You know, I think it kind of makes me the most popular person in this room, that I am now starting the last of the questioning for the evening. But it makes it a little difficult, obviously, when you are number 18 in a grueling session such as we have had, and I just want to thank and applaud the Judge for her patience and her deliberate manner. You have been just hanging in there, in spite of the fact that you have been talking all these hours and answering questions all these hours and mental gymnastics with the members of the committee.

I want to thank my senior Senator, who I know is only here because he has been so nice to me and he is looking out for me.

Senator SIMON. I am here because I want to hear Judge Ginsburg.

Senator MOSELEY-BRAUN. You want to hear Judge Ginsburg, not me. [Laughter.]

OK. You see, that is also why he is the senior Senator. Thank you, Senator Simon, for staying.

Judge Ginsburg, as you know, this month the worst deluge in memory has caused massive flooding along the Mississippi and Missouri Rivers and devastated much of the Midwest, including vast areas of my home State of Illinois. This has been a tragedy of epic proportions.

One of the most notable developments has been the failure, at several points along the various rivers that were affected, of levees that were denied to hold the waters back. The rupture of these levees has prompted a heated debate among scientists and engineers and environmentalists, farmers and thousands of ordinary citizens.

On one side are the people who say that the levees, which were artificially created to begin with, have distorted the Mississippi's natural drainage system, can never be built high enough to anticipate all of nature's fury, and may even make flooding worse by channeling the waters so that they become even faster and higher.

Supporters of the levees, on the other hand, claim that through the construction of the levees and other flood control systems, thousands of acres of land have been turned into productive farmland, housing and recreational areas.

In short, Judge Ginsburg, across a wide swath of the country, thousands of people and entire communities have made decisions, and invested their savings in some instances, for more than 100 years on where to locate their homes and their farms in reliance on this system of levees.

As I mention, though, this year's disaster and some new scientific evidence has prompted many to argue that pulling down the levees or actually not reconstructing them might actually improve flood control and, in terms of the environment, be better for the communities as a whole.

In fact, some have speculated that one day in the near future, the Army Corps of Engineers or some other arm of the executive branch may determine that the levees are counterproductive to re-

gional flood control efforts and damaging to the environment, and decide to tear the system down, or not to rebuild it.

While conceivably beneficial to the region as a whole, such a decision would clearly impact the use that thousands of individual landowners could make of their property. Clearly, in this situation—and the reason I ask this question, Judge, is because you have done so much in the area of administrative law and administrative decisionmaking, and I want to get to how you perceive and approach these issues, when a citizen's interest and rights are up against an arrayed power of the bureaucracy.

Clearly, as in a situation such as the levee situation—and it is all speculative, because this is just a debate that is going on—what an administrative agency decides to do or not to do, as the case may be, will matter greatly to the expectations that have been built up over time.

So I have two questions. The first is, in a situation like this, if the property owners challenge the government action as a taking of their property, what principles should the Supreme Court look to in evaluating that claim?

Judge GINSBURG. Senator, the question has some kinship to the one that Senator Pressler raised about the wetlands. It is an evolving area of the law. There is a clear recognition that at some point a regulation can become a taking. When that point is reached is something to be settled in the future.

We do know that, as the Court held in the *Lucas* (1992) case, when the value of the property is totally destroyed as a result of the regulation, a taking has indeed occurred and there must be compensation for it. Reliance is certainly one of the factors that must be weighed.

This is a still evolving area and I can't say any more about it than what is reflected in the most recent precedents, in the *Nollan* (1987) case and in the *Lucas* case. But there is sensitivity to the concerns. On the one hand, the regulations are made for the benefit of the community; and on the other hand, there is the expectation, the reliance interest of the private person. Those two considerations will have to be balanced in future cases. I can't say anything more at this point.

Senator MOSELEY-BRAUN. Well, let's approach it, and I don't know if this is an approach that will be productive. But looking at the whole issue of deference to agency decisionmaking, if the property owners challenge the Army Corps of Engineers on substantive grounds, what principles do you think should govern how much deference should be given the agency's determination and decisionmaking?

