you know, under current law, a different standard applies to Federal plans; it is a more tolerant standard than the one that applies to city plans like the Richmond plan.

Croson governs city plans, and *Metropolitan Broadcasting* (1990) governs Federal plans. There is certainly a role for Congress to play in this.

My concurring statement said *Croson* controls this case. I also recalled, in that separate statement, the position Justice Powell had taken in the *Bakke* (1978) case. He said that you could have a reason for an affirmative action program, for example, Harvard's preferential admissions program, that was not tied explicitly to proven past discrimination. But the *O'Donnell* (1992) case in our court did not fit that mold. It was a case totally controlled by the *Croson* precedent.

Senator SIMON. The second part of my question is, Do you have a philosophical disagreement with the idea of set-asides?

Judge GINSBURG. I tried to express my view yesterday that, in many of these cases, there really is underlying discrimination. But it's not so easy to prove. Sometimes it would be better for society if we didn't push people to the wall and make them say, yes, I was a discriminator. The kind of settlement reflected in many affirmative action plans seems a better, healthier course for society than one that turns every case into a fierce, adversary contest that becomes costly and bitter.

In many of these plans, there is a suspicion that underlying discrimination existed on the part of the employer and, sometimes, on the part of the unions involved. But, in place of a knock-down-drag-out fight, it might be better to pursue voluntary action, always taking into account that there is a countervailing interest, as there was in the *O'Donnell* case. Members of the once preferred class understandably ask, "why me," why should I be the one made to pay? I didn't engage in past discrimination. That's why these cases must be approached with understanding and with care.

I hope that is an adequate answer to your question.

Senator SIMON. Really candidly, it wasn't all I was hoping for, but I am getting your response and I appreciate that.

My time is up, and I thank you very much, Judge.

Judge GINSBURG. Thank you, Senator.

The CHAIRMAN. Senator Cohen

Senator COHEN. Thank you, Mr. Chairman.

Judge Ginsburg, during one of the breaks earlier today, I threw caution to the wind and agreed to go on a television program to comment on the proceedings that we are now conducting. I will be careful how I phrase this, because they are still covering me right now.

Two of the journalists indicated that there were several key points involved in these hearings. No. 1, Senators weren't as knowledgeable as Judge Ginsburg on constitutional decisions. No. 2, we weren't as prepared to followup your answers with an analysis of your judicial thought process. No. 3, we were too busy with other responsibilities and we were relying primarily upon our staffs. No. 4, we do not seem as passionate as a committee about your nomination as, say, the committee was during the Robert Bork hearings or those of Judge Clarence Thomas. No. 5, you man-

aged to deflect or, put more roughly, duck questions that might provide some insight into your thought process, because of the possibility, however remote, that those issues might come before the Court at some future, but indefinite time.

I pled guilty to all charges that were made, noting that there were several members of this committee who were expert in the field of constitutional law.

Nonetheless, it seems to me it called into sharp focus exactly why we are here, what is the purpose of this committee in its advice and consent role. We are supposed to determine whether you have the intelligence and the competence and the temperament to serve on the Supreme Court, and I think there is very little disagreement among the members of this committee that you have all of the requisites.

The additional question that we are seeking to probe is that of your judicial philosophy. Senator Biden indicated we crossed that line finally in this process of confirmation in looking at a judge's or a nominee's philosophy.

But even that examination of philosophy is not without its limits. For example, it is not incumbent upon you to agree with my interpretation of a law or what I think the law should be, or that of any other member. What I think we are trying to do, and are only really qualified to do, is to examine your philosophy to determine whether we find it so extreme that it might call into question those other requisites that I mentioned before. Barring that, I don't believe that the philosophical issue is one that would be appropriate for the committee. That is my personal view.

There are a number of reasons, in my judgment, why there are no fireworks in this hearing, and why the members may seem to be less prepared than they were, let's say, during Judge Bork's confirmation hearings, and perhaps those of Justice Thomas.

No. 1, your record as a jurist is not perceived to be outside the mainstream of current jurisprudence. That in my judgment is a major factor. There might be a different view, I would submit to you, if you had been nominated immediately following your string of victories before the Supreme Court in arguing on behalf of the expansion of equal protection. There might have been quite a bit of controversy on this committee at that time, because you might have been perceived as a political activist who would bring those activities to the Court.

