

S. HRG. 103-482

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

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**HEARINGS**  
BEFORE THE  
**COMMITTEE ON THE JUDICIARY**  
**UNITED STATES SENATE**  
ONE HUNDRED THIRD CONGRESS  
FIRST SESSION  
ON  
THE NOMINATION OF RUTH BADER GINSBURG, TO BE ASSOCIATE  
JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

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JULY 20, 21, 22, AND 23, 1993

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

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**TUESDAY, JULY 20, 1993**

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

The committee met, pursuant to notice, at 10:10 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, Thurmond, Simpson, Grassley, Specter, Brown, Cohen, and Pressler.

The CHAIRMAN. The hearing will come to order, please.

Judge Ginsburg, welcome.

Judge GINSBURG. Thank you.

The CHAIRMAN. And, believe me, you are welcome here this morning. As I said to you a few moments ago, riding down on the train this morning I had my usual stack of newspapers. I will not name them all for fear of getting in trouble, but one that I had, beyond the Wilmington News Journal, which is the most important paper in America, was the New York Times. And I looked at page 1, and there was no comment about this hearing. I looked at page 2, and there was no comment, and page 3. And I literally thought I had picked up yesterday's edition.

Then, as they say, my heart sank when I realized it was page 8 or 10 or 12, which was the most wonderful thing that has happened to me since I have been chairman of this committee: that a major hearing warranted the 8th or 9th or 10th page because thus far it has generated so little controversy. So you are welcome.

But the real purpose of today's hearing is to welcome back Arlen Specter. Arlen, welcome. It is so good to have you back. It really is.

[Applause.]

The CHAIRMAN. I am one of the few people who can understand why he is wearing that hat. When I had a similar operation, Senator, former President Reagan wrote me a letter saying, "Dear Joe"—and he had had the operation he had had on his skull somewhat earlier, and he said, "Dear Joe: Welcome to the Cracked Head Club."

Well, welcome, Arlen. I hope you wear it well. Welcome back.

Senator SPECTER. I very much appreciate that, Mr. Chairman. I thought that, being a Senator, I had been a member of that club for some time. [Laughter.]

The CHAIRMAN. No. You have been a member of a different—I won't characterize what the club is you are a member of. Welcome back.

Senator SPECTER. Thank you very much. Thank you.

#### **OPENING STATEMENT OF CHAIRMAN BIDEN**

The CHAIRMAN. On a more serious note, today the Senate Judiciary Committee welcomes Judge Ruth Bader Ginsburg, the President's nominee to be Associate Justice of the U.S. Supreme Court.

This is a very familiar setting for us. Since I became chairman of this committee 7 years ago, we have now convened hearings on five nominees for the U.S. Supreme Court.

The Constitution states clearly that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint \* \* \* judges of the Supreme Court." Clearly the appointment of a Supreme Court Justice is not a Presidential prerogative. The Senate is an equal partner in the process and has significant obligations attendant to its responsibilities. These confirmation hearings are a major part, though not the only part, of the process by which we attempt to fulfill our constitutional responsibility.

The nomination of a Supreme Court Justice signals the renewal of a national debate over the meaning of our Constitution—a debate, I might add, that has been going on for over 200 years, without end, and that will go on for another 200 years, I suspect.

How will the broad principles embodied in the Constitution—phrases like due process, equal protection, rights retained by the people—how will these and other ennobling phrases in the Constitution be applied to the realities of everyday life? That is the issue which we have been debating and will continue to debate.

Profound questions with practical implications have and will continue to confront us, as the judge only knows too well, questions such as:

Does religious freedom mean that Jewish-American soldiers cannot wear a yarmulke while on duty despite Army prohibition? Which, obviously, they can now, with certainty.

Does liberty mean that each of us can decide, without the Government deciding for us, whom we shall marry, whether we shall marry, where we will live, or whether to have children or choose not to have children?

Does the right to own property mean that the Government may not, without compensation, prohibit a property owner from polluting the stream that flows through his or her land?

These and hundreds of other thorny issues have no easy answers. There are not even any right answers in the usual sense of that word, but there are valid and varied constitutional approaches to answering them, applied over the last 200 years by Justices on the Court. The constitutional answers to such questions flow from the interpretive method judges apply to cases that come before them.

Over the more than two centuries in which our constitutional democracy has endured, our understanding of individual freedom has

expanded. This trend is not new. The expansion of notions of liberty and equality began with the birth of this Republic.

Our understanding of the Constitution has not been static; rather, it has flowed consistently in the direction of broadening the freedom that Americans have as individuals.

The document has remained, as its writers intended, in my view, a flexible and dynamic instrument. Throughout our history, each evolutionary change, though, has brought controversy. Each expansion of individual liberty has ignited resistance from those who prefer the status quo. But in every instance, moving ahead on liberty has proved to be the right thing to do.

Removing the barriers of race to full equality generated enough conflict in the 19th century to fuel a bitter and bloody civil war, and resistance has been carried on into our own time. But today it is generally acknowledged, even where it was once most resisted, that reducing the barriers of race has strengthened American society.

The granting of more equal rights under the Constitution to women, a change that owes much to the lawyer who is our nominee today, has been similarly controversial. But today, with that process not yet complete, most Americans agree that it has been a change for the better in the life of this society.

The Voting Rights Act, which has extended the practical right to vote to millions of formerly disenfranchised Americans, was and remains a source of controversy, even on the Supreme Court itself. But today there are hundreds of minority women and men holding public office where formerly there were few, even in areas where majority voters dominate the rolls, the entire process bringing us closer to the constitutional goal of representative government.

The controversy that flows inevitably from change has found its way into these hearings in the past, into the confirmation process in the past decade-and-a-half. But it does not alter in any sense what we plan on doing here today.

Our task today, as in all Supreme Court confirmation hearings, is to consider the character and qualities and the judicial philosophy of Ruth Bader Ginsburg.

Judge Ginsburg comes before the committee with her place already secured in history. In the 1970's, Judge, you argued a series of landmark cases that changed the way our laws could distinguish legally between women and men, and you have significantly narrowed the circumstances under which distinctions among Americans may be made. You have already helped to change the meaning of equality in our Nation.

Now, as you face a new opportunity to help shape the future of America, we welcome you, and we invite you—and I personally invite you, Judge, to share with us and the American people your vision of the shape of the future of America.

[The prepared statement of Chairman Biden follows:]

#### PREPARED STATEMENT OF CHAIRMAN BIDEN

Today, the Judiciary Committee welcomes Judge Ruth Bader Ginsburg, the President's nominee to be Associate Justice of the United States Supreme Court.

This is a familiar setting for us—since I became chairman of the committee seven years ago, we have now convened hearings on five nominees to the Supreme Court.

And these confirmation hearings are a major part though not the only part, of the process by which we attempt to fulfill that constitutional duty.

The nomination of a Supreme Court Justice signals the renewal of a national debate over the meaning of our constitution:

How will the broad principles embodied in the constitution—phrases like “due process,” “equal protection” and “rights retained by the people”—be applied to the realities of everyday life?

Profound questions with practical implications have and will continue to confront us:

Does religious freedom mean that a Jewish American soldier cannot wear a yarmulke while on duty despite an army prohibition?

Does “liberty” mean that each of us can decide—without the government deciding for us—whom to marry, where to live, or whether to have children or use contraceptives to avoid having them?

Does the right to own property mean that the government may not, without compensation, prohibit a property owner from polluting a stream that flows through his or her land?

There are no easy answers to such questions—there are not even any “right” answers in the usual sense of the word; but there are valid and varied constitutional approaches to answering them, and the constitutional answers to such questions flow from the interpretive method justices apply to cases that come before them.

Over the more than two centuries in which our constitutional democracy has endured, our understanding of individual freedom has expanded.

This trend is not new: the expansion of notions of liberty and equality began with the birth of the republic.

Our understanding of the constitution has not been static; rather it has flowed consistently in the direction of broadening the freedoms of Americans.

The document has remained, as its writers intended, a flexible and dynamic instrument.

Throughout our history, each evolutionary change has brought controversy; each expansion of individual liberty has ignited resistance from those who prefer the status quo—but in every instance, moving ahead on liberty has proved to be the right thing to do:

Removing the barrier of race to full equality generated enough conflict in the 19th century to fuel a bitter and bloody civil war, and resistance has been carried into our own time.

But today it is generally acknowledged, even where it was once most resisted, that reducing the barriers of race has strengthened American society.

The granting of more equal rights under the constitution to women—a change that owes much to the lawyer who is our nominee today—has been similarly controversial.

But today, with that process not yet complete, most Americans agree that it has been a change for the better in the life of our nation.

The voting rights act, which has extended the practical right to vote to millions of formerly disenfranchised Americans, was and remains a source of controversy, even on the Supreme Court itself; but today there are hundreds of minority women and men holding public office where formerly there were few—even in areas where majority voters dominate the rolls—bringing us closer to the constitutional goal of representative government.

The controversy that flows inevitably from change has found its way into the confirmation process. But it does not alter in any sense what we do here.

Our task today—as in all Supreme Court confirmation hearings—is to consider the character, the qualities and the judicial philosophy of Ruth Bader Ginsburg.

Judge Ginsburg, you come before the committee with your place in history already secure.

In the 1970's you argued a series of landmark cases that changed the way our laws could distinguish between men and women.

You have already helped to change the meaning of equality in our nation.

Now, as you face a new opportunity to help shape the future of America, we welcome you and we invite you to share with us and the American people your vision of the shape of that future.

The CHAIRMAN. I yield now to my colleague, Senator Hatch, the ranking member, who I would also like to publicly thank for expediting this process. As all of my colleagues know, if any of the members in this committee, and particularly the ranking member, concluded that it was not appropriate to move as rapidly as we

have, under the Senate rules that could easily be done. It could be slowed. The Senator has been totally and completely cooperative from the outset. He has been a man of his word in suggesting that he would move where there was no controversy from his perspective, would move judiciously, warning me that there may be future occasions when he might not be ready to be so cooperative. But I thank him for his cooperation, and I appreciate it very much.

Senator HATCH. Well, thank you, Senator Biden, for your kind words, and welcome, Judge Ginsburg, to the committee. We are very happy and pleased to have you here and to finally have these proceedings start.

I want to personally pay tribute to my colleague, Senator Specter. We are happy to have him back and happy to have him in such good health and good condition. I do think he could have gotten a little better Pennsylvania hat than that one myself.

The CHAIRMAN. And I wish you would fold the brim a little bit, Arlen.

Senator HATCH. At least curve the brim, Arlen. [Laughter.]

#### **OPENING STATEMENT OF SENATOR HATCH**

Senator HATCH. Well, I want to congratulate you, Judge Ginsburg, for this wonderful opportunity to be Associate Justice of the Supreme Court. You have had a distinguished career in the law. You have been a law professor and pioneering advocate for equal rights for women, and for over 13 years, you have served as a thoughtful member of the Court of Appeals for the District of Columbia Circuit.

You have been nominated to replace a really fine member of the Court, a distinguished public servant and patriot, Justice Byron White, a person I have had a personal, strong friendship and relationship with, who I think is a great Justice. And I pay him tribute and wish him well as he enters into a well-deserved retirement.

Judge Ginsburg's ability, character, intellect, and temperament to serve on the Supreme Court are not, in my mind, in question. I don't have any doubts at all about that. I have been favorably impressed with Judge Ginsburg for some time.

A Supreme Court Justice, in my view, however, must meet an additional qualification. He or she must understand the role of the judiciary, including the Supreme Court, in our system of government. Under our system, a Supreme Court Justice should interpret the law and not legislate his or her own policy preferences from the bench. The role of the judicial branch is to enforce the provisions of the Constitution and the laws we enact in Congress as their meaning was originally intended by the Framers.

Any other philosophy of judging requires unelected Federal judges to impose their own personal views on the American people in the guise of construing the Constitution and Federal statutes. There is no way around this conclusion. Such an approach is judicial activism, plain and simple. And it is wrong, whether it comes from the political left or whether it comes from the political right.

Let there be no mistake: The Constitution, in its original meaning, can be readily applied to changing circumstances. That telephones did not exist in 1791, for example, does not mean that the fourth amendment's ban on unreasonable searches is inapplicable

to a person's use of the telephone. But while circumstances may change, the meaning—the principle—of the text, which applies to those new circumstances, does not change.

Reasonable jurists can sometimes disagree over what a particular constitutional or statutory provision was intended to mean and over how such meaning is properly applied to a given set of facts. But if the judicial branch is not governed by a jurisprudence of original meaning, the judiciary usurps the role the Constitution reserves to the people through their elected representatives.

When judges depart from those principles of construction, they elevate themselves not only over the executive and legislative branches, but over the Constitution itself and, of course, over the American people. These judicial activists, whether of the left or right, undemocratically exercise a power of governance that the Constitution commits to the people and their elected representatives. And these judicial activists are limited, as Alexander Hamilton shrewdly recognized over 200 years ago, only by their own will—which is no limit at all.

As a consequence of judicial activism, we witnessed in an earlier era the invalidation of State social welfare legislation, such as wage and hour laws. Since the advent of the Warren court, judicial activism has resulted in the elevation of the rights of criminals and criminal suspects and the concomitant strengthening of the criminal forces against the police forces of our country; the twisting of the constitutional and statutory guarantees of equal protection of the law such that reverse discrimination often results; prayer being chased out of the schools; and the Court's creating out of thin air a constitutional right to abortion on demand, to just cite a few instances and a few examples. One of the objectives of the judicial activists for the future is the elimination of the death penalty.

The Constitution, as it has been amended through the years, in its original meaning, is our proper guide on all of these issues. It places primary responsibility in the people to govern themselves. It provides means of amendment through the agency of the people and their elected representatives, not by a majority of the Supreme Court. That is why appointing and confirming judges and Supreme Court Justices who won't let their own personal policy preferences sway their judgment is so important.

A President is entitled to some deference in a selection of a Supreme Court Justice. President Clinton and I are unlikely to agree on the person who ought to be nominated. But so long as the nominee is experienced in the law, intelligent, of good character and temperament, and gives clear and convincing evidence of understanding the proper role of the judiciary in our system of government, I can support that nomination and that nominee.

Moreover, I do not expect to agree with any nominee, especially one chosen by a President of the other party, on every issue before the judicial branch. The key question is whether the nominee can put aside his or her own policy preferences and interpret the Constitution and the laws in a neutral fashion.

Finally, I would point out that I disagree very much with some of Judge Ginsburg's academic writings and some views she held prior to ascending to the bench in 1980. I believe that Judge Ginsburg's judicial opinions, however, indicate her understanding that

her policy views and earlier role as advocate are distinct from her role as a judge. I will explore that distinction in these hearings.

It is my hope that Judge Ginsburg will satisfy this committee that she shares the judicial philosophy of applying the original meaning of our Constitution and laws in the cases which come before her on the Supreme Court, if she is confirmed.

[The prepared statement of Senator Hatch follows:]

**PREPARED STATEMENT OF SENATOR HATCH**

Thank you, Mr. Chairman. I congratulate the nominee, Judge Ruth Bader Ginsburg, on her nomination to be Associate Justice of the Supreme Court. Judge Ginsburg has had a distinguished career in the law. She has been a law professor and pioneering advocate for equal opportunity for women. For over 13 years, she has served as a thoughtful member of the Court of Appeals for the District of Columbia Circuit.

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Reasonable jurists can sometimes disagree over what a particular Constitutional or statutory provision was intended to mean and over how such meaning is properly applied to a given set of facts. But, if the judicial branch is not governed by a jurisprudence of original meaning, the judiciary usurps the role the Constitution reserves to the people through their elected representatives.

Alexander Hamilton, an advocate of a vigorous central government, in defending the judiciary's right to review and invalidate the Legislative Branch's acts which contravene the Constitution, made clear that federal judges are not to be guided by personal predilection. He rejected the concern that such judicial review made the judiciary superior to the legislature: "A constitution, is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body \* \* \*. It can be of no weight to say that the courts, on the pretense of a repugnancy [between a legislative enactment and the Constitution], may substitute their own pleasure to the constitutional intentions of the legislature. The courts must declare the sense of the law; and if they should be disposed to exercise will instead of judgment, the consequence would equally be the substitution of their pleasure to that of the legislature body. [This] observation \* \* \* would prove that there ought to be no judges distinct from that body." (Federalist 78.) And this comingling of the legislative and judicial functions, of course, would tend to start us down the road to the kind of tyranny the Framers warned about when the separate executive, legislative, and judicial functions are united in the same hands.

When judges depart from these principles of construction, they elevate themselves not only over the executive and legislative branches, but over the Constitution itself, and, of course, over the American people. These judicial activists, whether of the left or right, undemocratically exercise a power of governance that the Constitution com-

mits to the people and their elected representatives. And these judicial activists are limited, as Alexander Hamilton shrewdly recognized over 200 years ago, only by their own will—which is no limit at all.

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Moreover, I do not expect to agree with any nominee, especially one chosen by a President of the other party, on every issue before the Judicial branch. The key question is whether the nominee can put aside his or her own policy preferences and interpret the Constitution and laws in a neutral fashion.

Finally, I would point out that I disagree very much with some of Judge Ginsburg's academic writings and some views she held prior to ascending the bench in 1980. I believe that Judge Ginsburg's judicial opinions indicate her understanding that her policy views and earlier role as advocate are distinct from her role as judge. I will explore that distinction in these hearings.

It is my hope that Judge Ginsburg will satisfy this Committee that she shares the judicial philosophy of applying the original meaning of our Constitution and laws in the cases which will come before her on the Supreme Court if she is confirmed.

Senator HATCH. Now, Mr. Chairman, I want to say that I am pleased with this nomination. I am looking forward to these hearings. They are important. This is one of the great constitutional exercises, and I think every Senator here will be asking some very interesting questions. But could I ask for a few more minutes just as a personal privilege?

The CHAIRMAN. Yes.

Senator HATCH. I want to thank the chairman, and I appreciate the indulgence of my colleagues and the nominee.

I believe my colleagues will agree with me that two members of this committee deserve special recognition for their service on this committee and in the Senate. The distinguished Senator from Massachusetts, Senator Kennedy, has been a member of the Judiciary Committee since February 13, 1963—30 years, 5 months, and 1 week of service. This service included 2 years as chairman. I do not mean to age the Senator from Massachusetts, but his service on the committee began so long ago I had to ask the Senate Historical Office to look it up.

Fortunately, they did not have to go back as far as the Jurassic period, although he does tend to dwell in that period from time to time. [Laughter.]

Nineteen Supreme Court nominations have occurred during this time. Of course, we all know that Senator Kennedy has continued

a long and distinguished family tradition of public service. Many Americans have gotten involved in public service as a result of the example of the Kennedy family.

But I might add for other history buffs that Senator William E. Borah of Idaho, during his 31 years on this committee from 1909 to 1940, witnessed 22 Supreme Court nominations, a record which Senator Kennedy is now approaching. The Senator from Massachusetts, however, is a mere youngster next to our distinguished colleague, the senior Senator from South Carolina, Strom Thurmond, chairman of this committee for 6 years.

I was interested to learn from the Senate Historical Office that Senator Thurmond's service on the committee began after that of Senator Kennedy, on January 16, 1967. Thus, Senator Thurmond has not sat on the committee for as many Supreme Court nominations as Senator Kennedy. He missed the Abe Fortas nomination in committee in 1965, although, as we all know, he was on the committee for Justice Fortas' unsuccessful nomination to be Chief Justice.

But Senator Thurmond has been a Member of the Senate longer than any other current Member. He has witnessed 25 nominations as a Senator, beginning with President Eisenhower's nomination of John M. Harlan in January 1955. No other current Member of the Senate has been here for as many Supreme Court nominations. Through nine Presidents, all but one of whom, Jimmy Carter, sent nominees to the Senate, and as Supreme Court nominees and Supreme Court Justices have come and gone, Senator Thurmond has been at his post.

Amazingly, I discovered that Senator Thurmond does not hold the Senate record—not yet, anyway. Senator Carl Hayden of Arizona, during his 42 years of Senate service, witnessed 28 Supreme Court nominations. Does anyone doubt that that record one day will fall to South Carolina?

Earlier this year, I observed that my friend from South Carolina is a Senator's Senator, a tenacious advocate for the people of his State, the best interests of our country, and the principles he believes in.

Now, let me mention something more. Senator Thurmond has served as an inspiration to generations of young people, not just South Carolinians, not just southerners, but young people all over the Nation. These Americans have been spurred to participate in the political life of their communities, their States, and their country by the example of Senator Thurmond's devotion to limited government, free enterprise, a strong national defense, and his deep, selfless love of country. Some of those he has inspired sit behind me. Others he has inspired, like myself, sit on this committee as his colleague, a privilege for which I am very grateful.

I thought both of our colleagues deserve some small recognition for their service, and I want to thank Richard A. Baker, the Senate's Historian, and Joanne McCormick Quatannens of his office for their timely help in compiling the details of the service of our two colleagues. And I want to thank my colleagues for this courtesy so I could make these remarks and pay tribute to these two colleagues here today.

Thank you, Mr. Chairman.

The CHAIRMAN. I want to thank you, Senator. You have just solved a mystery for me. I wondered why Senator Thurmond spent so much time on the floor talking about Abe Fortas. Now I know. He wasn't on the committee. He didn't have a chance to speak in the committee.

Now, we are going to go slightly out of order here, and the distinguished chairman of the Finance Committee has the unenviable job of being the Chair of a conference committee that is just putting together the national budget and reconciliation. He is to convene that conference at 11. His distinguished colleague, Senator D'Amato, representing—I am going to figure out the New York connection here in a moment—is also here. So we are going to go with the three introducers now, and then return to Senators Kennedy and Thurmond and work our way through the committee.

Senator Moynihan, welcome. It is a pleasure to have you here. The floor is yours.

**STATEMENT OF HON. DANIEL PATRICK MOYNIHAN, A U.S.  
SENATOR FROM THE STATE OF NEW YORK**

Senator MOYNIHAN. Thank you. Mr. Chairman, Senator Hatch, Senator Specter, I am privileged to introduce and to recommend without reservation Judge Ruth Bader Ginsburg, who is especially qualified to be the 107th Justice of the Supreme Court of the United States.

Judge Ginsburg is perhaps best known as the lawyer and litigator who raised the issue of equal rights for women to the level of constitutional principle. She has also distinguished herself in a wide range of legal studies and for the last 13 years has been one of our Nation's most respected jurists on the U.S. Court of Appeals for the District of Columbia Circuit.

I must tell you that Senator D'Amato and I take special pride in her nomination. She was born and raised in Brooklyn. The day after her nomination, the front page of the New York Daily News exclaimed: "A Judge Grows in Brooklyn."

She attended Cornell where she was elected to Phi Beta Kappa, later Columbia Law School where she was tied for top of her class. Indeed, she actually attended two law schools, beginning at Harvard and finishing at Columbia so that she could be with her husband, Martin, who had returned from Cambridge to begin the practice of law in New York. Never before Ruth Bader Ginsburg had anyone been a member of both the Harvard and Columbia Law Reviews.

With such a record, you would think it not surprising that she should be recommended to serve as law clerk to Supreme Court Justice Felix Frankfurter. Neither is it surprising that at that time, a time she has changed, Justice Frankfurter thought it would be inappropriate to have a woman clerk.

She clerked for Judge Edmund Palmieri, and then entered the Columbia Law School project on international procedures. She taught at Rutgers Law School, then Columbia, becoming one of the first tenured woman professors in the country, and then became the moving force behind the women's rights project of the American Civil Liberties Union, the prime architect of the fight to invalidate discriminatory laws against individuals on the basis of gender.

Her imprint can be found on virtually every gender case which reached the Supreme Court in the 1970's. She herself argued six of the cases before the Court and won five of them. The specifics are well known to members of this honorable committee and will no doubt be discussed in detail. But I would call attention, sir, simply to remarks of Erwin N. Griswold, the former Solicitor General of the United States and dean of the Harvard Law School at the time Judge Ginsburg was there. He spoke at a special session of the Supreme Court commemorating the 50th anniversary of the opening of their new building, as it then was.

Dean Griswold spoke of the work of attorneys who had appeared before the Court on behalf of special interest groups, as he termed it, and he said this:

I think, for example, of the work done in the early days of the NAACP which was represented here by one of the country's great lawyers, Charles Hamilton Houston; work which was carried on later with great ability by Thurgood Marshall. And I may mention the work done by lawyers representing groups interested in the rights of women of whom Ruth Bader Ginsburg was an outstanding example.

It is in that context, Mr. Chairman, that the American Bar Association has given her its highest rating, and she has my most sincere and proud recommendation to this committee.

Thank you, sir.

The CHAIRMAN. Thank you very much, Mr. Chairman.

Senator D'Amato.

#### **STATEMENT OF HON. ALFONSE M. D'AMATO, A U.S. SENATOR FROM THE STATE OF NEW YORK**

Senator D'AMATO. Mr. Chairman, in the interest of time, let me second the magnificent introduction that the distinguished senior Senator, my colleague Senator Moynihan, has made on behalf of Judge Ginsburg. Let me say that I take very special pride in the fact that the judge grew and flourished in Brooklyn, my home town.

Let me also add to this committee that there is no doubt that she has distinguished herself as teacher, lawyer, judge, and parent, with her magnificent and wonderful family here today.

While we may not agree with all of the learned judge's decisions, no one can question her honesty, her integrity, her commitment to the process of law, and I commend her for your approval and ask that there be an extension for my written remarks to be included as if read and submitted in their entirety.

The CHAIRMAN. Without objection. I thank you very much, Senator.

[The prepared statement of Senator D'Amato follows:]

#### **PREPARED STATEMENT OF SENATOR ALFONSE M. D'AMATO**

Mr. Chairman, I am pleased to be here this morning to join with my colleague, Senator Moynihan, to introduce Judge Ruth Bader Ginsburg to this Committee and to our nation. As most of you know, Judge Ginsburg comes to us from the rough and tumble streets of Brooklyn, although her public demeanor would not suggest such a background. However, I wouldn't let her temperament fool you, for I know of no one from Brooklyn who did not know how to stand up for themselves and make their point known.

As I stated, Judge Ginsburg was born and raised in Brooklyn during the depression and World War II. Determined to succeed, Judge Ginsburg graduated from Cornell and entered Harvard Law at a time when it was not popular for young women

to enter law school. Eventually transferring to and graduating from Columbia Law School, she had a difficult time breaking the "old boy" network that excluded so many other fine law graduates. In true Brooklyn form, though, this did not dissuade her, and through perseverance, she obtained a clerkship with U.S. District Judge Edmund Palmieri.

After her clerkship, Judge Ginsburg went on to teach law at Rutgers University, where, during her nine years, she rose to become a full professor. She moved on to Columbia University Law School where she taught another nine years. During those years as a professor, Judge Ginsburg was quite successful before the bench arguing numerous cases, including winning five of six decisions before the Supreme Court regarding sex discrimination. Based on her intellect and ability, she was appointed to the U.S. Court of Appeals for the District of Columbia in 1980.

Since her appointment to the federal bench, Judge Ginsburg has written hundreds of decisions. While I may not agree with her on some of her opinions, I have found Judge Ginsburg to be honest to a fault, with the utmost in integrity, a keen mind, and a true belief in the law.

No Senator will agree with the opinions of a Supreme Court Justice 100 percent of the time. I know that I will not agree with Judge Ginsburg's decisions all of the time. However, I do know that hers will be the kind of decisions that will be undertaken with deliberate care and that even if I disagree with her, I will be confident that her opinion will not be the result of a rash or ill-thought decision making process.

Mr. Chairman, I am pleased, also, to welcome Judge Ginsburg's family—her husband Martin Ginsburg, a Professor of tax law at Georgetown University and a partner in the Washington office of Fried, Frank, Harris, and Shriver; her daughter Jane, a law Professor at Columbia University; her son James, a law student at the University of Chicago and a producer of classical recordings, and her lovely grandchildren.

Again, it is my pleasure to introduce Judge Ruth Bader Ginsburg at her confirmation hearings to be an Associate Justice to the United States Supreme Court.

The CHAIRMAN. Now we will hear from Delegate Eleanor Holmes Norton. We welcome you to the other body, and thank you for coming over.

#### **STATEMENT OF HON. ELEANOR HOLMES NORTON, A DELEGATE IN CONGRESS FROM THE DISTRICT OF COLUMBIA**

Ms. NORTON. Thank you, Mr. Chairman.

Mr. Chairman, it is my great pleasure to introduce and recommend Judge Ruth Bader Ginsburg to you. Now a resident of my district here in Washington, DC, Judge Ginsburg was born in Brooklyn. Brooklyn natives, of course, have often spread to far corners, like the overseas Chinese, sharing the riches of that borough with places like Washington which thrive on such exports.

Judge Ginsburg's service on our U.S. Court of Appeals has been unusually distinguished, a virtually foregone conclusion for any who knew her before her appointment in 1980. I have known Ruth Ginsburg for two decades. As a law professor, civil rights and civil liberties lawyer, she was the chief navigator in the journey that took women, after more than 100 years, into the safe harbor of the U.S. Constitution.

When Ruth Ginsburg founded the ACLU women's rights project, today's axiom that the 14th amendment applies to women was not axiomatic at all. As one of Judge Ginsburg's former students has said, "People forget how things were."

Judge Ginsburg has spent her life making things how they ought to be. Using her gifted mind, honed by indefatigably hard work, she has used the law, always carefully, always defensibly, for all of those left at the margins, for want of a lawyer or a judge with the brilliance and commitment to pull them mainstream.

As a lawyer, she was an activist intellectual who brought grace to both roles. As a judge, Ruth Ginsburg has not only resolved hard cases, she has contributed to legal theory and made collegiality among judges and its effect on the law a new and fascinating subject of scrutiny.

Those who have expected great things of Ruth Ginsburg have always gotten what they bargained for. Count on Justice Ginsburg to keep that unbroken record.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very, very much.

I know all of you have other duties, and we appreciate your being here. Thank you for your input. And, Pat, I am delighted that you had the opportunity to introduce a woman who saves my daughter Ashley from having to be the second woman nominee to the Supreme Court. Thank you.

Now we will return to semiregular order, which is that Senator Kennedy would go next. But our distinguished colleague and ranking member of the Armed Services Committee has to attend a hearing at 11, and Senator Kennedy has graciously suggested that he go next.

#### OPENING STATEMENT OF SENATOR THURMOND

Senator THURMOND. Thank you, Mr. Chairman. I wish to thank Senator Kennedy for letting me go at this time.

I want to express my appreciation to Senator Hatch for his kind words. He is a great Senator and a great man, and I appreciate what you had to say.

We all welcome Senator Specter back, a great Senator and a true patriot of this country. So glad to see you in good health now.

Now, Mr. Chairman, today the Senate begins consideration of the nomination of Judge Ruth Bader Ginsburg to be an Associate Justice of the U.S. Supreme Court. If confirmed, Judge Ginsburg will be the 107th person to serve as a Justice, continuing the long tradition of distinguished jurisprudence which began with Justice John Rutledge of South Carolina, who was appointed on September 26, 1789. Although I was not privileged to be in the Senate at that time—[Laughter.]

Lest anyone have doubts—Judge Ginsburg's will be the 25th Supreme Court nomination I have reviewed during my nearly 39 years in the Senate.

Since its first session in the Royal Exchange Building in New York City in 1790, the Supreme Court has been an indispensable part of our Government, securing individual rights and interpreting the laws of this Nation. Occasionally, however, the Federal courts have gone beyond their constitutional mandate and used their judicial authority to legislate from the bench. I believe that the Hamiltonian vision of the judiciary is a correct one: Judgment, not will, is to be exercised by the judicial branch.

Mr. Chairman, we have a very serious responsibility here. Article II of the Constitution confers upon the Senate the duty of giving "advice and consent" to the President's appointment of Supreme Court Justices. The detailed review of judicial nominations has been assigned by the Senate to the Judiciary Committee. To a great extent, our colleagues who are not on this committee depend

upon our work to make their own decisions on a nominee's qualifications to sit on the most important and prestigious court in America. These hearings also give the public an opportunity to see the process at work.

Justices occupy a position of immense power and are tenured for life. Furthermore, Justices and other Federal judges are not accountable to the public through the ballot box. It is, therefore, imperative that the Senate exercise its role in the confirmation process with great care, ensuring that the nominee possesses the necessary qualifications to fill this immensely important role.

Over the years, I have determined the special qualifications I believe an individual must possess to serve on the Supreme Court, and they are as follows:

First, unquestioned integrity. A nominee must be honest, absolutely incorruptible, and completely fair.

Second, courage. A nominee must possess the courage to decide tough cases according to the law and the Constitution.

Third, compassion. While a nominee must be firm in his or her decisions, they should show mercy when appropriate.

Fourth, professional competence. The nominee must have the ability to master the complexity of the law.

Fifth, proper judicial temperament. The nominee must have the self-discipline to base decisions on logic, not emotion, and to have respect for lawyers, litigants, and court personnel.

Sixth, an understanding of the majesty of our system of government. The nominee must understand that only Congress makes the laws, that the Constitution is changed only by amendment, and that all powers not specifically delegated to the Federal Government are reserved to the States.

These are the essential qualities which determine the fitness of an individual to serve on the Court, and it appears to me that Judge Ginsburg possesses them. She has had a distinguished scholastic and legal career and established a reputation as a person who thinks twice before acting—an especially valuable quality in a judge.

After 13 years on the D.C. Circuit Court, Judge Ginsburg has written hundreds of opinions, authored numerous articles, and delivered many speeches. I am not in agreement with her on every issue. However, I respect her intelligence and ability, and I look forward to discussing her approach to constitutional issues and reviewing her development on the D.C. Circuit Court.

Mr. Chairman, as we begin this hearing, I am reminded of the thoughts conveyed by President Washington to Chief Justice John Jay and the Associate Justices during the first term of the Supreme Court. His comments on the judicial branch remain as insightful and compelling today as when they were first delivered. He stated, and I quote:

I have always been persuaded that the stability and success of the National Government, and consequently the happiness of the people of the United States, would depend in a considerable degree on the interpretation and execution of its laws. In my opinion, therefore, it is important that the judiciary system should not only be independent in its operations, but as perfect as possible in its formation.

Mr. Chairman, I believe this hearing is a continuation of ongoing efforts to create a judiciary which is as perfect as possible. As we

pursue this worthy goal, it is incumbent upon the Senate to closely review Judge Ginsburg's qualifications to serve on the highest court in the land.

Judge Ginsburg, we welcome you here today and look forward to your testimony.

Thank you, Mr. Chairman.

[The prepared statement of Senator Thurmond follows:]

**PREPARED STATEMENT OF SENATOR THURMOND**

Mr. President, today, the Senate begins consideration of the nomination of Judge Ruth Bader Ginsburg to be an Associated Justice of the United States Supreme Court. If confirmed, Judge Ginsburg will be the 107th person to serve as a Justice; continuing the long tradition of distinguished jurisprudence which began with Justice John Rutledge of South Carolina, who was appointed on September 26, 1789. Although I was not privileged to be in the Senate at that time—lest anyone have doubts!—Judge Ginsburg's nomination will be the 25th Supreme Court nomination I have reviewed during my nearly 39 years in the Senate.

Since its first session in the Royal Exchange Building in New York City in 1790, the Supreme Court has been an indispensable part of our government, securing individual rights and interpreting the laws of this Nation. Occasionally, however, the Federal courts have gone beyond their constitutional mandate, and used their judicial authority to legislate from the bench. I believe that the Hamiltonian vision of the judiciary is the correct one: judgement, not will, is to be exercised by the judicial branch.

Mr. Chairman, we have a very serious responsibility here. Article II of the Constitution confers upon the Senate the duty of giving "advice and consent" to the president's appointment of Supreme Court Justices. The detailed review of judicial nominations has been assigned by the Senate to the Judiciary Committee. To a great extent, our colleagues who are not on this Committee depend upon our work to make their own decisions on a nominee's qualifications to sit on the most important and prestigious court in America. These hearings also give the public an opportunity to see the process at work.

Justices occupy a position of immense power, and are tenured for life. Furthermore, justices and other federal judges are not accountable to the public through the ballot box. It is therefore imperative that the Senate exercise its role in the confirmation process with great care, ensuring that the nominee possesses the necessary qualifications to fill this immensely important role.

Over the years, I have determined the special qualifications I believe an individual must possess to serve on the Supreme Court. They are as follows:

First, unquestioned integrity. A nominee must be honest, absolutely incorruptible, and completely fair.

Second, courage. A nominee must possess the courage to decide tough cases according to the law and the Constitution.

Third, compassion. While a nominee must be firm in his or her decisions, they should show mercy when appropriate.

Fourth, professional competence. The nominee must have mastered the complexity of the law.

Fifth, proper judicial temperament. The nominee must have the self-discipline to base decisions on logic, not emotion, and to have respect for lawyers, litigants and court personnel.

Sixth, an understanding of the role of the Court. The nominee must understand that only Congress makes the laws, that the Constitution is changed only by amendment, and that all powers not specifically delegated to the Federal government are reserved to the States.

These are the essential qualities which determine the fitness of an individual to serve on the court, and it appears to me that Judge Ginsburg possesses them. She has had a distinguished legal career, and established a reputation as a person who thinks twice before acting—an especially valuable quality in a judge.

After 13 years on the D.C. Circuit Court, Judge Ginsburg has written hundreds of opinions, authored numerous articles and delivered many speeches. I am not in agreement with her on every issue. However, I respect her intelligence and ability, and I look forward to discussing her approach to constitutional issues and reviewing her development on the D.C. Circuit Court.

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ing the first term of the Supreme Court. His comments on the judicial branch remain as insightful and compelling today as when they were first delivered. He stated and I quote:

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Mr. Chairman, I believe this hearing is a continuation of ongoing efforts to create a judiciary which is as perfect as possible. As we pursue this worthy goal, it is incumbent upon the Senate to closely review Judge Ginsburg's qualifications to serve on the highest court in the land.

Judge Ginsburg, we welcome you here today, and look forward to your testimony. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator.

#### **OPENING STATEMENT OF SENATOR KENNEDY**

Senator KENNEDY. Thank you very much, Mr. Chairman.

I want to extend my appreciation for the kind words of my good friend from Utah, and it is a pleasure to serve on this committee with "Tyrannosaurus" Hatch. [Laughter.]

I join in congratulating Judge Ginsburg on her nomination, and in welcoming her before this committee.

Nominations to the Supreme Court are among the most important decisions that any President makes, and the confirmation process is one of Congress' most important responsibilities.

The Supreme Court is the guardian of our most basic constitutional rights and liberties. The Justices of the Supreme Court have the last word on the meaning of the Constitution; and they are called upon to decide many of the most important and difficult questions of our time:

May a State consider the race of its citizens in drawing legislative districts? May a State impose a greater punishment for a crime because the criminal is motivated by racial or religious bigotry? What is the proper boundary between church and state when government furnishes aid to students in religious schools?

These are just a few of the questions that the Justices of the Supreme Court decided in the past term. The rules announced by the Court in its decisions affect the daily lives of all Americans.

Senators must satisfy themselves that a Supreme Court nominee has the outstanding ability, unquestionable character, and fair and balanced temperament to decide the important and difficult cases that come before the Court. And, no less important, Senators must determine whether a nominee to the Supreme Court possesses a deep understanding and commitment to the fundamental values of liberty, fairness, and equality enshrined in the Constitution.

Our constitutional freedoms are the historic legacy of every American. The Members of the Senate have an obligation to ensure that those freedoms are entrusted to women and men on the Supreme Court who will preserve their meaning for future generations.

Based on her pathbreaking work as a law professor and a legal advocate for the rights of women, and based on her distinguished career as a Federal appeals court judge, it appears that Judge Ginsburg easily meets these high standards. Her creative strategies to win legal recognition of the right of women to equal protec-

tion of the laws have earned her the admiration and respect of every American committed to ending discrimination in our Nation. Her impressive and scholarly work on the Federal appeals court here in Washington has earned her a reputation as one of the very best judges in the United States today.

The members of this committee, nonetheless, have a constitutional responsibility to carefully examine Judge Ginsburg's opinions and articles and to ask her about her legal philosophy and approach to the Constitution, to assure ourselves that she deserves the high honor of joining the Nation's highest court.

I commend President Clinton for this excellent nomination, and I look forward to Judge Ginsburg's testimony.

The CHAIRMAN. Because we went out of order at the outset, the next speaker will be Senator Metzenbaum.

#### OPENING STATEMENT OF SENATOR METZENBAUM

Senator METZENBAUM. Thank you, Mr. Chairman.

Judge Ginsburg, congratulations on your nomination and welcome to these hearings.

It has been a long time since a Democratic President has made a Supreme Court nomination. Justice White's resignation means that all of the remaining Justices were nominated by Republican Presidents.

This day is welcome, for many reasons. For 12 years, Supreme Court nominees have been sent to this committee in the hope of promoting a political and social agenda directly from the planks of the Republican Party platform. A core element of that agenda was the reversal of Supreme Court decisions in the areas of abortion, civil rights, individual liberties, and the first amendment. Unfortunately, their efforts have met with considerable success.

As a result, the Supreme Court today is plagued by a vision of the Constitution which is cramped and narrow. The current Court lacks either the will or the commitment to make the promises and principles of our Constitution a reality for all Americans.

This Nation faces difficult—and sometimes divisive—social problems. We need leadership that is inclusive and tolerant. And we need a Supreme Court that is a source of inspiration and moral leadership. Only then will individual liberty, equal justice, and fundamental fairness be a reality for everyday Americans, as we prepare to turn to the 21st century.

President Clinton took one large step in that direction by nominating Ruth Bader Ginsburg. No one can seriously claim that the President selected Judge Ginsburg to carry out a political agenda. The President found in Judge Ginsburg the nominee he was searching for, a person of enormous talent and integrity, a generous character, and an unyielding fidelity to the Constitution and the rule of law in the service of society.

Judge Ginsburg's record as a litigator is the envy of lawyers throughout the country. She spent the bulk of her career as a lawyer working to secure equal rights for women. She succeeded, due to her comprehensive knowledge of the law and her keen understanding of what would persuade the male members of the Supreme Court.

She developed a brilliant litigation strategy, which included at times using men as plaintiffs in gender discrimination suits. This tactic helped the then all-male Supreme Court see that discrimination based on gender was incompatible with the great constitutional principle of equal protection under the law.

She showed courage and determination, when opportunities were closed to her due to discrimination against women. She didn't just get angry and resentful. She fought to change the law for the benefit of all women and men.

With such an outstanding career as a lawyer, it is no surprise that President Carter selected her for the Federal Bench. Her tenure on the Circuit Court of Appeals for the District of Columbia has distinguished her as one of the country's finest judges. As President Clinton said in introducing her to the Nation, she is "progressive in outlook, wise in judgment, balanced and fair in her opinions."

Judge Ginsburg's record is exemplary, and I am frank to say that I expected nothing less in a nomination by President Clinton. But there is still more that I want to know.

As an advocate, Ruth Bader Ginsburg pushed the Court to landmark decisions on behalf of women's rights. While she fought for women one case at a time, she had a goal, a vision of a Constitution that protected women against discrimination.

While a circuit court of appeals judge, her duty has been to faithfully apply the law as interpreted by the Supreme Court. But, if confirmed as the next Supreme Court Justice, she would have the opportunity to shape the law, rather than merely apply it. I want to know whether Judge Ginsburg will embrace this opportunity to shape the law to make the enduring principles of our Constitution a reality for all Americans, no matter how rich or poor, no matter what race or religion, no matter how unpopular their cause might be.

As an appeals court judge, Judge Ginsburg is well known for her preference for measured or incremental movement in the law. She speaks of permitting constitutional doctrine, especially in controversial areas, to emerge from a dialog between the courts, other branches of government, and the people. I am concerned she will always take a similar approach on the Supreme Court, and I will make it no secret that I hope she will not.

When Judge Ginsburg speaks of a dialog, she apparently envisions a concept of gradualism in applying the Constitution's provisions. That causes me concern, because any delay in enunciating or protecting constitutional rights is justice denied.

There are times and there are issues when the Supreme Court must show leadership. History demonstrates that it is sometimes the Court, rather than Congress or the President, which must have the will and the vision to define the Constitution's promises of liberty and justice, even when it is unpopular to do so. I expect to inquire in this area, to know whether Judge Ginsburg will lead the Court at such times.

Judicial leadership in addressing the great social and political problems of our day can be controversial. Judge Ginsburg will probably hear much about judicial activism and judge-made laws from my colleagues during these hearings. I suspect they will warn her

against judicial activism, notwithstanding the considerable conservative judicial activism we have seen from the current Supreme Court.

But we must rise above this wornout debate to recognize that leadership in applying the cherished principles of our Constitution is not judicial activism. It is leadership we need from Judge Ginsburg on the Supreme Court.

The role of the Supreme Court in preserving and promoting individual liberty, equal opportunity, and social justice must be restored. Judge Ginsburg, your career as an advocate suggests that you have the intelligence, determination, and courage to begin the work that needs to be done. Your career as an appeals court judge suggests that you have the temperament and judicial skills to begin that restoration. My only question for you during these hearings relates to how you will meet that challenge.

Thank you, Mr. Chairman.

[The prepared statement of Senator Metzenbaum follows:]

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Judge Ginsburg, congratulations on your nomination and welcome to these hearings.

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The CHAIRMAN. Thank you very much.  
Senator Simpson.

#### **OPENING STATEMENT OF SENATOR SIMPSON**

Senator SIMPSON. Mr. Chairman, in the past, following Howard has always gotten me pretty well primed up, but not this time, except for a few rambling remarks there about Republican Presidents and a Democratic President, too, he is right on track.

I appreciate your leadership, Mr. Chairman. You have always been very fair and open, serious and practical with us.

Welcome back to Arlen, a wonderful legislator and friend and a real contributor to this committee.

Good morning, Judge Ginsburg.

In going through many of the things that you have written, I noted an article in the Illinois Law Review where you said, in carrying out its duty to consider the President's nominees to the Supreme Court, we have a "weighty responsibility to consider what will serve the national interest." We indeed do, and we will attempt to carry that out responsibly and with a serious intent of a knowledge of our responsibility by considering, among other things, your

judicial philosophy, how you will think and reason, as you contemplate the pressing legal issues of the day, questions of the day, and we must do that without compromising your judicial independence.

There are, of course, other important considerations and qualifications for a nominee to the Supreme Court. A nominee's rectitude and deportment are critical considerations. We must be certain that the nominee has the education, the experience, and the temperament to serve in the highest office in our profession.

I am certainly pleased to say here the record is remarkably clear. Indeed, in these areas you may well be overqualified. That is a serious defect in this community. Think of the ones you know who are.

As one who loves Gilbert and Sullivan, you would compose your own lyrics to the tune of "I've got a little list of society offenders who never would be missed," and you remember the rest of that.

But the record here is not so obvious or apparent on your judicial philosophy. So, indeed, as Senator Metzenbaum has said, what about judicial activism? That will be asked. Some of your writings seem to imply that it is justified at times, perhaps even forced upon the courts by congressional inaction. I have seen that problem. It is very real. No wonder courts enter the fray.

When considering constitutional issues, how persuasive do you find the intent of those who drafted the document. You said some things about that. Your colleagues have or your colleagues-to-be have. What will you do when their intent is unclear or, even more appropriately, more unknowable?

In these hearings, we will try to learn what approach you might take in deciding the critical questions of our day, and yet only you will know the extent and substance of response to those questions. Historical perspective here being an example, the more questions, the less answers will get you home.

So for me, your competence and temperament are beyond question and we look forward to learning more about your thinking and reasoning, as you would wish to share it in whatever depth, and we will know then whether this appointment will serve the national interest, a very broad and remarkable phrase, but I think, indeed, from what I know, that your appointment would indeed serve that interest.

I thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you.

I might note it is remarkable that 7 years ago the hearing we had here was somewhat more controversial, and I made a speech that mentioned the "p" word, philosophy, that we should examine the philosophy, and most editorial writers of the Nation said that was not appropriate. At least we have crossed that hurdle. No one is arguing that any more.

Senator DeConcini.

#### OPENING STATEMENT OF SENATOR DeCONCINI

Senator DECONCINI. Thank you, Mr. Chairman.

Let me join in the praise of you and the ranking member in conducting these hearings and the members of this committee for pro-

ceeding. I think it is very important that we process this nomination as soon as we can.

Judge Ginsburg, I join the accolades here in your nomination and those to President Clinton in sending your name here. Twelve years ago, I helped usher a good friend of mine through the same process which you are now experiencing. Her nomination was historic at that time. If confirmed, you will join my friend as the second woman ever to serve on the Court.

Like Justice O'Connor, despite your outstanding academic achievements, your ability to find employment after law school was deterred by your gender. You are an individual who has suffered firsthand the effects of discrimination.

I think that is most fitting for people who are going to interpret the constitutional rights of individuals who come before them and will, like you, ultimately, I predict, serve on the Supreme Court.

You overcame this rude beginning and proceeded to embark upon a truly remarkable and accomplished professional career. You became a nationally respected law professor. And during that time and throughout your career, you have made a considerable contribution to the written legal commentary on this subject and others.

Before coming to the bench, you dedicated your efforts to the struggle for gender equality. In the 1970's, you were instrumentally involved in the landmark case that ultimately persuaded the Supreme Court to establish a greater scrutiny to laws that classify on the basis of gender.

I thank you for that, Judge, for my two daughters, one a doctor and one a lawyer, who have witnessed job discrimination even today. But their opportunities were enhanced by the fact that you fought that battle early in life and earlier than they when they came along.

For the last 13 years, you have served with distinction on what is considered the second highest court in the land.

One comment that has been repeated often since the President announced your nomination is that you defy the label of liberal or conservative jurist. Indeed, one news account noted that during your tenure, you had "often gone out of your way to mediate between the Court's warring liberal and conservative factions."

Throughout your judicial career, you have shown great respect for the institutional integrity of the Court. Over the last few weeks, I have had a chance to read many of your opinions. To me, they demonstrate deference to precedent and embody judicial restraint. I think that is fundamental and so important.

You have great understanding of the role of a middle-tier appellate court. And as you have written, with that role, a judge must follow the guidance of the Supreme Court.

However, Judge Ginsburg, as a Supreme Court Justice, you will not be constrained by a higher court's interpretation. You will have free rein to interpret our Constitution. And as you have commented yourself, you will have "the last judicial word" on the "constitutional questions of the day."

Our constitutional system endows tremendous responsibility and power to our Supreme Court Justices. Because of that power, I strongly believe that nominees to that Court should be prepared to

tell the committee and the American people how they intend to approach the Constitution and the Bill of Rights.

A few years back, you wrote a law review article that discussed the Supreme Court's confirmation process. You concluded by quoting a law professor who described the Senate's role in the process "as second, but not secondary."

The Senate's constitutional obligation is to examine a nominee's competence, integrity, experience, and, yes, his or her philosophy. For the Supreme Court is undeniably a policymaker.

Our Framers drafted the Constitution in broadly worded principles that were intended to protect an evolving society. Constitutional interpretation requires an exercise of discretionary judgment. Thus, we must carefully choose the Constitution's most important interpreters.

By no means are we here to secure assurances from you on certain cases. No one knows exactly how a case will come before you in the future. But how you approach a constitutional issue and what you consider in resolving that issue are all part of the judicial philosophy and part of the questioning that you will undertake in the next few days.

The process is not foolproof. In the past, we have had Supreme Court nominees come before this committee and tell us they had no agenda—and they did. We have had nominees come before this committee and tell us that they did not have a fully developed judicial philosophy—but they did. We have had nominees come before the committee and evoke an image of moderation—but they were not.

These past performances by nominees obviously concern this Senator. Because I believe that the hearings are an integral part of the confirmation process, honest answers matter greatly in this process to this Senator.

Quite frankly, I do not expect this to be a problem with you, Judge. I am confident that at the conclusion of these hearings, the Senate and the American public will have a clear vision of your constitutional philosophy.

Again, my congratulations, Judge, and also to President Clinton for his outstanding nomination and taking the time and the process in which he went through in choosing you to be the next Supreme Court Justice.

I look forward to learning more about your judicial philosophy and your thoughts regarding the Constitution in the next several days.

Thank you, Mr. Chairman.

[The prepared statement of Senator DeConcini follows:]

#### PREPARED STATEMENT OF SENATOR DECONCINI

I am pleased to join my colleagues on the committee in welcoming you, Judge Ginsburg, to your confirmation hearings. Over 12 years ago, I helped usher a good friend of mine through the same process, which you are now experiencing. Her nomination was historic. If confirmed, you will join my friend as the second woman ever to serve on the Court.

Like Justice O'Connor, despite your outstanding academic achievements, your ability to find employment after law school was deterred by your gender. You are an individual who has suffered first-hand the effects of discrimination.

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#### SENATE ROLE

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By no means are we here to secure assurances from you on certain cases. No one knows exactly how a case will come before you in the future. But how you approach a constitutional issue and what you consider in resolving that issue are all part of judicial philosophy. And this is all fair questioning.

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These past performances by nominees obviously concern this Senator. Because I believe that the hearings are an integral part of the confirmation process, honest answers matter greatly in this process.

Quite frankly, I do not expect this to be a problem with you in the least bit. I am confident that at the conclusion of these hearings, the Senate and the American public will have a clear vision of your constitutional philosophy.

In closing, I join my colleagues in extending a warm welcome to you, Judge Ginsburg. I look forward to our dialogue and witnesses. And I look forward to learning more about your judicial philosophy and thoughts on the great constitutional issues of our day.

**The CHAIRMAN.** Thank you, Senator.  
Senator Grassley.

### OPENING STATEMENT OF SENATOR GRASSLEY

Senator GRASSLEY. Congratulations, Judge Ginsburg, and, of course, a warm welcome to your family. I am sure that they take great pride in this day, just as they have done for all of your accomplishments so far in your life, from scholar and law professor to advocate for gender equality, and now to be a distinguished Federal appellate judge, as you have for so many years.

The CHAIRMAN. Senator, before you go on, you mentioned the family: I would like to suggest—there are two young children, and this is a tremendously tedious process. I want them to know they are welcome. Instead of having to go out there to use the facilities and the television or anything they want back here, you have free roam, the kids, literally. So you can go back there, and this is the one time to exact from your daddy a promise of ice cream or something for being good. This is the time to do it. [Laughter.]

I apologize for the interruption, Senator. Seriously, you are welcome to use this end, as well.

Thank you.

Senator GRASSLEY. Also, they might help us by distracting us from time to time.

Today, after so many different distinguished careers you have, is the beginning of an even more notable achievement. If confirmed, you will become only the 107th person on the Supreme Court as a Justice. Indeed, you will join a very elite and a very important group, all charged with interpreting the Constitution.

You, Judge Ginsburg, seem to understand the place that the Supreme Court occupies within our democracy. Through many of your writings, I have detected traces of Alexander Hamilton. For example, you appreciate that the Framers gave the Court great authority to rule on the Constitution, but armed the Court with no swords to carry out its pronouncements.

Alexander Hamilton envisioned that it would be the accountable branch of government, the legislature, that would make the difficult choices within and for our society. In many of your opinions, you have expressly deferred to the will of Congress, as you apply law to the facts of a case.

This confirmation hearing gives us an opportunity to explore your approach to judging and to determine whether you will exercise self-restraint. That, after all, is the touchstone. A Justice must be willing to accept the Constitution as her rule of decision. And a Justice must be able to resist temptation to revise or amend the Constitution according to her definition of what is good public policy.

You and I will disagree on specific issues and will disagree on particular cases. I have no doubt about that. But the issue is not whether you and I can sign onto some political platform together. Justice need not be pro-one thing and anti-another thing. That is why judges were given lifetime tenure, so that they would be insulated from the political pressures of the day. The confirmation process need not be a campaign trail of promises by a nominee. These hearings are about judicial philosophy, not about political results.

Through much of the second half of this century, the Supreme Court has evolved into a political institution and away from being a legal institution. That trend has diminished somewhat in recent

years, with the nomination and confirmation of individuals anchored in the Constitution and individuals who have a deferential approach to the political accountable branches of government. Some political activists, including some of my distinguished colleagues on this committee, are hoping your presence on the Court will bring back an era of political judging. But that view shows a misunderstanding of the role of the Supreme Court.

Your fidelity to the Constitution, your appreciation of its framework of limited powers, and your understanding of the role of Congress and the States in making law—these are the important qualities. In addition, and no less important, a Justice must possess an open mind, or what Justice Frankfurter called “a capacity of disinterested judgment.”

I look forward to exploring these ideas in greater detail with you during these hearings. Once again, I say congratulations to you and all your friends and your family.

[The prepared statement of Senator Grassley follows:]

**PREPARED STATEMENT OF SENATOR GRASSLEY**

Congratulations, Judge Ginsburg, and welcome to your family. I am sure they take great pride in this day, just as they have done with all of your accomplishments—from scholar and law professor—to advocate for gender equality—to distinguished Federal appellate judge.

But today marks the beginning of an even more notable achievement. If confirmed, you will become only the 107th person to become a Supreme Court Justice. Indeed, you will join a very elite and important group, charged with interpreting the Constitution.

You, Judge Ginsburg, seem to understand the place the Supreme Court applies within our democracy. Through many of your writings, I have detected traces of Alexander Hamilton. For example, you appreciate that the Framers gave the Court great authority to rule on the Constitution, but armed the Court with no swords to carry out its pronouncements. Hamilton envisioned that it would be the accountable branch of government—the Legislature—that would make the difficult policy choices. In many of your opinions, you have expressly deferred to the will of Congress as you apply law to the facts of a case.

This confirmation hearing gives us an opportunity to explore your approach to judging and determine whether you will exercise self-restraint. That, after all, is the touchstone. A Justice must be willing to accept the Constitution as her rule of decision. And, a Justice must be able to resist the temptation to revise or amend the Constitution according to her views of what is good public policy.

We will disagree on specific issues and particular cases; I have no doubts about that. But the issue is not whether you and I can sign on to some political platform together. A Justice need not be “pro-one thing” and “anti-another thing.” Judges were given lifetime tenure to insulate them from the political pressures on the day. The confirmation process need not be a campaign trail of promises by a nominee. These hearings are about judicial philosophy, not political results.

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I look forward to exploring these ideas in greater detail with you during these hearings. Once again, congratulations.

The CHAIRMAN. Thank you very much, Senator.  
Senator Leahy.

### OPENING STATEMENT OF SENATOR LEAHY

Senator LEAHY. Thank you, Mr. Chairman.

Judge, I welcome you and your family. I think this has been an exciting trip for you and your family, from your time in Vermont when you got the call from the White House to being here today.

The CHAIRMAN. I wondered how you were going to get Vermont into this.

Senator LEAHY. Your wondering is on your time, Mr. Chairman.

I am glad to see you here, because you are going to be on a bench that guarantees the liberties all of us hold dearly. Whether we are Republicans or Democrats, liberal or conservative, it makes no difference. It is the Supreme Court that gives us the guarantees of the Constitution.

I have been struck by the breadth and distinction of your record, as I have read it, during the past few years. But I think the proudest achievements in many ways are the landmark Supreme Court cases you fought that literally changed the destiny of women in this country.

Much has been said about those victories, and a lot more is going to be said during these hearings. Let me say something: I think I speak for most parents in my own State of Vermont, when I thank you. I thank you personally for helping to contribute to a world where my daughter Alicia will have opportunities equal to those open to my sons Kevin and Mark, and I owe you a deep, deep sense of gratitude for that.

I think without your pioneering efforts, there is no guarantee that the progress that has been made so far would have occurred, and I applaud you for that. In fact, even without this nomination to the Supreme Court, you could have been satisfied with your place in history, just because of what you have done in that one area.

But you come here with such great qualifications—the court of appeals, teaching at Columbia and Rutgers—but also with a reputation as a fair and thoughtful jurist. I believe the ABA recommendation indicates that.

But a brilliant legal mind and volumes of circuit court opinions are far from being the only requirements that go into making a good Supreme Court Justice. You also possess life experience that is so very, very important.

Your mother, like so many women of her generation, certainly led a hard life. She was a motivated student—graduating from high school at the age of 15. But she went to work in New York's garment district to put not herself, but her brother through college.

You yourself, the first man or woman to be a member of both the Harvard and Columbia Law Reviews, graduated tied for first in your Columbia Law School class with impeccable credentials, but then found there was no law firm in New York that might offer you a job.

