Senator LEAHY. How much weight do you put on the extent to which a holding has guided and been relied upon by the public? Is that something that must weigh heavily on you if there is a body of law that seems so settled that it has been well relied upon? I am thinking now of the kind of thinking that must go through a Supreme Court Justice's mind if they are going to overturn a past decision of the Court. Are time and acceptance major factors to be considered?

Judge GINSBURG. Yes, both are. How it has been working? What expectations, what reliance interests has the decision generated? Those are major factors.

Senator LEAHY. Changed circumstances? A case that is settled in one era looking different in another?

Judge GINSBURG. Yes. The period could even be 10 years. Although I think the Supreme Court wrongly decided the women's jury service issue in 1961, by the time of *Taylor,* in 1976, there was a societal change that the Supreme Court came to understand. True, it took 100 years, practically, for appreciation of the changing position of women in society to be comprehended. But in the *Taylor* (1975) case, it finally was comprehended. *Taylor* upset what had been a unanimous precedent the other way.

Senator LEAHY. Then, lastly, Judge, what if you as an individual hold as your own moral belief that the earlier decision was wrong? Does that go against all—what weight does that have against, for example, some of the other things we have talked about—continuity, acceptance?

Judge GINSBURG. Well, that is why we have the law. That is why we have a system of stare decisis. It keeps judges from infusing their own moral beliefs, from making themselves kings or queens. That accounts for my answer to a question I have been asked here a few times. How do you feel about this or that? I responded that how I feel is not relevant to the job for which you are considering me.

Senator LEAHY. Would it be safe to say, however, Judge, that it can never totally disappear from your consideration?

Judge GINSBURG. Yes, that is certainly true. I have to be aware of it. I must know that it is there and guard against confusing my own predilections with what is the law.

Senator LEAHY. Thank you very much. I see my friend from Maine, Senator Cohen, is here, and I yield to him.

Senator COHEN. Thank you, Mr. Chairman. Let me explain, Mr. Chairman, that I have been given sort of a Hobson's choice. If I agree to be brief, we will continue with me. If I am not going to be brief, then we will take a break, and I will probably lose my turn.

Senator LEAHY. I am always the last to hear these things, Senator Cohen.

Senator COHEN. I will try to finish within 15 minutes. Is that satisfactory?

Judge GINSBURG. I think I can go 15 minutes, not a half-hour.

Senator LEAHY. Just so I fully understand, we will go until 4 o'clock. Is that OK with you?

Judge GINSBURG. Yes, I think I can manage that all right.

Senator COHEN. I will try and compress what I was going to say, and it may be more effective in that fashion, anyway.

On the way out during the last break that we had over lunchtime, I was asked the question, in essence: Why are you, meaning the Senators, prolonging either the agony or the ecstasy, depending upon one's viewpoint? The fact is that nothing that you say, Judge, is likely to change the outcome of these proceedings, so why are we continuing?

My response is that there is, nonetheless, a very important function that is being served by the attempt to explore these particular issues or cases with you. First, the general public, including us, I might add, is unlikely to ever see you in the future except on a personal appearance perhaps at some forum. So it is important that they have some comprehension of exactly who is this individual we are about to hand this scepter of power to. It is a very important delegation of power to you as a future Supreme Court Justice. I think it is important that they have an appreciation of the depth of your comprehension and your competence and judicial philosophy and general viewpoints.

Second, it allows us to explore and develop issues with you to perhaps sensitize you to some of the feelings that Members of the Senate will not be in a position to indicate to you in the future. We are unlikely to have any communication with you except perhaps on a purely social basis, and even that is likely to be remote.

The third, more cynical reason is that many here would like to have more air time. But let me go quickly to the questions I have.

I was curious in terms of your response to Senator Specter when he inquired about your article, the one you wrote saying that during the course of Judge Bork's confirmation hearing, the line between philosophy and votes tended to become blurred. Then you indicated today that the article was not necessarily a criticism of the committee but, rather, just a recognition of the morass into which one can step, and the blame should be placed squarely upon the nominee because you have an opportunity to say, Senator, I think that that is an inappropriate question and I am not going to answer it.

