NOMINATION OF RUTH BADER GINSBURG, TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

WEDNESDAY, JULY 21, 1993

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:12 a.m., in room 216, Hart Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee), presiding.

Also present: Senators Kennedy, Metzenbaum, DeConcini, Leahy, Heflin, Simon, Kohl, Feinstein, Moseley-Braun, Hatch, Simpson, Grassley, Specter, Brown, Cohen, and Pressler.

The CHAIRMAN. The hearing will come to order. Welcome back, Judge.

Let me say to my colleagues on the committee that after having a brief discussion with the judge this morning and discussing how we will proceed, it is my hope and expectation that every Senator will have an opportunity to ask their first round before today is over.

Unless someone on the committee objects, I would like to proceed in the following manner: Starting with the distinguished Senator from Arizona, we will ask three rounds of questions, three Senators; we will break, then come back, and do three more and break, and continue along that way.

Although the judge is very accustomed, as a judge, to being seated and listening to argumentation for lengthy periods of time, I think it is a different circumstance when you are having to do the talking instead of the listening. And although she is prepared to sit as long as we want, I think we should not keep her in that seat without stretching her legs for more than an hour-and-a-half at a shot, if that is all right with you, Judge.

Judge GINSBURG. That is just fine. Thank you.

The CHAIRMAN. So that is what we will do. With that, let me see. If we go—well, we will figure it out. I will confer with my colleague here as to when we will break for lunch. After the end of this round with Senator DeConcini, I will announce that.

Senator DeConcini.

Senator DECONCINI. Mr. Chairman, thank you.

Judge Ginsburg, thank you for the thoughtfulness that you have put forth in yesterday's hearing. Though I wasn't here for all of it, I did watch a lot of it, and I appreciate your effort to satisfy this committee. As you have noticed, the diversity here is widespread,

and it isn't easy to listen to all of us expound on judicial matters, particularly when you are an expert on it and we pretend to be. Some are, but I pretend to be.

I do have some questions, however, that have, oh, I wouldn't say troubled me, but which deal with areas that I think are important enough to elicit a response from a nominee, and I have asked them of many nominees before. They deal with an area that you truly are an expert in, and that is the equal protection clause of the 14th amendment, and particularly as it relates to gender.

Judge Ginsburg, throughout the 1980's I have asked Reagan and Bush Supreme Court nominees their views on gender discrimination. It was my belief that because of the integral role that the equal protection clause has performed in advancing women's equality, a Supreme Court nominee must be committed to those principles. I had concerns that the standards of review developed in the 1970's for gender discrimination analysis under the equal protection clause were at risk at times by nominees that were here. However, you, more than anyone else, any other individual I know, guided the Court into the direction of applying greater scrutiny to laws that discriminate on the basis of gender.

Yesterday I was quite moved by your exchange with Senator Kennedy when you shared the details of the cases that you litigated and some of your personal experience. Having, myself, had two daughters and even a mother who was discriminated against a long time ago, almost 70 years—and she raised me reminding of that—it is on my mind. And your discussion demonstrated to me, and I think the public, how abstract principles of constitutional law affect everyday people in the most fundamental way, including the basic rights to sit on the jury, administer the estate of a deceased family member, or to claim survivor's benefits for a deceased spouse.

Now, the heightened scrutiny test has made an enormous difference in combating laws that discriminate against women in our society. Earlier in this effort to change the law, you argued to the Court that gender-discriminatory statutes should receive the highest level of scrutiny. But then you revised your strategy, I believe, and steered the Court toward the middle-level scrutiny. And in a speech you gave in 1987, you praised the intermediate-scrutiny approach as a stable middle ground; that is, "an effective blend between responding to social change and actually driving it."

So my question, Judge, to you is: Will an intermediate level of scrutiny for gender discrimination statutes always be satisfactory, or does the area need to be constantly developed further?