Prestigious judges and justices made no bones about the fact that they couldn't have a woman as a law clerk. Or when you worked in a Social Security office, while your husband Martin—whom I am glad to see here—was serving in the military, you had to take a lower paying job because you were pregnant. These are days that are not that far gone, but let us hope they are gone now forever.

So the kind of things you did to break into what had been a closed world before, these are things you cannot learn about in a book and you can't read about and you can't write about. You had to do it, and you did.

I was moved that day in the Rose Garden, when I stood there with you and President Clinton and you spoke about the experiences of your mother. These were not words that just come from a page. They come from the heart and they come from a lifetime of experience, and I think they moved every single person, no matter what their political background, in that gathering in the Rose Garden.

I think of cases like *Reed*, *Frontier*, *Wiesenfeld*, and *Goldfarb*. These are legendary cases. There isn't a law student who can get through law school without reading them. They came from your briefs.

Judge, as I said before, the Senate's duty to advise and consent is an extremely important charge, but in exercising this responsibility, we have to consider certain threshold qualities—judgment, temperament, experience, intellectual distinction, moral fiber. But we also go into the judicial philosophy.

We will have meaningful questions and I believe meaningful answers, and we will ask you what you think and what kind of a Justice you want to be. But I think that you will also remember, when you go on the Court—as I know you will—what the Court means to everyday, ordinary people, like Sharron Frontiero and Stephen Wiesenfeld, your former clients, but also to others, like Barbara Johns and Clarence Earl Gideon. Barbara Johns attended classes in makeshift tar-paper shacks in a segregated high school in Virginia, but her case was one of five that we now know as *Brown v. Board of Education*. Clarence Gideon, who couldn't afford a lawyer, was convicted of breaking into a pool hall, but he said, "I am innocent." And the Supreme Court took up his handwritten petition, scrawled on plain paper. And as we know from "Gideon's Trumpet," Gideon got a lawyer, was acquitted of the charges against him, and changed the whole way our criminal justice system works.

That is what the Supreme Court stands for in this country, and that is the Court where we expect people can go and say, "My rights are being trampled, and you, you nine people, are the only people that can guarantee the Constitution means what it says to us." That is the kind of Supreme Court Justice we want; not a Republican, not a Democrat, not a liberal and not a conservative, but somebody who looks first and foremost at the rights of ordinary people.

Thank you, Mr. Chairman.

[The prepared statement of Senator Leahy follows:]

#### PREPARED STATEMENT OF SENATOR LEAHY

We are a nation blessed in many ways. But our greatest blessings are the individual liberties guaranteed by our Constitution. The nine men and women who serve as justices of the Supreme Court are the final guardians of these freedoms.

Because of all that is at stake, a lifetime appointment to this bench is perhaps the most sacred trust that can be bestowed on an individual. Because of what is at stake, the Senate's responsibility of advice and consent in these proceedings is perhaps its most important duty.

Judge Ginsburg, reviewing your record over these past weeks, I have been struck by its breadth and distinction. But perhaps your proudest achievements are the

landmark Supreme Court cases you fought that literally changed the destiny of women in this country. Much has been made said about these victories, and much more will be said throughout the course of these hearings. So let me just add this:

I think I speak for most parents in my State of Vermont when I thank you—personally—for helping to contribute to a world where someday my daughter will have opportunities equal to those open to my sons. Without your pioneering efforts, there is no guarantee that the progress that has been made so far would have occurred. All of us owe you a great debt of gratitude.

You come before this Committee with sterling qualifications. In your 13 years on the D.C. Circuit Court of Appeals, and before then teaching at Columbia and Rutgers, you have distinguished yourself as a top flight legal scholar. Along with having the reputation as a fair and thoughtful jurist, colleagues from the bench, scholars who comment on your work and lawyers who appear before you point to your keen intellect and ability for astute legal analysis.

But a brilliant legal mind and volume of circuit opinions are far from the only requirements that go into making a proper Justice of the Supreme Court. And they are far from the only attributes you offer. You also possess the life experience that makes you know the world of most people is more troubled than the confines of the courthouse or academia.

Your mother—like so many women of her generation—led a hard life. She was a motivated student—graduating from high school at age fifteen. But she went to work in New York's garment district to put her brother, not herself, through college.

You yourself, the first man or woman to be a member of both the Harvard and Columbia Law Reviews, graduating tied for first in your Columbia Law School class with impeccable credentials, could not find a law firm in New York that would offer you a job.

Prestigious judges and justices made no bones about denying you clerkships, just because you were a woman.

When you worked in a Social Security office while your husband, Martin, served in the military, you were forced to accept a lower-paying job because you were pregnant.

Your experiences breaking into what was—and to a surprising degree still is—a man's world are credentials that cannot be attained from books or briefs. You know what it means to be excluded, what it means not to be taken at your worth as a full member of society. And it is these experiences, I suspect, that you still draw upon every time you have to decide a truly tough case. Listening to your comments in the Rose Garden, I could tell especially how your mother's spirit inspires you to this day.

These experiences also spurred your pathbreaking role in litigating the major Supreme Court cases that advanced constitutional protections against sex discrimination. *Reed*, *Frontiero*, *Wiesenfeld*, *Goldfarb*—all legendary cases that every law student now reads in constitutional law class. From your briefs and arguments, they have become some of the Supreme Court's most revered works.

Judge Ginsburg, as I said before, the Senate's duty to advise and consent is an extremely important charge. In exercising this responsibility, the Senate must of course consider certain threshold qualities—judgment, temperament, experience, intellectual distinction, moral fiber.

But we must look beyond that, probing the nominee's judicial philosophy—how she thinks—how she views the role of the Constitution in society. Does she—like so many great conservative and liberal justices who have come before—regard the Constitution as an unbreachable wall separating the state from our liberties? Or does the nominee have a narrow, crimped view of our founding principles?

Judge Ginsburg, during these hearings, you will be pressed on many important issues. That is our responsibility. While it is inappropriate for you to be asked about specific cases that may be pending before the Court, the Committee cannot satisfy its constitutional obligation unless it can learn what your constitutional vision is—how you think about the great issues of the day.

This requires asking meaningful questions and receiving meaningful answers. The Committee's weighty responsibility for advice and consent is constant.

Judge Ginsburg, I am sure you have thought over the past weeks at least, what kind of a justice you want to be on the Supreme Court. When you are confirmed, as I expect you will be, I hope you will remember what the Court means to everybody, ordinary people like Sharron Frontiero and Stephen Wiesenfeld, your former clients, and to others like Barbara Johns and Clarence Earl Gideon.

Barbara Johns attended classes in makeshift tar-paper shacks in a segregated high school in Virginia. Barbara Johns knew that separate would never mean equal and, with her parents, resolved to fight for her rights. Her case was one of five that together we now know as *Brown v. Board of Education*.

Clarence Gideon, who could not afford a lawyer, was convicted of breaking into a pool hall and stealing money out of a jukebox. "I am innocent," he claimed. The Supreme Court took up his petition, scrawled by hand on plain paper, listened to his arguments, and gave his constitutional rights content and meaning. Thanks to the Supreme Court, Gideon got a lawyer and was acquitted of the charges against him.

This is what the Supreme Court stands for in our country. Sharron Frontiero, Barbara Johns and Clarence Gideon were hardly powerful or well connected, but they could rely on the Supreme Court to listen fairly to their pleas for justice. The Supreme Court is the institution—really unique in the world—all of us, rich or poor, famous or forgotten, can look to for justice. The place where anyone can go to and say, "I will be heard, and I will have my rights."

Let me conclude my remarks where I began. The Constitution is the soul of this country. I will be looking during these hearings for the intensity of your feelings about the liberties that make this country special, and your devotion to the Court as the protector of those rights. I want you to be a justice who recognizes the importance of this role—a justice who perceives your pivotal place in the history of our democracy, and the great trust that has been placed in your care.

I would not expect you to be outspoken on this score—your nature is to let your actions from the bench speak for themselves. But I do expect—really I know—that in the days ahead we will get a sense of your quiet determination and inner zest for the cause of justice—a cause to which you have dedicated your life.

Welcome to you and your family. I look forward to discussing these issues with you in the days ahead.

The CHAIRMAN. Thank you very much, Senator.  
Senator Specter.

#### **OPENING STATEMENT OF SENATOR SPECTER**

Senator SPECTER. Thank you very much, Mr. Chairman.

Judge Ginsburg, I welcome you here with my colleagues, and I compliment you on an outstanding academic, professional, and judicial record—some 322 opinions and still counting, and 79 articles.

Notwithstanding that outstanding record, I do express concern that some of my colleagues have expressed virtual approval of your nomination even before the hearings have begun, and I believe that that raises some significant problems.

I think that, first, there is a tendency to look at the hearings as pro forma or perhaps just going through the motions with confirmation a virtual assurance. Second, I am concerned about the real risk of undermining public confidence that the Senate will vigorously discharge its constitutional duty of advice and consent on a nominee who will have such a profound effect on the daily lives of more than 250 million Americans, with so many 5–4 decisions on the crucial issues of the day.

I have long expressed my own concern about judicial activism and the Supreme Court being a superlegislature, with the concern about undermining the vital constitutional principle of separation of powers.

At the outset let me say that, as I read your writings, I agree with much of what you say; and that if you were a Senator offering your ideas and legislation on the Senate floor, I would be inclined to cosponsor a good bit of what you articulate.

But the difficulty with judicial activism, as I see it, is that it is fine when we agree with your activism, but it is very problemsome if the principle is established that judicial activism is appropriate.

One of my colleagues referred to the agenda of the nominees of two Republican administrations and made it plain that he doesn't favor that kind of judicial activism. And I believe that, as a matter

of principle, it is vital to keep the activism out of the judicial line as much as is possible.

I have been very much impressed with the breadth of your writings and the openness and the candid approach which you have taken. When you talk about extension of benefits where there is an equal protection violation, and the Court then extends benefits to those not covered by legislation, you are candid in saying that you are legislating a bit. And any legislation by the Court is a matter of concern.

When you take up the equal protection issue and talk about bold interpretation and talk about judges being uneasy in the gray zone between interpretation and alteration of the Constitution, those raise concerns to me about where activism may lead.

Again, I repeat, I admire the positions you have taken and what you have achieved as a litigant and what you have done as a jurist. And I also say that on the bench you have not carried forward the lines which you have written. But as one of my colleagues has noted, when you are on the Supreme Court—how did my colleague put it?—you will have a free hand in doing a great deal more.

So I think these hearings are very important as we take a look at your record, as we take a look at what you have written and see how that may be applied. And as noted by a number of my colleagues, I think we are past the day where there is an issue about the propriety of inquiring into judicial philosophy, although we do not want you to answer how you are going to decide specific cases.

I have noted your writing that the second opinion by the Senate is a very important second opinion and your endorsement of the proposition that the Senators should have equal latitude with the President in deciding which nominees are good for the country.

Beyond those theoretical issues, there are many very important matters that are on the cutting edge of critical considerations for the American people, and I look forward to these hearings and hope that we will be able to have an open exchange where we will have some real idea as to how you see your role as a Supreme Court Justice contrasted with a court of appeals judge, where you will have a freer hand and where there will be a question as to how you will apply the writings on legislation and expansive interpretation of constitutional rights.

Thank you very much.

The CHAIRMAN. Thank you very much, Senator.  
Senator Heflin.

#### **OPENING STATEMENT OF SENATOR HEFLIN**

Senator HEFLIN. Judge Ginsburg, I welcome you and congratulate you on your selection as a nominee for the U.S. Supreme Court.

Over the years, I have had the opportunity to participate in the confirmation process of a number of nominees for our Nation's highest court. I have during past hearings seen the organized distortions of interest groups, heard the roars of extreme party loyalists, and witnessed the divisiveness of politics. I have in a sense seen blood shed during past confirmation hearings.

This time I believe we will see a process remarkably free of acrimony and partisan bickering. Already there is a noticeable dif-

ference. What a change of atmosphere from that of the recent past: Congeniality prevails over confrontation; back-slapping has replaced back-stabbing; inquiry is the motivation rather than injury. While it remains to be seen whether this climate of goodwill will last, at least for now we are scaling the heights of bipartisan cooperation.

Judge Ginsburg, you deserve much of the credit for this fresh new atmosphere. The excellence of your record has itself made your nomination a source of consensus. Much of the credit must also go to my Republican colleagues for their approach to this process. Too often in the past, both parties have suffered from the nearsightedness that sometimes comes from wearing the blinders of partisan allegiance. Finally, a large share of the credit must also go to the President for avoiding a selection based on litmus tests or ideology.

This respite of goodwill is a gift to all of us. Indeed, it is a rare opportunity for this committee and the public we represent to engage in an enlightened dialog with, in my judgment, a future member of our highest court. Freed of the turmoil that has often marred the confirmation process, this committee and the full Senate will have an opportunity to more properly and objectively play the advisory role with which the Constitution charges us.

In that spirit, let me add that my own review of your record leaves me highly impressed. I find particularly encouraging your writings on the need for collegiality and consensus in deciding cases, while adhering to principle. You have also said that a judge's role is to see beyond the often misleading claims of ideological labels. You observe, for example, that a description like "judicial activism" can be a battle cry for both the right and the left, and that a phrase like "original intent" is a signpost along an unending and uncertain road.

I welcome this insightful candor on your part. It reveals a healthy disdain for ideological dogma and a fresh receptiveness to intellectual challenge.

If these instincts are any guide, your service on the Supreme Court would honor that institution and our Nation. You have the potential to break free from the polarization of the left and the right. You offer the promise of reflective, nonideological, and fair jurisprudence. And I for one know of no other values more vital to a sound judicial temperament.

I am optimistic that your brand of judicial decisionmaking will set a standard, and I am also hopeful that the spirit of goodwill that has graced this process so far will set a standard for appointments to come. I look forward to your testimony and to a discussion of your vision, philosophy, and values over the next few days.

I welcome you today and wish you well.

[The prepared statement of Senator Heflin follows:]

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I welcome you today and wish you well.

**The CHAIRMAN.** Senator, I have never heard you so articulate or so rhetorically eloquent. Obviously major surgery does a lot to people up here. You are looking good, and we have been welcoming Senator Specter back, but you have gone through one heck of a summer and spring, and it is great to see you in such great health and making such fine statements.

**Senator HEFLIN.** Well, thank you, sir. I appreciate that.

**The CHAIRMAN.** Now, Senator Brown, who has not had any major surgery, is next. [Laughter.]

**Senator LEAHY.** But we still welcome him back.

**The CHAIRMAN.** That is right.

#### OPENING STATEMENT OF SENATOR BROWN

**Senator BROWN.** Thank you, Mr. Chairman.

Judge Ginsburg, let me add my welcome to you as well. It is clear from looking at your record that your commitment to the law is a family affair. I note that your husband Martin is a distinguished professor at Georgetown University and that your daughter is a tenured professor at Columbia Law School. They tell me that even your son, who is currently on leave from law school, is a law student at the University of Chicago. That kind of family

commitment, I think, bodes well for the endeavor that is ahead for you.

I also note a number of firsts in your background that I think any of us would take enormous pride from: No. 1 in your class at Cornell; among the first nine women admitted to Harvard Law School; No. 1 in your class at Columbia Law School; the second woman in history on the faculty of Rutgers Law School; and the first woman to ever serve on the faculty of Columbia Law School.

You are also the first woman to make law review at two Ivy League schools, which has already been noted, and you are among the first 20 law professors to teach at any American law school.

Your record is extraordinary by any account and I think is one of the reasons that you have the kind of welcome this morning that you have enjoyed.

This seat, as I know you know, is a very special one for Colorado. It is special because Byron White is so respected and so honored in the State. I think of Byron White's contribution as more than simply being one of the finest athletes in the history of our country, which, of course, he has been, perhaps more than even being one of the finest scholars to ever serve our country in the highest court. He has been both of those. But I think perhaps what is significant for our deliberations this morning is Byron White's integrity that he has brought to the process.

Ultimately, I think the concern of the committee is for integrity, perhaps more than any particular issue. I tend to think it affects all of the things we will discuss, most particularly the philosophy you bring as a Justice on the Supreme Court.

Our Founding Fathers laid out a Constitution that I don't think any of them thought would remain unchanged forever. As a matter of fact, as you know, the amending process started immediately with the first 10 amendments in what we now call the Bill of Rights. That Bill of Rights was a process not only to bring equity but also to get the measure passed and approved as it went for ratification to the various States.

But the Constitution laid out a process for its change. Our Founding Fathers never thought that that document would remain unchanged and specifically provided for how it could be changed and updated. And I note that Thomas Jefferson had suggested not only the need for change and adaptation, but had even suggested perhaps a constitutional convention that might take place every 20 years.

I, for one, think that idea would be an excellent one, but the question I think it raises is this: Do we respect the amendment process and reserve changes in our Constitution for that process, a process that involves levels of government closer to the people, elected representatives that can be eliminated from office if their constituents disagree? Or do we believe the amendment process can take place by those who are appointed to the Court?

That strikes me not just as a matter of favoring the woman's right to choose or opposing it, or favoring changes in the construction of the equal protection clause, or favoring or opposing changes in the interpretation of the 10th amendment, but one of integrity of the Constitution itself.

It seems to me it is a question that rises beyond whether we like the makeup of the Framers of the Constitution, but one of whether we will respect the integrity of the process they set in motion. And so, at least for me, I think the fundamental question that we will try and explore this week will be one of what kind of approach you will take in updating the Constitution and amending it, what your thoughts and philosophies are in that respect.

Once again, let me add a real sense of joy in the accomplishments you bring to this job. I think it is clear that you have the intellectual capacity to be a very distinguished member of the U.S. Supreme Court. I look forward to a chance to explore with you the issues that I think you will be facing in those years.

Thank you.

The CHAIRMAN. Thank you very much, Senator.  
Senator Simon.

#### OPENING STATEMENT OF SENATOR SIMON

Senator SIMON. Thank you, Mr. Chairman. And as I have listened to my colleagues, Judge Ginsburg, and I know of your interest in opera, it sounds not like the triumphal march of "Aida" but the triumphal march of Judge Ginsburg here. We welcome you, and particularly we welcome your son from Illinois here. [Laughter.]

As I have read your opinions and some of your writings, as you probably never anticipated U.S. Senators would read them, I have the impression of a solid scholar, but someone who is cautious. And my guess is that is the kind of Supreme Court nominee that you will be.

If I may comment, Mr. Chairman, just a moment on the process itself, I think first the President handled this properly in taking time, in consulting with members of this committee and consulting with legal scholars around the Nation.

It is very interesting, as you look at the history of nominations, when Presidents have acted quickly, with rare exceptions, the nominations have not been strong nominations. When Presidents have taken their time, there generally has been a superior quality to the nomination. And I think President Clinton and Attorney General Reno and his counsel, Bernie Nussbaum, are to be commended on the time that was taken.

The second thing I want to commend you on Mr. Chairman, is having one portion of the hearing a closed hearing where any negative charges, which may or may not have substance, are heard in that closed hearing. And then if there is something substantial, then the public can know about it. But if someone somewhere has a charge that a nominee embezzled \$50,000 10 years ago, we don't need that on national television immediately. That ought to be looked at in a private session. And then if there is substance, we look at it openly.

Judge Ginsburg, I think you are doing very well with this committee. In fact, maybe we ought to stop the hearings right here from your perspective. You face a much harsher judge, however, than this committee, and that is the judgment of history. And that judgment is likely to revolve around the question: Did she restrict freedom or did she expand it?

I am optimistic that the judgment of history will be a favorable one for you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator.

Senator Cohen, a new member of the committee and a very welcome member of the committee, although he has had experience in the past in the other body on the Judiciary Committee. It is nice to have you here, Senator, on this nomination.

#### **OPENING STATEMENT OF SENATOR COHEN**

Senator COHEN. Thank you very much, Mr. Chairman. Judge Ginsburg, welcome to this hearing.

Senator Brown suggested I might try to approach a discussion with you in a manner different than that pursued by all who have preceded me, and that is quite a challenge in itself. In preparing for the hearing, I was rummaging through the writings of Ambrose Bierce, an American writer and journalist, and I would note parenthetically the author of "The Devil's Dictionary," a book that many people in this country may feel we refer to in order to color and shade our words from time to time.

Bierce related the story of an Associate Justice of the Supreme Court who was sitting by the river when a traveler approached and said, "I'd like to cross. Would it be lawful to use this boat?" "It will," came the reply. "After all, it's my boat." The traveler thanked him, jumped in the boat, pushed it into the water, embarked and rowed away. The boat sank and the man was drowned.

"Heartless man," cried an indignant spectator. "Why didn't you tell the man that the boat had a hole in it?" "The matter of the boat's condition," said the great jurist, "was not brought before me."

Now, during the next several days, the committee hopes to bring before the American people the matter of your condition and that of your intelligence and competence and philosophy on the role and responsibility of the Court in our lives.

It is interesting that out of all the institutions in our three branches of government, the Supreme Court remains to most Americans the least well known, the least understood, and, perhaps not so paradoxically, the most revered. With the national press corps recording virtually every step or misstep that a President makes, the American people are fully aware that the Nation's Chief Executive is bound to be a colossus with imperfect feet, and it is no state secret that the American people hold the legislative branch in what we can only charitably call a minimum of high regard.

It is only the judicial branch, and particularly the Supreme Court, that has significantly grown in stature since its creation some 200 years ago. For the vast majority of people, the Justices, their deliberations, their decisionmaking processes, all remain shrouded in secrecy. There is almost an ecclesiastical aura and mystery that surrounds that temple where final and unreviewable power is exercised.

Prof. Laurence Tribe, who is no stranger to this committee, has described the profound nature of the Court's influence on our lives. He has written that:

A President resigns, a gargantuan corporation disintegrates, a frightened but hopeful child marches to school with her military escort past a hostile crowd, all because nine black-robed figures in Washington have gleaned new wisdom from an old and hallowed document. The sweep of the Supreme Court's influence is so vast that it cannot be grasped by the eye.

The Washington Post has published a thorough three-part series on your life and career, and there were many things that caught my eye in those articles. One involved your comments in which you express some concerns about the *Kahn* case. According to the article, you wrote a letter back in 1975 to one of your former law school students, expressing some apprehension that Justice William O. Douglas, whose widowed mother had had a very rough time financially, might not like a case challenging widows' benefits.

Now, most people cling to the illusion that Supreme Court Justices are simply black-robed oracles who peer through lenses that are unclouded by the personal experiences and biases that afflict ordinary mortals. But I think you, in writing that letter, understood what Justice Cardozo revealed some years before. He said, "We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own. To that test, they are all brought, a former pleading or an act of parliament, the wrongs of paupers, the rights of princes, a village ordinance or a nation's charter."

What I hope is that in the next several days we can get a better sense of the experiential and intellectual forces within you that will provide some indication of the direction that you are likely to pursue in the days in which you are going to remain beyond the reach of public opinion and beyond that of congressional recall.

One of my colleagues earlier indicated he has expressed opposition to nominees who were advocates as private citizens and whom he feared would remain so while on the Court. Today he offered, I think, some expressions of mild disappointment. While once you were an advocate, his fear is that you have become a jurist while serving as a judge and might continue to do so. Let me express my hope that you will maintain a jurist's approach to the law rather than that of an advocate.

Justice Cardozo, I think, in his most concise and penetrating comment reminded us that in the final analysis there is no guarantee of justice except the personality of the judge. I am hopeful that at the conclusion of these proceedings the American people will be satisfied, as we will, that we will have a guarantee of justice and that justice will be done.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator.

Judge, this is a historic occasion, but it is particularly historic because the next person to make a statement will be the first woman ever to preside over a Judiciary Committee proceeding for the Court, and it is appropriate that the first person over whom she presides is likewise a woman—oh, I beg your pardon. [Laughter.]

With that, I will introduce Senator Kohl from Wisconsin, who, I assure you, is not a woman and has done this before and done it well and is the most distinguished member of this committee. [Laughter.]

Senator Kohl, I apologize.

**OPENING STATEMENT OF SENATOR KOHL**

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

Judge Ginsburg, as we all know, last month President Clinton announced that he would nominate you to serve on the Supreme Court. At that Rose Garden ceremony, you told the President that you look forward to stimulating weeks this summer. I assume that you were referring to this confirmation process, and I hope very much that we don't disappoint you.

Although the Constitution is silent on what standard to apply in evaluating a nominee, you have provided some useful guidance. You have noted that in an appointment to the Supreme Court the Senate comes second, but is not secondary. And I agree. As a member of this committee, I have developed my own criteria for judgment.

First, I look for a nominee of exceptional character, competence, and integrity. That you clearly have, as an honored student, an effective advocate, and also as a very distinguished appellate judge. But I am struck by more than your professional honors. I am impressed by your dedication to principles that you have not only talked about but lived.

For example, you didn't just resign from discriminatory clubs; you refused to join them in the first place. You didn't just talk about gender equality; you fought for it. And we all admire that.

Second, I seek a Justice who understands and accepts both the basic principles of the Constitution and its core values implanted in our society. We do not elect Justices. They are given lifetime tenure precisely because we want to insulate the Court from the pull and the tug of partisan politics. That insulation makes it critical that we be certain that a nominee will protect the civil rights and the liberties of all Americans.

Third, I want a Justice with a sense of compassion. Behind every abstract legal principle, there are real people with real problems. It is the Court that must be their sanctuary and their shelter. Justice Black put it best when he said, "Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement."

In other words, Judge Ginsburg, the courts are places for doing justice, and not just giving logic to the law.

Judge you are not a stealth nominee. Your record is clear, and there is little opposition to your confirmation. In fact, conventional wisdom has you all but confirmed. But, even so, the Senate should not act as a rubber stamp.

The President is asking us to entrust you with an immense amount of power, and before we decide to give it to you, we need to know what is in your heart and what is in your mind. We don't have a right to know in advance how you will rule on cases which will come before you, but we do need and we deserve to know what you think about the fundamental issues that surround these cases.

So today we begin a public discussion which is the only opportunity we will have on behalf of the American people to engage you in a conversation about the core concepts of our society. And I hope, Judge, that you will discuss these matters with us more in

terms of principles and precedents, and more in terms of desires and doctrine.

The American people care about these concepts. They are not just debated in law journals. For example, as television brings violence into our homes, we agonize over the impact it has on our children, the damage it does to their values and to their view of reality, and wonder how we can reduce it without threatening the constitutional promises of free speech.

As gangs roam our streets and create fear in our communities, we debate balancing the rights of individuals with the responsibility of the police to protect civil order. As new civil and voting rights laws are proposed, we struggle to correct discrimination of the past without creating a newly disenfranchised class.

These and other issues invite all Americans to struggle with the dilemmas of democracy, and if we can discuss these issues today with candor, then I believe we will have a conversation the American people will profit from—and perhaps, Judge Ginsburg, the type of stimulating conversation that you spoke of in the Rose Garden. And so we welcome you before this committee, and we look forward to our discussion with you.

[The prepared statement of Senator Kohl follows:]

#### PREPARED STATEMENT OF SENATOR KOHL

Judge Ginsburg, last month President Clinton announced that he would nominate you to serve on the Supreme Court. At the Rose Garden ceremony, you told the President you "look[ed] forward to stimulating weeks this summer." I assume you were referring to the confirmation process; let's hope we don't disappoint you.

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But I am struck by more than your professional honors. I am impressed by your dedication to the principles that you not only talked about, but lived. For example, you didn't just resign from discriminatory clubs, you also refused to join them in the first place. You didn't just talk about gender equality, you fought for it. I admire that.

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In other words, the courts are places for "doing justice," not just giving logic to the law.

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cases which will come before you. But we do need—and we deserve—to know what you think about the fundamental issues that surround these cases.

Today we begin a public discussion, which is the only opportunity we will have—on behalf of the American people—to engage in a conversation with you about the core concepts of our society. And I hope, Judge, that you will discuss these matters with us more in terms of principles than precedents, more in terms of desires than doctrine.

The American people care about these concepts. They are not just reviewed in law journals. As violence flickers across our TV screens, we think about our responsibility to children and our pledge to protect free speech. As gangs roam our streets and create fear in our communities, we debate balancing the rights of individuals with the responsibility of the police to protect civil order. As new civil and voting rights laws are proposed, we struggle to correct discrimination of the past without creating a newly disenfranchised class.

These issues invite all Americans to struggle with the dilemmas of Democracy.

And if we discuss these issues with candor, I believe we will have a conversation the American people will profit from. And perhaps, Judge Ginsburg, the type of "stimulating" conversation you spoke of in the Rose Garden.

I welcome you before the Committee, and I look forward to our discussion.

Thank you, Mr. Chairman.

**The CHAIRMAN.** Thank you very much, Senator.

Now I would like to recognize the distinguished Senator from California, Senator Feinstein.

#### **OPENING STATEMENT OF SENATOR FEINSTEIN**

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Good morning, Judge Ginsburg.

For me, this is a very special opportunity, because while several of my colleagues spoke of the fact that they have been present during many of these hearings, for myself and Senator Moseley-Braun, this is our first. And it is no coincidence that, as our first, it is someone such as yourself.

We are contemporaries, Judge, and many women of our generation struggled against significant odds to educate themselves and to balance career and family. To be honest, though, until I began to prepare for these hearings, I really didn't realize the depth and the extent to which you have played a very critical role in breaking down the barriers that have barred women from public and private sectors for centuries. So now I know just how really fitting and proper and how significant this vote is going to be for me. And I want to thank President Clinton for nominating you.

I noted, for example, that as one of only 9 women in a class of 400 at Harvard, you were asked by the dean to justify taking a place in the class that otherwise would have gone to a man. That despite graduating at the top of your law school class, only two law firms in the entire city of New York offered you second interviews, and neither offered you a job. And that even after you became a litigator, you were given sex discrimination cases to handle, because they were viewed at the time as women's work.

You met each of these challenges and indignities and, no doubt, many more, Judge Ginsburg, with intellect, with determination, and grace. And not only did you justify your admission to law school, but you blazed a trail that thousands of women have followed.

Decades later, asked to identify the most significant jurists of his time, the same dean who had begrimed your matriculation at Harvard named you and the great Thurgood Marshall. The rest of

your story is quite literally history, the history of modern gender discrimination law.

As the founder and director of the ACLU women's rights project, you brought virtually every major sex discrimination case before the Supreme Court in the 1970's. From the very first case that you argued and won, as was spoken by Senator Leahy, *Frontiero v. Richardson*, your work has changed the constitutional rules of the road forever.

In *Frontiero*, the Court struck down as "inherently suspect" a law based on gender, and, for the first time in history, established a new and tough test to which all future gender-based statutes would be subjected.

As I know from my colleague, Senator Moseley-Braun, and I know she will appreciate it, *Frontiero* fittingly was decided precisely 100 years after the Supreme Court upheld in *Bradwell v. Illinois* that State's refusal to admit a woman to the practice of law.

In *Bradwell*, the Supreme Court wrote: "Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." Accordingly, the Court concluded, "The harmony \* \* \* of interests and views which belong, or should belong to the family institution, is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband." What a long way we have come in this Nation.

It took a century, though, to extract from the Court in *Frontiero* a new test of constitutionality for statutes based on gender, and it took an extraordinary woman to do it.

Incredibly, you prevailed, as has been said, in five of the six cases that you personally argued before the Court, winning in the process equal treatment under the law for both women and men in the administration of estates, receipt of Social Security benefits, availability of tax exemptions, and jury service. In the process, you improved the lives of virtually millions of Americans.

In conclusion, for the intellect and dedication to thrive in hostile academic environments, laying the groundwork for thousands of women, including your daughter and mine, who is today a lawyer, to follow; for the courage to persevere, with your husband's active participation, in pursuit of a life in the law, and perhaps most of all, for the fruits of that life as a litigator and a jurist.

I want to thank you, Judge Ginsburg, both for all that you have done, and as a member of the U.S. Supreme Court, for all that you have yet to do.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Another distinguished new member of the committee, Senator Moseley-Braun.

#### **OPENING STATEMENT OF SENATOR MOSELEY-BRAUN**

Senator MOSELEY-BRAUN. Thank you very much, Mr. Chairman. Judge Ginsburg and to your family, welcome.

Mr. Chairman, I am truly honored to have the opportunity to participate in these hearings. One of a Senator's most solemn responsibilities is the duty to offer advice and consent on the nomination of a Justice to the U.S. Supreme Court. One of the most pre-

cious privileges an American citizen can have is to play a role in that process.

Indira Gandhi once said that if you study history, you will find that where women have risen, that country attained a high position, and whenever they remained dormant, that country slipped back.

Regrettably, history teaches us that many obstacles have been placed in the way of progress for women in this country. Judge Ginsburg's own personal history, including being rejected for employment by leading law firms and by the very Court to which she is nominated today, demonstrated vividly the nature of gender discrimination in this country's very recent past. Now, in 1993, thanks in no small part to Judge Ginsburg's efforts as an advocate for women, many—but not all—of the formal legal obstacles to the advancement of women have been eliminated by legislative action and by judicial decisions.

As has been pointed out before, today marks only the second time in our Nation's history that a woman has appeared before the Senate Judiciary Committee as a nominee to the Supreme Court. It is also the first time that any woman, let alone two, has sat as a member of this all-important body.

Two years ago, I watched Senate confirmation hearings on the television from back home in Illinois with a sense of helplessness and exclusion. Our democracy once again responded and the people of Illinois and of California, I might add, have given us the unique privilege of participating here today.

This is the greatest country in the world, and I believe the U.S. Constitution to be the finest exposition of democratic principles ever written.

I make these statements, Mr. Chairman, fully aware of the fact that, in its original form, the Constitution included neither this Senator as an American of African descent, nor our distinguished nominee as a woman in its vision of a democratic society.

But the greatness of the Constitution lies in the fact that it is a living document. Or, as Dr. Martin Luther King, Jr., once said, a declaration of intent regarding America's unlimited potential, a document that, through an often painful process of amendment and interpretation, has broadened its reach to extend to the previously excluded its promise of equality and justice for all.

Over the years, the Supreme Court played a glorious role in that process. It was the Justices of our Supreme Court in their bold, independent, and faithful interpretations of our living Constitution, who outlawed racial segregation in our schools, guaranteed indigent criminal defendants the right to counsel, brought wiretapping within the restrictions of the fourth amendment, demanded freedom of speech, and recognized a woman's fundamental right to control her reproductive destiny.

In some of the most difficult areas of our history, the Supreme Court has shown the courage to give life to the promise of the Constitution. It seems to me that a central issue of our time is whether that courage has been lost to timidity and partisan politics.

It is troubling to me, Mr. Chairman, that the Court's general approach to constitutional interpretation—the willingness of some recent nominees to embrace the jurisprudence of so-called strict con-

struction and original intent—all too often has resulted in a narrow reading of the Constitution that has curtailed, rather than expanded, individual rights and has left those who are not rich or powerful or privileged with fewer and fewer rights and less and less liberty. Regular working men and women, ordinary people, can no longer be sure that the Supreme Court will be their champion of last resort.

All of the conversations that we have heard today about judicial philosophy boil down to this: Can the people be secure that this nominee will be a champion of their liberties, a jurist committed to the rule of law in the service of society, someone willing to see our living Constitution as a declaration of intent?

Over the next few days, this committee will have the opportunity to explore some of the most complicated doctrines of constitutional law with this nominee, a brilliant jurist and legal scholar. These discussions are designed to illuminate Judge Ginsburg's judicial philosophy and temperament.

But even as we engage in what sometimes becomes a highly technical dialog, Mr. Chairman, let us never forget that the Supreme Court does not belong to the Senate Judiciary Committee, nor to this country's 800,000 lawyers, nor even to the 9 distinguished Justices themselves.

Mr. Chairman, the Court belongs to the American people, and the Court belongs to the American people for one very simple, yet profound reason, because the Constitution belongs to the American people.

Judge Ginsburg, in your very eloquent remarks in accepting the President's nomination, you said that you hoped to work "to the best of my ability for the advancement of law in the service of society."

I salute your aspirations, but I also hope that you will bring more than just your ability, and it is prodigious, based on all of your work and writings so far, but bring more than just your ability to the High Court. I hope you will also bring your heart, your history, and your humanity. Because on this historic occasion, I can't help but recall the words of one distinguished American jurist who I believe is personally known to you, who said: "I often wonder whether we do not rest our hopes too much upon constitutions, upon laws, and upon courts. These are false hopes. Believe me, these are false hopes. Liberty lies in the hearts of men and women. When it dies there, no constitution, no law, and no court can save it." You know that was Judge Learned Hand who said that.

This great Nation is about to entrust its Constitution, its laws, and its highest court to you, Judge Ginsburg, and I say that without prejudging the outcome of this nomination—kind of. [Laughter.]

So I hope that liberty and equality and opportunity lie within your heart, because the hopes of millions of Americans depend on it. And if liberty and equality and the love of the law live in your heart, then the President and this committee and the American people will have made the right choice.

It is my hope, Judge Ginsburg, that you will pick up the mantle of Justices Brennan and Marshall, and that you will once again

give voice within the Court to the aspirations and hopes of the forgotten members of our society.

As a member of the Supreme Court, you will have a historic chance to nurture our living Constitution, and I use that word deliberately. In so doing, you will serve the people of this great Nation. Your rise to this position will, therefore, be our country's gain and we will all be the better for it.

I again would like to extend my congratulations to you. I look forward to the substantive part of the hearings and very much welcome you and your family to this hearing today.

[The prepared statement of Senator Moseley-Braun follows:]

**PREPARED STATEMENT OF SENATOR MOSELEY-BRAUN**

Mr. Chairman, I am truly honored to have the opportunity to participate in these hearings. One of a Senator's most solemn responsibilities is the duty to offer advice and consent in the nomination of a Justice to the United States Supreme Court. One of the most precious privileges an American citizen can have is to play a role in that process.

Indira Gandhi once said that "If you study history, you will find that where women have risen, that country attained a high position, and wherever they remained dormant, that country slipped back."

Regrettably, history teaches us that many obstacles have been placed in the way of progress for women in this country. Judge Ginsburg's own personal history—including rejection by leading law firms and by the very court to which she is nominated today—demonstrated vividly the nature of gender discrimination in this country's recent past. Now, in 1993, thanks in no small part to judge Ginsburg's efforts as an advocate for women, many—but not all—of the formal, legal obstacles to the advancement of women have been eliminated by legislative action and by judicial decisions.

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But the greatness of the Constitution lies in the fact that it is a living document, or as Dr. Martin Luther King Jr. once said, a "declaration of intent" regarding America's unlimited potential. A document that through an often painful process of amendment and interpretation has broadened its reach to extend to the previously excluded its promise of equality and justice for all.

Over the years the Supreme Court has played a glorious role in that process. It was the Justices of our Supreme Court, in their bold, independent and faithful interpretations of our Constitution, who outlawed racial segregation in our schools, guaranteed indigent criminal defendants the right to counsel, brought wiretapping within the restrictions of the fourth amendment, demanded freedom of speech, and recognized a woman's fundamental right to control her reproductive destiny.

In some of the most difficult eras of our history the Supreme Court has shown the courage to give life to the promise of the Constitution. A central issue of our time is whether that courage has been lost to timidity and partisan politics.

It is troubling that the court's general approach to constitutional interpretation—the willingness of some recent nominees to embrace the jurisprudence of so-called "strict construction" and "original intent"—all too often has resulted in a narrow reading of the Constitution that has curtailed, rather than expanded, individual rights and has left those who are not rich, powerful or privileged with fewer rights under our precious Constitution. Regular working men and women can no longer be sure that the Supreme Court will be their champion of last resort.

It is time for the Court to embark upon a bold new era, Judge Ginsburg. It is time for a new vision.

Over the next few days, this committee will have the opportunity to explore some of the most complicated doctrines of constitutional law with a brilliant jurist and legal scholar. These discussions are designed to illuminate Judge Ginsburg's judicial philosophy and temperament. But even as we engage in what may sometimes become a highly technical dialogue, Mr. Chairman, let us never forget that the Supreme Court does not belong to the Senate Judiciary Committee, nor to this country's 800,000 lawyers, nor even to the nine distinguished Justices themselves. No, Mr. Chairman, the Court belongs to the American people. And the Court belongs to the American people for one very simple, yet profound reason: Because the Constitution belongs to the American people.

Judge Ginsburg, in your very eloquent remarks accepting your nomination, you said that you hoped to work "to the best of my ability for the advancement of the law in the service of society."

I salute your aspirations, Judge Ginsburg. But, I also hope that you will bring more than your ability to the High Court. I hope that you will also bring your heart, your history, and your humanity.

Because on this historic occasion, I cannot help but recall the words of one distinguished American jurist, who said, "I often wonder whether we do not rest our hopes too much upon Constitutions, upon laws, and upon courts. These are false hopes; believe me these are false hopes. Liberty lies in the hearts of men and women \* \* \* when it dies there no constitution, no law, no court can save it."

This great nation is about to entrust its Constitution, its laws and its highest court to you, Judge Ginsburg. So I hope that liberty—and equality and opportunity—lie within your heart. Because the hopes of millions of Americans depend on it. And if liberty and equality and a love of the law live in your heart, then the President, this committee, and the American people have made the right choice.

It is my hope, Judge Ginsburg, that you will pick up the mantle of Justices Brennan and Marshall and that you will once again give voice within the Court to the aspirations and hopes of the forgotten members of our society.

**The CHAIRMAN.** Well stated, Senator. I thank you very much.

Let me take one brief moment to explain how Senator Hatch and I have concluded we will pursue the schedule for the remainder of the day. Very briefly, I will ask Judge Ginsburg to rise and be sworn and introduce her family to us, and then invite her to make an opening statement.

At the conclusion of that statement, we will recess for lunch. There have been five votes ordered to be voted in succession beginning at 2:15 this afternoon, so we will not reconvene the hearings until 3:15.

At 3:15, when we reconvene, I have a very brief statement of less than a couple minutes on process, how the remainder of the hearing will be conducted from a procedural standpoint, and I will begin the first round of questions. Each Senator will be given an opportunity to have an exchange with the witness, the nominee, up to 30 minutes, at which time we will conclude the questioning of that Senator. We will not have an opportunity to have every Senator ask their first round of questions today.

It is my intention to have the hearings recess approximately at 6:30, and we will reconvene then at 10 o'clock on Wednesday morning, picking up with whoever was the next questioner in line. So that is how we will proceed from a schedule standpoint.

Judge, I now ask you to stand with me and be sworn: Judge, do you swear that the testimony you are about to give will be the whole truth and nothing but the truth, so help you God?

Judge GINSBURG. I do, Mr. Chairman.

**The CHAIRMAN.** Thank you.

**TESTIMONY OF HON. RUTH BADER GINSBURG, TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES**

The CHAIRMAN. Judge, now you know, after hearing the click of all those cameras, why I am so popular with the camera persons here, because after lunch they will be banished from the well. I love them all, but after you introduce your family, we are going to take a moment to banish them from the well, so that when you make your statement, you are unencumbered by their smiling faces and the click of the camera.

Would you be kind enough, Judge, to introduce your family to us. Judge GINSBURG. Thank you, Mr. Chairman.

I have such a large family with me today, such an extended family, not just the immediate people behind me who I will introduce, but my friends, my law clerks, my secretaries. My heart is overflowing, because those are the people who have made it possible for me to be here today.

But let me start with my nephew, Peter Stiepleman.

The CHAIRMAN. Stand up, so we may all see you.

Judge GINSBURG. My brother-in-law, Ed Stiepleman.

The CHAIRMAN. Welcome.

Judge GINSBURG. My wonderful sister-in-law, Claire Stiepleman.

And one of my wonderful law clerks who is representing all the rest, Al Cacozza.

My life's partner for 39 years, Martin Ginsburg.

The CHAIRMAN. Welcome. Welcome.

Judge GINSBURG. And my son from the great State of Chicago, James Ginsburg.

The CHAIRMAN. That is what most Chicagoans think, that it is a State.

Judge GINSBURG. And his very special friend, Lisa Brauston.

The CHAIRMAN. Lisa.

Judge GINSBURG. And my incredible daughter, Jane Ginsburg and Clara.

The CHAIRMAN. Clara, you deserve an award so far today.

Judge GINSBURG. She sure does, and, you know, people think I am very serious and sober as a judge, and so when I had all you people taking photographs of me in the White House, people were trying to get me to smile, and they said think of Clara.

The CHAIRMAN. You have Clara smiling.

Judge GINSBURG. Then my grandson, Paul Spera. I must tell you that, in preparation for these hearings, I have read briefing books, opinion books, law reviews, but there is no book in the world that means as much to me as this one. This is Paul's book. It says, "My Grandma is Very, Very Special," by Paul Spera. I thank you, Paul, for this wonderful book.

The CHAIRMAN. I will tell you, Paul, the handwriting is good, the pictures are beautiful and you don't need a publisher. [Laughter.]

Judge GINSBURG. It ends with a map of the United States of America.

The CHAIRMAN. As Senator Kennedy just said, he hopes your teacher is listening to this.

Judge GINSBURG. And my son-in-law, George T. Spera, Jr.

The CHAIRMAN. George.

Judge GINSBURG. And Christine, au pair from Belgium, who has been taking such wonderful care of the children.

Then, on behalf of my cousins who I reckon by the dozen, Stephen Hess.

The CHAIRMAN. Stephen, welcome.

You have quite a family and we welcome you all here today. It is obviously a very proud moment for you, and this is a proud moment for the photographers, because they get to stand and be seen on television as they walk out of the well. [Laughter.]

Thank you all. While they are moving, I want those listening to understand I have not banished them from the hearing. They will recede into the various places for which this room was designed to be able to take their photographs, so they will continue to be able to do their job.

One of our colleagues who has just arrived has a statement, and I will ask him whether or not he would prefer to deliver it before or after the nominee makes her statement.

Senator PRESSLER. I apologize, Mr. Chairman. I was in the Commerce Committee where I am the ranking member. We had an air safety hearing, and I went through a long morning. I will greatly summarize my statement. What do you prefer? What does the chairman prefer?

The CHAIRMAN. That is fine, Senator, you go right ahead, and then we will go to your statement.

#### OPENING STATEMENT OF SENATOR PRESSLER

Senator PRESSLER. Welcome, Judge Ginsburg.

You and I share something in common. This is our first U.S. Supreme Court confirmation hearing. I am very much impressed with your legal background. You are a pioneer in the field of gender discrimination, and your long line of legal victories has secured fundamental rights for both women and men.

As stated in my conversation with you in my office several weeks ago, I am very interested in how you would approach cases of particular interest to those of us living in the West. In my part of the country, many legal controversies arise over how the law of the land is applied to the use of the land. Environmental law, water law, hunting and fishing rights, mineral rights, access to public lands, private property rights, and cases and controversies arising in Indian country—these are everyday issues that affect everyday people living in the West. The Court's treatment of these issues dramatically affects the way of life of the people of the West, including my home State of South Dakota.

I certainly am not looking for your position on these issues. After all, you are not campaigning for an elected office. Nor are you a political appointee. You have been nominated to be a Justice on the highest court in the land.

We on this committee and our colleagues in the Senate are charged with the responsibility to confirm or not confirm you for this high office. Some writers have commented that the Senate is the last opportunity for the people to have a voice in determining who shall sit on the Nation's highest Court.

Supreme Court Justices are appointed for life. Once you are seated on the Court, the American people will have to coexist with Jus-

tice Ginsburg for as long as you choose to stay, or God chooses to keep you there.

Before I cast my vote on your confirmation, I would like to know how familiar you are with the issues I referenced, your inclination to learn more about them, and how you intend to go about deciding cases involving these issues. Indeed, on Indian country issues, I note in the papers that even the State of Connecticut has a dispute over Indian lands and Indian jurisdiction.

Both Indians and non-Indians on or near reservations are eager to resolve some of these issues, and many of them go to the Supreme Court. Through these specific issues, I hope to learn more about your general approach to the basic principles of judging, principles such as fairness and objectivity.

There also are many issues that go to the Supreme Court regarding hunting and fishing rights, such as on the Missouri River. There are cases that go to the Supreme Court about the tribal courts, which are quite different from the U.S. Federal district courts. Indian cases significantly contribute to the work overload of Federal judges in my State.

In the course of the next few days, I hope we can have a dialogue on issues of concern to the people in the West, but not only in the West, but throughout the United States, because everyone is concerned about these issues. And the Supreme Court ends up deciding more of them than Congress, perhaps because Congress is unwilling. Maybe I should criticize our own institution.

In the interest of time, I ask unanimous consent to be able to submit the remainder of my statement for the record. I shall be asking many questions on Indian country jurisdiction.

The CHAIRMAN. Without objection, it will be entered in the record. I thank you, Senator.

[The prepared statement of Senator Pressler follows:]

**PREPARED STATEMENT OF SENATOR PRESSLER**

Welcome, Judge Ginsburg. You and I share something in common—this is our first U.S. Supreme Court confirmation hearing. I look forward to them very much, as I'm sure you do.

Judge Ginsburg, you have a most impressive legal background. You are a pioneer in the field of gender discrimination. Your long line of legal victories has secured fundamental rights for both women and men. Your distinguished place in the annals of American law already is secure.

The volume of your writings is astounding. My staff has filled nearly three dozen large three-ring binders to contain them. In reading your articles and decisions, one receives an education on a wide range of legal subjects. I commend you for the prolific contributions you have made to the law.

As stated in my conversation with you in my office several weeks ago, I am very interested in how you would approach cases of particular interest to those of us living in the West. In my part of the country, many legal controversies arise over how the law of the land is applied to the use of the land. Environmental law, water law, hunting and fishing rights, mineral rights, access to public lands, private property rights, and cases and controversies arising in Indian Country—these are everyday issues that affect everyday people living in the West. The Court's treatment of these issues dramatically affect the way of life of the people of the West, including my home state of South Dakota.

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commented that the Senate is the last opportunity for the people to have a voice in determining who shall sit on the nation's highest court.

Supreme Court justices are appointed for life. Once you are seated on the Court, the American people will have to coexist with Justice Ginsburg for as long as you choose to stay, or God chooses to keep you there. The people will have no say about your tenure.

Before I can cast my vote on your confirmation, I would like to know how familiar you are with the issues I referenced, your inclination to learn more about them, and how you intend to go about deciding cases involving these issues. Through these specific issues, I hope to learn more about your general approach to the basic principles of judging—principles such as fairness and objectivity.

Over the course of the next few days, I hope we can have a dialogue on issues of concern to people in the West. I believe we can learn from each other in the process.

Once again, welcome to this hearing. I look forward to your testimony.

The CHAIRMAN. Judge, the floor is now yours. Again, welcome.

Judge GINSBURG. Thank you, Mr. Chairman, Senator Hatch, and other members of the committee.

May I say first how much I appreciate the time committee members took to greet me in the weeks immediately following the President's nomination. It was a particularly busy time for you, and I thank you all the more for your courtesy.

To Senator Moynihan, who has been at my side every step of the way, a thousand thanks could not begin to convey my appreciation. Despite the heavy demands on his time, during trying days of budget reconciliation, he accompanied me on visits to Senate members, he gave over his own desk for my use, he buoyed up my spirits whenever a lift was needed. In all, he served as the kindest, wisest counselor a nominee could have.

Senator D'Amato, from my great home State of New York, volunteered to join Senator Moynihan in introducing and sponsoring me, and I am so grateful to him. I have had many enlightening conversations in Senate Chambers since June 14, but my visit with Senator D'Amato was sheer fun.

The CHAIRMAN. It always is. [Laughter.]

Judge GINSBURG. My children decided at an early age that mother's sense of humor needed improvement. They tried to supply that improvement, and kept a book to record their successes. The book was called "Mommy Laughed." My visit with Senator D'Amato would have supplied at least three entries for the "Mommy Laughed" book.

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Most of all, the President's confidence in my capacity to serve as a Supreme Court Justice is responsible for the proceedings about to begin. There are no words to tell him what is in my heart. I can say simply this: If confirmed, I will try in every way to justify his faith in me.

I am, as you know from my responses to your questionnaire, a Brooklynite, born and bred—a first-generation American on my father's side, barely second-generation on my mother's. Neither of my parents had the means to attend college, but both taught me to love learning, to care about people, and to work hard for whatever

I wanted or believed in. Their parents had the foresight to leave the old country, when Jewish ancestry and faith meant exposure to pogroms and denigration of one's human worth. What has become of me could happen only in America. Like so many others, I owe so much to the entry this Nation afforded to people yearning to breathe free.

I have had the great fortune to share life with a partner truly extraordinary for his generation, a man who believed at age 18 when we met, and who believes today, that a woman's work, whether at home or on the job, is as important as a man's. I attended law school in days when women were not wanted by most members of the legal profession. I became a lawyer because Marty and his parents supported that choice unreservedly.

I have been deeply moved by the outpouring of good wishes received in recent weeks from family, neighbors, camp mates, classmates, students at Rutgers and Columbia, law-teaching colleagues, lawyers with whom I have worked, judges across the country, and many women and men who do not know me. That huge, spirit-lifting collection shows that for many of our people, an individual's sex is no longer remarkable or even unusual with regard to his or her qualifications to serve on the Supreme Court.

Indeed, in my lifetime, I expect to see three, four, perhaps even more women on the High Court Bench, women not shaped from the same mold, but of different complexions. Yes, there are miles in front, but what a distance we have traveled from the day President Thomas Jefferson told his Secretary of State: "The appointment of women to [public] office is an innovation for which the public is not prepared." "Nor," Jefferson added, "am I."

The increasingly full use of the talent of all of this Nation's people holds large promise for the future, but we could not have come to this point—and I surely would not be in this room today—with-out the determined efforts of men and women who kept dreams of equal citizenship alive in days when few would listen. People like Susan B. Anthony, Elizabeth Cady Stanton, and Harriet Tubman come to mind. I stand on the shoulders of those brave people.

Supreme Court Justices are guardians of the great charter that has served as our Nation's fundamental instrument of government for over 200 years. It is the oldest written constitution still in force in the world. But the Justices do not guard constitutional rights alone. Courts share that profound responsibility with Congress, the President, the States, and the people. Constant realization of a more perfect Union, the Constitution's aspiration, requires the widest, broadest, deepest participation on matters of government and government policy.

One of the world's greatest jurists, Judge Learned Hand, said, as Senator Moseley-Braun reminded us, that the spirit of liberty that imbues our Constitution must lie first and foremost in the hearts of the men and women who compose this great Nation. Judge Hand defined that spirit, in a way I fully embrace, as one which is not too sure that it is right, and so seeks to understand the minds of other men and women and to weigh the interests of others alongside its own without bias. The spirit Judge Learned Hand described strives for a community where the least shall be heard and

considered side by side with the greatest. I will keep that wisdom in the front of my mind as long as I am capable of judicial service.

Some of you asked me during recent visits why I want to be on the Supreme Court. It is an opportunity beyond any other for one of my training to serve society. The controversies that come to the Supreme Court, as the last judicial resort, touch and concern the health and well-being of our Nation and its people. They affect the preservation of liberty to ourselves and our posterity. Serving on this Court is the highest honor, the most awesome trust, that can be placed in a judge. It means working at my craft—working with and for the law—as a way to keep our society both ordered and free.

Let me try to state in a nutshell how I view the work of judging. My approach, I believe, is neither liberal nor conservative. Rather, it is rooted in the place of the judiciary, of judges, in our democratic society. The Constitution's preamble speaks first of "We, the People," and then of their elected representatives. The judiciary is third in line and it is placed apart from the political fray so that its members can judge fairly, impartially, in accordance with the law, and without fear about the animosity of any pressure group.

In Alexander Hamilton's words, the mission of judges is "to secure a steady, upright, and impartial administration of the laws." I would add that the judge should carry out that function without fanfare, but with due care. She should decide the case before her without reaching out to cover cases not yet seen. She should be ever mindful, as Judge and then Justice Benjamin Nathan Cardozo said, "Justice is not to be taken by storm. She is to be wooed by slow advances."

We—this committee and I—are about to embark on many hours of conversation. You have arranged this hearing to aid you in the performance of a vital task, to prepare your Senate colleagues for consideration of my nomination.

The record of the Constitutional Convention shows that the delegates had initially entrusted the power to appoint Federal judges, most prominently Supreme Court Justices, not to the President, but to you and your colleagues, to the Senate acting alone. Only in the waning days of the Convention did the Framers settle on a nomination role for the President and an advice and consent role for the Senate.

The text of the Constitution, as finally formulated, makes no distinction between the appointment process for Supreme Court Justices and the process for other offices of the United States, for example, Cabinet officers. But as history bears out, you and Senators past have sensibly considered appointments in relation to the appointee's task.

Federal judges may long outlast the President who appoints them. They may serve as long as they can do the job. As the Constitution says, they may remain in office "during good Behaviour." Supreme Court Justices, most notably, participate in shaping a lasting body of constitutional decisions. They continuously confront matters on which the Framers left things unsaid, unsettled, or uncertain. For that reason, when the Senate considers a Supreme Court nomination, the Senators are properly concerned about the

nominee's capacity to serve the Nation, not just for the here and now, but over the long term.

You have been supplied, in the 5 weeks since the President announced my nomination, with hundreds of pages about me and thousands of pages I have penned—my writings as a law teacher, mainly about procedure; 10 years of briefs filed when I was a court-room advocate of the equal stature of men and women before the law; numerous speeches and articles on that same theme; 13 years of opinions—counting the unpublished together with the published opinions, well over 700 of them—all decisions I made as a member of the U.S. Court of Appeals for the District of Columbia Circuit; several comments on the roles of judge and lawyers in our legal system.

That body of material, I know, has been examined by the committee with care. It is the most tangible, reliable indicator of my attitude, outlook, approach, and style. I hope you will judge my qualifications principally on that written record, a record spanning 34 years, and that you will find in that written record assurance that I am prepared to do the hard work and to exercise the informed, independent judgment that Supreme Court decisionmaking entails.

I think of these proceedings much as I do of the division between the written record and briefs, on the one hand, and oral argument on the other hand, in appellate tribunals. The written record is by far the more important component in an appellate court's decision-making, but the oral argument often elicits helpful clarifications and concentrates the judges' minds on the character of the decision they are called upon to make.

There is, of course, this critical difference. You are well aware that I come to this proceeding to be judged as a judge, not as an advocate. Because I am and hope to continue to be a judge, it would be wrong for me to say or to preview in this legislative chamber how I would cast my vote on questions the Supreme Court may be called upon to decide. Were I to rehearse here what I would say and how I would reason on such questions, I would act injudiciously.

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erly keynote our exchanges. Judges, I am mindful, owe the elected branches—the Congress and the President—respectful consideration of how court opinions affect their responsibilities. And I am heartened by legislative branch reciprocal sensitivity. As one of you said 2 months ago at a meeting of the Federal Judges Association, “We in Congress must be more thoughtful and more deliberate in order to enable judges to do their job more effectively.”

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Thank you for your patience.

[The prepared statement and the initial questionnaire of Judge Ginsburg follow:]

#### PREPARED STATEMENT OF JUDGE GINSBURG

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SENATE JUDICIARY COMMITTEE  
INITIAL QUESTIONNAIRE (SUPREME COURT)  
I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used).  
**Ruth Bader Ginsburg**  
Name on birth certificate: **Joan Ruth Bader**  
Childhood nickname: **Kiki**
2. Address: List current place of residence and office addresses.  
Residence: **700 New Hampshire Avenue, N.W.  
Washington, D.C. 20037**  
Office: **United States Courthouse  
Washington, D.C. 20001**
3. Date and place of birth.  
**March 15, 1933; Brooklyn, New York.**
4. What is your marital status? List spouse's name, occupation, employer's name and business addresses.  
~Married.  
**Martin D. Ginsburg**  
law professor; lawyer  
**Georgetown University Law Center  
600 New Jersey Avenue, N.W.  
Washington, D.C. 20001**  
**Martin D. Gineburg, P.C., of counsel to  
Fried, Frank, Harris, Shriver & Jacobson  
1001 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004**
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Cornell University, 1950-54, B.A. 1954.

Harvard Law School, 1956-58.

Columbia Law School, 1958-59, LL.B. (J.D.) 1959.

(Transferred from Harvard to Columbia for financial and family reasons. Husband graduated from Harvard Law School in 1958. He had an attractive professional opportunity in New York; no equivalent opportunity was available in the Boston area. Our daughter was then age 3, and we wished to remain together as a family unit.)

6. Employment Record: List (by year) all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, with which you are or have been connected as an officer, director, partner, proprietor, or employee.

