Judge GINSBURG. You know the historic origin of the current absence of genuine protection. She, according to the common law, was under his wing and cover.

The CHAIRMAN. That's exactly right.

Judge GINSBURG. The law assumed that he took good care of her. He was allowed to beat her, but only mildly.

The CHAIRMAN. That's right. It was pointed out to me, Judge, as you well know, in the first hearing I had years ago on this issue. One of the witnesses looked at me and said, Senator, do you know where the phrase rule-of-thumb comes from? And I admit I did not know. She said let me tell you. She said under our English jurisprudential system, in the common law the woman was property—I knew that—and a chattel—I understood that. And she said, but at one point in the development of the common law, we reached a point where there were too many complaints about men beating their wives to death and/or crippling them, and so they thought they had to do something. So the rule adopted by the English courts was you could beat your wife with a rod, as long as it was no bigger than the circumference of your thumb. That is real progress.

I want to point out one other thing: Senator Moseley-Braun, you keep wondering why I flew to Chicago and helped unpack your apartment and move in, and to plead with you to come on this committee. Can you imagine what the Judge would have said, if both of you were not on this committee?

So I am working hard substantively to change it, but also so I don't get unfairly tarred.

Senator MOSELEY-BRAUN. Mr. Chairman, I must say that you once again showed stunning brilliance and insight in making that invitation at the time. I have been delighted to serve on this committee.

The CHAIRMAN. Well, I am glad you are, Senator. And I want to point out, I promised the Senator—excuse me for this digression, I will yield to my friend from Alabama—I promised the Senator, if you come on the committee along with Senator Feinstein, there won't be controversial nominees. The first 29 or so were controversial. But I have kept my promise, we finally have one. OK.

Senator Heflin.

Senator HEFLIN. Thank you, Mr. Chairman.

First, let me say that we are all delighted to see Senator Specter back. He looked a little peaked and I can understand why, but his questioning and his comments were erudite, scholarly and incisive, as they always have been. He is pretty much his old self, except he is wearing a cap and we understand why he is having to wear a cap. But let me warn you that if he comes back on his second round of questions, you had better be fearful if he is wearing a football helmet. [Laughter.]

I am going to try to get into some issues and things that you have not been asked about. I think we have gone over a great number of things, and I have tried to follow the line of questioning and will attempt to go into some areas that have not been inquired about.

You wrote an amazing dissent in the case of "In Re: Sealed Case" which dealt with the independent counsel law. When it went to the

Supreme Court and it came down as *Morrison* v. *Olson*, the Court in its opinion basically adopted your analysis relative to the issue of whether the Independent Counsel Statute was constitutional or did violate the separation of powers doctrine.

I wonder if you would give us some insight into what your thinking relative to this issue. It is still an issue that is being discussed a great deal today and will be an issue that will perhaps be looked at legislatively again. Would you give us basically your thinking from a judicial basis relative to the independent counsel law?

Judge GINSBURG. The independent counsel law was attacked on the ground that it was an improper derogation from the full authority of the executive branch; the defendant, in the case before my court, argued that prosecution belonged to the executive branch and that Congress had improperly curtailed the executive's role in choosing prosecutors.

I featured in my dissent in that case two mainstays of our constitutional system: First, separation of powers, and second, tempering the first, checks and balances. Centrally at stake was the principle that no person should be judge of his or her own cause. The independent counsel law provided for the designation of a prosecutor for the highest executive officer, the President, and those who immediately surrounded that officer. The President and his people could not be judge of their own cause without sacrificing the appearance of detachment, and reducing the prospect for a thorough investigation.

It would have been a very dangerous thing, a very different thing, if the legislature had said, President, you are disabled and we are going to be the prosecutors. The Founding Fathers worried most about legislative encroachment on other domains. But the legislature enacted a law that did not assign authority to Congress. The independent counsel law took away some, certainly not all, of the Executive's authority. The process starts with the Attorney General, whose responsibility it is to ask for the appointment of an independent counsel, and there were other safeguards.