Judge GINSBURG. It depends on what the agency is doing. If the agency is construing a law in which Congress has, in effect, delegated to the agency a gap-filling function, that is one thing. If the agency is simply applying a general principle, that is something else. You know we do have a guiding decision called *Chevron* (1984). That opinion instructs that, when the meaning of a law is uncertain, courts ordinarily should defer—that doesn't mean abdicate—deference means treat with due respect the agency's interpretation of it.

Now, that is a rule of construction, of determining what Congress wanted. Congress can say it doesn't want us to defer to the agency. There was a time when the Bumpers amendment had quite a following. That measure would have told courts not to defer. The Supreme Court's current doctrine in this area calls for deference to agency rulemakings. Congress knows that, and Congress is at liberty to change the orders under which courts are now operating. That is, if there is an ambiguity in the direction Congress has given, and the agency reaches a decision that is permissible, a permissible construction of congressional intent, then courts are supposed to respect that decision. But Congress can always tell us to take a different approach to statutory construction.

Senator MOSELEY-BRAUN. In a dissent in which you joined in the case of *San Luis Obispo Mothers for Peace* v. *the United States Nuclear Regulatory Commission,* you joined in a dissenting opinion against a decision that upheld the issuance of a license for the construction of a nuclear power plant on an earthquake fault, despite the lack of a hearing on safety implications.

That dissent, which was actually written by someone else, stated that:

> It defies common sense to exclude evidence about the complicating effects on earthquakes at a plant located three miles from an active fault. The majority's preoccupation with probability calculations does not justify the Commission's stubborn refusal to do the obvious.

So in that case, the decision flew in the face of doing the obvious, of common sense, and I suppose the question becomes, as we look at the whole issue of, again, due deference: Do you believe that injured parties, that people, should be afforded access to review by the courts, and particularly the Supreme Court, in cases like this in spite of the expert judgment of a bureaucrat regarding agency action?

Judge GINSBURG. I said that deference does not mean abdication. A decision I wrote bears some resemblance to the fault case. It involved placing nuclear material in salt domes. Yes, I think it is important that there be review, judicial review, of bureaucratic actions. Bureaucrats don't have to stand for election as you do. Courts are needed to check against bureaucratic arrogance. That is an important role that courts have.

On the other hand, agencies do feel beholden to the legislature. That is where they get their money from, and so they are accountable to you as well.

Senator MOSELEY-BRAUN. I think that is a fine answer, Judge, and that is very important because so many agency decisions impact on people's lives, sometimes even more than what we do here in the legislative branch. And it is just important—you mentioned the system of checks and balances. It is so very important to have a court willing to look out for the interests, the concerns of ordinary people in their everyday lives, again, in these situations where the bureaucracy just kind of rolls on and spins along sometimes without regard to the individual interests.

I would like to change the subject a little bit because I have several areas in which I would like to ask you questions or explore, and I don't know how much of this is new territory. I have listened to all the testimony, and I know you feel that you have probably

answered some of these questions before. But to bring my own perspective to some of these issues that we are all concerned about in terms of how you approach judging, how you approach being a member of the U.S. Supreme Court.

I want to change the subject to talk about voting rights for a minute. I was very touched yesterday in your testimony when you mentioned as a child seeing signs in front of a Pennsylvania resort that said "No dogs or Jews allowed." For a moment I would like to share with you my own recollection of what you have, I think, aptly described as American apartheid, which is what we went through.

In the summer, when I was little, we used to get sent south every summer to spend the summers on the farm, and we would travel by train. And at that time the South was still openly segregated on the basis of race. In fact, just going over some of these cases, I am reminded of how very recent striking down of some of those barriers has been.

