The same is true in Stephen Wiesenfeld's case. The benefit he sought was labeled a mother's benefit. He never would——

Senator DECONCINI. So you draw the line as to how far the Court goes beyond just deciding the issue as to the particular individual or the class that is before you and whether or not they extend themselves, as you just pointed out. Is it your position that that would have been going too far?

Judge GINSBURG. No. My position is one should be honest about what the Court has to do in that situation. And either way, the Court can be said to be legislating. If the Court strikes down what the legislature has ordered, it is legislating by removing benefits Congress clearly wanted there to be.

If the result in the *Wiesenfeld* (1975) case had been to strike down the mother's benefit until Congress acted, that is the last thing I think the sensible person would say Congress wanted to do.

In the cases to which I referred, the Court has to make a decision. Its remedy was essentially legislative. The legislature has a next session and can change it. The legislature can say we don't want any parent to have benefits, we want every parent to have benefits, or we want to do something in between, for example, have an income test. But a court, on the spot, of necessity, must serve as a surrogate legislature. Courts can't say, we don't want to decide this case, we are going to leave it and do something else.

Senator DECONCINI. Thank you, Judge. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator DeConcini. And thank you, Judge, for answering Senator DeConcini's question. I now understand much better.

Senator Grassley is next.

Senator GRASSLEY. From Iowa. [Laughter.]

The CHAIRMAN. I understand that part. I just wasn't sure whether Senator Simpson finished yesterday. But Senator Grassley from Iowa and the Judiciary Committee.

Senator GRASSLEY. The State where you campaigned for President.

The CHAIRMAN. I might add the obvious: very unsuccessfully.

Senator GRASSLEY. Well, good morning again, Judge Ginsburg.

Judge GINSBURG. Good morning, Senator.

Senator GRASSLEY. I would like to continue some of the discussion of judicial philosophy with you this morning, with particular emphasis, a little later on, on things that interest me about the speech or debate clause in Congress and the application of laws of general applicability to the Congress, laws that we have exempted ourselves from.

But before I ask my first question, I would like to make one observation from some of your statements yesterday. You spoke very eloquently about the obstacles that you encountered as a woman and particularly as a Jewish woman. You faced many hurdles in your very distinguished career, and you mentioned them very clearly.

These barriers that you were speaking about yesterday remind me of the compelling stories that Justice Clarence Thomas told us almost 2 years ago about facing segregation in the South, about drinking from a water fountain reserved only for blacks.

I think that it is very useful for us, and the country as a whole, to know how discrimination has influenced your life. There are similarities in life experiences but, of course, in the final analysis they may not influence you and Justice Thomas in quite the same way. Just an observation I wanted to make from yesterday.

In the article that you wrote for the Rutgers Law Review—and I believe it was based on a speech that you gave—you expressed a view that the courts are not the solvers of all society's problems. Your view seems very consistent with the belief held by Justice John Marshall Harlan that the courts cannot solve all the ills of our society. He expressed that very eloquently in the 1964 reapportionment case.

There Justice Harlan wrote, "The Constitution is not a panacea for every blot upon the public body, nor should this Court, ordained as a judicial body, be thought of as a haven for reform movements."

Judges after all, are not elected, nor are they accountable to the people. Would you agree that judges need to exercise self-restraint and not endeavor to reform society? Isn't that a task better left to the political branches?

Yesterday you made reference to Fifth Circuit Judge Irving Goldberg, who said that "Judicial fire fighters must respond to all cases." Those are his words. However, in responding, judges sometimes get carried away, it seems, by not only putting out the fire, but also trying to rebuild the whole house.

So my question, as well as those that I have generally stated here, is: Shouldn't some of the fires and all of the rebuilding be left to the Congress?

Judge GINSBURG. Judge Irving Goldberg, when he made that comment, was talking about cases of a judiciary nature. The courts hear only such controversies as the Constitution and the laws provide that courts shall hear. Courts may not hear cases for which the Constitution does not provide, for which legislation does not provide. But when the laws do provide for controversies of a judiciary nature, the judges must decide them. They have no choice.

