professor, Walter Wheeler Cook, "has all the tenacity of original sin and must constantly be guarded against." So that is what I was guarding against by not answering the question, was the Korean conflict a war. I must ask in what context are you asking that question, are you asking me to decide whether the Executive, in that affair, violated the Constitution, which gives Congress the power to declare war?

Senator SPECTER. I thank you for your answers, Judge Ginsburg. I will return to the issue of war on the next round, because I don't think there is any context in which it wasn't a war.

I would conclude by saying, and I would ask for your reconsideration of this, that although you should not answer questions about cases which are likely to come before your Court, *Marbury* v. *Madison* could, and, just as that is rockbed, I would hope that we would have assurances from nominees that rockbed issues, like the jurisdiction of the Court to carry out *Marbury* v. *Madison* on constitutional issues, like the first amendment and like the equal protection clause, are inviolate. Those are rockbed issues which are not going to change, no matter who brings them to the Court, and we are willing to stand up and say so.

Judge GINSBURG. In a case of a judiciary nature, I am prepared to do what a judge does.

Senator SPECTER. Thank you.

The CHAIRMAN. Senator Metzenbaum.

Senator METZENBAUM. Judge Ginsburg, during my first round of questions Wednesday, we had a discussion of antitrust. Now, antitrust is sort of a phrase in the law that you are very familiar with, and a lot of Americans don't pay too much attention to it. But in this Senator's opinion, it really has—it is the bedrock of the whole free enterprise system.

The question really having to do with antitrust is whether conglomerates of business or economic power can be used to adversely affect the consumer in his or her right to buy or sell at a fair price.

I would like to follow up on the discussion that we had yesterday. As you may recall, I am concerned about the fact that the Supreme Court appears to be of two minds about certain antitrust cases. Its most recent decision on the subject seemed to favor a pro-big business approach to antitrust law based on economic theory instead of the facts. And that disturbs me much.

My question to you is: How would you view an antitrust case where the facts indicated that there had been anticompetitive conduct but the defendant attempted to justify it based on an economic theory such as business efficiency?

Judge GINSBURG. I am not going to be any more satisfying to you, I am afraid, than I was to Senator Specter. I can answer antitrust questions as they emerge in a case. I said to you yesterday that I believe the only case in which I addressed an antitrust question fully on the merits was the Detroit newspaper case. In my disserting opinion in that case, I attempted faithfully to interpret the Newspaper Preservation Act. I sought to determine what Congress meant in allowing that exemption from the antitrust laws.

Senator METZENBAUM. Indeed you did.

Judge GINSBURG. Antitrust, I will confess, is not my strong suit. I have had, as you pointed out, some half a dozen—not many

more—cases on this court. I think I understand the consumer protective purpose, the entrepreneur, independent decisionmaking protective thrust of those laws, but I can't give you an answer to your abstract question any more than I could—I can't be any more satisfying on the question you are asking me than I was to Senator Specter on the question that he was asking.

If you talk about a particular case—my opinion in the Detroit newspapers case was a dissent. There was a division in the court on how to interpret the statute, the Newspaper Preservation Act. That case indicates my approach to determining what Congress meant.

Senator METZENBAUM. Well, let me ask you this: Do you think that anticompetitive conduct can ever be justified on the basis that you have to have it in order to achieve business efficiency? I am really not asking you how you would vote on a case. I am just sort of asking you generally.

Judge GINSBURG. As you know, there is a key decision by Justice Brandeis, *Chicago Board of Trade*, which teaches that restraints of trade which are not per se illegal can be justified if their effects are more procompetitive than anticompetitive. And that is the analysis one would have to undertake.

You asked me if the only purpose of the antitrust law is efficiency. The cases indicate that the antitrust laws are focused on the interests of the consumer. There is also an interest in preserving the independence of entrepreneurs. I don't think the antitrust laws call into play only one particular economic theory. The Supreme Court made that clear in the *Kodak* (1992) case. But out of the context of a specific case, I can't say much more. No, I don't think efficiency is the sole drive.

Senator METZENBAUM. In a totally different area, I recognize the majority of Americans, and a majority in Congress for that matter, support the death penalty as a means of dealing with violent crime. I have long opposed the death penalty because of my concern that our criminal justice system too often makes a mistake and sentences an innocent person to death.

