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"?

Judge GINSBURG. I can simply cite what I have accepted as entirely compatible with my job as a judge, and that is the historical practice of opening each court day with "God save the United States and this Honorable Court." I don't regard that historic practice as a violation of the establishment clause. If I did, I would have no business entering court when those words are said.

Senator HATCH. All right. I think I could press you on that, but I think that is good enough.

Let me just do this: You sit back and relax now. I don't think there are going to be any more questions from anybody, and we are going to end this hearing for you, but I would like to end it this way.

I would like briefly to run through with you some cases you decided that demonstrate in my mind your willingness to issue rulings that you believe to be compelled by the law, even though you might personally have preferred different results as a matter of policy. I would just like to kind of end the record with this, because I admire you for it.

In the 1990 case of *Women's Equity Action League* v. *Cavazos,* you wrote an opinion holding that because Congress did not intend to give a cause of action to civil rights groups or anyone else to sue Federal officials to force them to enforce civil rights laws as those groups would have them enforced, you as a judge, you ruled, have no authority to create such a cause of action for those civil rights groups. You declined an opportunity to legislate from the bench in that case, even though, from your background as a woman's rights lawyer, you might have been thought to have been sympathetic to the plaintiffs.

Similarly, in another case you decided in 1990, *Coker* v. *Sullivan,* you wrote an opinion holding that because Congress did not provide any such cause of action, homeless persons and advocacy groups could not sue to force the Department of Health and Human Services to monitor and enforce State compliance with Federal emergency assistance guidelines. Quite obviously, homeless persons and their advocacy groups are sympathetic litigants, but you did not allow that consideration to sway you from applying the relevant law, which was that Congress had not given them the right to sue that they claim. Now, maybe Congress should have, but they have not, and you applied the law as it was written.

In a 1988 case, *Randolph* v. *Meese,* you wrote an opinion that was joined by Judge Silverman, a Reagan appointee, from which Judge Mikva, a Carter appointee, dissented. In that opinion, you ruled that an alien who was present in this country on a visitor's visa and who was denied adjustment of status to permanent resident alien had to first exhaust her administrative remedies provided for by law, before seeking judicial recourse.

Now, this is an elementary principle of administrative law that, when properly adhered to, as you did in this case, reduces litigation and permits adjudication, if it must finally occur, to be based on a fully developed record. Again, you could have bypassed the law, been an activist judge and resolved that problem well in advance, whether it was worthy of resolution or not, but you applied the law as it really was.

In a 1984 case of *Dronenburg* v. *Zech,* you alone of the Carter appointees on the District of Columbia Circuit agreed with Judges Robert Bork and Antonin Scalia that a homosexual sailor's constitutional challenge to the military's homosexual exclusion policy was precluded by a controlling Supreme Court decision that had summarily affirmed the district court decision upholding a Virginia statute criminalizing homosexual conduct. Your liberal colleagues on the court wanted you to extend the right of privacy announced in other cases to this particular situation, but you, properly, in my view, concluded that the Supreme Court's summarily affirmance was controlling, and that whatever your own views on the right to privacy, there was no latitude to apply it in that particular case.

In the 1983 case of *Conair Corporation* v. *NLRB,* raised by some of my colleagues here, a very significant loss for the labor unions, they thought, you wrote an opinion that was joined by then Judge Scalia, over the dissent of Judge Wald. There an employer had engaged in outrageous and pervasive unfair labor practices in connection with an election to determine whether a union should represent the employees.

Since the union, however, had not otherwise shown that it had majority support among the employees for the use of cards designating the union as their bargaining agent, you ruled that the NLRB could not impose a bargaining order on that particular employer. You reasoned that to do so, in the absence of an expression of majority sentiment, would violate the National Labor Relations Act principles of freedom of choice and majority rule. In reaching this result, you disagreed with Warren Court dictum.

Now, I just cite these few cases, but I believe the ability of a judge to separate his or her own—and in this case your own—personal views from the task of interpreting the law is an essential qualification for the bench, and certainly on the Supreme Court. In these and other cases, I think you seem to have demonstrated that quality, and I just want my colleagues in this body to understand that you have covered a wide variety of issues from the left to the right. On occasions you are going to disappoint everybody. And I happen to believe that is probably a pretty good position to be in to go on the Supreme Court.

I disagree with you on a number of things, and I am sure you disagree with me. But that isn't the issue, is it? If we don't want to politicize the Supreme Court of the United States and we want to keep that independent so that Justices are not afraid—they don't have to test the winds before they decide cases—then we have to keep politicization aware from the Court.

Frankly, I admire you for—in most cases, I presume that if you had your own personal policy views that you could implement merely by a stroke of the pen on the bench and you didn't believe in the rule of law, you certainly could have done so, and you probably would have in each of those cases, and others as well.

But I think it is important for my conservative colleagues to understand that you have stood there time after time and interpreted the law the way it was written. There are many times when the law isn't written clearly. There are many times when there are fine dividing lines that you have to make decisions on. And I don't con-

sider those activist decisions even though I might disagree with one or more of them.

The fact of the matter is that I hope my colleagues in this body realize that you are a person of tremendous integrity, a person of great legal acumen—you have demonstrated that throughout these proceedings—a person who has served well on the Circuit Court of Appeals for the District of Columbia, I think one of the most important courts in the world, let alone here. And some even have argued that it may even be more important than the Supreme Court because of the thousands of issues that they decide every day that affect all of our lives every day. But, of course, it isn't. The Supreme Court has the final say with regard to judicial review matters.

But I just want to say in closing that I think you have acquitted yourself well. I think your family has acquitted themselves well, and they ought to be very, very proud of you, as you, of course, have demonstrated you are of them.

I for one have been uplifted by much of your testimony, and I would be crazy to not say that there are some things I wish I could change. But the fact is that I am sure there are things you wish we up here in the legislative branch would change, too, and you will be directing us to do so from time to time.

But I want you to know that you have acquitted yourself well. You have earned the right, in my opinion, to be on the Supreme Court before you started to testify, but you have augmented that right as you have testified here today.

So I personally am proud of you and the patience that you have had, the endurance that you have undergone, and the way that you have undergone it. And I just want you to know that I have great respect for you. I had it back in 1980 when we first visited. I have watched you on the court ever since, knowing that someday you may have this opportunity. And now that you are on the threshold of having that opportunity, I want to compliment you for all of the exemplary life that you have lived and the way you are approaching the Court, the way you are approaching the law, and the way you have over the last 13 years.

Thank you, Mr. Chairman.

Senator MOSELEY-BRAUN. Senator Biden, Senator Hatch and I were just about to get together—my friend and I were going to get together and collaborate about recessing this hearing and letting Judge Ginsburg go to dinner and the like, but then you came back. So I guess you will have to take the Chair, take the gavel.

Senator HATCH. I have got to go vote, so you will have to forgive me, but I wish you well.

Judge GINSBURG. May I say, if my mother-in-law is watching, she just loves you, Senator Hatch? [Laughter.]

Senator HATCH. Well, she is a person of great refinement and discernment. That is all I can——[laughter].

And I want you to know that I love her, and I haven't even met her yet. But I intend to.

I think a great deal of your family, too. They are very fine people. It is apparent.

Judge GINSBURG. Thank you.