As you know by the Senate rules, we don't trust an operation where there is no Democrat present. That is a joke. We totally trust the distinguished Senator from Maine.

Senator LEAHY. It is just that I need the experience, that is what it is. That is what he is trying to say.

The CHAIRMAN. I just want to also explain why at 5 of 7 or 8 minutes of 7 I get up and walk out. It is not out of disrespect.

So let me now turn it over to Senator Metzenbaum.

Senator METZENBAUM. Thank you very much, Mr. Chairman.

I am happy to see you here, Judge Ginsburg.

Before I begin my questions, I thought that it might be appropriate to make a brief response to Senator Thurmond's remarks about the need for finality in death penalty cases. This committee held a hearing on the death penalty with two witnesses who were sentenced to death, but later freed because they were innocent, totally innocent. They were close to losing their lives.

One was an Alabama black man who had been in the penitentiary for 6 years. Another was a Texas white man who was in the penitentiary for 10 years. Just this month, a Maryland man was released after 9 years in the penitentiary.

I understand Senator Thurmond's point of view, but, frankly, we have to be careful, because the finality of judgments in death sentences can mean death for innocent persons. That really does not relate specifically, Judge Ginsburg, but I did not want to leave the record open with the implication that everybody who has been found guilty and hasn't finished their rights of appeal should have been executed.

Judge Ginsburg, I have always believed it is important that the men and women who serve on the Court have a good sense of the reality that litigants face and the practical implications of their decisions. I expect that your broad range of professional and personal experiences would give you an understanding of the world faced by the individuals who are before the Court.

Having said that, I am frank to say that I am puzzled by your often repeated criticisms of the decision in *Roe* v. *Wade*, that the Court went too far and too fast. You stated the decision need only have invalidated the Texas abortion law in question. You have also stated that *Roe* curtailed a trend toward liberalization of State abortion statutes.

I am frank to say that some, including this Senator, would question whether women really were making real progress towards obtaining reproductive freedom, when *Roe* was decided in 1973. Would you be willing to explain your basis for making those statements about *Roe* and the state of abortion law at the time of the *Roe* decision?

Judge GINSBURG. Yes, Senator Metzenbaum, I will try. The statement you made about the law moving in a reform direction is taken directly from Justice Blackmun's decision in *Roe* (1973) itself. He explained that, until recently, the law in the States had been overwhelmingly like the Texas law, but that there had been a trend in the direction of reform. The trend had proceded to the extent that some one-third of the States, in a span of a very few years, had reformed their abortion laws from the point where only the life of the woman was protected. In relatively few years, one-third of the

States had moved from that position to a variety of positions. Most of the States followed the American Law Institute model, allowing abortion on grounds of rape, incest, and some other grounds. Four States had by then moved to permit abortion on the woman's request as advised by her doctor.

So I took that statement not from any source other than the very opinion, which I surely do not criticize for making that point. I accept it just as it was made in *Roe* v. *Wade*.

Senator METZENBAUM. Would you not have had some concern, or do you not have some concern that had the gradualism been the reality, that many more women would have been denied an abortion or would have been forced into an illegal abortion and possibly an unsafe abortion?

Judge GINSBURG. Senator, we can't see what the past might have been like. I wrote an article that was engaging in "what if" speculation. I expressed the view that if the Court had simply done what courts usually do, stuck to the very case before it and gone no further, then there might have been a change, gradual changes.

We have seen it happen in this country so many times. We saw it with the law of marriage and divorce. In a span of some dozen years, we witnessed a shift from adultery as the sole ground for divorce to no-fault divorce in almost every State in the Union. Once the States begin to change, then it takes a while, but eventually most of them move in the direction of change.

One can say this with certainty: There was a massive attack on *Roe* v. *Wade*; the Court's opinion became a clear target at which to aim. Two things happened. One side had a rallying cry, the other—a movement that had been very vigorous—relaxed to some extent. Pro-choice advocates didn't go home, but they were less vigorous than they might have been had it not appeared that the Court had taken care of the problem.

So while one side seemed to relax its energy, the other side had a single target around which to rally. My view is that if *Roe* had been less sweeping, people would have accepted it more readily, would have expressed themselves in the political arena in an enduring way on this question. I recognize that this is a matter of speculation. It is my view of "what if". Other people hold a different view.

Senator METZENBAUM. In the *Roe* case, the Supreme Court held that a woman's right to terminate her pregnancy was protected by the Constitution. The Court said that constitutional right was fundamental and deserved the highest standard of protection from government laws and regulations that interfere with the exercise of the right. States had to have a compelling State interest to regulate the right to choose.