TESTIMONY OF RUTH BADER GINSBURG

Judge GINSBURG. Senator DeConcini, I don't recall the words that you read. It was always my view that distinctions on the basis of gender should be treated most skeptically because, historically, virtually every classification that, in fact, limited women's opportunities was regarded as one cast benignly in her favor.

I tried yesterday to trace the difference between racial classifications, Jim Crow laws—which were not obscure in the message that one race was regarded as inferior to the other—and gender classifications that were always rationalized as favors to women. My

constant position was that these classifications must be rethought. Are they genuinely favorable, or are they indications of stereotypical thinking about the way women or men are. And that——

Senator DECONCINI. Well, Judge, to be a bit more specific, are you saying that you have to look at each case in determining whether or not the strict scrutiny or the intermediate scrutiny is applied? Is it on that basis or—first of all, am I correct that generally you believe that the intermediate scrutiny, as the Court has, I think, clearly established, is the right area for gender discrimination cases? You don't commit yourself to always be there? Is that what I think your position is, or can you expound on what your position is, please?

Judge GINSBURG. Senator DeConcini, as an advocate, I urged the highest level of scrutiny and——

Senator DECONCINI. All the time?

Judge GINSBURG. After it became clear as a strategic matter that there was not a fifth vote soon to declare sex a "suspect" category, I tried to establish a middle tier. In fact, I did that even earlier—the *Frontiero* (1973) Brief was the first time. Briefs I presented gave the Court two choices in *Reed* (1971), three in *Frontiero* and in Capt. Susan Struck's case.

As you know, I was an advocate of the equal rights amendment. I still am.

Senator DECONCINI. So am I.

Judge GINSBURG. So I think that answers your question about the level of scrutiny that——

Senator DECONCINI. But absent that amendment, Judge, then your position is that the strict scrutiny should be the beginning point on any gender issue brought before the Court?

Judge GINSBURG. I will try to answer your question this way. The last time the Supreme Court addressed this question, as I mentioned yesterday, was in the *Mississippi University for Women* (1982) case. The Court struck down a gender-based classification and said in a footnote that the question whether sex should be regarded as a suspect classification was one not necessary to decide that day; we don't have to go that far, the Court explained, to resolve the case at hand. It thus remains an open question before the Supreme Court.

Senator DECONCINI. And before you?

Judge GINSBURG. I can't, sitting where I am now——

Senator DECONCINI. I understand.

Judge GINSBURG [continuing]. Say anything more than what is in my briefs and my articles and my advocacy of the equal rights amendment, which is part of the record before you.

Senator DECONCINI. Well, thank you, Judge, and I will supply you the reference material I used here in your speech of 1987 where you praised the intermediate-scrutiny approach as a stable middle ground. And if you care to or can give any clarification—maybe that is taken out of context, and I have not read the entire remarks that you made, which might be unfair. But if you can give me a little more explanation, I would appreciate that. It doesn't have to be right now.

Judge GINSBURG. I would be glad to respond regarding that particular piece. At the moment, I don't recognize the words as mine.

Senator DECONCINI. And I appreciate that.

Yesterday, Judge Ginsburg, in reflecting to Senator Kennedy on a number of personal encounters that you had relating what brought you to where you began to press these issues in a legal forum, you had stories behind the reasons on how it affected you. One of the stories that I would like to know is the reason why you refer to this area as "gender discrimination" instead of "sex discrimination." Is there a history to that?

Judge GINSBURG. Yes, there is. I hesitate every time I say "gender-based discrimination" because I have been strongly criticized by an academic colleague for whom I have the highest respect. He tells me, "That term belongs in the grammar books; the word for what you have in mind is 'sex' and why don't you use it?" And I will tell you why I don't use it.

In the 1970's, when I was at Columbia and writing briefs, articles, and speeches about distinctions based on sex, I had a bright secretary. She said one day, "I have been typing this word, sex, sex, sex, over and over. Let me tell you, the audience you are addressing, the men you are addressing"—and they were all men in the appellate courts in those days—"the first association of that word is not what you are talking about. So I suggest that you use a grammar-book term. Use the word 'gender.' It will ward off distracting associations."