That is what I sought to convey. Justice Harlan would agree. He is one of my heroes as a great Justice because he always told us his reasoning—he never hid it; it was always spelled out with great clarity. But he might have been accused of legislating because he is responsible for paving the way for the cases I mentioned earlier, in which the Court chose extension rather than invalidation to cure a constitutional infirmity in a law. It was Harlan's concurring opinion in a case called *Welsh* v. *United States* (1970) that prompted me to be bold enough to say to the Court, we are asking you to extend not invalidate this law. I don't know that anyone has ever called Harlan an activist for that, but this is the case I have in mind. I will try to state it as briefly as I can.

Welsh was a case of a conscientious objector who was denied CO status. His conscientious objection to military service was based on a deeply held philosophical belief, but it wasn't tied to a religion. And the Congress, some thought, had pretty clearly limited CO status to people whose religion dictated the position they were taking.

Some of the Justices read the language of Congress, which seemed to say the nontheistic observer isn't covered, nonetheless to be broad or vague enough to cover Mr. Welsh. Justice Harlan said

I can't do that. Congress was clear in saying this objection is available only to one who has a deeply held religious belief. That means Congress has left out this man, a nontheistic conscientious objector. That means I must grapple with the constitutional question, Is it a violation of the first amendment to exempt from military service only theistic objectors—to limit the exemption to one whose objection is tied to a belief in a Supreme Being? Harlan answered that question, Yes. He than said, having read the law as Congress wrote it, and having decided that that law is unconstitutional, I reach the next step. Should that be to say there is no more CO exemption until the legislature meets?

No, Harlan reasoned. Instead, I must legislate a bit. I must include Mr. Welsh in the category of people who qualify for conscientious objector status, because Congress wanted there to be such an exemption. In Justice Harlan's judgment, Congress would have chosen to include Mr. Welsh in the catalog of exempt people, rather than to do away with the category CO, conscientious objectors, altogether.

Senator GRASSLEY. But you can agree, though, that sometimes the courts get carried away with rewriting the law, and isn't it still better to let Congress act? You have noted that in your Rutgers article, I believe. Am I misinterpreting——

Judge GINSBURG. Congress makes the policy, it writes the laws. Judges believe, as everyone else does, that that is what legislators do in a democracy.

Senator GRASSLEY. I suppose even judges get tired with the way that it sometimes takes political branches so long to act. It takes a long time, and we in this Congress certainly do not operate and legislate with lightning speed.

I think your Rutgers article expressed an understanding of this. You just stated it. You were talking specifically there about civil rights, and you advocated pressing in the legislatures and the bureaucracy and in the arena of public education. You noted that this effort would "require more patience, planning, and persistence than campaigns aimed at sweeping victories in the court, but success may be more secure."

Is this because the courts are conservative and you see them as inhospitable to reform? Or is it because policy made by the legislatures is often more widely supported within society and, therefore, more accepted and probably even more enduring?

Judge GINSBURG. Senator Grassley, for a host of reasons. One, is courts are not equipped to get the kind of information that legislators can get. You are addressing a problem, for example, what kind of legislation you should have to prevent air pollution. You have tremendous resources you can use to investigate, to find out about the problems you are confronting. Legislatures can engage in the kind of fact-finding that courts are not set up to do.

Of course, the fundamental policy decisions are entrusted to the legislative branch. The Court hears a controversy, one of a judiciary nature, generally between two parties.

Senator GRASSLEY. Obviously, the Constitution requires us to write the law, but is it your feeling that the people are more apt to accept it than if a court would make that decision?

Judge GINSBURG. People elect Members of Congress to make laws for them, and if people don't like those laws, they can vote out the people who made them.

Senator GRASSLEY. I believe that you have been very clear in establishing Congress as the fundamental law-making branch and that you don't want the courts to be assuming that role.

I would like to contrast the view I think you express with an admittedly older law review article that you wrote, one based more on your experience as an advocate of gender equality. It comes from the 1979 Cleveland State Law Review article on repairing unconstitutional legislation. There you said the Court would have to "serve as a short-term surrogate for the legislature in rewriting laws."

