questions about that before, but I would like to nail down a few more points.

I appreciate your answer, and I am not going to go beyond the 15 minutes. I will now yield to the Senator from Pennsylvania.

Senator COHEN. Does that mean I am precluded from raising that issue before it comes back to you, the *Chevron* issue?

The CHAIRMAN. Not at all. Not at all.

Senator SPECTER. Mr. Chairman, thank you very much. You asked for an indication of time. I would expect to use the full 30 minutes.

Judge Ginsburg, I begin by expressing my own concern about the scope of the answers. The chairman said that he wished you would have answered a little more. I would join Senator Biden in that. I appreciate the fact that you have to make your own judgment as to what you will answer.

My own reading of the prior nominees has been that, as a general rule, there were more answers. Some answered less. Justice Scalia answered virtually nothing.

The CHAIRMAN. That is why I would like to be on an island with him. [Laughter.]

Senator SPECTER. He is a very engaging gentleman and a squash player, and I haven't yet been able to persuade him to do that. But when he was before this panel, I think Senator Biden is correct that he answered much less than you have.

You will not find any quotations from me in the record about praising nominees before our panel, and this is the eighth occasion I have been a party to them—praising nominees for not answering questions. I read one of your articles, and as you know, I wrote to you because you had commented that you believed the committee had crossed the line with Judge Bork in questions we asked. I wrote to you and asked for some examples, and I can understand your being too busy to give them.

My own observations have been that nominees answer about as many questions as they have to for confirmation, and I think that Chief Justice Rehnquist, for example, came back and answered some questions. It was a 65–33 vote. The tenor of these hearings has been very laudatory from this side of the bench, and I would join in that, as I said, about your academic and professional and judicial career. So that I don't think there is any doubt about your nomination not being in any jeopardy, but I would just add my voice to those who have commented about an appreciation on our side for more information.

When I asked the question about the death penalty yesterday, I tried to articulate it in as gentle a way as possible. I would not ask you, as Senator Hatch did—and he had every right to ask, and you had every right to decline—about issues moving toward how cases might be decided and whether you agreed with Justices Marshall and Brennan on capital punishment being cruel and unusual punishment in violation of the eighth amendment.

But I think that capital punishment is sort of a landmark issue on law enforcement, its deterrent effect and its ability to be a beacon, so to speak. That is one of the areas where I would have appreciated a little more.

I mention those comments to you at the outset because I think it is important, and this is obviously going to be an area where there are going to be lots of differences of opinion, not only with you today but with the nominees who will follow.

Let me now move to the substantive area that I consider to be very important, and that is the role of the Court on refereeing disputes between the President and the Congress on the War Powers Act issue, about which you wrote a concurring opinion in *Sanchez-Espinoza* v. *President Reagan.*

The issue of the gulf war was very problemsome, and President Bush asserted very late into December 1990 the intent to move into a conflict with Iraq over Kuwait without congressional approval. The leadership in the Congress stated their intention not to bring the matter to the floor. It was in a very unusual procedural setting where we had swearing-ins on January 3, and Senator Harkin of Iowa brought the issue up in a way which I think forced the hand of the leadership, and the issue did come up and we did have a vote on the resolution for the use of power.

Let me move to your concurring opinion in *Sanchez-Espinoza*, as the fastest way to get into the issue and into a dialog, where you said that you:

> would dismiss the War Powers claim for relief asserted by congressional plaintiffs as not ripe for judicial review. The judicial branch should not decide issues affecting the allocation of power between the President and Congress until the political leaders reach a constitutional impasse. Congress has formidable weapons at its disposal: the power of the purse and investigative resources far beyond those available in the third branch.

I would suggest to you, Judge Ginsburg, that the power of the purse is not very helpful if the President goes into Kuwait without authorization from Congress were the Congress to cut off his funding. It obviously can't be done when fighting men and women are at risk.

And when you talk about the investigate resources far beyond those available in the third branch, I don't believe that our investigative resources, which are customarily very important, really bear on this issue.

If we are to have a resolution between the Congress and the President, where we have a Korean war without a declaration of war, we have a Vietnam war without a declaration of war, and we have an issue about a violation of the War Powers Act in El Salvador as the issue came before your court, how can this dispute of enormous constitutional proportion be decided unless the Court will take jurisdiction and decide it?

Judge GINSBURG. Senator Specter, in that case, in the portion you read, I said that the question was not ripe for our review.