I am frank to say that there are certain crimes with which I am familiar, which we all read about in the paper, we see on nightly TV, in which I would almost want to go out and shoot the criminal myself with a gun because they are so heinous. But so often, too often, mistakes are made.

Four months ago, this committee held a hearing on innocence and the death penalty, and we heard firsthand about two of the tragic mistakes the criminal system made. We heard from Walter McMillian, an African-American from Alabama, who was convicted of murdering a convenience-store clerk after a trial lasting all of a day-and-a-half. The jury recommended life imprisonment, but the State judge, who was an elected official, perhaps recognized the political aspects of the matter, overruled the jury and ordered the execution of McMillian. After 5 years on death row, Mr. McMillian was freed because he did not commit the murder.

We also heard from Randall Dale Adams, a white man who in 1979 came within a week—within a week—of being executed for the murder of a Dallas, TX, policeman. Ten years later, he was able to show his innocence and was released.

Another example occurred after our hearing. Just last month, a white man from Maryland, Kirk Bloodsworth, was set free after 9 years in prison when it was conclusively proven that he did not commit the heinous rape and murder of a young girl. He had been sentenced to die.

Our committee held a hearing to understand the problems with the Supreme Court's decision in the case of *Herrera* v. *Collins.* In that case, Mr. Herrera was sentenced to die and later obtained evidence that allegedly proved his innocence. A Reagan-appointed Federal judge, a district judge in Texas, wanted to conduct a timely hearing to review Herrera's new evidence of innocence. He was prepared to go forward with the hearing within 2 or 3 days. The State of Texas objected to the district court's decision to hold a hearing, and the case was sent to the Supreme Court for review.

The Supreme Court ruled that the Constitution does not require that a hearing be granted to a death row inmate who has newly discovered evidence which, if proven, could establish his innocence.

In the opinion for the Court, Chief Justice Rehnquist was unable to declare clearly and unequivocally that the Constitution forbids the execution of innocent people.

The attorney who represented the State of Texas went even further than the Chief Justice. She bluntly asserted that if a death row inmate receives a fair trial, it does not violate the Constitution to execute that inmate even if everyone agrees that he is innocent.

Now, frankly, that is a shocking statement that came from the prosecutor in that case. I am extremely concerned with the Court's opinion in *Herrera* and the argument made by the Texas prosecutor. Even though the Rehnquist opinion did not clearly hold that it was unconstitutional to execute an innocent person, it is possible to read that into his statements.

Do you believe the *Herrera* case stands for the principle that it is unconstitutional to execute an innocent person?

Judge GINSBURG. As I understand it—and the case is not fresh in my mind—what the Court said was that the evidence in that case was insufficient to show innocence. It did not exclude a different ruling in a case with a stronger record.

We heard yesterday from Senator Feinstein who expressed her anxiety about the number of cases that go on for years and years. The colloquy occurring here shows the tremendous tensions and difficulties in this area. Her concern was that there must be a time when the curtain is drawn, and your anxiety is that no innocent person should ever be put to death.

Those tensions are before you, some of them are presented in the Powell Commission report that you will address. My understanding of *Herrera* (1993) is that it is concerned with the situation of a prisoner asserting, say 10 years after a conviction and multiple appeals, "I didn't do it," and then the process would start all over again.

I can empathize tremendously with the concerns——

Senator METZENBAUM. No, I don't think anybody would argue that. I don't think anybody would argue that, Judge Ginsburg, that 10 years later he can "I didn't do it," because he has been saying for 10 years he didn't do it.

Judge GINSBURG. What the Court said—this is to the best of my recollection—is that the evidence was too slim in *Herrera* to make out that claim, and it left the door open to a case where there was stronger evidence of innocence. That case is yet to come before the Court. So my understanding of this case is that, based on its particular record, the Court found the evidence too thin to show innocence, but the Court left open the question whether one could maintain such a plea on a stronger showing than the one made in that case.

That is as far as the *Herrera* case went. The decision left open a case where a stronger showing could be made.

Senator METZENBAUM. Now, State courts, of course, should review any new claim of a death row inmate that he is innocent. But that review can be in an atmosphere of strong public pressure for execution, especially when the conviction is for a particularly heinous or vicious crime.

Public pressure in these circumstances is most worrisome when the State trial and appellate judges are elected. Historically, the Federal courts have played a significant role in reviewing State death penalty verdicts. Federal judges have lifetime appointments and are more immune to the strong public sentiments that surround death penalty cases for heinous and violent crimes.

