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*

S. HRG. 102-1084, PT. 1

NOMINATION OF JUDGE CLARENCE THOMAS TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SECOND CONGRESS

FIRST SESSION

ON

THE NOMINATION OF CLARENCE THOMAS TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

SEPTEMBER 10, 11, 12, 13, AND 16, 1991

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kind of an effort to make difficult decisions in any area, a judge tries to examine the relevant evidence and tries to reach a reasoned conclusion and tries to reach a conclusion, without implicating or without involving his or her personal opinions.

Senator LEAHY. Judge, you were in law school at the time *Roe* v. *Wade* was decided. That was 17 or 18 years ago. You would accept, would you not, that in the last generation, *Roe* v. *Wade* is certainly one of the more important cases to be decided by the U.S. Supreme Court?

Judge THOMAS. I would accept that it has certainly been one of the more important, as well as one that has been one of the more highly publicized and debated cases.

Senator LEAHY. So, it would be safe to assume that when that decision came down—you were in law school, where recent case law is oft discussed—that *Roe* v. *Wade* would have been discussed in the law school while you were there?

Judge THOMAS. The case that I remember being discussed most during my early part of law school was I believe in my small group with Thomas Emerson may have been *Griswold,* since he argued that, and we may have touched on *Roe* v. *Wade* at some point and debated that, but let me add one point to that.

Because I was a married student and I worked, I did not spend a lot of time around the law school doing what the other students enjoyed so much, and that is debating all the current cases and all of the slip opinions. My schedule was such that I went to classes and generally went to work and went home.

Senator LEAHY. Judge Thomas, I was a married law student who also worked, but I also found, at least between classes, that we did discuss some of the law, and I am sure you are not suggesting that there wasn't any discussion at any time of *Roe* v. *Wade?*

Judge THOMAS. Senator, I cannot remember personally engaging in those discussions.

Senator LEAHY. OK.

Judge THOMAS. The groups that I met with at that time during my years in law school were small study groups.

Senator LEAHY. Have you ever had discussion of *Roe* v. *Wade,* other than in this room, in the 17 or 18 years it has been there?

Judge THOMAS. Only, I guess, Senator, in the fact in the most general sense that other individuals express concerns one way or the other, and you listen and you try to be thoughtful. If you are asking me whether or not I have ever debated the contents of it, that answer to that is no, Senator.

Senator LEAHY. Have you ever, in private gatherings or otherwise, stated whether you felt that it was properly decided or not?

Judge THOMAS. Senator, in trying to recall and reflect on that, I don't recollect commenting one way or the other. There were, again, debates about it in various places, but I generally did not participate. I don't remember or recall participating, Senator.

Senator LEAHY. So you don't ever recall stating whether you thought it was properly decided or not?

Judge THOMAS. I can't recall saying one way or the other, Senator.

Senator LEAHY. Well, was it properly decided or not?

Judge THOMAS. Senator, I think that that is where I just have to say what I have said before; that to comment on the holding in that case would compromise my ability to——

Senator LEAHY. Let me ask you this: Have you made any decision in your own mind whether you feel *Roe* v. *Wade* was properly decided or not, without stating what that decision is?

Judge THOMAS. I have not made, Senator, a decision one way or the other with respect to that important decision.

Senator LEAHY. When you came up for confirmation last time for the circuit court of appeals, did you consider your feelings on *Roe* v. *Wade,* in case you would be asked?

Judge THOMAS. I had not—would I have considered, Senator, or did I consider?

Senator LEAHY. Did you consider.

Judge THOMAS. No, Senator.

Senator LEAHY. So you cannot recollect ever taking a position on whether it was properly decided or not properly decided, and you do not have one here that you would share with us today?

Judge THOMAS. I do not have a position to share with you here today on whether or not that case was properly decided. And, Senator, I think that it is appropriate to just simply state that it is—for a judge, that it is late in the day as a judge to begin to decide whether cases are rightly or wrongly decided when one is on the bench. I truly believe that doing that undermines your ability to rule on those cases.