Senator SPECTER. I did.

Judge GINSBURG. It is a position developed far more extensively than in the abbreviated statement I made in the *Sanchez-Espinoza* (1985) case. The principal exponent was my colleague, Carl McGowan. He wrote persuasively on congressional standing and the concept of ripeness for review. His position was essentially adopted by Justice Powell in *Goldwater* v. *Carter* (1979). That case concerned the termination of the Taiwan Defense Treaty.

Senator SPECTER. It was Justice Powell who just had a single line: "Although I agree with the result reached by the Court, I would dismiss the complaint as not ripe for judicial review." But I do not believe that either the Supreme Court or the circuit court—and the circuit had it in *Crockett* v. *Reagan*—has ever really dealt with the issue.

I tried with Justice Souter, asked him if he thought the Korean war was a war. I answered the question in the question, because I think the Korean war was a war, and he said he would have to think about it. I said, "I am going to ask you the next round," and over the weekend he came back. I said, "Have you thought about it?" And he said, "Yes, I have." And I said, "Well, was the Korean war a war?" And he said, "I don't know."

I think this is a matter that we really ought to explore with a nominee—standing, ripeness. You have written expansively and I have admired your work on standing. I think that the Court dismisses too many cases on the standing issue. But isn't the Supreme Court there really to referee big, big issues? It is harder to have a bigger issue than the constitutional authority of the Congress to declare war or whether the President exceeds the War Powers Act if we don't come to you. And we can hardly come to you when the troops are in the field.

Judge GINSBURG. Senator Specter, the question for me was: Who is the "we"? I have not ruled out the ultimate justiciability of a question of the kind you have raised. What I said was that I associate myself with the position taken by Justice Powell, and in both decisions and law review articles by Carl McGowan, the position that legislators must stand up and be counted in their own House before they can come to court. If Congress puts itself in conflict with the Executive by passing a resolution, by a majority of both Houses, saying we, the Congress, take the position that the Executive is acting in opposition to our will, at that point I could not say there isn't a ripe controversy. But unless and until that occurs, I have taken the position—whether it is Republican Senators or Democratic Senators—that no ripe controversy exists between Congress and the Executive. The controversy ripens only when legislators who oppose to the Executive's position win in their own branch. Until that point is reached, in my view, there is no justiciable controversy between the two branches of government.

The President is a unitary. The President takes a position. For Congress to take a position, Congress must act by majority vote. I do not think a group of Senators can come to court and ask the third branch to resolve a clash between the legislative and the executive branches. That is my position on ripeness. I have stated that position in an abbreviated way in *Sanchez-Espinoza* (1985). Others take different positions. Members of my court have taken other positions.

As I see it, there must be a majority vote in Congress before the Executive and the Congress can have a controversy ripe for court to review. If a group of legislators does not prevail in Congress, that group cannot come to court for resolution of a clash that, in my mind, does not exist until it becomes the position of the Congress.

That is about all I can say, Senator Specter, on that subject.

Senator SPECTER. Judge Ginsburg, do you believe that the Korean war was a war?

Judge GINSBURG. That is the kind of question on which you might ask a law teacher to expound. If you are asking me how I would rule as a judge—and you are considering me to be a judge, not a legislator—I would have to say the Korean conflict was a complex operation. If I were presented with the record, the briefs, the arguments, I would be required to make a decision on it on the basis of what the parties present to me. I am afraid I can't do any better than Justice Souter did on that question.

The job for which you are considering me is the job of a judge, and a judge has no business expounding on a question like that apart from the record, the briefs, the presentations of the parties. We do have a great attachment in our system of justice to the principle of party presentation. Judges in our system are not inquisitorial. They do not take over the proceedings and pursue what they will. Senator Hatch reminded me of that very forcefully. Very dear to our system of procedure is the principle of party, not judicial, presentations.

I can't answer the question about the Korean war off the top of my head. If I were confronted with it as a judge in a case where the issue was justiciable, I would make my decision on the basis of the record, the briefs, and the arguments before me; out of that setting I am not prepared to answer the question.

Senator SPECTER. May I respectfully suggest, Judge Ginsburg, that a question as to whether the Korean conflict was a war does not come within the confines of justiciable issues where briefs are required and oral argument is required on a narrowly focused matter. As a matter of common life experience, people have a view as to whether the Korean conflict, involving thousands of people with a lot of military action, was or was not a war.