But, anyway, we were small, and I was about eight or nine; my little brother was about six or seven. And we stopped at a train station one day, and it was a hot summer day, and we had been traveling for hours with my mother. We were tired and thirsty, and we got into the train station, got off the train, walked to the train station, and there were two different water fountains. One was labeled "Whites Only" and the other was labeled "Colored." And my mother told us very firmly that she didn't want her children drinking out of a colored water fountain.

We both pleaded with her. We were thirsty. We wanted some water. And she wouldn't let us have any water. She said we will just wait until we get to the house.

Well, my little brother laid out in the middle of the train station and had a temper tantrum because he wanted some colored water. He expected it was going to be green or blue or yellow or a rainbow of colors. [Laughter.]

And he was determined he was going to see and have some colored water that afternoon.

We have obviously come a long way in this country since that trip, Judge, and I can share that story with you now. And it is humorous and it is funny. It kind of points to the absurdity of how Jim Crow and how that apartheid operated.

But there are other aspects, those aspects of the history of this country that are not so humorous even with the passage of time. I want to call your attention to the troubled history of voting rights specifically in the State of North Carolina.

In 1900, an amendment to the North Carolina Constitution barred blacks from voting unless they could prove, among other things, that they were descended from a Confederate soldier. The result of that, of course, was that very few blacks in North Carolina in 1900 were able to vote.

Tactics such as these were openly utilized up to and through the enactment of the Voting Rights Act in 1965. Although African Americans comprised 22 percent of North Carolina's population, until 1992 no African American had represented the State in Congress since Reconstruction.

As you know, in the recent case of *Shaw* v. *Reno*, which we have had some discussion about, the Supreme Court chose to ignore that troubled history. In *Shaw*, the Supreme Court held that North Carolina's 12th Congressional District—a district, I might add, that was drawn in compliance with guidelines from the previous administration's Department of Justice, the Bush administration's Department of Justice—that that district violated the equal protection rights of the State's white voters.

The ruling was issued in spite of the fact that the Court was unable to conclude that any white voter had been actually injured, had suffered any injury by virtue of the drawing of this district.

I would like to ask you about the Court's decision in *Shaw*. It would probably be inappropriate to ask you if you would overrule that decision or how you would decide in any voting rights case that might come before the Court. What I would like to know is whether or not you think the majority's decision in *Shaw* ignores the very real, the very tragic, and very painful history of voting rights violations, not just in North Carolina but throughout this country?

Judge GINSBURG. That is an unfinished case. The Court remanded it, and it may well come back again. So I can't address that case specifically, but I know what you have in mind. I know about the literacy tests that were given to blacks, tests that were different from the tests given to whites. There was an extremely complicated passage given to a black would-be registrant to vote. When the would-be voter looked at the passage he was asked to interpret, he said, "It means black people can't vote in this State." So I appreciate your concern, and I know how recent the change is.

I remember going with my husband to an Army camp when he was in the military service. We passed a sign that said—I thought it said, "Jack White's Cafe." But it didn't. It said, "Jack's White Cafe". I had never seen such a sign. I was fully adult, indeed pregnant at the time, so it was not so long ago that such things existed in the United States. I am sensitive to that history. When I spoke about *Brown* v. *Board of Education,* earlier today, I mentioned specifically the deprivation of the very basic right to cast one's ballot that existed for so long in the United States for black people.

Senator MOSELEY-BRAUN. Judge, I would suggest—I have a map, actually—where are the maps? The Court in the *Reno* case held that the 12th Congressional District of North Carolina was so bizarrely shaped as to invite an equal protection challenge. Here it is right here. There is no question but that is not exactly a work of art. There is no question but that the district lines were drawn in a way—do you have a copy?

Judge GINSBURG. Yes. This is what the Court described as a snake district.

Senator MOSELEY-BRAUN. Right. But as we talk about the history, this district was drawn this way in order to achieve the objectives of the Voting Rights Act, which in and of itself was written to overcome the history that you have so eloquently talked about.

But in any event, we face a situation in which the history has made it very clear that districts have been bizarrely drawn since—well, I started to say time immemorial, but indeed the very word

"gerrymander" comes from the drawing of a salamander-shaped district by a politician named Gerry almost 100 years ago.