Senator LEAHY. Well, with all due respect, Judge, I have some difficulty with your answer that somehow this case has been so far removed from your discussions or feelings during the years since it was decided while you were in law school. You have participated in a working group that criticized *Roe.* You cited *Roe* in a footnote to your article on the privileges or immunity clause. You have referred to Lewis Lehrman's article on the meaning of the right to life. You specifically referred to abortion in a column in the Chicago Defender. I cannot believe that all of this was done in a vacuum absent some very clear considerations of *Roe* v. *Wade,* and, in fact, twice specifically citing *Roe* v. *Wade.*

Judge THOMAS. Senator, your question to me was did I debate the contents of *Roe* v. *Wade,* the outcome in *Roe* v. *Wade,* do I have this day an opinion, a personal opinion on the outcome in *Roe* v. *Wade;* and my answer to you is that I do not.

Senator LEAHY. Notwithstanding the citing of it in the article on privileges or immunities, notwithstanding the working group that criticized *Roe?*

Judge THOMAS. I would like to have the cite to it. Again, notwithstanding the citation, if there is one, I did not and do not have a position on the outcome.

With respect to the working group, Senator, as I have indicated, the working group did not include the drafting by that working group of the final report. My involvement in that working group was to submit a memorandum, a memorandum that I felt was an important one, on the issue of low-income families. And I thought that that was an important contribution and one that should have been a central part in the report. But with respect to the other comments, I did not participate in those comments.

Senator LEAHY. I will make sure that you have an opportunity to read both the footnote citation and the Lewis Lehrman article before we get another go-round. But am I also correct in characterizing your testimony here today as feeling that as a sitting judge it would be improper even to express an opinion on *Roe* v. *Wade*, if you do have one?

Judge THOMAS. That is right, Senator. I think the important thing for me as a judge, Senator, has been to maintain my impartiality. When one is in the executive branch—and I have been in the executive branch, and I have tried to engage in debate and tried to advance the ball in discussions, tried to be a good advocate for my points of views and listening to other points of views. But when you move to the judiciary, I don't think that you can afford to continue to accumulate opinions in areas that are strongly controverted because those issues will eventually be before the Court in some form or another.

Senator LEAHY. Of course, as Senator Metzenbaum pointed out earlier today, you have spoken about a number of cases, and I understand your differentiation in your answers to his question on that. But I wonder if those cases somehow fit a different category. The expression once was that the Supreme Court reads the newspapers, and I suppose we can update that today to say that Supreme Court nominees read the newspapers and know that this issue is going to be brought up.

But, Judge, other sitting Justices have expressed views on key issues such as—well, take *Roe* v. *Wade*. You know, Justice Scalia has expressed opposition to *Roe*. Does that disqualify him if it comes up? Justice Blackmun not only wrote the decision but has spoken in various forums about why it was a good decision. Is either one of them disqualified from hearing abortion cases as a result?

Judge THOMAS. Senator, I think that each one of them has to determine in his mind at what point do they compromise their impartiality or it is perceived that they have compromised their objectivity or their ability to sit fairly on those cases. And I think for me, shortly after I went on the court of appeals, I remember chatting with a friend just about current events and issues. And I can remember her saying to me, asking me three or four times what my opinion was on a number of issues, and my declining to answer questions that when I was in the executive branch I would have freely answered. And her point was that I was worthless as a conversationalist now because I had no views on these issues. And I told her that I had changed roles and the role that I had was one that did not permit me or did not comport with accumulating points of views.

Senator LEAHY. Well, I might just state parenthetically, I have been both a prosecutor and a defense attorney, and I have been before judges who have expressed very strong views on the idea that when they go on the bench, they do not go into a monastery—they still are part of the populace, able to express views. And I have been there when they have expressed views both for and against a position of a client I might be representing, whether it is the State on the one hand or the defendant on another. But I have also felt secure in knowing that they were fairminded people and

would set their own personal opinions aside, as judges are supposed to and as you have testified one should do in such a case.

