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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

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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.

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

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.

Judge Ginsburg, the famous case of *Miranda* v. *Arizona,* as you so well know, defined the parameters of police conduct for interrogating suspects held in custody. Since that decision, the Supreme Court has limited the scope of *Miranda* in certain cases. The process might be termed as kind of chipping away at it. *Miranda,* like the exclusionary rule, is a pragmatic rule that the Court adopted to provide better administration of constitutional rights.

I am interested in your opinion, if you would share with us: Should the Court be in the business of adopting pragmatic rules?

Judge GINSBURG. The purpose of the *Miranda* warnings is to make certain that a defendant's rights are known to the defendant, so the defendant can exercise them—the right not to speak and the information that, if you do, your words can be used against you, the right to an attorney and the knowledge that if you are unable to pay for counsel, a lawyer will be provided for you by the State. Those, it seems to me, are constitutional rights that should be brought home to every defendant.

Now, sophisticated defendants will know them without being told, but the unsophisticated won't. This practical approach, the *Miranda* warnings, has become familiar to all, thanks to television. I think it has worked.

Senator DECONCINI. You think it is a proper area for the Court to be involved in, certainly in the *Miranda* case, I suspect you do, but just in general of putting forth pragmatic rules?

Judge GINSBURG. In a situation like this, where the object is to ensure that a defendant knows about the right to counsel, knows that the defendant is not obliged to incriminate herself or himself, these are salutary rules that have safeguarded the constitutional right. Frankly, from my point of view, it makes the system run better because then one need not ask case-by-case: Did this defendant know that he had a right to counsel? Did he intelligently waive that right?

It avoids controversies. It is an assurance that people know their rights. It is an assurance that the law is going to be administered even-handedly, because, as I said, sophisticated defendants who have counsel ordinarily will know about their rights, so it is an assurance of the even-handed administration of justice.

Senator DECONCINI. Judge, let me go to another subject. I have been involved in this subject matter for a long time; it is judicial discipline. Had I been the member of the committee who heard your nomination some 13 years ago, I would have asked you this question. I was not, to my recollection.

So I would like to just give you some background of my interest. There are now 842 Federal judgeships. We are expecting that to increase to more than a thousand in the next decade, many more than the Framers of the Constitution I think ever possibly thought we would have.

The impeachment process is the only avenue to remove a judge. As we all know, the impeachment process is slow and cumbersome. It is left to the most egregious cases, some argue without adequate due process. Prior to 1986, the Senate hadn't heard an impeachment trial for 50 years, and since then there have been three. Furthermore, there are two more judges who have failed to resign, although they have been convicted. If only a fraction of the number

of sitting judges are accused of misconduct, the Congress could be just inundated with impeachment proceedings on an annual basis.

There have been a number of proposed constitutional amendments introduced over the years to address this problem. One approach would require that an article III judge who is convicted of a felony and has exhausted all appeals forfeit his or her office and all the benefits thereto.

Another approach would give Congress the power to legislatively set standards and guidelines by which the Supreme Court could discipline judges who have brought disrepute on the Federal courts or the administration of justice.

As a judge, do you think the impeachment process serves as a great enough deterrent to prevent the misconduct of judges? Is that a threat to a judge or intimidation at all in the process of a judge's conduct?

Judge GINSBURG. Senator DeConcini, I am afraid that there may be a real conflict of interest, possibility of bias and prejudice on my part. I am a member of the third branch of government; I prize my independence and the tenure I hold during good behavior. I think that Federal judges take their oaths to heart. Of course, there is always the rare exception, and I think it remains the very rare exception, even though, as the numbers go up, there is going to be——

Senator DECONCINI. Let me put it this way, Judge: Do you think there is any merit to a process within the judicial branch of government, which under a constitutional amendment, would permit the removal of a judge?

In other words, what if a constitutional amendment set up or gave authority to the judicial branch to set up procedures where complaints could be heard? A judge would have an opportunity to respond and to have a hearing and to appeal the hearing, and what have you, and the Supreme Court or somebody within the judicial branch could, in fact, dismiss the judge. Have you given that any thought?

Judge GINSBURG. I understand that the Kastenmeier Commission has been looking into the discipline and tenure of judges. The Commission has published a preliminary draft of its report. The Commission has been operating for some time; it has broad charter to take a careful look at all these areas. I will read the final report when it comes out with great interest, but I don't feel equipped to address that subject.

Senator DECONCINI. Let me ask you this: Is it offensive to you, if the judiciary had authority to discipline judges and that discipline could also include dismissal?

Judge GINSBURG. We already have an in-house complaint procedure, as you know.

Senator DECONCINI. Yes, I do.

Judge GINSBURG. And I think it has worked rather well. In all my years on the District of Columbia Circuit, no complaint has warranted a call for removal.

Senator DECONCINI. My problem, Judge, is what do you do with a convicted judge? Wouldn't it be appropriate for the judiciary to have a process where they could expel that judge? I mean I am giving you the worst of all examples. I am not talking about the liti-

gant who is unsatisfied, doesn't like the ruling of the judge and, thereby, files a complaint as to moral turpitude of the judge, and then you have a hearing on that. I am talking about something that is so dramatic as a felony conviction of a judge.

