I considered that way better. If you had to put pencil to paper, you had to think about the case, get your ideas together.

But my colleagues' view was different. It was that, just as you said, if you put something on a circulated paper, you have kind of committed yourself to it. It becomes a little harder to shake loose from what you wrote, to retreat, than if the first discussion of the case, the first encounter, is just in conversation. It is easier to back off and to modify your position.

Senator HEFLIN. Well, thank you. I am really impressed with your knowledge of the whole history of jurisprudence. I have witnessed a great number of confirmation processes, but I believe you show more of a comprehensive knowledge than any other nominee that I have seen. Maybe we didn't ask all the questions, and maybe they were at that stage that it wasn't developed certainly in regards to some of the earlier ones. But I congratulate you on your response and your knowledge relative to the law.

Thank you.

Judge GINSBURG. I thank you for your kind words.

The CHAIRMAN. That is a good note on which to go to lunch, Judge.

[Whereupon, at 1:27 p.m., the committee recessed, to reconvene at 2:30 p.m., this same day.]

AFTERNOON SESSION

The CHAIRMAN. The hearing will come to order. Welcome back, Judge. I hope you had time to have a cup of coffee and a sandwich.

I now yield to our distinguished friend from Colorado, Senator Brown, for his round.

Senator BROWN. Thank you, Mr. Chairman.

Judge Ginsburg, I look forward to a chance to chat with you, both now and later on as we go through this. I must say your performance and responses have been impressive, and I appreciate the candor that you have demonstrated here.

I wanted to direct your attention to what I think is an interesting development through the years. I suppose every first-year law student learns quickly that ignorance of the law is no excuse. I am not sure many schools really explore that. But it struck me as a very important concept as we go forward, one that perhaps is at the foundation of our jurisprudence.

The first case decided by the Supreme Court in which that doctrine was applied was *Res Publica* v. *Betsy*. It is a 1789 case. As near as I can tell, it is a reflection of the thinking in our common law and, before that, the Norman law, and even had foundations in the Roman law.

In thinking about the concept, though, that you are responsible whether you are aware of the law or not, or liable for violating it whether you are aware of the law or not, it appears that there are a variety of reasons for it. One is the philosophy that I think was reflected in our common law that basically laws reflect common sense, or at least moral mandates; that someone, while they may not be aware of the statute number, they are aware that murder or robbery or other crimes are wrong. So that while people may not be aware of the exact law, they are aware at least of moral mandates which guide us in our daily lives.

I suspect another basis for it is simply that it is tough to function in society without this assumption. It would be tough to get convictions without it.

But I noticed in the original case, the 1789 case, that at the time that was ruled, there were only 27 Federal statutes on the books. Clearly, that is different than our circumstances today. At last count I think there were some 26,000 pages of the United States Code, which, of course, excludes State laws. There were 128,900-some odd pages of the Code of Federal Regulations, and my impression is that this year the Federal Register will print 70,000 pages of notices and regulations that are new.

In doing a quick calculation, if one were conscientious and concerned with their duties as a citizen to know what the law was, and thus to abide by it, I thought if you read 300 words a minute, which is a pretty good pace for regulations, 60 minutes an hour with no breaks, 8 hours a day with no coffee breaks, 5 days a week with no holidays, 52 weeks a year with no vacations, you would have read somewhere in the neighborhood of 31,980 pages of the Federal Register, leaving you well short of half of the new pages printed every year.

The CHAIRMAN. Just think how long that hearing would take. [Laughter.]

Senator BROWN. I give you this background because I would be interested in your thoughts as to whether or not it is fair to insist that ignorance of the law is no excuse, when clearly what was once accomplishable by a conscientious citizen when that doctrine was first applied in the United States is beyond even remotely being possible now.

Judge GINSBURG. That question, Senator Brown, should be addressed first and foremost to people who sit in your forum and not in mine; that is, you can, in the statutes you pass, write in intent and knowledge requirements, and you often do. Sometimes courts have to determine what intent Congress meant, what knowledge the individual must be shown to have had. Sometimes you do speak with a clear voice, and judges appreciate it when you do. Other times we are not clear on exactly what intent requirement Congress contemplated, and then we do our best to try to determine what you meant.