And so I would suggest, just to point out, Judge, I have a couple of districts here that are also bizarrely drawn. This is the 3d district in Massachusetts, and this is the—got to turn it the other way. It is upside down. That way, yes. This is the 5th district of New York. And I think anybody would concur that these are similarly bizarrely drawn districts as well, which were drawn in the old-fashioned way; that is to say, with regard to political boundaries and incumbent party interests and because of the power equation in the community.

But in this instance, we see the Supreme Court has now decided to, in the *Shaw* v. *Reno* case, throw out the history. The Court's decision in the area of voting rights has changed the law altogether. And there has been a lot of discussion today about concern about judge-made law, but, quite frankly, Judge, I guess my question would be: Would you not concur that where we have precedent thrown out in order to invalidate a district drawn consistent with the Voting Rights Act based on the bizarrely shaped rule, which is a new rule as far as I can determine, that ignores the history of why the Voting Rights Act was there to begin with, and in light of the fact that no injury was shown, and in light of the fact that there are other districts throughout the country that are bizarrely drawn, would you not agree that we have in this instance judicial activism of a very real sort?

Judge GINSBURG. Senator, I can't comment on the *Shaw* (1993) case because, as I said, it is unfinished and it may be back in the Court again. And I would have to see the record, briefs, and arguments made in that very case. I can't prejudge what is going to be the next round in it. I am obliged to give the same answer I have given when that kind of question has been asked before about a case that is still alive, one that can be back before the Court.

Senator MOSELEY-BRAUN. All right. Then let me put the question to you otherwise. Yesterday, when Senator Metzenbaum had asked you about the views of Justices Scalia and Thomas in the *Lemon* v. *Kurtzman* test, which is used to judge challenges under the establishment clause of the first amendment, in response to that question you urged caution on the part of judges who wish to tear down established law, stating that, and I quote,

> It is very easy to tear down, to deconstruct. It is not so easy to construct. I as a general matter would never tear down unless I am sure that I have a better building to replace what is being torn down.

Judge Ginsburg, what the majority opinion—and, again, looking at the voting rights cases, we have now seen a deconstruction of a system of legislative redistricting and voting rights enforcement in the United States. That system, while it was not perfect, was an effective system that has been arrived at through the efforts of various Congresses and administrations and even the courts. But in one fell swoop, the Justices struck down this system without providing any guidance on how to reconstruct voting rights enforcement, other than to say you don't go with bizarrely shaped districts.

States that relied on the voting rights precedent in drawing legislative districts now find themselves subject to court challenges;

and, further, the courts have no guidelines with which to just these challenges.

And so I would like to ask you how much consideration do you think that a judge should give—now, this is going to be a real softball, Judge. This is not a—how much consideration do you think that judges should give to difficulties that will arrive from deconstructing an established constitutional test or enforcement mechanism in areas such as voting rights?

Judge GINSBURG. I can't speak to this specific case because I am not familiar with the record. The Department of Justice is going to have to study this case and prepare whatever its position is going to be for future cases. But I can repeat what I said before, that a judge should not tear down without having a better building to replace what is in place, and that is a general rule to which most judges would subscribe. I can't say that is true of most law professors, but it certainly is true of most judges.

I wish I could speak at a more specific level, but I really can't without having before me the precise record on which I could make an informed judgment.

Senator MOSELEY-BRAUN. I understand, and that is one of the reasons why this particular area is difficult to talk about, because of the uncertainties surrounding that entire area in voting rights enforcement in light of the *Shaw* decision.

But to take it another step and another aspect of voting rights that I would like to pursue with you, another recent voting rights case was *Presley* v. *Etowah,* and I would like to talk with you about that case a minute. I would like to first offer a brief summary of the case. The Etowah County Commission had five members, and each of the members' chief function in this rural Alabama county was the allocation of highway construction and repair funds. Each commissioner had complete control over how the funds were used in his district—and I said "his" district and not "his or her" district deliberately.

