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

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

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

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

Senator METZENBAUM. But you haven't answered.

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

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

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

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

AFTERNOON SESSION

The CHAIRMAN. The committee will be in order.

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

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

Senator Grassley.

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

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

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

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

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

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

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

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

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

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

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

Senator GRASSLEY. Thank you.

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

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

Leahy it might have been 108. My count of the list in your questionnaire shows that it was a little more than 300 cases involving more than 25 firms on the list. That is in addition to your 11 sua sponte recusals.

And while you recalled Tuesday that many of those recusals resulted from your minor child's ownership of one share of El Paso Natural Gas Co., I want to bring to your attention that none of the cases listed in your questionnaire appeared to involve El Paso Natural Gas. If I am wrong on that, you can correct me.

Rather, the cases that were listed on your questionnaire involved the major American firms on your recusal list, which I understand from your answers Tuesday are clients of members of your family who practice law. I am sure that you will agree that it is important that we clarify this matter, to make certain that conflicts of interest will not substantially impair your ability to perform your duties as an Associate Justice. I don't have any question that you will be impartial in how you make a decision, but I want to ensure your recusals don't impair the work of the Court.

As you noted Tuesday, recusals are far more significant on the Supreme Court, where every case is heard by nine Justices sitting as a full panel, as opposed to the District of Columbia Circuit, where any of the more than a dozen judges on the circuit court can be selected by the clerk to make up the three-judge panel that decides a case.

In close cases before the Supreme Court, the recusal of one Justice can substantially undermine the ability of a court to lay down a clear decisive ruling.

If confirmed, will you continue to recuse yourself from cases involving the firms listed in your questionnaire?

Judge GINSBURG. No, Senator Grassley, and I will not for this reason. The great bulk of those cases would not be on my recusal list next year in any event, no matter what court I served on. Let me explain.

The latest count I got from my chambers, and they checked last night, was 208 automatic recusals, 11 separately listed. You are quite right in reporting that, indeed, it was not my son's two shares of El Paso Natural Gas. In fact, in my early years on the court, there were only four automatic recusals. The great bulk came starting in 1984. A single corporate group my spouse represented from 1984 until this spring accounted for 111 of the 208 cases. That representation is now completed.

That representation meant that I tied for second place in the number of recusals listed for judges on my court. Eliminating that group, I would be at or probably below the middle point. But I can represent to you that the representation in question is indeed completed, so that the single corporate group that accounted for 111 of the 208 recusals should no longer be on my recusal list.

Senator LEAHY. If the Senator from Iowa will yield on my time, yesterday there had been a question on this, or 2 days ago during my discussion with Senator Simpson about recusals. I was acting chairman at that time and I was given by the chairman's staff an incorrect number which was the result of a typographical error. Now I am told the actual number was 208, not 108, as I had represented from the staff printout, and approximately 100 of them

were on matters relating to AT&T, a company which the Judge's husband no longer represents, if I am getting the correct numbers now.

Judge GINSBURG. Yes, I was reluctant to mention the name of the corporate group, but——

Senator LEAHY. I know, but we have had some question of this and a number of Senators have raised questions of whether the accurate numbers were given. That is why now the chairman has asked me to note that the correct number is 208. I also understand your husband no longer represents that client.

Judge GINSBURG. That representation is indeed completed.

Senator GRASSLEY. I think your answer is satisfactory to me. But I did have a concern, because, looking at those same firms and their involvement in appeals to the Supreme Court over a period of time, the LEXIS search found about 300 cases. Basically, what you are saying now is that there isn't any involvement by any member of your family with a large number of those firms, so there wouldn't be a need for recusal. Is that your answer?

Judge GINSBURG. That's correct, Senator.

Senator GRASSLEY. Thank you very much.

If I could go on to something that, to a nonlawyer like me, is a little more complicated. It involves a decision that you were involved in, *United States* v. *Jackson*. In that case, the defendant was indicted under the Armed Career Criminal Act. You were called upon to determine whether a part of the statute either enhanced an existing criminal penalty for repeat offenders, or, instead, created a new separate offense. You noted that the statute created a new offense, and Jackson's conviction would have to be thrown out, because the grand jury did not indict him for that new offense.

You found the statutory language to be ambiguous, but you did not apply the rule of lenity, where ambiguous criminal statutes are supposed to be construed in favor of the defendant. Instead, you upheld the conviction and, in so doing, it is my understanding, you relied to a great extent on the statute's legislative history.