In the first six months of 1955, I held, successively, two clerk-typist jobs. The first was at the post engineer troop supply office in Fort Sill, Oklahoma, the second, at the Social Security Office in Lawton, Oklahoma.

In July and August of 1957, I worked as a summer law clerk at Paul, Weiss, Rifkind, Wharton & Garrison, then located at 575 Madison Avenue, New York, N.Y. (current address: 1285 Avenue of the Americas, New York, N.Y. 10019).

\* Employment experience after law school:

Law Secretary (law clerk), Hon. Edmund L. Palmieri,  
United States District Court, Southern District of  
New York, 1959-61  
reference: Alvin Schulman, Moses & Singer,  
1271 Avenue of the Americas, New York, N.Y.  
10020, tel. (212) 246-3700

Research Associate, Columbia Law School  
Project on International Procedure, 1961-62  
reference: Professor Hans Smit, Columbia Law  
School, 435 W. 116 Street, New York, N.Y.  
10027, tel. (212) 854-2631

Associate Director, Columbia Law School  
Project on International Procedure, 1962-63  
reference: Professor Hans Smit, Columbia Law  
School, 435 W. 116 Street, New York, N.Y.  
10027, tel. (212) 854-2631

Rutgers -- The State University School of Law (Newark)  
Assistant Professor, 1963-66  
Associate Professor, 1966-69  
Professor, 1969-72  
reference: Professor Allen Axelrod, 810  
Washington Street, Hoboken, N.J. 07030, tel.  
(201) 659-3753

Columbia University School of Law  
Professor, 1972-80  
reference: Professor Hans Smit, Columbia Law  
School, 435 W. 116 Street, New York, N.Y.  
10027, tel. (212) 854-2631

As a law professor, I regularly taught civil  
procedure, conflict of laws, constitutional law,  
sex equality under the law; I occasionally taught  
federal courts, comparative law and procedure.

Consultant to U.S. Commission on Civil Rights, 1973-74

American Civil Liberties Union  
Director, Women's Rights Project, 1972-73  
General Counsel, 1973-80 (one of three or four)  
reference: Professor Norman Dorsen, NYU Law  
School, 40 Washington Square South, New York,  
N.Y. 10012, tel. (212) 998-6233

Center for Advanced Study in the Behavioral Sciences,  
Stanford, California  
Fellow, 1977-78  
reference: Professor Gerald Gunther,  
Stanford University Law School, Stanford, CA  
94305, tel. (415) 723-4477

United States Court of Appeals for the District of  
Columbia Circuit  
United States Circuit Judge, 1980-present  
reference: Chief Judge Abner J. Mikva,  
United States Court of Appeals, Washington,  
D.C., tel. (202) 273-0375

Over the years, I have also visited several faculties:

New York University School of Law, Spring 1968  
Harvard Law School, Fall 1971  
University of Amsterdam, Summer 1974  
University of Strasbourg, Summer 1975  
Salzburg Seminar in American Studies, Summer 1984  
Aspen Institute, Summer 1990

7. Have you had any military service?

No.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Prior to coming to the bench in 1980, I was the recipient of the following honors and awards:

New York State Regents and Cornell Scholarships; Phi Beta Kappa (junior year); Phi Kappa Phi; B.A. awarded with High Honors in Government and Distinction in All Subjects; Cornell University 1954 graduating class marshall (as female student with highest academic average);

Harvard Law Review, 1957-58; class rank estimated as among first ten students, based on two-year average; Columbia Law Review, 1958-59; tied for first in class, based on third-year grades; Kent Scholar (Columbia Law School); Juris Doctorian Honoris Causa, University of Lund, Sweden, 1969; Phi Beta Kappa Visiting Scholar, 1973-74; Fellow, Center for Advanced Study in the Behavioral Sciences (Stanford, CA), 1977-78; Scholar-in-Residence, Rockefeller Foundation Bellagio Study and Conference Center, July-August, 1977; Robert S. Marx Lecturer, University of Cincinnati, 1974; George Abel Dreyfous Lecturer, Tulane University, 1978; Will E. Orgain Lecturer, University of Texas, 1979; Cleveland-Marshall Fund Lecturer, Cleveland-Marshall College of Law, 1979; invited to sit on panel of constitutional law scholars at 1977 and 1978 Hearings before U.S. House and Senate Subcommittees on H.J. Res. 638 (extending the time for ratification of the proposed Equal Rights Amendment); selected as one of ten outstanding United States law school professors in mid-career, Time, March 14, 1977; Society of American Law Teachers Annual Outstanding Teacher of Law Award, 1979; Barnard College Annual Woman of Achievement Award, 1980.

Since my appointment as United States Circuit Judge, United States Court of Appeals for the District of Columbia Circuit, I have received honorary degrees from American University (1981); Vermont Law School (1984); Georgetown University Law Center (1985); Brooklyn Law School (1987); Hebrew Union College (1988); Rutgers University (1991); Amherst College (1991); Lewis and Clark College (1992).

I have also delivered several endowed lectures, later published in the institution's law review: John A. Sibley Lecture, University of Georgia, 1981; John R. Coen Lecture, University of Colorado, 1983; William T. Joyner Lecture, University of North Carolina, 1984; Dunwody Lecture,

University of Florida, 1985; Lester W. Roth Lecture,  
University of Southern California, 1986; David C. Baum  
Lecture, University of Illinois, 1988; Jurisprudential  
Lecture, University of Washington, 1989; Ben J. Alzheimer  
Lecture, University of Arkansas at Little Rock, 1990;  
Madison Lecture, New York University, 1993.

On August 8, 1993, I will receive a Margaret Brent  
Women Lawyers of Achievement Award from the American Bar  
Association Commission on Women in the Profession.

9. Bar Associations: List all bar associations, legal or  
judicial-related committees or conferences of which you are or  
have been a member and give the titles and dates of any offices  
which you have held in such groups. Also, if any such  
association, committee or conference of which you were or are a  
member issued any reports, memoranda or policy statements  
prepared or produced with your participation, please furnish the  
committee with one copy of these materials, if they are available  
to you. "Participation" includes, but is not limited to,  
membership in any working group of any such association,  
committee, or conference which produced a report, memorandum, or  
policy statement even where you did not contribute to it.

American Bar Association  
Amicus Curiae Committee, 1979-April 1980  
Section of Individual Rights and Responsibilities,  
    Council Member, 1975-81  
Standing Committee on Federal Judicial Improvements,  
    1992-  
ABA Journal, Board of Editors, 1972-78  
Section of International Law, Committee  
    on Comparative Procedure and Practice  
    (Chairman), 1970-73  
European Law Committee (Member), 1967-72

American Bar Foundation  
Fellow, 1978-  
Board of Directors (Executive Committee and  
    Secretary), 1979-89

Association of the Bar of the City of New York  
Executive Committee, 1974-78  
Civil Rights Committee, 1979-April 1980  
Sex and Law Committee, 1978-79  
Post Admission Legal Education  
    Committee, 1970-74  
Foreign Law Committee, 1966-69

District of Columbia Bar, 1980-

Bar Association of the District of Columbia,

1981-

Women's Bar Association of the District of Columbia,  
1980s.

Federal Judges Association, 1986-

National Association of Women Judges, 1982-

American Law Institute  
Council Member, 1978-  
Adviser, Restatement (Second) of Judgments,  
1972-82  
Adviser, Project on Complex Litigation,  
1985-

Federal Bar Council  
Vice-President, 1978-80

American Foreign Law Association  
Vice-President, 1973-76  
Board of Directors, 1970-77

Association of American Law Schools  
Executive Committee, 1972  
Nominating Committee, 1979

Society of American Law Teachers  
Vice President, 1978-April 1980  
Board of Governors and Executive  
Committee, 1975-77

Judicial Conference of the Second Circuit  
Planning and Program Committee, 1976-May 1980

Judicial Council of the Second Circuit  
Advisory Committee on Planning for the  
District Courts, 1979-June 1980

West Publishing Company Law School Department  
Advisory Board, 1978-April 1980  
Editorial Board, Guide to American Law,  
1978-April 1980

American Journal of Comparative Law  
Editorial Board, 1966-72

International Association of Jewish Lawyers  
and Jurists  
Honorary Member, Board of Governors, 1990-

Judicial Conference of the United States,

Committee on the Fifth International Appellate  
Judges Conference, Member 1988-90

Historical Society of the District of Columbia  
Circuit, Chairman, 1990-

Study Group on International Recognition of  
Judgments, Secretary of State's Advisory  
Committee on Private International Law, 1992-

The above-listed associations and committees have records of activities, reports, memoranda, and policy statements prepared during periods of my participation. As is evident from the character of the organizations, materials produced are voluminous. These materials, I estimate, are spread over hundreds of volumes. I do not maintain a library of such materials and it is beyond my resources to collect and compile them.

While reports, memoranda, or policy statements may have been issued by several of the listed groups during the period of my affiliation, I have no specific recollection of them, and no compilation or index to help me recall my participation. All materials should be available from the respective organizations. If additional detail on any particular matter is needed from me, I will attempt to obtain and supply it on request.

10. Other Memberships: Please list all private and governmental organizations (including clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications) to which you belong or to which you have belonged since graduation from law school, or in which you have participated since graduation from law school, giving dates of membership or participation and of any office you held. Please describe briefly the nature and objectives of each such organization, the nature of your participation in each such organization, and identify an officer or other person from whom more detailed information may be obtained. Please indicate which of these organizations, if any, are active in lobbying before public bodies. If any of these organizations of which you were or are a member or in which you participated issued any reports, memoranda or policy statements prepared or produced with your participation, please furnish the committee with one copy of these materials, if they are available to you. "Participation" includes, but is not limited to, membership in any working group of any such association, committee, or conference which produced a report, memorandum, or policy statement even where you did not contribute to it. If any of these materials are not available to you, please give the name and address of the organization that issued the report,

memoranda or policy statement, the date of the document, and a summary of its subject matter.

American Civil Liberties Union  
General Counsel, 1973-April 1980  
National Board, 1974-April 1980  
Counsel to Women's Rights Project, 1972-April 1980

Encyclopedia of the American Constitution  
(National Endowment for the Humanities)  
Editorial Board, 1980-

Columbia University Center for the Study of Human Rights  
Academic Advisory Board, 1977-June 1980

Columbia University Center for the Social Sciences,  
Program in Sex Roles and Social Change  
Advisory Board, 1977-June 1980

American Jewish Congress  
National Commission on Law and Social Action, 1978-  
April 1980

Women's Law Fund (Cleveland, Ohio)  
Board Member, 1972-April 1980  
(an organization engaged in litigation and other endeavors  
to promote equal employment opportunity for women)

Women's Action Alliance (New York, N.Y.)  
Board Member, 1975-April 1980  
(an organization formed to advance the status of women,  
particularly women who are not affluent)

Women's Equity Action League  
National Advisory Board and Advisory Board to  
Legal Defense and Educational Fund, 1977-April 1980  
(an organization engaged in litigation and other endeavors  
to promote equal employment opportunity for women)

Federation of Organizations for Professional Women  
Advisory Council, 1977-April 1980  
(umbrella organization for women in diverse professions)

Urban Institute, Center for Policy Research on Women  
Advisory Board, 1977-March 1980

National Woman's Party  
Board Member, 1977-April 1980  
(founded in 1923 to launch and support Equal Rights  
Amendment; headquartered in Sewall-Belmont House, D.C.)

Council on Foreign Relations

Member, 1975-

Citizens Union  
    Director, 1972-73 (Member since 1968)  
(an organization designed to promote good government in New York City)

Children's International Summer Villages  
    International Board, 1963-67  
(an organization bringing together children from around the globe for summer camp experience)

Other memberships: Columbia and Harvard Law School Alumni Associations, League of Women Voters, Women's Forum (1975-March 1980) (an organization of women in diverse professions meeting occasionally to discuss common interests and current events), National Organization for Women, Metropolitan Opera Guild, New York City Opera Guild, Metropolitan Museum of Art, Museum of Modern Art, Alpha Epsilon Phi (college sorority, 1952-54).

Since my appointment as United States Circuit Judge, United States Court of Appeals for the District of Columbia Circuit, I have joined the following organizations in the "other memberships" category:

Constitution, Journal of the Foundation for the U.S. Constitution  
    Advisory Board, 1988  
    1271 Avenue of the Americas  
    New York, New York 10020

American Academy of Arts & Sciences  
    Fellow, 1982  
    Norton's Woods, 136 Irving Street  
    Cambridge, Massachusetts 02138

Woodmont Country Club, 1980-83  
    Rockville, Maryland

Army Navy Country Club, 1983-  
    Arlington, Virginia

Lawyers Committee for the Washington Opera, 1981-  
    Kennedy Center

In addition, I am a sponsoring member of the Smithsonian Institution; a contributor to the Kennedy Center Stars and the Arena Stage; a member of the American Film Institute; a member of the National Museum of Women in the Arts and of the Corcoran; a charter member of the United States Holocaust Memorial Museum; and a member of the

**American Jewish Congress.**

As a General Counsel to the American Civil Liberties Union, 1973-April 1980, I was informed of lobbying activities in which the ACLU engaged and, from time to time, within the organization, expressed my views. However, I did not participate personally in legislation-related efforts as a representative of the ACLU, and retain no record compilation or index responsive to this question. While some of the other organizations in which I participated until 1980 may have engaged in lobbying, I did not participate personally in such activity and have no memory of what that activity may have been.

The "other memberships" I have held since my appointment in 1980 entail no lobbying activities. All of the organizations listed in this category, I believe, maintain full records. Further information is available from the Director or President of the respective organizations. If additional detail is needed from me, I will attempt to obtain and supply it on request.

11. **Court Admission:** List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed.

State of New York 1959  
District of Columbia 1975  
United States Supreme Court 1967  
United States Courts of Appeals:  
    Second Circuit 1962  
    Fifth Circuit 1975  
    D.C. Circuit 1975  
United States District Courts:  
    Southern and Eastern Districts of New York 1961  
    District of Columbia 1975

I am not aware of any lapsed membership.

12. **Writings and Speeches:**

- (a) List the titles, publishers, and dates of books, articles, reports, letters to the editors, editorial pieces, or other published material you have written or edited. Please supply one copy of all published material to the Committee.

**Books**

Civil Procedure in Sweden (1965) (with Anders Brzelius)  
Swedish Code of Judicial Procedure (1968) (with

Anders Bruzelius)  
 Volume editor, Business Regulation in the Common  
 Market Nations, vol. 1 (1969)  
 Text, Cases, and Materials on Sex-Based  
 Discrimination (1974, Supp. 1978) (with Herma  
 Hill Kay and Kenneth M. Davidson; Supplement  
 with Herma Hill Kay)

#### Monographs

A Selective Survey of English Language Studies on  
 Scandinavian Law (1970)  
 The Legal Status of Women under Federal Law (with  
 Brenda Feigen Fastau) (1974) (report to U.S.  
 Commission on Civil Rights)  
 Constitutional Aspects of Sex-Based Discrimination  
 (1974)

#### Articles

The Jury and the Nämnd, 48 Cornell L.Q. 253 (1963)  
 Special Findings and Jury Unanimity in the Federal  
 Courts, 65 Colum. L. Rev. 256 (1965)  
 The Competent Court in Private International Law,  
 20 Rutgers L. Rev. 89 (1965)  
 Chapters (with co-authors) on Denmark, Finland,  
 Norway, Sweden, in Sait ed., International  
 Cooperation in Litigation 58, 105, 281, 333  
 (1965)  
 Civil Procedure, Basic Features of the Swedish  
 System, 14 American Journal of Comparative  
 Law 336 (1965)  
 Proof of Foreign Law in Sweden, 14 International &  
 Comparative L.Q. 277 (1965)  
 Judgments in Search of Full Faith and Credit, 82  
 Harv. L. Rev. 798 (1969)  
 Recognition and Execution of Foreign Civil  
 Judgments and Arbitration Awards, in Legal  
 Thought in the United States Under  
 Contemporary Pressures 237 (1970)  
 Recognition and Enforcement of Foreign Civil  
 Judgments: A Summary View of the Situation  
 - in the United States, 4 International Lawyer  
 420 (1970)  
 Notes in International Lawyer 1968-72 on Right of  
 U.S. Lawyers to Practice Abroad (vol. 3 at  
 903), Service of Process Abroad (vol. 4 at  
 163), Summary Adjudication (vol. 4 at 882),  
 Legal Services to Poor People and People of  
 Limited Means in Foreign Systems (vol. 6 at  
 128) (all relating to Scandinavian systems)  
 Sex and Unequal Protection: Men and Women as

- Victims, 11 Journal of Family Law 347 (1971)  
The Status of Women (Symposium editor), 20  
American Journal of Comparative Law 585  
(1972)
- Men, Women, and the Constitution, 10 Columbia  
Journal of Law and Social Problems 91 (1973)  
The Need for the Equal Rights Amendment, 59 A.B.A.  
Journal 1013 (1973)
- Gender and the Constitution, 44 U. Cincinnati L.  
Rev. 1 (1975) (Robert S. Marx Lectures)
- Gender in the Supreme Court: The 1973 and 1974  
Terms, 1975 Supreme Court Review 1 (1976)
- Women As Full Members of the Club: An Evolving  
American Ideal, 6 Human Rights 1 (Fall 1977)
- Gender-Based Discrimination and the Equal Rights  
Amendment (Panel Presentation at 1976 Second  
Circuit Judicial Conference), 74 F.R.D. 298,  
315
- Let's Have ERA as a Signal, 63 A.B.A. Journal 70  
(1977)
- Realizing the Equality Principle, in Social  
Justice & Preferential Treatment 135  
(Blackstone & Heslep eds. 1977)
- Women, Men, and the Constitution: Key Supreme  
Court Rulings, in Women in the Courts 21  
(National Center for States Courts 1978)
- Is the ERA Constitutionally Necessary?, Update 16  
(A.B.A. Special Committee on Youth  
Education for Citizenship, Spring 1978)
- From No Rights, to Half Rights, to Confusing  
Rights, 7 Human Rights No. 1, at 12 (May  
1978)
- Sex Equality and the Constitution: The State of  
the Art, 4 Women's Rights Law Reporter 143  
(Spring 1978)
- The Equal Rights Amendment Is the Way, 1 Harvard  
Women's Law Journal 19 (Spring 1978)
- Sex Equality and the Constitution, 52 Tulane L.  
Rev. 451 (1978) (George Abel Dreyfous  
Lecture)
- Some Thoughts on Benign Classification in the  
Context of Sex, 10 Conn. L. Rev. 813 (Summer 1978)
- Women at the Bar - A Generation of Change, 2  
University of Puget Sound L. Rev. 1 (Fall  
1978)
- American Bar Association Delegation Visits  
People's Republic of China, 64 A.B.A. Journal  
1516 (1978)
- Book Review, Tribe, American Constitutional Law,  
92 Harv. L. Rev. 340 (November 1978)
- A Feminist Lawyer Visits China, 4 Women's Agenda 5  
(January 1979)

- Bakke Decision, 65 Women Lawyers Journal 11 (1979)  
All About the E.R.A., Cosmopolitan 166 (1979)  
Sexual Equality Under the Fourteenth and Equal  
Rights Amendments, 1979 Wash. U. L.J. 161  
Ratification of the Equal Rights Amendment: A  
Question of Time, 57 Tex. L. Rev. 919 (1979)  
(Will E. Orgain Lecture)  
A Study Tour of Taiwan's Legal System, 66 A.B.A.  
Journal 165 (1980)  
Some Thoughts on Judicial Authority to Repair  
Unconstitutional Legislation, 28 Clev. St. L.  
Rev. 301 (1979) (Cleveland-Marshall Fund  
Lecture)  
Gender in the Supreme Court: The 1976 Term, in  
Constitutional Government in America 217  
(R. Collins ed. 1980)  
Women's Right to Full Participation in Shaping  
Society's Course: An Evolving Constitutional  
Precept, in Toward the Second Decade 171  
(B. Justice & R. Pore eds. 1981)  
Inviting Judicial Activism: A "Liberal" or  
"Conservative" Technique?, 15 Ga. L. Rev. 539  
(1981) (John A. Sibley Lecture)  
American University Commencement Address, May 10,  
1981, 30 Am. U. L. Rev. 891 (1981)  
Women's Work: The Place of Women in Law Schools,  
32 J. Legal Educ. 272 (1982); Columbia's  
Committee on the '80s, *id.* at 282  
Touring the Law in King Arthur's Court, 61 Tex. L.  
Rev. 341 (1982)  
The Burger Court's Grapplings with Sex  
Discrimination, in The Burger Court: The  
Counter-Revolution That Wasn't 132 (V. Blasi  
ed. 1983)  
Commencement Address, Ohio State University Law  
Record 25 (Winter 1983)  
Reflections on the Independence, Good Behavior,  
and Workload of Federal Judges, 55 U. Colo.  
L. Rev. 1 (1983) (John R. Coen Lecture)  
The Work of Professor Allan Delker Vestal, 70 Iowa  
L. Rev. 13 (1984)  
Some Thoughts on Autonomy and Equality in Relation  
to *Roe v. Wade*, 63 No. Carolina L. Rev. 375  
(1985) (William T. Joyner Lecture)  
The Obligation to Reason Why, 37 U. Fla. L. Rev.  
205(1985) (Dunwody Lecture)  
Interpretations of the Equal Protection Clause,  
9 Harv. J. L. & Pub. Pol'y 41 (1986)  
Some Thoughts on the 1980's Debate over Special  
versus Equal Treatment for Women, 4 J. Law &  
Inequality 143 (1986)  
Commentary, The Intercircuit Committee (with Peter

- W. Huber), 100 Harv. L. Rev. 1417 (1987)  
A Plea for Legislative Review, 60 S. Cal. L. Rev.  
995 (1987) (Lester W. Roth Lecture)  
Remarks on Women Becoming Part of the  
Constitution, 6 J. Law & Inequality 17 (1988)  
(remarks at 1987 8th Circuit Judicial  
Conference)  
La légitimité démocratique du contrôle de  
constitutionnalité, in Et La Constitution  
Crea L'Amérique 71 (M. Toinet ed., Presses  
Universitaires de Nancy 1988)  
Comment for Constitutional Bicentennial Conference  
Dartmouth College, April 21, 1987, in Design  
and Practice: The Constitution as a Working  
Document 66-76 (Working Paper Series RC-  
5/ELP, Nelson A. Rockefeller Center for the  
Social Sciences 1988)  
Confirming Supreme Court Justices: Thoughts on  
the Second Opinion Rendered by the Senate,  
1988 U. Ill. L. Rev. 101 (1988) (David C.  
Baum Lecture)  
In Memoriam: Judge Carl McGowan, 56 Geo. Wash. L.  
Rev. 691 (1988)  
Articles on Sex Discrimination and Reproductive  
Autonomy, in Civil Rights and Equality 291-  
304, 310-321 (L. Levy, K. Karst, D. Mahoney  
eds. 1989)  
In Memoriam: Judge J. Skelly Wright, 57 Geo.  
Wash. L. Rev. 1034 (1989)  
Some Reflections on the Feminist Legal Thought of  
the 1970s (with Barbara Flagg), 1989 U. Chi.  
Legal Forum 9  
Remarks on Writing Separately, 65 Wash. L. Rev.  
133 (1990) (Jurisprudential Lecture)  
Employment of the Constitution to Advance the  
Equal Status of Men and Women, in The  
Constitutional Bases of Political and Social  
Change in the United States (S. Slonim ed.  
1990)  
On Amending the Constitution: A Plea for  
Patience, 12 U. Ark. Little Rock L.J. 677  
(1990) (Ben J. Altheimer Lecture)  
On Muteness, Confidence, and Collegiality, 61 U.  
Colo. L. Rev. 715 (1990)  
A Moderate View on Roe, Guest Column in 4  
Constitution No. 2, at 17 (Spring-Summer  
1992)  
Styles of Collegial Judging, 39 Fed. Bar News & J.  
199 (1992)  
Commencement Remarks, The Advocate 14 (Lewis &  
Clark College, Northwestern School of Law,  
Winter 1992)

Speaking in a Judicial Voice, forthcoming in the  
N.Y.U. L. Rev. (Madison Lecture)

Copies of writings listed above attached at Appendix I-1.

Supreme Court Briefs for Appellants, Appellees, and  
Petitioners

(+ indicates presentation of oral argument)

I was principal author of all briefs listed.

*Reed v. Reed*, 404 U.S. 71 (1971)

*Struck v. Secretary of Defense*, cert. granted, 409  
U.S. 947, judgment vacated, 409 U.S. 1071  
(1972)

+ *Frontiero v. Richardson*, 411 U.S. 677 (1973)

+ *Kahn v. Shevin*, 416 U.S. 351 (1974)

+ *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975)

+ *Edwards v. Healy*, 421 U.S. 772 (1975)

*Turner v. Department of Employment Security*, 423  
U.S. 44 (1975)

+ *Califano v. Goldfarb*, 430 U.S. 199 (1977)

+ *Duren v. Missouri*, 439 U.S. 357 (1979)

Copies of briefs listed above attached at Appendix I-9.

I have written no letters to the editor or editorial pieces  
since my appointment as United States Circuit Judge for the  
District of Columbia Circuit in June 1980, and have retained  
no compilation of press pieces written prior to my  
appointment. However, a NEXIS search has turned up five  
such items, and these are attached at Appendix I-2.

- (b) Please supply one copy of any testimony, official  
statements or other communications relating, in whole  
or in part, to matters of public policy, that you have  
issued or provided or that others presented on your  
behalf to public bodies or public officials.

Hearings before U.S. House and Senate Subcommittees on  
H.J. Res. 638 (Nov. 8, 1977) (on extending time for  
ratification of proposed Equal Rights Amendment)

Hearings before Subcommittee on the Constitution,  
Senate Committee on the Judiciary on S.J. Res. 134  
(Aug. 3, 1978) (on extending time for ratification of  
proposed Equal Rights Amendment)

Hearings before Subcommittee on Courts, Senate  
Committee on the Judiciary, on S. 704 (Oct. 9, 1985)  
(Bill to establish Intercircuit Panel)

Statement to Members of the (American Law Institute)  
Council, Dec. 14, 1979 (on dining at clubs that exclude  
persons from membership on the basis of race, religion,  
national origin, or sex)

Please see Appendix I-3.

- (c) Please supply a copy, transcript or tape recording of all speeches or talks, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions, by you which relate in whole or in part to issues of law or public policy. If you have a recording of a speech or talk and it is not identical to the transcript or copy please supply a copy of the recording as well. If you do not have a copy of the speech or a transcript or tape recording of your remarks, please give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter; and if you have reason to believe that the group has a copy or tape recording of the speech, please request that the group supply the committee with a copy or tape recording of the speech, as the case may be. If you did not speak from a prepared text, please furnish a copy of any outline or notes from which you spoke. If there were press reports about the speech, and they are readily available to you, please supply them.

I have supplied in Appendix I-4 a chronologically-arranged list, and copies of, all speeches delivered from the date of my appointment as United States Circuit Judge for the District of Columbia Circuit in June 1980. The first page of each speech indicates the group before whom the speech was given and the date of delivery. I have not retained compilations of unpublished speeches given prior to my appointment. A number of them, however, were incorporated in published law journal comments (all law journal comments are included in Appendix I-1). I do not have tape recordings of any speech or talk, but my custom is to adhere closely to the written text when a speech is delivered. I have retained no outline or note compilations from question-and-answer sessions or other occasions on which I spoke

without a prepared text.

The Madison Lecture I gave at New York University School of Law on March 9, 1993, listed as the last item under 12a., attracted press reports. I have attached, at Appendix I-5, the five that are readily available to me: U.S. News and World Report, April 5, 1993; New York Times, May 10, 1993, The New Republic, May 10, 1993; The New Republic, May 17, 1993; King Features Syndicate, May 19, 1993. I have asked New York University School of Law to furnish the Committee with a tape of the Madison Lecture, if one was made. The request letter is reproduced at I-17A (next page).

I-17A

UNITED STATES COURT OF APPEALS  
DISTRICT OF COLUMBIA CIRCUIT  
WASHINGTON, DC 20001

COPY

RUTH BADER GINSBURG  
UNITED STATES CIRCUIT JUDGE

June 29, 1993

Dean John Sexton  
New York University  
School of Law  
40 Washington Square South  
New York, New York 10012

Dear John:

In connection with my forthcoming confirmation hearing, please send me as soon as possible (for redelivery to the Senate Judiciary Committee) a copy of the videotape which, I believe, was made of my delivery of the Madison Lecture at New York University School of Law on March 9, 1993.

Alternatively, if no videotape was made, a letter so confirming would be appreciated.

Thank you very much.

Sincerely,

  
Ruth Bader Ginsburg

I appeared on C-Span in two programs designed to educate the public about the work of the federal courts: *America and the Courts: A Focus on the Federal Judiciary*, April 7, 1986; *Federalism in the Twenty-First Century* (panel at 1993 workshop for judges of the United States Court of Appeals), Feb. 8, 1993. Tapes of these programs are not in my possession.

- (d) Please list all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and clips or transcripts of these interviews where they are available to you.

Apart from the C-Span April 7, 1986 tape listed above, I do not recall giving any interviews to newspapers, magazines or other publications or to radio or television stations since my appointment as United States Circuit Judge for the District of Columbia Circuit in June 1980. I have not retained any compilation of interviews prior to my appointment.

13. Citations. Please provide:

- (a) Citations for all opinions you have written (including concurrences and dissents).

Please see Appendix I-6.

- (b) A list of cases in which appeal or certiorari has been requested or granted.

Below is a list of cases in which I wrote an opinion -- the majority opinion unless otherwise indicated -- and in which certiorari was requested and denied. For cases in which certiorari was requested and granted, see response to part (c) below.

*SEC v. McGoff*, 647 F.2d 185 (D.C. Cir.), cert. denied, 452 U.S. 963 (1981)

*United States v. Russell*, 655 F.2d 1261 (D.C. Cir. 1981), vacated in part, 670 F.2d 323 (D.C. Cir.), cert. denied, 457 U.S. 1108 (1982)

*Warren v. United States Parole Commission*, 650 F.2d 183 (D.C. Cir. 1981) (R.B. Ginsburg, J., dissenting), cert. denied, 455 U.S. 950 (1982)

*Sea-Land Service, Inc. v. Alaska Railroad*, 659 F.2d 243 (D.C. Cir. 1981), cert. denied, 455 U.S. 919 (1982)

- Doyle v. Department of Justice*, 668 F.2d 1365 (D.C. Cir. 1981), cert. denied, 455 U.S. 1002 (1982)
- United States v. Russell*, 670 F.2d 323 (D.C. Cir.), cert. denied, 457 U.S. 1108 (1982)
- Natural Resources Defense Council, Inc. v. EPA*, 673 F.2d 400 (D.C. Cir.), cert. denied, 459 U.S. 879 (1982)
- Pass Word, Inc. v. FCC*, 673 F.2d 1363 (D.C. Cir.) (per curiam), cert. denied, 459 U.S. 840 (1982)
- Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968 (D.C. Cir. 1982) (per curiam), cert. denied, 459 U.S. 1146 (1983)
- Theodore Lombard v. United States*, 690 F.2d 215 (D.C. Cir. 1982) (R.B. Ginsburg, J., concurring in part and dissenting in part), cert. denied, 462 U.S. 1118 (1983)
- Ritter Transportation, Inc. v. ICC*, 697 F.2d 1153 (D.C. Cir. 1982) (per curiam), cert. denied, 460 U.S. 1022 (1983).
- Kizas v. Webster*, 707 F.2d 524 (D.C. Cir. 1983) (R.B. Ginsburg, J., writing part of majority opinion), cert. denied, 464 U.S. 1042 (1984)
- United States v. Kelly*, 707 F.2d 1460 (D.C. Cir. 1983), cert. denied, 464 U.S. 908 (1983)
- Conair Corp. v. NLRB*, 721 F.2d 1355 (D.C. Cir. 1983) (R.B. Ginsburg, J., writing principal part of majority opinion and dissenting in part), cert. denied, 467 U.S. 1241 (1984)
- Walker v. Jones*, 733 F.2d 923 (D.C. Cir.), cert. denied, 469 U.S. 1036 (1984)
- National Ass'n of Regulatory Utility Commissioners v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984) (per curiam), cert. denied, 469 U.S. 1227 (1985)
- Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071 (D.C. Cir. 1984) (per curiam), cert. denied, 469 U.S. 1181 (1985)
- AFGE v. O'Connor*, 747 F.2d 748 (D.C. Cir. 1984), cert. denied, 474 U.S. 909 (1985)
- Middle South Energy, Inc. v. FERC*, 747 F.2d 763 (D.C. Cir. 1984) (R.B. Ginsburg, J., dissenting in part), cert. dismissed, 473 U.S. 930 (1985)
- McSurely v. McClellan*, 753 F.2d 88 (D.C. Cir.) (per curiam), cert. denied, 474 U.S. 1005 (1985)

*Grace v. Burger*, 763 F.2d 457 (D.C. Cir.), cert. denied, 474 U.S. 1026 (1985)

*Contact Lens Mfg. Ass'n v. FDA*, 766 F.2d 592 (D.C. Cir. 1985), cert. denied, 474 U.S. 1062 (1986)

*Amalgamated Transit Union Int'l v. Donovan*, 767 F.2d 939 (D.C. Cir. 1985) (R.B. Ginsburg, J., concurring), cert. denied, 475 U.S. 1046 (1986)

*Browning v. Clerk, U.S. House of Representatives*, 793 F.2d 380, 381 (D.C. Cir.) (statement accompanying denial of rehearing en banc), cert. denied, 479 U.S. 996 (1986)

*Brock v. WMATA*, 796 F.2d 481 (D.C. Cir. 1986), cert. denied, 481 U.S. 1013 (1987)

*Walsh v. Ford Motor Co.*, 807 F.2d 1000 (D.C. Cir. 1986) (R.B. Ginsburg, J., writing part of majority opinion), cert. denied, 485 U.S. 915 (1987)

*Tavoulareas v. Piro*, 817 F.2d 762, 806 (D.C. Cir.) (en banc) (Ginsburg, J., concurring), cert. denied, 484 U.S. 870 (1987)

*United States v. Jackson*, 824 F.2d 21 (D.C. Cir. 1987), cert. denied, 484 U.S. 1013 (1988)

*National Cottonseed Products Ass'n v. Brock*, 825 F.2d 482 (1987) (R.B. Ginsburg, J., writing part of majority opinion), cert. denied, 485 U.S. 1020 (1988)

*Kurtz v. Baker*, 829 F.2d 1133, 1145 (1987) (R.B. Ginsburg, J. dissenting), cert. denied, 486 U.S. 1059 (1988)

*Dayton v. Czechoslovak Socialist Repub.*, 834 F.2d 203 (D.C. Cir. 1987), cert. denied, 486 U.S. 1054 (1988)

*State of New York v. EPA*, 852 F.2d 574 (D.C. Cir. 1988) (R.B. Ginsburg, J., concurring), cert. denied, 489 U.S. 1065 (1989)

*Randall v. Meese*, 854 F.2d 472 (1988), cert. denied, 491 U.S. 904 (1989)

*Petro-Chem Processing v. EPA*, 866 F.2d 433 (D.C. Cir.), cert. denied, 490 U.S. 1106 (1989)

*United States v. Dorsey*, 865 F.2d 1275 (D.C. Cir.), cert. denied, 492 U.S. 924 (1989)

*United States v. Husar*, 866 F.2d 1533 (D.C. Cir.) (R.B.

- Ginsburg, J., concurring), cert. denied, 492 U.S. 909 (1989)
- Olsen v. Drug Enforcement Admin., 878 F.2d 1458 (D.C. Cir. 1989), cert. denied, 495 U.S. 906 (1990)
- Panhandle Eastern Pipe Line Co. v. FERC, 881 F.2d 1101 (D.C. Cir. 1989) (R.B. Ginsburg, J., writing part of majority opinion), cert. denied, 112 S. Ct. 1169 (1992)
- Federal Labor Relations Authority v. U.S. Dep't of Treasury, 884 F.2d 1446 (D.C. Cir. 1989) (R.B. Ginsburg, J., concurring), cert. denied, 493 U.S. 1055 (1990)
- News/Sun Sentinel Co. v. NLRB, 890 F.2d 430 (D.C. Cir. 1989), cert. denied, 497 U.S. 1003 (1990)
- United Transp. Union v. ICC, 891 F.2d 908 (D.C. Cir. 1989) (R.B. Ginsburg, J., concurring), cert. denied, 497 U.S. 1024 (1990)
- United States v. Sobamowo, 892 F.2d 90 (D.C. Cir. 1989), cert. denied, 498 U.S. 825 (1990)
- B.J. Alan Co. v. ICC, 897 F.2d 561 (D.C. Cir. 1990), cert. denied, 112 S. Ct. 1760 (1992)
- Spann v. Colonial Village, Inc., 899 F.2d 24 (D.C. Cir. 1990), cert. denied, 498 U.S. 980 (1990)
- Food Chemical News v. Young, 900 F.2d 328, (D.C. Cir. 1990), cert. denied, 498 U.S. 846 (1990)
- Brown v. Secretary of Army, 918 F.2d 214 (D.C. Cir. 1990), cert. denied, 112 S. Ct. 57 (1991)
- United States v. North, 920 F.2d 940 (D.C. Cir. 1990) (denial of rehearing en banc) (R.B. Ginsburg, J., writing a dissenting statement), cert. denied, 111 S. Ct. 2235 (1991)
- Daingerfield Island Protective Soc. v. Lujan, 920 F.2d 32 (D.C. 1990), cert. denied, 112 S. Ct. 54 (1991)
- Ward v. Rutherford, 921 F.2d 286 (D.C. Cir. 1990), cert. dismissed, 111 S. Ct. 2844 (1991)
- Central States Motor Freight Bureau, Inc. v. ICC, 924 F.2d 1099 (D.C. Cir.), cert. denied, 112 S. Ct. 87 (1991)
- Full Gospel Portland Church v. Thornburgh, 927 F.2d 628 (1991) (R.B. Ginsburg, J., concurring in principal part, dissenting in part), cert. denied, 112 S. Ct. 867 (1992)

*Industria Panificadora, S.A. v. United States*, 957 F.2d 886 (D.C. Cir.) (per curiam), cert. denied, 113 S. Ct. 304 (1992)

*Save Our Cumberland Mountains, Inc. v. Lujan*, 963 F.2d 1541 (D.C. Cir 1992), cert. denied, 113 S. Ct. 1257 (1993)

*FEC v. International Funding Inst., Inc.*, 969 F.2d 1110 (D.C. Cir.) (en banc) (R.B. Ginsburg, J., concurring), cert. denied, 113 S. Ct. 605 (1992)

*Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) (en banc) (R.B. Ginsburg, J., dissenting), cert. denied, 113 S. Ct. 1579 (1993)

*United States v. Chin*, 981 F.2d 1275 (D.C. Cir. 1992), cert. denied, 61 U.S.L.W. 3773 (1993)

(c) A list of all appellate opinions where your decision was reversed or where your judgment was affirmed.

The following list includes all cases reviewed by the Supreme Court in which I wrote an opinion or statement. In some cases, the Court did not reach the issue or issues on which I wrote.

*Washington Post v. U.S. Dep't of State*, 647 F.2d 197 (D.C. Cir. 1981) (per curiam), rev'd, 456 U.S. 595 (1982)

*United States v. Ross*, 655 F.2d 1159 (D.C. Cir. 1981) (en banc), rev'd, 456 U.S. 798 (1982)

*Wright v. Regan*, 656 F.2d 820 (D.C. Cir. 1981), rev'd sub nom. *Allen v. Wright*, 468 U.S. 737 (1984)

*International Ass'n of Machinists and Aerospace Workers v. FEC*, 678 F.2d 1092 (D.C. Cir.) (en banc) (per curiam), aff'd, 459 U.S. 983 (1982)

*American Electric Power Service Corp. v. FERC*, 675 F.2d 1246 (denial of rehearing en banc) (per curiam memorandum), rev'd sub nom., *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402 (1983)

*NRDC v. Gorsuch, EPA*, 685 F.2d 718 (D.C. Cir. 1982), rev'd sub nom. *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 1227 (1984)

*Community for Creative Non-Violence v. Watt*, 703 F.2d 586 (D.C. Cir 1983) (en banc) (R.B. Ginsburg, J., concurring), rev'd sub nom. *Clark v. CCNV*, 468 U.S. 288 (1984)

*Goldman v. Secretary of Defense*, 739 F.2d 657 (D.C. Cir. 1984) (denial of rehearing en banc) (R.B. Ginsburg, J., dissenting), aff'd, *Goldman v. Weinberger*, 475 U.S. 503 (1986)

*Schor v. Commodity Futures Trading Comm'n*, 740 F.2d 1262 (D.C. Cir. 1984), vacated and remanded, 473 U.S. 922, later proceeding, 770 F.2d 211 (D.C. Cir. 1985) (per curiam), rev'd, 478 U.S. 833 (1986)

*Shaw v. Library of Congress*, 747 F.2d 1469 (D.C. Cir. 1984) (R.B. Ginsburg, J., dissenting), rev'd, 478 U.S. 310 (1986)

*Alaska Airlines, Inc. v. Donovan*, 766 F.2d 1550 (D.C. Cir. 1985) (R.B. Ginsburg, J., concurring), aff'd, 480 U.S. 678 (1987)

*Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), aff'd by an equally divided court, 484 U.S. 1 (1987)

*In re American Fed'n of Gov't Employees*, 790 F.2d 116 (D.C. Cir.), aff'd, 479 U.S. 801 (1986)

*McKelvey v. Turnage*, 792 F.2d 194 (D.C. Cir. 1986) (per curiam) (R.B. Ginsburg, J. concurring in part and dissenting in part), aff'd sub nom. *Traynor v. Turnage*, 485 U.S. 535 (1988)

*Hohri v. United States*, 793 F.2d 313 (D.C. Cir. 1986) (denial of rehearing en banc) (R.B. Ginsburg, J., writing separate statement with Wright, J.), vacated and remanded, 482 U.S. 64 (1987)

*Doe v. Casey*, 796 F.2d 1508, 1524 (1986) (R.B. Ginsburg, J., concurring), aff'd in part, rev'd in part sub nom. *Webster v. Doe*, 486 U.S. 592 (1988)

*In re Korean Air Lines Disaster*, 829 F.2d 1171 (D.C. Cir. 1987), aff'd sub nom. *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989)

*In re Sealed Case*, 838 F.2d 476 (D.C. Cir. 1988) (R.B. Ginsburg, J., dissenting), rev'd sub nom. *Morrison v. Olson*, 487 U.S. 654 (1988)

*Community for Creative Non-Violence v. Reid*, 846 F.2d 1485 (D.C. Cir. 1988), aff'd, 490 U.S. 730 (1989)

*Michigan Citizens for an Independent Press v. Thornburgh*, 868 F.2d 1285 (1989) (R.B. Ginsburg, J., dissenting), aff'd by an equally divided court, 493 U.S. 38 (1989)

*American Postal Workers' Union v. United States Postal Serv., 891 F.2d 304 (D.C. Cir. 1989) (R.B. Ginsburg, J. concurring), rev'd, 498 U.S. 517 (1991)*

(d) A list and copies of all your unpublished opinions.

Please see Appendix I-7.

(e) A list of all cases in which you were a panel member.

Please see Appendix I-8.

14. Public Office: State (chronologically) any public offices you have held, including judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

I have never been a candidate for elected public office. I have held only one public office: United States Circuit Judge for the District of Columbia Circuit, appointed June 1980.

15. Legal Career:

- a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;
2. whether you practiced alone, and if so, the addresses and dates;
3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

I served as a law clerk to Hon. Edmund L. Palmieri, United States District Judge, Southern District of New York, from August 1959 to August 1961. From September 1961 to August 1963, I served first as a Research Associate, then as Associate Director of Columbia Law School's Project on International Procedure. In those positions, I studied and wrote about Sweden's procedural system and the practices of Scandinavian countries with respect to international judicial assistance. I also participated in Project work regarding other countries and legislative improvements to enhance international cooperation in litigation.

From 1963 until 1980, law teaching was my primary

occupation. I was on the faculty of Rutgers -- The State University, School of Law (Newark, N.J.) from 1963 to 1972 and on the law faculty of Columbia University School of Law from 1972 until 1980. As a law teacher, my principal classroom and scholarly work related to civil procedure (emphasizing federal courts), conflict of laws, and constitutional law.

Since June 1980, I have served as a United States Circuit Judge for the District of Columbia Circuit.

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?
2. Describe your typical former clients and the areas, if any, in which you have specialized.

Apart from occasional consultation concerning Swedish law, federal procedure and jurisdiction, my practice was pro bono in association with the American Civil Liberties Union. Clients represented were men and women of diverse ethnic origin and economic circumstances pursuing claims for equal justice under the law.

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

From 1971 until 1979, I appeared regularly in appellate proceedings in the U.S. Supreme Court and in other federal court proceedings. Prior to 1971, I regularly observed but did not participate in court proceedings. Experience in court prior to 1971 included two years as a federal district court law clerk (involving attendance at a wide variety of trial and other proceedings) and attendance at diverse proceedings in the United States and Sweden in connection with comparative procedure studies.

2. What percentage of these appearances was in:
  - (a) federal courts;
  - (b) state courts of record;
  - (c) other courts.

All of my courtroom appearances as attorney for a party were in federal tribunals. I was the author of *amicus curiae* briefs filed in state courts and was regularly consulted by ACLU

attorneys regarding their preparation of state court briefs and pleadings.

3. What percentage of your litigation was:

- (a) civil;
- (b) criminal.

Civil cases represented approximately 90% of my litigation efforts.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

5. What percentage of these trials was:

- (a) jury;
- (b) non-jury.

4. and 5. I initiated as chief or supervising counsel several federal district court actions. First instance cases in which I acted as sole or supervising counsel were resolved, successfully, at the pre-trial stage. Nearly all were three-judge federal district court actions decided, after pre-trial proceedings, by summary judgment; thereafter, I served in five of these cases as attorney for appellees in the U.S. Supreme Court. All proceedings in which I served as sole or chief counsel were non-jury cases.

I had significant appellate experience in some fifteen cases in which I served as attorney for a party. I was the sole or principal author of several *amicus curiae* briefs filed in the U.S. Supreme Court and other appellate tribunals.

16. **Litigation:** Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- a. the date of representation;
- b. the name of the court and the name of the judge or judges before whom the case was litigated; and

- c. the individual names, addresses, and telephone numbers of co-counsels and of principal counsels for each of the other parties.

Identify each case you personally argued in court. Please provide a copy of all briefs on which your name appears. If copies are unavailable to you, please identify the case and court.

Below is a list of the ten most significant litigated matters which I handled. Copies of briefs on which my name appears as counsel are attached at Appendix I-9.

- (1) Reed v. Reed, 404 U.S. 71 (1971).

*Summary and disposition* -- Idaho statute declaring, as between persons "equally entitled" to administer a decedent's estate, "males must be preferred to females," held unconstitutional.

*Significance* -- Turning point decision, first occasion on which Supreme Court held a gender-based classification inconsistent with the equal protection principle.

*Party represented* -- Appellant Sally Reed.

*Nature of participation* -- Principal author of Brief and Reply Brief for Appellant.

*Co-counsel* -- (then) ACLU legal director Melvin L. Wulf, Beldock, Levine & Hoffman, 99 Park Avenue, New York, NY 10016-1502 (tel. 212/490-0400). Brief for Appellant written in partnership with Mr. Wulf.

Allen R. Derr, 817 West Franklin Street, Boise, ID 83701 (tel. 208/342-2674). Mr. Derr represented Sally Reed in proceedings below and presented oral argument in the Supreme Court.

*Counsel for Appellee* -- Charles S. Stout, 707 Michael Street, Boise, ID (tel. unlisted).

\* \* \*

- (2) Moritz v. Commissioner of Internal Revenue, 469 F.2d 466 (10th Cir. 1972), cert. denied, 412 U.S. 906 (1973).

*Summary and disposition* -- Unmarried son who provided care for his elderly, infirm mother held entitled to

tax deduction Internal Revenue Code provided only for daughters and married sons.

*Significance* -- Fraternal twin to *Reed*, this decision marks the only occasion, at least before 1980, in which a provision of the Internal Revenue Code has been declared unconstitutional.

*Party represented* -- Appellant in Tenth Circuit, Respondent in Supreme Court, Charles E. Moritz. (Mr. Moritz appeared pro se in the Tax Court.)

*Nature of participation* -- Principal author of Brief for Appellant in Tenth Circuit, and Brief in Opposition to Certiorari; divided oral argument with co-counsel.

*Judges by whom case heard and decided* -- C.J. Holloway, C.J. Doyle, D.J. Daugherty.

*Co-counsel* -- Martin David Ginsburg, Georgetown University Law Center, 600 New Jersey Avenue, N.W., Washington, D.C. 20001 (tel. 202/662-9077).

*Counsel for Commissioner* -- In Court of Appeals, James H. Bozarth, Interjust Law Firm, United Bank Plaza, Suite 900, 400 N. Pennsylvania Avenue, P.O. Box 820, Roswell, NM 88201 (tel. 505/622-2800); in Supreme Court, Richard B. Stone, Columbia Law School, 435 West 116 Street, New York, N.Y. 10027 (tel. 212/280-2467).

\* \* \*

- (3) *Struck v. Secretary of Defense*, cert. granted, 409 U.S. 947, judgment vacated, 409 U.S. 1071 (1972).

*Summary and disposition* -- Rule mandating discharge of pregnant Air Force officers challenged. After Supreme Court granted certiorari and the Brief for Petitioner was filed, Air Force agreed to retain Capt. Struck and to change the rule. As a result, the judgment below, which had upheld the rule, was vacated.

*Significance* -- The outcome in *Struck* indicated the beginning stage of change in the direction of more equitable employment practices regarding childbearing women.

*Party represented* -- Petitioner Capt. Susan B. Struck.

*Nature of participation* -- I consulted with local counsel during proceedings below, and was principal

author of all Supreme Court papers: Petition for Certiorari, Reply and Supplemental Briefs before certiorari was granted, and Brief for Petitioner after certiorari was granted.

(See also *Turner v. Dep't of Employment Security*, 423 U.S. 44 (1974), and *Crawford v. Cushman*, 631 F.2d 1114 (2d Cir. 1976), later dispositions in the same area. I co-authored the Petition for Certiorari on the basis of which the Court reversed the judgment in *Turner*, and co-authored the Brief for Appellant in *Crawford*.)

Co-counsel -- Joel M. Gora, Brooklyn Law School, 250 Joralemon Street, Brooklyn, NY 11201 (tel. 718/625-2200).

Counsel for Secretary of Defense -- (then) Solicitor General Erwin N. Griswold, Jones, Day, Reaves & Pogue, Metropolitan Square, 1450 G Street, N.W., Washington, D.C. 20005-2088 (tel. 202/879-3939).

(4) *Frontiero v. Richardson*, 411 U.S. 677 (1973).

Summary and disposition -- Federal statutes granting fringe benefits to married male members of the military but not to similarly situated married female members of the military held unconstitutional.

Significance -- The classification overturned reflected the most pervasive gender line in the law: four Justices subscribed to a plurality opinion declaring sex a "suspect" criterion.

Parties represented -- Appellants Sharron and Joseph Frontiero; amicus curiae American Civil Liberties Union.

Nature of participation -- I was principal author of the Jurisdictional Statement, the Brief Amicus Curiae for the American Civil Liberties Union, and the Joint Reply Brief for Appellants and Amicus Curiae; I divided oral argument with attorney for the Frontieros, Joseph Levin, Southern Poverty Law Center, Montgomery, AL.

Co-Counsel -- (then) ACLU legal director, Melvin L. Wulf, Beldock, Levine & Hoffman, 99 Park Avenue, New York, NY 10016-1502 (tel. 212/490-0400).

Counsel for Secretary of Defense Richardson -- (then) Solicitor General Erwin N. Griswold, Jones, Day, Reaves & Pogue, Metropolitan Square, 1450 G Street, N.W., Washington, D.C. 20005-2088 (202/879-3939).

\* \* \*

- (5) *Kahn v. Shevin*, 416 U.S. 351 (1974).

*Summary and disposition* -- Court upheld against constitutional challenge a Florida law, dating from 1885, providing a real property tax exemption for widows (also the blind and the totally disabled) but not widowers.

*Significance* -- Indicated that gender-based distinctions would withstand equal protection objections if the Court perceived them as compensating women for disadvantages encountered in economic endeavor.

[A later decision, *Orr v. Orr*, 440 U.S. 268 (1979), clarifies that even an apparently benign or compensatory gender-based classification should attract close review. I co-authored the brief *amicus curiae* in *Orr*.]

*Party represented* -- Appellant Mel Kahn.

*Nature of participation* -- I undertook representation of widower Kahn after the Supreme Court noted probable jurisdiction. I wrote the Brief and Reply Brief for Appellant, and presented oral argument.

*Co-counsel* -- William Hoppe, Hoppe, Backmeyer & Stokes, 66 W. Flagler Street, Concord Building, 2nd floor, Miami, FL 33130 (tel. 305/358-9060).

*Counsel for Florida* -- (then) Attorney General Robert L. Shevin, Strook, Strook & Lavan, Suite 3300, First Union Financial Center, Miami, FL 33131-2385 (tel. 305/358-9900); (then) Assistant Attorney General Sydney H. McKenzie, III (argued), 3769 Suffolk Drive, Tallahassee, FL (904/893/3882).

\* \* \*

- (6) *Healy v.-Edwards*, 363 F.Supp. 1110 (E.D. La. 1973), vacated for determination of mootness, 421 U.S. 772 (1975), in Supreme Court, companion to and argued in tandem with *Taylor v. Louisiana*, 419 U.S. 522 (1975).

*Summary and disposition* -- Louisiana law exempting from jury service all women except those who volunteer to serve held unconstitutional.

*Significance* -- Established that women count in

determining whether lists from which jurors are drawn represent a fair cross-section of the community.

*Parties represented -- Plaintiffs below (three classes: female civil litigants; female potential jurors; male potential jurors), Appellees in Supreme Court.*

*Nature of participation -- I was chief counsel from the initiation of proceedings in the district court through the Supreme Court presentation. With assistance from New Orleans counsel, I prepared district court pleadings, motions, and briefs and presented oral argument before the three-judge court. On appeal, I wrote the Motion to Affirm and the Brief for Appellees, and presented oral argument. I consulted with the attorney in Taylor in connection with the preparation of his brief and oral argument.*

*Judges by whom case heard and decided -- In district court, D.J. Rubin (convening Judge), C.J. Wisdom, D.J. West.*

*Co-counsel -- George M. Strickler, Jr., last address: LeBlanc and Strickler, One Poydras Plaza, Suite 1075, 639 Loyola Avenue, New Orleans, LA 70113 (tel. 504/581-4346).*

*Counsel for Hon. Edwin Edwards (Governor of Louisiana) -- (then) Attorney General William J. Guste, Jr., 639 Loyola Avenue, New Orleans, LA 70133 (tel. 504/568-5575); (then) Assistant Attorney General Kendall L. Vick (argued), 1235 Washington Avenue, New Orleans, LA 70123 (tel. 504/899-3565).*

\* \* \*

- (7) *Weinberger v. Wiesenfeld*, 367 F.Supp. 981 (D.N.J. 1973), aff'd, 420 U.S. 636 (1975).

*Summary and disposition -- Widowed father who cared personally for his infant held entitled to the same child-in-care social security benefits accorded by federal statute to widowed mothers.*

*Significance -- The first of a series of decisions holding the social security accounts of female wage earners, to comport with equal protection, must generate the same family benefits as the accounts of male wage earners.*

*Party represented -- Plaintiff in district court, Appellee in Supreme Court, Stephen C. Wiesenfeld.*

*Nature of participation* -- I was chief counsel from the initiation of proceedings in the district court through Supreme Court presentation. I prepared district court pleadings, motions, and briefs, and presented oral argument before the three-judge court. On appeal, I wrote the Motion to Affirm and the Brief for Appellee, and presented oral argument.

*Judges by whom case heard and decided* -- In district court, D.J. Fisher (convening Judge), C.J. Hunter, D.J. Whipple.

*Co-counsel* -- (then) ACLU legal director Melvin L. Wulf, Baldock, Levine & Hoffman, 99 Park Avenue, New York, NY 10016-1502 (tel. 212/490-0400)

*Counsel for Secretary of Health, Education, and Welfare* -- In district court, Assistant U.S. Attorney Bernard S. David, last address: United States Attorney's Office, Newark, NJ 07102 (tel. 201/645-2286); last address: T. Scott Johnstone, Department of Justice, Washington, D.C. 20530 (tel. 202/633-2000); in the Supreme Court, (then) Deputy Solicitor General Keith A. Jones, Fulbright & Jaworski, 801 Pennsylvania Avenue, N.W., Washington, D.C. 20004-2604 (tel. 202/662-0200).

\* \* \*

- (8) *Califano v. Goldfarb*, 430 U.S. 199 (1977).

*Summary and disposition* -- Widowed male retiree held entitled to social security benefits under his wage-earning wife's account without regard to dependency.

*Significance* -- The decision develops the principle advanced earlier in *Frontiero* and *Wiesenfeld* and explicitly applies a heightened equal protection review standard to gender-based classifications. [Substantial reliance was placed on *Goldfarb* and *Wiesenfeld* in *Califano v. Westcott*, 443 U.S. 76 (1979). I co-authored a brief *amicus curiae* in *Westcott*.]

*Party represented* -- Appellee Leon Goldfarb.

*Nature of participation* -- I was chief counsel, wrote the Motion to Affirm, Brief for Appellee and Supplemental Brief for Appellee, and presented oral argument. I supervised but did not appear in proceedings below. [Companion cases were *Califano v. Jablon*, 430 U.S. 294 (1977), summarily affirming 399 F. Supp. 118 (D. Md. 1975), and *Califano v. Coffin*, 430 U.S. 924 (1977), dismissing appeal from 400 F. Supp.

953 (D. D.C. 1975). I wrote the Motion to Affirm and the cross-Jurisdictional Statement in these cases, and was sole attorney in Coffin from the commencement of the action to final judgment.]

Co-counsel -- Kathleen Peratis, 800 Third Avenue, New York, NY (tel. 212/355-3900).

Counsel for Secretary of Health, Education, and Welfare -- (then) Deputy Solicitor General Keith A. Jones, Fulbright & Jaworski, 801 Pennsylvania Avenue, N.W., Washington, D.C. 20004-2604 (tel. 202/662-0200).

\* \* \*

- (9) *Duren v. Missouri*, 439 U.S. 357 (1979), reversing and remanding 556 S.W.2d 11 (Mo. 1977).

Summary and disposition -- Missouri law granting exemption from jury service to "any woman" held unconstitutional.

Significance -- The decision develops the principle advanced earlier in *Healy* and *Taylor* and clarifies that substantial underrepresentation of women on jury panels is not compatible with the Constitution's fair cross-section requirement.

Party represented -- Petitioner Billy Duren.

Nature of participation -- I wrote the Brief and Reply Brief for Petitioner and divided oral argument with Missouri public defender.

Co-counsel -- (then) Assistant Public Defender Lee M. Nation, 18416 Fightmaster Road, Trimble, MO 64492 (816/635-5580).

Counsel for Missouri -- (then) Assistant Attorney General Nanette Laughrey (argued), University of Missouri -- Columbia School of Law, Missouri and Conley Avenues, Columbia, MO 65211 (tel. 314/882-6487); Assistant Attorney General Philip M. Koppe, Suite 609, 3100 Broadway Street, Kansas City, MO 64111 (tel. 816/531-4207).

\* \* \*

- (10) *Owens v. Brown*, 455 F.Supp. 291 (D.D.C. 1978) (Judge Sirica).

Summary and disposition -- Federal statute prohibiting

assignment of female personnel to duty on navy vessels other than hospital ships and transports held unconstitutional. No appeal was pursued by the Secretary of Defense.

*Significance --* The decision is an important step in opening doors to women seeking careers, educational and training opportunities in the military.

*Parties represented --* Plaintiffs, class of female Navy officers and enlisted personnel.

*Nature of participation --* I supervised development of the case by ACLU staff attorneys and co-authored the Brief in Support of Plaintiffs' Cross-Motion for Summary Judgment. I did not participate in oral argument.

*Co-counsel --* (then) ACLU staff attorney Marjorie M. Smith, Legal Aid Society of New York, 52 Duane Street, New York, NY 10007 (212/285/2842).