Let me ask you this: Would you keep an open mind on cases which concern the question of whether the ninth amendment protected a given right? I would assume you would answer yes.

Judge THOMAS. The ninth amendment, I think the only concern I have expressed with respect to the ninth amendment, Senator, has been a generic one and one that I think that we all would have with the more openended provisions in the Constitution, and that is that a judge who is adjudicating under those openended provisions tether his or her ruling to something other than his or her personal point of view.

Now, the ninth amendment has, to my knowledge, not been used to decide a particular case by a majority of the Supreme Court, and there hasn't been as much written on that as some of the other amendments. That does not mean, however, that there——

Senator LEAHY. That is not what I am——

Judge THOMAS. That does not mean, however, that there couldn't be a case that argues or uses the ninth amendment as a basis for an asserted right that could come before the Court that does not—that the Court or myself, if I am fortunate enough to be confirmed, would not be open to hearing and open to deciding.

Senator LEAHY. You are saying that you would have an open mind on ninth amendment cases?

Judge THOMAS. That is right.

Senator LEAHY. I ask that because you have expressed some very strong views, as you know better than all of us, on the ninth amendment. You had an article that was reprinted in a Cato Institute book on the Reagan years. You refer to Justice Goldberg's "invention," of the ninth amendment in his concurring opinion in *Griswold*. And you said—and let me quote from you. You said, "Far from being a protection, the ninth amendment will likely become an additional weapon for the enemies of freedom." A pretty strong statement. But you would say, would you not, Judge, notwithstanding that strong statement, that if a ninth amendment case came before you, you would have an open mind?

Judge THOMAS. Again, Senator, as I noted, my concern was that I didn't believe that—in such an openended provision as the ninth amendment, it was my view that a judge would have to tether his or her view or his or her interpretation to something other than just their feeling that this right is OK or that right is OK. I believe the approach that Justice Harlan took in *Poe* v. *Ullman* and again reaffirmed in *Griswold* in determining the—or assessing the right of privacy was an appropriate way to go.

Senator LEAHY. That is not really my point. The point I am making is that you expressed very strong views—and you have here, too—about the ninth amendment. My question is: Notwithstanding those very strong views you have expressed about the ninth amendment—pretty adverse views about it—would you have an open mind in a case before you where somebody is relying on the ninth amendment?

Judge THOMAS. The answer to that is, Senator, yes.

Senator LEAHY. But if you were to express similar views regarding the principles and reasoning of *Roe* v. *Wade*, you feel that

somehow it would preclude you from having that same kind of objectivity as the views you have expressed about the ninth amendment?

Judge THOMAS. I don't believe, Senator, that I have expressed any view on the ninth amendment, beyond what I have said in this hearing, after becoming a member of the judiciary. As I pointed out, I think it is important that when one becomes a member of the judiciary that one ceases to accumulate strong viewpoints, and rather begin to, as I noted earlier, to strip down as a runner and to maintain and secure that level of impartiality and objectivity necessary for judging cases.

Senator LEAHY. Does that mean if you were just a nominee, a private citizen as a nominee to the Supreme Court, you could answer the question, but as a judge you cannot?

Judge THOMAS. I think a judge is even more constrained than a nominee, but I also believe that in this process, that if one does not have a formulated view, I don't see that it improves or enhances impartiality to formulate a view, particularly in some of these difficult areas.

Senator LEAHY. Thank you, Mr. Chairman. My time is up, but I am sure the judge realizes that we will probably have to revisit this subject a tad more. Thank you.

The CHAIRMAN. Thank you very much.

The Chair recognizes Senator Kennedy for a moment regarding a clarification of a quote that was used this morning.

Senator KENNEDY. Thank you, Mr. Chairman. I think there was just one area of clarification.

Yesterday I questioned Judge Thomas, and I used these words:

> Mr. Sowell goes on to suggest that employers are justified in believing that married women are less valuable as employees than married men. He says that if a woman is not willing to work overtime as often as some other workers, needs more time off for personal emergencies, that may make her less valuable as an employee or less promotable to jobs with heavier responsibilities.