Judge GINSBURG. Senator, I appreciate the concern you are bringing up. It isn't hypothetical. There are judges who are in that situation. They are rare, one or two in close to a thousand.

Senator DECONCINI. I think there are two.

Judge GINSBURG. So I appreciate the problem. When I was asked before about cameras in the courtroom, I was careful to qualify my own view. I said I would, of course, give great deference to the views of my colleagues on this subject. An experiment is going on right now in the Federal courts on that subject.

I don't feel comfortable expressing my own view, without information concerning the view of the U.S. Judicial Conference on this subject. I know that the judges are going to study the Kastenmeier report, and they are going to react to it. I can just say that I appreciate it is a very grave problem.

Senator DECONCINI. I won't beat it any further. It has troubled me and been a problem that I have dealt with here. I have legislation and constitutional amendments trying to get the court to be a bit more aggressive. They have set up the circuit disciplinary complaint procedures or whatever they are called, and there are some studies that show that they actually have taken some action.

What concerns me is all branches of government are suspect today, I think, by the public for a lot of reasons, some of it our own doing and some may be exaggeration by the press or whatever. And I am just trying to find a solution that would give more credibility to the judiciary. I would like to find that same solution for the legislative branch, but I am just really kind of grasping for thoughts and ideas without wanting to put you in an embarrassing situation that, my goodness sakes, what if the Judicial Conference turns down Kastenmeier or adopts it. And I am not absolutely sure what is in it, but I don't believe it goes near as far as I have suggested. And I was really looking for an opinion of a judge. I can probably find some other judges, and I have on many occasions, and most of them don't want it. Most of the judges I talk to that are personal friends of mine or people that I have been involved with for years in the judicial system, they just say no. Although, you know, candidly, some of them will say, yes, we should do that but it is impossible for us to do that, such as the charge or the opinion sometimes it is impossible for us in the Senate to criticize and really review our own conduct.

I am just looking for some thoughts on it without putting you in an embarrassing position because that is not my intent. And if you don't care to comment any further, I will let it go. I am just very frustrated about it. For almost 15 years now, I have tried to see and encourage the courts to be more involved in it, and going through the impeachment process here, it only frustrates me more because of our lack of being able to address that in a better procedural way.

Judge GINSBURG. Just as Members of Congress prize their speech or debate immunity, so judges prize their independence, the guarantee that they shall hold office during good behavior.

Senator DECONCINI. Thank you, Judge. I will try another judge. [Laughter.]

I have enjoyed, Judge, your frankness, and I want to compliment you again for it as we conclude my second round. I appreciate your attempt to be open with us and convey your views as much as you can. That is important to this Senator. I find this process not just fun, but trying to get inside the mind of a nominee to the Supreme Court without violating their oath and their potential conflicts, what have you, is fascinating, intellectually challenging, and very rewarding when you are as candid as you have been. And Judge Souter and others have fallen into that category.

As you noted in your opening statement, we hold these hearings to aid us in the performance of our task. I take it very seriously. I really don't think there is anything more important that I do as a Senator than addressing nominees to the bench, and particularly to the Supreme Court. The advice and consent duties here are extremely important, and I think Chairman Biden and the ranking member have certainly demonstrated that we take it seriously. And I know the nominees do.

If confirmed, our Constitution will endow you with immense power, and there is no doubt in this Senator's mind that you are well aware of that, having served as long as you have, and there is no doubt in my mind that you will take it extremely seriously and in a very wise manner. And I anticipate, unless something comes out in these hearings or in other procedures prior to the report of this committee, that you will be confirmed. And you have certainly demonstrated, I think, to the public and to this committee your knowledge of the law, your ability to be straightforward, your consciousness and sensitivity toward delicate issues that might come before the Court. And I give you high praise, Judge, for whatever that may be worth.

Judge GINSBURG. Thank you.

Senator DECONCINI. Thank you.

Judge GINSBURG. Thank you so much, Senator. I appreciate those kind words.

Senator DECONCINI. The Senator from South Dakota is recognized. Senator Pressler? North Dakota, not South Dakota.

Senator PRESSLER. Thank you very much.

Judge Ginsburg, I will take up where I left off yesterday. I have reviewed the answers to some of your questions in the area of Indian Country law and have found them lacking, very frankly, in terms of what some of the tribal leaders are looking for.

Let me say that many States west of the Mississippi are very involved in litigation, whether it is California or any of the States that have reservations or tribes or whatever they are referred to, as California uses a different name. I am told that 10 percent of all the cases decided by the Supreme Court last year involved Indian law questions, and it is a matter of growing concern with Indian gaming issues throughout the country, with issues of tribal lands, with issues of civil rights of Indian people. And yesterday you frequently responded by saying that Congress is responsible. And, indeed, it is and I am a great critic of Congress for not acting more.

But on the other hand, 80 years ago Congress passed a law regarding property rights and deeded land, and courts have ruled on the issue. In the last 10 or 15 years, there has been probably more law made by the Supreme Court and the courts regarding tribal law than has been made by Congress. That is probably not appropriate, but it is the way things have been done. I am a great critic of Congress, and Congress should do more. But in some cases, Congress has taken action and passed legislation, such as regarding patented deeded land, but the courts have ruled otherwise.

