

Senator SIMON. Is it misreading what you are saying to say you have not had a chance to dig into this as thoroughly as you eventually will obviously have to, but that on the basis of your limited knowledge of it, you have no difficulty with the *Lemon* test now? Is that incorrect?

Judge GINSBURG. I think that is an accurate description. It is also accurate to say I appreciate that the United States is a country of many religions. We have a pluralistic society, and that is characteristic of the United States.

Senator SIMON. And if I could just add, it is not only characteristic, I think it is very, very important that we maintain this. Obviously there is some working together. When the local Methodist church is on fire, no one says separation of church and state, we can't call out the fire department. But we have been careful in avoiding some of the mistakes that some other countries have made.

The CHAIRMAN. Senator, on my time, because we have gone through this a number of times, may I ask a question off of the last question you just asked?

Senator SIMON. You certainly may.

The CHAIRMAN. Hopefully it will help clarify rather than confuse.

The *Goldman* case to which the Senator referred, the case which is popularly known by most people as allowing a soldier to wear a yarmulke while in uniform, you were a dissenting view in the circuit. Your view on appeal—

Senator COHEN. Mr. Chairman, would you clarify? Disallow the wearing of—

The CHAIRMAN. In other words, the judge took the position that a soldier could wear a yarmulke while in uniform, notwithstanding a military prohibition against such use, she arrived at that decision using reasoning I will not go into now, but it relates to this question.

Senator COHEN. Was that a majority or minority opinion?

The CHAIRMAN. Her opinion ended up being the majority opinion of the Supreme Court—

Judge GINSBURG. I wish it did. It—

The CHAIRMAN. No, I mean, excuse me. Your opinion ended up being the minority opinion when it hit the Supreme Court, when it was decided.

Judge GINSBURG. It was the majority opinion of Congress.

The CHAIRMAN. Yes. [Laughter.]

That is a good way of putting it.

Senator HATCH. I know.

The CHAIRMAN. But you reasoned and argued, reasoned in your opinion when it was before you, that the soldier in question should be able to, under the free exercise clause—explain the case to me. [Laughter.]

Judge GINSBURG. Captain Goldman had been in service for many years, and one day the base commander said, "You're out of uniform," because he was wearing a yarmulke, which was his religious observance. The failure of the service to accommodate to that deviation from the uniform regulation was made the basis of a case that came before my court. It came before a three-judge panel. I was not on that panel.

The panel unanimously ruled that uniform regulations are, by their very nature, arbitrary and that the courts were not to second-guess the military in this decision.

There was then a petition to rehear the case en banc. I voted to rehear the case en banc. Three people did, but the majority voted against rehearing the case.

I did not write a full opinion in the *Simcha Goldman* (1986) case. I wrote a statement saying the case should be reheard by the full court. I said the full court should not embrace the argument that a uniform is a uniform, so there could be no deviation. The case, I thought, was worth fuller attention.

The CHAIRMAN. So you ultimately did not reach a conclusion whether or not it violated his constitutional right.

Judge GINSBURG. I just said we should not leave the final word for our court with the three-judge panel; we should rehear the case; the full court should rehear it.

The CHAIRMAN. Would there have been any question in your mind about the need to rehear it had the *Lemon* test been in place?

Judge GINSBURG. Because this was a free exercise case, it involved the accommodation that the Government would have to make to the free exercise of Captain Goldman's religion.

The case fell in the military category. The panel reasoned that the military setting is different. Many rights people enjoy, including free speech rights, are curtailed for members of the military.

That was the main line of the panel's position in Captain Goldman's case. The question ultimately decided by Congress was: In the interest of allowing Captain Goldman to freely exercise his religion, could the military be called upon to make this accommodation to him? Congress realized the free exercise right more fully than the courts did in that instance, and that issue, I think, is now well settled.

The CHAIRMAN. Thank you, Senator.

Senator SIMON. Of course, Mr. Chairman. If I might just add, I spoke on the floor on that issue. The question is: In addition to the fundamental religious question, the free exercise question, does it in any way impair the military? It has not impaired the Israeli military. The Indian Army has Sikhs who wear a different head-dress. They are among the finest members of the military of India. So that on a military ground, also, it did not have much validity.

If I may shift to a totally different subject so I get a little more of an understanding of where you are, in your opening statement you accurately described Judge Learned Hand as one of the world's greatest jurists. No other non-Supreme Court member has had as much influence in the history of our country as Judge Learned Hand. You had one unhappy experience with him, but you had the privilege of meeting him and knowing him—slightly, anyway. I wish I could have had that experience.

What made Judge Learned Hand such a distinguished jurist?

Judge GINSBURG. His tremendous learning, his facility with the English language so that he could describe things so extraordinarily well; his great love of the law as a craft; his genuine caring about people. Some people think he was too restrained and moderate in his judging, but he believed in the people and in the importance of keeping liberty alive in the hearts of men and women.