Now, the *Herrera* case raised significant new questions about the availability of the Federal courts to hear the claim of a death row inmate that he has new evidence of his innocence. Would you care to explain your view on the general role Federal courts should play in hearing the claims of death row inmates who have newly discovered evidence of their innocence?

Judge GINSBURG. Senator Metzenbaum, the question of habeas review and its limits is before the Senate, before this committee, I believe——

Senator METZENBAUM. But not before the Court. Not before the Court, so I think it is entirely proper for you to respond.

Judge GINSBURG. I can tell you of the legislation Congress passed for the District in which I operate; that is, we generally do not have habeas review. You have given to the District of Columbia courts a fine postconviction remedy. It is identical to the Federal remedy. The Supreme Court said, some time in the middle 1970's, that one goes from the District of Columbia courts to the Supreme Court. If the Supreme Court turns down a review request, there is no collateral review in the Federal Courts.

Some States must wonder why Congress so values the District of Columbia courts and doesn't similarly value the State courts. But I am now simply stating that in my court we don't have the brand of habeas review that the regional circuits have because Congress has said we don't. One of the reasons is that the President appoints District of Columbia court judges. Although they are not life-tenured judges, they are not elected or appointed by the city government. They are Presidential appointees commissioned to serve as judges for the District of Columbia.

What happens next in Federal habeas review, what controls there should be in setting the difficult balance between fairness to the defendant and finality in the system, is going to be your call,

not the Court's call. The next step will be the legislative response to the Powell Commission report.

Senator METZENBAUM. But having said that it is our call, my question to you is: What role do you believe the Federal courts should play in hearing the claims of death row inmates who have newly discovered evidence of their innocence, absent any action by the Congress?

Judge GINSBURG. All one can say is that the evidence would have to be stronger than it was in the *Herrera* case, because that is the binding precedent at the moment. I can't give you an advisory opinion on a case that is not before me with a particular record, a particular showing of innocence of the defendant in question.

Senator METZENBAUM. I am not asking for an opinion in a case. I am asking whether you feel that the Federal courts do have a role to play in habeas proceedings where there is newly discovered evidence that the guilty man, the man already found guilty, is innocent?

Judge GINSBURG. I think the Supreme Court has indicated that they do, but not without a sufficient showing, a factual showing, of innocence.

Senator METZENBAUM. I would agree you would have to have sufficient evidence and factual showing of innocence, and I would accept that answer.

The holding in a recent District of Columbia Circuit Court, *U.S.* v. *Thomas Jones,* is very disturbing to me. The appeal to your court involved the sentencing guidelines and whether a trial judge could give a longer sentence to a defendant who admitted responsibility for a crime after trial than could be given to the same defendant if he had pled guilty and admitted responsibility for the crime before going to trial.

On its face, it is shocking to consider that a trial court on its own initiative could penalize an individual for exercising his constitutional right to go to trial. The majority opinion, which you joined, held that it was permissible for the trial judge to give a longer sentence after the trial. Frankly, I have difficulty in comprehending that.

The four dissenting judges in the case stated that the majority opinion improperly allowed for increased punishment of a defendant for exercising his constitutional right to go to trial.

Now, I realize that the *Thomas Jones* case involved complicated sentencing guidelines. Therefore, I won't ask you to go into the specifics of the case. But what I do ask is whether you believe that it is improper for a trial court on its own initiative to impose a harsher sentence on a defendant just because that defendant chose to exercise his or her constitutional right to go to trial rather than to plead guilty.

Judge GINSBURG. That was not the nature of the trial judge's decision in——

Senator METZENBAUM. No, I am not asking about that case.

Judge GINSBURG. The answer to the question, can you penalize someone for exercising a constitutional right, should be evident. One cannot be punished for exercising a constitutional right. That is not what happened in that case. The question was the degree of clemency, the degree of leniency, the court was going to give.

The judge did something extraordinary in that case. He applied the guidelines markedly in the defendant's favor. He gave the defendant credit for acceptance of responsibility, which immediately knocked the range down under the guidelines from a range of 151 months to 171 months, to one of 121 months to 151. He gave the defendant 6 additional months—to make the sentence 127 months instead of the very lowest that it could have been, 121 months—because the defendant accepted responsibility late. The trial judge thus took into account the point in the process at which the defendant accepted responsibility. And that is all that case was about. That was all the majority held. The court held that within the context of giving a defendant credit for accepting responsibility for the crime he committed, the district judge could take into account that the man had accepted responsibility late—not on day one, but only after a jury had found him guilty of the crime as charged.