But the appointment authority was placed in the courts. The law did not present the kind of question that was involved in the challenge to the Gramm-Rudman Act. In that case, it was an officer allied with the legislature could be seen as encroaching on the Executive's domain. Independent counsel, however, were to be appointed by judges. In my view, the legislation responded to a grave concern on the checking side, and was constitutional on that account. I thought the law should have been upheld by my court, as it eventually was by the Supreme Court.

Senator HEFLIN. Let me ask you about stare decisis. We had some questions on this, but in the past few terms, the Supreme Court has sharply been criticized for abandoning certain recently decided cases. Two examples are both in the area of criminal law. During the past term, the Supreme Court overruled a 3-year-old precedent on double jeopardy. In *United States* v. *Dixon*, the Court overturned the 1990 holding in *Grady* v. *Corbin*, which held that the double jeopardy clause barred a second prosecution for any offense based on conduct for which a defendant had already been prosecuted.

Two terms ago, the Court reversed a 5-year-old precedent in *Payne* v. *Tennessee*, and in its opinion, the majority reasoned that stare decisis is less vital in cases that don't involve property or contract rights because litigants have not built up reliance on the current state of the law.

In your judgment, is this a sound theory of stare decisis? Would you prefer some other version such as the test that may have been hinted at in *Dixon,* which would inquire into the soundness of the reasoning in a prior opinion without regard to the substantive area of the law?

Judge GINSBURG. The soundness of the reasoning is certainly a consideration. But we shouldn't abandon a precedent just because we think a different solution more rational. Justice Brandeis said some things are better settled than settled right, especially when the legislature sits. So if a precedent settles the construction of a statute, stare decisis means more than attachment to the soundness of the reasoning. Reliance interests are important; the stability, certainty, predictability of the law is important. If people know what the law is, they can make their decisions, set their course in accordance with that law. So the importance of letting the matter stay decided means judges should not discard precedent simply because they later conclude it would have been better to have decided the case the other way. That is not enough.

If it is a decision that concerns the Constitution, as did the double jeopardy decision you mentioned, then the Court knows the legislature, in many cases, can't come to the rescue. If the judges got it wrong, it may be that they must provide the correction. But even in constitutional adjudication, stare decisis is one of the restraints against a judge infusing his or her own values into the interpretation of the Constitution.

Perhaps an apt example of when the Court should overrule a precedent is Justice Brandeis' decision in *Erie* v. *Tompkins* (1938), which overruled *Swift* v. *Tyson* (1842). Brandeis addressed the question whether the Federal courts could divine and declare general common law. The thought originally was that the Federal courts, being fine courts and knowing a lot about commercial law, would come up with better rules, and that Federal judgments would inspire the States and to fall in line.

But that is not what happened. Instead, you not infrequently had within the same jurisdiction—the same State—two "common laws." Which one applied depended on whether you went to Federal court or the State court. Some lawyers may love that kind of situation because it gives them choices. But such duality isn't good for a society; it generates instability, uncertainty, insecurity.

One of the things Brandeis said when he overruled *Swift* v. *Tyson* in *Erie* was that the *Swift* regime had proved unworkable. "Is it working" is a major consideration regarding stare decisis.

Reliance interests did not support retaining *Swift* because there was no stable law to rely on. What had been generated was confusion and uncertainty. Private actors didn't know whether the law governing their transaction would be the law as declared by the Federal court or the law declared by the State court, until they had a disagreement and litigation commenced.

So how has a precedent worked in practice? What about reliance interests? Those things count, as well as the soundness of the decision. Stare decisis is also important because it keeps judges from infusing their own value judgments into the law.

