Senator LEAHY. Judge, my time is up on this round, but I appreciate your answers, and I understand in some of them why you do not want to go further. I hope you understand, however, my reasons in asking them.

Judge GINSBURG. I do, Senator, and I thank you.

Senator LEAHY. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator.

Judge, I apologize for being out of the room for part of the questioning. The new nominee for the FBI came by to meet me and to see how quickly we could schedule a hearing, and it was suggested by one of my colleagues to whom I introduced the Director—as a matter of fact, my colleague from Pennsylvania—that, when we finish with you on Friday, we just start with him and keep going right through the weekend. But I do apologize for having been absent for about half an hour.

Let me suggest that in a moment we break until 10 after 12, break for 15 minutes, and then we will come back, with your permission, Judge, and Senator Specter will lead off the questioning, and then I believe Senator Heflin will follow. That will take us to about 1:15, at which time we will break for lunch until 2:30, and come back at 2:30 and continue with Senators Brown, Simon, Cohen, Kohl, Pressler, Feinstein, and Moseley-Braun, in a series of three.

Judge GINSBURG. With a break in between?

The CHAIRMAN. With a break in between, with a break every half hour or sooner, if you conclude that that would be preferable. As I said, we need to get up and stretch our legs. You are sitting there the whole time, and we appreciate it.

We will reconvene at 10 minutes after 12, in 15 minutes.

[A short recess was taken.]

The CHAIRMAN. Welcome back, Judge. The floor is yours, Senator Specter.

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

Judge Ginsburg, I was very much impressed with your opening statement yesterday when you talked about your background leading to your values. I would like to take just a moment at the outset to identify our commonality of background and values, because I think we may or may not have some differences as to the appropriate role of the Court on enforcing those values.

When you talked about discrimination, coming from a family background of one parent first generation and one the second generation, I understand that. Both of my parents were immigrants. When you talk about not having enough money to go to college, I can understand that. Neither of my parents went to high school.

And when you comment about having been in Pennsylvania and having seen the sign, "No Jews or dogs," I reflected as a 17-year-old graduating from high school in Kansas and the State university not having any fraternities which admitted Jews, or graduating from law school and finding employment opportunities shut off. The fact was that Jews were excluded. There weren't any references to dogs, however.

The concern about discrimination is one that I have always felt keenly on the issue of employing women. Shortly after you had

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Judge GINSBURG. Right. That is——

Senator SPECTER. The 14th amendment as well.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you, Mr. Chairman.

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

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

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

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

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

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

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