Congress has taken steps regarding the codification of tribal court decisions. Except for the Navajos, there is no judicial codification of tribal court decisions and no judicial training involved. The *National Farmers Union Insurance* case in the Supreme Court created such a situation of confusion that tribal leaders tell me insurance is hard to obtain on the reservations.

The case in Wisconsin where a Federal judge decided against congressional actions regarding fishing rights, where there had never been any history of netting fish, suddenly a district judge ruled that certain areas had to be set aside for netting fish at great expense to the State of Wisconsin. And this is a judicial decision without Congress acting.

Many of these are social policy decisions made by district court judges and appealed, and they end up in the Supreme Court. It is amazing the number of tribal laws and tribal matters that end up in the Supreme Court. As I said, it appears the Supreme Court, you can correct me on this, only takes about 100 or so cases a year, and perhaps 10 percent of those decided each year deal with Indian law.

I guess tribal leaders want to know—they want to get some feeling, and you have expressed your feelings in other areas—what it is that you know about Indian law, your familiarity from your years of teaching and from your years on the bench. They want to get a feel for your thinking.

Can you give us some response?

Judge GINSBURG. Senator Pressler, I would bring to this area of the law the same care and the same thought I bring to the vast array of Federal law I have handled in the last 13 years on the District of Columbia Circuit. I did not have any familiarity with Indian law as a student. I didn't take any course on that subject in law school. I did not teach in that area. I have not written in that area. That is true of most of the business I have handled on the District of Columbia Circuit, and it is true of most of my colleagues. With the wealth of Federal law, none of us can possibly be specialists in most of the cases that come before us.

I have had to deal with many cases involving complex questions about the environment, about surface mining, for example, cases using terms I had never heard of before I got the particular case. But then I boned up as hard as I could, with the information from the record, the information supplied to me by the capable attorneys in each case. And although I felt very much at a loss at the start, by the time I reached the point of making a decision I felt confident that I knew what was necessary to make a sound decision. And I would bring that same approach and hard work to bear on this question.

In fact, one of my colleagues, who observed the questions you asked me yesterday; was it yesterday? When I got back to Chambers, had placed an article on my desk, with a note that said, "In view of the questions you have been asked, I regret that I did not send this to you earlier." And it is a fine article called "Criminal Jurisdiction on the North Carolina Cherokee Indian Reservation: A Tangle of Race and History." It is by my colleague, David Sentelle. So there are in many parts of the country, as you have indicated, these very complex problems.

I cannot pretend to any special knowledge in this area of the law, but I can undertake that I will approach it in the same way I have approached all other difficult areas I have had to confront in my 13 years on the District of Columbia Circuit.

Senator PRESSLER. I did raise this issue, so I am not surprising you with questions here. I did raise it when you were in my office, and I sent you a series of questions that I would ask in advance.

But, in any event, I have got two or three questions here, and then I will conclude this area of questions. It isn't that I expect you to know detailed things about Indian law, but it is the basics that concern me. It is what the tribal leaders, non-Indians, Western States, and the State attorneys general are concerned with. The Western States attorneys general have meetings on these issues frequently.

Yesterday in your answers to my line of questions in regard to Indian sovereignty, Indian civil rights, tribal jurisdiction, and law enforcement in Indian country, you were very consistent in stating your view that Congress has full power, or plenary power, over Indian affairs, and that the Federal courts will follow the policy Congress sets in this area.

I guess the point I am trying to make here is that in many cases where Congress has acted, the courts in the last few years have overruled, in such as the deeded and patented land cases, the Wisconsin case, the insurance case, and so forth. Indeed, the courts have felt an obligation to act.

I am interested in finding out what you believe to be the limits on Congress' power when dealing with Indian affairs or courts. While it is true that Congress has plenary power in this area, the Court has not been clear identifying the source of Congress' power in this area. Early cases attributed this power to the treaty clause of the Constitution, the property clause, and the war power.

In an 1886 case, *United States* v. *Kagama,* the Supreme Court attributed the power to enact a major crimes act to the trust relationship. The Court rejected the Indian commerce clause as a basis because crimes are not commerce.

However, in a 1973 case, *McClanahan* v. *State Tax Commissioner,* the Court acknowledged the confusion regarding the source of Federal authority over Indian matters. It rejected the trust relationship as a source of congressional power and instead recognized that such power derives from the language in the commerce clause dealing with Indian tribes and from Federal treatymaking authority.

Now, I guess my questions are: To what do you attribute Congress' plenary power over Indian matters? And does the source of the authority vary with the subject matter of the legislation?

Judge GINSBURG. The Supreme Court has said repeatedly that Congress has full power over Indian affairs. A major source of that authority is, of course, article I, section 8, where the power is lodged in Congress. It surely is not lodged in the courts. The one thing that is clear is that the courts are obliged faithfully to follow the treaties and laws in this area as set by Congress. The courts do not have any law-creation role to play. This is not a common law area. This is an area for Congress to control. It is a very difficult area, and the courts will have construction questions presented to them. But that the Congress has the lead role and not the courts I think is plain.