I have some concern with such a viewpoint. Sometimes it can get into dangerous territory. Senator Thurmond yesterday pointed out some of that danger, like in *Missouri* v. *Jenkins,* when the Court ordered a tax increase. Can you tell me what you will do in the face of a statute you find inconsistent with the Constitution? Will you be more inclined—and I think the key words here are "more inclined"—to rewrite the law, or simply to strike it down and let the legislature do the rewriting?

Judge GINSBURG. The line of cases I examined in that Cleveland State Law Review article are the ones I have been talking about. *Frontiero* (1973), would Congress have wanted at that moment for the Court to remove housing allowances and medical and dental benefits for all dependents of servicemen? In the *Wiesenfeld* (1975) case, would Congress have wanted the courts to say there shall be no mothers' benefits until the legislature meets again?

In the latest case in that line, *Califano* v. *Westcott* (1979), Congress passed a law that originally was an unemployed parent law—one parent that once had an attachment to the work force, but was out of work for a prolonged period. There was an unemployment benefit for such a person. It was discovered that in many cases the person signing up as the unemployed parent was the mother, not the father.

Congress, apparently surprised, changed that law from an unemployed parent benefit to an unemployed father benefit. That law was challenged by a few unemployed mothers whose husbands had lost their attachment to the work force so long ago that they didn't qualify, but the mothers did. The plaintiffs in that case were effectively asking the Court, until the legislature meets again, to change the benefit back to one for an unemployed parent, rather than an unemployed father.

And the Supreme Court, in 1979, faced up to what Justice Harlan had said much earlier in *Welsh* v. *United States* (1970). It said yes, we have a choice to make. Either way, whether we extend or we invalidate, we are temporarily legislating. The question for us is this: If Congress knew the line it drew was unconstitutional, would Congress want us to take away the benefit totally, or would Congress want us to extend it to the small class that had been left out. The Justices were trying to divine congressional intent. And the opinions in that case plainly show that members of the Court agree there is a choice. In the particular instance, the *Westcott*

case, the Court divided on whether extension or invalidation was the proper remedy.

But Harlan's point was accepted by the entire Court. In *Califano* v. *Westcott* (1979), on the question of the existence of a choice, all of the Justices, in 1979, agreed. They said yes, we must choose; at this moment we are the surrogate legislature. I didn't mean to carry my point any further than that kind of case, one in which Congress legislates a benefit for a large class, the benefit is constitutionally infirm, because it leaves out a group of people similarly situated. What, then, is the remedy? I endeavored in that Cleveland article to talk about that discrete category of cases.

Senator GRASSLEY. You might consider that if the courts act too broadly, that legislatures might not fulfill their responsibilities. With the answer you just gave me, then, I think you are inclined to tell me that you are very willing to strike down a law and not very willing to rewrite it, if it is in conflict with the Constitution.

Judge GINSBURG. I think all of the judges in those cases, in all of the courts, agreed that the one thing we couldn't do is rewrite the law in detail. Legislators might come up with something in between, or redo the law entirely. But a court in such cases has just the stark choice between extension or invalidation. Courts can't craft something finer as the legislature might do when it looks at the matter again.

Senator GRASSLEY. I would like to move on to the subject of speech and debate. Your circuit, of course, hears many cases invoking the Constitution's speech or debate clause, which provides, as you know, that no Member of Congress can be questioned in any other place for any speech or debate in either House. The clause, of course, has long been a popular basis for Congress and individual members to avoid liability under a variety of criminal and civil laws.

I have often debated with my colleagues the clause when I proposed amendments to apply employment laws to the Senate. Opponents of such coverage hide behind the speech or debate clause or claim that sexual harassment or racial discrimination in a congressional office is completely immunized. Congressional employees, unlike private sector workers, or even people employed by the Federal bureaucracy, have, for instance, no statutory right to unionize or earn a minimum wage or overtime pay.