*Counsel for Secretary of Defense --* Michael J. Ryan, Assistant U.S. Attorney, 555 4th Street, N.W., Washington, D.C. 20001 (tel. 202/514-7352).

I personally argued:

*Moritz v. Commissioner of Internal Revenue*, 469 F.2d 466 (10th Cir. 1972), cert. denied, 412 U.S. 906 (1973)

*Frontiero v. Richardson*, 411 U.S. 677 (1973)

*Kahn v. Shevin*, 416 U.S. 351 (1974)

*Healy v. Edwards*, 363 F.Supp. 1110 (E.D. La. 1973) (before three-judge panel), vacated for determination of mootness, 421 U.S. 772 (1975)  
argued in both district court and Supreme Court

*Weinberger v. Wiesenfeld*, 367 F.Supp. 981 (D.N.J. 1973) (before three-judge panel), aff'd, 420 U.S. 636 (1975)  
argued in both district court and Supreme Court

*Califano v. Goldfarb*, 430 U.S. 199 (1977)

*Coffin v. Secretary of Health, Education, and Welfare*, 400 F. Supp. 953 (D.D.C. 1975) (before three-judge panel)

*Duren v. Missouri*, 439 U.S. 357 (1979)

*Stevenson v. Castles*, No. 75-1015 (5th Cir. June 29, 1977)

(unpublished opinion remanding case to D. Canal Zone for new trial). This case concerned educational benefits for women employed by Panama Canal Company. I was not involved in the district court proceedings, but was sole counsel for appellees and, in that capacity, wrote motions, briefs, and presented oral argument.

17. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. Please list any clients or organizations from whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

I count as the most significant legal activities I have pursued my work in comparative law and toward the advancement of equal opportunity and responsibility for women and men in all fields of human endeavor.

My interest in comparative law was sparked by my studies of foreign judicial systems (principally in Sweden, also in Denmark, Finland, and Norway) in the early 1960s. Several publications resulted from those studies. I later served as an editor of the American Journal of Comparative Law from 1966 until 1972, on several Bar committees relating to comparative law, and taught or lectured at faculties in Austria, France, the Netherlands, Sweden, and Taiwan. I have attended comparative law conferences or exchanges in China, England, Germany, India, Italy, Japan, the Netherlands, Scotland, and Sweden.

I had the good fortune to be able to devote my legal training, in the 1970s, to educational and litigation efforts aimed at improving the status of women in society and encouraging men to contribute, as full partners, to family life, particularly, to caring for children. During those years, I taught courses and seminars, and supervised clinical programs, on sex-based discrimination. Simultaneously, I helped to launch, and then supervised, the American Civil Liberties Union's Women's Rights Project, a project in which men worked together with women to overcome artificial barriers to equal opportunity for all persons.

I have not engaged in lobbying activities for any client or organization.

18. Teaching: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the

course, and describe briefly the subject matter of the course and the major topics taught.

At Rutgers -- The State University School of Law (Newark), I taught Civil Procedure (sometimes called Remedies) annually from 1963 until 1972. During my tenure there, I also taught Conflict of Laws, Comparative Law and Procedure, Federal Courts, and Women and the Law. As a visiting faculty member at New York University School of Law in the Spring of 1968, I taught Conflict of Laws. At Harvard Law School, in the Fall of 1971, I taught Women and the Law. At Columbia University School of Law, from 1972 until 1980, I regularly taught Civil Procedure, Conflict of Laws, and Sex-Based Discrimination, and also Constitutional Law.

**II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)**

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, client, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

I have no anticipated future receipts, except that as a full-time officer of instruction at Columbia University until June 1980, I was covered under the following retirement plan:

TIAA/CREF Annuity Plan for officers (membership was automatic, contributions were made annually by the University) and TIAA/CREF Supplemental Retirement Annuity (voluntary contributions made pursuant to a salary reduction agreement).

The accumulated balance in my TIAA/CREF account is shown on Schedule D to the attached financial net worth statement.

I have no arrangements to be compensated in the future for any financial or business interest.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts of interest during your initial service in the position to which you have been nominated.

If confirmed, I would disqualify myself in any proceeding in which my impartiality might reasonably be questioned. I would decline to hear or participate in any case with which I have served or participated, whether as lawyer, judge, or in any other capacity. Similarly, I would decline to hear or participate in any case with which another lawyer in my family is serving or participating, or has served or participated, whether as lawyer, judge, or in any other capacity.

Overall, I would seek to follow the letter and spirit of the Code of Conduct for United States Judges (although it is not formally binding on members of the United States Supreme Court), the Ethics Reform Act of 1989, 28

U.S.C. §455, and all other relevant prescriptions. These standards, of course, do not compel disqualification on the basis of a jurist's views on legal principles or expressions concerning the law itself as distinguished from application of the law to a particular matter. They do indicate, however, the obligations of a judge to exercise self-discipline, to reason dispassionately and to decide cases within the framework of the relevant legal rules. I would attempt diligently in all cases in which I may participate to meet these obligations.

I am not aware of any category of litigation or any financial arrangement that is likely to present a potential conflict of interest during my service in the position to which I have been nominated.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the Court? If so, explain.

I have no plans, commitments or agreements to pursue outside employment, with or without compensation, during my service with the Court. If it is fully consistent with all ethical standards for members of the federal judiciary, I may occasionally accept writing and lecture invitations from bar and community groups, universities, and similar institutions. I would do so only when there is no conflict with my duties and allegiances as an Associate Justice of the United States Supreme Court. I have undertaken one commitment of this character for a future year: to deliver the Tyrrell Williams Lecture in Law in 1995 at Washington University School of Law in St. Louis, Missouri.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including any salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more. (If you prefer, copies of the financial disclosure report required by the Ethics in Government Act of 1978 may be substituted here.)

Copies of the financial disclosure report required by the Ethics in Government Act of 1978, filed by me (1) on May 1, 1993 for the calendar year 1992, and (2) on June 21, 1993, covering the period January 1, 1993 through June 1, 1993, are attached as, respectively, Appendix II-1 and Appendix II-2.

5. Please complete the attached financial net worth statement in detail (add schedules as called for).

The completed statement is attached.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

Please supply one copy of any memoranda analyzing issues of law or public policy that you wrote on behalf of or in connection with a presidential transition team.

I have never held a position or played a role in a political campaign. I have never assisted in or prepared any memoranda for or in connection with a presidential transition team.

**Ruth Bader Ginsburg and Spouse (S)**  
**FINANCIAL STATEMENT**  
**Net Worth as of June 1, 1993**

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings), all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks	\$40,470	Notes payable to banks - secured	-0-
U.S. Government securities - see Schedule A	100,000	Notes payable to banks - unsecured	-0-
Listed securities	-0-	Notes payable to relatives	-0-
Unlisted securities - see Schedule B	2,580,300	Notes payable to others	-0-
Accounts and notes receivable:	-0-	Accounts and bills due	-0-
Due from relatives and friends	-0-	Unpaid income tax	-0-
Due from others	-0-	Other unpaid tax and interest	-0-
Doubtful	-0-	Real estate mortgages payable -- see Schedule E	\$60,000
Real estate owned - see Schedule C	1,300,000	Chancery mortgages and other liens payable	-0-
Real estate mortgages receivable	-0-	Other debts - itemize:	-0-
Autos and other personal property	100,000		
Cash value - life insurance	-0-		
Other assets - itemize see Schedule D	2,075,000		
		Total liabilities	\$60,000
		Net worth	6,135,770
		Total liabilities and net worth	6,195,770
Total Assets	\$6,195,770		

CONTINGENT LIABILITIES			GENERAL INFORMATION		
As endorser, comaker or guarantor	-0-		Are any assets pledged? (add schedule)	NO	
On leases or contracts	-0-		Are you defendant in any suits or legal actions?	NO	
Legal Claims	-0-		Have you ever taken bankruptcy?	NO	
Provision for Federal Income Tax (handled through salary withholding)	-0-				
Other special debt	-0-				

**Ruth Bader Ginsburg:**  
Schedule A  
U.S. Government Securities

**U.S. Treasury Notes, 9.375% 7 years, due 4/15/96**      **\$100,000**

**Ruth Bader Ginsburg:****Schedule B**  
**Unlisted Securities**

**Excluding funded retirement accounts  
which are listed on Schedule D**

**Code:** J is Joint Ownership, S is owned by Spouse

1.	(J) District of Columbia 10% General Obligation Bonds Prefunded to 12/1/95	\$260,000
2.	(J) The Pierpont Tax Exempt Bond Fund	424,900
3.	(J) The Pierpont Fund	947,200
4.	(J) The Pierpont Tax Exempt Money Market Fund	11,800
5.	(S) Twenty-four Puerto Rico Urban Renewal and Housing Corp. 5% New Housing Authority Bonds	120,000
6.	(S) Dreyfus Liquid Assets, Inc. (Money Market Fund)	10,400
7.	(S) 20 shares of common stock and 4 shares of preferred stock of The Racquet Club of Easthampton, Inc.	150,000*
8.	(S) 1.5 Class A shares and 4.5 Class B shares in AVI Holding Corp.	5,000*
9.	(S) 10% general partner interest in Westgoma Associates, which holds a limited partnership interest (8% current yield plus 5% residuary interest) in M. Westport Associates, which in turn is a 50% general partner in Westport Office Co., a partnership organized to construct an office building in Westport, Ct.	25,000*

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\* No market; value is estimated.

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|-----|--|-----------|
| 10. | (S) 7.5472% general partner interest in Wegomo 1974 Associates which holds a 1.08116% limited partnership interest in Starrett City Associates and a 9.89009% limited partnership interest in Manhattan Plaza Associates; these limited partnerships constructed and operate housing projects in New York City | \$75,000* |
| 11. | (S) 17.5% general partnership interest in Wegomo 1975, which holds a 16.660% limited partnership interest in Regency III Associates which constructed and operates an apartment project in Richardson, Texas   | 1,000*    |
| 12. | (S) Martin D. Ginsburg, P.C., a professional corporation (legal services) which is counsel to Fried, Frank, Harris, Shriver & Jacobson (value is equity value of P.C. plus estimated present value of unfunded retirement accounts as of June 1, 1993)   | 550,000*  |

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\* No market; value is estimated.

**Ruth Bader Ginsburg:**  
**Schedule C**  
**Real Estate Owned**

**Cooperative apartment (personal residence), Apt. 108, 700 New Hampshire Avenue,  
N.W., Washington, D.C. 20037, together with three underground garage parking  
spaces in the building (value is estimated in light of original cost, improvements,  
and recent sales information)**

**\$1,300,000**

**Ruth Bader Ginsburg:**  
**Schedule D**  
**Funded and Federal Retirement Accounts**

**Code: S is owned by spouse; accounts not so marked are owned by nominee**

1.	Dreyfus Liquid Assets, Inc. (I.R.A.)	\$18,000
2.	H.R. 10 (Keogh) Account maintained with Dreyfus Liquid Assets, Inc. (contributions were made from publication royalties, etc.)	30,000
3.	TIAA/CREF Retirement Accounts (including SRA) (contributions were made while law school professor)	551,000
4.	Federal retirement	31,000
5.	(S) Dreyfus Liquid Assets, Inc. (I.R.A.)	18,000
6.	(S) Merrill Lynch Custody Account (rollover I.R.A.), initially funded 6/29/89	318,000
7.	(S) TIAA/CREF Retirement Accounts	509,000
8.	(S) Fried, Frank, Harris, Shriver & Jacobson (law firm); value is funded retirement accounts at 6/1/93	600,000

**Ruth Bader Ginsburg:**  
**Schedule E**  
**Real Estate Mortgages Payable**

Share of mortgage on apartment building (700 New Hampshire Avenue, N.W., Washington, D.C. 20037) that is allocable to co-op apartment #108, in which we live \$60,000

**III. GENERAL (PUBLIC)**

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

Service to the ideal, "equal justice under the law," has been a central concern of my teaching, writing, speeches, advocacy (prior to my appointment to the bench), and daily life. My efforts in this regard include many of the publications listed above (I. 12), lectures, participation in panel discussions, and litigation.

Institutional activities in my seventeen years (1963-80) as a law faculty member demonstrating a commitment to equal justice include leadership of a Dean-appointed commission at Rutgers (Newark) Law School to increase participation by minorities in all phases of law school life, service on Columbia University's faculty affirmative action review committee, the Academic Advisory Board of Columbia University's Center for the Study of Human Rights, and the Advisory Board of the Columbia Center for the Social Sciences Program in Sex Roles and Social Change.

As a General Counsel to the American Civil Liberties Union (1973-80), a member of the ACLU National Board (1974-80), and a founder of the ACLU Women's Rights Project (1972), I was involved in a range of human rights and public interest activities, and worked in cooperation with a variety of public interest and legal services groups. In addition, I endeavored to advance equal justice and opportunity goals through service in the American Bar Association, the Association of the Bar of the City of New York, and other professional associations.

Prior to my June 1980 appointment to the bench, my activities directed to making legal services fully available included work as an ACLU volunteer attorney, service on the Executive Committee of the Association of the Bar of the City of New York during the period the Association established a public interest law office, and assistance in the organization of Columbia Law School's first legal services clinic.

In addition to activities noted above as a law faculty member and ACLU General Counsel and volunteer attorney, I supported, as a member of the Council of the American Bar Association's Section of Individual Rights and

Responsibilities, ABA resolutions designed to promote wider opportunities for economically and socially disadvantaged people and the physically or mentally handicapped.

2. The American Bar Association's commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Please list all business clubs, social clubs or fraternal organizations to which you belong or have belonged since graduating from law school, and for each such club or organization, please state:
  - a. the dates during which you were a member and the approximate number of members the club or organization had during that period;
  - b. the purpose of the club or organization (e.g., social, business, fraternal or mixed), the frequency with which you used the facilities, and whether you used the club or organization for business entertainment;
  - c. whether, while you were a member of such club or organization, it did or did not include members of all races, religions and both sexes;
  - d. if the club or organization did not do so,
    - (1) state whether this was the result of a policy or practice of the club or organization;
    - (2) if so, describe in full the reasons for this policy or practice and any action you took to change that policy or practice;
    - (3) if you were a member of such club or organization while serving as a U.S. Circuit Judge, please give your opinion as to whether the club or organization practiced invidious discrimination within the meaning of the ABA Code of Judicial Conduct, and give the reasons for your opinion.

The following are my responses to this question 2:

- (a) Woodmont Country Club  
Rockville, Maryland  
June 1980 - April 1983  
approximate number of members: 1,500

Army Navy Country Club  
Arlington, Virginia  
April 1983 --  
approximate number of members: 7,000

- (b) Both are social clubs with sports (golf, tennis, swimming) and dining facilities. My spouse, once an avid golfer, has used these clubs weekly in good weather. I have joined him only occasionally, not at all in the current year, and have not used the clubs for business entertainment.
- (c) Army Navy Country Club includes members of all races, religions, and both sexes.

Woodmont Country Club ("Woodmont"), while I was a member, had a predominantly Jewish membership. Its stated policy was nondiscriminatory admissions and in fact the membership included women as well as men and one member who was black (a friend and colleague whom I sponsored for membership in 1982).

- (d) In April 1983, however, Woodmont announced a change in its by-laws that had the practical effect of strongly discouraging my friend from continuing his membership beyond 1984, and he as a result promptly resigned. I cannot with certainty say that prompting that resignation was the purpose of the by-law change, but the circumstances were, to me, suggestive of that conclusion.

Immediately upon receiving notification of the by-law change I attempted to initiate a reversal of that action. My spouse, who was our family's active user of the club facilities, met the following day with members of Woodmont's Board of Governors. The Board, however, was unwilling to reverse the by-law change and, although the president of Woodmont did confer with my friend in an effort to retain him as a member, that effort did not succeed.

No longer comfortable at Woodmont, I promptly resigned my membership, and joined Army Navy Country Club.

Since the start of the 1970's, it has been my consistent policy to refuse to attend professional or social functions at clubs that do not have nondiscriminatory admission policies. I several times refrained from

attending American Bar Association functions at such clubs in days before the ABA adopted its current position.

3. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated). List all interviews or communications you had with the White House staff or the Justice Department regarding this nomination, the dates of such interviews or communications, and all persons present or participating in such interviews or communications.

Until Friday, June 11, 1993, I received no communication from the White House staff or any other government office or officer regarding my nomination. On the morning of June 11, while I was attending the D.C. Circuit Judicial Conference at the Tides Inn, Irvington, Virginia, I received a telephone message from the White House Counsel's Office asking me to return the call. I did so, and was asked where I would be in the course of the weekend. I responded that my husband and I had plans to attend a Saturday, June 12 wedding in Shaftsbury, Vermont, and to return home to Washington, D.C. on Sunday, June 13. I gave White House Counsel's Office the telephone number of the Manchester, Vermont hotel at which I could be called.

The evening of June 11, my husband and I traveled to Vermont and stayed overnight in Manchester. On Saturday morning, June 12, around 9:30, I received a call from White House Counsel Bernard Nussbaum asking if I could return to Washington, D.C. later that day or early the next morning to meet with his staff. Mr. Nussbaum followed up with a call around 1:00 p.m. requesting that I take the first available flight back the next morning.

My husband and I returned home on Sunday, June 13, around 8:30 a.m. About an hour later, Mr. Nussbaum and several members of the White House staff, including Ricki Seidman, Ron Klain, and Vincent Foster, together with consultants James Hamilton and Ronald Lewis, arrived at my apartment to interview me and to review our income tax and social security returns and my financial records<sup>and</sup> reports. Shortly after 11:00 a.m., Mr. Nussbaum escorted me to the White House to meet the President. Close to 11:30 a.m., I met the President. We had a conversation, with no other person present, that continued until 1:15 p.m. Mr. Nussbaum and I then walked back to my apartment, where the interview with his staff and consultants continued until close to 5:00 p.m.

After 11:00 that evening, Mr. Nussbaum called to tell me the President would call within the half-hour. The President did, twice, because the initial connection was poor. Some time before midnight, the President told me of his intention to nominate me, and I accepted.

4. Has anyone involved in the process of selecting you as a judicial nominee (including but not limited to a member of the White House staff, the Justice Department, or the Senate or its staff) discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, please explain fully. Please identify each communication you had during the 6 months prior to the announcement of your nomination with any member of the White House staff, the Justice Department, or the Senate or its staff referring or relating to your views on any case, issue or subject that could come before the United States Supreme Court, state who was present or participated in such communication, and describe briefly what transpired.

I repeated on June 14, 1993, just after the President announced his nomination for the Supreme Court vacancy, that a judge is bound to decide each case fairly, in accord with the relevant facts and the applicable law. The day a judge is tempted to be guided, instead, by what "the home crowd wants" is the day that judge should resign and pursue other work. It is inappropriate, in my judgment, to seek from any nominee for judicial office assurance on how that individual would rule in a future case. That judgment was shared by those involved in the process of selecting me. No such person discussed with me any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning my position on such case, issue, or question.

During the six months prior to the announcement of my nomination, I had no communication with any member of the White House staff, the Justice Department or the Senate or its staff referring or relating to my views on any case, issue or subject that could come before the United States Supreme Court.

5. Please discuss your views on the role of the judiciary in our governmental system and the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic

criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

Throughout its history, the Federal Judiciary has been attacked repeatedly for exceeding the bounds of its authority. Criticism of the courts, and similarly criticism of other branches of government, should not be resented. Rather, it should be accepted with good grace and considered thoughtfully. For judges who are lifetime appointees, reasoned criticism has a special importance. It helps maintain on the bench healthy attitudes of humility and self-doubt.

While the Federal Judiciary should be exposed fully to diverse views on its performance, judges must avoid capitulating to result-oriented criticism. Courts must root decisions in laws enacted by elected representatives, constitutional provisions ratified by representatives of the people, precedent, tradition, and reason. It is a reality that individuals and groups, reflecting virtually every position on the political spectrum, have sometimes attacked the Federal Judiciary, not because judges arrogated authority, but because particular decisions came out, in the critics' judgment, the wrong way. Chief Justice Marshall set the pattern for the appropriate response to criticism of that genre. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 536 (1832), is among the most celebrated examples. See Gunther, Some Reflections on

the Judicial Role: Distinctions, Roots, and Prospects, 1979 Wash. U. L. Q. 817, 824. Most federal judges, I believe, have maintained that courageous stance. A judge steps outside the proper judicial role most conspicuously and dangerously when he or she flinches from a decision that is legally right because, as Justice Rehnquist put it, the decision is not the one "the home crowd wants." Rehnquist, Dedicatory Address: Act Well Your Part: Therein All Honor Lies, 7 Pepperdine L. Rev. 227, 229-30 (1980).

The Federal Judiciary, in recent decades, has indeed become involved in far-reaching orders extending to large classes of individuals and resolution of problems far broader than those presented by the traditional bipolar dispute between individual persons or entities. Most commentators agree on the initial impetus for such unconventional adjudication on a grand scale. It was the formidable task faced by the lower federal courts in attempting to implement faithfully the Supreme Court's school desegregation mandates. For most federal judges, I believe, the supervisory, administrative, and oversight chores entailed in the school cases, and institutional (prison, mental hospital) litigation that came later, are uncongenial and unwelcome. Had state and federal legislatures and administrators assumed the implementation burden, the managerial jobs the courts took on, generally with reluctance and misgivings, could have been avoided, or at least substantially curtailed.

Most urgently needed, I think, is clear recognition by all branches of government that in a representative democracy important policy questions should be confronted, debated, and resolved by elected officials. Legislating clear standards, principles, and guidelines, for example, in areas where science and technology are advancing rapidly, is an enormously challenging undertaking. But the highly general law in a frontier area commits to administrators or courts responsibility for filling large gaps. Such a law may call upon judges to perform unaccustomed assignments and render them vulnerable all the more to criticism for excessive or abusive exercise of power.

In sum, I believe that legislators can and should react positively to criticism of overreaching on the part of the Federal Judiciary by making the hard, sometimes controversial decisions necessary to equip judges with clearer policy directions and standards. The Federal Judiciary, while it must not decline to determine cases properly before it, complex and controversial as they may be, must also retain clear vision of its place in the constitutional

scheme and appropriate skepticism concerning the remedial competence of jurists.

With particular reference to class action litigation, a judge is not free to ignore the mandate of Congress authorizing litigation in that form, or to distort the applicable Federal Rules. The core article III requirement, of course, must be met. A case must present a genuine, substantial controversy between contending parties actively pressing antagonistic demands. No federal judge is at liberty to issue an advisory opinion at the request of a petitioner who has suffered no injury, and the sensible guidelines Justice Brandeis supplied in *Ashwander v. TVA*, 297 U.S. 288, 356-48 (1936) (concurring opinion), remain vital in constitutional adjudication.

As to "judicial activism," the term seems to me much misperceived, a label too often pressed into service by critics of court results rather than the legitimacy of court decisions. Beyond question, a judge has no authority to upset decisions of legislators or executive officials based upon the jurist's own ideas about enlightened policy or a personal moral view on what content an ambiguously phrased legal text should have. At the same time, the Constitution does impose upon judges a duty to assure that government, when it impinges upon the property or liberty interests of individuals, does so by processes that are fair. In addition, the Constitution places basic individual rights beyond government authority to eradicate even by democratically elected representatives employing processes open and fair. Courts have an important role to play in adjudicating those rights. They must do so with a clear eye on the text, history, and structure of the Constitution. Even then, however, all questions of interpretation will not have ready answers. Doubt of one's own wisdom and a willingness to articulate fully the reasoning process behind a judgment (Justice Harlan, who served from 1955 until 1971, was a model in that regard) should attend judicial decision making in areas of uncertainty.

6. Approximately how many individuals have been employed by you as law clerks and support staff since you have been a United States Circuit Judge.

State separately the numbers, and describe briefly the duties of (1) women, (2) blacks, (3) members of other racial minority groups, whom you so employed.

In total:

Law Clerks 39

Secretaries 4

Interns 14

All of my secretaries, eleven of my law clerks, and six of my interns are women. Three of my interns and one of my clerks are Asian-Americans.

AFFIDAVIT

I, Ruth Bader Ginsburg, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

June 29, 1993

Ruth Bader Ginsburg  
(NAME)

Jacqueline M. Harrigan  
(NOTARY)

My Commission Expires October 14, 1995

The CHAIRMAN. Thank you very much, Judge Ginsburg.

Now what we will do, as I previously announced, is recess and reconvene at 3:15.

[Whereupon, at 12:42 p.m., the committee recessed, to reconvene at 3:15 p.m. this same day.]

#### AFTERNOON SESSION

The CHAIRMAN. Welcome back, Judge. I see your grandson has joined the photographers' corps. I could see him there. I tell you what. Your family covers it all.

As I indicated this morning, before I begin the first round I have a very brief few comments to make about procedure, not merely in terms of timing, but how procedurally this Supreme Court nomination will be handled differently than any that has been handled thus far, at least any of the others that I have handled. It is somewhat of an outgrowth of some of the contentious fights that we have had, and hopefully it will make the process a little better.

First, as I have indicated, although we will be limited in our rounds of questioning to a certain amount of time, no Senator who has a question will be denied the opportunity to ask that question no matter how many rounds it may take them to do that.

That is always a dangerous thing, Judge, to say with Senator Specter here because he always has a 7th, 8th, or 20th round, but they are always good questions. But we will not cut anyone off.

Judge, you referred in your statement to the nature of questions that you will answer. On this question, constitutional scholars and Senate precedents agree. A Senator has not only the right, but the duty to weigh carefully a nominee's judicial philosophy and, even more importantly, the consequences of that philosophy for the country. And as I have stated in past confirmation hearings, my questions about a nominee's judicial philosophy are not aimed at getting answers about specific cases.

You have said you would object, as in my view you should, to being asked to prejudge a case likely to come before the Supreme Court. Even if you did answer the question, it wouldn't, for me at least, tell me much about your judicial philosophy.

I have said many times and I want you to know that I believe my duty obliges me to learn how nominees will decide, not what they will decide, but how they will decide. This obligation for Senators to inquire into and understand the judicial philosophies of a Supreme Court nominee is neither new nor disputed any longer, although it was disputed recently.

Chief Justice William Rehnquist recognized this as long ago as 1959, when he called in the Harvard Law Record for restoring what he referred to as the Senate's practice of "thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him." Were he saying it today, he would say "her."

Judge Ginsburg, the other side of the coin is you must decide, of course, how to reply to our questions. There is nothing in the Constitution requiring you to reply. You can either give a full answer, a partial answer, no answer, or you can get up and you can walk out of here because, to remind everyone, this is only a part of the process. Our function here is—there is nothing in the Constitution

that talks about the Judiciary Committee. It talks about the Senate. The way in which the Senate has organized itself, it looks to the committee to give it information regarding the views of a nominee, but there is nothing in the Constitution that obliges you to answer any question in any particular way or, indeed, answer at all.

We must arrive at our judgment about your confirmation, though. As a matter of fact, without mentioning the Justice, there was one Justice named, a former Senator and a former judge. The committee asked him to come before the committee, and he said, "No. My record stands as a judge and a Senator. I am not going to take the time." He refused to show up, and they still confirmed him. I wouldn't recommend that, but to make the point for everyone to understand, there is no constitutional obligation for you to respond.

Now, I would hope, as I said to you very briefly, that the way in which you outlined the circumstances under which you would reply and not reply, that you will not make a blanket refusal to comment on things because obviously everything we could ask you is bound to come before the Court. There is not a controversial issue in this country that does not have a prospect of coming before the Court someday. And as we have said, because I think it was initiated by Senator DeConcini, I voted for a man who I have great respect for, but it is the vote that I most regret of all 15,000 votes I have cast as a Senator. I voted to confirm Judge Scalia. He is a fine, honorable, decent man with whom I agree on nothing. And I regret that vote.

One of the reasons I voted for him is that, while he was a brilliant scholar with standing and background, he basically refused to answer questions on anything at all. And I voted for him, and from that moment on, along with Senator DeConcini, I resolved that if a nominee, although it is their right, does not answer questions that don't go to what they would decide, but how they would decide, I will vote against that nominee regardless of who it is. And you can thank Justice Scalia for that.

With that object in mind, I would like to very briefly describe in another 3 minutes here the process by which these hearings will be conducted. All Senators on the committee, as I said, will have as much time to ask questions as they feel they should; and you, Judge, will have as much time as you need to speak to anything, whether or not you are asked a question.

I would hope—at this point it seems possible—that we could conclude these hearings by week's end. If we do not conclude by Friday, it is my intention at this moment—but I will confer with the ranking member—to continue on Saturday with the hearings.

Following the conclusion of the last confirmation hearing for the last Justice, I felt obliged to reexamine and attempt to reform the investigative procedures which are an important part of this confirmation process. I believe the committee had to better handle allegations of a personal nature which are inevitably brought against Supreme Court nominees, and they are brought against all nominees. There are none that I am aware of with regard to you, but there are specious allegations and there are substantive allegations on occasion. It is hard at the outset to determine one from the other until we begin the investigative process.

So I have instituted a new procedure. I announced last summer and again last week that this committee will hold a closed hearing for every Supreme Court nominee, while I am the chairman at least. Beginning with you, there will be a closed hearing at one point. It will be, in this case, on Friday. This is a new procedure adopted for the first time in this hearing, and it does not imply the need to discuss any adverse information with regard to you, Judge, but it is now going to be a standard part of all hearings.

Whether or not any allegation is raised, we will at some point for every nominee from this point on go into a closed session, where only the Senators on the committee and the nominee are there, to discuss any investigative matter that has been raised. Under rule XXVI of the Senate, any information that can be potentially embarrassing allows us to go into closed session, and embarrassing information can be real or false, nonetheless embarrassing under these klieg lights.

Under that rule XXVI, which permits the committee to go into closed session to protect the privacy of a nominee in considering confidential information, there is also an important caveat; that is, that every Senator, under the rules, at such a hearing, a closed session, is obliged under Senate rules, with the potential sanction of expulsion from the Senate, to keep confidential any matter that is raised in that setting.

The press has asked me since I announced this rule, "What about the public's right to know?" The committee will decide at that point whether or not there is any grounding to any allegation that has been raised. If there is grounding, then we will end up going public, and the public will have a right to know and make a determination.

One other procedural rule that has changed is that all investigative matters will be open to every single, solitary U.S. Senator—only Senators, not their staffs—beyond this committee. And anyone who comes forward with an allegation—and I announced this last year—should know at the outset that every Senator in the U.S. Senate, all 100, will be made aware under Senate rules, which require confidential information to be protected, of that allegation, so we do not go through a process whereby Senators, rightly or wrongly, think they were not fully informed prior to the vote being taken and so that we do not go through the process where the only way they can be aware of such information is to make it public.

So at some point when this hearing closes down, the Senate Judiciary Committee room will be closed off, just like the room of the Intelligence Committee is. Investigative staff, nine of them, majority and minority, will be in that room for a day, period. Any Senator in the U.S. Senate can go into that room, get fully briefed by that staff, read any documents we have, so that they are fully informed.

Again, I want to emphasize, Judge, this procedure has nothing to do with you. You are not only an honorable person, but everything I have heard about you, every matter that our committee has investigated, everything, is perfectly squeaky clean. And so I am not suggesting—but we are going to institute it, and it is nice to start with you. It is nice to start with someone where we are not going to have to spend a lot of time. But honorable people have had

the most outrageous charges raised against them, a case in point being the Attorney General of the United States. When she was nominated, some of the most outrageous charges were drawn to the attention of me personally and the investigative staff. We investigated them, found them without any foundation. It would have been extremely embarrassing and degrading and, I think, damaging had that taken place under the full glare of the Senate lights. This new procedure is meant to avoid that, to separate the chaff from the wheat, and I just want to make that clear as we begin.

Now, let's get down to business. I ask the staff to kick off the clock. We are going to have 30-minute rounds, and Judge, at any time at all, I would ask someone from the White House who may be with you to indicate to me when it is appropriate to take a break, because we will forget. We get to get up and walk out of here after we have our questions and go back and get coffee or take a call or whatever, and you have to sit there the whole time. So if I trespass at all on your physical constitution, I want to be made aware of that. But I will say now we will try to go for a total of up to 2 hours from this point on, try to get four Senators in. We will break very briefly to give you a rest. Then we will come back and continue again until roughly the 6:30 hour.

Is that agreeable with you, Judge?

Judge GINSBURG. That is fine, Mr. Chairman.

The CHAIRMAN. It must be an unusual role, for so many years, you sitting up here and having litigants down there. This is one of the few we get to do this and one of the few of my duties in the Senate that I don't particularly enjoy, although in your case it has been a pleasure thus far. Let me begin now with the questioning.

I would like to begin by asking you about how you will go about interpreting our Constitution, Judge. Judges, as you know better than I do, approach this job in many different ways, and these different approaches often lead to very different results.

You have made a great many statements about constitutional interpretation as a scholar and as a judge in lectures that you have delivered—most recently in a talk you gave this year which is referred to as the Madison Lecture. In that lecture, you said—and I am quoting here—that "Our fundamental instrument of Government is an evolving document."

You also said you rejected the notion "that the great clauses of the Constitution must be confined to the interpretation which the Framers would have placed on them."

I could not agree more. If the meaning of the Constitution did not evolve over time, today we would not have many of the individual rights all Americans now hold most dear, like the right to choose whomever we wish to marry. There is nothing in the Constitution, as you know, that gives someone a constitutional right to marry whom they want. It is not specifically enumerated. And were that not changed in *Loving v. Virginia*, there would still be laws on the books saying blacks can't marry whites and whites can't marry blacks. Or the right to get a job, whoever you are, whether you are white or black, male or female.

But, still, there are hard questions about precisely how the Constitution evolves, about when the Court should recognize a right not specifically mentioned in the Constitution or specifically con-

'templated by the authors of that document at that moment, whether it is an amendment or the core of the Constitution.

You spoke of these questions at some length in the Madison Lecture. You said that the history of the U.S. Constitution is in large part a story of—and I quote—"the extension of the constitutional rights and protections" to include "once excluded groups."

Judge, can you discuss with me for a moment what allows courts to recognize rights like the right to marry whomever you wish, like the right to be employed or not employed without regard to gender, like the right that was mentioned here earlier by several of my colleagues in the opening statements for women to be included in—I thought the phrase that Eleanor Holmes Norton used was "within the embrace of the 14th amendment," or something to that effect, when, in fact, they were not contemplated to be part of that amendment when it was written.

What is it that allows the Court to recognize such rights that the drafters of the Constitution or specific amendments did not mention or even contemplate at the time the amendment, in the case of the 14th amendment, or the Constitution and the Bill of Rights were drafted?

Judge GINSBURG. That is a large question, Mr. Chairman, and I will do my best to respond.

First, I think the credit goes to the Founders. When I visited Senator Thurmond, he was kind enough to give me a pocket Constitution.

The CHAIRMAN. I think that was Sam Ervin's. Did you give her Senator Ervin's pocket Constitution?

Senator THURMOND. I gave her a Thurmond Constitution. That is the U.S. Constitution.

Judge GINSBURG. But this pocket Constitution contains another document, and it is our basic rights-declaring document. It is the Declaration of Independence, the Declaration that created the United States.

I think the Framers are shortchanged if we view them as having a limited view of rights, because they wrote, Thomas Jefferson wrote, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these"—among these—"are life, liberty, and the pursuit of happiness," and that government is formed to protect and secure those rights.

Now, when the Constitution was written, as you know, there was much concern over a Bill of Rights. There were some who thought a Bill of Rights dangerous because one couldn't enumerate all the rights of the people; one couldn't compose a complete catalog. The thing to do was to limit the powers of government, and that would keep government from trampling on people's rights.

But there was a sufficient call for a Bill of Rights, and so the Framers put down what was in the front of their minds in the Bill of Rights. Let's look at the way rights are stated in the Bill of Rights in contrast to the Declaration of Independence, let's take liberty as it appears in the fifth amendment.

The statement in the fifth amendment—"nor shall any person be deprived of life, liberty, or property, without due process of law"—is written as a restriction on the government. The Founders had

already declared in the Declaration that liberty is an unalienable right, and the government is accordingly warned to keep off, both in the structure of the Constitution, which limits the powers of government, and in the Bill of Rights. And, as you also know, Mr. Chairman, the Framers were fearful that this limited catalog might be perceived—even though written as a restriction on government rather than as a grant of rights to people—as skimpy, as not stating everything that is. And so we have the ninth amendment, which states that the Constitution shall not be construed to deny or disparage other rights.

You might contrast our Bill of Rights with the great 1789 French Declaration of the Rights of Man, which does appear to grant or confer rights, for example, the state grants citizens a right to speak freely. But our Bill of Rights doesn't say the state gives one a right to speak. It says Congress shall make no law abridging the freedom of speech. So the whole thrust of it is that people have rights, and government must be kept from trampling on them. And the rights are stated with great breadth in the Declaration of Independence.

Now, it is true—and it is a point I made in the Madison Lecture—that the immediate implementation in the days of the Founding Fathers in many respects was limited. "We the People" was not then what it is today. The most eloquent speaker on that subject was Justice Thurgood Marshall, during the series of bicentennial celebrations, when songs in full praise of the Constitution were sung. Justice Marshall reminded us that the Constitution's immediate implementation, even its text, had certain limitations, blind spots, blots on our record. But he said that the beauty of this Constitution is that, through a combination of judicial interpretation, constitutional amendment, laws passed by Congress, "We the People" has grown ever larger. So now it includes people who were once held in bondage. It includes women who were left out of the political community at the start.

I hope that begins to answer your question. The view of the Framers, their large view, I think was expansive. Their immediate view was tied to the circumstances in which they lived.

The CHAIRMAN. Well, it does answer the question, and I am delighted, to be very blunt about it, with the answer. As I have indicated to you and said on numerous occasions over my 20 years in the Senate, I do not expect a nominee nor demand of a nominee to agree with me on substantive issues. But it does make a difference to me and give me, at least, some insight into the view of the past history and the future of this Nation that a nominee has, the vision they have, if I know the place from which they believe our rights are derived. And you have made a fundamental distinction from other nominees that have been before this committee in the past decade, in that you acknowledge there is a ninth amendment. You have no idea what a milestone that is in this committee. And I am being a bit facetious, but we had one nominee who said the ninth amendment was "nothing but an ink blot on the Constitution."

But your emphasis that whereby we derive rights, the courts over the years have derived rights, or expanded a concept which at the time the Constitution was written, it did not embrace a specific circumstance, you have indicated, as I understand your answer,

that you start off with the position, which I happen to share, that this is a limited Government. We do not derive our rights as human beings from a piece of paper called the Constitution. The Government derives its rights from "We the People." "We the People" got together back a couple hundred years ago and said this is the deal we are going to make among ourselves and this is the power we are going to allow Government to have.

I think the important word in the ninth amendment is "deny or disparage others"—referring to rights—"retained by the people." And as you point out, the distinction between how the great French Declaration of Rights or other great instruments proclaiming human rights and dignity, have always proclaimed them in terms of granting them to the people. In this case, the way in which, as you point out, our Constitution is written, the first amendment, "The Congress shall make no law"—a very different perspective from which we in the country have started. Second, you are referencing the 15th amendment, the Declaration of Independence, and the 9th amendment, and I expect possibly the 14th amendment as well, as a basis from which the courts have found over the last 200 years, and in particular over the last 50 years, an intellectually consistent and rational basis for being consistent with the Constitution, but nonetheless expanding individual rights in the sense that they recognize their existence and their guarantee of constitutional protection.

So it does answer the question for me, but I would like to move from there, if I may now, having established that, to where the Constitution has to be read by Justices in light of its broadest and most fundamental commitments, commitments to liberty, commitments to individual dignity, equality of opportunity. In my view, the Framers were wise when they drafted the Constitution with such broad language. I think—and there is ample historical evidence to indicate—that they understood that at the time that the document they were drafting for this newborn Nation was one that required concepts which embodied more than specific guarantees that could change with time. And I believe they did it in broad concepts, and not specifics, precisely to avoid freezing the rights and protections that were afforded Americans.

Now, their method permits the meaning of the document to progress as we progress, and as the world changes and as we better understand the full scope of our Nation's principles and ideals, our interpretation of the Constitution has changed.

Now, in the Madison Lecture, though, you also noted constraints on the ability of the courts to expand individual rights. You recognized that that has been done, that there has constantly been an expansion, but that there was, in a sense, a self-imposed restraint. And you wrote that movement in this direction of expansion by the courts should be measured—this is your quote, "measured and restrained."

You also wrote that courts generally should follow rather than lead changes taking place elsewhere in society. And you criticized the Court, as I read the lecture, for too often "stepping boldly in front of the political process." I believe that was the quote.

But, Judge, in your work as an advocate in the 1970's, you spoke with a different voice. In the 1970's, you pressed for immediate ex-

tension of the fullest constitutional protection for women under the 14th amendment, and you said the Court should grant such protection notwithstanding what the rest of society, including the legislative branch, thought about the matter.

For example, in one brief you wrote that "The quality of the Court's review is not determined by the presence or absence of stirrings in the legislative branch." I believe that was in the *Frontiero* brief.

Now, how does that square with your statement in the Madison Lecture that courts generally should follow rather than lead society, and that courts should move in measured motions, in measured steps? Is my question clear?

Judge GINSBURG. You are referring to the *Frontiero* (1973) brief?

The CHAIRMAN. Where you said, if I am not mistaken, "The quality of the Court's review is not determined by the presence or absence of stirrings." Then in the Madison Lecture you said that the Court should be measured and restrained: It should follow rather than lead changes taking place elsewhere in society. Can you square those for me or point out their consistency to me?

Judge GINSBURG. Yes.

The CHAIRMAN. That is a good answer. Now we will go on to the next question. [Laughter.]

Judge GINSBURG. The *Frontiero* (1973) brief from which you read was, in fact, the third in a set of briefs urging the Supreme Court to recognize the equal stature of men and women before the law. As an advocate in those cases, I gave the Court initially two and later three choices for the rationale. One was that any classification based on gender should have the closest review.

The CHAIRMAN. As would distinctions made on race?

Judge GINSBURG. Yes. And then, at the opposite pole, I said, these sex-based classifications that riddle our statute books couldn't even pass the lowest level of review, the rational basis test. The first case in which those arguments were presented was a very simple one. It was the case of Sally Reed, whose young son—a teen-aged boy—died under tragic circumstances. Sally Reed applied to be administrator of her son's estate. The boy's father—the parents were separated at that point—also applied to be administrator.

The State of Idaho at that time had a rule—a statute—for deciding such cases. The rule was: As between persons equally entitled to administer a decedent's estate, males must be preferred to females. It may be astonishing to some of the young people sitting behind you that laws like that were on the books in the States of the United States in the early 1970's, but they were. And there were many of them.

There had never been in the history of the United States any instance in which any law that differentiated on the basis of sex had been declared unconstitutional up to *Reed v. Reed* (1971).

The CHAIRMAN. As a matter of fact, some had been challenged and declared to be constitutional.

Judge GINSBURG. A number of them. But without reciting that entire history, as an advocate I presented to the Court different ways that the Justices could reach the decision in Sally Reed's case, which was as clear on its facts as any case could be.

That was the position I took as an advocate. My expectation, to be candid, was that I would repeat that kind of argument maybe half a dozen times.

The CHAIRMAN. Until they got it right?

Judge GINSBURG. Until the Court would look at one classification after the other and say, yes, this is irrational. And then the Justices would come to the point where they would say none of these lines make any sense, so we might as well announce that drawing lines on the basis of gender is in almost all cases impermissible, and the presumption will be against, rather than for, their constitutionality.

I saw my role in those days as an advocate in part and as a teacher in part, because one of the differences about gender discrimination and race discrimination is that race discrimination was immediately perceived as evil, as odious, as wrong, as intolerable. But the response I was getting from the judges before whom I appeared when I first talked about sex-based discrimination, then I began to use the word "gender"—I will explain that perhaps later—was: "What are you talking about? Women are treated ever so much better than men."

I was talking to an audience of men who thought immediately that what I was saying was somehow critical about the way they treated their wives, the way they treated their daughters. Their notion was, far from treating women in an odious, evil, discriminatory way, women were kept on a pedestal. Women were spared the messy, dirty real world; they were kept in clean, bright homes. I was trying to educate the judges that there was something wrong with the notion, "Sugar and spice and everything nice, that's what little girls are made of"—for that very notion was limiting the opportunities, the aspirations of our daughters.

One doesn't learn that lesson in a day. Generally, change in our society is incremental, I think. Real change, enduring change, happens one step at a time.

This litigation may be illustrative. In the second case you mentioned, *Frontiero* (1973), four Justices came on board for "sex as a suspect classification." I was told that by one of the lawyers at the ACLU women's rights project the day the decision was announced. It may even have been the executive director who came in and said, "You got four votes for sex as a suspect classification." I said, "It is too soon. We are not going to get the fifth."

The education process hadn't gone on long enough. Even though as an advocate I was advancing sex as a suspect classification as the end point I expected the Court to reach after it dealt with a series of real-life cases, cases like Sally Reed's case, I didn't expect it to happen in one fell swoop.

The CHAIRMAN. Judge, I don't mean to cut you off, but this is an appropriate place to take the next step. I understand what your strategy was, and I understand now how you view and perceive permanent, important change to come about, how it does come about. And I think it would be hard to argue from a historical perspective that you are wrong. I don't mean to do that.

I am trying to square, though, your—I understand your position as an advocate. Then you became an appellate court judge, and you gave a lecture this year called the Madison Lecture. Now, as an ap-

pellate court judge, you are required to follow Supreme Court precedent. You are not able to go off on your own. A subject I am going to come back to in my second round with you is your view of stare decisis, because we both know that in the Court you are about to go to, you are not bound by any previous Supreme Court ruling. As a judge on the circuit court, you are honor-bound to follow, to the best of your ability, what you believe to be the ruling consistent with what the Supreme Court has ruled as close as you can approximate it.

Now, you have had three different roles: advocate, where you were educating—and I know you mean that literally, and that is exactly what has to be done. Believe it or not, some of us in the legislature think we have to do it that way as well, like the violence against women legislation, which I would like to talk to you about here as well from a constitutional perspective, where there are laws on the books now that are outrageous. They don't relate directly to equal protection considerations, but they start off with premises about women that are arcane and wrong.

In my own State of Delaware, you can be convicted of first-degree rape if you rape a stranger, but if you rape someone with whom you have had an acquaintanceship, under the law you cannot be convicted. It can be as brutal a rape, as terrible a rape, but it is second-degree rape because you are "a social companion." Implicit in that is if you are a social companion somehow the woman is partially responsible for this.

So there are still these outrageous laws on the books in other areas. But the point is you then moved from being an advocate to being a judge on the circuit court of appeals. And as a judge, you indicated what I said, that the Court should move in a measured, restrained way.

You also noted, though, that the Court in *Brown v. Board of Education* was not timid; it was not fearful; it stepped out in front of society. And yet in another lecture you said that *Brown* "ended race segregation in our society, perhaps a generation before State legislators in our Southern States would have budged on the issue." Again, a seeming inconsistency. One, you say the Court should basically wait and not step out too far ahead of society. The other, you indicated that, in *Brown* you acknowledged, they did. They stepped out maybe an entire generation ahead of society.

They stopped an odious practice in *Brown v. Board of Education*, and so what I would like to know is, as a Supreme Court Justice, what will guide you, if you, as you may know—I am not asking you this, but you may conclude that strict scrutiny is the measure that should be applied under the equal protection clause of the 14th amendment relative to women, as it is with regard to race.

If you, as a Justice, concluded that is the proper test to be applied, notwithstanding the fact society may not have gotten that far, would it be appropriate? Not will you, but would it be appropriate for you, as a Justice, to move ahead of society, like the Justices in *Brown* did and moved ahead of society?

What did you mean in the Madison lectures that the Court should not? Were you referring to the lower courts, the Supreme Court, all the courts?

Judge GINSBURG. Mr. Chairman, first may I say that the Court has never rejected application of the suspect classification doctrine to sex. Most recently, when it came up, the Court said we don't have to reach that question, it is still open, because even if we employ a somewhat less exacting test—a heightened standard, but somewhat less exacting—the classification before us must fall. The case in which the Court made that statement involved exclusion of men from a nursing school the University of Mississippi maintained. The fine opinion by Justice O'Connor indicates the author's understanding that opening the doors of a nursing school—I would say the same thing for nursery school teaching—opening such doors to men can only improve things for women. When a job remains one that only women fill, it tends to be paid lower. When men take part, the pay tends to go up.

But let me try to respond to your question about *Brown* (1954), about moving ahead of society and at what level. First, recall that *Brown* wasn't born in a day. Thurgood Marshall came to the Court showing that facilities or opportunities were not equal, in case after case, in notable 1948 and 1950 higher education cases, particularly: *McLaurin* (1950), *Sweatt v. Painter* (1950), *Sipuel* (1948), a line started even earlier, in 1938, in *Gaines*. He set the building blocks, until it became obvious that separate couldn't be equal.

Something else had happened. One of the influences on *Brown*, I think, was a war we had just come through, in which people were exterminated on the basis of what other people called their race. And I don't think that apartheid in the United States could long outlive the Holocaust. From that perspective, the Court was not moving ahead of most of the people. There was resistance, of course, indeed massive resistance in some parts of the country.

But *Brown* itself, even *Brown* didn't command an end to all racial segregation. The end came years later. *Brown* was decided in 1954. It wasn't until *Loving v. Virginia* in 1967 that the Court took the final step in the series by declaring a miscegenation law unconstitutional.

The CHAIRMAN. So what did you mean when you said, Judge, in the Madison lecture that it ended race discrimination in our country, perhaps a generation before State legislators in our southern States would have budged on the issue? Are you saying that the Nation itself may have been in sync with *Brown* and the Court not that far ahead of the Nation, and it was only that part of the country?

Judge GINSBURG. The massive resistance was concentrated in some parts of the country. That there was discrimination throughout the country is undoubtedly true. But there was a positive reaction in Congress, not immediately, but voting rights legislation started in the late fifties, and then we had the great civil rights legislation of 1964. The country was moving together.

The CHAIRMAN. It was a decade later. My time is up, Judge. You have been very instructive about how things have moved, but you still haven't—and I will come back to it—squared for me the issue of whether or not the Court can or should move ahead of society a decade, even admittedly in the *Brown* case, it was at least a decade ahead of society. The Congress did not, in fact, react in any meaningful way until 10 years later, and so it moved ahead.

One of the things that has been raised, the only question that I am aware of that has been raised, not about you personally, but about your judicial philosophy in the popular press and among those who follow this, is how does this distinguished jurist distinguish between what she thinks the Court is entitled to do under the Constitution and what she thinks it is wise for it to do. What is permitted is not always wise.

So I am trying to get—and I will fish for it again when I come back—I am trying to get a clear distinction of whether or not you think, like in the case of *Brown*, where it clearly did step out ahead of where the Nation's legislators were, whether that was appropriate. If it was, what do you mean by "it should not get too far out ahead of society," when you talked about that in the Madison lectures?

But I will give it another try. I think you not only make a great Justice, you are good enough to be confirmed as Secretary of State, because State Department people never answer the questions fully directly, either.

Judge GINSBURG. May I leave you, Mr. Chairman—

The CHAIRMAN. If you would like to answer it more fully, I am anxious to—

Judge GINSBURG. I might offer two thoughts to consider between now and our next round. One of them was prompted by Senator Moseley-Braun, when she reminded us that the spirit of liberty must lie in the hearts of the women and men of this country. It would be one solution, wouldn't it, to appoint Platonic guardians who would rule wisely for all us. But then we wouldn't have a democracy, would we?

We cherish living in a democracy, and we know that this Constitution did not create a tricameral system. Judges must be mindful of their place in our constitutional order; they must always remember that we live in a democracy that can be destroyed if judges take it upon themselves to rule as Platonic guardians.

The CHAIRMAN. Well, I would have been happier, had the Court in *Dred Scott* decided to go ahead of society. I think America would maybe have had the same Civil War, but would have moved ahead more rapidly. Clearly, it would have been stepping out by 100 years ahead of where the Nation ultimately arrived.

I am not asking you to accept that, but what I am trying to get at is, there is no doubt that a Court's opinion cannot be sustained without ultimately the support of the majority of the people. As someone said relative to the Pope during World War II, how many legions does he have? You all have no legions. Ultimately, your judgments, as the Supreme Court, will depend upon the willingness of the American people to accept them as appropriate. I have no doubt about that.

I understand that, but there does come a time in the course of human events when the Court has in the past, and I suspect may have to in the future, be a generation ahead of where the Nation is. And I am wondering whether or not, as a matter of judging, if you conclude it should arrive at a decision, but look behind you and determine that the folks ain't with you, that that would restrain you from saying and enunciating what you believe the Constitution calls for in terms of enunciating a right or striking down a prohibi-

tion that the popular wisdom is not prepared to strike down. That is the essence of my question.

Judge GINSBURG. Mr. Chairman, I can assure you on one thing: I will never, as long as I am able to sit on any court, rule the way the home crowd wants out of concern about how it will play in the press if I rule the other way.

The CHAIRMAN. I wasn't implying playing the press. I know you would never do that. That is not even a question. My question is again—and I will drop it now—my question is whether or not, if you determined that it is appropriate in 1948, and you were on the Court, and you deemed separate but equal was inappropriate, or in 1938 that it was not constitutionally permissible under the 14th amendment, whether notwithstanding the fact you had reached that conclusion as a legal scholar and as a Justice bound by no previous Supreme Court ruling, that notwithstanding the fact that in 1938 America had not gone to war, did not understand genocide, did not have a notion of the value and the role that blacks would play in that war, that you would have been willing to say, if you believed it at that moment, we should strike down the law that the vast majority of Americans thinks is appropriate.

Judge GINSBURG. I think I can give you a clear example. It was Chief Justice John Marshall, who ruled in a way that the State of Georgia found exceedingly displeasing. The case was *Worcester v. Georgia* in 1832. Marshall ruled the right way, even though he knew that the people of that State, especially the people in power in that state, would be down on his head for that ruling. But it was the right ruling and so he made it.

May I also say that *Dred Scott* (1857) was the wrong decision for its time. There was no warrant for it at the time it was rendered. It should never have been decided the way it was. It was incorrect originally and it was incorrect ever after. I don't think it was a decision that the Court had to make at the time that it made it.

The CHAIRMAN. I thank you very much, Judge. I have exceeded my time, and I thank you for your cooperation.

I yield to the Senator from Utah.

Senator HATCH. Judge, I thought your answers were pretty good. Because, as a matter of fact, *Dred Scott* was the first illustration of substantive due process, where the judges just decided they want it done that way. Justice Taney thought he was really saving the country through doing that, so he did that, which really was not ahead of society. Society, at least in the North, was ahead of them.

And in the case of *Plessy v. Ferguson*, Mr. Justice Harlan, in 1896, had previously said that separate but equal was wrong. So, in all honesty, the Court was not ahead of society, but society really was ready for that type of a decision.

Now, there are many that criticize *Brown v. Board of Education* for the rationale of the decision, but, frankly, all *Brown v. Board of Education* did was what Justice Harlan suggested, and that is treat equality as equality under the 14th amendment.

So it isn't a question of whether you are ahead of society or not. It is a question of whether you are actually interpreting the laws in accordance with the original meaning which, of course, under the 14th amendment meant equal protection, equal rights, equality.

Let me just move on to something else. I would like to ask you whether you agree with the following statements about the role of a judge, including a Supreme Court Justice. The first statement is this: The judge's authority derives entirely from the fact that he or she is applying the law, not his or her personal values. Do you agree or disagree with that?

Judge GINSBURG. No judge is appointed to apply his or her personal values, but a judge will apply the values that come from the Constitution, its history, its structure, the history of our country, the traditions of our people.

Senator HATCH. I agree. Then you agree with that basic statement then, you shouldn't be applying your own personal values?

Judge GINSBURG. I made a statement quoting Holmes to that effect in my opening remarks.

Senator HATCH. You did. What about this statement: The only legitimate way for a judge to go about defining the law is by attempting to discern what those who made the law intended.

Judge GINSBURG. I think all people could agree with that. But as I tried to say in response to the chairman's question, trying to divine what the Framers intended, I must look at that matter two ways. One is what they might have intended immediately for their day, and the other is their larger expectation that the Constitution would govern, as Cardozo said, not for the passing hour, but for the expanding future. And I know no better illustration of that than to take the words of the great man who wrote the Declaration of Independence. Thomas Jefferson said: "Were our state a pure democracy, there would still be excluded from our deliberations women who, to prevent depravation of morals and ambiguity of issues, should not mix promiscuously in gatherings of men." Nonetheless, I do believe that Thomas Jefferson, were he alive today, would say that women are equal citizens.

The CHAIRMAN. Or else he wouldn't be President. [Laughter.]

Judge GINSBURG. But what was his understanding of "all men are created equal" for his day, for his time? It was that "the breasts of women were not made for political convulsion." So I see an immediate intent about how an ideal is going to be recognized at a given time and place, but also a larger aspiration as our society improves. I think the Framers were intending to create a more perfect union that would become ever more perfect over time.

Senator HATCH. I think that is a good way of putting it. I think reasonable jurists can disagree about what the original meaning of a provision is or how to apply it under certain circumstances. I don't think there is any question about that, or as to how to apply it to a given set of facts. But so long as the judge's or Justice's starting point is the original meaning of the text, then it seems to me that judge is seeking to fulfill his or her constitutional duty.

Let me ask about this statement: If a judge abandons the intention of the lawmakers as his or her guide, there is no law available to the judge and the judge begins to legislate a social agenda for the American people. That goes well beyond his or her legitimate power.

Judge GINSBURG. The judge has a law—whether it is a statute that Congress passed or our highest law, the Constitution—to construe, to interpret, and must try to be faithful to the provision. But

it is no secret that some of these provisions are not self-defining. Some of the laws that you write are not self-defining. There is nothing a judge would like better than to be able to look at a text and say this text is clear and certain, I do not have to go beyond it to comprehend its meaning. But often that is not the case, and then a judge must do more than just read the specific words. The judge will read on to see what else is in the law and read back to see what was there earlier. The judge will look at precedent, to see how the words in this provision or in similar provisions have been construed. The effort is always to relate to the intent of the law-giver or the lawmaker, but sometimes that intent is obscure.

Senator HATCH. I like your statement that the judge has an obligation to be faithful to the provisions of the law, and you have explained that I think very well.

Let me move to another subject that is very important to my folks out in Utah, and that is the second amendment. I would like to address the second amendment, the right to keep and bear arms, a right that many of us from Utah and across the country believe sometimes gets short shrift.

For instance, for most of our country's history, the Bill of Rights limited only the powers of the Federal Government, not the States. But through the process of so-called selective incorporation, the Supreme Court in recent decades ruled that most of the provisions of the Bill of Rights apply via the 14th amendment against the States.

Now, one right, however, that has not yet been held to be protected from infringement by the States, of course, is the second amendment right of law-abiding citizens to own firearms. Now, do you believe that there is a principled basis for applying almost all of the other provisions of the Bill of Rights against the States, but not the second amendment?

Judge GINSBURG. The second amendment shares with at least two other provisions of the Bill of Rights that status. They are significant provisions, but they have not been held to be incorporated. One is the grand jury presentment or indictment provision—

Senator HATCH. In amendment V.

Judge GINSBURG [continuing]. In article V. grand juries are not obligatory for the States. And another, also a right that many people think is very important, is the seventh amendment; the right to trial by jury in a civil case, stated in the seventh amendment, has not been held applicable to the States. So the second amendment doesn't stand alone. Grand juries and civil juries fall in that same category.

As you know, Senator, there is much debate about what the second amendment means. I think the last time the Supreme Court addressed the matter was in 1939, was it not, in the *Miller* case? So I am not prepared to expound on it beyond making the obvious point that the second amendment has been variously interpreted.

Senator HATCH. Well, I think what I am saying is I would agree with Justice Black, that if we are going to have incorporation against the States of any portion of the Bill of Rights, all eight amendments conferring rights should apply against the States. I don't think judges should be picking and choosing which rights they prefer.

Now, in the two cases that you have mentioned, the amendments still apply, other than those features. But it is just one I wanted to raise with you, just for whatever purpose I could.