I have done my best, Senator, to answer your questions on this subject. As I have explained, a judge works from a specific case. I have said that in answer to a number of your questions. I can't answer abstract inquiries even in areas I have studied. I can't answer an abstract issue. I work from a specific case based on the record of that case, the briefs that are presented, the parties' presentations, and decide the case in light of that record, those briefs. I simply cannot, even in areas that I know very well, answer an issue abstracted from a concrete case. That is not the way a judge works.

Senator PRESSLER. It is the feeling of many tribal leaders that the courts currently make more law on reservations than does Congress, because of court rulings and the Congress' inaction. So they are very interested in what goes on in the court system, because that is where most of the new law comes from.

My second question—as you may know, many members of Indian tribes, in their relations with their tribes, do not enjoy the protections other Americans have through the Constitution's Bill of Rights. They have a statutory bill of rights which Congress enacted, but it is not as complete as the Constitution's Bill of Rights.

Yesterday, I asked you whether the Native Americans are entitled to the same constitutional protection in Federal courts afforded to all American citizens. You answered, "All I can say is that Congress does have the full power over Indian affairs, and the Federal courts will follow the policy that Congress sets in this area."

My question is, If you feel Congress has full power over Indian tribes, you must regard Congress' abrogation of the U.S. Supreme Court's decision in *Duro* as constitutional, even though it delegated criminal jurisdiction over nonmember Indians who do not have constitutional bill of rights protection against the authority of the tribe. Would that be a fair interpretation of your view?

Judge GINSBURG. I have no question about the authority of Congress to override the Supreme Court decision in *Duro* v. *Reina* (1990).

Senator PRESSLER. Are there any limits to Congress' power to delegate to the tribes criminal or civil jurisdiction over non-Indians?

Judge GINSBURG. I can only repeat the answer that I gave you, Senator Pressler, that Congress has full power over Indian affairs. There is no restriction on a Native American to live in any community that he or she chooses. So we are discussing only the difficult concept of tribal sovereignty and how Congress has chosen to treat that. I certainly didn't mean to suggest that a Native American

outside of a tribal setting doesn't have the same rights as you and I do.

Senator PRESSLER. Are you uncomfortable that the Constitution's Bill of Rights does not extend to Native Americans?

Judge GINSBURG. I can't express my personal view on that subject. I know that there are many people who care deeply about the concept of tribal sovereignty. I am not a member of one of those communities and, as a judge, I will do my best to apply faithfully and fairly the policy that Congress sets with respect to tribal governance.

Senator PRESSLER. I have been informed that Indian tribes, the tribal leadership—and this is complained about by some of the tribal members—successfully convinced the American Civil Liberties Union not to take cases regarding the civil rights of Indian tribal members in their relations with their tribes. As I said earlier, Indians in their relations with their tribes have only limited statutory bill of rights protections and do not have the full panoply of constitutional rights available to most Americans.

Given these circumstances and I believe your prior involvement with the ACLU in winning civil rights cases involving sex discrimination, are you aware of any ACLU policy or understanding regarding taking cases involving the civil rights of Indians in their relationships with the tribes, and, if so, what was that policy or understanding or your reaction to it?

Judge GINSBURG. Senator, I have no knowledge or recollection of any policy of the kind that you have just described.

Senator PRESSLER. My final question in this area: Yesterday, I asked you a question on an Indian tribe's ability to impose fines and forfeiture against non-Indians who reside on a reservation with regard to activities on the land owned by non-Indians. Again, you answered this was an area that is particularly committed to the judgment of Congress.

My questions are, do non-Indians have any due process rights or property rights which they can assert against the authority of the tribal government? And, two, similarly, what due process rights are guaranteed to Indians who are not members of the tribe against a tribal government?

Judge GINSBURG. The authority of the tribal courts is something for Congress to decide. I believe that was my answer yesterday. Those courts will have such authority as Congress chooses to give them, and judges are bound to respect the decisions Congress has made.

Senator PRESSLER. The problem is that the courts have frequently overruled or defined Congress' mandates. Of course, I suppose it is Congress' fault, in the sense that maybe it should pass another law. But much of this ends up in the Supreme Court and the Supreme Court makes the law. That is the way it seems to a lot of people living in the West.

Judge GINSBURG. But the Supreme Court, as any court, has an obligation to construe and apply the laws Congress passes faithfully, and on whatever court I serve that would be my endeavor, no matter what area of the law.

Senator PRESSLER. That concludes my questions. Thank you very much.

Judge GINSBURG. Thank you.

Senator SIMON. The Chairman is tied up and I am going to——

The CHAIRMAN. Please go right ahead.

Senator SIMON. All right.

Judge, you and your family will be pleased to know in the second round I have only one question.

Judge GINSBURG. Yes, I am pleased. [Laughter.]

Senator SIMON. You will bring to the Court more background in international law than any other member of the Court. You will certainly be the only member of the Court who has ever translated Swedish law into English, I am absolutely positive of that. Though, come to think about it, Chief Justice Rehnquist, that is a very Swedish name, and he may——

Judge GINSBURG. Swedish or Norwegian.

Senator SIMON. He is Norwegian?

Judge GINSBURG. It could be. Swedish or Norwegian, I don't know.

Senator SIMON. It sounds Swedish, but we will have to check that very important question. [Laughter.]