But lawmakers surely should advert to and address the matter. When they expose individuals to a regulatory regime, they should be explicit about the intent or knowledge requirement. A difference based on the consequences may be in order. It is one thing to send someone to prison for violating a law that person didn't know existed. It is another simply to subject a person to an injunctive order requiring compliance with the law. In between those would be some kind of monetary exaction.

In this area, courts take their instructions from the legislature, which has a choice on state-of-mind issues—absolute liability, liability without fault, negligence, knowledge, intent, all that is for the legislature to say. But every citizen should be mindful that we are subject to so much more law than we once were.

Senator BROWN. I appreciate that. Of course, the Romans, when they looked at this question, they came with a little different view, I think, than perhaps our common law developed. The Romans rec-

ognized that someone in society might have an obligation or the ability to understand what the laws were, and others who had not been educated or had other problems would not have the same level of knowing what the law was ascribed to them.

I guess my question is not necessarily the wisdom of this body or of Congress making those decisions. I guess my question is: In light of the deluge—my own words—of statutes and regulations, where we as a Congress have assumed that people are aware of the law, does that trouble you, and do you see any avenues of relief in the Constitution?

Judge GINSBURG. Well, one thing is information, and it depends whether we are talking about the business community or individuals. From time to time, I receive from various law firms in town newsletters describing the latest developments in labor law or ERISA law, for example. Such law firms endeavor to keep their clients informed about new developments in the law.

In other areas, the flow of information is less satisfactory. We talked about Stephen Wiesenfeld's case involving the mother's benefit which became a parent benefit. When Wiesenfeld's case was reported in the press, I received many letters, not simply from fathers but from mothers, who didn't know that benefit was available. The Social Security Administration has tried to increase the availability of knowledge of what the law is—not only what the law requires of you, but the benefits the law provides for you.

Nowadays at funeral homes, at banks, information is accessible about benefits available on death. But I was disconcerted about the number of people who didn't know and, therefore, missed out on benefits because the limitation period for filing had passed.

We now have modern means of communication to spread information. Public service announcements on TV can be useful in that way. All involved with the law—government officers and private persons—should attempt to find solutions to the problem of individuals not knowing what the law is, what the law requires of them, and the benefits provided for them.

Senator BROWN. I understand that, and I guess my inquiry was a little more focused in light of 26,000 pages of the United States Code and 129,000 pages of Federal regulations in force. We can all understand it is a useful legal fiction if you are a law writer to assume that everyone is assumed to know the law.

I guess my question is: Does the Constitution afford any protection against that legal fiction because of the voluminous nature of the laws, the incredible breadth of laws on the books now, and regulations on the books? Does the Constitution provide any protection to citizens that may inadvertently violate a law that they had no idea existed?

Judge GINSBURG. I can't answer that question in the abstract. If it were to come before Court in the guise of a specific case where a party said the law is exposing me to a penalty, it is unfair, unjust, it violates due process, I would have the concrete context and the legal arguments that would be made on one side or the other. But, again, I would like to emphasize that this Constitution is the Constitution for the Congress of the United States, and before any law is passed, every legislator should be satisfied that, in his or her judgment, the law that has been proposed is compatible with con-

stitutional limitations. The Constitution is our fundamental instrument of government, and it is addressed to this body before it is addressed to the courts. We get it only when a citizen or person complains that Congress has, in effect, violated the highest law.

Senator BROWN. I appreciate the nature of your answer and the limitations, and I suspect one of the reasons we have a Court is that the Founders of our country knew the limitations of the legislative body, or at least suspected them.

But are you intrigued with this? I don't mean to bother you with abstractions, but it strikes me that with the very volume of what we have attempted to do in the way of regulating, to me it is an intriguing question that is a difficult one that I think at least raises substantial issues. I don't mean to put words in your mouth, but are you troubled by the breadth of what we have attributed to people in the way of knowledge?

Judge GINSBURG. And not simply in the way of laws. Think of what this body puts out, think of the massive regulations put out by the agencies. Even at the court level, each year the courts produce more volumes of the Federal Reporter than they did the year before. There was a day—when I was in law school and, later, when I was a law clerk—when I skimmed all the Federal advance sheets, the F.Supp.'s and the F.2d's. That would be impossible for me to do nowadays. I can just about manage U.S. Law Week each week.

Yes, we continue to make more and more law, both in the legislatures and the courts, and the agencies produce more than both of those put together.