Judge Ginsburg, I am concerned about a reverse discrimination case decided in the D.C. Circuit that you sought to overturn. Now, that is the case of *Hammon v. Barry*. That was in 1987. There the court ruled the District of Columbia Fire Department's racial hiring quotas violated title VII of the equal protection clause. In that particular case, according to Judge Starr's opinion, there was no evidence of any actual intentional discrimination in hiring by the D.C. Fire Department since the 1950's, in other words, no evidence of discrimination or intentional discrimination.

In fact, long before the quota hiring policy began, the majority of the new hires by the department had been black. In Judge Mikva's opinion dissenting from the court's denial of rehearing en banc in the case, an opinion which you joined, Judge Mikva wrote: "This case concerns one of the fundamental dilemmas our society faces, how to eliminate a 'manifest imbalance' that reflected under-representation of women and minorities in the workforce."

Now, because you joined in this opinion here, I take it that you agree with Judge Mikva that a "manifest imbalance" in an employer's workforce is sufficient justification under title VII for either voluntary or court-ordered race and sex-based quotas and preferences under title VII, even if the imbalance is not traceable to any prior intentional discrimination. Would that be a fair statement?

Judge GINSBURG. Senator Hatch, the *Hammon* (1987) case is not in the front of my mind. As you have pointed out, I wasn't on the panel that made the decision in that case.

Senator HATCH. I won't hold you to it, because I don't expect you to remember all of these.

Judge GINSBURG. This was a—

Senator HATCH. You have written some 700 opinions, as I recall, so I am not going to hold you to that.

Judge GINSBURG. I think it is important, though, to understand the difference between being part of a full court and being a member of a three-judge panel, which I was not. I was not one of the decisionmakers in the *Hammon* case, I was simply a member of the court, and all of us voted whether to hear the case en banc. But I was not part of any decision in that case.

Senator HATCH. Well, the problem with permitting a manifest imbalance, that is, a statistical disparity not traceable to any intentional discrimination, to justify quotas or other preferential euphemisms like numerical goals is that statistical disparities can and do often occur for many reasons other than discrimination, and it is unfair to penalize innocent persons and deny them opportunities through quotas or other preferences, simply because an employer's hiring statistics are not balanced, according to some notion of statistical proportionality.

It is an important issue. It is probably one of the most important issues in the future for our country. And I don't expect you to tell me how you would rule, but let me just pose a hypothetical situation to you.

Suppose a small business in a majority city that was majority black had never hired a black person, even though that business in over a decade had hired more than 50 people. Further, suppose that a disappointed black job applicant filed a discrimination suit and that she or he was unable to provide any direct evidence of intentional discrimination by the employer. Would such statistics standing alone, in your view, justify an inference of racial discrimination by the employer? And would that employer, in your view, to avoid an expensive and protracted lawsuit that could cost hundreds of thousands of dollars, be justified in using quotas or other forms of racial preferences to eliminate the manifest imbalance, if that really is the law?

And just one other question: Would a Federal court be justified in such a case, in ordering that employer to resort to quotas or other forms of racial preferences, to eliminate or reduce the manifest imbalance?

Senator COHEN. Would you repeat the question again for me?  
[Laughter.]

Judge GINSBURG. I think I have the gist of it, Senator Cohen.

Senator Hatch, we have many employment discrimination cases in the court. They come to us with a very large record of facts developed in the trial court, and they come also with lengthy briefs on both sides. I study those records intensely, read the arguments, have my law clerks do additional research, come armed to the teeth to the oral arguments so I can ask testing questions. So I am always suspicious, on guard, when given a one, two, three series in a hypothetical. I know I have done it myself when I was a law teacher, and sometimes my students would answer to that kind of question: "Unprepared."

But I can say this. I was thinking in relation to your question, about a particular case, one that, in fact, went to the Supreme Court. It was a Santa Clara (California) Highway Department case that involved an affirmative action program.

Senator HATCH. That was the *Johnson* (1987) case.

Judge GINSBURG. Right, Paul Johnson was the plaintiff and he complained that Diane Joyce had gotten a job he should have gotten, and it was a result of the affirmative action plan. That was a case that was much discussed.

I will tell you a nonlegal reaction I had to it. The case involved a department that had 238 positions, and not one before Diane Joyce was ever held by a woman. After an initial screening, 12 people qualified for the job. That number was further reduced until there were 7 considered well qualified for the job. Then the final selection was made.

On the point score, Paul Johnson came out slightly higher than Diane Joyce, but part of the composite score was determined by a subjective test, an interview, if I recall correctly, and they were scored on the basis of the interview.

I thought back to the days when I was in law school. I did fine on the pen and paper tests. I had good grades. And then I had interviews. I didn't score as high as the men on the interviews. I was screened out on the basis of the interviews.

So I wonder whether the kind of program that was involved in the *Johnson* (1987) case was no preference at all, but a safeguard,

a check against unconscious bias, bias that may even have been conscious way back in the fifties. In a department that has 238 positions and none of them are filled by women, perhaps the slight plus—one must always recognize that there is another interest at stake in the cases, Paul Johnson's—checks against the prospect that the employer was in fact engaged unconsciously in denying full and equal opportunity to women.

These are very difficult cases and each one has to be studied in its own particular context. But in that case, at least, I related back to my own experience. Whenever a subjective test is involved, there is that concern. If you are a member of the group that has up until now been left out, you wonder whether the person conducting the interview finds you unfamiliar, finds himself slightly uncomfortable, thinking about you being part of a workplace that up until then has been, say, all-white or all-male.

I did want to make one comment, if you will allow me, Senator Hatch.

Senator HATCH. Surely.

Judge GINSBURG. When you said that *Brown* (1954) wasn't ahead of the people, in at least one respect—

Senator HATCH. It was ahead of some of the people, there is no question about that.

Judge GINSBURG. Yes. When I think about one of my wonderful District of Columbia circuit colleagues, Judge Skelley Wright, who was a brave district judge in New Orleans in the 1960's, a judge who for 10 years tried to implement the *Brown* decision, when massive resistance was mounted against it. But he did what a good judge should do, he enforced the law.

Senator HATCH. Sure. The reason I brought up *Dred Scott* and that case is because there were segments, whole segments of our society who were way behind—or way ahead in the case of *Dred Scott*, almost all of the North was ahead. And many people in the South, they refused to fight on the part of the South.

In the case of *Brown v. Board of Education*, there were many in both areas that were way ahead and who expected and really demanded the decision that came.

Well, the reason I gave you the hypothetical example I did is because I have had a lot of experience with small business people who are suffering the stings of these employment discrimination cases. The average cost of defending those cases before our 1991 civil rights bill that we enacted here, which I voted for, the average cost of defending it, defense alone, just paying their attorneys to defend them is \$80,000. That was before that statute, and I suspect that cost has gone up a little bit since then.

But I give you that example I did, because I have great faith in you. I have known you since 1980, and I have watched what you have done, I have admired you, I have no doubt that you are a person of total equality and a person who deserves to be on the Supreme Court.

But in response to the Judiciary Committee questionnaire, in the 13 years since you went on the bench in 1980, you have not had a single black law clerk or secretary or intern, out of 57 such employees that you have hired. Now, I find no fault with that, because

I know that there was no desire to discriminate, even though your court sits in the middle of a majority black city of Washington, DC.

Now, some, if they took the broad language of Abner Mikva in that case, might call that a manifest imbalance. Now, I would not suggest for a moment that that imbalance resulted from any intentional discrimination on your part. The crucial point to keep in mind, however, is that when the concept of discrimination is divorced from intent and we rely on statistics alone, a small business man or woman with your record of employing minorities might find himself or herself spending hundreds of thousands of dollars to fend off discrimination suits, and that in fact is what is happening around this country right now.

Such an employer might adopt quotas or other forms of preferences in order to avoid or avert such litigation under any number of Federal civil rights laws. And I am worried about it, because it is not fair to the employer and it is not fair to the persons denied opportunities, because of preferences.

Naturally, I am concerned about preferences and I know you are and I know that you are a very good person. But I just want to point that out, because that happens every day all over this country, where there is no evidence of intent and, in fact, was no desire on the part of the employer to exclude anybody.

Judge GINSBURG. I appreciate that, Senator Hatch, but I do want to say that I have tried to—

Senator HATCH. I know you have.

Judge GINSBURG. And I am going to try harder, and if you confirm me for this job, my attractiveness to black candidates is going to improve. [Laughter.]

Senator HATCH. That is wonderful. I like that. But let me just say you can see my point. These things are tough cases. They are difficult. There should be some evidence of intent.

Now, in the case of *Johnson v. City of Santa Clara*, your point may be very well taken that the oral interview, if it had been explored in a little more depth, may have shown some intention to exclude women, and there is a tough case, there is no question about it.

I just bring that up for whatever it is worth, because I would like the Justices to think about the real world, real people out there who really aren't intending to discriminate. And if you just use the statistical disparity to make final determinations, you can create an awful lot of bad law and an awful lot of expense to the small business community that may very well not be willing to discriminate.

Let me just ask you this: You agree, I trust, that the first amendment right of free speech—frankly, I don't think I have enough time to go through this line of questions, so I think what I will do, Mr. Chairman—and you will be real happy with this—I will defer until the next round before I go into the next round of questions.

The CHAIRMAN. Does that mean you are giving your 3½ minutes up to Senator Kennedy?

Senator HATCH. I will reserve whatever time I have. How is that?

The CHAIRMAN. Senator Kennedy.

Senator HATCH. But if Senator Kennedy needs it, he can surely have it.

Senator KENNEDY. Thank you very much, Mr. Chairman.

I would like to just review with you, Judge Ginsburg, if I might, what I think has been an extraordinary period of Supreme Court history, and that is the progress that has been made on gender discrimination, which your involvement, your position as an advocate, as an educator, as a spokesperson, I think, has really been absolutely remarkable.

I think probably for our colleagues, maybe they have a full understanding and awareness in this committee, maybe they do in the Senate, but certainly I think it is something that it is important for the American people to know. I think you made some reference to it in response to the earlier questions by Chairman Biden.

But virtually up until 1971, the courts upheld every kind of gender discrimination. I was here in 1964 when we passed title VII of the Civil Rights Act to try to move us toward eliminating discrimination on the basis of gender. And still we found up until 1971—and we will come back to that—every kind of gender discrimination, from outright prohibitions on the entry of women into many professions to more subtle gender classifications that did just as much harm by perpetuating stereotypes about women and their role in society.

In 1873, the Supreme Court upheld a State law prohibiting women from entering the legal profession. In 1948, the Court upheld a State law prohibiting a woman from serving as a bartender unless her husband or father owned the bar. In 1961, the Court unanimously held that it was not a violation of equal protection or due process to limit jury service by women to only those women who volunteer for jury duty, while substantially all men were required to serve.

Even after the 1964 act, even more outrageous policies discriminating against women existed in the private workplace. In *Phillips v. Martin-Marietta*, the company absolutely barred women with preschool-aged children from applying for work. Even a man with sole custody of and responsibility for young children could apply, but the lower courts did not perceive this policy as discriminating against women. The Supreme Court ultimately reversed the lower courts, and I note that you have written that during the argument of the case before the Supreme Court, members of the High Court made light of the notion that they themselves might have to hire "lady lawyers" as law clerks. I know that you encountered the same discrimination as a young law school graduate.

So you had the perpetuation of gender discrimination in a long line of Supreme Court decisions. You had some action by the Congress. You still had rampant gender discrimination in the private sector. These kinds of barriers to equal opportunity only began to fall in the 1970's as a result of the litigation effort that you led. Your painstaking work led the Burger Court to take strides forward that would have been hard to imagine even a decade earlier.

I was interested when you referred to this in our conversations prior to the confirmation hearing in our wonderful visit that we had in our Senate offices, where I inquired about your own back-

ground. I want to pick up on some of the themes that I found so moving in your excellent statement in the Rose Garden about your mother and your own past.

I was just wondering what it was in your own experience that really led you to take this path, to devote so much of your career to breaking down the legal barriers to the advancement of the women in our society.

Judge GINSBURG. It came on me incrementally, one might say. There were many indignities one accepted as just part of the scenery, just the way it was. For example, when I was at Harvard Law School, I was on the Law Review and I was sent to check a periodical in Lamont Library in the old periodical room. When I got there, it was quite late at night, and I wanted to make sure I got home by midnight. My daughter, the professor, was then 14 months old—no, that was my second year, so she was a few months over 2 years old. And I wanted to look up the citation, report back, and return home.

There was a man at the door, and he said, "You can't come in." "Well, why can't I come in?" "Because you're a female." "But the library at Harvard is open to women," I protested, "Widener is open to women." This one room in Lamont, however, remained a symbol of the way things were. It was closed to women. There was nothing I could do to open the door guarded by a university employee who said, "You can't enter that room."

The Harvard Law Review had a banquet. I was allowed to invite my spouse, and I was also allowed to invite my father or father-in-law. But I wanted to invite my wonderful mother-in-law, who has been, next to my husband, my biggest booster, the greatest supporter imaginable. But I couldn't invite her because the Law Review dinner was just for men. The couple of women who were on Law Review—there were two of us—were allowed to come, but not the wives of the men on the Review and no mothers, only fathers.

Experiences like that and the trouble I had getting a job when I finished law school, all—

Senator KENNEDY. Maybe you would mention the difference between Cornell and Harvard in terms of where your dormitory was.

Judge GINSBURG. Yes. That was amusing.

Cornell, in the days I was there, had a 4-to-1 ratio. It had four men for every woman. The reason they gave for having that quota in the Arts and Science college—it was indeed a restrictive quota system—was that the girls had to live on campus, the boys could live in town. The men could find apartments and live in town, but the girls needed to be sheltered, to have curfews and check-ins. And there were only a certain number of dormitory spaces.

Then I enroll in the Harvard Law School, and there is a fine complex of dormitories, but all the rooms are reserved for men. No places in Holmes Hall for the girls. The girls had to find their own places in town.

So it was just the reverse. Harvard's scheme compared to Cornell's showed how irrational it all was.

Senator KENNEDY. You also had an incident involving an eating room at the faculty club.

Judge GINSBURG. Oh, yes. That was many years later in 1971. I visited Harvard Law School to teach a course on women and the law. It was the first such course Harvard offered. The faculty club, the Harvard Faculty Club, up until that 1971 fall term, had the dining room and the ladies' dining room. If you were a lady, until that term, you didn't have a choice. You went to the ladies' dining room.

I asked to be seated in the dining room and the hostess said to me, "Well, dear, you are allowed to dine in the Dining Room, but wouldn't you really feel more comfortable in the Ladies' Dining Room?"

The CHAIRMAN. What did you say, Judge?

Judge GINSBURG. I can tell you what I did. I had my meal in the dining room. The way the world was just a generation or two ago is something that, as I said before, today young people can hardly grasp.

One of my favorite stories concerned a case, a men's rights case, an early title VII case called *Diaz v. Pan American World Airways* (1971). The plaintiff was a man who wanted to be a cabin attendant, but that particular airline hired only women. You may remember the days of "I'm Cheryl, fly me." The *Diaz* case was part of that era.

I was having lunch with some law school colleagues at the U.N. dining room where we met to discuss a proposed commercial law treaty. And one of the men said to me, "I understand what you are doing, Ruth, and it is great you are all for equality, and we are, too. But some of this is getting beyond reason. You know about that case of a guy who wants to be a stewardess? Isn't that silly?"

The waitress serving our table came to my aid. She said, "Pardon me, but I couldn't help overhearing your conversation. I just came back to the United States on Alitalia, and on that plane there was the most adorable steward." The men turned to me, and one said, "Ruth, do women look at men that way?" And I said, "You're darn right we do." [Laughter.]

Senator KENNEDY. Well—[Laughter.]

Senator HATCH. You asked for it, Senator.

Senator KENNEDY. As we were proceeding along, I think in our visit in the office you also reviewed, and I think the record has brought out your experiences after graduation, the difficulties you had, with one of the most extraordinary academic records, both at Columbia and Harvard and in getting employment, and then your visit and travels overseas, and then back and eventually on the Rutgers Law School faculty.

Can you tell us just a little bit about when you started working, as I understand it, with the ACLU on gender discrimination cases while you were teaching there in the late 1960's? What was the first case you took to the Court, and can you tell us a little bit about it?

Judge GINSBURG. The first series of cases I handled were not big Federal cases. Many States had moved ahead of the Congress. The 1964 title VII legislation trailed a number of States that had already enacted State human rights laws, States that in some instances included sex along with race, national origin, and religion as a proscribed basis for discrimination.

I got into the sex equality advocacy business through two doors: one was opened by my students who, in the late 1960's and early 1970's, encouraged the faculty to offer a course in this area; the other was opened by complaints that began to trickle into the New Jersey affiliate of the ACLU. I will describe a typical one: A school teacher becomes pregnant, and is told she must leave work—in the third month or the fourth, or as the pregnancy begins to show. She is put on what was euphemistically called maternity leave, which meant no pay, no benefits, no health benefits. "We will call you back if we have a need for you." That was about the size of it.

Many of the women in that situation were schoolteachers. Some were in other fields.

I recall another typical case, one involving the Lipton Tea Co. The complainant's employer had a fine health plan. Her husband's employer didn't have an equally fine plan. So she wanted to sign up with her employer to get the more advantageous plan for herself, her spouse, and her children. And she was told, "Women can get health coverage under our plan only for themselves. We have family coverage only for male workers." That was another category of case.

Senator KENNEDY. So you had *Reed v. Reed* in 1971, which is the case that was referred to earlier, the Idaho case involving a law that required that males must be preferred to females in handling the decedent's estate. That was the first occasion on which, as I understand, the Court held a gender-based classification inconsistent with the equal protections of the laws. *Frontiero* (1973) has just been referenced earlier, and in that case, as I understand it, the wives were presumed to be dependent on the husbands, and you had to show—the husband had to prove he was dependent on the wife. Therefore, as I understand it, this was where Justice Brennan's opinion recognized this as an example of gender stereotyping. The law assumes that wives would be financially dependent on the spouses, but husbands would not. And he noted that traditionally such discrimination was rationalized by an attitude of romantic paternalism, which in practical effect put women not on a pedestal but in a cage.

As was mentioned earlier, in the *Frontiero* case, Justice Brennan's opinion applied the strict scrutiny test. You mentioned earlier the different tests which are applied in terms of economic regulation, race, and gender discrimination. He supported or applied a strict scrutiny test, which gathered four votes in favor at that point. But it would still take additional cases before the Supreme Court would raise, as I understand, the level of scrutiny.

The *Weinberger v. Wiesenfeld*, 1975, is a particularly moving case. I know that you remember it well, and I know that you have maintained an interest in the individuals involved. I wonder if you would just share with us briefly the history of cases involving gender discrimination.

Judge GINSBURG. Yes, I think you will hear from Stephen Wiesenfeld later. I would like to go back even before *Reed* (1971) so that it can be understood what the state of precedent was like, what led Justice Brennan to say the pedestal has sometimes been a cage.

The case is *Hoyt v. Florida*; it yielded a 1961 decision from the liberal Warren Court. You recited it correctly. The question was whether women would be required to serve on juries just as men are required to serve, or whether, as Florida had it, women could serve if they wanted to, but would not be summoned for jury duty. Women who wanted to serve would have to come to the clerk's office to sign up. Not surprisingly, very few did. This was the case.

A woman, Gwendolyn Hoyt, had a philandering husband who had humiliated her to the breaking point regularly. We didn't use names like "battered women" in those days. We just said, "She does not have a happy marriage." One day, enraged by the humiliation to which she was exposed, Gwendolyn Hoyt turned to the corner of the room and spied her young son's baseball bat. It was a broken baseball bat. She took the bat and brought it down on her husband's head, ending both the fight and husband, and starting the prosecution for murder.

Hoyt argued that having women on the jury—or at least in the pool from which the jury would be picked, improving the chances she would have women in that jury room—would yield better comprehension of her state of mind, her utter frustration, and might lead to her conviction of something less than murder.

The Court in 1961 responded to her plea—she was indeed convicted of murder by the all-male jury. Hoyt complained that the jury pool was not drawn from a fair cross-section of the community because women were left out. The Court said Florida's scheme was pure favor to women. They had the best of both worlds. They could serve if they wanted to. They had only to sign up in the clerk's office. They didn't have to serve if they didn't want to, so what was the complaint about? Women were treated better than men. Apparently, little thought was given to Gwendolyn Hoyt and the murder charge affirmed in her case.

Now, let's proceed from 1961 to—I think the *Wiesenfeld* case began in 1973.

Senator KENNEDY. It ended in 1975, the citation I have.

Judge GINSBURG. A young man, Stephen Weisenfeld, had a tragic experience. His wife Paula died in childbirth. She had had an entirely healthy pregnancy, and he was told that he had a healthy baby boy but his wife had died. He determined that day to be a caregiving parent to his child, Jason Weisenfeld.

Stephen Weisenfeld went to the local Social Security office and asked about the benefits he thought a sole surviving parent could get. He was informed that the benefit he sought was called a mother's benefit, and that he didn't qualify.

So as I recall, he wrote a letter to the editor of his local newspaper. The letter began, "I have heard a lot about women's lib. Let me tell you my story." He told about his wife having been a wage earner, having paid the same Social Security tax that a man would pay, about her death and how he didn't qualify as a caregiving parent because he was a male.

He ended the letter with the line, "Tell that to Gloria Steinem." He was tired of hearing about "women's lib." His case was the perfect example of how gender-based discrimination hurts everyone.

The discrimination started with his wife, who worked as a man did, who paid Social Security tax as any wage earner does, but

whose Government said, in effect, we don't protect your family the way we protect the family of a male wage earner.

And then there was Stephen Wiesenfeld himself, who wanted to care for his child, but was informed there were no benefits for him to do that, because he was a father, not a mother. Also there was Jason, the son of Paula and Stephen, who would not have the opportunity to have the care of his sole surviving parent, for the sole reason that it was his mother, not his father, who had died.

The case resulted in a unanimous judgment in Stephen Wiesenfeld's favor. Every Justice voted to strike down the gender-based classification. The majority said it discriminated against the woman as wage earner. Others said it discriminated against the man as parent. And one said it discriminated against the baby.

That case, more than any other, I believe, shows the irrationality of gender-based classification.

Senator KENNEDY. And you stayed in touch with the family, as I understand, is that correct?

Judge GINSBURG. Yes, and I am pleased to say that Jason, who I don't think was yet 3 at the time of the Supreme Court victory, is now in his last year in college, and his father tells me he's going to apply to law school.

Senator KENNEDY. Well, these cases are very important and significant on the legal issues and certainly equally important in terms of the human implications, and, obviously, your role in this was absolutely essential.

I want to just move along through these cases, starting in 1971 and continuing through 1975, and then finally the *Craig v. Boren* case, which held that gender-based distinctions by Government are invalid, unless shown to be "substantially related to an important government interest." So we have the striking down of gender-based discrimination and putting in place a heightened standard of review by the Supreme Court. That obviously has been an extraordinary achievement and accomplishment in striking down the barriers of discrimination in our society, and I think it is important for us to understand it.

You have obviously had a wealth of experience with the gender discrimination, both firsthand experience and through cases you have handled, and I would like to just move into the questions about what this has meant to you in terms of sensitizing you to other issues of discrimination—how it affects your own thinking as a judge, but also your own sensitivity to other forms of discrimination suffered by many others in our society.

I think you are very much aware of the continued kinds of discrimination, even gender discrimination and wage discrimination that exists in our society, and unequal remedies which are available for people, remedies which differ on the basis of gender. So those are matters that we are going to be addressing certainly in the Congress, but they do continue.

On the issue of civil rights, Congress and the President took up the challenge in the 1960's with the landmark civil rights bills. In the earlier period of time in the 19th century, Congress passing powerful laws, and they were effectively gutted by the Supreme Court. Then in the first 60 years of this century leadership in fighting discrimination basically fell to the Supreme Court. Congress

and the President took up the challenges in the 1960's and important progress was made.

Then we have seen action that was necessary in the Civil Rights Act of 1991, a bipartisan bill, to deal with the series of decisions by the Supreme Court in the 1980's that many of us believed have weakened the protections available to victims of employment discrimination.

I had intended to go through a number of the items on the civil rights issues which I think are important, and we will have a chance to review those in a second round. Maybe others will get to those issues. In *Shaw v. Library of Congress*, you showed sensitivity on the issue of attorneys fees, and then the Supreme Court treated that issue differently, and in the 1991 Civil Rights Act Congress overruled that decision.

Then there were other decisions such as *Spann v. Colonial Village*, on the Fair Housing Act, to challenge the use of all-white models in advertising for rental housing. You wrote an opinion holding that organizations dedicated to ensuring fair housing opportunity had standing to bring that suit, because they suffered real injury, when African-Americans were steered away from apartment complexes that used only white models in advertising.

As someone who is a sponsor of that Fair Housing Act, along with others on this committee, I was struck by the appreciation that you showed in your opinion for the need for private enforcement actions against this kind of discrimination.

Then in *Wright v. Regan*, you ruled that the parents of African-American school children had standing to challenge the fact that the Internal Revenue Service had allowed private schools that banned blacks to have tax-exempt status. The Court overturned you on the issue of standing, but eventually on the substance of the issue, in the *Bob Jones* case, certainly it supported the basic and fundamental principle that the IRS could deny tax-exempt status.

Perhaps in just the couple of minutes I have left—you take what time that you need, but I will not be able to inquire further of you—if you could go back perhaps to the experience that you had with regard to gender discrimination, I think some of these cases that I mentioned at least for me demonstrate a sensitivity on the issues of race discrimination.

You also wrote an opinion in *Walker v. Jones* applying the civil rights laws to Members of Congress, which was a welcome decision as well.

Perhaps you could tell us in your own words, in whatever way you care to, about how your experience on gender discrimination has sensitized you on the issues of discrimination generally, on the issues of civil rights, and other forms of discrimination which we face in our society. What may we expect of you?

Judge GINSBURG. Senator Kennedy, I am alert to discrimination. I grew up during World War II in a Jewish family. I have memories as a child, even before the war, of being in a car with my parents and passing a place in Senator Specter's State, a resort with a sign out in front that read: "No dogs or Jews allowed." Signs of that kind existed in this country during my childhood. One couldn't help but be sensitive to discrimination, living as a Jew in America at the time of World War II.

Then there was the tremendous debt the women's movement owed to the civil rights movement of the sixties, in the development of legal theories. There is also some crossover.

You mentioned the case of *Ida Phillips v. Martin-Marietta*, the 1971 Supreme Court decision, the first title VII sex discrimination case to come before the Court. That case was brought by the NAACP, Inc. Fund, although Ida Phillips was a white woman. The employer said we won't hire or retain women with preschool-age children. Although Ida Phillips was white, the NAACP, Inc. Fund appreciated what a devastating effect a rule like that would have on black women who were seeking to gain or retain employment.

People who have known discrimination are bound to be sympathetic to discrimination encountered by others, because they understand how it feels to be exposed to disadvantageous treatment for reasons that have nothing to do with one's ability, or the contributions one can make to society.

Senator KENNEDY. I thank you. My time is up, but I want to thank Judge Ginsburg for revealing not only the brilliance of her mind, but I think the quality of her soul and heart, as well.

Thank you, Mr. Chairman.

The CHAIRMAN. Judge, this would be an appropriate time to take a break, if you would like, or we can continue for one more Senator and then take a break. Do you have a preference?

Judge GINSBURG. Then we will have—

The CHAIRMAN. In other words, we need to take a break now or in 30 minutes.

Judge GINSBURG. Why don't we go another 30 minutes and then take a break, if that is satisfactory.

The CHAIRMAN. That is fine.

Mr. Chairman.

Senator THURMOND. Thank you very much. Thank you, Mr. Chairman.

Judge Ginsburg, several educators in South Carolina have requested I propound four questions to you, and in preparing these questions or any others I may propound during the hearings, if you feel they are inappropriate to answer, will you speak out and say so.

The first is, many parents feel that public school education is lacking. What are your views on the constitutionality of some form of voucher system, so that working and middle-class parents can receive more choice in selecting the best education available for their children?

Judge GINSBURG. Senator Thurmond, aid to schools is a question that comes up again and again before the Supreme Court. This is the very kind of question that I ruled out.

Senator THURMOND. Would you prefer not to answer?

Judge GINSBURG. Yes.

Senator THURMOND. Well, you feel free to express yourself on any of these.

Next is, based upon your understanding of the U.S. Constitution, do communities, cities, counties, and States have sufficient flexibility to experiment with and provide for diverse educational environments aided by public funding and geared to the particular needs of individual students of their particular area of jurisdiction?

Judge GINSBURG. Senator Thurmond, that is the kind of questions that a judge cannot answer at-large. The judge will consider a specific program in a specific school situation, together with the legal arguments for or against that program, but it cannot be answered in the abstract. As you so well know, judges work from the particular case, not from the general proposition.

Senator THURMOND. Judge, some recent studies underscored the historical precedent in the United States and elsewhere to the effect that single-sex education may be best for many students. Do you care to express your views under the Constitution concerning single-sex education, or do you think single-sex education should be available for girls and boys, young women and young men, aided by public funding?

Judge GINSBURG. Senator, I can say only this: The Constitution requires that equal opportunity be given for boys and girls, equal opportunity for education. I will report on one class of cases in which I was involved. They were easy cases, because there was an exclusion, an imbalance in opportunity.

I worked at Rutgers University for 9 years. The main college was all-male when I began working there. There was also a very fine school, Douglas, much smaller, for women. But the State had many more places for male students than it had for female students. That was wrong. The way it was eventually cured was fine. Rutgers opened its doors to female students, the women's college remained separate. I think it remains separate to this day. But the State can't say we are going to have separate education and we are going to have many more places for men than for women.

Other cases in which I was involved concerned Princeton, a private university. Princeton had a wonderful program for sixth graders. That program took sixth graders from the community and gave them an enriched learning experience, an introduction to math and science. The program included followup instruction in the students' high school years. This program was designed for children who were disadvantaged, children who did not go to private schools. They went to public schools and they lived in neighborhoods that weren't affluent. It was a wonderful program, but it was only for boys.

Senator THURMOND. Judge, do you believe it is desirable that single-sex education should be available on some basis for the working and middle-class parents, and not just available to those who can afford to send their children to exclusive private schools?

Judge GINSBURG. Senator Thurmond, I have expressed my view that the Constitution requires that the State treat people, boys and girls, equally. The cases I have described to you all involved either separate and nonexistent for girls, or separate and not equal. That is as far as my experience goes.

Senator THURMOND. Judge Ginsburg, it is my firm belief that the responsibility of the Congress is to make the laws. The executive branch is to execute the laws, and the role of the judiciary is to interpret the laws. Clearly, there are times when the responsibilities of the three branches of government will overlap.

However, this is in stark contrast to activities conducted by one branch which are the distinct prerogatives of another. It has been said that you agree with Harvard Law Prof. Lawrence Tribe, that

it is notion that the different branches of the Federal Government must be limited to the exercise of the powers specifically within their own sphere of authority.

Another constitutional commentator, James Madison, in the 47th Federalist, has argued that the preservation of liberty requires that the three great departments should be separate and distinct. If you are in agreement with Professor Tribe over James Madison on this issue, when do you believe it is appropriate for the Federal courts, including the Supreme Court, to engage in what would traditionally be considered a legislative activity?

The CHAIRMAN. Professor Tribe has finally gotten his true billing compared to James Madison.

Judge GINSBURG. I think James Madison had it absolutely right. He explained that ours is a system of separate branches of Government, but the very idea Professor Tribe expressed you will find in another of the Federalist papers; that is, each branch is given by the Constitution a little space in the other's territory. We see that in operation today. The judiciary is separate and independent, but I can't be a Federal judge unless you, the legislators, advise and consent. You make the laws, but the President can veto laws that you pass.

Senator THURMOND. Of course, we can override him, you know.

Judge GINSBURG. Yes, but only by a supermajority. So the Constitution has divided government, but it also has checks and balances, and it makes each branch a little dependent on the other.

Senator THURMOND. Judge Ginsburg, in a 1981 George Law Review article—oh, by the way, I am glad you agree with James Madison. I meant to say that. [Laughter.]

In a 1981 Georgia Law Review article, I believe you stated that the need for judicial interventionist decisions would be reduced significantly if elected officials shouldered the full responsibility for activist decisionmaking. I understood this to be your response to the Court's difficulty on occasion determining congressional intent in legislative acts.

If confirmed as Associate Justice, what criteria will you use and where will you place the boundaries of your own interpretation of congressional acts which you find ambiguous and lacking clarity?

Judge GINSBURG. Senator Thurmond, as I have told Senator Hatch in our conversations, there is nothing that a judge would like better than to have a highly activist legislature passing the laws, making clear its positions on policy and on implementation.

The tremendous difference between legislators who decide what policies should be, then write laws to implement those policies, and judges is that you design the plate and you put things on it. Judges never make business for themselves. Judges don't create cases. Cases come to court, brought by parties; and if it is a case of what James Madison called a judiciary nature, then the judges have no choice. They must decide it, no matter how much they would like to avoid decision.

Judge Irving Goldberg of the fifth circuit described it—and I quoted him in that University of Georgia article—this way: He compared judges to firefighters. They don't light the fire, but they are obliged to put it out. Judges are reactive. They don't make the cases or controversies that come before them, but if they are proper

judicial cases, judges are obliged to decide them no matter how unpopular the decision may be to some group or another.

Senator THURMOND. Judge Ginsburg, my next question is directly related to this issue of judicial activism. As you may know, House and Senate conferees are meeting to determine the fate of President Clinton's tax proposal. There has been spirited discourse, publicly and within the Congress, on whether there is a need to raise the taxes of the American people.

The power to tax is an awesome power. As elected officials with this power, we are directly accountable to the American people for our actions. For over 200 years, consent to taxation has come through the ballot box. This has been fundamental in our history for over 200 years. In fact, a resolution adopted by the Stamp Act Congress in 1765, protesting excise duties imposed by Great Britain on the Colonies, stated, and I quote, "It is inseparably essential to the freedom of a people that no taxes be imposed on them but with their own consent given personally by their representatives." Yet this fundamental principle was turned on its head in the *Missouri v. Jenkins* decision, with which I presume you are familiar, handed down by the Supreme Court in 1990.

Essentially, the *Jenkins* decision grants the power to the Federal courts to order new taxes or tax increases to carry out a judicial remedy. It is my firm belief that the American people lack adequate protection when they are subject to taxation by unelected life-tenured Federal judges. It is worrisome enough to the American people that the majority party in the Congress is trying to raise their taxes, to which, I might add, I am opposed, without having to worry about the same treatment from the Federal courts.

As James Madison stated in Federalist No. 48, "The legislative branch alone has access to the pockets of the people."

I introduced legislation to alter the *Jenkins* decision to preclude the lower Federal courts from issuing any order or decree requiring the imposition of any new tax or to increase any existing tax or tax rates. I firmly believe that the Constitution explicitly reserves the power to tax to the legislative branch where representatives are accountable for unnecessary taxes. This matter has yet to be acted on by the Congress.

My question is: Do you believe there is sound constitutional authority for the American people to be exposed to taxation unless it is imposed by proper legislative authority?

Judge GINSBURG. Senator Thurmond, may I put the *Jenkins* case in its context, as I understand it, and preface my response with Madison's words about the Federal courts. James Madison said that with the Bill of Rights, he anticipated that the Federal courts would consider themselves in a peculiar manner the guardians of the rights incorporated in the Bill of Rights. He expected the judges to be an impenetrable bulwark, naturally led to resist every encroachment upon rights stipulated for in the Constitution by the Declaration of Rights.

One of those rights, after adoption of the 14th amendment, is the right to equal protection of the laws. What was involved in that case, as I understand, was desegregation in schools. Federal courts don't make those cases. Every judge I know who has been involved in one has found it distressing, stressful, not what that judge

would choose to do. And every effort is made in those cases to have the community decide for itself, to come up with a plan that will cure a violation of rights.

Once a violation of rights, of constitutional rights, is proved, then it becomes the Court's responsibility to impose relief, to grant relief, to work out a remedy. Now, courts will work out a remedy themselves only as the very last resort, after trying in every way possible to have the people's elected representatives do the job that they should do.

I can't talk to the specifics of this particular case, but I do know that no judge, no Federal judge, to my knowledge, ever invites this kind of case. When the case comes to court, the judges will do everything they can to have the remedy worked out among the people involved in the case. And only when nothing else works will the judge then step in and fulfill, as best as she or he can, the judge's constitutional responsibility.

Senator THURMOND. As I mentioned earlier, my legislation would alter the *Jenkins* decision to preclude the Federal court from using taxation as part of a judicial remedy. This bill does not affect the subject matter jurisdiction of the courts, but limits their remedial discretion. Now we will move on to another subject.

Judge Ginsburg, in *Shaw v. Reno* (1993), which was handed down by the Supreme Court last month, the Court remanded to the district court the appellant's claim under the equal protection clause which alleged that a North Carolina reapportionment plan was so irrational on its face that it could be understood only as an effort to segregate voters into separate districts on the basis of race and that the separation lacked sufficient justification.

One vocal critic of this decision said that the Supreme Court has now created an entirely new constitutional right for white people. Judge Ginsburg, do you believe this to be an accurate assessment of the *Shaw* decision? And if confirmed, how will you approach challenges to reapportionment plans under the equal protection clause?

Judge GINSBURG. Senator Thurmond, the *Shaw* (1993) case to which you referred was returned to a lower court. The chance that it will return again to a higher court is hardly remote. It is hardly remote for that very case. It is almost certain that other cases like it will come up. These are very taxing questions. I think the Supreme Court already has redistricting cases on its docket for next year, so this is the very kind of question it would be injudicious for me to address.

Senator THURMOND. Thank you.

Judge Ginsburg, as you may know, Congress has before it a proposed amendment to the Constitution which would mandate the Federal Government to achieve and maintain a balanced budget. I am a strong supporter of the balanced budget amendment. I have worked on this for over 20 years. Should the amendment become part of our Constitution, do you believe that individual taxpayers would have standing to bring suit in Federal court to force the Congress to adhere to its mandate?

Judge GINSBURG. You have described a measure that you support and, therefore, hope and expect may someday pass. That being the

case, you are describing a future controversy that may very well come before the Court.

Senator THURMOND. Well, you don't have to answer it, then, if you feel that you shouldn't.

Judge GINSBURG. Yes.

Senator THURMOND. Judge Ginsburg, there are hundreds upon hundreds of inmates currently under death sentences across the country. Here in the Congress I have been advocating habeas corpus reform to bring about finality of judgment in capital cases.

Please tell this committee your views on the validity of placing some reasonable limitations on post-trial appeals that allow inmates under death sentences to avoid execution for years after commission of their crimes. Some of these cases go on for many years. For example, one in my State went for 10 or 11 years; one I believe in the State of Utah, Senator Hatch's State, went for 16 years.

Judge GINSBURG. I know, Senator Thurmond, that there is in this area a great tension between two important principles. The one to which you have referred is finality. All things must come to an end, and that is important in the law. Controversies must be decided, and people must go on about their business. So finality is important.

But fairness is also important and, unfortunately, we don't live in an ideal world where people get the best representation the first time they come to court.

Senator THURMOND. Suppose they do have good representation?

Judge GINSBURG. These concerns, finality and fairness, are in tension, and they must be balanced in the particular case. I should add that, unlike Federal judges in many other places, judges in the District of Columbia Circuit do not have experience with the kind of habeas petitions you have in mind. Congress, when it created the separate District of Columbia court system, established courts with judges appointed by the President, gave them a postconviction remedy that is identical to 2255 of title 28, the Federal postconviction remedy, and then indicated, you go from the District of Columbia courts to the Supreme Court, if the Supreme Court will take your case. There is no Federal habeas review when you get through with the District of Columbia courts. So we don't get the kind of habeas corpus business that the fourth circuit and the other regional circuits get.

So I appreciate the tension between finality and fairness. I have not had the experience that some of my colleagues on the Federal bench have had with the habeas jurisdiction.

Senator THURMOND. It is my belief that the public loses respect for the courts when the case is tried and the sentence is given and it is 10 years later or 15 years later before the sentence takes effect. We have got to do something to bring finality to these matters. If you remember, Justice Rehnquist appointed a commission with Justice Powell to make recommendations on habeas corpus reform. The Congress has been considering the Powell report.

Judge GINSBURG. Yes, I understand that Congress has and will continue to give consideration to the Powell report.

Senator THURMOND. I welcome your statement and your committee questionnaire response that judges must avoid capitulating to

a result or any criticism. I especially welcome your approving reference to Prof. Gerald Gunther's discussion of Chief Justice Marshall's 1832 opinion in *Worcester v. Georgia*. As Professor Gunther explains, when John Marshall and his fellow Justices voted in that case, they generally believed that the decision might well mean the end of effective Court authority, but they also thought that it was legally right. And, unflinchingly, they did their duty. They decided the case on merits, even though the immediate prospects were anxiety-producing, even though the survival of the Court was truly at stake.

If a decision is right on the merits, it should be handed down, despite fears about consequences. This approach, which you soundly praise, contrasts sharply with the approach taken by five Justices of the Supreme Court last year in the *Casey* decision. In the past, Chief Justice Marshall did what he believed was right regardless of the possible effect on the Court's public standing. By contrast, five Justices relied on concerns over the Court's perceived legitimacy in the public's eyes in deciding not to overrule the constitutional error made in *Roe v. Wade*.

As Justice Scalia pointed out in dissent, instead of engaging in the hopeless task of predicting public perception, a job not for lawyers but for political campaign managers, the Justices should do what is legally right. I am pleased to see that you are with Chief Justice Marshall and Justice Scalia on this principle.

Would you care to make any further comment?

Judge GINSBURG. I think that every Justice of the Supreme Court and every Federal judge would subscribe to the principle that a judge must do what he or she determines to be legally right.

The CHAIRMAN. You are good, Judge. You are real good.

Senator THURMOND. Judge Ginsburg, in 1975, at a meeting of the ACLU board of directors that you attended, the board adopted a policy statement that declared the ACLU opposed limitations on the custody and visitation rights of parents where such limitations are based solely on the parent's sexual preference. However, that statement did not claim that such limitations are unconstitutional.

My question for you is this: Putting aside your views on the wisdom of any such limitations, do you have any doubt that a State is free, if it wishes, under the Constitution to take into account a parent's sexual preference in awarding custody and visitation rights and to limit those rights solely because of that preference? Similarly, could a State, in your view, if it so desired, limit adoption rights to heterosexuals, or do you feel that that might come before the Supreme Court?

Judge GINSBURG. From the announcements we have seen in the paper today, yes, the questions that you have outlined certainly could come up.

Senator THURMOND. I will not press you to answer any that you feel are inappropriate.

Judge GINSBURG. Thank you.

Senator THURMOND. Judge Ginsburg, one very important area of the law is the question of whether courts exceed their authority by creating rights of action for private litigants under Federal statutes where Congress did not expressly provide such rights of action, and Justice Powell put it this way:

In Article III, Congress alone has the responsibility for determining the jurisdiction of the lower Federal courts. As the legislative branch, Congress should also determine when private parties are to be given causes of action under legislation it adopts. As countless statutes demonstrate, including titles of the Civil Rights Act of 1964, Congress recognizes that the creation of private actions is a legislative function and frequently exercises it. When Congress chooses not to provide a private civil remedy, Federal courts should not assume the legislative role of creating such a remedy, and thereby enlarge that jurisdiction.

As a general matter, what do you think of Justice Powell's argument?

Judge GINSBURG. Congress should express itself plainly on the question of private rights of action. Judges would welcome clear expression by Congress with great enthusiasm. Judges do not lightly imply private rights of action. In some areas of the law, securities law, for example, where private rights of action have been understood by the courts to be the legislature's intention—and that is always what the Court is trying to divine—it appears that the legislature has been content with those implications. Congress has let those private rights stand now in some cases for even decades.

Judges have said often enough in their opinions, we are going to try to find out, try to determine as best we can, whether Congress intended that there be a private right of action. We wish that Congress would speak precisely to this question, because, as you said, Senator, the existence of a private right of action is a question for Congress to decide.

Senator THURMOND. Judge, I believe my time is up. Thank you for your presence here on this occasion.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Judge you are obviously doing very well. Do you know how I know that? Three-quarters of the press has left. [Laughter.]

The print media has left, not the important ones, but three-quarters of the press has left, which means that they assume you have been confirmed.

We will, as I indicated, take a break now for 10 minutes, and when we return we will go at least through Senator Metzenbaum and possibly through Senator Simpson. We have a little conflict here. I said we would end by 6:30. If we get both, we are going to go until 7:15 or so. We are going to check with my colleagues to see what is the most appropriate. If you have a preference, you can let your staff know in the break and we will take that into consideration.

We will now recess until quarter after. If we start sharp at quarter after, we can get a lot done.

[A short recess was taken.]

The CHAIRMAN. The hearing will come to order.

Judge, I have conferred with my colleagues and your staff on what we will do. We will proceed now with the distinguished Senator from Ohio—and I will say this for the 15th time, what great regret I have that he is leaving at the end of this term, choosing not to run again—who will begin the questioning. Then I am going to have to leave here at 5 of 7, and the distinguished chairman of the Agriculture Committee and a member of this committee, Chairman Leahy, has agreed that he will preside until Senator Simpson, who will be here, has his round of questioning.

As you know by the Senate rules, we don't trust an operation where there is no Democrat present. That is a joke. We totally trust the distinguished Senator from Maine.

Senator LEAHY. It is just that I need the experience, that is what it is. That is what he is trying to say.

The CHAIRMAN. I just want to also explain why at 5 of 7 or 8 minutes of 7 I get up and walk out. It is not out of disrespect.

So let me now turn it over to Senator Metzenbaum.

Senator METZENBAUM. Thank you very much, Mr. Chairman.

I am happy to see you here, Judge Ginsburg.

Before I begin my questions, I thought that it might be appropriate to make a brief response to Senator Thurmond's remarks about the need for finality in death penalty cases. This committee held a hearing on the death penalty with two witnesses who were sentenced to death, but later freed because they were innocent, totally innocent. They were close to losing their lives.

One was an Alabama black man who had been in the penitentiary for 6 years. Another was a Texas white man who was in the penitentiary for 10 years. Just this month, a Maryland man was released after 9 years in the penitentiary.

I understand Senator Thurmond's point of view, but, frankly, we have to be careful, because the finality of judgments in death sentences can mean death for innocent persons. That really does not relate specifically, Judge Ginsburg, but I did not want to leave the record open with the implication that everybody who has been found guilty and hasn't finished their rights of appeal should have been executed.

Judge Ginsburg, I have always believed it is important that the men and women who serve on the Court have a good sense of the reality that litigants face and the practical implications of their decisions. I expect that your broad range of professional and personal experiences would give you an understanding of the world faced by the individuals who are before the Court.

Having said that, I am frank to say that I am puzzled by your often repeated criticisms of the decision in *Roe v. Wade*, that the Court went too far and too fast. You stated the decision need only have invalidated the Texas abortion law in question. You have also stated that *Roe* curtailed a trend toward liberalization of State abortion statutes.

I am frank to say that some, including this Senator, would question whether women really were making real progress towards obtaining reproductive freedom, when *Roe* was decided in 1973. Would you be willing to explain your basis for making those statements about *Roe* and the state of abortion law at the time of the *Roe* decision?

Judge GINSBURG. Yes, Senator Metzenbaum, I will try. The statement you made about the law moving in a reform direction is taken directly from Justice Blackmun's decision in *Roe* (1973) itself. He explained that, until recently, the law in the States had been overwhelmingly like the Texas law, but that there had been a trend in the direction of reform. The trend had proceeded to the extent that some one-third of the States, in a span of a very few years, had reformed their abortion laws from the point where only the life of the woman was protected. In relatively few years, one-third of the

States had moved from that position to a variety of positions. Most of the States followed the American Law Institute model, allowing abortion on grounds of rape, incest, and some other grounds. Four States had by then moved to permit abortion on the woman's request as advised by her doctor.

So I took that statement not from any source other than the very opinion, which I surely do not criticize for making that point. I accept it just as it was made in *Roe v. Wade*.

Senator METZENBAUM. Would you not have had some concern, or do you not have some concern that had the gradualism been the reality, that many more women would have been denied an abortion or would have been forced into an illegal abortion and possibly an unsafe abortion?

Judge GINSBURG. Senator, we can't see what the past might have been like. I wrote an article that was engaging in "what if" speculation. I expressed the view that if the Court had simply done what courts usually do, stuck to the very case before it and gone no further, then there might have been a change, gradual changes.

We have seen it happen in this country so many times. We saw it with the law of marriage and divorce. In a span of some dozen years, we witnessed a shift from adultery as the sole ground for divorce to no-fault divorce in almost every State in the Union. Once the States begin to change, then it takes a while, but eventually most of them move in the direction of change.

One can say this with certainty: There was a massive attack on *Roe v. Wade*; the Court's opinion became a clear target at which to aim. Two things happened. One side had a rallying cry, the other—a movement that had been very vigorous—relaxed to some extent. Pro-choice advocates didn't go home, but they were less vigorous than they might have been had it not appeared that the Court had taken care of the problem.

So while one side seemed to relax its energy, the other side had a single target around which to rally. My view is that if *Roe* had been less sweeping, people would have accepted it more readily, would have expressed themselves in the political arena in an enduring way on this question. I recognize that this is a matter of speculation. It is my view of "what if". Other people hold a different view.

Senator METZENBAUM. In the *Roe* case, the Supreme Court held that a woman's right to terminate her pregnancy was protected by the Constitution. The Court said that constitutional right was fundamental and deserved the highest standard of protection from government laws and regulations that interfere with the exercise of the right. States had to have a compelling State interest to regulate the right to choose.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court did not overrule *Roe v. Wade*. However, the case in *Casey* lowered the standard for protecting a woman's right to choose. The Court held that States may regulate the right to choose, as long as they do not create an undue burden on women.

After the *Casey* decision, some have questioned whether the right to choose is still a fundamental constitutional right. In your view, does the *Casey* decision stand for the proposition that the right to choose is a fundamental constitutional right?

Judge GINSBURG. The Court itself has said after *Casey* (1992)—I don't want to misrepresent the Supreme Court, so I will read its own words. This is the statement of a majority of the Supreme Court, including the dissenters in *Casey*: "The right to abortion is one element of a more general right of privacy \* \* \* or of Fourteenth Amendment liberty." That is the Court's most recent statement. It includes a citation to *Roe v. Wade*. The Court has once again said that abortion is part of the concept of privacy or liberty under the 14th amendment.

What regulations will be permitted is certainly a matter likely to be before the Court. Answers depend, in part, Senator, on the kind of record presented to the Court. It would not be appropriate for me to go beyond the Court's recent reaffirmation that abortion is a woman's right guaranteed by the 14th amendment; it is part of the liberty guaranteed by the 14th amendment.

Perhaps I can say one thing more. It concerns an adjustment we have seen moving from *Roe* to *Casey*. The *Roe* decision is a highly medically oriented decision, not just in the three-trimester division. *Roe* features, along with the right of the woman, the right of the doctor to freely exercise his profession. The woman appears together with her consulting physician, and that pairing comes up two or three times in the opinion, the woman, together with her consulting physician.

The *Casey* decision, at least the opinion of three of the Justices in that case, makes it very clear that the woman is central to this. She is now standing alone. This is her right. It is not her right in combination with her consulting physician. The cases essentially pose the question: Who decides; is it the State or the individual? In *Roe*, the answer comes out: the individual, in consultation with her physician. We see in the physician something of a big brother figure next to the woman. The most recent decision, whatever else might be said about it, acknowledges that the woman decides.

Senator METZENBAUM. I won't go further into the *Roe v. Wade* case, and let me change the subject on you a bit. For over 100 years, our fair competition laws have protected consumers against monopolies and cartels that fix high prices, boycott smaller competitors, or force consumers to buy unwanted merchandise, in order to get the products they really want.

As one prominent antitrust scholar correctly stated, our antitrust laws are based on a distrust of power, a concern for consumers and a commitment to opportunity for entrepreneurs. In other words, their goal is to protect consumers and small competitors from unfair competition, although not all jurists share that view. Some believe that the only goal of the antitrust laws should be economic efficiency which favors the financial interests of big business over the best interests of smaller competitors and consumers.

In the last two sessions, Supreme Court opinions have taken both a proconsumer and a probig business economic view of antitrust. In the 1992 decision in *Kodak v. Image Technical Services*, the Court adopted a decidedly proconsumer approach to the antitrust laws. The Court held that Kodak's business policies could be anticompetitive, based on the extra time and money they cost consumers. Those policies made it virtually impossible for Kodak's cus-

tomers to buy replacement parts and repair services for copying machines from smaller competitors.

However, this term the Court seemed to change direction and it adopted probig business approach to antitrust law based on economic theory. In its decision in *Brook Group v. Brown & Williamson Tobacco*, the Court amazingly theorized that a small, but powerful group of tobacco companies could not fix prices and ruin a smaller competitor, despite the fact that the defendant companies believed that they could. The dissent written by Justice Stevens criticized the majority's reliance on economic theory to decide the case, stating that they had relied on supposition instead of facts.

As a member of the District of Columbia Court of Appeals, you participated in about half a dozen antitrust cases. To be frank, those decisions have not given me a very clear idea of which view you take of the antitrust laws. On the one hand, your dissent in *Michigan Citizens for an Independent Press v. Thornburgh* impressed me greatly with your high regard for consumers and for fair competition.

In that case, the Attorney General overrode the recommendation of his Antitrust Division and permitted the merger of two financially viable newspapers in Detroit. You were admirably the only judge who looked at the facts and questioned whether the Attorney General's decision would open the door to a self-serving competition quieting arrangement between local newspapers in Detroit and other markets.

On the other hand, you joined the court's opinion in *Rothery Storage & Van Company v. Atlas Van Lines*. Now, that decision has been criticized by commentators for taking an economic view of the antitrust laws which favors big business over smaller competitors and consumers.

Because the Supreme Court appears to be of two minds about the antitrust cases, I frankly believe the next Justice will have an important influence on the direction the Court takes. As I stated, your antitrust decisions don't give me a clear idea of how you will come out on those cases.

Please share with us your views as to whether a defendant can excuse anticompetitive conduct that violates the antitrust laws on the basis of an economic theory of business efficiency.

Judge GINSBURG. Senator Metzenbaum, I think your recitation of the purposes of the antitrust law—to protect consumers, to protect the independent decisionmaking of entrepreneurs—is entirely correct. I am pleased that you like my opinion in the *Michigan Citizens* (1989) case. It is a decision that I wrote. I think it gives the best picture of my views in this area.

As for *Rothery Storage* (1986), that is an opinion I joined but did not write. It seemed a rather clear case of an arrangement involving a small firm in an industry that had many firms and no entry barriers, plus the particular arrangement was to the advantage of consumers.

No one doubted that. There was no dissenting opinion in *Rothery*. Four judges considered that case, and all four of them came to the same conclusion. So I think your concern is not with the decision or the judgment reached, but with portions of the court's opinion.

You know how we work in courts of appeals. *Rothery* was decided in the first instance by District Judge Oberdorfer. He wrote a good opinion. We could have rested on that opinion. But the case was fully briefed and argued in our court before a panel of three judges. We voted unanimously to affirm. The opinion was then assigned to one of the three of us. Such an opinion, when completed, is circulated to the panel and panel members respond. We all agreed with most of the opinion.

The major difference centered largely on a footnote. I don't think that the judgment reached in *Rothery* is one that many would criticize. Facets of the opinion may have been open to criticism. When one of my colleagues is assigned the opinion, I will read the circulated opinion carefully. If anything stands out as genuinely troublesome, I will alert the writer of the opinion. Perhaps the footnote could have been revised or eliminated as a collegial accommodation. But the *Rothery* judgment itself seems to me noncontroversial. As I said, the case was not a difficult case.

Senator METZENBAUM. Let me switch to still another subject. Thank you for your response.

As Chair of the Senate Subcommittee on Labor, I have tried to be a strong advocate for America's workers. I reviewed your court of appeals opinions in labor law cases, and I would like to ask you about two of those decisions: *Conair v. NLRB* and *St. Francis v. NLRB*.

In both cases, workers were trying to organize to improve their wages and working conditions. Federal law protects their right to do that. You know that. I know that. Most people in this country know that. But when they tried to organize, the employers responded by threatening to close the plant, by coercively interrogating and threatening employees, and by firing union sympathizers.

It was no surprise that the employers' unlawful tactics worked. The employees were very intimidated, and the unions lost both elections.

You agreed in these cases that the employers had engaged in "serious," "outrageous," "massive and unrelenting antiunion conduct" that interfered with the workers' freedom to organize. Nevertheless, although the NLRB has broad discretion to grant effective remedies, you voted in both cases to reject the Board's order, requiring the employer to bargain with the union. In short, you agreed that the employers had violated the law in a pervasive fashion, but you voted to overturn the remedy that the NLRB thought was appropriate.

I am not interested in going over the facts of either of these cases or even the legal basis for your decisions. I don't see any useful purpose in that. But in reading your opinions, I can't discern whether you can identify with the harsh practical realities of the workplace when antiunion employers intimidate their employees to prevent them from organizing. I can't tell from your decision whether you understand what it is to have your boss threaten your livelihood and your family's economic well-being, to watch your friends lose their jobs, to sit in the boss' office while he interrogates you about your union sympathies, all because you and your coworkers are trying to band together to improve your wages and working conditions.

Supreme Court Justices, as you and I both know, are far removed from these harsh realities. If they don't come to the job with a deep understanding of the problems of America's workers, they will never achieve that understanding.

I wonder if you could shed some light on your insight into the problem of workers trying to organize in the face of an antagonistic employer and whether there is anything in your background that gives you some feeling of understanding of the challenge that the worker has.

Judge GINSBURG. Senator Metzenbaum, I don't think one needs to delve into my psyche on that score. I think if you take a full and fair look at the body of decisions I have written in the labor law area, you will be well satisfied that I possess the empathy you have just expressed. I might mention the *Fort Bragg* (1989) case, among many.

In *St. Francis* (1984), I did not say the Board lacked power to issue a bargaining order in that setting. Far from it. I said give us a reason.

One of the things we must be careful about regarding administrative agencies is any tendency for them to abuse their authority. One of the easiest ways to be abusive is to decide turbulent questions without giving a reason.

It seemed to me that on the facts presented in *St. Francis*, the Board had not justified imposing a bargaining order. *St. Francis*, unlike *Conair* (1983), was not a case of egregious conduct. Unfair labor practice, yes, but not the kind of pattern that was involved in *Conair*. And so I did not say that a bargaining order would be inappropriate in that situation. All I said was, Board, you haven't given us a reason why you ordered bargaining in this case and not in other similar cases. All I asked of the NLRB was this: Say why you ruled as you did. It seemed to me unsatisfactory to have an order out there without adequately supportive reasoning.

*Conair* was a different case. *Conair* was the worst kind of conduct imaginable on the part of an employer. But I was dealing with a statute, the NLRA, that protects the rights of employees. And that was a situation where the employees themselves had never in any way indicated that they wanted a union.

Senator METZENBAUM. Isn't that the case where 45 percent of the employees had signed cards?

Judge GINSBURG. There was never at any point a showing of a card majority.

Senator METZENBAUM. That is correct.

Judge GINSBURG. And what I said was this: The principle of majority rule is fundamental to the legislation, the NLRA. It seemed to me that if Congress wanted to give the Board the authority to issue a bargaining order, even when there was never proof that at any time a majority of the workers wanted a union, the majority rule principle would have to be abandoned. If Congress wants the Board to have that authority, Congress should say so. I thought it involved a basic policy decision that the legislature should make.

Now, it has been many years, you know, since the *Conair* decision, and in all that time the legislation has remained unaltered. But—

Senator METZENBAUM. Because the law already permits—the NLRB has the right to recognize, order an employer to recognize a union where less than a majority of employees have signed cards and have not voted in an election if the employer's conduct is of such a nature that it has been so intimidating and so harassing and so restrictive of the employee's rights. The NLRB has that right now.

Judge GINSBURG. There was a very strong dissent in *Conair* to that effect, whether you needed to have a showing of a majority at any time.

Strong arguments can be made either way, Senator. I am simply saying that there is written into that Act, the NLRA, the principle that underlies so much of our society, and that is the principle of majority rule. The NLRA says it is the employees' choice.