Two things have intervened: No. 1, time, during which the American people have caught up to your views and now accept them as what we should have assumed would have been the law all along; and, No. 2, your service on the Court where you practice restraint, instead of pursuing a political agenda.

The reason that so many of the members have dwelled on the issue of whether you might do the right thing—you were citing Justice Marshall in the *Worcester* v. *Georgia* case—is that there is suspicion in some circles, at least, that you are basically a political activist who has been hiding in the restrictive robes of an appellate judge, and that those restrictions will be cast aside and you will don a much larger garment. There is fear and apprehension on the part of some that that might be the case, and there is the hope on the part of some that that is precisely what you will do.

So for all of those reasons, we are trying to probe exactly where it is you would likely take yourself and perhaps even the Court on any given decision.

I was struck by your comment in response to Senator Biden yesterday. You said every Justice and judge should do what he or she believes to be legally right. I looked over at Senator Biden and he was smiling, and he said, "You're good, Judge, you're real good." I jotted a note that said "delphic ambiguity."

I am sure you are familiar with Greek mythology about the delphic oracle, where people would go to this cave and they would ask the mouth of the cave a question, and the answer would come back, to be interpreted by the listener to whatever he or she wanted to hear at that time. I can recall one classic case where a leader of an army went to the delphic oracle and said, "Tell me what will happen if I invade Greece or a province tomorrow." And the answer came back, "If you invade tomorrow, a great army will fall." Buoyed by that, he went back, got his troops together and went in and got massacred. A great army did fall, his army.

So we have come to see those kinds of responses as perhaps delphic in their ambiguity.

It also struck me that the response that every judge should do what he or she believes to be legally right is something of a Socratic exercise. I thought of the Socratic dialog in which the question is posed, Is beauty pleasing to the gods because it is good, or is it good because it is pleasing to the gods?

In this particular case, I would ask, Is it the right thing because it pleases the Court, or does it please the Court because it is the right thing?

That is the kind of Socratic question that we are trying to resolve here. In the absence of established precedent, is what the Court believes to be the right thing based upon what is morally right or what it perceives to be socially right?

Judge GINSBURG. I have yet to see the case where the Court has nothing to guide it, where there is that kind of blank. There is always the text that we are interpreting. The text comes in a certain setting. There is in this day and age an abundance of case law and commentary.

I have not seen a case where the Court totally lacks way pavers.

Senator COHEN. Aren't there always questions where you call it a first impression?

Judge GINSBURG. Yes; that means the precise case hasn't been decided by the Court. But there are, almost always analogies. I have not seen a case without analogies. And there are often choices to be made. I described one when I spoke of *Wright* v. *Regan* (1981), where there were two lines of precedent; the case, the particular case, could have been placed in either category. We placed it in one category. The Supreme Court said we were wrong; it belonged in the other.

There are those kinds of choices. But I think every judge in this system is committed to the health and welfare of the Federal courts. When one compares to other systems what we have and the high position of our Supreme Court—a position unique in the world—the value of our system becomes clear, and we want to keep the system safe.

Senator COHEN. All right. Let me rephrase it a bit. Senator Biden asked you under what circumstances it would be appropriate to do the right thing; that is, to step out in front of the political process or perhaps even, indeed, public opinion. We can go back and look at the *Brown* case in which you felt there was a sufficient legal foundation for the Court to have stepped out, at least a little bit, in front of public opinion at that time.

There is the *Roe* decision in which I think you felt, in writing your analysis of that particular case, that there was an insufficient foundation, at least politically, to support that decision and that the Court might have reached a different result or perhaps the same result under a different rationale.

These are two cases where they stepped out in front to make a rather bold decision.

The question I have is: What if you have public opinion polls which delineate a fairly stable body of public opinion and Congress has taken either no action or has passed a law which you perceive to be inconsistent with public opinion? What would be your role as a Supreme Court Justice in doing the right thing under those circumstances?

Judge GINSBURG. If Congress has passed a law inconsistent with public opinion, then the public will react to it one way or another, and either accept it or not accept it. That is what legislatures——

Senator COHEN. No; I am asking it a different way. I am asking what if you have a situation in which Congress has taken no action in this area but public opinion polls show that there is a fairly solid majority in favor of a particular social objective. Congress has either taken no action or, in fact, passes an act which is inconsistent with what is perceived to be a solid body of public opinion. What do you believe the role of the Court should be under those circumstances?