Senator HEFLIN. Well, in *Erie* you have the situation, too, of where really, in effect, it goes to the 10th amendment in reserving to the States certain aspects of the law relative to that, as well as a confusion that might exist with two sets of laws in regards to it. Do you agree that——

Judge GINSBURG. Yes, Brandeis said that even though *Swift* wasn't working as anticipated, and even though one couldn't justify retaining the precedent on the basis of reliance, he would hesitate to overrule. What led him finally to do so was the recognition that the Federal courts were embarked on an unconstitutional course, and that was——

Senator HEFLIN. I noticed in your answer you didn't really touch on the issue of the reasoning that stare decisis is less vital in those cases involving property or contract law because of the comparison that in the more commercial field they have built up more of a reliance. Do you have some feeling that criminal law ought to be put on the same par and on the same equal basis as commercial or property law?

Judge GINSBURG. I don't think that reliance is absent from the criminal law field. Recall that precedent is set for the way the courts will behave, the way the police will behave, the way prosecutors will behave. One can't say that, in criminal law, reliance doesn't count.

Adhering to precedent fosters the stability, the certainty, the clarity of the law; stare decisis across the board serves those purposes. We have distanced ourselves from the British practice which, until very recently, so solidly entrenched stare decisis that the House of Lords, the Law Lords, would not overrule any precedent. That rigidity became unworkable and the Law Lords today admit some leeway. But stare decisis is a firm principle of our law and important in all areas.

Senator HEFLIN. Let me ask you this question. Have you given any thought to televising court proceedings?

Judge GINSBURG. Yes, I gave thought to it just the other night when C–SPAN was replaying a clip of an interview with me taped some years ago, and I was trying to explain appellate court procedure. And I used many words to convey the picture. One minute filmed in the courtroom, during the argument of an appeal, would have been so much clearer than my attempt to explain to an interviewer in chambers how we proceed in the courtroom. Yes, I did give thought to the matter.

As you know, Senator Heflin, the Federal courts are just now embarked on an experiment on a volunteer basis. Some courts have volunteered, some district courts—trial courts—and some courts of appeals have volunteered to take part in televising proceedings. A report will be published evaluating the experiment. Based on that report, the U.S. Judicial Conference is going to come up with some proposals for the future.

Some of the judges are apprehensive about who will control the editing of videotapes, because one can take a snippet out of context and give the public a false or distorted impression of what goes on.

The CHAIRMAN. We know the problem.

Senator HEFLIN. Well, of course, I have served on the court, and we were one of the first States to allow it at the appellate level, and locating places for cameras where it was not any disruption in the court proceedings, and our experience was excellent.

Now, let me ask you about the issue of standing. In the case of *Wright* v. *Regan,* or Reagan, in 1981, you held that the parents of black children attending public schools had standing to challenge IRS failure to deny tax-exempt status to private schools that discriminated on the basis of race. The Supreme Court later overruled you in *Allen* v. *Wright* in 1983. Your decision has been cited as your willingness to be more receptive to citizens' access to our Nation's courts.

In your various opinions, you have granted standing in cases to allow a woman's organization to challenge disbursing Federal funds to educational institutions discriminating against women and to allow local organizations to bring an action enforcing the Fair Housing Act. Yet you have denied standing to a trade association alleging injury for law enforcement of EPA laws in the case of *Petrochemical* v. *EPA* and denied standing to copper manufacturers challenging a Treasury regulation reducing the copper content in coins in the case of *Copper & Brass Fabricators* v. *Treasury Department.*

How do you distinguish these cases, and what are your basic notions and principles on the issue of standing?

Judge GINSBURG. I believe I followed precedent in every one of those cases, including *Wright* v. *Regan* (1981). It was Regan. The suit was against the Secretary of the Treasury, not against the President. Perhaps I should explain why I say that I followed precedent in face of the Supreme Court's judgment reversing my decision.

In *Copper & Brass* (1982), I wrote a concurring opinion. It was about the "zone of interest" test. I said I was bound by precedent to rule as I did, as long as that test governed.

In *Allen* v. *Wright* (1984), I confronted two lines of cases involving standing. *Wright* was modeled on a case brought in the 1960's. That case was called *Green* v. *Connally* (1971). It involved as plaintiffs parents of black school children in the State of Mississippi who objected to the then Secretary of the Treasury's granting tax-exempt status to private institutions regarded as white-flight schools, schools whose existence was threatening the implementation of *Brown* v. *Board.*

The *Green* case reached the Supreme Court. The lower court's decision for plaintiffs was affirmed. It was a summary affirmance. The Court didn't write an opinion. But the affirmance counted as precedent for the lower courts.