In citing the Korean conflict, I cite something which is not going to come before the Court, and I would expect that that would be the kind of a question where at least we could get some idea as to your life experience and your general approach to a matter of some magnitude, but I am not going to press it.

Let me move to another issue. I have been very much concerned about the Supreme Court functioning as a super legislature. As I said earlier, I am very much concerned about the issue of judicial activism, and would cite two cases where the Court acted as a revisionist Court. The *Griggs* decision was handed down in 1971 on a matter involving the Civil Rights Act, and then *Ward's Cove* came along in 1989 and, in my view, overruled *Griggs*. Congress changed that and returned to *Griggs* with the Civil Rights Act of 1991.

Senator Kennedy asked you earlier today if you agreed with the decision of the Supreme Court in one of those series of cases, and I am going to have to recheck the record to see if that was really answered. But the case I want to take up with you is the case of *Rust* v. *Sullivan,* and the concern that I have here is with an activist-revisionist Court which is going to make new law.

Rust v. *Sullivan* is the gag rule case, and that involved a situation where the provisions of the Public Health Services Act of 1970 relating to counseling on planned parenthood, was passed in 1970, and a regulation was promulgated in 1971 that there could be

counseling on abortion issues. Then in 1988, the Secretary of Health and Human Services issued a new regulation to the contrary, that there could not be counseling. Even though the earlier regulation had stood for some 17 years, Congress had not acted to alter it, strongly suggesting congressional approval of the regulation.

Then in a 5-to-4 decision, the Supreme Court upheld to new regulation, pointing out, among other things, that the new regulation was "in accord with the shift in attitude against the elimination of the unborn children by abortion." I was surprised to see the Court rest its opinion in part on a shift in attitude, shift in public opinion, to come out with a new regulation.

My question to you, as this is now a decided issue, do you agree with the Supreme Court's judgment in *Rust* v. *Sullivan?*

Judge GINSBURG. Senator Specter, remind me of the prior history of that case. It was a question, was it not, of the deference due to the Health and Human Services——

Senator SPECTER. That was a factor in the case, on the deference due a regulation promulgated by the executive branch, but within the context where there had previously been a contrary regulation, which had been in existence for 17 years, and no congressional action to change it during that time.

Judge GINSBURG. You said that you were going to check to see what my answer was about *Griggs* (1971) and *Ward's Cove* (1989). I hope I have been consistent in saying I think that the court, my court, and the Supreme Court, endeavored to determine what Congress meant. *Griggs*, was a unanimous decision authored by Chief Justice Burger, was it not?

Senator SPECTER. It was.

Judge GINSBURG. And wasn't *Ward's Cove* a divided decision?

Senator SPECTER. Five-to-four.

Judge GINSBURG. And then Congress said what it meant. I gave some other examples of such congressional clarification or correction. But I am uncomfortable about inquiries concerning how I would cast my vote in a particular case. I will address and explain, to the extent I am able, any vote I have cast. But you are raising a question about—one of your colleagues said he would inquire about *Chevron* (1984) deference and ask what that means to me.

I will confess I am the judge who wrote the decision that was reversed in *Chevron.* I regard *Chevron* as stating a canon of construction, which Congress is at liberty to say it doesn't want applied. I don't want to sit here before this committee, however, and write the opinion I would have written in the *Rust* v. *Sullivan* case.

Senator SPECTER. Judge Ginsburg, I am not asking you about *Chevron.* The specific case that Senator Kennedy asked you about I believe was *Patterson,* and in response to his question about whether you agreed with the opinion—and I believe it was *Patterson*—he said since they won't come back, you responded about—I don't believe you answered his question—you responded about the Congress changing the law on title VII cases applying to sex discrimination, and then about the *Goldman* case.

But I have moved away from *Patterson* and I haven't brought up *Chervon,* and the decision involving the gag rule, *Rust* v. *Sullivan,* is an example of a revisionist Court, in my opinion. It is a decided

case. What is the problem, on a matter which has been litigated and is finished, in having a Senator on the Judiciary Committee ask a nominee for the Supreme Court whether that case was correctly decided? It is a finished matter. Just as Senator Kennedy asked you about *Patterson* this morning, as he put it, the case won't come back.

Judge GINSBURG. It isn't clear to me, Senator, that the case won't come back, simply because we have a different regulation now. The gag rule was withdrawn in the very first week of this new administration. But it isn't far-fetched to think the rule could return in another administration.