The U.S. Supreme Court, in what I think was a terrible 6-to-3 decision, the *Alvarez* decision, said that the FBI could legally go into another country and kidnap someone, because the kidnaping was not covered by the extradition law. It is the only case I can think of where every country around the world condemned what we did, and Senator Moynihan and I have legislation in to make sure this doesn't happen again.

Article VI of the Constitution, as you know, says treaties made or which shall be made under the authority of the United States shall be the supreme law of the land. I do not want to ask you about the *Alvarez* case, because I am sure you would, understandably, decline to comment on that.

But if you would comment on the general theory that because something is not covered in an extradition treaty—and you have had, at least my staff has discovered at least seven cases where you have been involved in international law on the appeals court, and one, *Ward* v. *Rutherford,* in 1991, involved extradition law—if an extradition treaty does not cover going in and kidnaping someone, or if a country owes us some money, does not cover going in and robbing a bank or any number of illegal activities, what is your opinion about the legality of our doing things that are understood by all the countries of the world to be in violation of international law?

Judge GINSBURG. Senator Simon, I can only tell you the code of conduct I would adopt for myself wherever I am, here or abroad, and that is the Constitution of the United States. I would consider it binding on me.

I can perhaps cite an example. There is a good book called "Judgment in Berlin," written by a former Federal judge, Judge Stern, who was sent to judge a hijacking case in Berlin. It was a sensitive case in the international community. A plane was hijacked from Poland, I believe, to take people who had been in East Germany into West Germany. The hijacking presented a sensitive question within Germany. So a court that had been created in World War

II, called the United States Court for Berlin, was resurrected, and a U.S. district judge, Judge Stern, was sent there.

He was told by the State Department that the alleged hijackers would have only such rights as the State Department chose to give them. Judge Stern said, I am a Federal judge, the Constitution is my law, and that is the law I am going to apply in any proceeding over which I preside.

He made sure that defendants had very able counsel—there were two defendants—and that they got the full panoply of rights we accord criminal defendants. He did something remarkable in a country that does not use juries. He insisted that there be a jury trial. The case was tried under German law, under German substantive law, but according to U.S. procedures. And that procedural law was largely determined by the rights guaranteed in the U.S. Constitution. It is a wonderful example, I think, of the way any Federal official should behave at home or abroad. The Constitution and the Federal law should be our guide wherever we are.

Senator SIMON. If I could get you to be a little more specific here, if I can ask, not in commenting on the substance of the *Alvarez* case—incidentally, he was tried in the United States and not found guilty—but were you at all startled, when you heard about the results of the *Alvarez* case?

Judge GINSBURG. If I may, Senator, I would not like to comment on my personal reactions to that case. I think I told you what my view is on how U.S. officials should behave, and I would like to leave it at that. You have cited a decision of the U.S. Supreme Court. I have tried religiously to refrain from commenting on a number of Court decisions raised in these last couple of days.

Senator SIMON. I understand. Let me just say that I hope you were startled, and my hope is that this particular case—first, I hope we overturn it in Congress, so that this cannot happen again. But the fact that an extradition treaty doesn't spell out that we can't go in and kidnap people in another country or we can't rob banks or we can't do all kinds of other things doesn't give us the authority to do those things. My hope is that this is one case where, if we don't pass something in Congress, that you will not let precedent stand in the way of what the international community believes is in our best interest.

If I may add one other thing, Mr. Chairman, that has nothing to do with this procedure: I was over on the floor of the Senate, and I believe you were, too, when our colleague Senator Heflin made a speech that took an incredible amount of courage. I just want him to know I have never been prouder to serve in the U.S. Senate than when I heard that speech.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

I, too, heard that speech and, for the public listening to this, the Senator made a very moving and eloquent speech, as a son of the Confederacy, acknowledging that it was time to change and yield to a position that Senator Carol Moseley-Braun raised on the Senate floor, not granting a Federal charter to an organization made up of many fine people who continue to display the Confederate flag as a symbol. The charter would have given them the right, the imprimatur of the Federal Government to do that.

It had nothing to do with the first amendment, Judge, so don't worry. But the Senator made a very significant speech rivaled only, in my view, by a private speech given to me personally by a man whose office I now occupy, Senator John Stennis from Mississippi.

Judge, I hope some day you are able to come to my office and see the conference table in my room, which Judge Stennis—he was a judge—Senator Stennis presented to me as he left the Senate. It was a table that he referred to as "the flagship of the confederacy," where he indicated to me that every Wednesday, I believe it was, the Senators from the old Confederate States would meet with the most powerful member of the U.S. Senate, from what I hear, in the last 40 years, Senator Richard Russell of Georgia. They would sit at this table at lunch, and to quote Senator Stennis, beginning in the late fifties through the early sixties, plan the demise of the civil rights legislation in the Senate.

The first time I came to his office, as a young Senator at age 29, just having been elected, he asked me why I ran for public office. And being as impolitic as I am, not stopping to think, I said civil rights, Mr. Chairman. As soon as I said that, I realized who I was speaking to, and I remember the beads of perspiration breaking out on my forehead, and he said, "Remember the first time you came to me see me."

And I hadn't, Judge, and he reminded me it was to pay my respect as a young Senator, and he said, "I wanted to tell you then what I want to tell you now." He said,

It's appropriate that this table, the flagship of the confederacy, is now yours, for the Nation has changed, and it is good that it has.