Judge GINSBURG. We do not have a tricameral system. The courts don't react to public opinion polls. They do react to what Professor Freund described as, not the weather of the day, but the climate of the age. I tried to explain that when I talked about the 19th amendment and the 14th amendment.

Senator COHEN. Let me go ahead and quote what you did write, and perhaps you can clarify it for me. You indicated that you approve of a change in constitutional interpretation that has been brought about by a "growing comprehension by a jurist of a pervasive change in society at large."

So you believe the Court should acknowledge a pervasive change in society at large in reaching a constitutional decision.

What I am asking you is: What if society at large is ahead of the legislative branch?

Judge GINSBURG. Senator Cohen, I must ask you to place the statement that you read in context. It was made in a very specific context. The point was that, at last, the country had come to appreciate that women were full and equal citizens with men; that the perception of women's place that marked the 19th century and the 18th century had become obsolete; that when the 19th amendment gave women the right to vote, they became full and equal citizens entitled to the same protection men had under the 14th amendment.

I was speaking in that context. I was not addressing a grand, philosophical concept that would apply across the board. I spoke specifically and only of the growing understanding of society that women were equal citizens. That is the point I made in the writing to which you referred.

Senator COHEN. Right, but the language, I would assume, would apply to other situations as well, would it not? If there is a growing comprehension by that jurist of a pervasive change in society at large, that in your judgment would at least argue for or, indeed, perhaps even compel the Court to recognize that change, even in the absence of a statute or perhaps even in opposition to a statute, would it not?

Judge GINSBURG. Senator, I have spoken in the context of gender equality. There are other contexts in which people are making claims and will be making claims that will come before the Federal courts. I cannot say anything more than I have already said on that subject.

Senator COHEN. In other words, should I just take that argument and confine it only to the equality of women under the 14th amendment?

Judge GINSBURG. Take what I wrote and appreciate that I believe it would be injudicious of me to speak now about the many classifications that could come before the Court. May I recall what I said in my opening remarks, that I do not want to offer here any hints on matters I have not already addressed.

Senator COHEN. All right.

Judge GINSBURG. To avoid prejudgment, I must draw the line where I did.

Senator COHEN. Let me go on. I take it you do believe that the Equal Rights Amendment is still necessary to provide an explicit constitutional guarantee of equal protection for women. Do you still believe that?

Judge GINSBURG. I have said that I think the Equal Rights Amendment is an important symbol. Our Constitution has survived for over 200 years with very few amendments. I appreciate that, and would like to keep it that way.

On the other hand, I do think that at the end of this century, the Equal Rights Amendment would be, even if only symbolic, an important symbol to add explicitly to the Constitution, because I would like the statement the amendment makes to be clear to every grade school child.

Senator COHEN. Let me explain to you why I am asking this question so you won't take offense that I might be quoting something out of context. My understanding is you have written that you believe the Equal Rights Amendment is necessary to provide an explicit constitutional guarantee of equal protection for women, that the Supreme Court has used what you call creative interpretations to accommodate a modern vision of sexual equality, and that such interpretation, however, has limits, but sensibly approached, it is consistent with the grand design of the Framers. I believe that is a pretty close paraphrase of what you have written.

Judge GINSBURG. Yes.

Senator COHEN. The question I have is: What are the limits that you believe are still in place? And would you wait for Congress to

eliminate those limits, or would you engage in creative interpretation to achieve the elimination of the limits?

Judge GINSBURG. I must return to my plea for understanding that a judge works from the particular to the general.

Senator COHEN. What are the limits you see that the Court has imposed in not granting full recognition to equal rights for women through this process of creative interpretation?

Judge GINSBURG. I don't think that the Court has imposed limits. The Court takes these matters case by case. In the most recent cases the Court struck down a gender classification. It said the standard of review is still open; the Court has not rejected the most stringent standard of review for gender-based classifications.

But I do want to clarify. I appreciate the compliment that you paid me, but you must understand how unfamiliar this milieu is to me. I haven't done anything as a teacher or an advocate without tremendous preparation, without a written outline or brief, without notes for oral argument. I never taught a class without hours of preparation, at least 4 hours for every 1 hour I spent in the classroom. So this milieu is much more familiar to you——

Senator COHEN. In other words, you would rather be up here asking us those questions, right? [Laughter.]