And then the judge went on and gave his response to that question.

In a response to a question earlier this morning from Senator DeConcini, Judge Thomas said, "There were questions on—I think the comment yesterday by Senator Kennedy, I believe, was something to the effect that women who were married weren't as good employees. And as an employer and someone who has employed a significant number of women, I did not find that to be true and made that very clear."

I would just like to ask consent that the record—I understood what Judge Thomas was trying to say this morning, and——

Judge THOMAS. I did not intend to attribute Professor Sowell's quotes to you. [Laughter.]

Senator KENNEDY. So I would just ask consent that the record reflect that modification at the appropriate point.

Senator LEAHY. I thought that was a little out of character there, Ted.

The CHAIRMAN. Without objection, the record will be corrected.

Senator KENNEDY. Thank you.

The CHAIRMAN. The Senator from Pennsylvania, Senator Specter.

Senator LEAHY. Yesterday you and I went through a number of very specific questions and you gave what I thought were, in the appropriate instances, some very specific responses, and in others you felt that you could not respond based on issues that may come before the Court. This morning around 1 or 2 o'clock, I was watching a replay on television of your responses to my questions and your responses to a number of other Senators' questions, and making notes about it.

I was thinking about what I might do today, and I would probably be a little bit less specific, but use the advise and consent process for what I have often felt it should be: a way of looking into your jurisprudential soul, or actually a way for the country to do so.

I realize that, as is appropriate, people pay not so much attention to who might be asking the questions, but, rather, to what you say, and it really is a way for the American people to know just how you think.

So let me ask you this: Judge, you have spoken eloquently of the reaction you had when you first got the call from the President, when he asked you if you would accept this nomination. You spoke eloquently in the Rose Garden. You have been a judge for a number of years in a prestigious court. You have certainly been a student of the Supreme Court from the time you were in law school, and you practiced before it, had to rely on cases from it in deciding how you might vote on individual cases.

Now you have had to think, I would assume, a great deal from the day the President asked you to accept this nomination, right up to this moment, just what you might or might not do as a Supreme Court Justice. In that, you have 200 years of history of the Court. Could you give me some of the cases you consider the most important Supreme Court cases, taken from whatever era, time, recent or not, just some of those that mean the most to you and why?

Judge GINSBURG. To start from the beginning, *Marbury* v. *Madison* (1803) established judicial review for constitutionality of other great decisions of the Marshall Court era, I might mention, as signal, *Gibbons* v. *Ogden* (1824). When I recited from the Pledge of Allegiance before, I said "one nation, indivisible." I would put *Gibbons* v. *Ogden* in the one nation camp.

Proceeding to our times, I would list the great dissents of Holmes and Brandeis in *Abrams* (1919) and *Gitlow* (1925), and Brandeis' concurring opinion in *Whitney* v. *California* (1927). People think free speech was always secure in this country. It really wasn't. That is a development of our current century, reflected in those great dissenting opinions that are now well accepted. But they were originally stated as dissenting positions. *Brown* v. *Board of Education* (1954) must be on any list.

That gives you about half a dozen.

Senator LEAHY. Judge, let me go to the dissents for a moment, because you and I talked about first amendment rights and freedom of speech before. How have you seen the evolution of our free speech rights in this country? Obviously, it is stated in the Bill of Rights from the beginning. But as you said, it has changed, evolved. We saw censorship during the Civil War and President Lincoln's time, everything from the suspension of habeas corpus

and suspension of freedom of speech. We have seen attacks on it that have been either direct government attacks or responses in fear. The McCarthy era comes to mind, when there were truly attacks on the first amendment.

Do you see that right as still evolving in this country?

Judge GINSBURG. Free expression was an ideal from the start. The Alien and Sedition Act, early on, severely limited free speech. That law was never declared unconstitutional by the Supreme Court, but it has been overturned by the history of our country since that time.

The idea was there from the beginning, though. I mentioned the Revolutionary War cartoon, "LIBERTY of speech for those who speak the speech of liberty." The idea was always there. The opposition to the government as censor was always there.

