Judge GINSBURG. The only comment that I have, Senator Specter, is that I appreciate the difficulty that State and Federal courts alike have had in this area. I have explained that in the District of Columbia Circuit, we do not have such cases. We do not engage in habeas review over State court decisions. Our counterpart to State courts, our District of Columbia courts, have their own postconviction remedy identical to 28 U.S.C. 2255, and applications for review go from there to the Supreme Court, with no collateral review, no collateral attack in the Federal courts.

So, if confirmed, this will be new business for me. I know it is very difficult business for State and Federal courts in the regional circuits across the country, but I will come to it, if confirmed, new. It is not business I have had, as my colleagues on other Federal courts have had.

Senator SPECTER. Thank you very much, Judge Ginsburg. I end with a compliment, as I began, on your academic, professional, and judicial career. I compliment you on your stamina.

Judge GINSBURG. Thank you.

Senator SPECTER. Thank you.

Senator HATCH. Senator Cohen, do you have any questions?

Senator COHEN. One brief one.

Senator MOSELEY-BRAUN. Senator Cohen.

Senator COHEN. I am told we are going to start voting in about 5 minutes, and I just have one question I think perhaps you can clarify for me, Judge Ginsburg.

Earlier today, Senator Specter asked the question about the resolution of war powers. Whenever you have a conflict between the executive branch and the legislative branch, the Court is generally reluctant to intervene, particularly as it involves foreign policy.

I think you suggested that one way of bringing this to a state of ripeness before the Court would be in a situation in which the President has committed forces. Congress could pass a resolution objecting to the action taken by the President, and that might in and of itself present a justiciable issue or a ripe issue for the Court. Am I correct?

Judge GINSBURG. Such a controversy, whatever other threshold barriers might be argued, would be ripe only if Congress as a body put itself in opposition to the Executive.

Senator COHEN. Through a legislative action.

Judge GINSBURG. Right.

Senator COHEN. I would like to just ask the one question in another field. It does involve foreign policy, but it is something that we have dealt with. I will not ask you how you would rule on the issue, but, rather, the process which Congress might follow.

In the field of foreign policy, the President generally asserts the fact that the President is the primary mover, as such, in the field of foreign policy, the spokesperson for the institution that executes foreign policy. But Congress also have a role to play and a major role to play in the formulation of foreign policy. That is clear when we talk about overt programs.

We move into a somewhat different field when we talk about covert programs. There has always been a conflict between the Executive and the congressional branches dealing with the so-called covert actions. We saw that during Iran-Contra.

We have a law on the books, that was passed I believe back in 1980, in which Congress said that if a covert action is to be undertaken, then the President should notify the requisite members, heads of the committees, intelligence committees and the majority and minority leaders in both Houses in advance. If that were not possible to do, then it should be done within a reasonable timeframe. The assumption was it would be within a relatively short period of time, a day or two.

During Iran-Contra, of course, there was no notification of a covert action that was undertaken by the Executive, and an interpretation was delivered by the Justice Department. The Attorney General wrote an opinion which indicates that the President could give notice whenever he, or conceivably she, decides to give notice. It could be a day, it could be 2 days, it could be a week, it could be a month, it could be 6 months, whenever the President decides. So you have a basic conflict between the two branches.

What I would like is to ask you, again not the result, but the process. Suppose that Congress passes a law which mandates that a President must notify the congressional leaders of a proposed covert action within, let's say, a 48-hour period. The President either allows the bill to become law without signing it or he vetoes it and the veto is overridden, and the President were to challenge it at that point, saying it is unconstitutional.

My assumption would be—and I am very rusty on this issue—my assumption would be the Court would probably decline to hear it, because it was not yet ripe, that there was no justiciable issue before the Court. You can either nod or not, under those circumstances.

But let me just take it one step further. Let's suppose the President vetoes the bill, does not challenge its constitutionality, but simply it is overridden, it becomes law, as such, even though the President still maintains it is unconstitutional. Let us assume that he goes forward with a covert action. Congress is placed in a very difficult position. On the one hand, we can't disclose that the President has undertaken the action, without violating our own responsibilities here. Second, it might very well endanger the lives of those individuals who are undertaking that particular covert action. So we are presented with a dilemma. We cannot cut off funding, we cannot go public, we cannot really do very much about it.

Would you recommend under those circumstances, in order to get a case before the Court procedurally, that Congress pass a resolution in order to bring the case to the Court, without violating its own rules about disclosing that—how would we get the case to the Court is what I am asking you. I am asking you as Professor Ginsburg, not as Judge Ginsburg.

Judge GINSBURG. But I am not Professor Ginsburg. I am Judge Ginsburg and I belong to the third branch. You have a very able Senate counsel. He has appeared before us a number of times. I would refer that question to the Office of Senate Counsel for advice. One thing I can't do is give an advisory opinion, even if the parties file pleadings for one.

Senator COHEN. I thought you gave one to Senator Specter earlier about the War Powers Act. One a day?

Judge GINSBURG. No, I spoke of a position I had taken in court on ripeness. I have taken the position, together with my colleague, my former colleague Judge McGowan, that these cases are not fare for the courts, unless and until Members of Congress stand up and are counted. I was simply repeating a position that I have taken.

Senator COHEN. Fair enough.

Senator MOSELEY-BRAUN. Senator Hatch.

Senator COHEN. Thank you——

Senator MOSELEY-BRAUN. I'm sorry, Senator Cohen, I thought you were finished.

Senator COHEN. I am finished. Thank you, Judge Ginsburg. I have a number of questions. I am looking at the clock and I am looking at you, and you have held up extraordinarily well.

Judge GINSBURG. Thank you.

Senator COHEN. I thank you for your answers.

Senator MOSELEY-BRAUN. Are you sure?

Senator COHEN. That I am finished?

Senator MOSELEY-BRAUN. Yes.

Senator COHEN. I am sure for this evening.

Senator MOSELEY-BRAUN. Thank you very much, Senator Cohen. Senator Hatch.

Senator HATCH. Thank you, Madam Chairman.

I am going to wind up, Judge Ginsburg, with one question and then some comments. The question I have is on the establishment clause, and I don't want to keep you any longer. It has been a real ordeal, but it is an important thing, because you have been asked a wide variety of questions by both sides of the aisle, you have answered an awful lot of questions here, and I have great respect for your legal acumen.

On the establishment clause, of course, the establishment clause of the first amendment provides that Congress shall make no law respecting an establishment of religion, as you know. Under the test devised by the Supreme Court in 1971, the *Lemon* v. *Kurtzman* test, a practice establishes the establishment clause only if, one, it reflects a clearly secular purpose, two, has the primary effect that neither advances nor inhibits religion, and, three, avoids an excessive entanglement with religion.

Judge GINSBURG. Right.

Senator HATCH. I am very concerned that this abstract, a historical test is often applied in a manner that is insensitive to practices that are part and parcel of our political and cultural heritage. In particular, narrow reliance on the *Lemon* test ignores the richer strain of Supreme Court precedent that recognizes that the interpretation of the establishment clause should "comport with what history reveals was the contemporaneous understanding of its guarantees." Of course, I am quoting *Lynch* v. *Donnelly,* the case that you know back in 1984.

In Justice Brennan's words, "The existence from the beginning of the Nation's life of a practice is a fact of considerable import in the interpretation" of the establishment clause. That is in *Walz* v. *Tax Commissioner* in 1970. Now, do you agree or disagree that the historical pedigree of practice should be given considerable weight in the determination of whether a practice amounts to "the establishment of religion"?