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.