The CHAIRMAN. Thank you very much, Senator Feinstein.

Senator Moseley-Braun.

Senator MOSELEY-BRAUN. Thank you very much, Mr. Chairman.

The CHAIRMAN. Last, but not least.

Senator MOSELEY-BRAUN. You know, I think it kind of makes me the most popular person in this room, that I am now starting the last of the questioning for the evening. But it makes it a little difficult, obviously, when you are number 18 in a grueling session such as we have had, and I just want to thank and applaud the Judge for her patience and her deliberate manner. You have been just hanging in there, in spite of the fact that you have been talking all these hours and answering questions all these hours and mental gymnastics with the members of the committee.

I want to thank my senior Senator, who I know is only here because he has been so nice to me and he is looking out for me.

Senator SIMON. I am here because I want to hear Judge Ginsburg.

Senator MOSELEY-BRAUN. You want to hear Judge Ginsburg, not me. [Laughter.]

OK. You see, that is also why he is the senior Senator. Thank you, Senator Simon, for staying.

Judge Ginsburg, as you know, this month the worst deluge in memory has caused massive flooding along the Mississippi and Missouri Rivers and devastated much of the Midwest, including vast areas of my home State of Illinois. This has been a tragedy of epic proportions.

One of the most notable developments has been the failure, at several points along the various rivers that were affected, of levees that were denied to hold the waters back. The rupture of these levees has prompted a heated debate among scientists and engineers and environmentalists, farmers and thousands of ordinary citizens.

On one side are the people who say that the levees, which were artificially created to begin with, have distorted the Mississippi's natural drainage system, can never be built high enough to anticipate all of nature's fury, and may even make flooding worse by channeling the waters so that they become even faster and higher.

Supporters of the levees, on the other hand, claim that through the construction of the levees and other flood control systems, thousands of acres of land have been turned into productive farmland, housing and recreational areas.

In short, Judge Ginsburg, across a wide swath of the country, thousands of people and entire communities have made decisions, and invested their savings in some instances, for more than 100 years on where to locate their homes and their farms in reliance on this system of levees.

As I mention, though, this year's disaster and some new scientific evidence has prompted many to argue that pulling down the levees or actually not reconstructing them might actually improve flood control and, in terms of the environment, be better for the communities as a whole.

In fact, some have speculated that one day in the near future, the Army Corps of Engineers or some other arm of the executive branch may determine that the levees are counterproductive to re-

gional flood control efforts and damaging to the environment, and decide to tear the system down, or not to rebuild it.

While conceivably beneficial to the region as a whole, such a decision would clearly impact the use that thousands of individual landowners could make of their property. Clearly, in this situation—and the reason I ask this question, Judge, is because you have done so much in the area of administrative law and administrative decisionmaking, and I want to get to how you perceive and approach these issues, when a citizen's interest and rights are up against an arrayed power of the bureaucracy.

Clearly, as in a situation such as the levee situation—and it is all speculative, because this is just a debate that is going on—what an administrative agency decides to do or not to do, as the case may be, will matter greatly to the expectations that have been built up over time.

So I have two questions. The first is, in a situation like this, if the property owners challenge the government action as a taking of their property, what principles should the Supreme Court look to in evaluating that claim?

Judge GINSBURG. Senator, the question has some kinship to the one that Senator Pressler raised about the wetlands. It is an evolving area of the law. There is a clear recognition that at some point a regulation can become a taking. When that point is reached is something to be settled in the future.

We do know that, as the Court held in the *Lucas* (1992) case, when the value of the property is totally destroyed as a result of the regulation, a taking has indeed occurred and there must be compensation for it. Reliance is certainly one of the factors that must be weighed.

This is a still evolving area and I can't say any more about it than what is reflected in the most recent precedents, in the *Nollan* (1987) case and in the *Lucas* case. But there is sensitivity to the concerns. On the one hand, the regulations are made for the benefit of the community; and on the other hand, there is the expectation, the reliance interest of the private person. Those two considerations will have to be balanced in future cases. I can't say anything more at this point.