In *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, the Court did not overrule *Roe* v. *Wade*. However, the case in *Casey* lowered the standard for protecting a woman's right to choose. The Court held that States may regulate the right to choose, as long as they do not create an undue burden on women.

After the *Casey* decision, some have questioned whether the right to choose is still a fundamental constitutional right. In your view, does the *Casey* decision stand for the proposition that the right to choose is a fundamental constitutional right?

Judge GINSBURG. The Court itself has said after *Casey* (1992)—I don't want to misrepresent the Supreme Court, so I will read its own words. This is the statement of a majority of the Supreme Court, including the dissenters in *Casey*: "The right to abortion is one element of a more general right of privacy * * * or of Fourteenth Amendment liberty." That is the Court's most recent statement. It includes a citation to *Roe* v. *Wade*. The Court has once again said that abortion is part of the concept of privacy or liberty under the 14th amendment.

What regulations will be permitted is certainly a matter likely to be before the Court. Answers depend, in part, Senator, on the kind of record presented to the Court. It would not be appropriate for me to go beyond the Court's recent reaffirmation that abortion is a woman's right guaranteed by the 14th amendment; it is part of the liberty guaranteed by the 14th amendment.

Perhaps I can say one thing more. It concerns an adjustment we have seen moving from *Roe* to *Casey*. The *Roe* decision is a highly medically oriented decision, not just in the three-trimester division. *Roe* features, along with the right of the woman, the right of the doctor to freely exercise his profession. The woman appears together with her consulting physician, and that pairing comes up two or three times in the opinion, the woman, together with her consulting physician.

The *Casey* decision, at least the opinion of three of the Justices in that case, makes it very clear that the woman is central to this. She is now standing alone. This is her right. It is not her right in combination with her consulting physician. The cases essentially pose the question: Who decides; is it the State or the individual? In *Roe*, the answer comes out: the individual, in consultation with her physician. We see in the physician something of a big brother figure next to the woman. The most recent decision, whatever else might be said about it, acknowledges that the woman decides.

Senator METZENBAUM. I won't go further into the *Roe* v. *Wade* case, and let me change the subject on you a bit. For over 100 years, our fair competition laws have protected consumers against monopolies and cartels that fix high prices, boycott smaller competitors, or force consumers to buy unwanted merchandise, in order to get the products they really want.

As one prominent antitrust scholar correctly stated, our antitrust laws are based on a distrust of power, a concern for consumers and a commitment to opportunity for entrepreneurs. In other words, their goal is to protect consumers and small competitors from unfair competition, although not all jurists share that view. Some believe that the only goal of the antitrust laws should be economic efficiency which favors the financial interests of big business over the best interests of smaller competitors and consumers.

In the last two sessions, Supreme Court opinions have taken both a proconsumer and a probig business economic view of antitrust. In the 1992 decision in *Kodak* v. *Image Technical Services*, the Court adopted a decidedly proconsumer approach to the antitrust laws. The Court held that Kodak's business policies could be anticompetitive, based on the extra time and money they cost consumers. Those policies made it virtually impossible for Kodak's cus-

tomers to buy replacement parts and repair services for copying machines from smaller competitors.

However, this term the Court seemed to change direction and it adopted probig business approach to antitrust law based on economic theory. In its decision in *Brook Group* v. *Brown & Williamson Tobacco*, the Court amazingly theorized that a small, but powerful group of tobacco companies could not fix prices and ruin a smaller competitor, despite the fact that the defendant companies believed that they could. The dissent written by Justice Stevens criticized the majority's reliance on economic theory to decide the case, stating that they had relied on supposition instead of facts.

As a member of the District of Columbia Court of Appeals, you participated in about half a dozen antitrust cases. To be frank, those decisions have not given me a very clear idea of which view you take of the antitrust laws. On the one hand, your dissent in *Michigan Citizens for an Independent Press* v. *Thornburgh* impressed me greatly with your high regard for consumers and for fair competition.

In that case, the Attorney General overrode the recommendation of his Antitrust Division and permitted the merger of two financially viable newspapers in Detroit. You were admirably the only judge who looked at the facts and questioned whether the Attorney General's decision would open the door to a self-serving competition quieting arrangement between local newspapers in Detroit and other markets.

On the other hand, you joined the court's opinion in *Rothery Storage & Van Company* v. *Atlas Van Lines*. Now, that decision has been criticized by commentators for taking an economic view of the antitrust laws which favors big business over smaller competitors and consumers.