Judge GINSBURG. This questioning is a very healthy exercise, because you are making an indelible impression on me of what it is like to sit down here, on the receiving end and how much easier it is to ask the questions than to answer them.

Senator COHEN. I hope you will reciprocate in the event that any of us, when we leave this place, come before you and you are sitting on the Court. [Laughter.]

In any event, I would like to move on——

The CHAIRMAN. As counsel, he means. [Laughter.]

Senator HATCH. Not a defendant. Right. I just hope you won't reciprocate under some circumstances.

Senator COHEN. Judge Ginsburg, you were quoting, I believe, Judge Irving Goldberg yesterday. You quoted him as saying that the Court or judges were like fire fighters putting out fires that they didn't start. Some would argue that the Supreme Court from time to time has, in fact, started fires that might have remained either unignited or been smothered through what I would call supreme silence.

But assume that fire of controversy is now before you. I would like to know how you view congressional intent.

There are jurists who argue that the Court should disregard the tradition of looking to the legislative history of a law to determine how Congress intended that it be executed, and under this view they should look to the language in the four corners of the statute to resolve any ambiguities and not to committee reports, floor speeches, or any other items that might accompany a bill through the legislative process.

Now, the proponents argue, as one has said, that "judicial abdication to a fictitious legislative intent" would occur were you to look for congressional intent, and that legislative history itself is "the last hope of lost interpretive causes."

Do you agree with that statement?

Judge GINSBURG. It would be wonderful, Senator, if you wrote the laws so clearly that we knew what your intent was immediately on reading them. Our job is to interpret the laws as the legislature meant them to be interpreted. Best of all possible worlds for us would be that you speak clearly, you leave no doubt, and we can just read the text and say no reasonable person can disagree about its meaning.

But very often, my colleagues will look at a text, and one reasonable mind will say it means x while another reasonable mind will say it means y. We must then look someplace else.

In such cases, I turn to the legislative history. I do so with an attitude I can best describe as hopeful skepticism. Hopeful because I really hope I will find something genuinely helpful there and that everything will be on line, the committee report and any other statements made. It would be grand if they all coincide.

Senator COHEN. What happens when you find legislative ambiguity? Do you look to the statements of committee chairmen, the managers of the bill? Do you look to the majority and minority leaders? Do you look to language in the committee reports? Do you give any priority in that hierarchy of words that might be found in a legislative history, assuming there is ambiguity?

Judge GINSBURG. Not rigidly. I can say as a general rule, if you have a unanimous committee report, that is going to be more useful, more reliable, than a statement made by a member of the chamber after the bill has passed. The statement of a single legislator generally would count for less.

But I can't give you a definitive account and say it is always the committee report or it is always the statement of the sponsor that comes first. A very fine judge of my court, Judge Harold Leventhal, once said that visiting legislative history is like going to a cocktail party and looking through the crowd for your friends. There are some very recent situations in which the legislative history is so crammed that a statement saying the law means one thing can be matched by a statement saying it means something else.

So, yes, one must decide the case. A judge must decide what the legislature mean. If she can't tell from the words of the statute, she must resort to our sources of help. Sometimes a judge can reason by analogy. Perhaps a similar statute was passed that has a clearer statement either in the text or the history of that statute. But, yes, I do look at legislative history when the text is not clear, and I approach it with an attitude of hopeful skepticism.

Senator COHEN. I raise the issue because, No. 1, you have testified before this committee in the past, I believe in 1985, in opposition to the creation of a Federal intercircuit panel that would resolve the differences in statutory interpretation among the circuit courts. Another reason I raise the issue is that the Supreme Court traditionally upholds the executive branch's interpretation of a law unless there is a contrary congressional intent that has been established. That became of particular importance to us in the *Rust* v. *Sullivan* case in which the Supreme Court in a 5-to-4 decision upheld the Reagan administration's regulation that prohibited the grant recipients of title X family planning funds from providing counseling and referral or services on abortion. It seems to me it

was a reversal of longstanding tradition to achieve that particular end.

For the benefit of my colleagues, the language that I quoted earlier, about judicial abdication to a fictitious legislative intent, that was Justice Scalia who articulated that position.

Judge GINSBURG. I am well aware of his position.

Senator COHEN. Let me turn, if I can, to the issue of free speech. The case involved the Community for Creative Nonviolence or *CCNV* v. *Watt*. Do you remember that case?

Judge GINSBURG. Yes, I do, that was the sleeping in the park case.