Again, I sense that I am in the position of a skier at the top of that hill, because you are asking me how I would have voted in *Rust* v. *Sullivan* (1991). Another member of this committee would like to know how I might vote in that case or another one. I have resisted descending that slope, because once you ask me about this case, then you will ask me about another case that is over and done, and another case. So I believe I must draw the line at the cases I have decided.

You asked about my statement in *Sanchez-Espinosa,* and I answered that question. If you inquire about something I have written, or an authority on which I have relied, I will do my best to respond. But if you ask how I would have voted on an issue that can come back, I must abstain. I can address an issue or case that is never going to come before the Court again—*Dred Scott,* for example, a decision I said was wrong for all times.

The issue in *Rust* is one that may come back. You can't rule it out, any more than I can. You can say for now the gag rule has been removed, the President removed it in his very first week in office. But it was put in place by the prior administration. I can't rule out the possibility that another administration will put the gag rule back. If I address the question here, if I tell this legislative chamber what my vote would be, then my position as a judge could be compromised. And that is the extreme discomfort I am feeling at the moment. You are asking me to tell you how I would vote on a case you call over and gone, one that can't come up again. I know the case is not going to come up again in the next 4 years. I can't see beyond that. I know that——

Senator SPECTER. How about 8 years? [Laughter.]

Judge GINSBURG. I am not going to predict the result of the next election, any more than you are, Senator.

Senator SPECTER. Judge Ginsburg, do you agree with the decisions of the Supreme Court in the 1930's, when the Supreme Court of the United States invalidated a whole series of congressional enactments on the New Deal, on the ground of substantive due process? Do you agree with those decisions?

Judge GINSBURG. Senator Specter, I think that line of authority has been so discredited by so many Supreme Court decisions, that if anything is well established, it is well established that the *Lochner* era is over. One cannot say of a recent 5-to-4 decision what one can say about the repudiation of the *Lochner* line of cases.

Senator SPECTER. Good. Now that we are finished with the thirties, we can move into the forties.

Judge Ginsburg, do you think that Congress has the authority to take away the jurisdiction of the Supreme Court of the United States to decide the constitutionality of issues under the equal protection clause of the 14th amendment?

Judge GINSBURG. You are asking me, what if Congress decided to do that, and if it were challenged in court—I don't think Congress has ever done that, right?

Senator SPECTER. *Ex Parte McCardle* dealt with that right after the Civil War.

Judge GINSBURG. There is *McCardle* (1869) and there is *Klein* (1872), and I don't think there is much more. If Congress were ever to do what your question hypothesizes, there would almost certainly be a challenge and it would almost certainly come before the Court. I can recite the names of the cases that exist, but I can't say anything beyond that. Any further statement would not be in the best interests of the Supreme Court.

Senator SPECTER. Did you answer—I believe you did yesterday—that you agreed with *Marbury* v. *Madison?*

Judge GINSBURG. I believe——

Senator SPECTER. I don't ask that question lightly, because some don't.

Judge GINSBURG. I believe the institution of judicial review for constitutionality is well established—I think I expressed myself to that effect yesterday. It is a hallmark of this Nation that our courts exercise that function.

We have served as a model for the world in that regard. After World War II, a number of states that never had the institution of judicial review for constitutionality looked to our system as a model. Yes, I feel comfortable that I am not doing any damage to the Supreme Court or the Federal judiciary by saying I believe *Marbury* v. *Madison* (1803) is here to stay.

Senator SPECTER. The time goes fast when I am questioning, maybe more slowly for you, Judge Ginsburg. The red light is on. If I may just pursue this for a moment or two more, Mr. Chairman.

Marbury v. *Madison* established the supremacy of the Supreme Court to decide the constitutionality of issues, and there are some up to this moment who dispute that. I asked you the question about whether Congress can take away the power of the Supreme Court to decide the constitutionality of issues under the equal protection clause of the 14th amendment, because you are the foremost champion of that clause.

But when you declined to answer that question, the thought occurs how do you have inviolate Supreme Court standing to decide constitutional issues, if the Congress can take away the authority of the Supreme Court to decide it, take away the jurisdiction.