Because the Supreme Court appears to be of two minds about the antitrust cases, I frankly believe the next Justice will have an important influence on the direction the Court takes. As I stated, your antitrust decisions don't give me a clear idea of how you will come out on those cases.

Please share with us your views as to whether a defendant can excuse anticompetitive conduct that violates the antitrust laws on the basis of an economic theory of business efficiency.

Judge GINSBURG. Senator Metzenbaum, I think your recitation of the purposes of the antitrust law—to protect consumers, to protect the independent decisionmaking of entrepreneurs—is entirely correct. I am pleased that you like my opinion in the *Michigan Citizens* (1989) case. It is a decision that I wrote. I think it gives the best picture of my views in this area.

As for *Rothery Storage* (1986), that is an opinion I joined but did not write. It seemed a rather clear case of an arrangement involving a small firm in an industry that had many firms and no entry barriers, plus the particular arrangement was to the advantage of consumers.

No one doubted that. There was no dissenting opinion in *Rothery*. Four judges considered that case, and all four of them came to the same conclusion. So I think your concern is not with the decision or the judgment reached, but with portions of the court's opinion.

You know how we work in courts of appeals. *Rothery* was decided in the first instance by District Judge Oberdorfer. He wrote a good opinion. We could have rested on that opinion. But the case was fully briefed and argued in our court before a panel of three judges. We voted unanimously to affirm. The opinion was then assigned to one of the three of us. Such an opinion, when completed, is circulated to the panel and panel members respond. We all agreed with most of the opinion.

The major difference centered largely on a footnote. I don't think that the judgment reached in *Rothery* is one that many would criticize. Facets of the opinion may have been open to criticism. When one of my colleagues is assigned the opinion, I will read the circulated opinion carefully. If anything stands out as genuinely troublesome, I will alert the writer of the opinion. Perhaps the footnote could have been revised or eliminated as a collegial accommodation. But the *Rothery* judgment itself seems to me noncontroversial. As I said, the case was not a difficult case.

Senator METZENBAUM. Let me switch to still another subject. Thank you for your response.

As Chair of the Senate Subcommittee on Labor, I have tried to be a strong advocate for America's workers. I reviewed your court of appeals opinions in labor law cases, and I would like to ask you about two of those decisions: *Conair* v. *NLRB* and *St. Francis* v. *NLRB.*

In both cases, workers were trying to organize to improve their wages and working conditions. Federal law protects their right to do that. You know that. I know that. Most people in this country know that. But when they tried to organize, the employers responded by threatening to close the plant, by coercively interrogating and threatening employees, and by firing union sympathizers.

It was no surprise that the employers' unlawful tactics worked. The employees were very intimidated, and the unions lost both elections.

You agreed in these cases that the employers had engaged in "serious," "outrageous," "massive and unrelenting antiunion conduct" that interfered with the workers' freedom to organize. Nevertheless, although the NLRB has broad discretion to grant effective remedies, you voted in both cases to reject the Board's order, requiring the employer to bargain with the union. In short, you agreed that the employers had violated the law in a pervasive fashion, but you voted to overturn the remedy that the NLRB thought was appropriate.

I am not interested in going over the facts of either of these cases or even the legal basis for your decisions. I don't see any useful purpose in that. But in reading your opinions, I can't discern whether you can identify with the harsh practical realities of the workplace when antiunion employers intimidate their employees to prevent them from organizing. I can't tell from your decision whether you understand what it is to have your boss threaten your livelihood and your family's economic well-being, to watch your friends lose their jobs, to sit in the boss' office while he interrogates you about your union sympathies, all because you and your coworkers are trying to band together to improve your wages and working conditions.

Supreme Court Justices, as you and I both know, are far removed from these harsh realities. If they don't come to the job with a deep understanding of the problems of America's workers, they will never achieve that understanding.

I wonder if you could shed some light on your insight into the problem of workers trying to organize in the face of an antagonistic employer and whether there is anything in your background that gives you some feeling of understanding of the challenge that the worker has.

Judge GINSBURG. Senator Metzenbaum, I don't think one needs to delve into my psyche on that score. I think if you take a full and fair look at the body of decisions I have written in the labor law area, you will be well satisfied that I possess the empathy you have just expressed. I might mention the *Fort Bragg* (1989) case, among many.

In *St. Francis* (1984), I did not say the Board lacked power to issue a bargaining order in that setting. Far from it. I said give us a reason.