Because of my interest in this provision of article I, I was, of course, delighted to read your opinions narrowly construing the clause. I was particularly impressed with your opinion in *Walker* v. *Jones*. In that case, you rejected, as I read it, the House's argument that the clause immunized the House Services Subcommittee from a sex discrimination action. As you remember, that was the case where the subcommittee chairman declared that a House restaurant director's $45,000 a year salary was "ridiculous for a woman." Those are his words.

Am I correct in concluding, based on your opinions, that you see no speech or debate clause problem with the application of civil rights or labor laws to the administrative aspects, as opposed to the legislative aspects of Congress' work and its employees?

Judge GINSBURG. Senator Grassley, I think I will stay with Ella Walker's case, because the question you ask conceivably could come

up in a live case. I am delighted that you think well of our decision. I can tell you some people in the House of Representatives didn't. As you know, they regarded the speech or debate clause as sacred, and they said, well, of course our restaurant has a connection to legislating. How can you legislate if you are not well-fed?

In Ella Walker's case, we said we don't have to deal with anything other than auxiliary services. In contrast, concerning members of a representative's staff working on legislation, one could make an argument for connection to the job of legislating that one could not make regarding auxiliary services. We thought we could draw a clear line between legislating and going to the gym, having a meal, going to a parking lot. I don't know if there are any attendants in the restrooms. But those areas we said were beyond the zone of legislating covered by the speech or debate clause.

I think you know of the case of *Davis* v. *Passman* (1979). That case shows why I don't want to talk about administrative staff. That case involved a Member of Congress, a Representative who wrote a letter to a woman who had been his legislative assistant on a temporary basis. The letter praised the temporary assistant, but then said, you're so sweet and lovely and this job is so hard, it's really a job for a man. Davis charged Congressman Passman with sex discrimination, in violation of the equal protection component of the fifth amendment. One of Passman's defenses was the speech or debate clause.

The Supreme Court, in deciding that the plaintiff in that case had stated a claim, left open the speech or debate question, because it hadn't been decided by the court below. When the case went back for a decision on speech or debate immunity for Passman's action, the case was settled. So that question was never decided by the Fifth Circuit or by the Supreme Court. That is why I would like to stay with my auxiliary service case, Ella Walker's case, and not go beyond that.

I do think, and have expressed this in writing, that when Congress enacts a measure like title VII, it should set a good example by saying we are not simply going to ask the private sector to end discrimination, we are going to do it ourselves, we are going to hold ourselves to the same standards we expect of the public.

Senator GRASSLEY. Let's follow on with what you just said there, because I think the speech or debate clause necessarily leads us to the issue of the doctrine of separation of powers.

As I debate congressional coverage, I am repeatedly told by my colleagues that the separation of powers precludes some Federal agencies from investigating claims against a Member of Congress. The argument tends to be that it would be unconstitutional for an executive department, it would be an unconstitutional infringement, I suppose, on legislative power to have, for instance, an OSHA investigator check out this hearing room, to see whether or not there were any safety violations here, or to have the Civil Rights Division or EEOC pursue remedies for discrimination against congressional employees in a Federal trial court.

First of all, do you see any separation of power problems with an agency that has expertise in an area insuring that Congress complies with laws?

Judge GINSBURG. Again, Senator Grassley, I think I must avoid expressing anything concerning——

Senator GRASSLEY. I can appreciate that. Let me just ask you if you could generally discuss how you might determine a separation of powers boundaries in the Constitution in such a case?

Judge GINSBURG. May I offer an example from real life, something that happened to me. It explains why I am sensitive on this subject.

There was a case before my court, titled *Murray* v. *Buchanan* (1983). It was a challenge not to the offices of the chaplains in the House and Senate. The case, in some accounts, has been inaccurately portrayed. There was no challenge to opening the sessions of the Senate and the House with prayer. There was never any challenge to having a chaplain. But there was in that case a challenge to using taxpayer money to fund the offices of the chaplains.

The people who brought that suit were not very popular people—Murray was the name, the son of Madeline O'Hare Murray was the lead plaintiff. The only question before my court was whether the plaintiffs had standing to raise their objection in court, or whether it constituted a political question.

