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-