There was another factor in *Conair*, as you know. Because of the way, unfortunately, the process moves, by the time that case came to our court there had been—by the time it got to the Board for decision, no less the court, by that time, there had been a total turnover of employees. So none of the people who were in that shop at the time the Board decided the case had been exposed to the employer's egregious practices. If the Board had succeeded in imposing a bargaining order at that point, the NLRB would have imposed the order on a whole new set of employees. So that was a factor, too.

Senator METZENBAUM. I have long been an advocate for placing what Thomas Jefferson described as a wall of separation between church and state. I applaud Justice Hugo Black's statement in the 1947 case of *Everson v. Board of Education* that the first amendment has erected a wall between church and state that must be high and impregnable.

As you know, in the 1971 case of *Lemon v. Kurtzman*, the Court devised a three-part test which applies strict scrutiny to any law that has a religious purpose. To pass muster, a law must not pertain specifically to religion, must not advance nor inhibit religion, and must not excessively entangle government with religion. It is a strict test, as I believe it should be. It has been used to strike down such things as State tax relief programs that benefited parochial schools.

However, some of the Justices currently sitting on the Court are in favor of toppling this wall between church and state. This term, Justices Scalia and Thomas ridiculed the *Lemon* test. In their dissent in *Lamb's Chapel v. Center Mauritus School District*, the Justices compared it to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad after being repeatedly killed and buried."

Both Justices suggested that pencils should be "driven through the creature's heart" and that it should be buried "fully six feet under."

In my opinion, if the *Lemon* test were to meet the fate Justices Scalia and Thomas have in mind, it could put the Government in the business of choosing which religious groups receive taxpayer dollars. It could even destroy the religious harmony on which our country prides itself.

I don't believe that you have written an opinion that speaks directly to this issue. At least we did not come across it. Would you care to give us your view of the *Lemon* test and whether you agree with Justice Black that the Court should keep a high and impregnable wall between church and state?

Judge GINSBURG. Senator Metzenbaum, you are right that I don't have any cases in the establishment area except a couple of standing cases. I do have a few in the free-exercise area. This issue, as you know, will come before the Court in many cases in the future, as it has in the past. My approach or attitude about criticism, the kind that you read, is generally to ask: "What is the alternative?" It is easy to tear down, to deconstruct. It is not so easy to construct. Some of my law school and judicial colleagues don't appreciate that sufficiently. It is much easier to criticize than to come up with an alternative.

So, as a general matter, I would never tear down unless I am sure I have a better building to replace what is being torn down.

Senator METZENBAUM. Thank you very much, Judge Ginsburg. My time has expired.

Senator LEAHY [presiding]. Thank you, Senator Metzenbaum.

The last questioning this evening will be Senator Simpson's. Senator Simpson.

Senator SIMPSON. Mr. Chairman, that was a ghoulish case that our colleague from Ohio reported on. I was fascinated by that language. Who did that? I will ask him, but I see he is preoccupied. It was certainly graphic.

Senator SIMON. It was Justice Scalia.

Senator SIMPSON. What was that ghoulish case you were quoting from there, Senator Metzenbaum, that ghoulish case about stakes in the hearts and the specters of the night and six feet into the hole?

Senator METZENBAUM. It is *Lamb's Chapel v. Center Mauritius School District*.

Senator LEAHY. I think the question of the Senator from Wyoming was who was the judge writing the opinion.

Senator METZENBAUM. Well, I don't know who wrote the prevailing opinion, but the two who wrote the language that I read were Scalia and Thomas. You remember them.

Senator SIMPSON. I remember them. [Laughter.]

Senator LEAHY. I didn't want the record to be incomplete, Alan.

Senator SIMPSON. I wondered when he was going to insert that in the record.

Senator METZENBAUM. I thought I had said it at the time.

Senator SIMPSON. I perhaps missed that. But, nevertheless, it is always the spirited thing to follow Senator Metzenbaum, and I have been doing that for 14 years. You can imagine the burden that I have to carry, because he usually lays all the traps and he knows I am going to jump right in them. And I often have, and probably will again.

Nevertheless, upon his retirement—and he announced that—I went to the floor very swiftly, and I said as far as Senator Metzenbaum—and I spoke glowingly about him, and I said, "But I don't want this to sound like a eulogy, although there have been many times when I wished it was." [Laughter.]

And so we shall miss him and his incisive participation, but he has lots more, many more months to go to serve on this committee. I enjoy him very much.

Senator METZENBAUM. Thank you, Alan.

Senator SIMPSON. Many questions have been asked. It can get tedious. You are all great sports at this hour, and if we go a little further tonight, you will have less to do tomorrow. And I think you would appreciate that. But you are very patient and very adroit in your responses.

Let me ask one. It came to me as I looked at a large bulk of material that our ranking member, Senator Hatch, provided us. That was a significant number of recusals. Where you recused yourself, it was quite a bulky stack. You have been recused from hearing cases more than 250 times, by count of someone on my staff, during your years on the circuit court, and that obviously is no problem and would not be a problem on the circuit court since another judge could take your place on the panel. But it seems that it could be a problem on the nine-member Supreme Court.

Will it be a problem? What do you foresee there? And I realize that is totally nebulous. Assuming your confirmation, what—I sense you will be very careful about doing that whenever you feel any sense of the conflict. In looking at some of those recusals, they were very precise, very specific; in fact, backed up carefully with documentation, letters. It was impressive, and I am not even suggesting anything that would be awry. But what do you think could happen with regard to recusals?

Judge GINSBURG. The number that you recited, in fact, startled me. I was not aware that—

Senator SIMPSON. Over the years.

Judge GINSBURG [continuing]. That there was any such number. I did recite, in response to the questionnaire, what my recusal policy is.

Senator SIMPSON. It is very clear and certainly very appropriate.

Judge GINSBURG. And the specific instances, which were not too many, in which I determined to recuse myself *sua sponte*, those are, I think, just 11, 11 in 13 years.

Senator SIMPSON. Eleven?

Judge GINSBURG. Yes. There are automatic recusals in my court for every judge, and that is worked out in the clerk's office. Each judge has a recusal list of clients, of parties whose cases that judge will not sit on because of a financial interest—in my case, it is never because of stock ownership, because when I got this good job we sold all our securities. Some of the judges will list one company or another, and they won't sit on those cases because they or their spouse or a minor child owns securities. That is never a cause of a conflict for me. Rather, my recusals generally occur when a lawyer in my family has a client relationship with a party. But I would have to see what is the basis for that number.

Senator SIMPSON. I am sure that what you say is so, and in most cases the clerk would automatically recuse you from her list of the parties that you had left, and I have a hunch that your list was very complete.

Judge GINSBURG. I think, Senator, now that you jog my memory, my very first year on the court, I may have had an unusual num-

ber of recusals in Federal Energy Regulatory Commission cases. I think so for this reason: My son was given at birth a share of El Paso Natural Gas, which, due to a stock split, became two shares.

When I was appointed by President Carter, we sold all of our shares, but we couldn't find my son's share of El Paso Natural Gas. It got lost in transit. A Federal statute says, if you have a financial interest, if you, your spouse, or a minor child living in your household has a financial interest in a party, a financial interest "however small"—those are the words Congress put into the statute—you must recuse yourself.

After turning over every paper we had, I finally found the El Paso share certificate, gave it to my spouse who was going to New York, and asked him to bring it to our bank and have the bank sell it. Well, he lost it en route. [Laughter.]

Then we had to—

Senator SIMPSON. It probably pleased the broker.

Judge GINSBURG. It took the better part of a year to get and sell a replacement certificate. It meant that for one entire term of the court, I was recused from all El Paso cases, not because of my husband's law practice, but simply because my son was given at birth one share then worth \$10 of El Paso Natural Gas. That experience, and others like it, might lead Congress to rethink whether the statute really should say "financial interest, however small." There should perhaps be a de minimis principle installed.

Senator LEAHY. If the Senator from Wyoming would yield, I am advised by the staff that during Judge Ginsburg's tenure on the circuit court of appeals, she was automatically recused 108 times, plus the 11 that you did. There is some confusion in the numbers.

I also tend to agree that we should probably have a different rule and put de minimis activities, because it gets a little crazy.

Senator SIMPSON. I think that is true and I concur. Obviously, some of those were the telephone companies, and I am sure your husband's firm. I am just leading it, and surely I was thinking of the broker waiting to do that transaction. You would be known as the greatest odd-lot trader of our time, one share of El Paso. [Laughter.]

Do you think that would be any problem in your duties on the U.S. Supreme Court?

Judge GINSBURG. No, Senator, I don't think so. I don't think I have the highest recusal rate on my court. On automatic recusals, I probably come out, taking 13 years into account, somewhere in the middle, I would guess.

The telephone company recusals didn't come in time to allow me to escape from the huge access charge case. I did sit on that. It was a complex case, with an opinion divided three ways among the panellists.

Senator SIMPSON. I thank you. Let me ask you a question about a case. In 1989, you were on a panel deciding *DKT Memorial Fund v. Agency for International Development*, AID. A foreign organization claimed that its speech abroad was unconstitutionally restricted by conditions the U.S. Government attached to providing financial assistance.

And while you did not reach that issue, you expressed sympathy for the argument in that sense, and so do I. Senator Simon and I

had an amendment to overturn that. Senator Bingaman and I are involved in population control at international levels. So the next question then comes back to thoughts on whether foreigners abroad have the protection of the U.S. Constitution from U.S. governmental action.

There I become triggered by activities in immigration and refugee activities. If you believe that the Constitution would apply at all to foreigners abroad, what are the limits to its protection?

I think it is my personal thought that an extension of constitutional right abroad, again, other than this issue of abortion rights or family planning or what was attempted to have been done, it would certainly have a severe effect on U.S. immigration and refugee policy. Considerable immigration activities take place in our embassies, our refugee camps, at the U.S. border, across the U.S. border, all outside of U.S. territory. Are aliens detained at the U.S. border entitled to the full panoply of constitutional rights that citizens enjoy?

Judge GINSBURG. Senator, the case law, as you know, has developed since that *DKT* (1987) decision. I think the Supreme Court has answered the question you raised. No, the Court said, the Constitution doesn't necessarily follow the flag abroad. As you correctly stated, that was a thought I expressed, but my decision did not rest on the notion that the foreign population planning group in question was entitled to U.S. constitutional rights. It was a population planning group in India. My dissent rested on the free speech rights of the U.S. organization.

Senator SIMPSON. You have always been very interested and active in population planning and that type of thing, haven't you, in your general work, issues of—of course, we know so well your work in women's rights and your significant incremental approach, which worked and worked so well. But the issue of international population planning and that type of thing is something that is appropriate.

Judge GINSBURG. Our Government has long been involved in that area. The policy that was at issue in the *DKT* case has since been changed. It was the Mexico City policy, a policy withdrawn by President Clinton in the first week of this administration.

Senator SIMPSON. Very appropriately, I thought. It was a tough one for me to watch during the administration of my own party.

As you say so clearly, you did not reach that issue, but you expressed concern and sympathy for the argument, and it is going to be a much more serious case as it comes up, as people pay more attention to refugee asylum and immigration issues.

Many of them don't understand that overseas, when someone is seeking asylum, a member of the Embassy consular staff makes the decision as to whether they receive this precious status of refugee or not, with no appeal possible under any circumstances whatsoever, and that is it. And when they get here, we have a list of items of due process that are often more than a U.S. citizen receives, an interesting irony, part of the cause of the movement in the world today here. Enough of that.

Under the ninth amendment, rights left unnamed in the Constitution are retained by the people. When considering that designation of the right retained by the people, how would you reason

the grant or denial of a new right not enumerated in the Constitution? You have touched on this.

I frankly like the way you kind of prod Congress along. It is a very important aspect of what a court should do, in my mind. Even though I believe deeply in separation of powers, there comes a time when I think a court has to say why don't you people go back to work, instead of putting me through this grueling exercise, and do what you are supposed to do, and that is correct this or legislate it. That is my view. But to what extent would the position, the action or nonaction of the Congress be a factor in your reasoning?

Judge GINSBURG. Senator Simpson, the primary guardian of the 9th and 10th amendments has really got to be the Congress itself. The national government is one of enumerated powers. To create a conflict, an arguable conflict with the 10th amendment, Congress would have to take action vis-a-vis the States.

So I think these amendments, first about not restricting people's rights and then about the reserved rights of the States, these amendments are peculiarly directed to Congress. A question about the 10th amendment would never come to Court apart from some action Congress has taken.

So I think these two amendments are instructions first and foremost to Congress itself. Congress is not to limit people's freedom and not to encroach upon the States. And it is only when Congress takes an action with regard to the States that the States consider intrusive, that a 10th amendment issue would come to the Court. So I think that these amendments are directed to the Congress. I think you suggested that in the way you put the question.

Senator SIMPSON. Justice Brennan, we used to visit about things. You can still do that I think in this separation of powers. He would often say I think it's time for you people to move. That is what he would say. And he was usually very right. I think that is a very important thing. We say it is a government of laws and not men and women, but I think it is more really a government of men and women, and not laws, and he was one who perceived that, that it was about persons. I think you perceive that, from all the readings I have looked at that you have done, the readings of your writings.

I think that is a heartening prospect, if I could enjoy seeing an opinion come down which might be just one line and say how did this get here, why didn't you do this? Was it because you were politically in chains and restricted and politically correct, where you couldn't move? This issue cries out for your attention, so have a go at it before you bring it back here.

Judge GINSBURG. Senator Simpson, I have ended a number of opinions with the lines, "We need guidance from Higher Authority."

Senator SIMPSON. You didn't mean us? [Laughter.]

Judge GINSBURG. I surely did, when we are dealing with statutes. We do have now a means of communication just starting. Brookings is aiding in this effort. There has been cooperation both on the judiciary side and on the part of Congress. Opinions of my circuit not infrequently identify statutes with gaps or obscure language. Very often, these are not political hot potatoes, but just something unforeseen, the particular case wasn't seen. We send those opinions, with no comment at all, to the Senate, and I think

the House, as well, for Congress to do what it will to clear up the laws.

Other circuits are doing this, and perhaps we will succeed in reducing some of the uncertainty in the law, if when courts spot a need for revision, clarifying revision, Congress will then respond. That kind of cooperation is just beginning and I hope it will bear fruit.

Senator SIMPSON. I hope so, too, and I think those are good things, and perhaps seminars and perhaps discussions of court members. We ought to do that through the Brookings Institution, where legislators and Supreme Court Justices sat down and talked informally, and those are good things, I think very good things.

Let me ask you another one, because it is certainly going to come up I think more and more, not just with television, violence, the arts. There has been considerable controversy in recent years over the use of Federal taxpayer money to fund art, which some find offensive. Some argue, of course, that the denial of funding of some of those art forms is equal to nothing more than censorship. Others argue that the art is sacrilegious or morally offensive and undeserving of public financial support.

The first amendment prohibits the Government from restricting expression on the basis of its content, and the courts have not made public funding or the denial of it the equivalent yet of punishing expression, and the courts have not required the Government to fund all types of art expression, and the Government is free to favor particular types of expressions over others.

What is the reasoning you might use in considering a case involving a constitutional right to Federal funding of the arts or something else that might be highly controversial of similar nature?

Judge GINSBURG. Senator Simpson, the initial concern of the first amendment is with the Government as censor. I don't think the first amendment says that the Government can't choose Shakespeare over modern theater, David Mamet, for example, in deciding what programs it wants to support, say, for public performances. It can't shut down speech, but it can purchase according to its preference, within limits.

So although the first amendment keeps the Government from squelching speech on the basis of its content, I don't think anyone has taken the first amendment or the equal protection principle to the length of saying Government must fund equally anything that anyone considers art. I think the Government as a consumer doesn't have to buy all art equally.

Senator SIMPSON. It is my experience that the toughest part of the job from this side of the table is dealing with the extremists on both sides of every issue. That is what we get to deal with here, the locked-in of the world who are not going to change their opinion, the ones who can make their opinion in the shortest possible time with the most possible emotion and the least possible content. So we deal with that continually.

Yet, those are the things that cause people great concern about their Government works, whether the courts work, and meanwhile the poor citizen who is in the middle, the thoughtful person, as I say, raising their children, going to work, coaching, teaching, in-

volving themselves in the community—they are sitting it out, and meanwhile the heavy hits and the shrieking come from both sides on both extremes, and I find that so often.

Those things, then, when they get that hot are often sidestepped by us and then they come to the judiciary. I think there will be more of that, and then they will accuse you of being an activist Court, which is the way that works. Yet, if we were more active in dealing with it before it came to the fueling of emotion and racism and guilt and anguish and all the rest of it, it might be a better filter for you. But that is rambling, as best described.

In a speech on March 9 of this year, questioning the rationale of *Roe*—and it is interesting to me how I keep reading that apparently you didn't do this correctly for some with regard to *Roe v. Wade*. I am pro-choice, always have been, never varied, after the State of Wyoming had to change its law because the law overturned by *Roe v. Wade* was exactly the same as that on the books in the State of Wyoming. I was a member of the Wyoming Legislature at the time. We did it, and it was a tough and emotional debate greater than any I have been in in this arena.

You remarked, "But without taking giant strides and thereby risking a backlash too forceful to contain, the Court, through constitutional adjudication, can reinforce or signal a green light for a social change." I would ask you, Judge Ginsburg, in your view, are the limits on the Court's ability to act as an engine for social change merely prudential and self-imposed according to the will of each Justice, or are there instead more fundamental, perhaps even constitutional, limits to the Court's authority?

Judge GINSBURG. Senator, if there is any message I would like the public to understand about courts, it is that courts don't make controversies; courts don't choose what they do. Courts are constrained, as you know, Federal courts, by article III. Article III tells Congress what it may give the Federal courts to do, and Congress is limited in this way, too. Congress can't put on our plate something that isn't included in one of the article III categories.

So the courts are limited, first, by the case or controversy requirement. A case of a judiciary nature has to be a live controversy between adverse parties. Federal courts are limited in the subject matter of the cases they may hear, and there are a host of requirements that people must meet in order to have a justiciable case or controversy. Those stem from the Constitution first, then from the laws that Congress passes in conferring or withholding jurisdiction from the Federal courts, and then from precedent built up since the Nation was new.

So no judge can decide what is appropriate for a court to do. All of what judges do is heavily constrained by the Constitution, the laws, the decisions, and the traditions that have been built up over 200 years.

Senator SIMPSON. Well, Judge Ginsburg, my time has expired, but I would just reflect that whatever you have been doing has worked pretty well, so keep doing it. That is my thought for today.

Thank you, Mr. Chairman.

Senator LEAHY. Judge, you and your family have been extremely patient. I might say for myself this has been one of the most interesting and enlightening days I have spent in my 19 years here in

the Senate. I have enjoyed every moment of it, but it is time to let you and your family and your friends have some rest.

We will stand in recess until 10 tomorrow morning. Thank you.  
Judge GINSBURG. Thank you.

[Whereupon, at 7:29 p.m., the committee was adjourned, to reconvene at 10 a.m., Wednesday, July 21, 1993.]

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

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**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.

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 then 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

concurrence in the sense that he is citing the political question doctrine as a way out. And I will go into that a little bit further.

I must say, though, sometimes when I approach these nomination hearings, the only enthusiasm that I can get up is because I wasn't able to find something more interesting like a root canal to go through. You have been entirely different. As I said last night at the close, I have enjoyed this very much because of your obvious love of the law and what I discern to be a very real interest in having the law do what it is supposed to do to protect the rights of individuals.

There was some discussion yesterday of *Lemon*, and I have with past nominees gone into that question at some length. A lot of it was covered yesterday, but I just want to make sure I fully understand your answers.

First off, do you feel the Supreme Court today has a clear test for deciding establishment clause cases?

Judge GINSBURG. The *Lemon v. Kurtzman* (1971) test remains the test that the Court has.

Senator LEAHY. Is that their test today, in your estimation?

Judge GINSBURG. They have no other that the Court has ever announced. The test has been criticized by some of the Justices. Senator Metzenbaum read yesterday from a dissent with rather strong criticism. But the Supreme Court has not supplanted that test.

Senator LEAHY. Well, let's go back to yesterday because you had said that before a judge or Justice tears down a—

Judge GINSBURG. Yes.

Senator LEAHY. Or "deconstructs," I believe was your expression, deconstructs an established test, he or she should ask, Well, what is the alternative?

Judge GINSBURG. Right.

Senator LEAHY. Today, what do you think the appropriate test for establishment clause cases should be?

Judge GINSBURG. Senator, I don't have a satisfactory alternative. This is a very difficult area. I can say only that I am open to arguments, to ideas, but at this moment, as I said yesterday, I have no solution to offer. I do know that it is easy to criticize. It is not so easy to offer an alternative.

Senator LEAHY. Have you given thought to the alternative? Because you know you are going to be faced with these questions.

Judge GINSBURG. Yes. I haven't had much establishment clause business—

Senator LEAHY. You are going to.

Judge GINSBURG [continuing]. Apart from the standing issues which came up in two cases, *Murray v. Buchanan* (1983) and *Kurtz v. Baker* (1987).

The only case that I have had that touched at all on the establishment clause was the marijuana sacrament case, the *Olsen* (1989) case, where—

Senator LEAHY. This is the Ethiopian—

Judge GINSBURG. Right, the Zion Coptic Church case. So you are right that I will have to think in a harder, more focused way, as I always do when I have a case to decide.

Senator LEAHY. Well, I certainly don't want you to have to lay out a test here in the abstract which might determine what your

vote or your test would be in a case you have yet to see that may well come before the Supreme Court. But because there has been so much dispute over *Lemon* and other cases that seem to branch off or go at it since then, you know and I know that this is an issue that will be before the Supreme Court, if not next year, then the year after.

But I would like to get some idea of your feelings, and let me approach it this way: Under the first amendment's freedom of religion guarantee, people expect that if they send their children to public school, for example, that the establishment clause is going to prohibit the school from forcing religion on them. At the same time, they know they also have the free exercise clause, and we have a right to practice our religion, to have nonpublic religious schools. I think in my own experience my children have been both to private religious schools and to public schools, and there is no question in my mind that there are real differences in what is allowed or not allowed in the two.

Do you see a tension between the establishment and the free exercise clause?

Judge GINSBURG. There are cases that raise a tension. I am not prepared here to discuss those cases specifically, but you mentioned public schools, on the one hand, and private schools—that may be religious schools—on the other. Some crossovers do not create intractable problems, as the Supreme Court indicated fairly recently. For example, suppose a school facility is available after hours. Can the school board say we are not going to allow a religious group to use the facilities, because we don't want the State to be acknowledging religion in any way? The Supreme Court said if the facility is open on a first-come, first-served basis to anyone, the school's authorities can't exclude a group on the ground of religion. That position does not involve the State in establishing religion. Instead, it allows room for people freely to exercise their religion, as long as they are not being treated differently from any other group.

Senator LEAHY. Does that mean that the free exercise clause and the establishment clause are equal, or is one subordinate to the other?

Judge GINSBURG. I prefer not to address a question like that; again, grand principles have to be applied in concrete cases. My job involves reasoning from the specific case and not—

Senator LEAHY. Let me ask you this: Do you have a view whether the Supreme Court today has put one in a subordinate position to the other?

Judge GINSBURG. The two clauses are on the same line in the Constitution. I don't see that it is a question of subordinating one to the other. Both must be given effect. They are both—

Senator LEAHY. But there are instances where both cannot be upheld.

Judge GINSBURG. Senator, I would prefer to await a particular case and—

Senator LEAHY. I understand. Just trying, Judge. Just trying.

Let me move on a little bit, then, to free exercise. Let's take the *Leahy* case. *Leahy v. District of Columbia*, that is. In *Leahy v. District*, does your ruling mean that you are not going to let the first amendment right of the free exercise of religion be trampled on or

compromised just because there is legislation intended for public safety? Or what did you intend?

Judge GINSBURG. *Leahy* (1987), so it won't be a mystery to—  
Senator LEAHY. It is a different Leahy. We ought to put that down. No relation to this Leahy.

Judge GINSBURG. And perhaps I should explain what that case involved.

Leahy applied for a driver's license in the District of Columbia. As District driver's licenseholders know, the license number here coincides with—it is the same as—one's Social Security number. Leahy's religious belief involved a rejection of identification with a Social Security number. If he were to use that number to identify himself, he would very substantially reduce his chances for an after-life. That was his religious belief.

The District said this is our system. Every driver must have a driver's license, and these are our numbers. But something else came out in that case. Because this city has many people who don't have Social Security numbers, diplomats, it did have another system of numbers it used for embassies. And Leahy's religious belief could have been accommodated by the city; at least we sent it back to determine why the city could not respect his religious belief—we said that in the interest of free exercise there had to be a compelling reason to require Leahy to choose between his faith and his driver's license.

Senator LEAHY. In fact, if I could quote from it, you said, that requiring a Social Security number was not "the least restrictive means of achieving the vital public safety objective at stake." I interpret that as saying you would hold public safety legislation to a strict standard of review if first amendment freedoms are implicated.

Am I reading your opinion correctly?

Judge GINSBURG. Yes, you are reading my opinion correctly. I was applying the test then effective, looking closely at such a restriction and requiring the State to come up with a compelling justification for not making an accommodation. The decision suggested in a footnote that perhaps there could be no compelling justification given this alternate system of license numbers the city had. But we remanded the case on that point. We said it wasn't enough to say every driver must have a driver's license and so either you get one that we provide or you don't drive.

Senator LEAHY. Again, for anybody who tunes in late, so that everybody won't go off and try to check my bio to see who my relatives are, the Leahy referred to here is no relative, and obviously a different religion. [Laughter.]

Judge, let me follow a little bit from that, and I think these are related. I would like to go to the *Goldman v. Secretary of Defense* case, in which we had an officer who had served, I believe, 14 or 15 years with distinction. He was threatened with a court-martial because he wore a yarmulke. You wanted to make the military explain why it was necessary to prohibit the wearing of the yarmulke, and I recall reading in your decision basically that he served with distinction all these years and nobody had questioned it, and all of a sudden it became an issue. But the majority of the

judges on the District of Columbia Circuit and the Supreme Court sided with the military.

You wrote that the military showed callous indifference to the officer's orthodox Jewish religious faith by denying him the right to wear a yarmulke.

How much accommodation should the military be required to make to protect the freedom of religion in the first amendment?

Judge GINSBURG. Senator Leahy, may I say first that the majority of the District of Columbia Circuit did not uphold that classification. What we did was vote to deny a rehearing en banc. The Air Force regulation was upheld by a three-judge panel. As I recall, the writing judge was a visiting judge, and two of my colleagues voted with him to uphold the military uniform regulation.

Senator LEAHY. I am concerned with what your views were. You had written that the military showed callous indifference to Goldman's religious beliefs. My basic question, though, without going into that case, is how much accommodation should the military be required to do to make the freedom of religion guarantees of the first amendment real guarantees, or how do you determine how much accommodation?

Judge GINSBURG. There was a divided decision in the Supreme Court upholding my court's decision that a uniform regulation has to be applied uniformly. That was the decision of the majority of the Supreme Court.

Our Constitution is the Constitution for all of us. It is the most fundamental law for this body and for all of the people. The end of Capt. Simcha Goldman's case was that this body, Congress, passed a law that said the Air Force can accommodate to the yarmulke. By that action, this body was implementing the free exercise clause in an entirely proper way, in my judgment.

Senator LEAHY. Let me ask you this in a very general way: Whether it is the military or public safety departments, is it not a fact that they have to make accommodations to free speech? There may be special circumstances, because of the nature of the military or the nature of public safety, but at least they must start out assuming there has to be accommodation to the right of free speech or the right of religion?

Judge GINSBURG. Yes, I think that is quite right. Our tradition has been one of many religions, one of tolerance and mutual respect.

Senator LEAHY. What about right of association?

Judge GINSBURG. In what context? We also have first amendment protection for that, and the right to petition the Government to redress our grievances.

Senator LEAHY. Simply serving in the military or in a public safety organization does not remove your rights of association.

Judge GINSBURG. I think that is quite correct. It doesn't mean that you have the same rights of association in the military that you would have in civilian life. There are undoubtedly restrictions, if you are a member of the military, that control you, but your constitutional rights don't end. They are fitted to the setting in which you are placed.

Senator LEAHY. Obviously, if we follow this to its logical conclusion, we are going to get into what is going to be a major debate

before the courts within the next year, so I will stop at that point. I would note for the record, for those who might, that they should review your dissenting statement in *Goldman* and your citing of Judge Starr's dissenting opinion.

To go back to your discussion with Senator Grassley and Senator Metzenbaum yesterday, you talked of the case of the professor who challenged the House and Senate on who was allowed to give prayers. You pretty well knew his first amendment claim would be denied, because of a prior Supreme Court case, but you wanted him at least to be heard. I believe the court of appeals dismissed his case, without hearing his constitutional arguments. Why did you think it was important for him to have that day in court?

Judge GINSBURG. I don't think it is a political judgment. I don't view the issue in terms whether I think it's important. Anyone who comes to court with a justiciable controversy has access to the court.

Senator LEAHY. Politically sensitive or otherwise?

Judge GINSBURG. Yes, judges in the first instance are not supposed to have any choice in that matter. If the case is of a judiciary nature, it is the judiciary's obligation to hear it, and it seemed to me that the professor qualified under the precedent that governed.

Senator LEAHY. Do you think the political question doctrine should not be used? Should the question be whether a person has a right to be heard?

Judge GINSBURG. I think the political question doctrine is much misunderstood. There are so many cases where what the Court is saying is, essentially, we look at this issue and it has been committed, textually committed, to another branch of the Government. You don't have to label that a political question. The Court has to examine the question to determine if the Constitution has given it over to another branch.

What I said in my discussions and debates with my colleague Judge MacKinnon on this subject is, you are really taking a merits-first approach to these questions. You are deciding on the merits that the Government is right, and then you are saying that it's a political question or there is no standing. But really, you have taken more than a peek at the merits. You have resolved the merits against the plaintiff and then justified the result as a door-closing decision.

Senator LEAHY. If it is any consolation to you, I am one member of the more political branch of the Government who agrees with you on that. I think you are right and I think the Court should not shy away from those issues.

Do you think there is a core political speech that is entitled to greater constitutional protection than other forms of speech?

Judge GINSBURG. That there is some kind of speech that is more protected than other kinds, I think there is no question about that. One kind of speech that is entirely outside the first amendment under current doctrine is obscenity. Commercial speech doesn't get quite the same protection as core political speech. Various expressions fall somewhere in between, like indecent, but not obscene speech.

So if you are asking me the question, is there only one kind of speech and is all speech protected to the same extent, I think the case law is clear that, no, that isn't the case.

Senator LEAHY. Senator Simpson and you touched a little bit on this yesterday, exploring whether Government can require recipients of Federal funds to express only those views that the Government finds acceptable.

In an FEC case last year, you said that: "Decisionmakers in all three branches of Government should be alert to this reality: Taxing and spending decisions—even those that might appear to offer the individual a choice or to leave her no worse off than she would have been absent Government involvement—can seriously interfere with the exercise of constitutional freedoms."

Let's take a few examples. Could the Government, for example, to further a policy in favor of promoting democratic participation, give out subsidies only to, say, Republican voters or only to Democratic voters?

Judge GINSBURG. Senator, I am so glad that you brought that up, because that issue came up yesterday at a point when I was, to be frank, very tired. I gave a glib answer that I should have qualified, an answer inconsistent with what I said in the *DKT* (1989) case. I said yesterday that the Government can buy Shakespeare and not modern theater. That answer still stands, but what the Government cannot do is buy Republican speech and not Democratic speech, buy white speech and not black speech, and that—

Senator LEAHY. Let's take it a little bit further, then. I thought you might want to elaborate on it a little bit, and that is why I thought I would ask the question today. Could the Government, to further a policy in favor of protecting the public from sexually explicit material, for example, prohibit libraries that receive public funds from making Alice Walker's "The Color Purple," or J.D. Salinger's "Catcher in the Rye" available to patrons, but allow something else?

Judge GINSBURG. I must avoid giving an advisory opinion on any specific scenario, because, as clear as it may seem to you, that scenario might come before me. Some of these matters are in a state of flux now, for example, what falls within this category of indecent speech, to what extent can it be regulated. I can state quite comfortably what is, to the extent that I comprehended what the current law is, but I must avoid responding to hypothetical, because they may prove not to be so hypothetical.

Senator LEAHY. Let's go into that a little bit. Hypothetically, could you give funds to a college and say, because we want to maintain the family, we don't want you to put anything in your sociology course about divorce or illegitimacy, and so on and so forth? We could pick up a dozen kinds of examples that have great sounding names from whatever funding body is using taxpayers' money. Or could the Government, to protect the integrity of a new computer highway or the Internet, say, well, you can use the network, but you can't put this type of political speech on it. Those are tough questions and I can see them coming before the Court.

But what general standard do you feel today, at least, the Government should apply to Government restrictions on speech tied to Federal funding? Is there a standard today?

Judge GINSBURG. We know that the most dangerous thing the Government can do is to try to censor speech on the basis of the viewpoint that is being expressed. We are uncomfortable with content regulation, generally, but particularly uncomfortable with attempts to certain statements of particular point of view.

I might mention the military base case, the *Spock* (1976) case: The Court said it was all right for the military to say no political speech on the base. But suppose the question had been, we will allow Republican and Democratic Party speech, but not Labor Party speech.

Now, that would have been a very troublesome thing for Government to be doing. It is one thing to ban the category, even though it is content-based regulation—no political speech. But if the Government were to say that we regard this speech as safe and that speech is unsafe, it would run up against the motivating force for the first amendment. Shortly after the Revolutionary War, there was a political cartoon that showed a Tory being carted off, and the caption read: "Liberty of speech for those who speak the speech of Liberty." That is what we have to be on our guard against. The message of the first amendment is tolerance of speech, not the speech we agree with, but the speech we hate.

Senator LEAHY. Some could say that is the underpinning of our whole democracy, to allow that kind of diversity, and no other country protects it as we do.

Senator Metzenbaum had asked you whether the right to choose is a fundamental right. Is there a constitutional right to privacy?

Judge GINSBURG. There is a constitutional right to privacy composed of at least two distinguishable parts. One is the privacy expressed most vividly in the fourth amendment: The Government shall not break into my home or my office without a warrant, based on probable cause; the Government shall leave me alone.

The other is the notion of personal autonomy. The Government shall not make my decisions for me. I shall make, as an individual, uncontrolled by my Government, basic decisions that affect my life's course. Yes, I think that what has been placed under the label privacy is a constitutional right that has those two elements, the right to be let alone and the right to make basic decisions about one's life's course.

Senator LEAHY. And absent a very compelling reason, the Government cannot interfere with that right?

Judge GINSBURG. Yes.

Senator LEAHY. I realize we are painting in broad strokes here, but am I correctly reflecting your answer?

Judge GINSBURG. The Government must have a good reason, if it is going to intrude on one's privacy or autonomy. The fourth amendment expresses it well with respect to the privacy of one's home. The Government should respect the autonomy of the individual, unless there is reason tied to the community's health or safety. We live in communities and I must respect the health and well-being of others. So if I am not going to accord that respect on my own, the Government appropriately requires me to recognize that I live in a community with others and can't push my own decision-making to the point where it would intrude on the autonomy of others.

Senator LEAHY. Judge, my time is up on this round, but I appreciate your answers, and I understand in some of them why you do not want to go further. I hope you understand, however, my reasons in asking them.

Judge GINSBURG. I do, Senator, and I thank you.

Senator LEAHY. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator.

Judge, I apologize for being out of the room for part of the questioning. The new nominee for the FBI came by to meet me and to see how quickly we could schedule a hearing, and it was suggested by one of my colleagues to whom I introduced the Director—as a matter of fact, my colleague from Pennsylvania—that, when we finish with you on Friday, we just start with him and keep going right through the weekend. But I do apologize for having been absent for about half an hour.

Let me suggest that in a moment we break until 10 after 12, break for 15 minutes, and then we will come back, with your permission, Judge, and Senator Specter will lead off the questioning, and then I believe Senator Heflin will follow. That will take us to about 1:15, at which time we will break for lunch until 2:30, and come back at 2:30 and continue with Senators Brown, Simon, Cohen, Kohl, Pressler, Feinstein, and Moseley-Braun, in a series of three.

Judge GINSBURG. With a break in between?

The CHAIRMAN. With a break in between, with a break every half hour or sooner, if you conclude that that would be preferable. As I said, we need to get up and stretch our legs. You are sitting there the whole time, and we appreciate it.

We will reconvene at 10 minutes after 12, in 15 minutes.

[A short recess was taken.]

The CHAIRMAN. Welcome back, Judge. The floor is yours, Senator Specter.

Senator SPECTER. Thank you very much, Mr. Chairman.

Judge Ginsburg, I was very much impressed with your opening statement yesterday when you talked about your background leading to your values. I would like to take just a moment at the outset to identify our commonality of background and values, because I think we may or may not have some differences as to the appropriate role of the Court on enforcing those values.

When you talked about discrimination, coming from a family background of one parent first generation and one the second generation, I understand that. Both of my parents were immigrants. When you talk about not having enough money to go to college, I can understand that. Neither of my parents went to high school.

And when you comment about having been in Pennsylvania and having seen the sign, "No Jews or dogs," I reflected as a 17-year-old graduating from high school in Kansas and the State university not having any fraternities which admitted Jews, or graduating from law school and finding employment opportunities shut off. The fact was that Jews were excluded. There weren't any references to dogs, however.

The concern about discrimination is one that I have always felt keenly on the issue of employing women. Shortly after you had

problems finding employment, I actively recruited women as assistant district attorneys in Philadelphia, starting with my election in 1965, and at one time had as many as 17 women, mostly as assistant district attorneys, and some as legal interns moving up to the rank of assistant D.A.

We had a rather remarkable case in 1968 in which we had an indeterminate sentence for women, a day to life, as opposed to a determinate sentence for a man, say 5 to 10 for robbery. And it was challenged on constitutional grounds, and I was the district attorney of the county, and I refused to defend it. I said it was wrong, confessed error and the State attorney general had to come in to handle the case.

When Henry Wade, the district attorney of Dallas, was sued in *Roe v. Wade*, I was sued by Ms. Ryan, *Ryan v. District Attorney Arlen Specter*. And I entered a statement, among others, that given all the serious crimes I had to prosecute, I wasn't going to get involved in the tough remedy of criminal sanctions on the abortion issue.

When you talk about the role of the Court and judicial activism, the concern that I have is that if the Court is with you, it is great; but I think about the *Dred Scott* Supreme Court, which perpetuated slavery, and the *Plessy v. Ferguson* Supreme Court, which kept discrimination and segregation in effect for more than a half-century. I think of the Supreme Court in the 1930's, where the strong conflict existed between the Court and Congress when legislation was invalidated by a super-legislature Supreme Court on substantive due process grounds. I think about some who today challenge *Marbury v. Madison*, with the Supreme Court being the ultimate decider of cases, some saying very seriously that the President and the Congress have as much authority to interpret the Constitution as the Court does, and some saying that there ought not to be judicial review by the Federal courts unless you adhere to original intent because there is no legitimacy.

Two of the Justices now sitting declined to answer questions on what I consider a rockbed principle about whether the Congress can take away the jurisdiction of the Supreme Court of the United States to decide constitutional issues. That is one of those matters for me on which there is no alternative answer, but two of the Justices have declined to respond when questions were asked of them.

When I read your writings—and I make a sharp distinction between your writings and your work on the court as I read your opinions, but it is a concern I have, and not exclusively as to what you would decide as a Justice but what you as an advocate would argue to the Court to decide as being within the range of the Court's power.

I am only going to pick one, perhaps two, and get to a very short question.

When you commented in the Washington Law Quarterly to this effect: "A boldly dynamic interpretation, departing radically from the original understanding, is required to tie to the 14th amendment's equal protection clause, a command that Government treat men and women as individuals, equals in rights and responsibilities and opportunities." And then concluding, referring to the judi-

cial anxiety, the "uneasiness judges feel in the gray zone between interpretation and alteration of the Constitution."

And after that unduly lengthy introduction, the narrow question I have for you is: Is it the role of the courts to upset decisions of legislators based on the jurist's own ideas about enlightened policy by bold, dynamic interpretation of the Constitution?

Judge GINSBURG. Senator Specter, may I first join in what the chairman has said, what your colleagues have said. I am so pleased that you showed the care and concern to be here and that you are looking so well.

Senator SPECTER. Judge Ginsburg, you were an inspiration to me, hastened my recovery. There was a real motivation.

The CHAIRMAN. Judge, there is no possibility we could hold a major hearing and Senator Specter not be here.

Judge GINSBURG. I could also say that I believe *Marbury v. Madison* (1803) was rightly decided. I said already yesterday that *Dred Scott* (1857) was wrong the day it was issued. There was no justification for it.

Senator SPECTER. I am glad to hear you say that because one nominee would not affirm *Marbury v. Madison*, and one nominee in the discussion in my office said, when I started off talking about *Marbury v. Madison*, "You know, Senator, that case wasn't very well reasoned." And I said, "No, I didn't know that."

Judge GINSBURG. Then I would also like to say that I prize the institution of judicial review for constitutionality. We have become a model for the world in that respect, and that is one of the reasons why I resist labels like "activism" and "restraint." I think it is a very precious institution that we have, and it should not be abused.

After World War II, nations in other parts of the world that never had judicial review for constitutionality as part of their tradition adopted models compatible with their own systems but inspired by what our Supreme Court has been in our society. That role needs to be guarded; it should be exercised with great care.

Now, the Washington University Law Quarterly article you mentioned was about the need for, or utility of an equal rights amendment. Why do we need an equal rights amendment when so many people have said the equal protection clause suffices? That was the topic of that article, was it not?

Senator SPECTER. Judge Ginsburg, it went beyond that, and it went to the point about having the Court extend what you categorized as a host of rights. It really was more in line with a statement you made at the second circuit judicial conference in 1976, where you put it this way: "The Supreme Court, by dynamic interpretation of the equal protection principle, could have done everything we asked today," and then, as an advocate, you had articulated a number of rights which you were looking for. So that I think it was beyond ratification of ERA. It was in your role as an advocate.

Judge GINSBURG. I don't know if my article in the Washington University Law Quarterly is here. I do recall the second circuit conference, and I do know that was a conference focused on the need for the utility of an equal rights amendment. I recall that that was a debate with Gloria Steinem and myself on one side and two gentlemen on the other side.

The Washington University Law Quarterly article, which somebody is going to try to get for me, was part of a series in the Washington University in St. Louis on the topic of equality. My specific topic was gender discrimination. I think the title indicated that the article dealt with the equal protection clause and the equal rights amendment as safeguards of the fair and equal treatment of women in our society.

Senator SPECTER. Judge Ginsburg, the title is "Sexual Equality Under the Fourteenth and Equal Rights Amendments."

Judge GINSBURG. Right. That is—

Senator SPECTER. The 14th amendment as well.

Judge GINSBURG. Right, yes. The article contrasted having an Equal Rights Amendment as distinguished from the equal protection clause as a guarantee of the equal citizenship of women before the law.

Senator SPECTER. Let us give you a copy of the article. We have an extra here.

Judge GINSBURG. Yes. This article is, as I said, an article in a symposium on the quest for equality. There was one on race, one on equal employment opportunity, one devoted to sexual equality under the 14th amendment and the Equal Rights Amendment.

That article, like the Second Circuit Judicial Conference talk, focused on two things: the equal protection clause as a guarantee of the equal citizenship of women versus the Equal Rights Amendment. That was the entire context of the article, and what I said there was this: It is part of our history—a sad part of our history, Senator Specter, but undeniably part of our history—that the 14th amendment, that great amendment that changed so much in this Nation, was not intended by its framers immediately to change the status of women. And it is part of history that the leading feminists of the day—Susan B. Anthony, Elizabeth Cady Stanton, Lucretia Mott—campaigned against ratification of the 14th amendment because it allowed a system to persist in the United States where women couldn't vote, they couldn't hold office, if they married they couldn't hold property in their own name, they couldn't contract for themselves. That is what life was like for women in the middle of the 19th century.

Times changed, and eventually, after nearly a century of struggle, women achieved the vote. They became full citizens. And many people thought that when women became full citizens, entitled to the vote, they had achieved equality. The vote should have qualified women as full and equal citizens with men, entitled to the same equal protection before the laws.

The position was that, yes, it took bold and dynamic interpretation in view of what the framers of the 14th amendment intended. The framers of the 14th amendment meant no change, they intended no change at all in the status of women before the law. But in 1920, when women achieved the vote, they became full citizens, and you have to read the Constitution as a whole, changed, as Thurgood Marshall said, over the years by amendment and by judicial construction. So it was certainly a bold change from the middle of the 19th century until the 1970's when women's equal citizenship was recognized before the law.

I remain an advocate of the Equal Rights Amendment for this reason. I have a daughter and a granddaughter. I know what the history was. I would like the legislators of this country and of all the States to stand up and say we know what that history was in the 19th century; we want to make a clarion announcement that women and men are equal before the law, just as every modern human rights document in the world does, at least since 1970. I would like to see that statement made just that way in the U.S. Constitution. But that women are equal citizens and have been ever since the 19th amendment was passed, I think that is the case. And that is what the Washington University Law Quarterly article is about. That is what the second circuit debate was about. And I do not think my statements should be applied out of context. This was a precisely focused article about women's entitlement to equal citizenship before the law.

Senator SPECTER. Judge Ginsburg, I quite agree with you about the equality principle as a matter of values and have been a sponsor of the Equal Rights Amendment for the time that I have been in the Senate. But I refer to the bold interpretation or your language on the alteration of the Constitution as raising the issue of the appropriate role of the Court because my concern is where we are going to be in the future. We can see the 21st century on the horizon. We have had a Constitution which has worked marvelously for 200 years, and we have to maintain it. And I know you are dedicated to that principle.

But a vital aspect of it is maintaining the appropriate role of Congress, and part of the language I read you was from your questionnaire where you limit later the Court's constitutional authority, but you start on the answer as to judicial activism by saying, "Beyond question, a judge has no authority to upset decisions of legislators or executive officials based upon the jurist's own ideas about enlightened policy or a personal moral view on what content an ambiguously phrased legal text should have."

Now, I am concerned about legislating a bit, which is the language which you had used in your article in the Cleveland Marshall Law Review. And when you talk about the doctrine of extension, I wonder why it wouldn't be a sounder course—and you got into this extensively with Senator Grassley—to do what courts do in many situations; that is, stay execution of their judgment for 90 days or 180 days, giving the legislative body, the Congress, an opportunity to decide whether husbands of servicewomen ought to have the same benefits as wives of servicemen.

I certainly would vote for that, but it would make me a great deal more comfortable so that you don't get involved in legislating a bit and a movement in the direction which may lead to an imbalance between the Court and the Congress.

Judge GINSBURG. Senator Specter, that technique is necessary and, as you know very well, has been used in situations like the *Marathon* (1982) case, where the Supreme Court upset the arrangement Congress thought it could make with respect to bankruptcy judges. It was used also in a case upsetting a jury system because it discriminated on the basis of sex, by leaving out women. I think it was a case from Alabama, it was *White v. Crook* (1966). The three-judge Federal district court said we obviously are not

going to stop all trials. Instead, we are going to give the legislature until the next session to come up with a new plan for calling jurors so that women will not be excluded. In settings like that, where it takes more than just temporarily putting someone in, or temporarily putting someone out, your point is essential.

I mentioned as the model for the decisions the Supreme Court made in this area Justice Harlan's opinion in *Welsh*. Justice Harlan didn't say, Mr. Welsh, you lose until Congress decides what it wants to do. I took the position I did as an advocate. It is a position nine Justices of the Supreme Court explicitly accepted in 1979. It is an area that is tightly cabined. It reaches only benefits conferred on one group, but denied to a similarly or identically situated other group.

There is a denial of equal protection that the Court has unanimously decided must be dealt with one way or another. It is not like constructing a new system for bankruptcy judges. It is not like having the clerk gear up to call more people to serve on juries.

I stand by the Supreme Court's unanimous decision on this point in *Califano v. Westcott* (1979), I ask you to read it, and I tell you that I go no less far and no further than the Court did in that case.

Senator SPECTER. Well, I know the *Welsh* case and I know Justice Harlan's concurring opinion, and I would only ask that, as a matter of deference among branches, that consideration be given to the stay concept, because you can leave the existing benefits in effect for a period of time, but I think we have explored it.

Let me move on to the subject matter of achieving the expanded women's interest in ways other than through constitutional interpretation, such as through legislation which would look to the remedies and the establishment of the values that we agree on in terms of having the Congress make the judgments.

I was interested in a comment made by Catherine MacKinnon and a group of women's rights activists which have been brought together by Jeffrey Rosen in an August issue of the New Republic, commenting that, in the 1980's, and then referring to your work in the seventies, "A new generation of feminist legal scholars have argued that the law should emphasize women's differences from men, rather than their similarities." And Catherine MacKinnon, in the Buffalo Law Review, in 1985, says, "You can be the same as men, and then you will be equal, or you can be different from men, and then you will be women."

There is a line of contention that more protections are necessary for women from bans on pornography to child-rearing benefits for mothers, but not for fathers, not equally for fathers, the greater protection that women need from child sexual molestation, where they are more frequently the victims, assaults and battery against the person, a form of rape or assault with intent to ravish. I would be interested in your thinking as to use of the legislative branch as some of the other women's advocates have articulated the views in the 1980's.

Judge GINSBURG. I think it is grand to use the legislative branch. What you discuss, Senator Specter, I think reflects a large generational difference.

If the legislative branch really knew what women needed \* \* \*. The lawmakers thought they did in the days of protective legisla-

tion. The legislative branch was used extensively, and the legislative branch said we will restrict the hours for women, but not for men, we will restrict night work for women, but not for men, we will restrict the jobs women can take, but not men, because we know better, we can protect women; they need to be protected from unhealthy and unsafe conditions, especially jobs that pay doubletime and the like.

The legislature was all over the place protecting women. My generation of women knew about that style of protection and suspected it. We had the sense, my generation had the sense, that that old-style protection was protecting men's jobs from women's competition.

So I come to legislative protection of women with a certain skepticism. I do so even today, because, although Senator Moseley-Braun is sitting there, most of the faces I see are not women's faces. I suppose if the legislature were filled with women and had only one or two men, and it was the women's judgment that the protection Catherine MacKinnon advocated was in order, I might trust that judgment to a greater extent than I would trust the old-style protective legislation. All that legislation, and there was a lot of it, was similar to old-style maternity leave, that said it's unsafe for you to be working when you are pregnant, so we will take away your job and send you home. That legislation was not genuinely protective, although "protection" was the label lawmakers used for it.

Senator SPECTER. Well, Judge Ginsburg, there are certainly a lot of efforts made by many of us in the Senate. Senator Biden is a leader on the protection of women against violence. We do have more women now. We do listen. I have a very activist wife who is a Philadelphia City Council member who is the toughest lobbyist I know, has more access to me. But I am interested in your thinking.

Let me move on to another line, because my time is close to expiring. The issue of law enforcement is a very important one, and I hope we have time to discuss some of those concepts. My own view is that we need to curtail the lengthy Federal habeas corpus proceedings, where the death penalty is not imposed or other penalties are not imposed, because of the deterrent effect of the death penalty, although I understand there are many people who have scruples in the other direction.

Let me ask you a question articulated the way we ask jurors, whether you have any conscientious scruple against the imposition of the death penalty?

Judge GINSBURG. My own view on the death penalty I think is not relevant to any question I would be asked to decide as a judge. I will be scrupulous in applying the law on the basis of the Constitution, legislation, and precedent. As I said in my opening remarks, my own views and what I would do if I were sitting in the legislature are not relevant to the job for which you are considering me, which is the job of a judge. So I would not like to answer that question, any more than I would like to answer the question of what choice I would make for myself, what reproductive choice I would make for myself. It is not relevant to what I would decide as a judge.

Senator SPECTER. The yellow light is still on, so I will ask you one more question, Judge Ginsburg. And that is, coming back to the Equal Rights Amendment—again, I emphasize my own cosponsorship and support for it consistently—every Congress since 1923 has considered the Equal Rights Amendment. It was passed by the House of Representatives in 1971, passed by the Senate in 1972, but it did not attain the requisite 38 votes for ratification.

Your writings consistently look to the ERA to solve some of the problems in adjudicating the interests of women, and my question to you is: Do you have any concern about an issue of legitimacy for the Supreme Court to identify new rights in the equal protection clause, in light of the failure of the passage of ERA, which is the way identified in the Constitution itself to establish new rights?

Judge GINSBURG. Senator Specter, I tried to answer that question before. I will try once more. The 14th amendment says that no State shall deny, neither the United States nor any State shall deny to any person within its jurisdiction the equal protection of its laws.

Before women were full citizens, before they could vote, maybe one could justify the lack of equal treatment. Ever since the 19th amendment, women are citizens of equal stature with men. The Equal Rights Amendment is a very important symbol, in my judgment, because it would explicitly correct the unfortunate history of the treatment of women as something less than full persons.

However, the Constitution has been corrected by the 19th amendment to make women full citizens. I can't imagine anyone not reading the equal protection clause today to mean that women and men are persons of equal stature and dignity before the law. I don't think that is at all an activist position with regard to the proper interpretation of the equal protection clause of the 14th amendment.

Senator SPECTER. Well, what you have just said appears to me to suggest that we might not need the Equal Rights Amendment.

Judge GINSBURG. I think Martha Griffiths, when she first supported the Equal Rights Amendment in a big way in the House, said if the courts had properly construed the equal protection clause of the 14th amendment, there would be no need for this Equal Rights Amendment.

In fact, the first Commission on the Status of Women, which I think Eleanor Roosevelt headed, was not enthusiastic about the Equal Rights Amendment. The Commission said it was not needed, because the courts would come in time to recognize that decisions holding that the State need not allow women to practice law, the State need not put women on juries, that those decisions are just wrong, incompatible with the statement that no State shall deny to any person the equal protection of the laws.

So the supporters of the Equal Rights Amendment, even when it passed Congress—Martha Griffiths and others—made the point that, if the courts had interpreted the equal protection clause to cover all of humanity, females as well as males, there would not have been a need for the amendment.

As time went on, when the Burger Court began to move in this area, the need for the amendment lessened in the practical sense. It still is important, I believe, in the symbolic sense. As I said be-

fore, every modern human rights document has a statement that men and women are equal before the law. Our Constitution doesn't. I would like to see, for the sake of my daughter and my granddaughter and all the daughters who come after, that statement as part of our fundamental instrument of Government.

Senator SPECTER. Thank you very much, Judge Ginsburg. I will work with you to try to get the Equal Rights Amendment passed.

Thank you, Mr. Chairman.

The CHAIRMAN. Judge, the last thing you need is a lawyer, or me, as your lawyer. But another way of saying what you said, as I have read all that you have written, I think about everything you have written, that if there were an Equal Rights Amendment, it clearly would have ended the debate as to what the 14th amendment meant. There would be no need to discuss it.

It is not incompatible with the 14th amendment to extend to women, as persons, the same rights as men. It would have ended the debate from the—I was going to say right, but that would not be correct—it would end the debate from those who suggest it didn't extend to women. There would be no argumentation left that they would have even for purposes of political discussion, let alone outcomes of cases in Federal courts or in the court system. Is that accurate?

Judge GINSBURG. That is exactly right, Mr. Chairman, and, on the legislature's part, it would have been a good way of keeping cases out of court, cases that should never have had to become Federal cases.

The CHAIRMAN. The last point I will make—and I thank the Senator from Pennsylvania for not only mentioning the violence against women legislation, which I drafted and have been fighting to get passed for 3 years now, and also being so incredibly helpful with me in that effort—I want to make it clear that the purpose of that—and I am going to ask you some questions about it when my turn comes—is to break down the barriers that continue to exist in the unequal application of the law.

A case in point: Police officers need not have someone swear out a warrant to arrest two people in a fight. If two men are standing on a corner in a fist fight, the police officer is going to arrest them both, regardless if either one swears out a complaint. In the vast majority of cases where a woman is bleeding from an orifice and a man is standing over her and the police are called, they turn to the woman and say do you wish to swear out a warrant. And when she stands there at 110 pounds, looking at a 230-pound man, knowing that if she says yes, once he gets out on bail he may beat the living hell out of her again, they demand of her before they arrest, to swear out a warrant. They don't do that with men.

There are a lot of things that aren't law, but practice. The Violence Against Women Act is intended to level the playing field. It is not intended in a paternalistic way to protect our women. That is not the purpose of it.

I will get back to that. I just didn't want to let that go in terms of being compared to other attempts in the past by all-male legislative bodies to protect women.

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

The CHAIRMAN. That's exactly right.

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

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

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

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

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

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

Senator Heflin.

Senator HEFLIN. Thank you, Mr. Chairman.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The CHAIRMAN. We know the problem.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.

Judge GINSBURG. I thank you for your kind words.

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

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

#### AFTERNOON SESSION

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

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

Senator BROWN. Thank you, Mr. Chairman.

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

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

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

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

I suspect another basis for it is simply that it is tough to function in society without this assumption. It would be tough to get convictions without it.

But I noticed in the original case, the 1789 case, that at the time that was ruled, there were only 27 Federal statutes on the books. Clearly, that is different than our circumstances today. At last count I think there were some 26,000 pages of the United States Code, which, of course, excludes State laws. There were 128,900-some odd pages of the Code of Federal Regulations, and my impression is that this year the Federal Register will print 70,000 pages of notices and regulations that are new.

In doing a quick calculation, if one were conscientious and concerned with their duties as a citizen to know what the law was, and thus to abide by it, I thought if you read 300 words a minute, which is a pretty good pace for regulations, 60 minutes an hour with no breaks, 8 hours a day with no coffee breaks, 5 days a week with no holidays, 52 weeks a year with no vacations, you would have read somewhere in the neighborhood of 31,980 pages of the Federal Register, leaving you well short of half of the new pages printed every year.

The CHAIRMAN. Just think how long that hearing would take.  
[Laughter.]

Senator BROWN. I give you this background because I would be interested in your thoughts as to whether or not it is fair to insist that ignorance of the law is no excuse, when clearly what was once accomplishable by a conscientious citizen when that doctrine was first applied in the United States is beyond even remotely being possible now.

Judge GINSBURG. That question, Senator Brown, should be addressed first and foremost to people who sit in your forum and not in mine; that is, you can, in the statutes you pass, write in intent and knowledge requirements, and you often do. Sometimes courts have to determine what intent Congress meant, what knowledge the individual must be shown to have had. Sometimes you do speak with a clear voice, and judges appreciate it when you do. Other times we are not clear on exactly what intent requirement Congress contemplated, and then we do our best to try to determine what you meant.

But lawmakers surely should advert to and address the matter. When they expose individuals to a regulatory regime, they should be explicit about the intent or knowledge requirement. A difference based on the consequences may be in order. It is one thing to send someone to prison for violating a law that person didn't know existed. It is another simply to subject a person to an injunctive order requiring compliance with the law. In between those would be some kind of monetary exaction.

In this area, courts take their instructions from the legislature, which has a choice on state-of-mind issues—absolute liability, liability without fault, negligence, knowledge, intent, all that is for the legislature to say. But every citizen should be mindful that we are subject to so much more law than we once were.

Senator BROWN. I appreciate that. Of course, the Romans, when they looked at this question, they came with a little different view, I think, than perhaps our common law developed. The Romans rec-

ognized that someone in society might have an obligation or the ability to understand what the laws were, and others who had not been educated or had other problems would not have the same level of knowing what the law was ascribed to them.

I guess my question is not necessarily the wisdom of this body or of Congress making those decisions. I guess my question is: In light of the deluge—my own words—of statutes and regulations, where we as a Congress have assumed that people are aware of the law, does that trouble you, and do you see any avenues of relief in the Constitution?

Judge GINSBURG. Well, one thing is information, and it depends whether we are talking about the business community or individuals. From time to time, I receive from various law firms in town newsletters describing the latest developments in labor law or ERISA law, for example. Such law firms endeavor to keep their clients informed about new developments in the law.

In other areas, the flow of information is less satisfactory. We talked about Stephen Wiesenfeld's case involving the mother's benefit which became a parent benefit. When Wiesenfeld's case was reported in the press, I received many letters, not simply from fathers but from mothers, who didn't know that benefit was available. The Social Security Administration has tried to increase the availability of knowledge of what the law is—not only what the law requires of you, but the benefits the law provides for you.

Nowadays at funeral homes, at banks, information is accessible about benefits available on death. But I was disconcerted about the number of people who didn't know and, therefore, missed out on benefits because the limitation period for filing had passed.