When Justice Rehnquist was up for confirmation for Chief Justice, I asked him the question as to whether the Congress could take away the jurisdiction of the Supreme Court, and he declined to answer. Overnight, one of the staffers found an article written by Chief Justice Rehnquist in 1958. It was in the Harvard Law Record. He was then William H. Rehnquist, no titles.

In that article, Mr. Rehnquist criticized the Judiciary Committee for not asking Justice Whittaker, a nominee, important questions on due process. I said to him the next morning, I said this article

was found by staff and this is what you said in 1958, and he had a great answer. He said, "I was wrong." Then I pursued the question, with some tenacity, perhaps, and he finally answered the question. He said the Court could not be stripped of jurisdiction in first amendment cases.

I then asked him what about fourth amendment cases. He said I am not going to answer that. How about fifth amendment cases, due process, right to counsel? No, I am not going to answer. Sixth amendment? I asked him what's the difference between saying the Court can't be stripped of jurisdiction in the first amendment, but you won't answer as to the fourth, fifth and sixth? I said I am not going to answer that, either. [Laughter.]

The CHAIRMAN. Senator, I have a feeling your tenacity is not likely to be rewarded with this Judge.

Senator SPECTER. Don't bet on it, Mr. Chairman.

My final question to you, Judge Ginsburg, for this round is how can your granddaughters have the protection of equal protection under the equal protection clause of the 14th amendment, and my granddaughters, too, if the Congress can take away the jurisdiction of the Supreme Court of the United States to decide those issues?

Judge GINSBURG. Senator Specter, so far I have only one granddaughter.

Senator SPECTER. Just wait.

Judge GINSBURG. I am hopeful. I never said the Congress could. I haven't got the case before me. Chief Justice Marshall, in *Marbury* v. *Madison* (1803), said you start with the case. As Madison said, before the courts can do anything, they must have a case of a judiciary nature. Then Chief Justice Marshall said, when I have a case, I must apply the law to it, and the highest law in the land is the Constitution. That fundamental law trumps other laws. But judges do not apply the Constitution to abstract questions. I am bound by the case, I must decide the case, that is where a judge gets his or her authority to expound on anything from, from what article III says, from a case or controversy, a case of a justifiable nature.

If I may, I do want to emphasize what I hope I have made clear to you, because I do not want to be misunderstood as having criticized this committee. In the article that you read, I confess to an ambiguity. The sentence I wrote was, "The distinction between judicial philosophy and votes in particular cases blurred as the questions and answers wore on." I would like to clarify that I was not criticizing this committee. Far from it. I appreciate now more than ever how difficult it is for the responder to maintain that line and not pass beyond it into forecasting or giving hints about votes in particular cases. I was speaking of the vulnerable responder, not the committee that asked the questions.

I might also say, on your question concerning the word "war," it depends on the context. Are you asking about the power of Congress to declare war, or are you speaking in lay terms? I can recite wise counsel that has always shored me up. What a word means depends on the context in which it is used.

That you define a word one way in one context doesn't necessarily mean that you should define that word the same way in every other context. The notion that you should, said a great law

professor, Walter Wheeler Cook, "has all the tenacity of original sin and must constantly be guarded against." So that is what I was guarding against by not answering the question, was the Korean conflict a war. I must ask in what context are you asking that question, are you asking me to decide whether the Executive, in that affair, violated the Constitution, which gives Congress the power to declare war?

Senator SPECTER. I thank you for your answers, Judge Ginsburg. I will return to the issue of war on the next round, because I don't think there is any context in which it wasn't a war.

I would conclude by saying, and I would ask for your reconsideration of this, that although you should not answer questions about cases which are likely to come before your Court, *Marbury* v. *Madison* could, and, just as that is rockbed, I would hope that we would have assurances from nominees that rockbed issues, like the jurisdiction of the Court to carry out *Marbury* v. *Madison* on constitutional issues, like the first amendment and like the equal protection clause, are inviolate. Those are rockbed issues which are not going to change, no matter who brings them to the Court, and we are willing to stand up and say so.

Judge GINSBURG. In a case of a judiciary nature, I am prepared to do what a judge does.

Senator SPECTER. Thank you.

The CHAIRMAN. Senator Metzenbaum.

Senator METZENBAUM. Judge Ginsburg, during my first round of questions Wednesday, we had a discussion of antitrust. Now, antitrust is sort of a phrase in the law that you are very familiar with, and a lot of Americans don't pay too much attention to it. But in this Senator's opinion, it really has—it is the bedrock of the whole free enterprise system.

