

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

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

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

[A short recess was taken.]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Senator DECONCINI. Yes, I saw that.

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

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

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

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

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