We now have modern means of communication to spread information. Public service announcements on TV can be useful in that way. All involved with the law—government officers and private persons—should attempt to find solutions to the problem of individuals not knowing what the law is, what the law requires of them, and the benefits provided for them.

Senator BROWN. I understand that, and I guess my inquiry was a little more focused in light of 26,000 pages of the United States Code and 129,000 pages of Federal regulations in force. We can all understand it is a useful legal fiction if you are a law writer to assume that everyone is assumed to know the law.

I guess my question is: Does the Constitution afford any protection against that legal fiction because of the voluminous nature of the laws, the incredible breadth of laws on the books now, and regulations on the books? Does the Constitution provide any protection to citizens that may inadvertently violate a law that they had no idea existed?

Judge GINSBURG. I can't answer that question in the abstract. If it were to come before Court in the guise of a specific case where a party said the law is exposing me to a penalty, it is unfair, unjust, it violates due process, I would have the concrete context and the legal arguments that would be made on one side or the other. But, again, I would like to emphasize that this Constitution is the Constitution for the Congress of the United States, and before any law is passed, every legislator should be satisfied that, in his or her judgment, the law that has been proposed is compatible with con-

stitutional limitations. The Constitution is our fundamental instrument of government, and it is addressed to this body before it is addressed to the courts. We get it only when a citizen or person complains that Congress has, in effect, violated the highest law.

Senator BROWN. I appreciate the nature of your answer and the limitations, and I suspect one of the reasons we have a Court is that the Founders of our country knew the limitations of the legislative body, or at least suspected them.

But are you intrigued with this? I don't mean to bother you with abstractions, but it strikes me that with the very volume of what we have attempted to do in the way of regulating, to me it is an intriguing question that is a difficult one that I think at least raises substantial issues. I don't mean to put words in your mouth, but are you troubled by the breadth of what we have attributed to people in the way of knowledge?

Judge GINSBURG. And not simply in the way of laws. Think of what this body puts out, think of the massive regulations put out by the agencies. Even at the court level, each year the courts produce more volumes of the Federal Reporter than they did the year before. There was a day—when I was in law school and, later, when I was a law clerk—when I skimmed all the Federal advance sheets, the F.Supp.'s and the F.2d's. That would be impossible for me to do nowadays. I can just about manage U.S. Law Week each week.

Yes, we continue to make more and more law, both in the legislatures and the courts, and the agencies produce more than both of those put together.

Senator BROWN. I always suspected that those who came in number one in their class at Harvard or Columbia did things like that, but I didn't know. [Laughter.]

You have attracted some attention by observing with regard to *Roe v. Wade* that perhaps a different portion of the Constitution may well deserve attention with regard to that question; specifically, if I understand your articles correctly, the equal protection clause of the Constitution rather than the right to privacy evolving from the due process right contained in the 14th amendment.

Would you share with us a description of how your writings draw a relationship between the right to choose and the equal protection clause?

Judge GINSBURG. I will be glad to try, Senator. May I say first that it has never in my mind been an either/or choice, never one rather than the other; it has been both. I will try to explain how my own thinking developed on this issue. It relates to a case involving a woman's choice for birth rather than the termination of her pregnancy. It is one of the briefs that you have. It is the case of *Captain Susan Struck v. Secretary of Defense* (1972). This was Capt. Susan Struck's story.

She became pregnant while she was serving in the Air Force in Vietnam. That was in the early 1970's. She was offered a choice. She was told she could have an abortion at the base hospital—and let us remember that in the early 1970's, before *Roe v. Wade* (1973), abortion was available on service bases in this country to members of the service or, more often, dependents of members of the service.

Capt. Susan Struck said: I do not want an abortion. I want to bear this child. It is part of my religious faith that I do so. However, I will use only my accumulated leave time for the childbirth. I will surrender the child for adoption at birth. I want to remain in the Air Force. That is my career choice.

She was told that that was not an option open to her if she wished to remain in the Air Force. In Captain Struck's case, we argued three things:

First, that the applicable Air Force regulations—if you are pregnant you are out unless you have an abortion—violated the equal protection principle, for no man was ordered out of service because he had been the partner in a conception, no man was ordered out of service because he was about to become a father.

Next, then we said that the Government is impeding, without cause, a woman's choice whether to bear or not to bear a child. Birth was Captain Struck's personal choice, and the interference with it was a violation of her liberty, her freedom to choose, guaranteed by the due process clause.

Finally, we said the Air Force was involved in an unnecessary interference with Captain Struck's religious belief.

So all three strands were involved in Captain Struck's case. The main emphasis was on her equality as a woman vis-a-vis a man who was equally responsible for the conception, and on her personal choice, which the Government said she could not have unless she gave up her career in the service.

In that case, all three strands were involved: her equality right, her right to decide for herself whether she was going to bear the child, and her religious belief. So it was never an either/or matter, one rather than the other. It was always recognition that one thing that conspicuously distinguishes women from men is that only women become pregnant; and if you subject a woman to disadvantageous treatment on the basis of her pregnant status, which was what was happening to Captain Struck, you would be denying her equal treatment under the law.

Now, that argument—that discrimination, disadvantageous treatment because of pregnancy is indeed sex discrimination—was something the Supreme Court might have heard in the *Struck* case, but the Air Force decided to waive her discharge. Although the Air Force had won in the trial court and won in the court of appeals, the Supreme Court had granted certiorari on Captain Struck's petition. At that point, perhaps with the advice of the Solicitor General, the Air Force decided it would rather switch than fight, and Captain Struck's discharge was waived. So she remained in the service, and the Court never heard her case.

In the case the Court eventually got, one less sympathetic on the facts, the majority held that discrimination on the basis of pregnancy was not discrimination on the basis of sex. Then this body, the Congress, in the Pregnancy Discrimination Act, indicated that it thought otherwise.

The *Struck* brief, which involved a woman's choice for birth, marks the time when I first thought long and hard about this question. At no time did I regard it as an either/or, one pocket or the other, issue. But I did think about it, first and foremost, as differential treatment of the woman, based on her sex.

Senator BROWN. I can see how the equal protection argument would apply to a policy that interfered with her plan to bear the child. Could that argument be applied for someone who wished to have the option of an abortion as well? Does it apply both to the decision to not have an abortion, as well as the decision to have an abortion, to terminate the pregnancy?

Judge GINSBURG. The argument was, it was her right to decide either way, her right to decide whether or not to bear a child.

Senator BROWN. In this case, am I correct in assuming that any restrictions from her employer to that option, or to that right, would be constrained by the equal protection clause?

Judge GINSBURG. Yes. In the *Struck* case, it was a woman's choice for childbirth, and the Government was inhibiting that choice. It came at the price of an unwanted discharge from service to her country. But you asked me about my thinking on equal protection versus individual autonomy. My answer is that both are implicated. The decision whether or not to bear a child is central to a woman's life, to her well-being and dignity. It is a decision she must make for herself. When Government controls that decision for her, she is being treated as less than a fully adult human responsible for her own choices.

Senator BROWN. I also appreciate that you simply presented this not as the only approach, but as an option that was looked at.

With regard to the equal protection argument, though, since this may well confer a right to choose on the woman, or could, would it also follow that the father would be entitled to a right to choose in this regard or some rights in this regard?

Judge GINSBURG. That was an issue left open in *Roe v. Wade* (1973). But if I recall correctly, it was put to rest in *Casey* (1992). In that recent decision, the Court dealt with a series of regulations. It upheld most of them, but it struck down one requiring notice to the husband. The ruling on that point relates to a matter the chairman raised earlier.

The *Casey* majority understood that marriage and family life is not always all we might wish them to be. There are women whose physical safety, even their lives, would be endangered, if the law required them to notify their partner. And *Casey*, which in other respects has been greeted in some quarters with great distress, answered a significant question, one left open in *Roe*; *Casey* held a State could not require notification to the husband.

Senator BROWN. I was concerned that if the equal protection argument were relied on to ensure a right to choose, that looking for a sex-blind standard in this regard might also then convey rights in the father to this decision. Do you see that as following logically from the rights that can be conferred on the mother?

Judge GINSBURG. I will rest my answer on the *Casey* decision, which recognizes that it is her body, her life, and men, to that extent, are not similarly situated. They don't bear the child.

Senator BROWN. So the rights are not equal in this regard, because the interests are not equal?

Judge GINSBURG. It is essential to woman's equality with man that she be the decisionmaker, that her choice be controlling. If you impose restraints that impede her choice, you are disadvantaging her because of her sex.

Consider in this connection the line of cases about procreation. The importance to an individual of the choice whether to beget or bear a child has been recognized at least since *Skinner v. Oklahoma* (1992). That case involved a State law commanding sterilization for certain recidivists. Sterilization of a man was at issue in *Skinner*, but the importance of procreation to an individual's autonomy and dignity was appreciated, and that concern applies to men as well as women.

Abortion prohibition by the State, however, controls women and denies them full autonomy and full equality with men. That was the idea I tried to express in the lecture to which you referred. The two strands—equality and autonomy—both figure in the full portrayal.

Recall that *Roe* was decided in early days. *Roe* was not preceded by a string of women's rights cases. Only *Reed v. Reed* (1971) had been decided at the time of *Roe*. Understanding increased over the years. What seemed initially, as much a doctor's right to freely exercise his profession as a woman's right, has come to be understood more as a matter in which the woman is central.

Senator BROWN. I was just concerned that the use of the equal protection argument may well lead us to some unexpected conclusions or unexpected rights in the husband.

You had mentioned earlier, I thought, a very sage observation, that provisions that, if I remember your words correctly, provisions that limited opportunities have been sometimes cast benignly as favors, that we ought to take a new look at these things that are thought as favors in the past. I think that is a fair comment and a very keen observation.

I guess my question is: If you look at these provisions of law that treat women differently than men and decide that they genuinely are favorable, not unfavorable, or practices that are favorable, not unfavorable, does this then mean that they are not barred?

Judge GINSBURG. Senator, that sounds like a question Justice Stevens once asked me at an argument. I said I had not yet seen a pure favor. Remember, I come from an era during which all the favors in the end seem to work in reverse. I often quoted the lines of Sarah Grimke, one of two wonderful sisters from South Carolina, and they said to legislators in the mid-1900's, I ask no favor for my sex, all I ask of my brethren is that they take their feet from off our necks. That is the era in which I grew up. I had not seen a protection that didn't work in reverse.

Many of today's young women think the day has come for genuinely protective laws and regulations. Were the legislature filled with women, I might have more faith in that proposition. But, yes, you can see the difference, you can distinguish the true favor from the one that is going to have a boomerang effect, maybe so. I reserve judgment on that question.

Senator BROWN. My time is out, but I look forward to chatting with you again. Thank you.

The CHAIRMAN. He's going to see if he can think of a favor for you, Judge.

Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

Judge, you are holding up very well in this endurance test that you are going through. I was pleased when Senator Biden, in his very first question, when you responded, you used the much neglected ninth amendment to the Constitution. I think it has a great many implications.

The ninth amendment, as I am sure you know, came about as a result of correspondence between Madison and Alexander Hamilton. Madison was persuaded that we should have a Bill of Rights, and Alexander Hamilton said if you spell out these rights, there will be people who say these are the only rights that people have, and so the ninth amendment was added—the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

When Senator Leahy asked you about privacy you mentioned the fourth amendment. I think that privacy is also clearly in the third amendment.

Judge GINSBURG. Yes.

Senator SIMON. Troops can't be quartered in your home. I think it is there by implication in the ninth amendment. But we had a nominee before us who said, when the ninth amendment says certain rights shall not be construed to deny or disparage others retained by the people, that they probably meant by the States, rather than the people. Now, that's a very, very important distinction. That nominee was not approved by this committee, I might add.

But when the ninth amendment says "by the people," do you believe it means by the people?

Judge GINSBURG. The 10th amendment addresses the powers not delegated to the United States and says they are reserved to the States. The 10th amendment deals with the rights reserved to the States. The ninth amendment—and you have recited the history—speaks of the people. There was a concern, as you said, that if we had a Bill of Rights, some rights would surely be left out. Therefore, it was better, some thought, just to rely on the fact that the Federal Government was to be a government of enumerated, delegated powers, and leave it at that.

The ninth amendment is part of the idea that people have rights. The Bill of Rights keeps the Government from intruding on those rights. We don't have a complete enumeration in the first 10 amendments, and the ninth amendment so confirms.

Senator SIMON. So that there is no misunderstanding, you believe, when it says "retained by the people," it means retained by the people?

Judge GINSBURG. It doesn't mean the States. That's the 10th amendment, yes.

Senator SIMON. I would like to also follow through on the public opinion question that Senator Biden and Senator DeConcini stressed. In your opening statement, you quote the great Justice Cardozo as saying justice is not to be taken by storm, she is to be wooed by slow advances, and a couple of other quotes that we heard here.

The *Dred Scott* decision was probably a very popular decision in 1857. President Buchanan said we have now solved the slavery problem. But Chief Justice Taney and the others in the majority made a mistake. In the *Korematsu* decision regarding Japanese-

Americans who were taken from the west coast, you had public opinion clearly on the side of the President of the United States, Congress, the military. You had a Lt. Gen. John DeWitt who, in explaining the need for taking 120,000 Japanese from the west coast, said the Japanese race is an enemy race, and while many second- and third-generation Japanese born on U.S. soil possess U.S. citizenship and have become Americanized, the racial strains are undiluted.

Then in one of the most unbelievable nonsequiturs in history, he said the very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken.

What we needed at that time and did not have was a Supreme Court that said we are willing to stand up to all public opinion. The gradualist approach simply would not work in the *Korematsu* decision, nor could the Court say, well, Congress can change this.

I am sure you agree the *Korematsu* decision was a tragic decision.

Judge GINSBURG. Yes, I agree entirely. I think *Dred Scott* (1857), by the way, was a tragic decision, a wrong decision. I don't think it was such a popular decision with a good part of the country that didn't believe a person who was in a place where he could be free could be returned to a state of bondage. I don't believe that *Dred Scott* was a popular decision throughout the United States.

Senator SIMON. It was divided opinion, but probably if polls had been taken at the time, it would have been a popular decision.

Judge GINSBURG. *Korematsu* (1944) was indeed a tragic decision. One of the dissenting Justices called it legalized racism. That might have a euphemism for what we now recognize that case represents. Americans of German ancestry and Americans of Italian ancestry were not treated that way.

Senator SIMON. But the basic point, and the one that I think by implication you are suggesting, is that there are times when the Court has to stand up to public opinion, and it may be 99 percent of the time on the other side. But the Court has to be courageous and lead. It cannot sometimes be gradualist in its approach.

Judge GINSBURG. That was certainly the position Justice Murphy took. As you know, Justice Black wrote the opinion for the Court.

Senator SIMON. Hard to believe, but he did.

Judge GINSBURG. His opinion upheld the racial classification.

Senator SIMON. Yes.

Senator METZENBAUM [presiding]. Pardon me for interrupting, Senator Simon. There is a rollcall vote on.

Senator SIMON. OK.

Senator METZENBAUM. We have 6 minutes to get there. Judge Ginsburg, I think we will take a 10-minute recess because obviously everybody else has left for the rollcall vote. I think we had better do so as well.

We will recess for a period of 10 minutes.

[A short recess was taken.]

The CHAIRMAN. The hearing will come to order, please.

Let me explain, for those who may be watching this proceeding, why we all got up and left. There is a debate on the Senate floor on President Clinton's national service legislation, and Senator Kennedy is what we call the floor manager of that legislation, re-

quired to be on the floor of the Senate during the duration of its consideration. That is why he is not here, and that is why all of us got up and went to vote.

We were not abandoning you, Judge. I know you know this, but for those who are in the audience, it may be useful for them to understand why we all started to trickle out of here. I was worried that some of them who are new to the Senate might think it was a fire drill and they weren't informed or something.

Senator MOSELEY-BRAUN. It is true.

The CHAIRMAN. It is true.

I also want to tell you, as I got up and left—I should do this, Judge, but as we got up and left, I was heading over in the subway car with everyone else to vote. Senators Moseley-Braun and Feinstein got in the car with me and said, "Now we know what you think about equal protection." I said, "What do you mean?" She said, "You got up knowing there was a vote, went to vote, and left us there." [Laughter.]

That was not my intention. We were supposed to work this out, Judge, that half of us would leave so you could continue the questioning and half would come back.

But, at any rate, none of that is on your time, Senator.

Senator SIMON. I thank you.

The CHAIRMAN. You have 22 minutes and 17 seconds left, and the floor is yours.

Senator SIMON. I thank you very, very much, and I will use all 22 minutes and 17 seconds.

The CHAIRMAN. And more if you need it, Senator.

Senator SIMON. All right.

You have been asked by both Senator Metzenbaum and Senator Leahy about the *Lemon* test on the question of religion and Government. Through the years, we have had nominees here who have all been asked and have all given answers one way or another. My staff checked out four nominees I have asked this question of who now sit on the Court. One was very critical of the *Lemon* test, and he continues to be critical of the test on the Court. One was very supportive, and he continues to be supportive. One said, "I have no personal disagreement with the test," but he has voted consistently in opposition to the *Lemon* test. And one was not clear, and he has not been clear since he has been on the Court.

And I guess I would put you down in the not clear position right now. Is that an incorrect assumption on my part?

Judge GINSBURG. Senator Simon, only to this extent: It is the governing test, and my approach is the law stays the law unless and until there is a reason to displace it. So I recognize *Lemon v. Kurtzman* (1971) as the governing test. It is the law that is, and I am not in doubt about that.

I do know that these are very difficult cases. They come to the Court with a record, with arguments. I have informed the committee that I have had only one case involving, on the merits, the establishment part of the religion clauses. So I am going to devote very careful thought to the matter. I am going to read a lot more than I have read up until now. I appreciate the values involved in making these decisions. More than that, I am not equipped to say.

Senator SIMON. Is it misreading what you are saying to say you have not had a chance to dig into this as thoroughly as you eventually will obviously have to, but that on the basis of your limited knowledge of it, you have no difficulty with the *Lemon* test now? Is that incorrect?

Judge GINSBURG. I think that is an accurate description. It is also accurate to say I appreciate that the United States is a country of many religions. We have a pluralistic society, and that is characteristic of the United States.

Senator SIMON. And if I could just add, it is not only characteristic, I think it is very, very important that we maintain this. Obviously there is some working together. When the local Methodist church is on fire, no one says separation of church and state, we can't call out the fire department. But we have been careful in avoiding some of the mistakes that some other countries have made.

The CHAIRMAN. Senator, on my time, because we have gone through this a number of times, may I ask a question off of the last question you just asked?

Senator SIMON. You certainly may.

The CHAIRMAN. Hopefully it will help clarify rather than confuse.

The *Goldman* case to which the Senator referred, the case which is popularly known by most people as allowing a soldier to wear a yarmulke while in uniform, you were a dissenting view in the circuit. Your view on appeal—

Senator COHEN. Mr. Chairman, would you clarify? Disallow the wearing of—

The CHAIRMAN. In other words, the judge took the position that a soldier could wear a yarmulke while in uniform, notwithstanding a military prohibition against such use, she arrived at that decision using reasoning I will not go into now, but it relates to this question.

Senator COHEN. Was that a majority or minority opinion?

The CHAIRMAN. Her opinion ended up being the majority opinion of the Supreme Court—

Judge GINSBURG. I wish it did. It—

The CHAIRMAN. No, I mean, excuse me. Your opinion ended up being the minority opinion when it hit the Supreme Court, when it was decided.

Judge GINSBURG. It was the majority opinion of Congress.

The CHAIRMAN. Yes. [Laughter.]

That is a good way of putting it.

Senator HATCH. I know.

The CHAIRMAN. But you reasoned and argued, reasoned in your opinion when it was before you, that the soldier in question should be able to, under the free exercise clause—explain the case to me. [Laughter.]

Judge GINSBURG. Captain Goldman had been in service for many years, and one day the base commander said, "You're out of uniform," because he was wearing a yarmulke, which was his religious observance. The failure of the service to accommodate to that deviation from the uniform regulation was made the basis of a case that came before my court. It came before a three-judge panel. I was not on that panel.

The panel unanimously ruled that uniform regulations are, by their very nature, arbitrary and that the courts were not to second-guess the military in this decision.

There was then a petition to rehear the case en banc. I voted to rehear the case en banc. Three people did, but the majority voted against rehearing the case.

I did not write a full opinion in the *Simcha Goldman* (1986) case. I wrote a statement saying the case should be reheard by the full court. I said the full court should not embrace the argument that a uniform is a uniform, so there could be no deviation. The case, I thought, was worth fuller attention.

The CHAIRMAN. So you ultimately did not reach a conclusion whether or not it violated his constitutional right.

Judge GINSBURG. I just said we should not leave the final word for our court with the three-judge panel; we should rehear the case; the full court should rehear it.

The CHAIRMAN. Would there have been any question in your mind about the need to rehear it had the *Lemon* test been in place?

Judge GINSBURG. Because this was a free exercise case, it involved the accommodation that the Government would have to make to the free exercise of Captain Goldman's religion.

The case fell in the military category. The panel reasoned that the military setting is different. Many rights people enjoy, including free speech rights, are curtailed for members of the military.

That was the main line of the panel's position in Captain Goldman's case. The question ultimately decided by Congress was: In the interest of allowing Captain Goldman to freely exercise his religion, could the military be called upon to make this accommodation to him? Congress realized the free exercise right more fully than the courts did in that instance, and that issue, I think, is now well settled.

The CHAIRMAN. Thank you, Senator.

Senator SIMON. Of course, Mr. Chairman. If I might just add, I spoke on the floor on that issue. The question is: In addition to the fundamental religious question, the free exercise question, does it in any way impair the military? It has not impaired the Israeli military. The Indian Army has Sikhs who wear a different head-dress. They are among the finest members of the military of India. So that on a military ground, also, it did not have much validity.

If I may shift to a totally different subject so I get a little more of an understanding of where you are, in your opening statement you accurately described Judge Learned Hand as one of the world's greatest jurists. No other non-Supreme Court member has had as much influence in the history of our country as Judge Learned Hand. You had one unhappy experience with him, but you had the privilege of meeting him and knowing him—slightly, anyway. I wish I could have had that experience.

What made Judge Learned Hand such a distinguished jurist?

Judge GINSBURG. His tremendous learning, his facility with the English language so that he could describe things so extraordinarily well; his great love of the law as a craft; his genuine caring about people. Some people think he was too restrained and moderate in his judging, but he believed in the people and in the importance of keeping liberty alive in the hearts of men and women.

It is unfortunate that he had a blind spot, that he felt uncomfortable about dealing with a woman as a law clerk. I think you have heard the story of my acquaintance with Judge Hand.

Senator SIMON. I did. That is what I was referring to.

Judge GINSBURG. But he was a man of a different age. He had been brought up not to relate to women in that kind of setting. I have told the story many times of sitting in the back of the car when my judge drove Judge Learned Hand home. That great man would say, en route home, anything that came into his mind. He would sing songs with words I didn't even know. I once said to him, "How can you carry on this way with me in the car and yet not consider me to be your law clerk?" And he said words to this effect: "Young lady, I am not looking you in the face."

Those were ancient days. There was no title VII, people were up front about feeling uncomfortable dealing with women, and that was that.

Senator SIMON. One other aspect that you did not—and I agree with everything you said about Judge Learned Hand. I think the other aspect is he was a great champion of civil liberties.

Judge GINSBURG. Yes, he was, and his decision in the *Masses* (1917) case was one of the bright lights in what we see now as a very unhappy episode in the history of this country—the post-World War II days of the Red scare.

Senator SIMON. If you were to pick a role model on the Court, living or dead, what role model or composite role model would it be?

Judge GINSBURG. I will stay away from the living.

Senator SIMON. All right. [Laughter.]

Judge GINSBURG. We are just now doing a history of our Court, a circuit history. A question came up about talking to law clerks for this history. We drew a line with the living. We said to the author, you may talk to the law clerks about the judges who can't complain about it anymore, but not clerks who served the living, at least not without the judge's permission.

The CHAIRMAN. That is one of the incredible values of life tenure. [Laughter.]

Judge GINSBURG. I would also like to restrict my response to this century. That will make it easier, because if I didn't I would have to include Chief Justice John Marshall; he helped make us one Nation, indivisible. If we go on to liberty and justice for all, I would put together two people who spoke originally in dissent but whose position on the first amendment is well accepted today, Brandeis and Holmes.

I would like to include Cardozo, but as you know, his career was principally on the New York Court of Appeals. He was known for his common law judging, and less known for constitutional adjudication. He served only 6 years on the Supreme Court.

I would add to the list Justice Harlan because, as I explained before, of the judges in my time, there is no one—whether you agree with him or disagree with him—who was more honest in telling you the grounds of his decision, the competing interests, and why he came out the way he did. I spoke of his total honesty in my discussion of the conscientious objector case.

So if I could take those three and put them together, that would be some Justice, wouldn't it?

Senator SIMON. It would be. And I would like to add Learned Hand to that list, if I could, aside from that—

Judge GINSBURG. Yes; I thought we were limiting it to Supreme Court Justices, but certainly yes. I would like to put Henry Friendly there, too.

Senator SIMON. You have been a champion of the cause of women and civil liberties for women, and Senator Grassley earlier mentioned that in our laws we have finally included Congress which has set up its own provisions for enforcement of antidiscrimination. There are problems, and under the separation of powers I think it is proper for Congress to set up its own.

I serve on the Subcommittee on Disabilities, and my colleague, Senator Tom Harkin, has written me a letter, and let me just read two paragraphs from that letter. And I would like to enter the full letter in the record, Mr. Chairman.

It says:

Unfortunately, no Federal law prohibits discrimination on the basis of disability or, for that matter, race, gender, religion, or national origin by our Federal courts. It is my understanding that our Federal district and appellate courts have developed model policies regarding complaints of discrimination by applicants and employees. However, these policies do not specify the standards that must be used to determine whether discrimination has occurred, do not specify what remedies are available, assuming discrimination has been found, and do not include the right to appeal to the courts. Furthermore, there are no policies governing nondiscrimination with respect to access by the general public.

With respect to the Supreme Court, it is my understanding that there are no written policies or procedures whatsoever prohibiting discrimination in employment and in access to Supreme Court proceedings and for remedying discrimination.

[The letter of Senator Harkin follows:]

U.S. SENATE,  
COMMITTEE ON LABOR AND HUMAN RESOURCES,  
*Washington, DC, July 14, 1993.*

Hon. PAUL SIMON,  
*U.S. Senator, Dirksen Senate Office Building, Washington, DC.*

DEAR PAUL: Over the years, we have worked together to broaden the civil rights and expand opportunities for individuals with disabilities. Section 504 of the Rehabilitation Act of 1973 (which, among other things, prohibits discrimination by Federal agencies in the conduct of their business) and the Americans with Disabilities Act are two of the most important pieces of legislation impacting on the lives of people with disabilities.

Unfortunately, no Federal law prohibits discrimination on the basis of disability (or for that matter race, gender, religion, or national origin) by our Federal courts. It is my understanding that our Federal district and appellate courts have developed model policies regarding complaints of discrimination by applicants and employees. However, these policies: do not specify the standards that must be used to determine whether discrimination has occurred; do not specify what remedies are available assuming discrimination has been found; and do not include the right to appeal to the courts. Furthermore, there are no policies governing nondiscrimination with respect to access by the general public.

With respect to the Supreme Court, it is my understanding that there are no written policies or procedures whatsoever prohibiting discrimination in employment and access to Supreme Court proceedings and for remedying discrimination.

I request that when Judge Ruth Bader Ginsburg comes before the Judiciary Committee next week regarding her nomination to serve as an associate Justice on the U.S. Supreme Court, you inform her about this situation and ask her what she will do to address it, if confirmed by the Senate.

Sincerely,

*TOM HARKIN, U.S. Senator.*

Senator SIMON. Now, I don't want to ask you to turn things around overnight. I would like to get any observations you have on this, and I would like to, 6 months from now, send a letter to the new Justice of the Supreme Court and ask her her response at that point and what you feel at that point maybe could or should be done.

Judge GINSBURG. I don't know what the Supreme Court regulations are. I do know that the Supreme Court in many respects has been treated differently by Congress. For example, I participated in the decision of a case involving picketing at the Supreme Court. The Supreme Court was not covered by the law that covered the rest of the Federal courts. The case was called *Grace v. Burger* (1985).

The decision, both in our court and the Supreme Court, upheld the first amendment claim of a woman who was standing, if I remember correctly, on the sidewalk in front of the Court carrying a sign that had the words of the first amendment written on it. She was removed for doing that.

I can't speak about what the Supreme Court's own rules are now. But, as you have said, Congress has accepted fair employment practices standards for itself. I hope, if we meet 6 months from now, I will be informed on the subject of your inquiry and can give you an enlightened answer.

Senator SIMON. And it does seem to me that not only the Supreme Court, but the lower courts ought to have some process by which, if a person feels that he or she has been aggrieved, that he or she can go to someone and know that there is some process established, some procedures established at all court levels. I will write to you, if my staff reminds me, 6 months from now.

Senator LEAHY. I will.

Senator SIMON. Senator Leahy will remind me.

I was pleased in reading your background about, first of all, the fact that you have gone through some things that have been tough, so that you understand the problems that people who face difficulties have, particularly your statement yesterday of riding along as a child and you saw the sign "no dogs or Jews," and your work in a social security office in Oklahoma, where you had to deal with the problems that the American Indians had.

Theodore Roosevelt, in a 1913 speech—this is after he had been President—said this:

Our judges have been, on the whole, both able and upright public servants, but their whole training and the aloofness of their position on the bench prevent their having, as a rule, any real knowledge of or understanding sympathy with the lives and needs of the ordinary hard-working toiler.

I think that is a danger for jurists, and probably no place is at a greater danger than on the U.S. Supreme Court, where you really are isolated, and where, when you meet people, they will tend to be people of power and wealth, and not people who are unemployed, not people who have many of the problems that Americans face. Have you reflected on this at all, either in your present tenure or future tenure? How can this nominee make sure that she stays in touch with the real problems people have out there?

Judge GINSBURG. Yes, Senator, I have and I know just what you mean. You can even see the difference between the Federal court

on which I serve and the courts across the street. The U.S. Court-house tends to be a rather quiet, empty place. If you go across the street to the District of Columbia Superior Court, you will see a great mass of people—all kinds of legal business, all kinds of problems, including heart-rending family problems. The place is teeming; it is quite a contrast to the quieter halls of the Federal court.

One of the things that I have done every other year with my law clerks, more often, if they are so inclined, is to visit the local jail and Lorton Penitentiary, which is the nearest penitentiary. We visited St. Elizabeth's, the facility for the criminally insane, when it was a Federal facility. Now it is a District facility, so we haven't gone there in the past few years.

I do that to expose myself to those conditions, and also for my law clerks. Most of them will go on to practice in large law firms specializing in corporate business, and won't see the law as it affects most people. That is one of the things I do to stay in touch.

Senator SIMON. I would simply commend that practice, first of all. And as you prepare to take that oath and when you get together with your family—your son from Illinois, particularly—I hope that you in some way plan to continue that kind of an exposure. I think it is important. I think it is important for the members of the U.S. Senate. I think it is important for Supreme Court Justices.

Judge GINSBURG. It took me a long time to arrange for a tour at Alderson, which is one of the nearest women's Federal facilities. That was also instructive and moving for me.

Senator SIMON. There are people who will have to assist you in that, because of the nature of your new position, but I think it is something that is a desirable thing.

In the case of *O'Donnell Construction Co. v. District of Columbia*, you voted against a set-aside, and that was done, as I understand it, on the basis of the *Croson* decision of the U.S. Supreme Court. The *Croson* decision has resulted in significant damage to opportunities for a lot of minorities and women in the field of business. We have come a long way in providing opportunities, but we still have a long way to go, as you know.

I had my staff dig out something from one of my books. Abraham Lincoln, incidentally, as a State legislator in 1832, came out for the women's right to vote almost a century before that happened nationally. But when he was in the legislature, one of the bills passed, fairly typical, was the act for the Wabash and Mississippi Railroad which included this provision:

In case any married woman, infant, idiot or insane person shall be interested in any such land or real estate, the circuit court or justice of the peace shall appoint some competent and suitable person to act for and in behalf of such married woman, infant, insane person or idiot.

We have made progress, but we still have progress to make. I was interested in your decision in the *O'Donnell* case, whether that is solely based on response to the Supreme Court, or is there a philosophical base to your decision also?

Judge GINSBURG. I concurred in a decision that was written for a unanimous panel. I think the author was Judge Randolph. Our decision was controlled by *Croson* (1989). The District's plan measured up even less than the Richmond plan did in *Croson* itself. As

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.

The CHAIRMAN. It comes with age and senility on my part, Senator. I apologize for yesterday again. I imagine I will be apologizing for the remainder of the year. Please go ahead.

Senator KOHL. Judge Ginsburg, a brief question.

First, earlier this year, as perhaps you recall, during the months when President Clinton was searching for a replacement for Justice White, one of Justice Scalia's law clerks, who was seeking to find out who he would prefer as a colleague, asked the Justice whether he would rather be stranded on a desert island with Lawrence Tribe or Mario Cuomo. And as I am sure you remember, Justice Scalia answered quickly and distinctively, perhaps, Ruth Bader Ginsburg.

I have two questions. First, Judge, do you want to be stranded on a desert island with Justice Scalia? Do you want to be stranded on an island with him? [Laughter.]

The second question is do you see yourself on the same island of legislative intent that Justice Scalia now lives on?

Senator HATCH. You can refuse to answer those questions, Judge.

Judge GINSBURG. I can say one thing about Justice Scalia: He is one of the few people in the world who can make me laugh, and I appreciate him for that.

On legislative intent, I think I answered the question earlier. We have had on our court interesting colloquies about the difference in our attitude toward legislative history. Wherever I am and wherever he is, I think we will continue to have that interesting difference of view on the appropriateness of seeking help from legislative history.

Senator KOHL. So I take it you don't feel safe on the same island, you don't see yourself on the same island of legislative intent as Justice Scalia?

Judge GINSBURG. I don't on the question whether conduct is expression.

Senator KOHL. All right. Judge Ginsburg, I am still trying to get a better sense of the way your experience as a person has impacted your vision as a judge and as a potential Supreme Court Justice.

As I reviewed your testimony and the conversation we had several weeks ago, I was struck by how directly you have been touched by injustice. You were, as we know, a victim of gender discrimination, and you told us yesterday of having been denied admission to some resort, because dogs and Jews were not allowed there. Of course, you told us your family left Europe, in part, to flee discrimination and persecution.

Now, up until Chairman Biden introduced me yesterday, I myself have never experienced gender discrimination. But I also remember seeing those "no dogs and Jews allowed" signs in the community where I went to camp as a kid.

As we all know, today, access to society's opportunities and institutions is still denied to many. For example, kids who can't vote, who contribute money to politicians, are still left out. The growing disparity between rich and poor in our country is barely being addressed. And while great progress has been made in civil rights, many minorities and women are still denied full equality.

I am in public life partly because I want to do what I can to ameliorate these conditions. What I would like to do is to discuss with

you your motives, your commitment, and perhaps some of your passions.

As an advocate, you, on behalf of all women in our society, slowly scaled the mountain of injustice. As part of that process, you turned to the courts, and it was there that you sought decisions to extend the current range of rights for women. So I am a little bit confused about the tension between the somewhat restrictive role you describe for judges and the much more dynamic role that you adopted as an advocate.

This now is the third confirmation hearing that I have been involved in, and in each of them, Judge Ginsburg, the nominee has told us or asked us to ignore certain aspects of their personality or their previous life-work experience, and you appear to be doing somewhat of the same thing. You ask us to judge you almost only as a judge, and not to consider very much of your experience as an advocate. But I think we need to judge you as a total person, a person who felt discrimination and fought against it, as a woman who cares about the future of her children and grandchildren, in short, as a whole person.

I, for one, don't believe that you can shed your total life experiences and your personality when you sit at the bench. I know you do not have and should not have an agenda in terms of specific issues, but I wonder if you have an agenda in terms of broad concepts.

When you were an advocate, you sought to persuade the courts to listen to what were then novel arguments about gender discrimination. And as a Justice, when you sit with your colleagues to decide what cases to hear, you will for that moment also be an advocate, seeking to persuade your colleagues to accept certain cases which raise certain kinds of issues.

As a Justice, will you, as you did as an advocate, encourage the Court to hear cases whose facts allow you to entertain novel claims and break new ground? Or will you be inclined to be a moderate incrementalist in that capacity, as well, encouraging the Court to hear cases whose facts raise more narrow issues and restrict the range of a decision?

Finally, what I am trying to say, Judge, is that, as a lawyer, you helped build a ladder which allowed women to climb into the courts and begin the process of achieving equality. As others seek to construct their ladder, do you feel any special obligation to help them get their day in court?

Judge GINSBURG. Senator, I have not asked you to overlook, nor have I apologized for, anything I have done. Some of the best work I have done is reflected in my briefs. But I am a judge, not an advocate.

I am reminded of the story that Judge Constance Baker Motley tells. She was once asked to recuse herself from a title VII case, because it was a sex discrimination case and she was a woman, so surely she should not sit on the case. She reminded the lawyer who made that application that there are only two choices, either you are a man or you are a woman. She said she would decide that case fairly and no one should think she is disqualified.

Of course, the role of a judge is different from the role of an advocate. An advocate makes the very best case she can for her cli-

ent. A judge judges impartially. A judge at my level takes what is put on her plate. We don't have a choice.

You are right in pointing out that the Supreme Court's jurisdiction is discretionary, and the obligation of those judges is to take the cases that most need a national solution. The Court doesn't sit there to take the easy cases. You don't need a Supreme Court for the easy cases. The Justices must look at what issues need to be decided most for the Nation, and that's the basis on which the judges make their decisions about what to take.

I can't answer any more precisely than that, but I think one of the reasons the Supreme Court was eager and urged Congress to remove the mandatory jurisdiction was that the Court then could take the cases that most needed a national solution.

Senator KOHL. Well, I think that is a very good answer. When you and your fellow Justices, in the event you are confirmed, will be sitting, you will be deciding every year collectively, and you will have the right and the obligation and the opportunity to exercise the judgment as to which cases the Court will take. Just as a simple matter of fact, I think we need to point that out and understand that, and when you make those decisions, you know you will be exercising judgments, of course. And you said you will take those cases which will most appear to need some national solution in our society.

So let me ask you: What do you think are the major problems and challenges that face our society? I just throw out things like racism, sexism, guns, crime, drugs. Give us some indication as to what you think some of these major unresolved problems are that we are facing in our society today.

Judge GINSBURG. You listed a number of the ones that would be on the top of anyone's list. But the Court doesn't deal with problems at large—crime or violence in our society. What comes to the Court is a particular case raising an issue in a particular context; unlike legislators, courts don't entertain general issues. They resolve concrete cases.

The Court also considers timing. Sometimes the Court believes it will be able to judge better, if it has more returns from the other Federal courts. That is, perhaps the first time an issue is presented, the Court shouldn't take the case. Perhaps the Court would benefit from the views of several judges on the question. If all of the judges who have heard the matter are in agreement, the Court might decide that it need not take up the issue.

If there is a division among lower court judges, then there may be a greater need for Supreme Court disposition. The idea is sometimes called percolation—having an issue aired in the lower courts for a time, having commentators speak to it, so that when the Court ultimately judges the case, it will be better informed to make the decision. In some areas, that is a wise thing to do.

One of the cases in which I participated—a decision the Supreme Court reversed—might serve as an example. The case involved the fourth amendment. The Supreme Court had decided that if police officers stop a car, open the trunk and find a suitcase in it, they can't open the suitcase without a warrant.

Cases then trooped before the lower courts involving other containers in cars—cardboard boxes and plastic bags, for example.

Lower courts began to draw a "luggage line"; some applied a "worthy container" doctrine to determine when police officers needed a warrant. One was needed for a leather suitcase, for sure; lower courts were not so sure about lesser containers.

My court, in that time of uncertainty, got the case of a leather pouch and a paper bag, side-by-side in a car trunk. The three-judge panel held that the police needed a warrant before they could open the leather pouch, but didn't need a warrant to open the paper bag, because it was a flimsy, unworthy container.

I wrote an opinion for the full court saying we have now seen an array of container cases, going from the leather suitcase to the lowly paper bag, and we can't expect police officers to make worthy container judgments on the spot. Either you can open a container or you can't without a warrant. Because the Supreme Court had held that police officers could not open a suitcase without a warrant, my court held police could not open any closed container without a warrant.

The Supreme Court said you have persuaded us that police officers should not be expected to draw luggage lines on the spot, but you are wrong about the ultimate solution. Once police officers have reason to stop a car, they can open the trunk and inspect anything in it without a warrant. That was a situation in which it was at first thought that police, and then courts, could distinguish between containers on the basis of their character. By the time the issue got to the Supreme Court, the Court saw that a "worthy container" rule would not work.

The Court might not have seen that in the very first case. It took a string of cases in the lower courts—there really were cardboard box and plastic bag cases—all kinds of container cases. So that is an example of percolation. The Supreme Court was better informed, I think, in making the ultimate decision because the issue had been considered in the circuits for some years and the Court could take the variety of lower Court opinions into account when it made its final decision.

Senator KOHL. I know how much you care for your grandchildren. It is perfectly obvious to all of us who have seen this confirmation hearing, and it is a great thing.

As you know, what we are doing without their ability to represent themselves is imposing an enormous tax burden on them. We are building it up year by year, and they have no way to respond, to react, to protest, to vote us in or out. They just sit there and see it happen. And we all know that someday they are going to have to pay a price for that.

How can they be represented by the courts? Is there any way that your court can represent them? There is taxation without representation, an enormous burden of taxation without representation. Does that in any way strike you as something that the courts might have a right to take a look at someday?

Judge GINSBURG. I think you must represent them and their parents must represent them, and we all must represent them. All persons should care about the next generation. In a democracy, the people and the legislators must care about what is happening to the next generation.

Senator KOHL. All right. Judge Ginsburg, Justice Brandeis once said that you can judge a person better by the books on their shelf than by the clients that they have in their office. So I am asking you what is on your shelf. Could you tell us a little bit about your reading habits, the kinds of books you read, what book you most recently read?

Judge GINSBURG. I can tell you the two books I most recently read. I don't know that these are representative, but most recently I read "Wordstruck" by Robert McNeil, and Marian Wright Edelman's book, dedicated to her children, "The Measure of Our Success."

I haven't been doing heavy reading in these last 5 weeks apart from reviewing over 700 of my opinions, to recall what I said in them, and refreshing my recollection of various areas of Federal law.

My husband is a voracious reader. He often selects books for me. He knows what I would enjoy. Every once in a while, I choose something for myself, like "The Bean Tree," which I recently read and enjoyed. But when my husband reads a book he knows I would particularly like, he says, "Read this one," like "Love in the Time of Cholera," which I adored.

Senator KOHL. Do you read a great deal of fiction or nonfiction, or is it equal?

Judge GINSBURG. I probably read more fiction because I deal every day with so much nonfiction.

Senator KOHL. All right. Judge Ginsburg, if confirmed, you will be replacing Justice Byron White, of course. What are your thoughts on Justice White's career on the Court? In what ways do you think you might be like or different from the person that you are most likely to be replacing?

Judge GINSBURG. The differences I think are obvious. I surely do not have his athletic prowess. [Laughter.]

He is very tall, and I am rather small. I have tremendous admiration for him. I hope I am like him in dedication to the job and readiness to work hard at it.

I can tell you that he has been so grand and thoughtful. He called me the day of the nomination, and called me at least twice while cleaning up—he is moving his chambers—to ask me whether I would like him to save for me this or that document, items he thinks would be particularly useful for a new Justice. He has already sent me some pages with the advice, "Don't read this now, but read it a month from now."

He is a very caring, wonderful person. I would like to say something about Justice White that few people appreciate. It has been said many times here that I argued six cases in the Supreme Court and prevailed in five. If it had been up to Justice White, I would have prevailed in all six because he voted for me every time. He was the only one who did, although I am happy to say that Justices Brennan and Marshall came close in that one case the Court decided against my client. So I feel a particularly strong affinity to Justice White.

Senator KOHL. That is very good. Since your nomination, Judge Ginsburg, there have been reams and reams of information that have been printed and impressions that have been printed about

you. Anything that you have read that has struck you particularly as being reflective of the kind of a person you are? Or don't you read these things? Don't they interest you? How would you describe, just in general terms, the person that you would like us to know today on the eve of what may be your confirmation as a Supreme Court Justice? Recognizing that this is probably the last time that the American people will ever have a chance to glimpse you as a person and what you would like them to think most of all when they think of you.

Judge GINSBURG. I would like to be thought of as someone who cares about people and does the best she can with the talent she has to make a contribution to a better world.

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

The CHAIRMAN. Thank you.

We will now take a brief break and then come back, and we will finish with our three distinguished colleagues. We will take these in the order of three, and then we will close down for the day, Judge. So we will take now a 10-minute break. Let's try to come back at 25 after, maybe about 13 minutes, and then we will start with Senator Pressler when we come back, then Senator Feinstein, then Senator Moseley-Braun.

[A short recess was taken.]

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

Senator Pressler, the floor is yours.

Senator PRESSLER. Thank you very much.

Judge, as I mentioned to you in the meeting in my office, in my State and in the Western part of the United States there are a lot of questions about Indian jurisdiction and problems between non-Indians and Indians on or near reservations. And I subsequently sent you a series of questions that I might ask.

I might say that I also wrote to all the lawyers in my State and asked them for suggested questions, and they sent back lengthy responses about what I should ask. I have stacks of their letters here somewhere. I am going to have to write all of them a thank-you note. If they watch this, they might be disappointed if I don't ask their question. But I don't think I can ask you all the questions they sent because some of them have been covered. But many of the questions they sent did involve tribal jurisdiction and some of the problems that affect Native American people.

Now, the Constitution in article I, section 8, gave Congress the power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes. Over the years the Federal Government has employed various policies to structure its relations with the tribes. Federal policy toward the tribes has run the gamut from waging war against them to viewing them as dependent beneficiaries of a Federal trust relationship, creating reservations for them, allotting individual tracts of land to their members, attempting to assimilate them into the dominant culture, terminating their tribal status, to the present time affording them greater self-determination.

Apart from the right or wrong of any of these policies, the fact of the matter is that my constituents, Indian and non-Indian, must live with the present-day realities descended from these policies.

These realities lead to litigation that comes before the courts for resolution.

Let me say that it is not only in South Dakota, but I read in the paper that Connecticut even has a dispute over Indian lands, and I believe other east coast States have unresolved Indian questions. So it isn't strictly a Western issue.

But, first of all, do you take an expansive or restrictive view of tribal sovereignty?

Judge GINSBURG. I take whatever view Congress has instructed. Senator, Congress has full power over Indian affairs under the Constitution, and the Supreme Court has so confirmed, most recently in *Morton v. Mancari* (1974). Judges are bound to accord the tribes whatever sovereignty Congress has given them or left them, and as a judge, I would be bound to apply whatever policy Congress has set in this very difficult area. Control is in the hands of Congress, and the courts are obliged to faithfully execute such laws as Congress has chosen to enact.

Senator PRESSLER. Now, what type of analysis might you apply in deciding the legal boundaries of tribal sovereignty?

Judge GINSBURG. I am not equipped to respond absent information about the particular case. Without the benefit of briefs and arguments, all I can say is that I would attempt faithfully to follow the law as laid down by Congress, taking account of the precedent in point.

Senator PRESSLER. What weight would you give to each of the following when deciding cases involving disputes with the Indian tribes in view of what the Constitution says? Treaties between the tribes and the Federal Government that have been written over the years. We have a trust relationship between the Federal Government and the federally recognized Indian tribes. And, finally, the power of Congress to legislate matters relating to Indians and Indian tribes.

Judge GINSBURG. As far as treaties are concerned, Congress can abrogate treaties with the Indian tribes, and to the extent Congress has not done so, the treaties would be binding on the Executive.

And your next inquiry concerned?

Senator PRESSLER. There are treaties and there is the trust relationship. I believe the Secretary of the Interior is the trustee for the American Indians, and there is a special relationship between the Federal Government and federally recognized Indian tribes.

Judge GINSBURG. The Court made clear in the *Cherokee Nation* (1831) case that when Congress indicates in a treaty or a statute that the Government is to assume a trust relationship with a recognized tribe, the Court will then apply that policy. And with respect to the power of Congress to legislate, the Supreme Court has consistently recognized that Congress has full power over Indian affairs.

So my answer is that this is peculiarly an area where the courts will do what Congress instructs, recognizing that these are very difficult questions for the legislature to confront and resolve.

Senator PRESSLER. Perhaps the No. 1 complaint I hear from my constituents in Indian country, both Indian and non-Indian, is in the area of law enforcement. The Federal Government, while it has the authority in Indian country to prosecute minor crimes, chooses

not to do so given limited resources. Assaults, thefts, beatings, and vandalism, crimes falling outside the purview of the Major Crimes Act, which confers Federal jurisdiction, are routinely unpunished because of jurisdictional voids or checkerboard jurisdictions so complicated that it is impossible for the law enforcement officer to know who has jurisdiction to take action over any given crime. It varies given the type of crime, the legal description of the land it was committed on, and the Indian blood level or tribal affiliation of both the victim and the suspect.

Into this legal jungle, we have sent four different jurisdictional layers of law enforcement—local, State, Federal, and tribal—to keep order. The problem is that we have no set of rules with which to work. It is not practical to have a court hearing every time they need to determine who has the authority to take action. As a result, action is often not taken.

When I meet with tribal chairmen, which I do frequently, this frequently is cited as one of the most pressing problems facing Indian people today. They want tough law enforcement but cannot get it. I hear the same from non-Indians living in or near Indian country.

In a case which illustrates such problems, *Duro v. Reina*—it is a 1990 case—the Court held that Indian tribes could not exercise jurisdiction over Indians who committed misdemeanor crimes on the tribe's reservation if the violator was not a member of the tribe exercising jurisdiction. As the State had no jurisdiction over such individuals and Federal law enforcement generally declined to exercise jurisdiction in this area, many felt a jurisdiction void had been created by the Court. While Congress later abrogated *Duro*, the episode starkly highlights the jurisdictional problems that occur in law enforcement in Indian country.

I guess my questions are: Can you envisage a way State authorities might be able to exercise jurisdiction in Indian country in those instances where law enforcement voids appear to exist?

Judge GINSBURG. Congress can certainly give the States such authority. The example that you gave, the *Duro v. Reina* (1990), is a case on point. In Congress' judgment, the courts got it wrong and Congress corrected their error. And with respect to the question you just asked, if Congress so chooses, it can give the States that law enforcement authority.

Senator PRESSLER. Given the problems that the current patchwork jurisdiction nightmare presents for people living in Indian country, that is on or near reservations, do you feel it is possible to reconcile these disparate law enforcement situations through clearer Court rulings, or is specific congressional action required?

Judge GINSBURG. I can't address that question in the abstract. Clearer Court decisions are always desirable. But out of the context of a specific case, I am not equipped to give you a more precise answer.

Senator PRESSLER. Should there be limited Federal court review of tribal court decisions, as is the case with State courts?

Judge GINSBURG. Again, Congress has plenary authority over Indian affairs and it can authorize Federal courts to review tribal court decisions. Whether Congress should do so is a judgment the

Constitution commits to the first branch, not to the third branch, of government.

Senator PRESSLER. Now, Federal allotment policies around the turn of the century divided up Indian reservations, giving tracts of land to individual Indians. In many cases, these individual allotments were sold in fee to non-Indians. We now have the situation where many acres of non-Indian fee-own land lie within the borders of Indian reservations.

This has created a checkerboard ownership pattern, with non-Indians owning some land, Indians owning other parcels, and other land held in trust by the Federal Government for tribes. This situation has prompted many court cases which often must resolve the question of whether the State or the tribe has jurisdiction over non-Indians or non-Indian lands.

What is your view of how the courts can clarify issues arising out of the checkerboard jurisdictional patterns in Indian country?

Judge GINSBURG. Again, Congress prescribes the jurisdiction, and I would apply the law as Congress declares it. I can't offer any policy-based view on this issue, because the question is one that is committed to the Congress.

Senator PRESSLER. As you now, beginning in the late 1800's and continuing to the early 1900's, Congress and the President opened many of the reservations in the West to non-Indian settlement. In the process, non-Indians were granted patents in fee for their lands. According to the Supreme Court in the *Duro* case, the 1990 Supreme Court case, the population of non-Indians on reservations generally is greater than the population of all Indians, members and nonmembers.

This series of questions is intended to deal with the status of non-Indians on the reservations. Can you describe for me the importance of Indian self-government in the constitutional framework?

Judge GINSBURG. Congress has not been perfectly consistent in dealing with that question. Sometimes, as you pointed out in your opening statement, Congress has sought to eliminate or curtail tribal self-government, and other times, notably in more recent times, it has sought to strengthen tribal self-government. Fostering self-government seems to be the current trend, although some statutes still limit tribal sovereignty. Again, these are legislative decisions for the Congress to make.

Senator PRESSLER. Indian tribes do not allow non-Indians to participate in their elections, to serve in tribal office, or to serve on tribal juries, generally speaking. In view of these facts, do you see a principled basis for allowing an Indian tribe to impose civil fines and forfeiture against non-Indians who reside on the reservation with regard to activities on the land owned by non-Indians?

Judge GINSBURG. Again, this seems to me peculiarly a policy question committed to the judgment of Congress, and it is the function of judges to apply whatever solution the legislature chooses to enact.

Senator PRESSLER. Do you see a principled basis upon which Congress can delegate to tribes the power to exercise jurisdiction over non-Indians, especially non-Indians who are residents of the reservation?

Judge GINSBURG. This question, too, raises policy matter that calls for a judgment by the legislature. Judges would be obliged to apply whatever law Congress enacts, but I am not equipped to comment on a policy question that is so clearly committed to the legislative branch.

Senator PRESSLER. In the area of Indian civil rights, in the Supreme Court case of *Santa Clara Pueblo v. Martinez*, the U.S. Supreme Court held that suits against a tribe for violation of the Indian Civil Rights Act may not be brought in Federal court. As a result, individual tribal members, although citizens of the United States, are limited to relief, if any, in their respective tribal court systems. Many tribal governments do not provide for a court system independent of the executive, creating the possibility of intimidation by the executive leadership.

Several years ago, I cosponsored legislation with Senator Hatch which would have permitted individuals who had exhausted their remedies in tribal court for violation of the Indian Civil Rights Act to bring an action in Federal court. This measure did not become law. Thus, people turned to the Supreme Court. Should Native Americans be entitled to the same constitutional protections afforded to all Americans in our Federal courts?

Judge GINSBURG. Again, all I can say is that Congress has full power over Indian affairs, and the Federal courts will follow the policy Congress sets in this area.

Senator PRESSLER. Now, are you aware of any Supreme Court civil rights discrimination cases involving Indians? And what is your view of these cases?

Judge GINSBURG. In *Morton v. Moncari* (1974), it was argued that the category "Indian" was a racial classification. The Court held that, given the history of our country, the category "Indian" was not racial but political.

Senator PRESSLER. In a recent Supreme Court decision, *South Dakota v. Bourland*, decided a month ago, the Court held that Indian tribes did not have the power to regulate the hunting and fishing of non-Indians on fee-owned land within the boundaries of the Cheyenne River Indian Reservation that had been taken by the Federal Government when it constructed a flood control project. Do you have any comments on that case and its significance in the area of tribal jurisdiction?

Judge GINSBURG. That case is a precedent that may require interpretation in cases that will arise in the future. It would not be proper for me to comment on how that precedent will be interpreted in the next case, when the next case may be before a court on which I serve.

Senator PRESSLER. Do you feel the Court was correct in basing its analysis of the case of *Montana v. United States*, which is a 1981 case, which held that the tribal power did not extend to the regulation of hunting and fishing by nonmembers on reservation land owned in fee by nonmembers of the tribe?

Judge GINSBURG. Senator, I feel obliged to give the same response to that question. It calls for interpretation of a precedent likely to figure in a future case.

Senator PRESSLER. The ninth circuit, in *Washington Department of Ecology v. U.S. Environmental Protection Agency*, held that

States could not regulate the activities of an Indian tribe in operating a solid waste project, only the Federal Government can regulate the operation of such facilities on Indian reservations. Do you have any thoughts on whether an Indian tribe can be made to comply with environmental regulations of a State, whose regulations are more stringent than those of the Federal Government?

Judge GINSBURG. This is a matter that might come before me, if this nomination is confirmed. I would have to decide it in the context of a specific case, and I can't preview or forecast my decision.

Senator PRESSLER. The Indian Gaming Act mandates that the States negotiate in good faith with the tribes in establishing compacts regulating reservation gambling. The statute does not define good faith nor set out much direction for what is required by either party.

As you know, Indian gaming has become a controversial issue in many States. What are your views with respect to the ability of Congress to mandate that these two sovereigns negotiate in good faith, without providing significant direction to either?

Judge GINSBURG. The Indian Gaming Act is a new and much litigated law. Cases concerning that legislation may well come before me, so at this time I am not in a position to comment on it.

Senator PRESSLER. In the 1970's, when I was a member of the House, I was quoted by the Supreme Court, albeit in a footnote, because they wanted some legislative history. I had helped the Sioux Tribes by working for legislation that allowed them to go back into court enabling them to file suit in the Court of Claims for compensation for the Black Hills of South Dakota, the doctrine of res judicata and collateral estoppel notwithstanding.

After the passage of that legislation, the U.S. Supreme Court rendered a lengthy opinion, *United States v. Sioux Nation of Indians*, which held, in part that with passage of this legislation, Congress' mere waiver of the res judicata effect of a prior judicial decision rejecting the validity of a legal claim against the United States does not violate the doctrine of separation of powers.

The Court went on to rule in favor of the Sioux Tribes on the basis for the case, holding that an 1977 Act of Congress effected a taking of tribal property, property which had been set aside for the exclusive use and occupation of the Sioux by the Fort Laramie Treaty of 1868. That taking implied an obligation on the part of the Government to make just compensation to the Sioux Nation.

The money awarded for the Sioux claim to the Black Hills has been appropriated and placed in a trust account. The judgment, with interest, now amounts to more than \$300 million. A plan to use and distribute the money must be agreed upon by the tribes, before the money can be put to good use by the Native Americans entitled to the judgment. I would like to see the award distributed, but the lack of unanimity on the part of the tribes as to whether to accept the award has prevented this from occurring.

What is your view of the importance of *United States v. Sioux Nation of Indians* in the area of Indian land claims?

Judge GINSBURG. Senator, *Sioux Nation* (1980) is a well-known and very significant case. As you mentioned, it resulted in one of the largest judgments for an Indian tribe in the history of our country, and it righted what many people considered to be a very

old and a very grave historical wrong. Also, it set down some clear guideline for handling Indian just compensation claims. It brought some clarity to an area that was notably murky.

With regard to the current situation—the distribution of the proceeds—that is a matter that may very well be back in the lap of the Court, so I can't comment on that part of it.

Senator PRESSLER. Do you regard monetary compensation as awarded by the Supreme Court as an equitable remedy to settle Indian land claims?

Judge GINSBURG. Again, that is the very issue that may be coming up. The adequacy of monetary relief is what some people are challenging.

Senator PRESSLER. Do you see any need to depart from the traditional approach the Court has used in deciding Indian land claims?

Judge GINSBURG. Again, that will be the very question at issue, if the case does come back to the Court. So I can offer no comment beyond recognizing the importance of that precedent, both in terms of the size of the award and the guidelines it laid down for just compensation.

Senator PRESSLER. Moving away from the Indian jurisdictional questions, another question that several lawyers in my State suggested I ask involves wetlands. The Federal Government frequently takes productive farmland out of production and classifies it as a wetland. Wetland determinations facilitate certain environmental and wildlife management objectives.

In my view, the application of wetlands regulations, the determination of what does and does not constitute a wetland approaches absurdity at times. However, the definition of what constitutes a wetland is not my concern today. Rather, the Federal Government's designation of wetlands causes farmers in my State to lose income due to the fact that their land has been taken out of production.

How do you square the Federal Government's regulation of wetlands with the fifth amendment's prescription against taking private property for public use, without just compensation?