Senator DECONCINI. That secretary obviously was a woman.

Judge GINSBURG. Yes. And, Millicent, if you are somewhere watching this, I owe it all to you. [Laughter.]

Senator DECONCINI. Well, it shows that good advice can come from staff people, as we all know working here.

Judge, with regards to the issue of standard of review for gender discrimination laws, you once wrote that a society changed and evolved with respect to the role of men and women; so, too, did the force of the grandly general clause of the Constitution that provides for equal protection of the law.

Now, the Constitution has open-ended and broad clauses such as the one we are discussing, the equal protection clause. And as you have stated, as society changes, so do the meaning of those clauses.

Now, as Senator Feinstein noted in her opening statement yesterday, in the first 100 years of the equal protection clause of the 14th amendment, not a single gender-based challenge was sustained. And as you mentioned yesterday, even the Warren Court, which has been criticized for their activism, upheld restrictions on jury service for women.

So as our society changes and evolves, so do our interpretations of these open-ended clauses. Indeed, you have also written that our 18th century Constitution is dependent on changes in societal practices, constitutional amendments, and judicial interpretation.

Now, were the gender discrimination cases that you brought in the 1970's reflecting social changes, or were they leading social changes, from your viewpoint?

Judge GINSBURG. From my viewpoint, they were reflecting social changes and putting the imprimatur of the law on the direction of change that was ongoing in society. Yesterday I described the *Hoyt*

(1961) case, Gwendolyn Hoyt's case, the case of the woman who, in an altercation with her husband, hit him over the head with a broken baseball bat, her son's broken baseball bat, and as a result, ended up being prosecuted and convicted of second-degree murder. When I mentioned that 1961 Supreme Court decision, I said there was no possibility of winning that case at the time it arose. No one would listen to the argument that this exemption from jury service wasn't pure favor to women.

One of you mentioned yesterday—I think it was Senator Kennedy—the case of *Goesaert* v. *Cleary* (1948). That was about a mother and daughter who owned and operated a bar in the State of Michigan. The mother owned the bar. The mother and the daughter wanted to tend the bar that they themselves owned. But Michigan law, as was said yesterday, declared that a woman could not tend bar unless she was the wife or the daughter of a male barowner.

That mother and daughter found that Michigan's law effectively put them out of business. The rationale for the law was that bartending wasn't safe; rather, it was a risky occupation. So women were being protected. They were being sheltered from working in such a setting, absent a father figure, or a husband, as the owner.

In my law school constitutional law casebook, I remember the *Goesaert* case being treated simply as an illustration of the Supreme Court's retreat from the *Lochner* (1905) era, in which the Court regularly struck down economic and social legislation. Hardly a word was said about the mother and daughter, the people Michigan's law put out of business. That was 1948. The case was regarded as a typical example of the Court's retreat from a body of decisions that interfered with legislative judgments about economic and social legislation.

So there really was no chance that any court in the land, and certainly not the Supreme Court, was going to move until there were pervasive changes in society. Change in the mid-1900's perhaps started during World War II, when women took jobs that had been considered, up until then, jobs only men could do. You remember Rosie the Riveter. There was a time after the war when women were told to go back home, don't compete with men for jobs. But then many things came together. One factor was inflation. The two-earner family became a pattern people accepted out of necessity, out of caring for—wanting to provide the best for—their children. Factors that coalesced included women's opportunity to control their reproductive capacity, the two-earner family pattern, longer life spans, the woman having a life at home and at work.

A number of factors came together to change women's lives, to alter and expand what they were doing.

Senator DECONCINI. Societal changes you are referring to, primarily.

Judge GINSBURG. Yes.