What I gathered, however, from your testimony this morning is that as a general proposition, if you have written about a subject, if you have taught a subject, if you have lectured on a subject, even though that subject matter may come before the Court at some future time, you feel that it is legitimate to talk about it, for example, abortion rights, equal rights amendments or other types of things on which you have expressed a view publicly either as a judge or as a professor or simply as an advocate. Is that correct?

Judge GINSBURG. If I have written something, either an opinion or an article, and you want to ask me about what I wrote, something you think should be clarified or questioned, then you can confront me with my writing. Yes, I think that is right.

Senator COHEN. Even though a permutation or some modification of that issue might at some future time come before the Court. That is a fair area for us to explore.

Judge GINSBURG. Senator Cohen, I have asked you to judge me on the basis of my written record, and I have said what that record

contains. So, yes. I regard this hearing as in the nature of an oral argument where I can clarify what is in that written record.

Now, it is true, as just occurred, that when one writes over 700 opinions in the course of 13 years, one must sometimes refresh one's recollection. One of your colleagues just said to me, well, in the case of *United States* v. *Jackson* (1987), you said such-and-so. Another of your colleagues said, in the *Xidex* (1991) case, where you were on the panel, the court unanimously ruled thus and so. In both instances, I had to refresh my recollection.

Senator COHEN. All right. Let me go to the *Goldman* case that we have talked about so many times before. You joined Judge Starr in his dissent.

The case originally was heard, and then there was a request made for a rehearing en banc, right?

Judge GINSBURG. Right.

Senator COHEN. In which case you wrote a very brief dissenting opinion from the majority of the appellate court that refused a rehearing.

Judge GINSBURG. Right.

Senator COHEN. OK. This is the so-called yarmulke case that we have been talking about the past 2 days.

Judge GINSBURG. Right.

Senator COHEN. Judge Starr's dissent I think is important, and I am going to quote excerpts from it.

He said:

It cannot be gainsaid that the judiciary is singularly ill equipped to sit in judgment on military personnel regulations. In matters touching upon the exigencies of military affairs, the courts have wisely exercised the restraint and caution that befits the unelected branch of Government.

Then he cited Justice Jackson in terms of Jackson's comments opposing the Korean conflict.

The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate [military] matters as the [military] must be scrupulous not to intervene in judicial matters.

This is part of Judge Starr's dissent.

He goes on to say, however, that

The military's claim that flexibility generates resentment, whereas arbitrariness keeps the corps content is utterly belied, however, by Dr. Goldman's own experience in serving his country.

He went on to say that

Dr. Goldman has been required to render to Caesar far too much for far too little reason.

I think you associated yourself with the eloquence of those remarks, but you went on to say that

A military commander has now declared intolerable the yarmulke that Dr. Goldman has worn without incident throughout his several years of military service, and at least the declaration suggests callous indifference to his religious faith.

That case went to the Supreme Court. By the way, Judge Scalia joined with you in that dissent.

Judge GINSBURG. Joined with me, right.

Senator COHEN. That case went to the Supreme Court, and the Supreme Court affirmed the military's position of denying Dr.

Goldman the opportunity to wear the yarmulke that he had worn for 13 or 15 years. The issue has been resolved, however, because Congress subsequently passed an act.

I am asking you this question because I would like to know your opinion. If Congress had reaffirmed by statute the regulations of the military relative to the wearing of religious apparel, would that have changed, in your judgment, the constitutional protection afforded to Dr. Goldman under the first amendment? In other words, Congress can enlarge the rights, but can it restrict them? What would be your conclusion if Congress were to statutorily incorporate the regulations pertaining to the prohibition against wearing a religious garment, for example?

Judge GINSBURG. If Congress had made a law in effect adopting the uniform code the service had at the time of Simcha Goldman's case? If Congress had enacted the uniform code into law, then the case would have come to Court challenging that law instead of the uniform regulation, and the Court would have divided over the law, as it did over the regulation. It would have been—was it five to uphold the regulation? It would have been five to uphold the law. I imagine that the Court would have divided just the same way whether the uniform code came up in the form of a regulation or in the form of a law. Judge Starr was very clear that he would have dissented.

My position for myself and then Judge Scalia was that this was a very important question, one that should be decided by the full Court. I did not feel at liberty to write an opinion because I was not on the original panel. I participated only at the petition for rehearing stage. I said we should rehear the case, and the full Court should be briefed on the issue.