But it is only in our time that that right has come to be recognized as fully as it is today. The line of cases ending in *Brandenburg* v. *Ohio* (1969) truly recognizes that free speech means not freedom of thought and speech for those with whom we agree, but freedom of expression for the expression we hate.

New contexts undoubtedly will arise. But everyone accepts that the dissenting positions of Holmes and Brandeis have become the law. That is where we stand today.

Senator LEAHY. Do you consider *Brandenburg* as one of the great milestones in the Court's history?

Judge GINSBURG. I certainly do, yes. I think *Brandenburg* was a 1969 decision. The McCarthy era was well over by then. There were many brave judges in the period of McCarthy, including Learned Hand, who wrote one of the great early decisions in the *Masses* (1917) case. There were some outstanding decisions of Justice Harlan in that very difficult time for our country. But I think *Brandenburg* is not the least controversial now.

Senator LEAHY. I remember very well when it came down. I was a young prosecutor at the time in Vermont, and I remember some of the discussion there. We have gone through an interesting time during the McCarthy era, when at the University of Vermont, the oldest land grant university, there was a question of whether a professor was loyal enough. Our State's largest newspaper questioned his loyalty, actually trying to get him suspended. The same newspaper now, to its credit, stands up very strongly for free speech. But it shows just how the evolution could be.

In fact, it was a Senator from Vermont, Ralph Flanders, who was probably the greatest Vermont Senator of the century, who stood up and introduced a resolution condemning Senator McCarthy on the floor of the Senate, and finally started to bring to an end what was a very sad and I think sorry time in our history.

I wonder where democracy might be, had we not seen this right continuously expand. It is a momentary contraction, but I believe you would agree with me on this, during our 200-year history, it has continuously expanded, in the aggregate, it hasn't contracted.

Judge GINSBURG. I think we have been a model for the world in that regard. Recall the words from Ballard for America, "The right to speak my mind out, that's America to me." It is one of the great things about our country.

I was a student at Cornell during the McCarthy era. In those days, most students just wanted to make their own way in the world, and were not politically active.

I had a wonderful professor, his name was Robert Cushman, he was one of the teachers who was most important to me. He was in the government department, and I worked for him. He had me read Alan Barth. I scanned issues of "Red Channels" as he suggested. That way, I came to know about what was going on, about the people banned from the entertainment business, because they were considered, if not red, then pink-tinged. That was an indelible part of my upbringing. A great teacher forced me to think about the times in which we were living, when I really didn't want to.

Senator LEAHY. My parents ran a small weekly newspaper back in Vermont and they ran a printing business, and I recall, growing up, being encouraged to read whatever I wanted. Read whatever you want, but just read. It is not bad advice for any parent to give to their child, especially today.

But I am struck by the fact that, as various countries have moved toward democracy, from their new parliaments, they send people to our country to visit with Members of the Congress or State legislatures, and invariably with every single group that has come to my office, we have ended up in a discussion of how we have allowed free speech, an expanse of speech and difference of opinions, and how struck they have been by that, because so many of them have come from countries where there is anything but. There is a controlled press, there is controlled, allowable speech.

What I have always told them is I felt that in our first amendment we really have the whole groundwork for democracy. We have a freedom of religion or not to practice a religion, whichever you want, and freedom of speech, which guarantees diversity and diversity guarantees democracy.

I find now that we have the question of does it expand further in new technologies. I am chairman of the Technology Subcommittee here, and one scholar suggested a new amendment to the Constitution explicitly to extend constitutional freedoms including freedom of speech and also search and seizure protections to new technologies, computer technologies, I guess E mail and all the rest. Do you think we need a change in the Constitution, or do you think we can work it within the Constitution we have, as we deal with computer and other electronic technologies?

Judge GINSBURG. I think that our over 200-year-old Constitution has been able to deal with more difficult things than new computer technology. But I would like to consult my daughter on that question, because she is the copyright expert in our family.