That is what that case involved. It is easy to mischaracterize what the court ruled, but I believe my description is accurate.

Senator METZENBAUM. I am not trying to go into that case. I am asking the more broad general question of whether or not it is improper for a trial court—forget about that case—to impose a harsher sentence on a defendant who chooses to exercise his or her constitutional right to a trial rather than plead guilty?

Judge GINSBURG. If you are asking the question, Can you penalize someone, punish someone for exercising a constitutional right? We have constitutional rights and one can't be punished for exercising a constitutional right. Otherwise, the right is not real.

Senator METZENBAUM. But you haven't answered.

Judge GINSBURG. You can't punish someone for exercising a constitutional right. If you punish someone for exercising a constitutional right, that person has no right.

Senator METZENBAUM. OK. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. We will now, with your permission, Judge, break for lunch until 2:15, if that is OK.

[Whereupon, at 1:13 p.m., the committee recessed, to reconvene at 2:15 p.m., this same day.]

AFTERNOON SESSION

The CHAIRMAN. The committee will be in order.

Judge, welcome back. We are starting a few minutes later, because there has been a very controversial vote on the floor of the Senate, causing some Members to continue to engage in the debate, and that is why some Members are not here. Thank you. I hope you had a chance at least to get some lunch.

I now yield to our distinguished colleague from the great State of Iowa, which I do know well and have great love and respect for.

Senator Grassley.

Senator GRASSLEY. You notice how I only had to remind him once about Iowa.

Senator BROWN. I think he was referring to the State, not the Senator.

The CHAIRMAN. That is correct. I do like the Senator from Iowa.

Senator GRASSLEY. I was referring to the State, as well.

In your 1986 article, "Interpretations of Equal Protection Clause," in the Harvard Journal of Law and Public Policy, you wrote that the greatest figures of the Federal judiciary "have not been born once or reborn later liberals or conservatives," and then you went on to say:

> They have been independent thinking individuals with open, but not drafty minds, individuals willing to listen, and throughout their day to learn. They have been notably skeptical of all party lines. Above all, they have exhibited their readiness to reexamine their own premises, liberal or conservative, as thoroughly as those others.

Now, this may sound like a softball question, but I would like to ask you, from the standpoint of your years experience of judging—and the reason I ask is just to see how you have evolved as a judge—can you tell us whether any of your views have evolved or changed over time? I don't want a lot of examples, maybe one example would be enough. Is there something on which you have changed a particular view of yours. How did it come about and what was the view that changed, and why did it change.

Judge GINSBURG. Senator Grassley, I am glad you quoted that, because it is my creed. When I made my opening remarks, I quoted from Judge Learned Hand's "The Spirit of Liberty." He said "it is the spirit that is not too sure that it is right." When I was asked to enumerate the Justices I admire most, I left out some jurists one might think should be on that list; I did so because they were sometimes too sure they were right.

An example that comes immediately to mind is in the field of civil procedure. Civil procedure is a subject I taught for several years. When I graduated from law school and was clerking for a Federal district judge, I was absolutely sure of the answer to this question: Does a Federal district court have authority to transfer a case, although the transferee court lacked both subject matter and personal jurisdiction?

I had several conversations with the judge for whom I worked. It was, in the end, his decision, but the decision he made coincided with my own view—that the court was powerless to do anything but dismiss the case. The second circuit affirmed the dismissal. Then the Supreme Court reviewed the decision and held that the lower courts got it wrong. We have one Federal court system. A court without subject matter and personal jurisdiction could indeed transfer the case to another Federal court that had authority to hear it. That was the Supreme Court's decision.

I have come to recognize over the years that my thinking was too rigid, that the Supreme Court was indeed right in its view of the flexibility of the Federal court system. So that is an example that comes immediately to mind. I suppose it does, because procedure is the subject I taught for 17 years.

Senator GRASSLEY. Thank you.

I was supposed to inform Senator Biden whether or not I wanted 15 or 30 minutes, and I want to claim 30 minutes for my round.

I want to go on to something that you discussed briefly with Senator Simpson, and that was the issue of recusals. There was some confusion about the number of cases in which you were automatically recused by the clerk of the court of appeals. Senator Simpson thought it was 251, and Senator Biden's staff advised Senator