Senator BROWN. I always suspected that those who came in number one in their class at Harvard or Columbia did things like that, but I didn't know. [Laughter.]

You have attracted some attention by observing with regard to *Roe* v. *Wade* that perhaps a different portion of the Constitution may well deserve attention with regard to that question; specifically, if I understand your articles correctly, the equal protection clause of the Constitution rather than the right to privacy evolving from the due process right contained in the 14th amendment.

Would you share with us a description of how your writings draw a relationship between the right to choose and the equal protection clause?

Judge GINSBURG. I will be glad to try, Senator. May I say first that it has never in my mind been an either/or choice, never one rather than the other; it has been both. I will try to explain how my own thinking developed on this issue. It relates to a case involving a woman's choice for birth rather than the termination of her pregnancy. It is one of the briefs that you have. It is the case of *Captain Susan Struck* v. *Secretary of Defense* (1972). This was Capt. Susan Struck's story.

She became pregnant while she was serving in the Air Force in Vietnam. That was in the early 1970's. She was offered a choice. She was told she could have an abortion at the base hospital—and let us remember that in the early 1970's, before *Roe* v. *Wade* (1973), abortion was available on service bases in this country to members of the service or, more often, dependents of members of the service.

Capt. Susan Struck said: I do not want an abortion. I want to bear this child. It is part of my religious faith that I do so. However, I will use only my accumulated leave time for the childbirth. I will surrender the child for adoption at birth. I want to remain in the Air Force. That is my career choice.

She was told that that was not an option open to her if she wished to remain in the Air Force. In Captain Struck's case, we argued three things:

First, that the applicable Air Force regulations—if you are pregnant you are out unless you have an abortion—violated the equal protection principle, for no man was ordered out of service because he had been the partner in a conception, no man was ordered out of service because he was about to become a father.

Next, then we said that the Government is impeding, without cause, a woman's choice whether to bear or not to bear a child. Birth was Captain Struck's personal choice, and the interference with it was a violation of her liberty, her freedom to choose, guaranteed by the due process clause.

Finally, we said the Air Force was involved in an unnecessary interference with Captain Struck's religious belief.

So all three strands were involved in Captain Struck's case. The main emphasis was on her equality as a woman vis-a-vis a man who was equally responsible for the conception, and on her personal choice, which the Government said she could not have unless she gave up her career in the service.

In that case, all three strands were involved: her equality right, her right to decide for herself whether she was going to bear the child, and her religious belief. So it was never an either/or matter, one rather than the other. It was always recognition that one thing that conspicuously distinguishes women from men is that only women become pregnant; and if you subject a woman to disadvantageous treatment on the basis of her pregnant status, which was what was happening to Captain Struck, you would be denying her equal treatment under the law.

Now, that argument—that discrimination, disadvantageous treatment because of pregnancy is indeed sex discrimination—was something the Supreme Court might have heard in the *Struck* case, but the Air Force decided to waive her discharge. Although the Air Force had won in the trial court and won in the court of appeals, the Supreme Court had granted certiorari on Captain Struck's petition. At that point, perhaps with the advice of the Solicitor General, the Air Force decided it would rather switch than fight, and Captain Struck's discharge was waived. So she remained in the service, and the Court never heard her case.

In the case the Court eventually got, one less sympathetic on the facts, the majority held that discrimination on the basis of pregnancy was not discrimination on the basis of sex. Then this body, the Congress, in the Pregnancy Discrimination Act, indicated that it thought otherwise.

The *Struck* brief, which involved a woman's choice for birth, marks the time when I first thought long and hard about this question. At no time did I regard it as an either/or, one pocket or the other, issue. But I did think about it, first and foremost, as differential treatment of the woman, based on her sex.

Senator BROWN. I can see how the equal protection argument would apply to a policy that interfered with her plan to bear the child. Could that argument be applied for someone who wished to have the option of an abortion as well? Does it apply both to the decision to not have an abortion, as well as the decision to have an abortion, to terminate the pregnancy?

Judge GINSBURG. The argument was, it was her right to decide either way, her right to decide whether or not to bear a child.

Senator BROWN. In this case, am I correct in assuming that any restrictions from her employer to that option, or to that right, would be constrained by the equal protection clause?