The commission had been structured to ensure that no minorities would be elected. After being sued under the Voting Rights Act, the commission was expanded to six members, six commissioners. Two commissioners were elected under the new changes, including Mr. Presley, the county's first African American commissioner in the modern era. Soon after that election, the four original commissioners passed a resolution which abolished the practice of allocating road funds to individual districts.

Under the changes, the two new commissioners had no power at all to ensure that any road funds, even minimal funds, were earmarked for their districts.

Now, one does not have to be a legal scholar to understand what happened in this case. In direct response to an African American being elected to the commission, the commission changed the rules in the middle of the game to ensure that the newly elected black official had no real power.

Yet when Mr. Presley sued the commission under section 5 of the Voting Rights Act, the Supreme Court held that the acts of the commissioners in stripping him of all real power were not changes with respect to voting. The only explanation the Court gave for its decision there was that "the line must be drawn somewhere."

Many people familiar with *Presley,* including the Bush administration's Justice Department, wondered what was the point of being able to vote for a county road commissioner if as soon as you got that opportunity the commissioner was stripped of any authority over what happens to the roads in your district.

I have two questions. The first is: Would you agree that in interpreting the Voting Rights Act, the Court in *Presley* was overly concerned or more concerned with the language of the statute as opposed to its purpose? And, second, when the narrow interpretation of the language of a statute would hinder the statute's ability to achieve its purpose: Is it proper for a court to look beyond the language in order to offer a remedy to citizens who have a valid grievance?

Judge GINSBURG. That is a decision constructing a statute. If the Court got it wrong, Congress can amend the Voting Rights Act and say that the Court got it wrong. I suppose the view was that the stripping of one commissioner was not peculiar to that commissioner; every commissioner was similarly stripped. That leaves the authority in the hands of the body as a whole, and the body has only one minority member, as I understand it.

But the argument was that the Voting Rights Act does not extend so far as to require court approval of how functions are allocated within a governing body. That is the Court's construction of what Congress ordered. The cure can be provided by Congress if Congress thinks the Court got it wrong. And that is about all I can say with respect to that case.

Senator MOSELEY-BRAUN. Judge, in this case, Justice Stevens described this case as one in which a few pages of history are more illuminating than volumes of logic and hours of speculation about hypothetical problems. I suppose my question to you is: Other than just waiting—I mean, other than saying, well, the Court may have gotten it wrong here, which is what you have just said, do you see any role in other decisions in suggesting to the Court that the history of these cases is as important in interpreting the specific language?

Judge GINSBURG. I think the advocates made that point to the Court. I can't opine on that particular case because it wasn't before me. If it had been before me, I would have been familiar with the record, familiar with the arguments. All I know about it at this point is the summary in U.S. Law Week. So I wish I could engage in more of a conversation with you about it, but from the limited information I have, it would not be judicious of me to speak further.

Senator MOSELEY-BRAUN. Well, Judge, it appears that the light is on. My chairman has left, but I am left with my loyal and faithful senior Senator from Illinois. I want to thank you. I have other questions that I suppose—I guess the way this works it will hold for the second round of questions. But I do thank you for your responses, and I look forward to pursuing some of these other areas with you.

Mr. Chairman, thank you.

Senator SIMON [presiding]. And we thank you, Judge, for a lengthy day. You have served your cause well today. Let me also thank your family members and that crew in back of you there who

have had to go through all of this and have done it smiling, even. They may not have felt like it, but that is what they are doing there.

The committee will convene tomorrow at 9:45 a.m. for an executive business meeting. When we say "executive," it does not mean it is in closed session here. And then we will proceed immediately to reconvene this hearing at 10 a.m. Our hearing stands adjourned.

Judge GINSBURG. Thank you.

[Whereupon, at 7:56 p.m., the committee was adjourned, to reconvene at 10 a.m., Thursday, July 22, 1993.]