But on your question, I think that the Court would have come out the same way whether the challenged measure were a law or a regulation.

Senator COHEN. In other words, Congress cannot——

Judge GINSBURG. I think Congress can enlarge, but it cannot shrink.

Senator COHEN. It cannot shrink. In other words, if the military were to pass a regulation and Congress incorporates that by statute, if the Court decides that infringes upon a fundamental right inherent in one of the amendments to the Constitution, the fact that we had incorporated that by statute would give it no greater weight. We can't restrict something that has been guaranteed by the Constitution. We can only enlarge.

Judge GINSBURG. I think you can exercise your authority under section 5 of the 14th amendment or under the necessary and proper clause. There are many fountains of congressional authority to expand rights.

Senator COHEN. But we cannot restrict them in violation of the Court's interpretation of what is a fundamental right.

Judge GINSBURG. Not unless the Court is to stop being the last resort on questions of constitutional interpretation. Not unless we are to overturn *Marbury* v. *Madison* (1803). The people do have another resort. The Constitution can be amended. The Supreme Court can be urged to rethink its decision.

Senator COHEN. Let me quote the language of the Supreme Court in that particular case.

But the First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by dress regulations. The Air Force has drawn the line essentially between the religious apparel that is visible and that which is not, and we hold that those portions of the regulations challenged here reasonably and evenhandedly regulate dress in the interest of the military's perceived need for uniformity.

That was the conclusion of the Court as recently as 1986. Correct?

Judge GINSBURG. That was the majority opinion in the *Goldman* (1986) case.

Senator COHEN. Right, and it was 5-to-4 decision.

Judge GINSBURG. Yes.

Senator COHEN. It becomes important because your elevation to the Court would, in fact, have changed the outcome in that particular case. It might very well have a major impact on cases that will be coming to the Court.

I say this in connection, for example, with your own very heartfelt and passionate feelings about discrimination in this country. There is a debate taking place on the floor right now that deals with a symbol, a symbol which is anathema to those of African-American descent. It deals with a flag and a charter of a group that has had that flag as its symbol for many years. Your feelings about discrimination are terribly important. Today in response to Senator Kennedy, you talked about discrimination, be it race discrimination or based on religion, gender, or sexual orientation and you said, "Rank discrimination is deplorable."

I assume by the word "rank" you mean intentional or institutional discrimination. Is that what you mean by rank?

Judge GINSBURG. Yes, I think base discrimination is deplorable and against the spirit of this country. Discrimination, arbitrary discrimination without reason——

Senator COHEN. No. Does rank mean institutional discrimination? Does it mean intentional discrimination? Does it mean arbitrary discrimination? Because as I understand the Constitution, it is permissible to discriminate or to classify provided there is a rational basis for it.

Judge GINSBURG. If I discriminate against a person for reasons that are irrelevant to that person's talent or ability, that is what I meant when I said rank discrimination. Arbitrary discrimination, unrelated to a person's ability or worth, unrelated to a person's talent, discrimination simply because of who that person is and not what that person can do.

Senator COHEN. Or what that person does. In other words, you draw it upon a person's status or conduct? Would there be a difference, in your judgment?

Judge GINSBURG. A person's birth status should not enter into the way that person is treated. A person who is born into a certain home with a certain religion or is born of a certain race, those are characteristics irrelevant to what that person can do or contribute to society.

Senator COHEN. What about sexual orientation?

Judge GINSBURG. Senator, you know that is a burning question virtually certain to come before the Court. I cannot address that question without violating what I said had to be my rule about no hints, no forecasts, no previews.

Senator COHEN. It seemed to me that you already did comment on that when you responded to Senator Kennedy this morning. He talked about race, religion, and gender and sexual orientation. I think your comment was rank discrimination is deplorable under all of those——

Judge GINSBURG. I think rank discrimination for any reason, hair color, eye color, you name it, rank discrimination is un-American. There must be a reason, as you said, for any classification. Government can't take action——

The CHAIRMAN. Will the Senator yield on that one point for clarification? We have used the phrase——

Senator COHEN. I have to wrap it very quickly. I promise I will be very brief.