Senator MOSELEY-BRAUN. Well, let's approach it, and I don't know if this is an approach that will be productive. But looking at the whole issue of deference to agency decisionmaking, if the property owners challenge the Army Corps of Engineers on substantive grounds, what principles do you think should govern how much deference should be given the agency's determination and decisionmaking?

Judge GINSBURG. It depends on what the agency is doing. If the agency is construing a law in which Congress has, in effect, delegated to the agency a gap-filling function, that is one thing. If the agency is simply applying a general principle, that is something else. You know we do have a guiding decision called *Chevron* (1984). That opinion instructs that, when the meaning of a law is uncertain, courts ordinarily should defer—that doesn't mean abdicate—deference means treat with due respect the agency's interpretation of it.

Now, that is a rule of construction, of determining what Congress wanted. Congress can say it doesn't want us to defer to the agency. There was a time when the Bumpers amendment had quite a following. That measure would have told courts not to defer. The Supreme Court's current doctrine in this area calls for deference to agency rulemakings. Congress knows that, and Congress is at liberty to change the orders under which courts are now operating. That is, if there is an ambiguity in the direction Congress has given, and the agency reaches a decision that is permissible, a permissible construction of congressional intent, then courts are supposed to respect that decision. But Congress can always tell us to take a different approach to statutory construction.

Senator MOSELEY-BRAUN. In a dissent in which you joined in the case of *San Luis Obispo Mothers for Peace* v. *the United States Nuclear Regulatory Commission,* you joined in a dissenting opinion against a decision that upheld the issuance of a license for the construction of a nuclear power plant on an earthquake fault, despite the lack of a hearing on safety implications.

That dissent, which was actually written by someone else, stated that:

> It defies common sense to exclude evidence about the complicating effects on earthquakes at a plant located three miles from an active fault. The majority's preoccupation with probability calculations does not justify the Commission's stubborn refusal to do the obvious.

So in that case, the decision flew in the face of doing the obvious, of common sense, and I suppose the question becomes, as we look at the whole issue of, again, due deference: Do you believe that injured parties, that people, should be afforded access to review by the courts, and particularly the Supreme Court, in cases like this in spite of the expert judgment of a bureaucrat regarding agency action?

Judge GINSBURG. I said that deference does not mean abdication. A decision I wrote bears some resemblance to the fault case. It involved placing nuclear material in salt domes. Yes, I think it is important that there be review, judicial review, of bureaucratic actions. Bureaucrats don't have to stand for election as you do. Courts are needed to check against bureaucratic arrogance. That is an important role that courts have.

On the other hand, agencies do feel beholden to the legislature. That is where they get their money from, and so they are accountable to you as well.

Senator MOSELEY-BRAUN. I think that is a fine answer, Judge, and that is very important because so many agency decisions impact on people's lives, sometimes even more than what we do here in the legislative branch. And it is just important—you mentioned the system of checks and balances. It is so very important to have a court willing to look out for the interests, the concerns of ordinary people in their everyday lives, again, in these situations where the bureaucracy just kind of rolls on and spins along sometimes without regard to the individual interests.

I would like to change the subject a little bit because I have several areas in which I would like to ask you questions or explore, and I don't know how much of this is new territory. I have listened to all the testimony, and I know you feel that you have probably

answered some of these questions before. But to bring my own perspective to some of these issues that we are all concerned about in terms of how you approach judging, how you approach being a member of the U.S. Supreme Court.

I want to change the subject to talk about voting rights for a minute. I was very touched yesterday in your testimony when you mentioned as a child seeing signs in front of a Pennsylvania resort that said "No dogs or Jews allowed." For a moment I would like to share with you my own recollection of what you have, I think, aptly described as American apartheid, which is what we went through.

In the summer, when I was little, we used to get sent south every summer to spend the summers on the farm, and we would travel by train. And at that time the South was still openly segregated on the basis of race. In fact, just going over some of these cases, I am reminded of how very recent striking down of some of those barriers has been.