I got up to leave, and he said to me, "One more thing." He said, "The civil rights laws in America have done more to free the white man than the black man."

I thought that was an astounding statement for a then 84-year-old man, I believe, who had served in the Senate over 42 years, and in the minds of young activists or semiactivists, like me in the sixties, was one of the symbols of resistance to change.

You have never been a symbol of resistance to change, but you have been a symbol of courage, and today was one of those days. For the Senator from Illinois, Senator Simon, and me to cast the vote we did today, it takes no political courage. But for you it did, and it was moving.

Senator SIMON. Mr. Chairman, if I may just add, I wish you the best, Judge Ginsburg. I think you are going to bring honor to the U.S. Supreme Court. I will cast my vote for you with great pride.

Judge GINSBURG. Thank you so much, Senator Simon.

The CHAIRMAN. I have attempted to survey my colleagues on both sides of the aisle to see who has additional questions, and I understand that Senator Brown and Senator Heflin have some additional questions, and Senator Specter has some additional questions. I have a very few, maybe 5 minutes worth.

I asked the staff now, I put the staff of all the Senators here on notice that it is my intention to excuse the witness this evening at whatever time, so that she need not come back and is able to see a good movie this weekend or whatever she would like to do. So I would ask you to ask your Senators, if you would, please, in the

next 20 minutes or so to let me know if they have a desire to ask additional questions.

I understand you have begun this round, Judge, at about 5 after 5. If it is appropriate, I would yield now to Senator Brown, whose turn it is to ask questions. After his round of questions, depending on how long they go, you can let me know whether you would like to break then or we should continue with Senator Heflin and his questions. But, hopefully, we will get you home at a reasonable hour, and you will be able to do what I am sure you will, watch the remainder of the proceedings on television. I am sure you will be glued to your television. But that is my intention, if that is appropriate, if that is all right with you.

Judge GINSBURG. That is the greatest thing I have heard all day. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Brown.

Senator BROWN. Thank you, Mr. Chairman.

Judge Ginsburg, I appreciate the long day that you put in. The only thing I know that is somewhat comparable to this process is the bar exam. The only difference, of course, is this is oral and that is written. In this case, many of the people who grade the test have different answers, so it is more of a challenge.

The CHAIRMAN. And they are not as informed as you, and I include myself in that category.

Senator BROWN. I never thought that was a major impediment for people who took the bar exam.

Judge GINSBURG. That was 2 days, at least when I took it, back in ancient times. The bar exam was 2 days. I don't know what it is now.

Senator BROWN. I guess in the older days when I took it, it was 3.

The CHAIRMAN. It was 3 for me as well, but maybe the Senator and I were slower.

Senator BROWN. Our State was less benign. [Laughter.]

It is really quite an extraordinary treat to have you here. You not only have a distinguished academic record that we have talked about, but really a very excellent record in terms as an adjudicator and as a teacher.

If I were to describe an area of the law where perhaps you have as much or more experience than anyone we have had the pleasure of coming before the committee, it would be on the equal protection clause. We touched on it in our earlier discussions, and I thought I would follow up with questions in this area. And I appreciate the sensitivity with regard to how you would rule, and I would want to direct this more to the pleadings and your writings in this area. I say that because I think people should keep in mind that when you are filing pleadings you are an advocate. That doesn't necessarily mean that it is how you would rule. I think anyone who reviews your record knows that.

But with that in mind, as I review the equal protection clause, I guess my first question is if you feel that that clause suggests, in effect, a sex-blind standard with regard to legislation and programs?

Judge GINSBURG. In most instances, that is correct. "Nor shall any person be denied the equal protection of the laws." It is my firm belief that for purposes of being whatever a person wishes and is able to be, sex is not a relevant criterion.

One of the things I think is so wonderful about being the second woman and looking forward to the third and the fourth, is that I am thought of as judge, who happens to be a woman.

Recently, I sat on a complex case with Judge Karen Henderson and my former Chief Judge, Patricia M. Wald. When the three of us left the courtroom at the conclusion of argument we noticed there were three women. We sat together for close to 3 hours. And nobody even remarked on it. That was a tremendous change from the way it was 10 years ago. We were judges who happened to be women, but we were judges. So I think for most purposes, sex is not a relevant criterion for choosing.

Senator BROWN. I particularly appreciated your comment the other day or observation that sometimes that which has been included in our laws that are defined as favors, sometimes is not that at all in the long run for women. And we explored that a bit yesterday. My mother had gone through law school in the 1940's and worked as an attorney in the 1950's and 1960's, and I know from firsthand experience with her life that that is a keen observation.

What I thought I might do is go through questions that occurred to me, though, as I thought about the application of the equal protection clause and ask you to help me understand it, help us understand certain instances in which it may or may not apply.

Nan and I were lucky enough to have twins. They turned out to be a boy and a girl. In the process of their growing up, we have run into occasions where the law and the world treats them differently. I suppose the first thing that happened was that my son had the opportunity to register for the draft, which my daughter did not. Indeed, a provision of the law which may not be extended; the draft is obviously up before Congress right now. But as it is structured now, young men register for the draft; young women do not.

Is this an example of unequal protection under the laws?