The question really having to do with antitrust is whether conglomerates of business or economic power can be used to adversely affect the consumer in his or her right to buy or sell at a fair price.

I would like to follow up on the discussion that we had yesterday. As you may recall, I am concerned about the fact that the Supreme Court appears to be of two minds about certain antitrust cases. Its most recent decision on the subject seemed to favor a pro-big business approach to antitrust law based on economic theory instead of the facts. And that disturbs me much.

My question to you is: How would you view an antitrust case where the facts indicated that there had been anticompetitive conduct but the defendant attempted to justify it based on an economic theory such as business efficiency?

Judge GINSBURG. I am not going to be any more satisfying to you, I am afraid, than I was to Senator Specter. I can answer antitrust questions as they emerge in a case. I said to you yesterday that I believe the only case in which I addressed an antitrust question fully on the merits was the Detroit newspaper case. In my disserting opinion in that case, I attempted faithfully to interpret the Newspaper Preservation Act. I sought to determine what Congress meant in allowing that exemption from the antitrust laws.

Senator METZENBAUM. Indeed you did.

Judge GINSBURG. Antitrust, I will confess, is not my strong suit. I have had, as you pointed out, some half a dozen—not many

more—cases on this court. I think I understand the consumer protective purpose, the entrepreneur, independent decisionmaking protective thrust of those laws, but I can't give you an answer to your abstract question any more than I could—I can't be any more satisfying on the question you are asking me than I was to Senator Specter on the question that he was asking.

If you talk about a particular case—my opinion in the Detroit newspapers case was a dissent. There was a division in the court on how to interpret the statute, the Newspaper Preservation Act. That case indicates my approach to determining what Congress meant.

Senator METZENBAUM. Well, let me ask you this: Do you think that anticompetitive conduct can ever be justified on the basis that you have to have it in order to achieve business efficiency? I am really not asking you how you would vote on a case. I am just sort of asking you generally.

Judge GINSBURG. As you know, there is a key decision by Justice Brandeis, *Chicago Board of Trade*, which teaches that restraints of trade which are not per se illegal can be justified if their effects are more procompetitive than anticompetitive. And that is the analysis one would have to undertake.

You asked me if the only purpose of the antitrust law is efficiency. The cases indicate that the antitrust laws are focused on the interests of the consumer. There is also an interest in preserving the independence of entrepreneurs. I don't think the antitrust laws call into play only one particular economic theory. The Supreme Court made that clear in the *Kodak* (1992) case. But out of the context of a specific case, I can't say much more. No, I don't think efficiency is the sole drive.

Senator METZENBAUM. In a totally different area, I recognize the majority of Americans, and a majority in Congress for that matter, support the death penalty as a means of dealing with violent crime. I have long opposed the death penalty because of my concern that our criminal justice system too often makes a mistake and sentences an innocent person to death.

I am frank to say that there are certain crimes with which I am familiar, which we all read about in the paper, we see on nightly TV, in which I would almost want to go out and shoot the criminal myself with a gun because they are so heinous. But so often, too often, mistakes are made.

Four months ago, this committee held a hearing on innocence and the death penalty, and we heard firsthand about two of the tragic mistakes the criminal system made. We heard from Walter McMillian, an African-American from Alabama, who was convicted of murdering a convenience-store clerk after a trial lasting all of a day-and-a-half. The jury recommended life imprisonment, but the State judge, who was an elected official, perhaps recognized the political aspects of the matter, overruled the jury and ordered the execution of McMillian. After 5 years on death row, Mr. McMillian was freed because he did not commit the murder.

We also heard from Randall Dale Adams, a white man who in 1979 came within a week—within a week—of being executed for the murder of a Dallas, TX, policeman. Ten years later, he was able to show his innocence and was released.

Another example occurred after our hearing. Just last month, a white man from Maryland, Kirk Bloodsworth, was set free after 9 years in prison when it was conclusively proven that he did not commit the heinous rape and murder of a young girl. He had been sentenced to die.

Our committee held a hearing to understand the problems with the Supreme Court's decision in the case of *Herrera* v. *Collins.* In that case, Mr. Herrera was sentenced to die and later obtained evidence that allegedly proved his innocence. A Reagan-appointed Federal judge, a district judge in Texas, wanted to conduct a timely hearing to review Herrera's new evidence of innocence. He was prepared to go forward with the hearing within 2 or 3 days. The State of Texas objected to the district court's decision to hold a hearing, and the case was sent to the Supreme Court for review.