But, anyway, we were small, and I was about eight or nine; my little brother was about six or seven. And we stopped at a train station one day, and it was a hot summer day, and we had been traveling for hours with my mother. We were tired and thirsty, and we got into the train station, got off the train, walked to the train station, and there were two different water fountains. One was labeled "Whites Only" and the other was labeled "Colored." And my mother told us very firmly that she didn't want her children drinking out of a colored water fountain.

We both pleaded with her. We were thirsty. We wanted some water. And she wouldn't let us have any water. She said we will just wait until we get to the house.

Well, my little brother laid out in the middle of the train station and had a temper tantrum because he wanted some colored water. He expected it was going to be green or blue or yellow or a rainbow of colors. [Laughter.]

And he was determined he was going to see and have some colored water that afternoon.

We have obviously come a long way in this country since that trip, Judge, and I can share that story with you now. And it is humorous and it is funny. It kind of points to the absurdity of how Jim Crow and how that apartheid operated.

But there are other aspects, those aspects of the history of this country that are not so humorous even with the passage of time. I want to call your attention to the troubled history of voting rights specifically in the State of North Carolina.

In 1900, an amendment to the North Carolina Constitution barred blacks from voting unless they could prove, among other things, that they were descended from a Confederate soldier. The result of that, of course, was that very few blacks in North Carolina in 1900 were able to vote.

Tactics such as these were openly utilized up to and through the enactment of the Voting Rights Act in 1965. Although African Americans comprised 22 percent of North Carolina's population, until 1992 no African American had represented the State in Congress since Reconstruction.

As you know, in the recent case of *Shaw* v. *Reno*, which we have had some discussion about, the Supreme Court chose to ignore that troubled history. In *Shaw*, the Supreme Court held that North Carolina's 12th Congressional District—a district, I might add, that was drawn in compliance with guidelines from the previous administration's Department of Justice, the Bush administration's Department of Justice—that that district violated the equal protection rights of the State's white voters.

The ruling was issued in spite of the fact that the Court was unable to conclude that any white voter had been actually injured, had suffered any injury by virtue of the drawing of this district.

I would like to ask you about the Court's decision in *Shaw*. It would probably be inappropriate to ask you if you would overrule that decision or how you would decide in any voting rights case that might come before the Court. What I would like to know is whether or not you think the majority's decision in *Shaw* ignores the very real, the very tragic, and very painful history of voting rights violations, not just in North Carolina but throughout this country?

Judge GINSBURG. That is an unfinished case. The Court remanded it, and it may well come back again. So I can't address that case specifically, but I know what you have in mind. I know about the literacy tests that were given to blacks, tests that were different from the tests given to whites. There was an extremely complicated passage given to a black would-be registrant to vote. When the would-be voter looked at the passage he was asked to interpret, he said, "It means black people can't vote in this State." So I appreciate your concern, and I know how recent the change is.

I remember going with my husband to an Army camp when he was in the military service. We passed a sign that said—I thought it said, "Jack White's Cafe." But it didn't. It said, "Jack's White Cafe". I had never seen such a sign. I was fully adult, indeed pregnant at the time, so it was not so long ago that such things existed in the United States. I am sensitive to that history. When I spoke about *Brown* v. *Board of Education,* earlier today, I mentioned specifically the deprivation of the very basic right to cast one's ballot that existed for so long in the United States for black people.

Senator MOSELEY-BRAUN. Judge, I would suggest—I have a map, actually—where are the maps? The Court in the *Reno* case held that the 12th Congressional District of North Carolina was so bizarrely shaped as to invite an equal protection challenge. Here it is right here. There is no question but that is not exactly a work of art. There is no question but that the district lines were drawn in a way—do you have a copy?

Judge GINSBURG. Yes. This is what the Court described as a snake district.

Senator MOSELEY-BRAUN. Right. But as we talk about the history, this district was drawn this way in order to achieve the objectives of the Voting Rights Act, which in and of itself was written to overcome the history that you have so eloquently talked about.