Wright v. *Regan,* as I remember, was a rather long decision. It discussed the recent precedent, some of it pointing away from standing. The strongest "no standing" precedent on point was made in the *Eastern Kentucky Welfare Rights Organization* (1976) case, which involved a challenge on the part of poor people to the Treas-

ury Department's regulation allowing a hospital to retain its tax-exempt status even if it didn't provide full care for indigents. The Supreme Court held that plaintiffs lacked standing to sue in that case. *Eastern Kentucky* was argued as the controlling decision for *Wright* v. *Regan.*

I said there were two relevant lines of cases. One line was indicated by the *Eastern Kentucky* case. The other line of cases had two elements. They were about race, and they fell in the area of education. Whenever there was the combination of race and education, in every one of those cases, the Supreme Court had found standing, most recently in an Alabama case. I think that case arose in Montgomery County.

I found the two lines of cases in tension. As an intermediate court judge, I had to pick the line of precedent closest to my case. *Wright* v. *Regan* involved race and education, so it fit with *Green* v. *Connally* and the race/education cases that followed it.

The Supreme Court rejected the disparate lines, and said *Eastern Kentucky* controlled across the board. That meant "no standing" for the plaintiffs in *Wright.* But at the time I wrote, I tried to follow the precedent as it then existed. The cases on which I relied were all race/education cases, decisions that up until that point had not been questioned by the Court itself.

So my answer regarding those standing cases is that I have tried to apply precedent faithfully, allowing access to the courts in cases like *Wright* v. *Regan,* but not in the *Copper & Brass* case, where the zone of interest test was dispositive. I wrote a concurring opinion, not the main opinion, in *Copper & Brass.* Even though the copper and brass manufacturers had a very strong economic interest in keeping up the copper content of the penny, even though they had an undeniable economic interest and an injury if Congress reduced the amount of copper, still they were not within the relevant "zone of interest." Congress didn't care about the copper manufacturers when it passed the regulation saying how much copper versus how much zinc should be in coins. Congress did not think the interest of the manufacturers relevant to the congressional determination of how much of each metal should be in the penny. That was the *Copper & Brass* case, and I think *Petrochemical* was a similar case.

Senator HEFLIN. You commentated, when your announcement as the nominee came out, frequently said that you would be a consensus builder—I don't think anybody has asked you about this yet—with the idea that on the court that you have attempted to get judges together without necessarily affecting their integrity but moving them towards an institutional approach. And in an article you have written, you speak about the individualistic approach as opposed to the institutional approach.

Would you tell us how you feel or what are the parameters that you feel should be followed relative to trying to reach a consensus as opposed to a feeling that you should dissent or you should disagree, even in concurring opinions? This is sort of a nebulous idea, but I think it is an area we ought to explore a little bit relative to your thinking on consensus building as opposed to perhaps an individualistic approach towards decisionmaking.

Judge GINSBURG. This is an area where style and substance tend to meet. It helps in building collegiality if you don't take zealous positions, if you don't write in a overwrought way, if you state your position logically and without undue passion for whatever is the position you are developing.

Think of this way: Suppose one colleague drafts an opinion and another is of a different view. That other says, "Here's what I think, perhaps you can incorporate my ideas in your opinion, then we can come together in a single opinion for the court; otherwise, consider this a statement I am thinking about making for myself." That is one way of inviting or encouraging accommodation.

Another way is to ask, "Is this conflict really necessary?" Perhaps there is a ground, maybe a procedural ground, on which everyone can agree, so that the decision can be unanimous, saving the larger question for another day.

Willingness to entertain the position of the other person, readiness to rethink one's own views, are important attitudes on a collegial court. If your colleagues, who are intelligent people and deserve respect, have a different view, perhaps you should then pause and rethink, Am I right? Is there a way that we can come together? Is this a case where it really doesn't matter so much which way the law goes as long as it is clear?