Senator DECONCINI. Well, let me pursue it just by asking you, Judge, when you are confirmed and you sit on the Supreme Court, when and how do you determine whether to lead or follow societal changes?

Judge GINSBURG. That sounds like a question Mr. Chairman asked me yesterday.

Senator DECONCINI. Yes, he was kind of asking that question.

The CHAIRMAN. I am glad you remember, Judge.

Judge GINSBURG. And I would like to ask all of your indulgence to help me with this, because I must deal with the question in terms of past history. I can't predict in terms of cases that might come up.

Senator DECONCINI. I don't want you to do that, and I understand the sensitivity of that question. But I am interested in just how you approach it. I mean, it isn't some kind of a score I am keeping here, yes or no, that you fail or flunk.

Judge GINSBURG. I will give you the answers I attempted to give in the Madison lecture, a lecture I was afraid would put the audience to sleep, but has turned out to prompt a quite different response. [Laughter.]

I gave in that lecture two examples. One was *Baker* v. *Carr* (1962). That was a State legislative reapportionment case. I quoted from a law professor who said the rationale for that decision and the ones that followed it, the one-person, one-vote line of decisions, was that when political avenues become dead-end streets judicial intervention in the politics of the people may be essential in order to have effective politics. *Baker* v. *Carr* came up from Tennessee, I believe. The comment concerned the composition of Tennessee's legislature at the time of *Baker*. At that time there was a history of many years of unsuccessful State court litigation and unsuccessful efforts to get the State legislature to reapportion itself. So that is one example.

When is the political avenue a dead-end street? The other example, the historic example, of course, is race discrimination, which we talked about yesterday. It was not simply the schools. I referred to a talk that Judge Constance Baker Motley gave about Thurgood Marshall's leadership and litigation campaign. It was not simply separate education. She spoke of other cases, the restrictive covenant cases, most notably *Shelley* v. *Kraemer* (1948), interstate travel, the teacher salary cases, and most of all, I think, in terms of your question, the early voting cases.

Remember the white primary cases. The last case in that line, *Terry* v. *Adams,* was decided in 1953, just one year before *Brown.* People were shut out of the political process. There was——

Senator DECONCINI. Well, Judge, let me interrupt you, if I may. Are you saying that if there is a dead end on the political process—maybe you don't want to commit yourself to this, but a Supreme Court judge may very well decide that is more of a time to lead than to follow, which has got to be more of a subjective decision as to when the political dead end has come? For instance, the equal right amendment, you are a strong advocate of that, and others are not. I happen to agree with you and have supported that, but it appears to be at a political dead end, which would lead me to conclude, if that is accurate—because the States are not going to ratify it, as we can see—that in that area of equal rights for women the Court should lead.

Judge GINSBURG. Senator DeConcini, first let me clarify what I meant by a dead-end street. I meant that blacks couldn't vote. We know what the history of the white primaries and literacy tests were. Women became galvanized in the 1970's. I think we are

going to see more and more political activity for advancement of women's stature. Some of the results of that activity are visible in this room. I don't think it has stopped.

That doesn't mean that I am not an advocate of a statement in our fundamental instrument of government that equality of rights shall not be denied or abridged on account of sex. I am and I——

Senator DECONCINI. Well, Judge, I would classify you as a leader. And I am not going to put words in your mouth, but that is how I interpret what you have told us. My observation of what you have told me here is that, certainly in the area of gender discrimination, you lead. You don't follow. That is what you have done, though on occasion, on many occasions, you have concurred with other judges, but you certainly have been a leader there. That is really what I wanted to know, and that doesn't trouble me.

I think the Court should lead, particularly in that area, and I was only trying to develop when you should follow, if there is any philosophy you have that there is a time to follow and a time to lead. It sounds to me like you are going to lead, and I think that is fine with me.

Judge GINSBURG. I won't comment on that. As I said, I have given you examples from the past.

Senator DECONCINI. That is fine. You have answered it sufficiently for me, Judge, unless you want to make any other clarifying statement.