Senator LEAHY. Judge, we all accept easily that political speech is protected. Again, just to expand a little bit on what we discussed yesterday about scientific speech, does it get the same kind of protection?

Judge GINSBURG. Senator, I am not sure I understand what you mean by scientific speech.

Senator LEAHY. If somebody is writing in an area of science, for example, do they have the same protection as if they were speaking just on political issues?

Judge GINSBURG. I can't imagine why not.

Senator LEAHY. What about in the area of entertainment?

Judge GINSBURG. Now we are getting into more slippery territory. It depends on what kind of entertainment, I suppose. The Supreme Court has a series of decisions about speech that is in the netherland between fully protected speech and unprotected speech, speech within the first amendment, but not entitled to the same level of protection as other speech.

The Supreme Court has made decisions about adult movie theaters that can be zoned for the safety of the neighborhood. A municipality can decide to spread them out so they won't be clustered, or can put them all together in one combat zone. There is a difference between the degree of tolerance for such expression and the greater respect accorded political speech.

Then, as you know, there is a category of speech that is unprotected by the first amendment, a category called obscenity. There is also a category of speech that is not out of the ballpark, but is subject to regulation, called indecent speech. That is an area that I can't talk about in specific terms, because it is one that has come before my court, and is coming before the Supreme Court in connection with broadcast regulation. But I recognize that there is that category of speech that does not get the full protection of the first amendment, but is not left out entirely.

Senator LEAHY. Political speech, that truly you feel has absolute protection?

Judge GINSBURG. It has the highest level of protection.

Senator LEAHY. Surpassing all other kinds of speech?

Judge GINSBURG. Yes.

Senator LEAHY. Judge, we have had a lot of discussion here about the impact of mandatory minimum penalties on the judiciary. We have passed a lot of laws in the Congress. We never have Members of the Congress stand up and say they are in favor of crime. Obviously, we are not. But usually in a spirit of showing just how much we disfavor crime, we pass laws to say people shan't do things, we say we will end crime by doubling the penalties or tripling the penalties. Usually the word doesn't get to the criminal, but it does make us feel better and it is nice at campaign time.

But mandatory minimum penalties, some of which I liked when I was a prosecutor, have now expanded greatly. Judge Billings, a Federal judge I respect very much in my State, has written that this type of statute denies that judges have a right to bring their conscience, experience, discretion, and sense of what is just into the sentencing procedure.

Now, you must have had discussions of this issue both in your own court and at judicial conferences. How do you feel about the mandatory penalties? Are they putting too much discretion over sentencing in the hands of prosecutors, and not in the hands of judges?

Judge GINSBURG. Senator Leahy, there was recently published a very intelligent comment by Judge Weinstein of the Eastern District of New York concerning mandatory sentences. He recommended appointment of a commission to do a careful study of how they are working out in practice.

The perception is very strong among many judges—I know this from conversations we have had at meetings of judges—that it is

deceptive to think discretion has been removed. It has indeed been removed from the sentencing judges, because mandatory minimums don't give the judges any choice. If there is an indictment for *x* amount of drug *y* and a conviction for that, then the sentence will be 10 years mandatory or 5 years mandatory, based solely on the character of the drug and the weight that the defendant was charged with distributing.

So the judges' sense is that the discretion has been transferred from them to the prosecutor, who can choose to indict for a lesser weight than the weight actually found at the time the defendant was arrested. There is much concern that these mandatory minimum sentences are transferring discretion from the judge to the prosecutor and that they may be deceptive in other respects, because the likelihood of apprehension—not the sentence length—may be the strongest deterrent. If someone is aware that the chance of being caught is very high and the sentence is sure, even if it is shorter, that awareness probably would be the greatest deterrent you could have.

Senator LEAHY. I remember when I was a prosecutor, I used to try to point out to legislative bodies—they say simply that their idea of good law enforcement is to double the penalties—if you have two buildings side-by-side, two warehouses, one with a very good burglar alarm system on it and one without, which one gets broken into? The penalty for breaking in is the same for either one of them, but obviously they are going to break into the one without the burglar alarm system, because you are not going to get caught or you are less apt to get caught.

