Senator COHEN. It is called a prosecutorial look, not professorial.

The CHAIRMAN. No, the prosecutorial one doesn't bother me. The professorial one does bother me.

There may be two votes at 4:15, beginning at 4:15, and so I will recess until 25 after, unless there is an ongoing vote, in which case we will not reconvene until the vote has been concluded.

[A short recess was taken.]

Senator DECONCINI [presiding]. The committee will be in order.

With the concurrence of the chairman, Judge Ginsburg, we will go ahead and proceed. I know the day is getting long and I am sure you could find something else to do.

Judge I have paid some attention to your remarks, although I have not been here, and I appreciate your openness and candidness with the committee. I know you have gone over this subject matter. I just want to touch on it a little bit more, because it is troubling to me.

I want to go back over the issue you discussed with Senator Cohen yesterday. He asked you about the use of legislative history and statutory construction. Over the last few Supreme Court terms, almost 50 percent of the Supreme Court cases have involved issues of statutory interpretation and, thus, it has become more important to know a nominee's approach, and you have expressed that quite clearly.

During yesterday's hearing you told Senator Cohen that you do look at the legislative history, when the text is not clear. I was also encouraged to hear you tell Senator Kohl that you do not feel safe on "the same island of legislative intent" as Justice Scalia. Now, Justice Scalia is a proponent of so-called textualism. He attempts to limit the statutory interpretation to the text and ignores the legislative history. He does not look at committee reports, he does not look at congressional debate. Rather, he has decided that he will just look at the statute to determine congressional intent.

Now, congressional legislative history is not always clear, I am very cognizant of that, but I believe that ignoring it per se is a form of judicial activism, however you may define that term of art, that goes beyond what is acceptable. But there isn't anything we can do about judges who have been confirmed and sit there.

During his confirmation hearing, I asked Judge Souter his approach to legislative history. He stated the need to rely upon legislative history, when attempting to derive the meaning of an unclear statute. His approach on the Court has been consistent with his testimony.

Judge Thomas, on the other hand, told Senator Grassley during his confirmation hearing that a judge must "look to legislative history, we look to debate on the floor, of course, we look to committee reports, conference reports, we look to the best indications of what your intent was." However, in direct contradiction of that testimony, while on the Court, Justice Thomas has adopted the Scalia approach to legislative intent. For example—and there are several of them—Thomas alone concurred with Justice Scalia in the opinion last year, in which Scalia stated that reliance on legislative history was inappropriate.

Judge Ginsburg, interpreting statutes is a difficult process. Many statutes are subject to many different interpretations. If legislative

history is ignored altogether, what is a judge left with, in interpreting the vast number of statutes? Is there anything logically that you could do, other than look at the history of the legislation? I am just quite perplexed by Judge Scalia's, and what appears to be Judge Thomas', leaning.

I am not asking you to get into any fray with your future colleagues, if you are confirmed, but I just wonder, where else could you look?

Judge GINSBURG. Another source we look to as a way of determining congressional meaning is familiar canons of construction, like exceptions to the antitrust laws are to be strictly construed, like the specific prevails over the general——

Senator DECONCINI. General principles that you would look at. Not looking at the legislative history, and I realize it is certainly not binding, seems to me to may be a trend in the judiciary. As a scholar yourself and a judge, but more as a scholar, do you think it is a trend to go away from legislative history, or just a phenomena?

Judge GINSBURG. I don't see it as a trend in the Federal courts generally. Your colleague Senator Grassley was good enough to supply me with one of my decisions that I didn't remember until he handed it to me, *United States* v. *Jackson,* a 1987 decision of mine. I think it is typical. Yesterday, I tried to sum up how I approach legislative history. I said that I consult legislative history with an attitude of hopeful skepticism.

Senator DECONCINI. Yes, I saw that.

Judge GINSBURG. *Jackson* is a typical case where I said the statutory language we are obliged to construe is not free from ambiguity, and in light of the textual ambiguity, we must look elsewhere for clues to the legislators' intent. The legislative history of the act, while itself not free of ambiguity, which is often the case, offered more support for one position than for the other. I then referred to the Senate report and the House report, and continued for a page and a half citing material from the legislative history.

Senator DECONCINI. I guess in answer to my question, you don't think it is a trend, or do you have an opinion which you care to give, as to it being textualism or a veering away from legislative history?

Judge GINSBURG. I think a judge must try to find out what the legislature meant. One hopes Congress' meaning will be clear on the face of the statute, and it sometimes is. It sometimes is not, however. Then, I think, a judge will want to consult all of the sources that bear on the question, what does the statute mean. I also said yesterday that some parts of legislative history are more reliable than other parts. If everything in the legislative history goes one way, you feel more comfortable than you do when one statement goes one way and another statement goes another way.

To answer the question, what did the legislature mean, if it is not clear from the text, we need help, and legislative history can be a source of help that should be considered.

Senator DECONCINI. Thank you, Judge. I think that is quite adequate and I appreciate your response. I am sorry to drag you through that subject matter again, but I couldn't get it off my mind.