Judge GINSBURG. Senator Brown, once it was just that way with jury duty, not that long ago. It wasn't a question that your son had the opportunity. He had the obligation. And so it was with jury duty. Men had the obligation, and women, it was thought, had the opportunity. They could serve if they wanted to. And we may see someday a similar change in this area.

It is not unknown in the world that women are obliged to serve their country as men are. That is something that has been before Congress, and may be before it again.

Senator BROWN. About that time also, both got driver's licenses, and we had the unique pleasure, as I know you have in your family, to add a rider to your policy or to secure different auto insurance rates. As it turned out, the auto insurance companies that we dealt with seemed to think that my son was a significantly greater risk than my daughter. An observation, incidentally, which appears to have some basis in fact.

Judge GINSBURG. Boys drive more, drink more, and commit more alcohol-related offenses. That, on average, is certainly true, and the

Supreme Court acknowledged it in a case called *Craig* v. *Boren* (1976).

Senator BROWN. This is obviously not a function so much of our statutes as a function of our market system with insurance. That is not to say we don't legislate insurance rates. Sometimes we do.

Is this an area where the equal protection of the laws may well require uniform insurance rates?

Judge GINSBURG. Not unless the Government takes over the business of insurance. You know that differentials of that same nature work the other way for pensions. Women, on average, live longer than men. Many women die young; many men live long. But, on average, it is unquestionably true that women live longer than men. And so, until not so long ago, when people retired, the women got less than the men because it was thought that there was actuarial equality. Women would live longer. Women, on average, would live longer so, in the end, they would get the same amount, but it would be stretched out over a longer period of time.

Lawsuits were brought challenging that differential under title VII. The hook was not the Constitution because the Constitution restricts government action, not private action. It was the civil rights, equal employment opportunity legislation Congress had passed. Title VII is applicable to the private sector. And it was often private employers who were providing these plans to their employees. The private employer is covered by title VII and cannot discriminate on the basis of sex, not because of the Constitution but because of the law that Congress passed.

So in group plans connected with employment, those differentials are unlawful. They aren't unlawful yet—unless Congress passes a law so regulating the insurance industry—on an individual basis. If I want to buy an annuity from a private insurance company, then, barring some State law, the insurance company can still say I will get less per month than a man of identical age because, on average, women live longer than men. But in group plans that is no longer permissible because of title VII.

It isn't true for individual plans any more than it is for automobile insurance, and I know just what you are talking about because we had the identical experience when my son got his driver's license. Our premium went way up.

Senator BROWN. I certainly hope that that differential was not as justified as it is in some families. [Laughter.]

Judge GINSBURG. I will remain silent on that subject.

Senator BROWN. I don't know that there is any bar to incrimination of your family.

One of the other areas that comes to mind is the whole question of affirmative action. You have drawn, I think, a very clear and succinct differentiation between government programs and the private sector with your last response in the application of the constitutional protections for equal protection.

Affirmative action comes, I guess, as a remedy for areas where discrimination has been spotted and perhaps well may involve governmental standards that restrict discrimination.

Would the equal protection clause apply to affirmative action programs?

Judge GINSBURG. The equal protection clause applies to government action, and there have been two cases that have come up in the course of these discussions: one, the *Croson* (1989) case, involving city plans, and the other, *Metropolitan Broadcasting* (1990), involving Federal plans. Government action is restricted; it is controlled by the equal protection guarantee. Private action in the employment sector is controlled by title VII prohibiting discrimination on the ground of race, national origin, religion, sex.

So while the equal protection principle doesn't apply, the title VII legislation does apply and does control affirmative action programs in the private sector.

Senator BROWN. I wanted to cover one last area, and it may be an area you would prefer not to explore. If you do, I would certainly understand.

I believe earlier on Senator Cohen and others had brought up a question with regard to homosexual rights. I would not expect you to comment on something that may well involve a case before the Court in the future. But there is a question I thought you might clear up for us that I think has some relevance here.

The equal protection clause, as we have explored it this afternoon, requires, in effect, sex-blind standards with regard to government action or legislation. That relates to classes of people; in this case, males and females. Obviously, there are other classes.

In the event we are dealing with forms of behavior—and I appreciate that is not a foregone conclusion with regard to homosexuals. In other words, it is open to debate whether or not it is a class of people or forms of behavior. But in the event we are dealing with forms of behavior, would homosexuals be protected under the provisions of the equal protection clause?

Judge GINSBURG. Senator Brown, I am so glad you prefaced your inquiry by saying you would understand if I resisted a response, because in this area, I sense that anything I say could be taken as a hint or a forecast of how I would treat a classification that is going to be in question before a court, and ultimately the Supreme Court. So I think it is best that I not say anything that could be used as a prediction of how I might vote with regard to that classification.

Senator BROWN. Judge, thank you for your responses.

Mr. Chairman, I yield back.

The CHAIRMAN. Thank you. It is a convenient time. There are 6 minutes left for us to go vote. Why don't we break now for 15 minutes?

Judge, I think we are moving along. Senator Specter, I was going to ask his staff, it might be appropriate to ask him after the vote if he wishes to question after we come back. I know he has questions. And I don't think there are any other questions on our side of the aisle. I have a couple, but I may submit them in writing to you, on *Chevron*. But at this moment I am not sure anyone would understand except you Chevron from Chivron.