But in any event, we face a situation in which the history has made it very clear that districts have been bizarrely drawn since—well, I started to say time immemorial, but indeed the very word

"gerrymander" comes from the drawing of a salamander-shaped district by a politician named Gerry almost 100 years ago.

And so I would suggest, just to point out, Judge, I have a couple of districts here that are also bizarrely drawn. This is the 3d district in Massachusetts, and this is the—got to turn it the other way. It is upside down. That way, yes. This is the 5th district of New York. And I think anybody would concur that these are similarly bizarrely drawn districts as well, which were drawn in the old-fashioned way; that is to say, with regard to political boundaries and incumbent party interests and because of the power equation in the community.

But in this instance, we see the Supreme Court has now decided to, in the *Shaw* v. *Reno* case, throw out the history. The Court's decision in the area of voting rights has changed the law altogether. And there has been a lot of discussion today about concern about judge-made law, but, quite frankly, Judge, I guess my question would be: Would you not concur that where we have precedent thrown out in order to invalidate a district drawn consistent with the Voting Rights Act based on the bizarrely shaped rule, which is a new rule as far as I can determine, that ignores the history of why the Voting Rights Act was there to begin with, and in light of the fact that no injury was shown, and in light of the fact that there are other districts throughout the country that are bizarrely drawn, would you not agree that we have in this instance judicial activism of a very real sort?

Judge GINSBURG. Senator, I can't comment on the *Shaw* (1993) case because, as I said, it is unfinished and it may be back in the Court again. And I would have to see the record, briefs, and arguments made in that very case. I can't prejudge what is going to be the next round in it. I am obliged to give the same answer I have given when that kind of question has been asked before about a case that is still alive, one that can be back before the Court.

Senator MOSELEY-BRAUN. All right. Then let me put the question to you otherwise. Yesterday, when Senator Metzenbaum had asked you about the views of Justices Scalia and Thomas in the *Lemon* v. *Kurtzman* test, which is used to judge challenges under the establishment clause of the first amendment, in response to that question you urged caution on the part of judges who wish to tear down established law, stating that, and I quote,

> It is very easy to tear down, to deconstruct. It is not so easy to construct. I as a general matter would never tear down unless I am sure that I have a better building to replace what is being torn down.

Judge Ginsburg, what the majority opinion—and, again, looking at the voting rights cases, we have now seen a deconstruction of a system of legislative redistricting and voting rights enforcement in the United States. That system, while it was not perfect, was an effective system that has been arrived at through the efforts of various Congresses and administrations and even the courts. But in one fell swoop, the Justices struck down this system without providing any guidance on how to reconstruct voting rights enforcement, other than to say you don't go with bizarrely shaped districts.

States that relied on the voting rights precedent in drawing legislative districts now find themselves subject to court challenges;

and, further, the courts have no guidelines with which to just these challenges.

And so I would like to ask you how much consideration do you think that a judge should give—now, this is going to be a real softball, Judge. This is not a—how much consideration do you think that judges should give to difficulties that will arrive from deconstructing an established constitutional test or enforcement mechanism in areas such as voting rights?

Judge GINSBURG. I can't speak to this specific case because I am not familiar with the record. The Department of Justice is going to have to study this case and prepare whatever its position is going to be for future cases. But I can repeat what I said before, that a judge should not tear down without having a better building to replace what is in place, and that is a general rule to which most judges would subscribe. I can't say that is true of most law professors, but it certainly is true of most judges.

I wish I could speak at a more specific level, but I really can't without having before me the precise record on which I could make an informed judgment.

Senator MOSELEY-BRAUN. I understand, and that is one of the reasons why this particular area is difficult to talk about, because of the uncertainties surrounding that entire area in voting rights enforcement in light of the *Shaw* decision.

But to take it another step and another aspect of voting rights that I would like to pursue with you, another recent voting rights case was *Presley* v. *Etowah,* and I would like to talk with you about that case a minute. I would like to first offer a brief summary of the case. The Etowah County Commission had five members, and each of the members' chief function in this rural Alabama county was the allocation of highway construction and repair funds. Each commissioner had complete control over how the funds were used in his district—and I said "his" district and not "his or her" district deliberately.