To what extent should legislative history be used in interpreting criminal statutes? While everyone is presumed to know the law, how is a potential criminal to fairly foresee that a court will convict him based on legislative history, rather than how he might read the statute?

Judge GINSBURG. The meaning of a statute we would always like to get, Senator Grassley, from the text of the statute itself. Sometimes that meaning is not clear and we must resort to construction aids. Aid sometimes comes from legislative history, sometimes from an agency interpretation. I do not have the case that you mentioned in the front of my mind, and I would have to look at it to refresh my recollection. But I am certainly conscious of the need for fair notice to anyone in the criminal justice system.

Senator GRASSLEY. Why don't we do this, since it is not familiar to your mind, we will get you a copy of it and then you can answer at a later time in another round for me. Would that be OK?

Judge GINSBURG. That is fine.

Senator GRASSLEY. I would rather have you answer as thoroughly as you can.

I was here when Senator Biden talked about unenumerated rights. I was not here yesterday when the issue again came up, but I am glad that the chairman clarified whether the Constitution protects the right to marry. It doesn't protect the right to marry whomever a person chooses to marry. The Supreme Court has said the Constitution protects against State interference with the right to marry, if that State regulation is based on race. But the State can and does regulate the right to marry. For example, bigamy laws exist, and protection against people marrying their siblings exist. So you agree with Senator Biden's clarification, don't you, that the Constitution doesn't protect a right to marry whomever a person wants?

Judge GINSBURG. Yes, I agree with that. That has been recognized even in the face of a free exercise of religion challenge, as the bigamy case you mentioned demonstrates.

Senator GRASSLEY. Similarly, you know that there is no unenumerated constitutional right to get a job, assuming no race or gender discrimination. The Supreme Court has never held that anyone has a right to a job, and it is a fundamental part of constitutional law that protections against race and gender discrimination apply only to government actors, not to private employers. If the Constitution itself banned job discrimination, then there never would have been a need to enact the civil rights statues, which are based on the congressional power to regulate interstate commerce, and not upon section 5 of the 14th amendment.

So you agree that the Constitution does not protect the right to a job, free of race or gender discrimination?

Judge GINSBURG. Yes, Senator Grassley, the Constitution is established by and for the people through the people's representatives. The individual rights recognized in the Constitution are phrased as restraints on Government. The Constitution says what Government may or may not do.

There is a conspicuous exception, an instance in which the Constitution directly applies to persons. That instance is the 13th amendment, which says that slavery shall not exist, slavery or involuntary servitude shall not exist in the United States. That provision governs everyone in these United States.

Senator GRASSLEY. But you are in no way saying that that confers a right to a job?

Judge GINSBURG. In our country, as opposed to some newer democracies, we guarantee directly against Government intrusion into fundamental civil and political rights. Economic and social rights are in the charge of the legislature. Our Constitution does not guarantee a right to work, a right to be fed, a right to be clothed, a right to have decent shelter. Our society is as respectful of those rights as any I know, but the respect comes through measures passed by the legislature, and not in the form of a constitutional command that courts are capable of implementing.

Senator GRASSLEY. Judge Ginsburg, you have declined to talk about the constitutionality of capital punishment. You have distinguished your discussions about abortion from your unwillingness to talk about the death penalty on the basis that you haven't written about or spoken about capital punishment. I hope I understand that that was your answer before. So I want to bring to your atten-

tion that during your tenure at the ACLU, you wrote an amicus brief in *Coker* v. *Georgia*, arguing that the death penalty for rape was not constitutional.

You have written, then, haven't you, on the death penalty?

Judge GINSBURG. I did not write on the general question of the constitutionality of the death penalty. The *Coker* v. *Georgia* (1977) brief said the death penalty for rape—where there was no death or serious permanent injury, apart from the obvious psychological injury—was disproportionate for this reason: The death penalty for rape historically was a facet of the view that woman belonged to man. First, she was her father's possession. If she suffered rape before marriage, she became damaged goods. The rapist was a thief. He stole something that belonged first to the father, then, when the woman married, to her husband. Once raped, a woman would be regarded as damaged goods.