I agree with you, it is the fear of apprehension, and then a prosecution, but also it is finality, which goes into a whole other issue. For whatever it is worth, I think that we have got to go back and review this whole question of mandatory minimum sentences. I think we have gotten too far down the road with it.

Judge GINSBURG. There has been enough experience with mandatory minimum sentences by now to make that kind of close look very valuable. I am sure the Federal Bureau of Prisons, too, would have a large contribution to make, to tell the ramifications of a burgeoning prison population. We went from a system where a sentence was effectively one-third of the time imposed; you served one-third of your time and then you were up for parole. Now there is no parole. Your sentence is what you serve.

So I think the time has come when a study, a close look at how mandatory minimums have been working would make a contribution of great value.

Senator LEAHY. Judge, when you came before our committee before for confirmation to the court of appeals, we could ask you questions about Supreme Court cases and you could say, as you did in one form or another, well, of course, if the Supreme Court has ruled that way, as a court of appeals judge, I am bound by it, stare decisis, and so on and so forth.

You don't have those fetters if you go on the Supreme Court. I looked back, and Justice Brandeis, in *Burnett* v. *Coronado Oil and Gas* in 1932, talked about stare decisis, and he said, "In cases involving the Federal Constitution, the Court bows to the lessons of experience and the force of better reasoning, recognizing that the

process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function."

I remember reciting that at different times when I was before our State supreme court as a young lawyer, when I wanted them to change past decisions.

Would you agree with Justice Brandeis, that the lessons of experience can prevail in cases involving the Constitution?

Judge GINSBURG. Yes, I do, but I also agree with something else Justice Brandeis said in that very same opinion. He liked it so much, that he said it twice. Because I was misquoted in my quotation from Justice Brandeis by the press this morning, I would like to repeat it. It says: "In matters of statutory interpretation, it is more important that the applicable rule of law be settled than that it be settled right. This is commonly true," Brandeis continued, "even when the error is a matter of serious concern, provided correction can be had by legislation." There he was making the distinction between construing legislation and constitutional interpretation. The press missed that essential point by stopping the quotation midstream.

Senator LEAHY. They won't miss it twice, Judge. [Laughter.]

Do you agree with that? Do you take that as your philosophy?

Judge GINSBURG. The statement that Brandeis made in *Burnet* v. *Coronado Oil* (1932) and again in *DiSanto* v. *Pennsylvania* (1927), yes. I have said so many times in print, quoting from Justice Brandeis. I believe, too, that stare decisis has an important role in constitutional interpretation. With the possible exception of the passage Senator Grassley read, I associate myself with what was said in *Casey* about settled expectations. I think, in the case of Brandeis, the overruling of *Swift* v. *Tyson* (1842) in *Erie* v. *Tompkins* (1938) is illustration of when stare decisis must give way.

One doesn't lightly overrule precedent even in the constitutional area. But Brandeis made an obvious point, although he said it so well. Correction can come by legislation if the Court messes up on a matter of statutory interpretation. That often can't be done when the question is one of constitutional interpretation.

Senator LEAHY. Well, but even that must have some changes. For example, you could reverse an obscure technical decision of the Securities and Exchange Commission. I don't mean to suggest they are obscure or technical, but say some minor IRS point or something like that. That is one thing. Or you can let it stand even though you don't think it creates justice. Or you could overturn a case like *Brown* v. *Board of Education* or *Taylor* v. *Louisiana*.

Judge GINSBURG. *Taylor* v. *Louisiana* (1975)? Heaven forfend. [Laughter.]

Senator LEAHY. Well, I thought I would just—it is getting late in the afternoon. I wanted to throw that one in.

But you see what I am getting at. Can the Brandeis test always be held? Sometimes the consequences might be horrendous. Is there a point where the circumstances are such that you have to strike out differently?

Judge GINSBURG. No doubt, and I think Brandeis was saying that himself. He said this is commonly truly, not this is always true.

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.