Judge Ginsburg, the famous case of *Miranda* v. *Arizona,* as you so well know, defined the parameters of police conduct for interrogating suspects held in custody. Since that decision, the Supreme Court has limited the scope of *Miranda* in certain cases. The process might be termed as kind of chipping away at it. *Miranda,* like the exclusionary rule, is a pragmatic rule that the Court adopted to provide better administration of constitutional rights.

I am interested in your opinion, if you would share with us: Should the Court be in the business of adopting pragmatic rules?

Judge GINSBURG. The purpose of the *Miranda* warnings is to make certain that a defendant's rights are known to the defendant, so the defendant can exercise them—the right not to speak and the information that, if you do, your words can be used against you, the right to an attorney and the knowledge that if you are unable to pay for counsel, a lawyer will be provided for you by the State. Those, it seems to me, are constitutional rights that should be brought home to every defendant.

Now, sophisticated defendants will know them without being told, but the unsophisticated won't. This practical approach, the *Miranda* warnings, has become familiar to all, thanks to television. I think it has worked.

Senator DECONCINI. You think it is a proper area for the Court to be involved in, certainly in the *Miranda* case, I suspect you do, but just in general of putting forth pragmatic rules?

Judge GINSBURG. In a situation like this, where the object is to ensure that a defendant knows about the right to counsel, knows that the defendant is not obliged to incriminate herself or himself, these are salutary rules that have safeguarded the constitutional right. Frankly, from my point of view, it makes the system run better because then one need not ask case-by-case: Did this defendant know that he had a right to counsel? Did he intelligently waive that right?

It avoids controversies. It is an assurance that people know their rights. It is an assurance that the law is going to be administered even-handedly, because, as I said, sophisticated defendants who have counsel ordinarily will know about their rights, so it is an assurance of the even-handed administration of justice.

Senator DECONCINI. Judge, let me go to another subject. I have been involved in this subject matter for a long time; it is judicial discipline. Had I been the member of the committee who heard your nomination some 13 years ago, I would have asked you this question. I was not, to my recollection.

So I would like to just give you some background of my interest. There are now 842 Federal judgeships. We are expecting that to increase to more than a thousand in the next decade, many more than the Framers of the Constitution I think ever possibly thought we would have.

The impeachment process is the only avenue to remove a judge. As we all know, the impeachment process is slow and cumbersome. It is left to the most egregious cases, some argue without adequate due process. Prior to 1986, the Senate hadn't heard an impeachment trial for 50 years, and since then there have been three. Furthermore, there are two more judges who have failed to resign, although they have been convicted. If only a fraction of the number

of sitting judges are accused of misconduct, the Congress could be just inundated with impeachment proceedings on an annual basis.

There have been a number of proposed constitutional amendments introduced over the years to address this problem. One approach would require that an article III judge who is convicted of a felony and has exhausted all appeals forfeit his or her office and all the benefits thereto.

Another approach would give Congress the power to legislatively set standards and guidelines by which the Supreme Court could discipline judges who have brought disrepute on the Federal courts or the administration of justice.

As a judge, do you think the impeachment process serves as a great enough deterrent to prevent the misconduct of judges? Is that a threat to a judge or intimidation at all in the process of a judge's conduct?

Judge GINSBURG. Senator DeConcini, I am afraid that there may be a real conflict of interest, possibility of bias and prejudice on my part. I am a member of the third branch of government; I prize my independence and the tenure I hold during good behavior. I think that Federal judges take their oaths to heart. Of course, there is always the rare exception, and I think it remains the very rare exception, even though, as the numbers go up, there is going to be——

Senator DECONCINI. Let me put it this way, Judge: Do you think there is any merit to a process within the judicial branch of government, which under a constitutional amendment, would permit the removal of a judge?

In other words, what if a constitutional amendment set up or gave authority to the judicial branch to set up procedures where complaints could be heard? A judge would have an opportunity to respond and to have a hearing and to appeal the hearing, and what have you, and the Supreme Court or somebody within the judicial branch could, in fact, dismiss the judge. Have you given that any thought?

Judge GINSBURG. I understand that the Kastenmeier Commission has been looking into the discipline and tenure of judges. The Commission has published a preliminary draft of its report. The Commission has been operating for some time; it has broad charter to take a careful look at all these areas. I will read the final report when it comes out with great interest, but I don't feel equipped to address that subject.

Senator DECONCINI. Let me ask you this: Is it offensive to you, if the judiciary had authority to discipline judges and that discipline could also include dismissal?

Judge GINSBURG. We already have an in-house complaint procedure, as you know.

Senator DECONCINI. Yes, I do.

Judge GINSBURG. And I think it has worked rather well. In all my years on the District of Columbia Circuit, no complaint has warranted a call for removal.

Senator DECONCINI. My problem, Judge, is what do you do with a convicted judge? Wouldn't it be appropriate for the judiciary to have a process where they could expel that judge? I mean I am giving you the worst of all examples. I am not talking about the liti-

gant who is unsatisfied, doesn't like the ruling of the judge and, thereby, files a complaint as to moral turpitude of the judge, and then you have a hearing on that. I am talking about something that is so dramatic as a felony conviction of a judge.