We have seen that phenomenon recently in tragic incidents in many places in the world. Women in Bangladesh, for example, were discarded, were treated as worthless because they had been raped. That was what prompted my position in *Coker* v. *Georgia*. That is the whole thrust of the brief I co-authored. We emphasized that rape was made punishable by death because man's property had been taken from him by reason of the rape of his woman. That was the perspective that informed the *Coker* v. *Georgia* brief.

Senator GRASSLEY. Again, I am not a lawyer, so when I refer to something, if you want to tell me that I am missing a point, feel free to do it. But on page 22 of that brief, a heading, underlined, says the death sentence for rape is impermissible under the 8th amendment because it does not meet "contemporary standards regarding the infliction of punishment and is inadvisable since it diminishes legal protection afforded rape victims."

It seems to me it deals directly with the issue of the eighth amendment.

Judge GINSBURG. "Diminishes legal protections afforded rape victims." Senator Grassley, I urge you to read the entire *Coker* v. *Georgia* brief. I think you will find it to be exactly what I represented it to be.

One of the reasons why rapes went unpunished, why women who had been raped suffered the indignity of having the police refuse to prosecute, was statutes of that order.

Senator GRASSLEY. Please understand that the reason I brought it up wasn't that I want you to tell me any more than you were willing to tell other people on your position on the death penalty. I brought it up because you said you hadn't written on the subject, and I found something that you have written on the subject.

Judge GINSBURG. I have written on the subject of women who have been raped and society's attitude toward them. *Coker* v. *Georgia* fits into that category. My statements regarding that case should not be taken out of context to say or imply anything about any subject other than the one addressed in that brief. The position developed in the brief was that the death penalty for rape, the origin of that penalty and the perpetuation of it, was harmful to women. Far from resulting in conviction——

Senator GRASSLEY. Well, let me ask you this, then, separate from the issue of the extent of your writings: Did *Coker,* outside the fact

that it outlawed capital punishment in the case of rape, solve the purpose that your brief intended to solve?

Judge GINSBURG. It was a contribution to the proper way to look at this terrible crime. It was a contribution to the end of thinking of women as damaged goods because they had been raped. That is what I think about it.

Senator GRASSLEY. If I could go on to another point, yesterday in conversation with Senator Cohen, there was a discussion of whether judges should or should not follow opinion polls. In light of that statement, I wonder what you think of the approach to constitutional decisionmaking espoused by the authors of the joint opinion in *Planned Parenthood* v. *Casey*. And I don't want this to be a discussion about abortion. That is not my point.

I want to quote:

> Where in the performance of its judicial duties the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe*, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.

Do you agree that Justices should consider the political dimensions of controversial cases, or is that the kind of constitutionally unprincipled "pleasing the home crowd" that you have criticized?

Judge GINSBURG. What those three Justices said in the *Casey* (1992) case I think has to be taken in the context of what they said before. They were talking about the importance of stare decisis, of precedent, in a judicial system. What I regard as most important, Senator Grassley, is what those Justices said just before the line you read. They talked about stability in the legal system. Was a precedent plainly established? How was it working in society? Had reliance interests been built up around it?

There is an expansive discussion of the principle of stare decisis in that portion of the *Casey* opinion. The sentences you read can't be detached from the three or four pages that go before it. The part that goes before stresses the reliance interest built up around a precedent, the generation of women who have grown up thinking that *Roe* v. *Wade* (1973) is the law of the land.

That is the central part of the stare decisis discussion, and not the very last part, the portion you read. To concentrate on that last part, I think, diminishes what is a very satisfactory, very complete discussion of the principle of stare decisis. Those last sentences seem to me not nearly as impressive as what went before. The discussion of stare decisis in the central part of the opinion is excellent and means much more than that last paragraph. Taken in isolation, the last paragraph might be misperceived. I think it must be read in context. I might express, regarding judicial opinions, the same things I say about legislation. The first rule is read, the next rule is read on, and the third rule is read back.

That is my view of the portion of the *Casey* opinion about which you inquired. I can't give that paragraph a mark apart from what precedes it. Taking it together with what precedes it, the whole is a very impressive statement of the doctrine of stare decisis.

Senator GRASSLEY. Well, without commenting on *Casey* or *Roe* or any other case, could you just simply comment whether judges

should, in any way, consider the effects of their rulings on external political disputes?

Judge GINSBURG. I have said here and in several other places that a judge——

Senator GRASSLEY. Should they be drafting political compromises?