Now, with one of the people sitting behind me, I am hesitant to say this, but let's say a tax provision is at issue. And I think Congress meant x, while my colleague thinks Congress meant y. But either one will do for the purposes of getting on with the world.

The CHAIRMAN. Close enough for Government work, right? [Laughter.]

Judge GINSBURG. In such a case, I might then say I am going to squelch my view of how the Internal Revenue Code subsection should be interpreted and go along with my colleague.

Senator HEFLIN. I noticed in your article pertaining to this individualistic institutional approach that you seem to—from your knowledge of the internal operations of the Supreme Court, I got the impression that you feel perhaps that there are too many written memorandums and that there is a little too few discussions, that further discussions might aid in reaching a consensus. I suppose that is based on the fact that if somebody put something in writing, they have some sort of a pride or a defendership of a written document.

None of us knows exactly what goes on in the Supreme Court, but I do find that sometimes oral discussions can lead to the consensus rather than a flurry or a great number of written memorandums that might be circulated back and forth.

Do I interpret that maybe that was something that you were driving at in your article?

Judge GINSBURG. Yes, Senator Heflin. I understand the problem. It is easier to talk among three than it is among nine. I had a lesson in my own circuit. When we confer after a case is argued, we have a conference before the judges exchanged written memorandums. We have an immediate, oral conference. I understand that the practice in the Second Circuit—I came from New York—was once different. Judges there, at least in the 1970's, exchanged written memorandums before coming together to decide the case. And

I considered that way better. If you had to put pencil to paper, you had to think about the case, get your ideas together.

But my colleagues' view was different. It was that, just as you said, if you put something on a circulated paper, you have kind of committed yourself to it. It becomes a little harder to shake loose from what you wrote, to retreat, than if the first discussion of the case, the first encounter, is just in conversation. It is easier to back off and to modify your position.

Senator HEFLIN. Well, thank you. I am really impressed with your knowledge of the whole history of jurisprudence. I have witnessed a great number of confirmation processes, but I believe you show more of a comprehensive knowledge than any other nominee that I have seen. Maybe we didn't ask all the questions, and maybe they were at that stage that it wasn't developed certainly in regards to some of the earlier ones. But I congratulate you on your response and your knowledge relative to the law.

Thank you.

Judge GINSBURG. I thank you for your kind words.

The CHAIRMAN. That is a good note on which to go to lunch, Judge.

[Whereupon, at 1:27 p.m., the committee recessed, to reconvene at 2:30 p.m., this same day.]

AFTERNOON SESSION

The CHAIRMAN. The hearing will come to order. Welcome back, Judge. I hope you had time to have a cup of coffee and a sandwich.

I now yield to our distinguished friend from Colorado, Senator Brown, for his round.

Senator BROWN. Thank you, Mr. Chairman.

Judge Ginsburg, I look forward to a chance to chat with you, both now and later on as we go through this. I must say your performance and responses have been impressive, and I appreciate the candor that you have demonstrated here.

I wanted to direct your attention to what I think is an interesting development through the years. I suppose every first-year law student learns quickly that ignorance of the law is no excuse. I am not sure many schools really explore that. But it struck me as a very important concept as we go forward, one that perhaps is at the foundation of our jurisprudence.

The first case decided by the Supreme Court in which that doctrine was applied was *Res Publica* v. *Betsy*. It is a 1789 case. As near as I can tell, it is a reflection of the thinking in our common law and, before that, the Norman law, and even had foundations in the Roman law.

In thinking about the concept, though, that you are responsible whether you are aware of the law or not, or liable for violating it whether you are aware of the law or not, it appears that there are a variety of reasons for it. One is the philosophy that I think was reflected in our common law that basically laws reflect common sense, or at least moral mandates; that someone, while they may not be aware of the statute number, they are aware that murder or robbery or other crimes are wrong. So that while people may not be aware of the exact law, they are aware at least of moral mandates which guide us in our daily lives.