Senator COHEN. Yes, the sleeping in the park case. It is not the same as "Sleeping in Seattle," but sleeping over in Lafayette Park.

Judge GINSBURG. "Sleepless in Seattle."

Senator COHEN. You saw the movie?

Judge GINSBURG. I did, yes. [Laughter.]

I don't get to see many movies, but I did get to see that one.

Senator COHEN. You enjoyed it, as well.

Judge GINSBURG. I did, especially the music.

Senator COHEN. Do you have the sound track to the music? [Laughter.]

Let me come back to the issue of conduct and speech. We have a somewhat ironic situation where conduct can in fact be interpreted as speech protected by the first amendment. For example, we know the Court's ruling on burning of the American flag. A number of people believe that to be an act which is not protected by the first amendment, but the Court ruled otherwise. So this is a case in which what I consider to be a violent act is construed to be speech.

We also have a situation in which speech can be construed to be conduct. You would agree with that?

Judge GINSBURG. That conduct——

Senator COHEN. That speech itself can constitute conduct.

Judge GINSBURG. Can you give me an example?

Senator COHEN. I could, but if I did, you couldn't answer the question.

Judge GINSBURG. Then you are tipping me off that I shouldn't——

[Laughter.]

You are starting me down the slope and I shouldn't put on the skis.

Senator COHEN. That is precisely where I want to take you. Let me see if I can camouflage my intent here for a moment and go back to the *CCNV* v. *Watt* case. In that particular case, the Government argued that protesters could not sleep in the park. They could demonstrate, they could parade in the park and they could stand in the park, but they could not sleep in the park. The Park Service argued it violated camping restrictions, and the district court ruled in favor of the Park Service.

The appellate court reversed, ruling 6 to 5 in favor of the protestors, and you, as I understand it, joined in the majority decision, but you did not join in some rather sweeping language about free speech—the on-site sleep of a round-the-clock demonstrator is

indistinguishable from leaflet distribution, speeches or flag displays—or something to that effect on the part of the majority.

You also rejected then Judge Scalia's position that the first amendment only protected speech and not conduct, and I think you called it or wrote that it was an arbitrary, less than fully baked theory. Do you remember writing those words?

Judge GINSBURG. Yes.

Senator COHEN. It would seem that the Supreme Court affirmed your position as far as the first amendment applying to conduct as well as speech. What you said is that "sleeping in symbolic tents" has a "personal non-communicative aspect" that bears a "close, functional relationship" to standing or sitting in such tents, that is, it guarantees that the demonstrator is physically present to sustain around-the-clock demonstration.

Then you went on to say it is not a rational rule of order to forbid sleeping, while permitting tenting, lying down and maintaining a 24-hour presence, and that "the non-communicative component of the mix reflected in CCNV's request of permission to sleep * * * facilitates expression."

I can see my time is running out here.

The CHAIRMAN. Finish your thought.

Senator COHEN. The question I have is whether you would give first amendment protection to any noncommunicative component of the mix in a case that involves a facilitation of expression. In other words, is that a test that we can apply in future cases that involve conduct that is in some way related to speech that would be protected, or is this the same situation where you are going to say don't take my words beyond the individual case?

Judge GINSBURG. The facilitative aspect of it is not entitled to the same protection as the expressive aspect of it. My comment in relation to my colleague's opinion is that one cannot draw a line between words and expression as he did, and say neatly, when you speak, that is speech, and otherwise it is conduct. I gave, as an example, this illustration: It is said that during World War II the King of Denmark stepped out on the street in Copenhagen wearing a yellow armband. If so, that gesture expressed the idea more forcefully than words could.

Senator COHEN. Let me just conclude. I have been struck by the irony in which one can burn the American flag and that is constitutionally protected speech, and yet, if one declares that one is gay in the military, that is not speech, that's an act. It is a paradox, perhaps, that exists, which you, Judge Ginsburg, in all likelihood will have to resolve.

My time is up, Mr. Chairman. Thank you.

The CHAIRMAN. Thank you. You have demonstrated several things. The first part of your question is that you are a much better commentator than those who ask you the questions.

Senator Kohl, I got it right this time.

Senator KOHL. All right. Thank you very much, Mr. Chairman.

The CHAIRMAN. Just so I let it be known, one of my colleagues passed me a note saying, "It's Kohl, not Feinstein."

Senator KOHL. I asked them to do that.