Judge GINSBURG. A judge is not a politician. A judge rules in accord with what the judge determines to be right. That means in the context of the particular case, based on the arguments the parties present, in accord with the applicable law and precedent. A judge must do that no matter what the home crowd wants, no matter how unpopular that decision is likely to be. If it is legally right, it is the decision that the judge should render.

And I also said what a judge should take account of is not the weather of the day, but the climate of an era. The climate of the age, yes, but not the weather of the day, not what the newspaper is reporting.

Senator GRASSLEY. You addressed the standing issue to some extent yesterday with Senator Heflin, and you have talked with a number of Senators about deferring to Congress as you decide cases. I would like to talk about one case, that was a dissent of yours, that covers both issues.

In *Dellums* v. *Nuclear Regulatory Commission,* you called for deference to congressional predictions regarding the South African sanction laws. The plaintiffs were trying to sue the NRC over the importation of a commodity that wasn't specifically mentioned in those sanction laws. They argued its importation violated the law and, therefore, prevented a quicker end to the apartheid government.

The majority found that they lacked standing. You dissented. By deferring to congressional predictions, weren't you actually expanding the scope of constitutional standing and Federal court jurisdiction? And isn't there a line to be drawn between what you might have to look for that we just talked about, legislative history, congressional intent, and what are congressional predictions?

Judge GINSBURG. Senator Grassley, let me try to explain the *Dellums* (1988) case. The constitutional requirement for standing was that a person show injury in fact. Among the plaintiffs in that case—the one on whom I concentrated—was an exile, an outcast from his country, a South African black who had been banned from his native country because of his political activity.

Our Congress, you, had enacted an embargo on certain commodities from South Africa. In doing so, you said you thought that putting this kind of pressure on the South African Government would hasten the time when apartheid would end. When apartheid ended—or when it began to break down—that man could return to his native country.

He said he was injured by his outcast status. You said you were pursuing a policy designed to promote the end of apartheid, the day that this man would no longer be an outcast from his country.

I was following the constitutional requirement that to have standing to sue one must suffer an injury in fact. This man was claiming an injury, and I was relying on your factfinding that the

measure you took could hasten the day when his injury would end. That is the nub of my dissenting position.

The court majority disagreed with me and said he didn't sustain an injury in fact. I thought he did, and I relied on your factfinding that the reason you put an embargo on South Africa was not to do something futile, but to hasten the day when apartheid in that country would end. On that day, this man would no longer be an exile from his native land. That was my reasoning in the *Dellums* case.

You asked me before if I stand ready to reexamine my own decisions. If you asked me in this Chamber today: Do I think I was right in taking the position that the plaintiff in *Dellums* suffered an injury in fact within the meaning of article III of the Constitution, and that Congress had recognized his injury would abate as a result of the embargo? I thought my decision was right then, and I think it is right today, and I stand by my dissent in the *Dellums* case.

Senator GRASSLEY. As a taxpayer, I would like to have standing in court based on a prediction Congress makes. In fact, we are in the process of making a prediction right now that 4 or 5 years from now we will have $500 billion less deficit than we have now. And if we don't meet that target, can a taxpayer sue me—not sue me——

Judge GINSBURG. A taxpayer has standing——

Senator GRASSLEY. Would it have standing in court?

Judge GINSBURG. No. The answer is "no." Under current precedent, a taxpayer has standing to challenge only one thing, and that is the State's involvement in establishing a church. A taxpayer—you are a taxpayer, and I am a taxpayer, and we have shared grievances about what the Government does with our money. But the plaintiff who had been declared an exile, an outcast from his native land, was not a taxpayer who shared with the generality of the public a common grievance. He was not complaining about the way the Government was spending his tax dollars. The cases are simply not comparable. There is only one category of case in which a taxpayer can sue. The paradigm case, under current precedent, is *Flast* v. *Cohen* (1968).

Senator GRASSLEY. Well, I was hoping that I would maybe have a friend on the Court who would want to overturn *Frothingham*.

My last question: In response to questions by Senator Pressler and Senator Moseley-Braun yesterday, you stated basic agreement with the Court's general holding in *Lucas* v. *South Carolina Coastal Council* that a regulatory taking which denies an owner of all economically beneficial uses of her property violated the fifth amendment.