Judge GINSBURG. Senator, I appreciate the concern you are bringing up. It isn't hypothetical. There are judges who are in that situation. They are rare, one or two in close to a thousand.

Senator DECONCINI. I think there are two.

Judge GINSBURG. So I appreciate the problem. When I was asked before about cameras in the courtroom, I was careful to qualify my own view. I said I would, of course, give great deference to the views of my colleagues on this subject. An experiment is going on right now in the Federal courts on that subject.

I don't feel comfortable expressing my own view, without information concerning the view of the U.S. Judicial Conference on this subject. I know that the judges are going to study the Kastenmeier report, and they are going to react to it. I can just say that I appreciate it is a very grave problem.

Senator DECONCINI. I won't beat it any further. It has troubled me and been a problem that I have dealt with here. I have legislation and constitutional amendments trying to get the court to be a bit more aggressive. They have set up the circuit disciplinary complaint procedures or whatever they are called, and there are some studies that show that they actually have taken some action.

What concerns me is all branches of government are suspect today, I think, by the public for a lot of reasons, some of it our own doing and some may be exaggeration by the press or whatever. And I am just trying to find a solution that would give more credibility to the judiciary. I would like to find that same solution for the legislative branch, but I am just really kind of grasping for thoughts and ideas without wanting to put you in an embarrassing situation that, my goodness sakes, what if the Judicial Conference turns down Kastenmeier or adopts it. And I am not absolutely sure what is in it, but I don't believe it goes near as far as I have suggested. And I was really looking for an opinion of a judge. I can probably find some other judges, and I have on many occasions, and most of them don't want it. Most of the judges I talk to that are personal friends of mine or people that I have been involved with for years in the judicial system, they just say no. Although, you know, candidly, some of them will say, yes, we should do that but it is impossible for us to do that, such as the charge or the opinion sometimes it is impossible for us in the Senate to criticize and really review our own conduct.

I am just looking for some thoughts on it without putting you in an embarrassing position because that is not my intent. And if you don't care to comment any further, I will let it go. I am just very frustrated about it. For almost 15 years now, I have tried to see and encourage the courts to be more involved in it, and going through the impeachment process here, it only frustrates me more because of our lack of being able to address that in a better procedural way.

Judge GINSBURG. Just as Members of Congress prize their speech or debate immunity, so judges prize their independence, the guarantee that they shall hold office during good behavior.

Senator DECONCINI. Thank you, Judge. I will try another judge. [Laughter.]

I have enjoyed, Judge, your frankness, and I want to compliment you again for it as we conclude my second round. I appreciate your attempt to be open with us and convey your views as much as you can. That is important to this Senator. I find this process not just fun, but trying to get inside the mind of a nominee to the Supreme Court without violating their oath and their potential conflicts, what have you, is fascinating, intellectually challenging, and very rewarding when you are as candid as you have been. And Judge Souter and others have fallen into that category.

As you noted in your opening statement, we hold these hearings to aid us in the performance of our task. I take it very seriously. I really don't think there is anything more important that I do as a Senator than addressing nominees to the bench, and particularly to the Supreme Court. The advice and consent duties here are extremely important, and I think Chairman Biden and the ranking member have certainly demonstrated that we take it seriously. And I know the nominees do.

If confirmed, our Constitution will endow you with immense power, and there is no doubt in this Senator's mind that you are well aware of that, having served as long as you have, and there is no doubt in my mind that you will take it extremely seriously and in a very wise manner. And I anticipate, unless something comes out in these hearings or in other procedures prior to the report of this committee, that you will be confirmed. And you have certainly demonstrated, I think, to the public and to this committee your knowledge of the law, your ability to be straightforward, your consciousness and sensitivity toward delicate issues that might come before the Court. And I give you high praise, Judge, for whatever that may be worth.

Judge GINSBURG. Thank you.

Senator DECONCINI. Thank you.

Judge GINSBURG. Thank you so much, Senator. I appreciate those kind words.

Senator DECONCINI. The Senator from South Dakota is recognized. Senator Pressler? North Dakota, not South Dakota.

Senator PRESSLER. Thank you very much.

Judge Ginsburg, I will take up where I left off yesterday. I have reviewed the answers to some of your questions in the area of Indian Country law and have found them lacking, very frankly, in terms of what some of the tribal leaders are looking for.

Let me say that many States west of the Mississippi are very involved in litigation, whether it is California or any of the States that have reservations or tribes or whatever they are referred to, as California uses a different name. I am told that 10 percent of all the cases decided by the Supreme Court last year involved Indian law questions, and it is a matter of growing concern with Indian gaming issues throughout the country, with issues of tribal lands, with issues of civil rights of Indian people. And yesterday you frequently responded by saying that Congress is responsible. And, indeed, it is and I am a great critic of Congress for not acting more.