The commission had been structured to ensure that no minorities would be elected. After being sued under the Voting Rights Act, the commission was expanded to six members, six commissioners. Two commissioners were elected under the new changes, including Mr. Presley, the county's first African American commissioner in the modern era. Soon after that election, the four original commissioners passed a resolution which abolished the practice of allocating road funds to individual districts.

Under the changes, the two new commissioners had no power at all to ensure that any road funds, even minimal funds, were earmarked for their districts.

Now, one does not have to be a legal scholar to understand what happened in this case. In direct response to an African American being elected to the commission, the commission changed the rules in the middle of the game to ensure that the newly elected black official had no real power.

Yet when Mr. Presley sued the commission under section 5 of the Voting Rights Act, the Supreme Court held that the acts of the commissioners in stripping him of all real power were not changes with respect to voting. The only explanation the Court gave for its decision there was that "the line must be drawn somewhere."

Many people familiar with *Presley,* including the Bush administration's Justice Department, wondered what was the point of being able to vote for a county road commissioner if as soon as you got that opportunity the commissioner was stripped of any authority over what happens to the roads in your district.

I have two questions. The first is: Would you agree that in interpreting the Voting Rights Act, the Court in *Presley* was overly concerned or more concerned with the language of the statute as opposed to its purpose? And, second, when the narrow interpretation of the language of a statute would hinder the statute's ability to achieve its purpose: Is it proper for a court to look beyond the language in order to offer a remedy to citizens who have a valid grievance?

Judge GINSBURG. That is a decision constructing a statute. If the Court got it wrong, Congress can amend the Voting Rights Act and say that the Court got it wrong. I suppose the view was that the stripping of one commissioner was not peculiar to that commissioner; every commissioner was similarly stripped. That leaves the authority in the hands of the body as a whole, and the body has only one minority member, as I understand it.

But the argument was that the Voting Rights Act does not extend so far as to require court approval of how functions are allocated within a governing body. That is the Court's construction of what Congress ordered. The cure can be provided by Congress if Congress thinks the Court got it wrong. And that is about all I can say with respect to that case.

Senator MOSELEY-BRAUN. Judge, in this case, Justice Stevens described this case as one in which a few pages of history are more illuminating than volumes of logic and hours of speculation about hypothetical problems. I suppose my question to you is: Other than just waiting—I mean, other than saying, well, the Court may have gotten it wrong here, which is what you have just said, do you see any role in other decisions in suggesting to the Court that the history of these cases is as important in interpreting the specific language?

Judge GINSBURG. I think the advocates made that point to the Court. I can't opine on that particular case because it wasn't before me. If it had been before me, I would have been familiar with the record, familiar with the arguments. All I know about it at this point is the summary in U.S. Law Week. So I wish I could engage in more of a conversation with you about it, but from the limited information I have, it would not be judicious of me to speak further.

Senator MOSELEY-BRAUN. Well, Judge, it appears that the light is on. My chairman has left, but I am left with my loyal and faithful senior Senator from Illinois. I want to thank you. I have other questions that I suppose—I guess the way this works it will hold for the second round of questions. But I do thank you for your responses, and I look forward to pursuing some of these other areas with you.

Mr. Chairman, thank you.

Senator SIMON [presiding]. And we thank you, Judge, for a lengthy day. You have served your cause well today. Let me also thank your family members and that crew in back of you there who

have had to go through all of this and have done it smiling, even. They may not have felt like it, but that is what they are doing there.

The committee will convene tomorrow at 9:45 a.m. for an executive business meeting. When we say "executive," it does not mean it is in closed session here. And then we will proceed immediately to reconvene this hearing at 10 a.m. Our hearing stands adjourned.

Judge GINSBURG. Thank you.

[Whereupon, at 7:56 p.m., the committee was adjourned, to reconvene at 10 a.m., Thursday, July 22, 1993.]