The Supreme Court ruled that the Constitution does not require that a hearing be granted to a death row inmate who has newly discovered evidence which, if proven, could establish his innocence.

In the opinion for the Court, Chief Justice Rehnquist was unable to declare clearly and unequivocally that the Constitution forbids the execution of innocent people.

The attorney who represented the State of Texas went even further than the Chief Justice. She bluntly asserted that if a death row inmate receives a fair trial, it does not violate the Constitution to execute that inmate even if everyone agrees that he is innocent.

Now, frankly, that is a shocking statement that came from the prosecutor in that case. I am extremely concerned with the Court's opinion in *Herrera* and the argument made by the Texas prosecutor. Even though the Rehnquist opinion did not clearly hold that it was unconstitutional to execute an innocent person, it is possible to read that into his statements.

Do you believe the *Herrera* case stands for the principle that it is unconstitutional to execute an innocent person?

Judge GINSBURG. As I understand it—and the case is not fresh in my mind—what the Court said was that the evidence in that case was insufficient to show innocence. It did not exclude a different ruling in a case with a stronger record.

We heard yesterday from Senator Feinstein who expressed her anxiety about the number of cases that go on for years and years. The colloquy occurring here shows the tremendous tensions and difficulties in this area. Her concern was that there must be a time when the curtain is drawn, and your anxiety is that no innocent person should ever be put to death.

Those tensions are before you, some of them are presented in the Powell Commission report that you will address. My understanding of *Herrera* (1993) is that it is concerned with the situation of a prisoner asserting, say 10 years after a conviction and multiple appeals, "I didn't do it," and then the process would start all over again.

I can empathize tremendously with the concerns——

Senator METZENBAUM. No, I don't think anybody would argue that. I don't think anybody would argue that, Judge Ginsburg, that 10 years later he can "I didn't do it," because he has been saying for 10 years he didn't do it.

Judge GINSBURG. What the Court said—this is to the best of my recollection—is that the evidence was too slim in *Herrera* to make out that claim, and it left the door open to a case where there was stronger evidence of innocence. That case is yet to come before the Court. So my understanding of this case is that, based on its particular record, the Court found the evidence too thin to show innocence, but the Court left open the question whether one could maintain such a plea on a stronger showing than the one made in that case.

That is as far as the *Herrera* case went. The decision left open a case where a stronger showing could be made.

Senator METZENBAUM. Now, State courts, of course, should review any new claim of a death row inmate that he is innocent. But that review can be in an atmosphere of strong public pressure for execution, especially when the conviction is for a particularly heinous or vicious crime.

Public pressure in these circumstances is most worrisome when the State trial and appellate judges are elected. Historically, the Federal courts have played a significant role in reviewing State death penalty verdicts. Federal judges have lifetime appointments and are more immune to the strong public sentiments that surround death penalty cases for heinous and violent crimes.

Now, the *Herrera* case raised significant new questions about the availability of the Federal courts to hear the claim of a death row inmate that he has new evidence of his innocence. Would you care to explain your view on the general role Federal courts should play in hearing the claims of death row inmates who have newly discovered evidence of their innocence?

Judge GINSBURG. Senator Metzenbaum, the question of habeas review and its limits is before the Senate, before this committee, I believe——

Senator METZENBAUM. But not before the Court. Not before the Court, so I think it is entirely proper for you to respond.

Judge GINSBURG. I can tell you of the legislation Congress passed for the District in which I operate; that is, we generally do not have habeas review. You have given to the District of Columbia courts a fine postconviction remedy. It is identical to the Federal remedy. The Supreme Court said, some time in the middle 1970's, that one goes from the District of Columbia courts to the Supreme Court. If the Supreme Court turns down a review request, there is no collateral review in the Federal Courts.

Some States must wonder why Congress so values the District of Columbia courts and doesn't similarly value the State courts. But I am now simply stating that in my court we don't have the brand of habeas review that the regional circuits have because Congress has said we don't. One of the reasons is that the President appoints District of Columbia court judges. Although they are not life-tenured judges, they are not elected or appointed by the city government. They are Presidential appointees commissioned to serve as judges for the District of Columbia.

What happens next in Federal habeas review, what controls there should be in setting the difficult balance between fairness to the defendant and finality in the system, is going to be your call,