One of the things we must be careful about regarding administrative agencies is any tendency for them to abuse their authority. One of the easiest ways to be abusive is to decide turbulent questions without giving a reason.

It seemed to me that on the facts presented in *St. Francis*, the Board had not justified imposing a bargaining order. *St. Francis*, unlike *Conair* (1983), was not a case of egregious conduct. Unfair labor practice, yes, but not the kind of pattern that was involved in *Conair*. And so I did not say that a bargaining order would be inappropriate in that situation. All I said was, Board, you haven't given us a reason why you ordered bargaining in this case and not in other similar cases. All I asked of the NLRB was this: Say why you ruled as you did. It seemed to me unsatisfactory to have an order out there without adequately supportive reasoning.

Conair was a different case. *Conair* was the worst kind of conduct imaginable on the part of an employer. But I was dealing with a statute, the NLRA, that protects the rights of employees. And that was a situation where the employees themselves had never in any way indicated that they wanted a union.

Senator METZENBAUM. Isn't that the case where 45 percent of the employees had signed cards?

Judge GINSBURG. There was never at any point a showing of a card majority.

Senator METZENBAUM. That is correct.

Judge GINSBURG. And what I said was this: The principle of majority rule is fundamental to the legislation, the NLRA. It seemed to me that if Congress wanted to give the Board the authority to issue a bargaining order, even when there was never proof that at any time a majority of the workers wanted a union, the majority rule principle would have to be abandoned. If Congress wants the Board to have that authority, Congress should say so. I thought it involved a basic policy decision that the legislature should make.

Now, it has been many years, you know, since the *Conair* decision, and in all that time the legislation has remained unaltered. But——

Senator METZENBAUM. Because the law already permits—the NLRB has the right to recognize, order an employer to recognize a union where less than a majority of employees have signed cards and have not voted in an election if the employer's conduct is of such a nature that it has been so intimidating and so harassing and so restrictive of the employee's rights. The NLRB has that right now.

Judge GINSBURG. There was a very strong dissent in *Conair* to that effect, whether you needed to have a showing of a majority at any time.

Strong arguments can be made either way, Senator. I am simply saying that there is written into that Act, the NLRA, the principle that underlies so much of our society, and that is the principle of majority rule. The NLRA says it is the employees' choice.

There was another factor in *Conair*, as you know. Because of the way, unfortunately, the process moves, by the time that case came to our court there had been—by the time it got to the Board for decision, no less the court, by that time, there had been a total turnover of employees. So none of the people who were in that shop at the time the Board decided the case had been exposed to the employer's egregious practices. If the Board had succeeded in imposing a bargaining order at that point, the NLRB would have imposed the order on a whole new set of employees. So that was a factor, too.

Senator METZENBAUM. I have long been an advocate for placing what Thomas Jefferson described as a wall of separation between church and state. I applaud Justice Hugo Black's statement in the 1947 case of *Everson* v. *Board of Education* that the first amendment has erected a wall between church and state that must be high and impregnable.

As you know, in the 1971 case of *Lemon* v. *Kurtzman*, the Court devised a three-part test which applies strict scrutiny to any law that has a religious purpose. To pass muster, a law must not pertain specifically to religion, must not advance nor inhibit religion, and must not excessively entangle government with religion. It is a strict test, as I believe it should be. It has been used to strike down such things as State tax relief programs that benefited parochial schools.

However, some of the Justices currently sitting on the Court are in favor of toppling this wall between church and state. This term, Justices Scalia and Thomas ridiculed the *Lemon* test. In their dissent in *Lamb's Chapel* v. *Center Mauritius School District*, the Justices compared it to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad after being repeatedly killed and buried."

Both Justices suggested that pencils should be "driven through the creature's heart" and that is should be buried "fully six feet under."

In my opinion, if the *Lemon* test were to meet the fate Justices Scalia and Thomas have in mind, it could put the Government in the business of choosing which religious groups receive taxpayer dollars. It could even destroy the religious harmony on which our country prides itself.

I don't believe that you have written an opinion that speaks directly to this issue. At least we did not come across it. Would you care to give us your view of the *Lemon* test and whether you agree with Justice Black that the Court should keep a high and impregnable wall between church and state?

Judge GINSBURG. Senator Metzenbaum, you are right that I don't have any cases in the establishment area except a couple of standing cases. I do have a few in the free-exercise area. This issue, as you know, will come before the Court in many cases in the future, as it has in the past. My approach or attitude about criticism, the kind that you read, is generally to ask: "What is the alternative?" It is easy to tear down, to deconstruct. It is not so easy to construct. Some of my law school and judicial colleagues don't appreciate that sufficiently. It is much easier to criticize than to come up with an alternative.