The CHAIRMAN. All right.

Senator COHEN. I am sure she will clarify this as we go through.

The CHAIRMAN. Sure.

Senator COHEN. I believe that this issue is important, and your own experience and the passion with which you feel and express that past experience is important. I am not trying to, in any way, get you to commit how you are going to decide a case but, rather, to understand what you mean by rank discrimination being deplorable and perhaps unconstitutional in certain circumstances. I was curious in connection with your feeling in the *Goldman* case because there the Supreme Court in a 5-to-4 decision clearly indicated that it deferred to the military to engage in what clearly was a prohibition on a fundamental right, the wearing of a religious garment.

You and Judge Starr felt quite strongly, and I suspect Judge Scalia also felt strongly, that this did not meet the rational test basis.

At the time, the Supreme Court disagreed. Now we are going to have a new Supreme Court Justice, so I wanted to clarify what you meant by rank discrimination.

Judge GINSBURG. May I just say one further word about the *Goldman* case?

Senator COHEN. Surely.

Judge GINSBURG. The panel of the District of Columbia Circuit that decided the *Goldman* (1986) case said the very nature of a uniform regulation is its arbitrariness. That panel, as you know, was among the most "liberal" benches one could draw, if one labels judges liberal or conservative. Those three judges stressed the necessarily arbitrary nature of military uniform regulations. The panel was dealing with a discrete category; the opinion was not meant to spill over to any other area. Military uniforms could be arbitrary. That, in sum, was the decision of the panel of my court in——

Senator COHEN. The Court was saying that the military regulation was necessary in order to maintain uniformity. It was an issue of diversity and uniformity, and the Court deferred to the military in that case. That issue is obviously going to be before us and it is going to be before you, I suspect, at some future time. I just

wanted to explore with you your feeling about rank discrimination being deplorable. It is always deplorable. The question is, is it going to be constitutional under some circumstances.

Let me conclude. I made a pledge, Mr. Chairman, that we would break by 4, and I am already a minute or two over. I just wanted to conclude with an observation. I may not have an opportunity to come back and to participate further, Judge.

I know that you are a great student of Holmes. In fact, I was pleased that you placed him in the pantheon of your heroes on the judiciary, at least as far as those of the 19th and early part of the 20th century who are no longer with us.

Holmes wrote a letter to Cardozo, and Cardozo said it was one of his most prized possessions. In this letter, Holmes said:

> I have always thought that not power or place or popularity brings one the success that one desires, but the trembling hope that one has come near to an ideal. The only thing that warrants us for not believing that we are living in a fool's paradise is the voice of a few masters, and I feel it so much I don't want to talk about it any more.

I hope that you will have this place, obviously, and the power and perhaps even the popularity. I hope that you will hold onto that ideal that Holmes spoke of and lived, and that you pay heed to those voices of the few masters that you cited as being among your heroes.

Judge GINSBURG. I hope so, too.

Senator COHEN. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Senator I was necessarily absent on the floor debating an amendment, I understand that you limited yourself to 4 o'clock, to accommodate the witness.

Senator COHEN. Right.

The CHAIRMAN. But I want you to know that, after we break, if you have more questions, you can continue, because we indicated that we would give people up to half an hour, if they wanted it. It is up to you. I know you have other things you have to do, as well.

Senator COHEN. We have an Armed Services Committee markup going on right now. Senator Brown was kind enough to let me go first, so I think I will wait until we complete another round.

The CHAIRMAN. The reason I attempt to interrupt, Judge—and I will recess in 60 seconds—is that when discussion was made about discrimination, the phrase used by the Senator was "the government has a rational basis," and I did not want to let that stand.

Once the Court has concluded that a group is in a suspect category, they require strict scrutiny, not a rational basis, is that not correct? If you make a distinction based on race, race is in a suspect category, the government has to have more than a rational basis, does it not, to make a distinction based on race?

Judge GINSBURG. Yes, Mr. Chairman. Race classifications are subject to strict scrutiny, and the State must have a compelling interest to justify such a classification. We have not seen such an interest in some time.

The CHAIRMAN. I wasn't saying that in any way to imply that you didn't know that, Judge. You have that professorial look at this moment, and I feel mildly intimidated. [Laughter.]

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