Now I, of course, understand your unwillingness to elaborate on *Lucas* because there will be many, many more cases before the courts. But I would like to see if you could help me understand the rule of *Lucas*.

The Court said that when a regulation leaves an owner with no economic use of her property, the land has been taken for the benefit of the general public just as if the Government has physically occupied the land. Do you think that what I just said was an accurate statement of the holding in *Lucas?*

Judge GINSBURG. The Court said, just as you summarized it, that the Government cannot take, but it may regulate. There is a point at which the regulation is so enveloping that it becomes a taking. When the Government acts so as to deprive the owner of all of the value of the land, as the Supreme Court said in *Lucas* (1992), that is tantamount to a taking and it must be compensated.

The *Lucas* case itself went back to the lower court to determine whether that was, indeed, the case—had the owner been deprived of all the economic value of the land. But you are also right, Senator Grassley, that the point at which regulation becomes a taking is something that will be determined case by case. Many cases will come before the Court calling for development of the doctrine of the *Lucas* case.

Senator GRASSLEY. Thank you, Judge Ginsburg.

Senator LEAHY [presiding]. Thank you, Judge. You can see how these hearings have progressed. Once again, the back-benchers come in to chair the hearing. I would hope that you feel complimented by that lack of a full-court attention up here. I suspect it indicates more approval than disapproval.

Earlier this morning, I know that you and Senator Hatch had a dialog regarding Judge Thomas, now Justice Thomas' confirmation hearing. I had asked him some questions about *Roe* v. *Wade*. Both the questions and answers became a matter of some of the debate subsequently in Justice Thomas' confirmation hearings.

Without going further, I just want to make sure that when somebody dusts off these records they get it fully and accurately, and so I will place in the record at this point the transcript of the series of questions I asked then-Judge Thomas regarding *Roe* v. *Wade* and his responses to them. That is not directed as a question to you. I know you went through that this morning.

[The transcript follows:]

You do have a style that is precise and on occasion seems less expansive when you answer a question, but you have given us some significant substance on issues of privacy and equal protection, freedom of speech, and constitutional methodology.

Still, I have to say, like other recent nominees, you have given us less than I would like. I doubt whether any nominee would ever satisfy me in terms of being as expansive about their views as I would like. But on that score, I want to emphasize that you have, as I have gone back and looked at the record, given us some genuine insight and expansive answers on some of the critical issues, maintaining your distinction between what you think is appropriate and inappropriate for a prospective Justice to comment on.

But, still, I tell you that on my round of questioning I will return to several subjects which I just mentioned—equal protection, freedom of speech, and constitutional methodology—to see if we can engage just a little bit more. I thank you for what you have done so far, but I hope maybe we can pursue these subjects a little more without violating your understandable and self-imposed limitation about getting involved in matters that may come before the Court and in any way compromise you.

But having said that, rather than take my round of questioning now, since the distinguished Senator from Massachusetts is the manager of a bill on the floor on the national service legislation, I will yield my turn to him and then go to Senator Hatch and then back to me.

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

As the chairman mentioned, we are considering a national service bill on the floor of the Senate, so I missed part of the responses yesterday, but I will look forward to reviewing the record carefully. I appreciate the courtesy of the Chair now.

I am just inquiring really in two areas. During my round on Tuesday, Judge Ginsburg, we talked briefly about the very important role of the Supreme Court in construing civil rights laws, and I would like to return to that topic this morning.

As you well know, the effort to pass legislation banning discrimination in public accommodations, employment, voting, and Federal programs was a long and difficult one. Congress tried for many years during the 1950's, with limited success. And it wasn't until 1964 that the landmark civil rights legislation was passed, and the Voting Rights Act, which Senator Moseley-Braun asked you about yesterday, was passed in 1965.

It is not hard to understand why it is difficult for a popularly elected legislature to pass laws to protect the rights of minorities and women who have been the victims of discrimination. For too long, legislatures were dominated by those who tolerated that discrimination, and that is why it is particularly important to have on the Supreme Court persons who appreciate the significance of the civil rights laws and will construe them to achieve Congress' purpose of eliminating discrimination.

In the 1980's, the Supreme Court turned away from that approach and issued a series of decisions that dramatically cut back on the legal protections against job discrimination: in 1989, in the *Patterson* v. *McLean Credit Union* case; we had the *Ward's Cove*