Judge GINSBURG. Yes. In the *Struck* case, it was a woman's choice for childbirth, and the Government was inhibiting that choice. It came at the price of an unwanted discharge from service to her country. But you asked me about my thinking on equal protection versus individual autonomy. My answer is that both are implicated. The decision whether or not to bear a child is central to a woman's life, to her well-being and dignity. It is a decision she must make for herself. When Government controls that decision for her, she is being treated as less than a fully adult human responsible for her own choices.

Senator BROWN. I also appreciate that you simply presented this not as the only approach, but as an option that was looked at.

With regard to the equal protection argument, though, since this may well confer a right to choose on the woman, or could, would it also follow that the father would be entitled to a right to choose in this regard or some rights in this regard?

Judge GINSBURG. That was an issue left open in *Roe* v. *Wade* (1973). But if I recall correctly, it was put to rest in *Casey* (1992). In that recent decision, the Court dealt with a series of regulations. It upheld most of them, but it struck down one requiring notice to the husband. The ruling on that point relates to a matter the chairman raised earlier.

The *Casey* majority understood that marriage and family life is not always all we might wish them to be. There are women whose physical safety, even their lives, would be endangered, if the law required them to notify their partner. And *Casey,* which in other respects has been greeted in some quarters with great distress, answered a significant question, one left open in *Roe; Casey* held a State could not require notification to the husband.

Senator BROWN. I was concerned that if the equal protection argument were relied on to ensure a right to choose, that looking for a sex-blind standard in this regard might also then convey rights in the father to this decision. Do you see that as following logically from the rights that can be conferred on the mother?

Judge GINSBURG. I will rest my answer on the *Casey* decision, which recognizes that it is her body, her life, and men, to that extent, are not similarly situated. They don't bear the child.

Senator BROWN. So the rights are not equal in this regard, because the interests are not equal?

Judge GINSBURG. It is essential to woman's equality with man that she be the decisionmaker, that her choice be controlling. If you impose restraints that impede her choice, you are disadvantaging her because of her sex.

Consider in this connection the line of cases about procreation. The importance to an individual of the choice whether to beget or bear a child has been recognized at least since *Skinner* v. *Oklahoma* (1992). That case involved a State law commanding sterilization for certain recidivists. Sterilization of a man was at issue in *Skinner,* but the importance of procreation to an individual's autonomy and dignity was appreciated, and that concern applies to men as well as women.

Abortion prohibition by the State, however, controls women and denies them full autonomy and full equality with men. That was the idea I tried to express in the lecture to which you referred. The two strands—equality and autonomy—both figure in the full portrayal.

Recall that *Roe* was decided in early days. *Roe* was not preceded by a string of women's rights cases. Only *Reed* v. *Reed* (1971) had been decided at the time of *Roe.* Understanding increased over the years. What seemed initially, as much a doctor's right to freely exercise his profession as a woman's right, has come to be understood more as a matter in which the woman is central.

Senator BROWN. I was just concerned that the use of the equal protection argument may well lead us to some unexpected conclusions or unexpected rights in the husband.

You had mentioned earlier, I thought, a very sage observation, that provisions that, if I remember your words correctly, provisions that limited opportunities have been sometimes cast benignly as favors, that we ought to take a new look at these things that are thought as favors in the past. I think that is a fair comment and a very keen observation.

I guess my question is: If you look at these provisions of law that treat women differently than men and decide that they genuinely are favorable, not unfavorable, or practices that are favorable, not unfavorable, does this then mean that they are not barred?

Judge GINSBURG. Senator, that sounds like a question Justice Stevens once asked me at an argument. I said I had not yet seen a pure favor. Remember, I come from an era during which all the favors in the end seem to work in reverse. I often quoted the lines of Sarah Grimke, one of two wonderful sisters from South Carolina, and they said to legislators in the mid-1900's, I ask no favor for my sex, all I ask of my brethren is that they take their feet from off our necks. That is the era in which I grew up. I had not seen a protection that didn't work in reverse.

Many of today's young women think the day has come for genuinely protective laws and regulations. Were the legislature filled with women, I might have more faith in that proposition. But, yes, you can see the difference, you can distinguish the true favor from the one that is going to have a boomerang effect, maybe so. I reserve judgment on that question.

Senator BROWN. My time is out, but I look forward to chatting with you again. Thank you.

The CHAIRMAN. He's going to see if he can think of a favor for you, Judge.

Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.