So we now will recess for 15 minutes to go vote, and come back, and then we will see where the next round takes us. But we are getting there, Judge.

Judge GINSBURG. Thank you. I appreciate that.

[A short recess was taken.]

Senator MOSELEY-BRAUN [presiding]. The Judiciary Committee will reconvene.

Senator COHEN. It is quite a day for you, isn't it?

Senator MOSELEY-BRAUN. Tell me about it.

I understand that Senators Grassley, Specter, and Cohen have questions of the nominee.

Senator GRASSLEY. Madam Chairman, for the benefit of my colleagues, I only have questions that probably will take no more than 5 or 6 minutes.

Senator MOSELEY-BRAUN. And I understand—and perhaps I am wrong about this—that you were going to defer to Senator Specter to go first?

Senator GRASSLEY. Not if he will let me go first.

Senator SPECTER. How can I stop him?

Senator MOSELEY-BRAUN. Senator Grassley.

Senator GRASSLEY. Judge Ginsburg, I would like to discuss something with you that we probably would have discussed at our session tomorrow, but if we discussed it tomorrow, we still probably would have to discuss it again in open session anyway. So for the benefit of time, I would like to go ahead with something I have corresponded with you about. If I could put you at ease, recent correspondence that you have had with me basically satisfies me, but I want to go ahead and bring it out for the record, anyway.

I want to address your membership in the Woodmont Country Club. This committee has looked at the club membership of nominees to determine if the club engaged in any discrimination, and you know about our concern about that on this committee. At least for the last several years it has been a major concern. It is even something we debated as recently as our last two executive meetings.

You belonged to the Woodmont Country Club in Rockville for several years in the 1980's. You said you resigned after the club changed its by-laws and you felt it caused Judge Harry Edwards, the only black member of the club, to resign.

So I would like to explore not that aspect of it, but another aspect of this club membership, and that is the ethical implications of your membership at Woodmont. When you joined the club, you did not pay any initiation fee, is that correct?

Judge GINSBURG. That's correct, Senator. We paid dues, but not initiation for the period from August 1980 when I joined, until April 1983, when I resigned.

Senator GRASSLEY. OK. Then you have answered another question I was going to ask, and that was whether or not you paid dues or fees.

The next point is, do you know the amount of initiation fee that was paid by incoming members at that particular time?

Judge GINSBURG. No, but I do know what the dues were at the time that I resigned, I mean the initiation. The initiation at the time I resigned, which Judge Harry Edwards and I were asked to pay, I believe was $25,000.

Senator GRASSLEY. I thank you for that very certain answer. There were press reports to the effect that it was somewhere between $20,000 and $25,000. It is my understanding today's initi-

ation fees would be about $65,000. You could buy a good Iowa farm for that.

Anyway, moving on, the ABA Judicial Code of Conduct prohibits the acceptance of gifts, bequests, favor or loan, except in limited circumstances. Canon 4 requires that if a gift or favor meets one of the exemptions and is accepted, and it must be reported like compensation, if its value exceeds $150. And at the time you joined, it is my understanding that that was $100.

In addition, the Code of Judicial Conduct of the Judicial Conference contains a similar provision in canon 5. I know that you did not consider the waiver of the initiation fee to be a gift, because you only accepted special membership or at least a membership that was classified as special, as opposed to the regular. As you explained in your written response to me, that category of membership did not entitle you to voting privileges. In addition, you could not pass on your membership to your children.

Other than these two distinctions, were there any other restrictions to your special membership?

Judge GINSBURG. It was terminable at will, as I understand it. My membership was a membership category that was terminable by the club at any time.

Senator GRASSLEY. So that was an additional restriction.

Judge GINSBURG. Those three, as I understand it: no right to vote; no right to obtain any membership for my children; and the membership was terminable by the club at any time.

Senator GRASSLEY. You did have a good reason for resigning, but if there had not been that reason for resigning, and considering the fact that you could expect to be on the Court for life, you could have had membership in the club for the rest of your life, as long as you were still a sitting judge, presumably?

Judge GINSBURG. The membership was terminable by the club at any time, as it in fact was. We were not given notice. We didn't know in advance, because we weren't voting members. Both Judge Edwards and I were informed that our special membership would be terminated, and that is what led to my resignation.

Senator GRASSLEY. I don't argue with that and I am only trying to make the point that, at the time you had it and until they notified you that you would have to pay an initiation fee to stay in, that special membership could have been, by the waiving of the initiation fee, could have been good for the rest of your life.

Judge GINSBURG. It could have been for the term of my Government service.

Senator GRASSLEY. Yes. I think I will go on.

You had full use of club facilities, but a waiver of initiation fees. At the time you received this benefit, you did not consider it a gift or favor. But in a letter you wrote to me dated July 21, and which I received today, you indicated that you should have regarded this as a gift and disclosed it, as required under the code of conduct. I am glad to hear that you acknowledge that the waiver of the initiation fee should have been reported.

I would like to have that letter placed in the record, Madam Chairman.

Senator MOSELEY-BRAUN. Without objection.

[The letter referred to and responses of Judge Ginsburg to questions of committee members follow:]