So, as a general matter, I would never tear down unless I am sure I have a better building to replace what is being torn down.

Senator METZENBAUM. Thank you very much, Judge Ginsburg. My time has expired.

Senator LEAHY [presiding]. Thank you, Senator Metzenbaum.

The last questioning this evening will be Senator Simpson's. Senator Simpson.

Senator SIMPSON. Mr. Chairman, that was a ghoulish case that our colleague from Ohio reported on. I was fascinated by that language. Who did that? I will ask him, but I see he is preoccupied. It was certainly graphic.

Senator SIMON. It was Justice Scalia.

Senator SIMPSON. What was that ghoulish case you were quoting from there, Senator Metzenbaum, that ghoulish case about stakes in the hearts and the specters of the night and six feet into the hole?

Senator METZENBAUM. It is *Lamb's Chapel* v. *Center Mauritius School District*.

Senator LEAHY. I think the question of the Senator from Wyoming was who was the judge writing the opinion.

Senator METZENBAUM. Well, I don't know who wrote the prevailing opinion, but the two who wrote the language that I read were Scalia and Thomas. You remember them.

Senator SIMPSON. I remember them. [Laughter.]

Senator LEAHY. I didn't want the record to be incomplete, Alan.

Senator SIMPSON. I wondered when he was going to insert that in the record.

Senator METZENBAUM. I thought I had said it at the time.

Senator SIMPSON. I perhaps missed that. But, nevertheless, it is always the spirited thing to follow Senator Metzenbaum, and I have been doing that for 14 years. You can imagine the burden that I have to carry, because he usually lays all the traps and he knows I am going to jump right in them. And I often have, and probably will again.

Nevertheless, upon his retirement—and he announced that—I went to the floor very swiftly, and I said as far as Senator Metzenbaum—and I spoke glowingly about him, and I said, "But I don't want this to sound like a eulogy, although there have been many times when I wished it was." [Laughter.]

And so we shall miss him and his incisive participation, but he has lots more, many more months to go to serve on this committee. I enjoy him very much.

Senator METZENBAUM. Thank you, Alan.

Senator SIMPSON. Many questions have been asked. It can get tedious. You are all great sports at this hour, and if we go a little further tonight, you will have less to do tomorrow. And I think you would appreciate that. But you are very patient and very adroit in your responses.

Let me ask one. It came to me as I looked at a large bulk of material that our ranking member, Senator Hatch, provided us. That was a significant number of recusals. Where you recused yourself, it was quite a bulky stack. You have been recused from hearing cases more than 250 times, by count of someone on my staff, during your years on the circuit court, and that obviously is no problem and would not be a problem on the circuit court since another judge could take your place on the panel. But it seems that it could be a problem on the nine-member Supreme Court.

Will it be a problem? What do you foresee there? And I realize that is totally nebulous. Assuming your confirmation, what—I sense you will be very careful about doing that whenever you feel any sense of the conflict. In looking at some of those recusals, they were very precise, very specific; in fact, backed up carefully with documentation, letters. It was impressive, and I am not even suggesting anything that would be awry. But what do you think could happen with regard to recusals?

Judge GINSBURG. The number that you recited, in fact, startled me. I was not aware that——

Senator SIMPSON. Over the years.

Judge GINSBURG [continuing]. That there was any such number. I did recite, in response to the questionnaire, what my recusal policy is.

Senator SIMPSON. It is very clear and certainly very appropriate.

Judge GINSBURG. And the specific instances, which were not too many, in which I determined to recuse myself sua sponte, those are, I think, just 11, 11 in 13 years.

Senator SIMPSON. Eleven?

Judge GINSBURG. Yes. There are automatic recusals in my court for every judge, and that is worked out in the clerk's office. Each judge has a recusal list of clients, of parties whose cases that judge will not sit on because of a financial interest—in my case, it is never because of stock ownership, because when I got this good job we sold all our securities. Some of the judges will list one company or another, and they won't sit on those cases because they or their spouse or a minor child owns securities. That is never a cause of a conflict for me. Rather, my recusals generally occur when a lawyer in my family has a client relationship with a party. But I would have to see what is the basis for that number.

Senator SIMPSON. I am sure that what you say is so, and in most cases the clerk would automatically recuse you from her list of the parties that you had left, and I have a hunch that your list was very complete.

Judge GINSBURG. I think, Senator, now that you jog my memory, my very first year on the court, I may have had an unusual num-