Judge GINSBURG. If you are satisfied with my answer, I will be glad to move on.

Senator DECONCINI. I am. Thank you for pursuing it.

Judge you have written extensively on the judicial role in our constitutional system, and as you have stated, throughout its history the Federal judiciary has been attacked repeatedly for exceeding the bounds of its authority. The term that is usually bandied about is "judicial activism." The committee questionnaire that we sent to you when you were nominated asked you to comment on the role relating to judicial activism, and you stated that the term judicial activism "seems to me much misperceived, a label too often pressed into service by critics of the Court results rather than the legitimacy of Court decisions." I tend to agree with that.

In the past, conservatives have used it to criticize decisions by a liberal court, and now today's liberals are using it to criticize the conservative Court decisions. Nonetheless, going back to your quote, "The Court can and does exceed the bounds of its authority."

Can you name any instances where you think the Court exceeded the bounds of its authority in the past?

Judge GINSBURG. Are you pointing to something in my answer to the questionnaire?

Senator DECONCINI. Yes. Well, in your answer to the questionnaire regarding judicial activism, you are quoted as saying, "seems to be much misperceived, a label too often pressed into service by critics of Court results rather than the legitimacy of Court decisions." And I am just interested in knowing if you have any specifics where you felt the Court in the past might have exceeded the bounds of its authority. Perhaps you don't.

Judge GINSBURG. The examples I gave were of the cases in which the courts have been most criticized. Frankly, I criticized in return

the legislatures and the executives who wouldn't take action when they should have. I spoke primarily of the school cases, the institutional cases, hospital and prison cases. These are cases, I observed, that courts do not like; judges feel extremely uncomfortable having to deal with them. But I gave the example, I think, of Judge Johnson in Alabama who was severely criticized for attempting to run the prisons in Alabama. He gave this account of it. He said, "The State's attorney stood up in my court and said that every prison in this State is in violation of the eighth amendment." At that point, what the law required him to do was clear. His own competence to do it, he was most doubtful about that, but he was bound by the law—by the Nation's highest law—to supply a remedy.

He explained how he tried in every way to have that remedy come from the State officials, but in the end, when it didn't, the Court has to supply it.

Senator DECONCINI. Judge, you don't have any cases that you cite where you think the Court has gone beyond its bounds of authority? You can't think of any or that you have mentioned in your lectures or your writings?

Judge GINSBURG. As I said, I think the courts have gotten the most heat for that institutional litigation—for trying to run schools, for trying to run hospitals.

Senator DECONCINI. But in your opinion, you don't cite any as going beyond what your quotient or ratio or judgment might be as the bounds of the Court's authority to do so.

Justice Holmes, to whom you made reference in your Madison lecture, talks about judges who do and must legislate. Do you agree with that?

Judge GINSBURG. Then he said they must do so interstitially.

Senator DECONCINI. That is right.

Judge GINSBURG. I think I gave an example. One of the Senators referred to it; perhaps it was Senator Specter yesterday. It was in an article I wrote about a series of cases in which the Court acted, in effect, as an interim legislature. The article concerned the appropriate remedy when someone is challenging a classification that affords benefits and says, "I want in."

Sharron Frontiero's suit was such a case. So was Stephen Wiesenfeld's.

Senator DECONCINI. You think those were proper that the Court——

Judge GINSBURG. Either way, the Court is, in effect, legislating. Let me explain what I mean.

The *Frontiero* (1973) case involved housing allowance and medical facilities for a spouse, benefits automatically available for the spouse of a male member of the military, but not available for the spouse of a female member unless she supplied effectively three-quarters of the family's support, all of her own plus half of his.

The Court said that the gender line was invalid. Now, if at that point the Court had said, "And until the legislature convenes again, there shall be no housing allowance, no medical benefits for anybody," that would have been far more destructive of the legislative will than letting in the women members who had been left out.

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.