The standing question seemed to me governed by a case clearly on point, *Flast* v. *Cohen* (1968). We asked the lawyers in the argument of that case—because there seemed to be a straight-forward legal question with no fact record to develop—if we should hold that there is standing, that the case is justiciable, can we get supplemental briefs and proceed to decide the merits? Both parties said, no, if you are going to hold that the case is justiciable, send it back to the district court because there are historical materials we would like to place in the record. So we were told by the parties that they did not want the court of appeals, at that stage, to decide the merits of the case.

A panel on which I served—a divided panel, it was 2 to 1—held that the plaintiffs had standing to bring the case. There was a strong reaction. The House of Representatives adopted a resolution saying that the court had acted improperly, had encroached on the legislature's domain, had meddled in a matter covered by the House Rules. There was no nay vote in the House. Representative Conyers abstained; otherwise, the House was unanimous. That resolution was indeed a telling legislative reaction to a decision perceived as an improper judicial incursion on legislative turf.

My court, the full court, vacated the three-judge panel decision, so it does not appear in the Federal Reporter. It was in the advance sheet, but the decision was vacated before the opinions could be put in the bound volume. You have the opinions before you, however, in the collection of my decisions.

I recount that episode to indicate how sensitive these questions are, how——

Senator GRASSLEY. Well, there wouldn't be any question about separation of powers protecting Members of Congress from applicability of criminal laws. What principled distinction can there be made with having employment laws or civil rights laws applied to Congress?

Judge GINSBURG. You might ask the counsel to the Senate, who argued very effectively in a number of speech or debate clause

cases before us, for a brief on that subject. That office would be best qualified to address the issue for a Senate audience.

Senator GRASSLEY. Well, I believe before long you will be addressing it sometime. Obviously that would keep you from responding to a specific question, but——

Judge GINSBURG. If and when the question is presented, I would have the benefit of briefs on both sides. That is the difficulty that I confront in this milieu. I am accustomed—as a judge, it is the only way I can operate—to considering cases on a full record, with briefs and often oral arguments. I am not accustomed to making general statements apart from a concrete case for which I am fully prepared, taking into account the arguments parties present on both sides.

Senator GRASSLEY. Well, it seemed to me like you did address the issue pretty thoroughly in your 1987 speech to the 92d Street Y in New York. You noted Congress exempts itself—and you referred to this just a little while ago—from title VII of the Civil Rights Act of 1964 and prohibition of race and sex discrimination. You said, drawing on John Locke and Madison's Federalist 10 that "One might plausibly contend that Congress violates the spirit if not the letter of the constitutional doctrine of separation of powers when it exonerates itself from the imposition of the laws it obliges people outside the legislature to obey."

Maybe you are even afraid to elaborate on those remarks.

Judge GINSBURG. I did say "spirit," but there is a much simpler way of stating the point. It is that one should practice what one preaches.

Senator GRASSLEY. I am sorry. Would you repeat that?

Judge GINSBURG. I used the words "violates the spirit if not the letter." But there is a much simpler way, without referring to Locke, to express that idea: One should practice what one preaches with respect to equal employment.

Senator GRASSLEY. It seemed to me like something that you would be very concerned about on your present court or even on the Supreme Court, that the applicability of these laws to Congress is surely a check on legislative tyranny, and you have got to be concerned about legislative tyranny.

Judge GINSBURG. Yes.

Senator GRASSLEY. I think my time is up.

Senator KENNEDY [presiding]. Thank you, Senator.

I want to acknowledge Senator Grassley's leadership in this area of public policy, on the applicability of statutes to the Congress. He has been interested in it for a long period of time. Quite frankly, I think we have made impressive progress in the Civil Rights Act of this last year and some of the recent statutes, but it is obviously an issue which we are grappling with. And I think your comments in the *Walker* case give at least some indication about your own views on this issue, one that I think is of enormous importance, obviously to the institution and I think to the American public generally.

Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

Judge actually I want, a little later on, to get back to *Murray* v. *Buchanan*. I think that you were critical of Judge MacKinnon's