Judge GINSBURG. Senator, we know that the Government cannot take, but it can regulate, and the point at which regulation becomes a taking is one of the hottest issues before the Court at the moment. The Supreme Court most recently said in the *Lucas* (1992) case that if the regulation effectively deprives the owner of the entire value of the land, then even though the law is phrased as a regulation rather than a taking, the owner would be entitled to just compensation.

There must be dozens or scores of cases in which litigants are seeking clarification of the line between regulation and taking. I can't offer now anything more than to say I appreciate that the issue is very much alive, and that the most recent decision, the *Lucas* decision is hardly the be-all-and-end-all. If confronted with such a case, I will do my best to prepare for it diligently and give it my best judgment.

Senator PRESSLER. In the area of small business, employer versus union rights, I know another Senator already has asked about this issue, but I will take it from a slightly different point of view. In the *Xidex Corporation* case, a 1991 decision, you voted in the

majority in a case involving a series of actions taken by Xidex Corp. following its purchase of a new plant that had been a union shop. The union alleged many of these actions constituted unfair labor practices.

An administrative law judge in the NLRB agreed with the union on several points, and you enforced their orders against Xidex, as I understand it. In *Xidex*, the circuit court relied on the holding in *NLRB v. Brown*, that antiunion motivation will convert an otherwise ordinary business act into an unfair labor practice. Please elaborate on what you understand this standard to mean.

Judge GINSBURG. Senator Pressler, may I ask, since the name of that case is not immediately familiar to me—

Senator PRESSLER. It is a long name, *Microimage Display Division of the Xidex Corporation v. National Labor Relations Board*; it is a 1991 case, 924 F. 2d, 245.

Judge GINSBURG. I have just asked for some assistance in finding the opinion. It is not one I wrote.

Senator PRESSLER. We can come back to it or you can address it later, if you want to, after you get a chance to look at it.

Judge GINSBURG. Thank you.

Senator PRESSLER. I have several followup questions regarding that case involving the relationship between labor and management, particularly in small business, but I will save them and either ask them later or ask them for the record.

Judge GINSBURG. Sorry. Even though I have written over 700 decisions, I usually remember the names. But I do not recall *Xidex* (1991).

Senator PRESSLER. That is all right. How do you feel about arbitrary caps on damages?

Judge GINSBURG. Senator, I think you loaded that question by calling them arbitrary. [Laughter.]

Senator PRESSLER. That was from one of the lawyers to whom I wrote and asked for questions, so I will only take partial responsibility. Let's just talk caps on damages.

Judge GINSBURG. If the legislature sets a cap on damages, then the matter will come before the courts, and judges will attend to the record, briefs, and arguments that the parties make with respect to it.

Senator PRESSLER. But you can declare them excessive or you can—

Judge GINSBURG. I can't express a view on that, apart from the contours of a particular case.

Senator PRESSLER. I guess the most commonly asked question by attorneys in my State is—and you have addressed this to some extent, but to boil it down—does the nominee wish to interpret the Constitution as a static document, or does she wish the Court to initiate creative changes or creative new approaches?

Judge GINSBURG. I have said that I associate myself with Justice Cardozo who said our Constitution was made not for the passing hour but for the expanding future. I believe that is what the Founding Fathers intended.

My assistants just handed me the case you mentioned. I was on the panel, but the decision was by my colleague, Judge Karen Henderson. In addition to the 700-odd decisions I have written, if I

were to review every case in which I was on the panel, I would confront thousands of opinions. I haven't even attempted to do that, and this decision by Judge Henderson is not now in the front of my mind. I will be glad to refresh my recollection and attempt to answer any questions you have about it. But when one is a concurring judge and doesn't do the actual writing, the—

Senator PRESSLER. OK, good. I will ask you about that in a future round of questions, because the small-business community feels that is an important case from their point of view, and there are two or three other questions about it which I will give to you in writing, and I will try to ask them in a later round.

Judge GINSBURG. Now that I have the case, I will certainly read it and refresh my recollection.

Senator PRESSLER. My time is up.

The CHAIRMAN. Thank you very much.

Now, Judge Ginsburg, one of the few things you have not done in your career is serve in an elected capacity. Now you know how we feel when we are debating in the middle of a campaign, after having cast literally 18,000 votes and a press person or an opponent says, "What did you mean when you cast the vote on S. 274 in 1968?" And so we can sympathize with your inability to remember every single solitary decision. I am amazed you remember as many as you do. If we remembered that many votes we had cast, we would all be better for it.

Judge GINSBURG. I recall that a lawyer once asked me, "But, Judge Ginsburg, in the such-and-such case in which you concurred, footnote 83"—and it really was footnote 83—"said \* \* \*. Are you backing away from footnote 83?" At that moment I decided that I don't concur in footnotes, especially when they get up over 50. [Laughter.]

The CHAIRMAN. Believe me, I share your concern, your position.

Senator Feinstein, thank you for waiting.

Senator FEINSTEIN. Thank you, Mr. Chairman. You have now turned to the equal protection side of the table. We appreciate it very much.

The CHAIRMAN. I want to explain, by the way, for all who are watching, if the Senator will yield. The two women on the committee are sitting at the end of the platform. That is not because they are women; it is because they are the most junior members of the Senate on the Democratic side. And so I just want to—I was thinking about that today. As we are going through all this discussion of the equal protection clause and women's rights, as we should, I kept thinking, but they are probably home saying why don't they let the women ask any questions? It is purely because of seniority, a rule that when I arrived here as No. 100 in seniority I thought was horrible, and I now think has merit. [Laughter.]

Senator Feinstein.

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Judge Ginsburg, not only have I found you a scholar, but you have also got incredible stamina. And I might say that one of the special things for me today has been to sit here and watch you, because I am not a lawyer, reduce things to kind of their basic, simple element and explain them so that they were much more easily

understood. I think that is a very special teaching talent, and it is very clear to me that you have it.

I want to talk to you about four subjects, if I may today. They are guns, choice, capital punishment, and quotas. And I don't know whether I will end up just thrusting and you will parry, but I want to do it as someone whose experience is that of a former mayor of a big city and also as a grandmother. And I am hopeful that we might just have a conversation with a few people listening on the side.

Let me begin with the second amendment. I first became concerned about what the second amendment means with respect to guns in 1962 when President Kennedy was assassinated, and then with Martin Luther King and Bobby Kennedy. And then I watched the evolution of serial murders in this country and then the growth of assault weapons and their prevalence on our streets.

We said we shared the same age, and on my birthday a gunman walked into a swimming pool and shot at six youngsters. And then I went home on our break, and I went to one of San Francisco's premier office buildings, and someone had just walked in and wounded six, killed eight, and shot himself.

Then I picked up a newspaper where a 3-year-old had pulled a loaded assault weapon from under a bed and fired three bullets into his sister.

And so I went back to the second amendment, and I read it again, and it said, "A well-regulated Militia"—capital M—"being necessary to the security of a free State"—capital S—"the right of the people to keep and bear Arms"—capital A—"shall not be infringed."

And then I understand that in 1939 in a decision called *United States v. Miller*, the Supreme Court held that the obvious purpose of the second amendment is to protect the viability of the organized State militia. Since *Miller*, the lower Federal courts unanimously have held that the second amendment protects the people's right to keep and bear arms only in connection with service in the organized militia, today's National Guard.

Now, as a mayor, I tried to do something about it through the law, found that the State had preempted the area of licensing, registration, and when we tried possession, the Supreme Court of the State of California said the State also controls the area of possession. This very committee—Senator DeConcini, Senator Metzenbaum—has legislation that aims to deal with assault weapons, and the chairman of this committee, very shortly, has consented to allow there to be a hearing, for which I am very grateful because several victims would like to testify.

And so I am somewhat puzzled, and let me ask this question: If the Federal courts, as I believe they have, have unanimously held that the second amendment protects the right of the people to keep and bear arms only in connection with service in the organized militia, today's National Guard, do you agree with this consensus judicial interpretation of the second amendment?

Judge GINSBURG. Senator Feinstein, I can say on the second amendment only what I said earlier. The Court has held that it is not incorporated in the 14th amendment; it does not apply to the States. What it means is a controversial question. The last time the

Supreme Court spoke to the issue was in 1939. You summarized that decision, and you also summarized the state of law in the lower courts. The matter may well be before the Court again. All I can do is to acknowledge what I understand to be the current case law, that the second amendment is not binding on the States. Given my current situation, it would be inappropriate for me to say anything more than that. I would have to consider, as I have said many times today, the specific case, the record, briefs, and arguments presented. It would be injudicious for me to say anything more than that with respect to the second amendment.

Senator FEINSTEIN. Thank you.

Mr. Chairman, my understanding is that a 15-minute rollcall vote has just been called.

The CHAIRMAN. Thank you. Yes, it has. I suggest maybe, Senator, you decide whether it is best to break now in your line of questioning or continue to the next line and then break when we receive the halfway—but it is up to you.

Senator FEINSTEIN. You are not going to recess so we are just going to keep going?

The CHAIRMAN. No. I will recess because there are few of us here now, and I will recess so we can all go and come back, because I am anxious to hear what you have to ask as well.

Senator FEINSTEIN. All right. Maybe it might be appropriate to go and vote and then come back, if that is agreeable with you.

The CHAIRMAN. All right. We will recess for the approximately 10 to 12 minutes it takes us to get over there and vote, and then we will come back, OK?

Senator FEINSTEIN. Thank you.

[A short recess was taken.]

The CHAIRMAN. The hearing will come to order.

As I said, Judge, we had two votes. They threatened we may have one more vote. Hopefully it will not occur before we finish the questioning tonight, but we will finish tonight on the first round.

The floor is yours, Senator Feinstein.

Senator FEINSTEIN. Thank you, Mr. Chairman.

Just to try to pursue that a little bit further, Judge Ginsburg, could you talk at all about the methodology you might apply, what factors you might look at in discussing second amendment cases should Congress, say, pass a ban on assault weapons?

Judge GINSBURG. I wish I could, Senator, but all I can tell you is that this is an amendment that has not been looked at by the Supreme Court since 1939. And apart from the specific context, I really can't expound on it. It is an area in which my court has had no business, and one with which I had no acquaintance as a law teacher. So I am not equipped to enlarge my response. If the Court takes a case involving the second amendment, I would proceed with the care that I give to any serious constitutional question.

Senator FEINSTEIN. Fair enough. Let's go on, then, to the next topic.

I was very interested in your discussion with Senator Brown, particularly—this is the issue of choice—because you began to touch on the *Casey* case, and then somehow got a little distracted.

If I understand what you are saying—correct me if I am wrong—you are saying that *Roe* could have been decided on equal protec-

tion grounds rather than the fundamental right to privacy. And I think you noted that *Struck* could have served as a bridge linking reproductive choice to the disadvantageous treatment of women on the basis of their sex. Is that fair so far?

Judge GINSBURG. Yes, Senator, except in one respect. I never made it an either/or choice. That has been said in some accounts of my lectures. It is incorrect. I have always said both, that the equal protection strand should join together with the autonomy of decisionmaking strand, so that it wasn't a matter of equal protection or personal autonomy, it was both.

Senator FEINSTEIN. I see.

Judge GINSBURG. I would have had added another underpinning, one I thought was at least as strong, indeed, stronger. But my argument was never equal protection rather than personal autonomy. It was both. I used the *Struck* case as an example, because it was the first time I fully expressed myself on this subject. I urged that it was a woman's choice either way—her choice to bear or not to bear a child. So the only amendment I would make in what you said is that it was never either/or; it was both.

Senator FEINSTEIN. So, in essence, there are two tests out there that could be used. One is equal protection, and the other is the right to privacy. Is that—

Judge GINSBURG. I would put it in terms of principles on which the decision could rest rather than tests to apply, but principles.

Senator FEINSTEIN. Right.

Judge GINSBURG. One of the underlying principles is the autonomy of the individual, the other is the equal dignity of the woman.

Senator FEINSTEIN. Right. Let's proceed on.

Then in 1992, in *Planned Parenthood v. Casey*, it was enunciated a new test, and as I understood it, the Court upheld various limitations on abortion because they did not unduly burden women seeking such services. And as I heard you earlier, statutes which limit fundamental rights get strict scrutiny by the Court. Statutes which classify on the basis of gender receive heightened or intermediate scrutiny.

My question is: Did the Court in *Casey* explicitly erode the protections previously afforded women under *Thornburgh v. American College of Obstetricians*?

Judge GINSBURG. I have two responses. One is, as I said before, that heightened scrutiny for sex classifications remains an open question. Justice O'Connor made that clear in the *Mississippi University for Women* (1982) case. Sex as a suspect classification remains open. It wasn't necessary for the Court to go that far in that case. The Court struck down the gender-based classification. So it is not settled that sex classifications will be subject to a lower degree of scrutiny than limitations on fundamental rights. It is just that the Court has left the question open, and it may some day say more.

If you are inquiring about the specific rulings in *Thornburgh* (1986) as against the rulings in *Casey* (1992), yes, I think there are respects in which *Casey* is in tension with *Thornburgh*. Restrictions rejected in *Thornburgh* were accepted in *Casey*. So I must say yes, the two decisions are in tension, and I expect that the tension is going to be resolved sooner or later. Similar issues are likely to

come before the Court again, so I can't say more than yes, the two decisions are in tension; that is where we are at the moment.

Senator FEINSTEIN. You said that they are in contention? Would you say that *Casey* is as reasoned as *Thornburgh*?

Judge GINSBURG. What I would say is that the two decisions are in tension, not in contention, because to some extent they overlap. These are decisions that are rather dense. I mean this—there are numerous opinions, and it is difficult to work through them all. The one thing I do sense is that this is a matter likely to come up again, so I believe it would be inappropriate for me to say anything more than what I have already acknowledged. There was no majority opinion in the *Casey* (1992) case. I think that is about what I can say.

Senator FEINSTEIN. Thank you very much. That was a help, and I thank you for that.

Let me turn to capital punishment, and let me speak as a Californian. I believe the people of California voted in 1978 overwhelmingly to reinstitute the death penalty. Since that time, there has been a very long delay before its carrying out.

It was recently carried out in one case, the case of Robert Alton Harris, which is a rather notorious case, and brings up the whole habeas corpus discussion.

I believe Harris had 6 Federal habeas petitions and 10 State habeas petitions. It is my understanding that the delay was due in large part because the ninth circuit took a while to decide.

Earlier in these discussions, you discussed the finality versus the fairness of habeas, and I think, if I understood you correctly, you said that you believed, yes, it was right to think that things had to be brought to a logical conclusion within finality.

If laws are going to work in this country, they have to have some finality to them. And the older I get, the more clearly I see that.

One of the biggest concerns that people have is that justice no longer seems just because it never happens, or it takes a long time for it to happen.

You also raised the fairness, which I guess is the competence of counsel issue. Would that be fair to assume?

Judge GINSBURG. That's a large part of it, yes.

Senator FEINSTEIN. With over 300 cases on death row, do you have concern that there is a lack of finality, because of Federal habeas review? Could you be more specific at all, when you speak of finality? It is interesting to me, because of the crime bill, major discussion on habeas, what is fair in terms of a wait. Is it 6 months? Is it 1 year? Is it 18 months?

The Attorney General testified before us earlier, she said as long as there was competency of counsel, she believed, too, that there had to be finality and, therefore—I am paraphrasing her, but I think I am accurate, and, Mr. Chairman, correct me if you think I am wrong—she said whether it is 6 months or 1 year or 18 months, really is not consequential, as long as there is competency of counsel.

The CHAIRMAN. That is correct, that is my recollection, as well, Senator.

Senator FEINSTEIN. Would you concur in that?

Judge GINSBURG. I do not know what her testimony was. I do know that Congress has before it Justice Powell's report, and that the first action to be taken with respect to this fairness/finality balance is going to come from Congress, based on Congress' study of that Powell Commission Report.

The CHAIRMAN. If the Senator will yield to me on that point—  
Senator FEINSTEIN. Of course.

The CHAIRMAN [continuing]. The Judge is absolutely correct. As a matter of fact, I think we will be able to announce in the next day or so that, after literally 5 months—it is going to sound like an exaggeration—of close to around-the-clock negotiations with the Attorneys General and the District Attorneys Association, we have reached a compromise. So I hope with the support of the Senator from California, who has been deeply interested in this issue, we will be able, Judge, to pass a piece of legislation that gives some life to the thrust of the Powell Commission Report.

Senator FEINSTEIN. The reason I am asking this, as a nonlawyer, a former mayor who has a great deal of interest in the crime bill, as the chairman correctly stated, is because the issue of habeas is so very complicated, and any insight that you might have with respect to both fairness and finality, I would certainly appreciate hearing.

Judge GINSBURG. Senator Feinstein, I commented before that I realize this area is very complex. We don't have that kind of review in this district, because, unlike the State of California, the District of Columbia is not a State for this purpose. The District of Columbia has local courts created by Congress, and Congress has provided a postconviction remedy that is just like the Federal remedy, so if you are convicted in the District of Columbia courts, there is no habeas review in our court.

If I am confirmed, this is going to be altogether new business for me. I haven't had experience with habeas petitions and I haven't had experience with death cases, either. I know what the history is in California. Your State supreme court held that the death penalty was unconstitutional under the State constitution. That judgment, made in *People v. Anderson* (1972), was reversed by the people in a referendum, wasn't it?

Senator FEINSTEIN. That is correct, in 1978, I believe.

Judge GINSBURG. But the District doesn't have the kind of State-Federal review that you have proceeding from your State courts to the Federal district courts and the ninth circuit. I know something about what has gone on in the regional circuits. I have not had experience with these cases myself.

Senator FEINSTEIN. Thank you very much.

Moving right along to the third topic of the day, to another controversial issue, which is the issue of quotas in affirmative action. Again, let me go back to my mayor's experience. In 1979, there was a Federal case, concerning police officers consent decree, and I was mayor and did not support a consent decree which initially contained quotas, for the very reason that I have seen quotas used to discriminate against, as well as to prevent discrimination, and have never felt that it is a very good vehicle for bringing about affirmative action.

Instead, the consent decree that I did support and which became the law of the city was one that provided goals and timetables and a master to oversee the department as it moved along, and we made some very good progress, both with respect to people of color, first minorities, first gays in the San Francisco Police Department.

I know you have favored affirmative action, but you have generally taken a very restrained approach on the subject of quotas in local government hiring and contracting. I was wondering if you would care to comment on your decisions in that area and your judicial philosophy that brought about those decisions.

Judge GINSBURG. My circuit recently decided a set-aside case, the *O'Donnell* (1992) case. It was the same kind of case as *Croson* (1989). We followed the Supreme Court's precedent and said that the District of Columbia's plan was invalid.

Most plans I have had anything to do with are of the kind that you describe, not fixed, rigid quotas, but goals and timetables, which are really estimates of what the workforce would be, if there were fair employment practices. In so many of these cases, a whole range of items are implicated, including tests.

I remember some police cases involving tests, physical tests that women could not pass at the same rate as men, but that were not at all related to job performance. So some of the plans include new tests that are related to what the job requires, and do not include standards, unrelated to job performance, that men can meet more readily than women.

I remember one test particularly. The job involved was slide projectionist. As part of the physical test, the applicant had to carry a certain weight with arms raised above his head. That posture was much harder for women than for men, and women failed that portion of the test disproportionately. But the weight that had to be carried was something like 18 to 20 pounds, about the weight of a year-old child. Women have carried that weight from the beginning of time, but not with arms lifted over their heads. Once you eliminate that element of the test, the women begin instantly to pass at least at the same rate as men.

Many of these job classifications and tests were set up one way without thinking—with no thought of including women. Eliminating such tests is part of the kind of positive affirmative action that does not entail rigid quotas, but estimates of what one would expect the workforce to look like, if discrimination had not operated to close out certain groups.

Senator FEINSTEIN. Yes, that is certainly true. Of course, even though when the tests were revised for job related strength capacity, it was still difficult for some women, I must say that. There still was a rate where women could not pass it, but many women did and I think that really harkened the day where women could go into police departments and fire departments and have some degree of equal opportunity. We are not entirely there yet, but there has been a big change.

Judge GINSBURG. Yes.

Senator FEINSTEIN. Let me just change to the Japanese internment case, because this also is a major issue where I come from, and I very much appreciated your comment that the *Korematsu* case was wrongly decided. I would certainly agree with that.

With regard to the *Hohri v. United States* case, it is my understanding that you voted to permit victims of the internment to file claims for confiscation of their property during World War II. Because this might be useful in the future, could you elaborate on why *Korematsu* was wrongly decided, and why you believe so strongly that the plaintiffs in *Hohri* should be able to sue long after the internment policy was relegated really I supposed to the dust bin of history?

Judge GINSBURG. In *Hohri* (1987), our decision was not the final decision. The key question before us concerned the right court in which to bring that case. The Supreme Court, in a well-stated opinion by Justice Powell, held that the case belonged in the Federal circuit and not in the District of Columbia Circuit.

Justice Powell's decision, incidentally, said there was a tenable case to be made for either side. Congress had not been clear about whether the case belonged in our court or in the Federal circuit, the specialized Federal appeals court in this city.

The question on the merits in *Hohri* concerned when the statute of limitations began to run. The view my court took of that question was different from the view ultimately taken by the Federal circuit.

*Korematsu* (1944), as presented to the Supreme Court, involved a challenge to a race classification—people of Japanese ancestry—and a defense based on national security. We now know—it came out clearly in the fifties—that the pressing national security need urged before the U.S. Supreme Court didn't exist and never existed. An overwrought general wrote an affidavit that the Court relied on. J. Edgar Hoover, hardly someone who had no concern about national security, had said that there was no reason to have the kind of massive relocation program our country ordered during World War II. The FCC said that the alleged communications between the West Coast and Japanese ships at sea didn't exist, either.

The question was at what point in time the clock began to run. When did the people affected have a claim a court would hear. We said the clock began to run when it became clear that there was no national emergency justification for curfews and relocation.

Now, the end of the story is that Congress passed legislation providing compensation. Before that there was a congressional declaration recognizing that a wrong had been done. There were two dissents in *Korematsu* itself. I recall one, the dissenting opinion of Justice Murphy. Every judge, I believe, would like to think he or she would have joined Justice Murphy, had he or she been a member of the Court at that time. But no one can say for sure. History has certainly made it plain that there was nothing like the kind of emergency the Court was told of, nothing that required the kind of treatment to which people were subjected solely on the grounds of their race or ancestry.

Senator FEINSTEIN. Thank you very much. Judge Ginsburg, I just want you to know that, for me, it has been a very great pleasure and privilege to listen to this. You really are a remarkable person. I am also just very proud that you are a woman.

Judge GINSBURG. I appreciate your saying that so much.  
Senator FEINSTEIN. Thank you.

The CHAIRMAN. Thank you very much, Senator Feinstein.  
Senator Moseley-Braun.

Senator MOSELEY-BRAUN. Thank you very much, Mr. Chairman.  
The CHAIRMAN. Last, but not least.

Senator MOSELEY-BRAUN. You know, I think it kind of makes me the most popular person in this room, that I am now starting the last of the questioning for the evening. But it makes it a little difficult, obviously, when you are number 18 in a grueling session such as we have had, and I just want to thank and applaud the Judge for her patience and her deliberate manner. You have been just hanging in there, in spite of the fact that you have been talking all these hours and answering questions all these hours and mental gymnastics with the members of the committee.

I want to thank my senior Senator, who I know is only here because he has been so nice to me and he is looking out for me.

Senator SIMON. I am here because I want to hear Judge Ginsburg.

Senator MOSELEY-BRAUN. You want to hear Judge Ginsburg, not me. [Laughter.]

OK. You see, that is also why he is the senior Senator. Thank you, Senator Simon, for staying.

Judge Ginsburg, as you know, this month the worst deluge in memory has caused massive flooding along the Mississippi and Missouri Rivers and devastated much of the Midwest, including vast areas of my home State of Illinois. This has been a tragedy of epic proportions.

One of the most notable developments has been the failure, at several points along the various rivers that were affected, of levees that were denied to hold the waters back. The rupture of these levees has prompted a heated debate among scientists and engineers and environmentalists, farmers and thousands of ordinary citizens.

On one side are the people who say that the levees, which were artificially created to begin with, have distorted the Mississippi's natural drainage system, can never be built high enough to anticipate all of nature's fury, and may even make flooding worse by channeling the waters so that they become even faster and higher.

Supporters of the levees, on the other hand, claim that through the construction of the levees and other flood control systems, thousands of acres of land have been turned into productive farmland, housing and recreational areas.

In short, Judge Ginsburg, across a wide swath of the country, thousands of people and entire communities have made decisions, and invested their savings in some instances, for more than 100 years on where to locate their homes and their farms in reliance on this system of levees.

As I mention, though, this year's disaster and some new scientific evidence has prompted many to argue that pulling down the levees or actually not reconstructing them might actually improve flood control and, in terms of the environment, be better for the communities as a whole.

In fact, some have speculated that one day in the near future, the Army Corps of Engineers or some other arm of the executive branch may determine that the levees are counterproductive to re-

gional flood control efforts and damaging to the environment, and decide to tear the system down, or not to rebuild it.

While conceivably beneficial to the region as a whole, such a decision would clearly impact the use that thousands of individual landowners could make of their property. Clearly, in this situation—and the reason I ask this question, Judge, is because you have done so much in the area of administrative law and administrative decisionmaking, and I want to get to how you perceive and approach these issues, when a citizen's interest and rights are up against an arrayed power of the bureaucracy.

Clearly, as in a situation such as the levee situation—and it is all speculative, because this is just a debate that is going on—what an administrative agency decides to do or not to do, as the case may be, will matter greatly to the expectations that have been built up over time.

So I have two questions. The first is, in a situation like this, if the property owners challenge the government action as a taking of their property, what principles should the Supreme Court look to in evaluating that claim?

Judge GINSBURG. Senator, the question has some kinship to the one that Senator Pressler raised about the wetlands. It is an evolving area of the law. There is a clear recognition that at some point a regulation can become a taking. When that point is reached is something to be settled in the future.

We do know that, as the Court held in the *Lucas* (1992) case, when the value of the property is totally destroyed as a result of the regulation, a taking has indeed occurred and there must be compensation for it. Reliance is certainly one of the factors that must be weighed.

This is a still evolving area and I can't say any more about it than what is reflected in the most recent precedents, in the *Nollan* (1987) case and in the *Lucas* case. But there is sensitivity to the concerns. On the one hand, the regulations are made for the benefit of the community; and on the other hand, there is the expectation, the reliance interest of the private person. Those two considerations will have to be balanced in future cases. I can't say anything more at this point.

Senator MOSELEY-BRAUN. Well, let's approach it, and I don't know if this is an approach that will be productive. But looking at the whole issue of deference to agency decisionmaking, if the property owners challenge the Army Corps of Engineers on substantive grounds, what principles do you think should govern how much deference should be given the agency's determination and decision-making?

Judge GINSBURG. It depends on what the agency is doing. If the agency is construing a law in which Congress has, in effect, delegated to the agency a gap-filling function, that is one thing. If the agency is simply applying a general principle, that is something else. You know we do have a guiding decision called *Chevron* (1984). That opinion instructs that, when the meaning of a law is uncertain, courts ordinarily should defer—that doesn't mean abdicate—deference means treat with due respect the agency's interpretation of it.

Now, that is a rule of construction, of determining what Congress wanted. Congress can say it doesn't want us to defer to the agency. There was a time when the Bumpers amendment had quite a following. That measure would have told courts not to defer. The Supreme Court's current doctrine in this area calls for deference to agency rulemakings. Congress knows that, and Congress is at liberty to change the orders under which courts are now operating. That is, if there is an ambiguity in the direction Congress has given, and the agency reaches a decision that is permissible, a permissible construction of congressional intent, then courts are supposed to respect that decision. But Congress can always tell us to take a different approach to statutory construction.

Senator MOSELEY-BRAUN. In a dissent in which you joined in the case of *San Luis Obispo Mothers for Peace v. the United States Nuclear Regulatory Commission*, you joined in a dissenting opinion against a decision that upheld the issuance of a license for the construction of a nuclear power plant on an earthquake fault, despite the lack of a hearing on safety implications.

That dissent, which was actually written by someone else, stated that:

It defies common sense to exclude evidence about the complicating effects on earthquakes at a plant located three miles from an active fault. The majority's preoccupation with probability calculations does not justify the Commission's stubborn refusal to do the obvious.

So in that case, the decision flew in the face of doing the obvious, of common sense, and I suppose the question becomes, as we look at the whole issue of, again, due deference: Do you believe that injured parties, that people, should be afforded access to review by the courts, and particularly the Supreme Court, in cases like this in spite of the expert judgment of a bureaucrat regarding agency action?

Judge GINSBURG. I said that deference does not mean abdication. A decision I wrote bears some resemblance to the fault case. It involved placing nuclear material in salt domes. Yes, I think it is important that there be review, judicial review, of bureaucratic actions. Bureaucrats don't have to stand for election as you do. Courts are needed to check against bureaucratic arrogance. That is an important role that courts have.

On the other hand, agencies do feel beholden to the legislature. That is where they get their money from, and so they are accountable to you as well.

Senator MOSELEY-BRAUN. I think that is a fine answer, Judge, and that is very important because so many agency decisions impact on people's lives, sometimes even more than what we do here in the legislative branch. And it is just important—you mentioned the system of checks and balances. It is so very important to have a court willing to look out for the interests, the concerns of ordinary people in their everyday lives, again, in these situations where the bureaucracy just kind of rolls on and spins along sometimes without regard to the individual interests.

I would like to change the subject a little bit because I have several areas in which I would like to ask you questions or explore, and I don't know how much of this is new territory. I have listened to all the testimony, and I know you feel that you have probably

answered some of these questions before. But to bring my own perspective to some of these issues that we are all concerned about in terms of how you approach judging, how you approach being a member of the U.S. Supreme Court.

I want to change the subject to talk about voting rights for a minute. I was very touched yesterday in your testimony when you mentioned as a child seeing signs in front of a Pennsylvania resort that said "No dogs or Jews allowed." For a moment I would like to share with you my own recollection of what you have, I think, aptly described as American apartheid, which is what we went through.

In the summer, when I was little, we used to get sent south every summer to spend the summers on the farm, and we would travel by train. And at that time the South was still openly segregated on the basis of race. In fact, just going over some of these cases, I am reminded of how very recent striking down of some of those barriers has been.

But, anyway, we were small, and I was about eight or nine; my little brother was about six or seven. And we stopped at a train station one day, and it was a hot summer day, and we had been traveling for hours with my mother. We were tired and thirsty, and we got into the train station, got off the train, walked to the train station, and there were two different water fountains. One was labeled "Whites Only" and the other was labeled "Colored." And my mother told us very firmly that she didn't want her children drinking out of a colored water fountain.

We both pleaded with her. We were thirsty. We wanted some water. And she wouldn't let us have any water. She said we will just wait until we get to the house.

Well, my little brother laid out in the middle of the train station and had a temper tantrum because he wanted some colored water. He expected it was going to be green or blue or yellow or a rainbow of colors. [Laughter.]

And he was determined he was going to see and have some colored water that afternoon.

We have obviously come a long way in this country since that trip, Judge, and I can share that story with you now. And it is humorous and it is funny. It kind of points to the absurdity of how Jim Crow and how that apartheid operated.

But there are other aspects, those aspects of the history of this country that are not so humorous even with the passage of time. I want to call your attention to the troubled history of voting rights specifically in the State of North Carolina.

In 1900, an amendment to the North Carolina Constitution barred blacks from voting unless they could prove, among other things, that they were descended from a Confederate soldier. The result of that, of course, was that very few blacks in North Carolina in 1900 were able to vote.

Tactics such as these were openly utilized up to and through the enactment of the Voting Rights Act in 1965. Although African Americans comprised 22 percent of North Carolina's population, until 1992 no African American had represented the State in Congress since Reconstruction.

As you know, in the recent case of *Shaw v. Reno*, which we have had some discussion about, the Supreme Court chose to ignore that troubled history. In *Shaw*, the Supreme Court held that North Carolina's 12th Congressional District—a district, I might add, that was drawn in compliance with guidelines from the previous administration's Department of Justice, the Bush administration's Department of Justice—that that district violated the equal protection rights of the State's white voters.

The ruling was issued in spite of the fact that the Court was unable to conclude that any white voter had been actually injured, had suffered any injury by virtue of the drawing of this district.

I would like to ask you about the Court's decision in *Shaw*. It would probably be inappropriate to ask you if you would overrule that decision or how you would decide in any voting rights case that might come before the Court. What I would like to know is whether or not you think the majority's decision in *Shaw* ignores the very real, the very tragic, and very painful history of voting rights violations, not just in North Carolina but throughout this country?

Judge GINSBURG. That is an unfinished case. The Court remanded it, and it may well come back again. So I can't address that case specifically, but I know what you have in mind. I know about the literacy tests that were given to blacks, tests that were different from the tests given to whites. There was an extremely complicated passage given to a black would-be registrant to vote. When the would-be voter looked at the passage he was asked to interpret, he said, "It means black people can't vote in this State." So I appreciate your concern, and I know how recent the change is.

I remember going with my husband to an Army camp when he was in the military service. We passed a sign that said—I thought it said, "Jack White's Cafe." But it didn't. It said, "Jack's White Cafe". I had never seen such a sign. I was fully adult, indeed pregnant at the time, so it was not so long ago that such things existed in the United States. I am sensitive to that history. When I spoke about *Brown v. Board of Education*, earlier today, I mentioned specifically the deprivation of the very basic right to cast one's ballot that existed for so long in the United States for black people.

Senator MOSELEY-BRAUN. Judge, I would suggest—I have a map, actually—where are the maps? The Court in the *Reno* case held that the 12th Congressional District of North Carolina was so bizarrely shaped as to invite an equal protection challenge. Here it is right here. There is no question but that is not exactly a work of art. There is no question but that the district lines were drawn in a way—do you have a copy?

Judge GINSBURG. Yes. This is what the Court described as a snake district.

Senator MOSELEY-BRAUN. Right. But as we talk about the history, this district was drawn this way in order to achieve the objectives of the Voting Rights Act, which in and of itself was written to overcome the history that you have so eloquently talked about.

But in any event, we face a situation in which the history has made it very clear that districts have been bizarrely drawn since—well, I started to say time immemorial, but indeed the very word

"gerrymander" comes from the drawing of a salamander-shaped district by a politician named Gerry almost 100 years ago.

And so I would suggest, just to point out, Judge, I have a couple of districts here that are also bizarrely drawn. This is the 3d district in Massachusetts, and this is the—got to turn it the other way. It is upside down. That way, yes. This is the 5th district of New York. And I think anybody would concur that these are similarly bizarrely drawn districts as well, which were drawn in the old-fashioned way; that is to say, with regard to political boundaries and incumbent party interests and because of the power equation in the community.

But in this instance, we see the Supreme Court has now decided to, in the *Shaw v. Reno* case, throw out the history. The Court's decision in the area of voting rights has changed the law altogether. And there has been a lot of discussion today about concern about judge-made law, but, quite frankly, Judge, I guess my question would be: Would you not concur that where we have precedent thrown out in order to invalidate a district drawn consistent with the Voting Rights Act based on the bizarrely shaped rule, which is a new rule as far as I can determine, that ignores the history of why the Voting Rights Act was there to begin with, and in light of the fact that no injury was shown, and in light of the fact that there are other districts throughout the country that are bizarrely drawn, would you not agree that we have in this instance judicial activism of a very real sort?

Judge GINSBURG. Senator, I can't comment on the *Shaw* (1993) case because, as I said, it is unfinished and it may be back in the Court again. And I would have to see the record, briefs, and arguments made in that very case. I can't prejudge what is going to be the next round in it. I am obliged to give the same answer I have given when that kind of question has been asked before about a case that is still alive, one that can be back before the Court.

Senator MOSELEY-BRAUN. All right. Then let me put the question to you otherwise. Yesterday, when Senator Metzenbaum had asked you about the views of Justices Scalia and Thomas in the *Lemon v. Kurtzman* test, which is used to judge challenges under the establishment clause of the first amendment, in response to that question you urged caution on the part of judges who wish to tear down established law, stating that, and I quote,

It is very easy to tear down, to deconstruct. It is not so easy to construct. I as a general matter would never tear down unless I am sure that I have a better building to replace what is being torn down.

Judge Ginsburg, what the majority opinion—and, again, looking at the voting rights cases, we have now seen a deconstruction of a system of legislative redistricting and voting rights enforcement in the United States. That system, while it was not perfect, was an effective system that has been arrived at through the efforts of various Congresses and administrations and even the courts. But in one fell swoop, the Justices struck down this system without providing any guidance on how to reconstruct voting rights enforcement, other than to say you don't go with bizarrely shaped districts.

States that relied on the voting rights precedent in drawing legislative districts now find themselves subject to court challenges;

and, further, the courts have no guidelines with which to just these challenges.

And so I would like to ask you how much consideration do you think that a judge should give—now, this is going to be a real soft-ball, Judge. This is not a—how much consideration do you think that judges should give to difficulties that will arrive from deconstructing an established constitutional test or enforcement mechanism in areas such as voting rights?

Judge GINSBURG. I can't speak to this specific case because I am not familiar with the record. The Department of Justice is going to have to study this case and prepare whatever its position is going to be for future cases. But I can repeat what I said before, that a judge should not tear down without having a better building to replace what is in place, and that is a general rule to which most judges would subscribe. I can't say that is true of most law professors, but it certainly is true of most judges.

I wish I could speak at a more specific level, but I really can't without having before me the precise record on which I could make an informed judgment.

Senator MOSELEY-BRAUN. I understand, and that is one of the reasons why this particular area is difficult to talk about, because of the uncertainties surrounding that entire area in voting rights enforcement in light of the *Shaw* decision.

But to take it another step and another aspect of voting rights that I would like to pursue with you, another recent voting rights case was *Presley v. Etowah*, and I would like to talk with you about that case a minute. I would like to first offer a brief summary of the case. The Etowah County Commission had five members, and each of the members' chief function in this rural Alabama county was the allocation of highway construction and repair funds. Each commissioner had complete control over how the funds were used in his district—and I said "his" district and not "his or her" district deliberately.

The commission had been structured to ensure that no minorities would be elected. After being sued under the Voting Rights Act, the commission was expanded to six members, six commissioners. Two commissioners were elected under the new changes, including Mr. Presley, the county's first African American commissioner in the modern era. Soon after that election, the four original commissioners passed a resolution which abolished the practice of allocating road funds to individual districts.

Under the changes, the two new commissioners had no power at all to ensure that any road funds, even minimal funds, were earmarked for their districts.

Now, one does not have to be a legal scholar to understand what happened in this case. In direct response to an African American being elected to the commission, the commission changed the rules in the middle of the game to ensure that the newly elected black official had no real power.

Yet when Mr. Presley sued the commission under section 5 of the Voting Rights Act, the Supreme Court held that the acts of the commissioners in stripping him of all real power were not changes with respect to voting. The only explanation the Court gave for its decision there was that "the line must be drawn somewhere."

Many people familiar with *Presley*, including the Bush administration's Justice Department, wondered what was the point of being able to vote for a county road commissioner if as soon as you got that opportunity the commissioner was stripped of any authority over what happens to the roads in your district.

I have two questions. The first is: Would you agree that in interpreting the Voting Rights Act, the Court in *Presley* was overly concerned or more concerned with the language of the statute as opposed to its purpose? And, second, when the narrow interpretation of the language of a statute would hinder the statute's ability to achieve its purpose: Is it proper for a court to look beyond the language in order to offer a remedy to citizens who have a valid grievance?

Judge GINSBURG. That is a decision constructing a statute. If the Court got it wrong, Congress can amend the Voting Rights Act and say that the Court got it wrong. I suppose the view was that the stripping of one commissioner was not peculiar to that commissioner; every commissioner was similarly stripped. That leaves the authority in the hands of the body as a whole, and the body has only one minority member, as I understand it.

But the argument was that the Voting Rights Act does not extend so far as to require court approval of how functions are allocated within a governing body. That is the Court's construction of what Congress ordered. The cure can be provided by Congress if Congress thinks the Court got it wrong. And that is about all I can say with respect to that case.

Senator MOSELEY-BRAUN. Judge, in this case, Justice Stevens described this case as one in which a few pages of history are more illuminating than volumes of logic and hours of speculation about hypothetical problems. I suppose my question to you is: Other than just waiting—I mean, other than saying, well, the Court may have gotten it wrong here, which is what you have just said, do you see any role in other decisions in suggesting to the Court that the history of these cases is as important in interpreting the specific language?

Judge GINSBURG. I think the advocates made that point to the Court. I can't opine on that particular case because it wasn't before me. If it had been before me, I would have been familiar with the record, familiar with the arguments. All I know about it at this point is the summary in U.S. Law Week. So I wish I could engage in more of a conversation with you about it, but from the limited information I have, it would not be judicious of me to speak further.

Senator MOSELEY-BRAUN. Well, Judge, it appears that the light is on. My chairman has left, but I am left with my loyal and faithful senior Senator from Illinois. I want to thank you. I have other questions that I suppose—I guess the way this works it will hold for the second round of questions. But I do thank you for your responses, and I look forward to pursuing some of these other areas with you.

Mr. Chairman, thank you.

Senator SIMON [presiding]. And we thank you, Judge, for a lengthy day. You have served your cause well today. Let me also thank your family members and that crew in back of you there who

have had to go through all of this and have done it smiling, even. They may not have felt like it, but that is what they are doing there.

The committee will convene tomorrow at 9:45 a.m. for an executive business meeting. When we say "executive," it does not mean it is in closed session here. And then we will proceed immediately to reconvene this hearing at 10 a.m. Our hearing stands adjourned.

Judge GINSBURG. Thank you.

[Whereupon, at 7:56 p.m., the committee was adjourned, to reconvene at 10 a.m., Thursday, July 22, 1993.]

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

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**THURSDAY, JULY 22, 1993**

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

The committee met, pursuant to notice, at 10:16 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 committee will come to order. Welcome back, Judge.

Judge GINSBURG. Thank you.

The CHAIRMAN. It is a pleasure to see you. I hope you had an opportunity to get a good meal and get a good night's sleep and not have to sit up and worry about more briefing books. We appreciate your willingness to forbear as well as you have.

Let me do a little bit of committee business here this morning in terms of how we will proceed, and then make one comment.

We have now completed our first round of questioning, and I might add, sounding somewhat presumptuous, that I was impressed by the line of questioning of our friend from Illinois. It was obvious yesterday you are a graduate of the University of Chicago Law School.

Senator MOSELEY-BRAUN. Thank you, Mr. Chairman.

The CHAIRMAN. I was impressed, and I thank you for being willing, Senator, to stay and go as late as you did last night.

But we have now completed our first round of questioning, and as has been the committee tradition—I wouldn't say a tradition—only since I have been the chairman. I am surrounded by two former Chairs who chaired this outfit longer than I, and sometimes I think they still wonder whether or not they should still be chairing this committee. But they were wise enough to choose other pursuits.

We have, in the first round of half-hour questioning, allowing a Senator and the nominee to develop a line of questioning without artificial interruption.

Now, what we have done in the past is shorten those rounds on the second round, but my friend from Utah, the ranking member, has indicated to me that some Members on his side, and possibly

on the Democratic side as well, may want to pursue a similarly lengthy line of questioning with the judge. So unless there is a revolt in the committee, this is how I would like to proceed.

We will go to 15-minute rounds unless a Senator asks before his or her turn to question that they would like to have a 30-minute round in order to flesh out the line of questioning they wish to pursue because, as I said at the outset, no Senator will be cut off. In other words, it is just going to be a matter of having two 15-minute rounds or one 30-minute round. But no Senator will be cut off.

The reason I would like to cut it down to 15 minutes is to allow Senators to be able to have more interchange with their colleagues in the questions rather than having to wait 2 or 3 or 4 hours to get into the mix with a line of questioning that may be followed on from when another Senator has finished questioning. So, in a sense, I hope this procedure will enhance the prospect of a little continuity in the questioning among the Senators. But any Senator who wishes before he or she begins to question that this round be a half-hour, should indicate their wish to the Chair and we will do that. But I would hope we would, most of us, if we can, for the convenience of our colleagues, keep our rounds to 15 minutes.

Judge, I will look for a signal from you and/or your husband or whomever behind you to indicate when you would like to take a break, but we will essentially do what we did yesterday. About every hour-and-a-half, we will break and give you a chance to stretch your legs. But anytime you wish to do that, that is not a problem.

Now, is that appropriate, Senator Hatch?

Senator HATCH. I do believe that there are many questions that our side would like to ask, so I am not—this isn't working.

The CHAIRMAN. Is the other mike—we have complete control of this committee. [Laughter.]

And we are able to—this is one of the few times, Judge, I am able to turn off the microphone on a Republican.

Senator HATCH. Senator Simpson says there is a screw loose in the speaker. I am not sure—that is ambiguous, it seems to me, but I know those who believe that, anyway.

The CHAIRMAN. Now, let me make one last point. Over the last few days, Judge, you have many times, at least from my perspective, appeared to be reticent to answer some of our questions, even more so than recent nominees. This, as I indicated, concerns me, and I believe the forum offered by these hearings, I think, is very important.

Once confirmed as a Justice, you generally will not appear before the public to answer questions or to discuss your judicial philosophy, and this hearing provides the only opportunity for a public forum to hear the individuals who will make our critical constitutional decisions.

So last night I went back and, with my staff, reviewed the transcripts of recent hearings, and I found, quite frankly, to be honest with you, that you provided no less expansive answers than others who have come before the committee, and also no more than others who have come before the committee, of your views on the law and your views on judging.

You do have a style that is precise and on occasion seems less expansive when you answer a question, but you have given us some significant substance on issues of privacy and equal protection, freedom of speech, and constitutional methodology.

Still, I have to say, like other recent nominees, you have given us less than I would like. I doubt whether any nominee would ever satisfy me in terms of being as expansive about their views as I would like. But on that score, I want to emphasize that you have, as I have gone back and looked at the record, given us some genuine insight and expansive answers on some of the critical issues, maintaining your distinction between what you think is appropriate and inappropriate for a prospective Justice to comment on.

But, still, I tell you that on my round of questioning I will return to several subjects which I just mentioned—equal protection, freedom of speech, and constitutional methodology—to see if we can engage just a little bit more. I thank you for what you have done so far, but I hope maybe we can pursue these subjects a little more without violating your understandable and self-imposed limitation about getting involved in matters that may come before the Court and in any way compromise you.

But having said that, rather than take my round of questioning now, since the distinguished Senator from Massachusetts is the manager of a bill on the floor on the national service legislation, I will yield my turn to him and then go to Senator Hatch and then back to me.

Senator KENNEDY. Thank you very much, Mr. Chairman.

As the chairman mentioned, we are considering a national service bill on the floor of the Senate, so I missed part of the responses yesterday, but I will look forward to reviewing the record carefully. I appreciate the courtesy of the Chair now.

I am just inquiring really in two areas. During my round on Tuesday, Judge Ginsburg, we talked briefly about the very important role of the Supreme Court in construing civil rights laws, and I would like to return to that topic this morning.

As you well know, the effort to pass legislation banning discrimination in public accommodations, employment, voting, and Federal programs was a long and difficult one. Congress tried for many years during the 1950's, with limited success. And it wasn't until 1964 that the landmark civil rights legislation was passed, and the Voting Rights Act, which Senator Moseley-Braun asked you about yesterday, was passed in 1965.

It is not hard to understand why it is difficult for a popularly elected legislature to pass laws to protect the rights of minorities and women who have been the victims of discrimination. For too long, legislatures were dominated by those who tolerated that discrimination, and that is why it is particularly important to have on the Supreme Court persons who appreciate the significance of the civil rights laws and will construe them to achieve Congress' purpose of eliminating discrimination.

In the 1980's, the Supreme Court turned away from that approach and issued a series of decisions that dramatically cut back on the legal protections against job discrimination: in 1989, in the *Patterson v. McLean Credit Union* case; we had the *Ward's Cove*

*Packing v. Antonio* case; and then the *AT&T Technologies* case, the *Lawrence* case. I think you are familiar with those cases.

A bipartisan majority in the Congress joined together to pass the Civil Rights Act of 1991 to overrule those decisions and several others. So now those cases are dead letters because of the 1991 act, so they can't come before you.

My question is: What is your view of the approach to construing civil rights laws taken by the Supreme Court majorities in those cases?

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

Judge GINSBURG. My view of the civil rights laws conforms to my views concerning statutory interpretation generally; that is, it is the obligation of judges to construe statutes in the way that Congress meant them to be construed. Some statutes, not simply statutes in the civil rights area but those in the antitrust area, are meant to be broad charters—the Sherman Act, for example. The Civil Rights Act states grand principles representing the highest aspirations of our Nation to be a nation that is open and free where all people will have opportunity. And that spirit imbues that law just as free competition is the spirit of the antitrust laws, and the courts construe statutes in accord with the essential meaning that Congress had for passing them.

Senator KENNEDY. Well, we have overturned those decisions now in the Civil Rights Act of 1991. I am asking you whether you are willing to express an opinion about those cases that were overturned since it won't come back up to you and since now we have legislated in those particular cases.

Judge GINSBURG. I don't want to attempt here a law review commentary on the Supreme Court's performance in different cases. I think the record of the decisions made in the lower courts can be helpful. In some of the cases, the Supreme Court's position was contrary to the position that had been taken in the lower Federal courts. I believe that was true in the *Ward's Cove* (1989) case and in the *Patterson* (1989) case. It is always helpful when Congress responds to a question of statutory interpretation, as it did in this instance, to set the record right about what the legislature meant to convey.

Now, sometimes—I spoke of the Pregnancy Discrimination Act and title VII—Congress is less clear than it could have been the first time around. Maybe the ambiguity wasn't apparent until the specific case came up. Congress reacted rather swiftly in that instance and said, "yes," discrimination on the ground of pregnancy is discrimination on the ground of sex, and title VII henceforth is to be interpreted that way.

It is a very healthy exchange. It is part of what I called the dialog. Particularly on questions of statutory interpretation if the Court is not in tune with the will of Congress, Congress should not let the matter sit but should make the necessary correction. That can occur even on a constitutional question. I referred to the *Simcha Goldman* (1986) case yesterday, a case in which Congress fulfilled the free exercise clause more generously than the Court had.

We live in a democracy that has, through the years, been opened progressively to more and more people. The most vital part of the civil rights legislation in the middle 1960's was the voting rights legislation. The history of our country has been marked by an ever widening participation in our democracy. I expressed on the very first day of these hearings my discomfort with the notion that judges should preempt that process to the extent that the spirit of liberty is lost in the hearts of the men and women of this country. That is why I think the voting rights legislation, more than anything else, is so vital in our democracy.

Senator KENNEDY. In another area, we have certainly made important progress, as you mentioned, in the areas of banning discrimination on the basis of race, we have on gender, we have on religious prejudice, and more recently on disability with the passage of the Americans With Disabilities Act, banning discrimination against persons with disabilities.

One form of discrimination still flourishes without any Federal protection, and that is discrimination against gay men and lesbians. I note that in a 1979 speech at a colloquium on legislation for women's rights, you stated that "rank discrimination based on sexual orientation should be deplored." By rank discrimination, I assume you meant intentional discrimination rather than discrimination on the basis of rank in the military. I share that view, and I think most Americans do.

I would like to ask you whether you still believe, as you did in 1979, that discrimination based on sexual orientation should be deplored.

Judge GINSBURG. I think rank discrimination against anyone is against the tradition of the United States and is to be deplored. Rank discrimination is not part of our Nation's culture. Tolerance is, and a generous respect for differences. This country is great because of its accommodation of diversity.

The first thing I noticed when I came back to the United States from a prolonged stay in Sweden—and after I was so accustomed to looking at people whose complexion was the same—was the diversity. I took my first ride in several months on a New York subway, and I thought, what a wonderful country we live in; people who are so different in so many ways and yet, for the most part, we get along with each other. The richness of the diversity of this country is a treasure, and it is a constant challenge, too, a challenge to remain tolerant and respectful of one another.

Senator KENNEDY. I think we will leave that one there. Thank you.

The CHAIRMAN. It is not going to get any better, Senator.

Senator KENNEDY. Thank you very much, Mr. Chairman. My time is up.

The CHAIRMAN. Thank you. Now I assume my colleague would like half an hour.

Senator HATCH. Yes, I think I would.

The CHAIRMAN. I yield half an hour to our distinguished friend from Utah.

Senator HATCH. Well, thank you, Mr. Chairman.

Judge, just a real quick response, if you can. Are you for or against TV coverage of the Court? I had a number of people in the

media who asked me to ask that question. And I don't want to spend a lot of time on it, and if you don't have an opinion, I would be happy to hear that as well.

Judge GINSBURG. Senator Hatch, I spoke earlier about the C-SPAN interview with me. I thought how unfortunate it was that the audience couldn't view, because we didn't allow it at the time, television of the proceeding itself.

Senator HATCH. Right.

Judge GINSBURG. I don't see any problem with having appellate proceedings fully televised. I think it would be good for the public.

Senator HATCH. I do, too.

Judge GINSBURG. We have open hearings. If coverage is gavel-to-gavel, I see no problem at all televising proceedings in an appellate court. Some concern has been expressed about televising trials, but we have come a long way from the days of the *Sheppard* (1966) case when the camera was very intrusive and there was all kinds of equipment in the courtroom that could be distracting.

The concern currently is about distortion if editing is not controlled.

Senator HATCH. I understand. That is good enough for me. I would be concerned about the editing that goes on, too. You are saying gavel-to-gavel you are for.

Judge GINSBURG. Yes.

Senator HATCH. OK.

Judge GINSBURG. Yes. But I would be very respectful of the views of my colleagues.

Senator HATCH. Sure. No, no, I understand.

In 1975, while you were at the ACLU, that organization adopted a policy statement favoring homosexual rights. According to what has been represented to me as minutes of a meeting on this matter, the following is noted:

In the second paragraph of the policy statement dealing with relations between adults and minors, Ruth Bader Ginsburg made a motion to eliminate the sentence reading, "The State has a legitimate interest in controlling sexual behavior between adults and minors by criminal sanctions." She argued that this implied approval of statutory rape statutes, which are of questionable constitutionality.

Now, I realize that these events took place over 18 years ago, so let me just ask you: Do you have any doubt that the States have the constitutional authority to enact statutory rape laws to impose criminal sanctions on sexual contact between an adult and a minor, even where the minor allegedly consents?

Judge GINSBURG. Not at all, Senator Hatch. What I did have a strong objection to was the sex classification.

Senator HATCH. Sure.

Judge GINSBURG. I think child abuse is a deplorable thing, whether it is same sex, opposite sex, male-female, and the State has to draw lines based on age.

What I do object to is the vision of the world that supposes a woman is always the victim. So my only objection to that policy was its sex specificity.

Senator HATCH. So as long as they treat males and females equally, that is your concern?

Judge GINSBURG. Yes, and I think that as much as we would not like these things to go on, children are abused, it is among the most deplorable things, and it doesn't—

Senator HATCH. And the State has power to correct it.

Judge GINSBURG. Yes, and has power to draw lines on the basis of age that are inevitably going to be arbitrary at the edge.

Senator HATCH. Well, I am relieved to hear that that was the basis for your objection. It was a shock to me to learn, you know, that the Constitution, some people argue that the Constitution denies the State the right or the ability to protect young people and teenagers by forbidding sexual contact between them and an adult, even where the sexual contact is supposedly voluntary, and I am concerned about that.

Let me just move on to the death penalty. Now, I have a question. One of the problems I had yesterday, you were very specific in talking about abortion, equal rights, and a number of other issues, but you were not very specific on the death penalty.

Now, there are people on this committee who are for and against the death penalty, as there are people throughout the Congress, and my question is about the constitutionality of the death penalty. I am not going to ask you your opinion about any specific statute or set of facts to which the death penalty might apply. Also, I recognize that your personal views regarding the morality or utility of capital punishment are not relevant, unless your personal views are so strong that you cannot be impartial or objective. Then that would be a relevant question and a relevant matter for us here today.

Rather, I would just like to ask you the following specific question: Do you believe, as Justices Brennan and Marshall did, that the death penalty under all circumstances, even for whatever you would consider to be the most heinous of crimes, is incompatible with the eighth amendment's prohibition against cruel and unusual punishment?

Judge GINSBURG. Senator Hatch, let me say first that I appreciate your sensitivity to my position and the line that I have tried to draw.

Senator HATCH. Sure.

Judge GINSBURG. Let me try to answer your question this way.

Senator HATCH. All right.

Judge GINSBURG. At least since 1972 and, if you date it from *Furman*, even earlier, the Supreme Court, by large majorities, has rejected the position that the death penalty under any and all circumstances is unconstitutional. I recognize that no judge on the Court currently takes the position that the death penalty is unconstitutional under any and all circumstances. All of the Justices on the Court have rejected that view.

Many questions left unresolved. They are coming constantly before the Court. At least two are before the Court next year.

I can tell you that I do not have a closed mind on this subject. I don't think it would be consistent with the line I have tried to hold to tell you that I will definitely accept or definitely reject any position. I can tell you that I am well aware of the precedent, and I have already expressed my views on the value of precedent.

Senator HATCH. But do you agree with all the current sitting members that it is constitutional, it is within the Constitution?

Judge GINSBURG. I can tell you I agree that what you have stated is the precedent and clearly has been the precedent since 1976. I must draw the line at that point and hope you will respect what I have tried to tell you—that I am aware of the precedent, and equally aware of the principle of stare decisis.

Senator HATCH. You see, my question goes a little bit farther than that. I take it that you are not prepared to endorse the Brennan/Marshall approach that it is cruel and unusual punishment under the eighth amendment. But in response to my previous question, you stated that statutory rape laws are constitutional. Yet, you are unwilling to really answer the question or comment on the constitutionality—I am not asking you to interpret the statute, just the Constitution—you are unwilling to comment on the constitutionality or unconstitutionality of the death penalty.

The thing I am worried about is that it appears that your willingness to discuss the established principles of constitutional law may depend somewhat on whether your answer might solicit a favorable response from the committee.

Now, this is a touchy thing. I don't think anybody is going to vote against you, one way or the other, on this issue, at least I hope not, because I don't think we should politicize the Court. But it is important. For instance, the death penalty is, in effect, mentioned in the 5th amendment and the 14th amendment to the Constitution. The fifth amendment makes reference to a capital crime, stating that no one could be held to answer for such a crime unless pursuant to a grand jury. And this presupposes the constitutionality of the death penalty.

Now, the eighth amendment's bar on cruel and unusual punishments was adopted at the same time as the fifth amendment, as you know. And it obviously was intended to be read in conjunction with the fifth amendment's express approval of the death penalty. As well, the Supreme Court has affirmed the death penalty's constitutionality, as you said, as early as 1976 in the case of *Gregg v. Georgia*.

Given the express constitutional provisions, presupposing the constitutionality of the death penalty and the body of case law reaffirming its constitutionality, I think you ought to tell us where you really come down on this thing. Because I am not asking you to decide a future case. I am just asking is it in the Constitution, is it constitutional, or is there room to take the position that Brennan and Marshall did, even though it is expressly mentioned in at least the 5th and the 14th amendment, and probably six or seven places in the Constitution, that they find it barred by the cruel and unusual punishment clause of the 8th amendment.

Judge GINSBURG. Senator Hatch, I have tried to be totally candid with this committee.

Senator HATCH. You have. You have.

Judge GINSBURG. You asked a question. I was asked a lot about abortion yesterday. I can't—

Senator HATCH. You were very forthright in talking about that.

Judge GINSBURG. I have written about it, I have spoken about it as a teacher since the middle seventies. You know that teaching

and appellate judging are more alike than any two ways of working at the law. I tried to be scholarly in my approach to the question then. I have written about it in law review articles. I authored a dissertation in that area in the *DKT* case.

The question you raised about age lines, I had a stated objection to drawing lines between males and females based on age, whether it is for beer drinking, for statutory rape, for—the first time I encountered an age line I think was in your State, Senator Hatch. Utah required parents to support a boy until age 21, but a girl only until age 18. The case was *Stanton v. Stanton* (1975).

Senator HATCH. I remember the case, but I can't remember whether it is from Utah.

Judge GINSBURG. In any event, that's the way it was. It was support a boy until 21 and a girl until 18, and that age line was struck down. So that is another area. Is the *Stanton* case not from Utah?

Senator HATCH. Yes, it is.

Judge GINSBURG. The death penalty is an area that I have never written about.

Senator HATCH. But you have taught constitutional law in this country.

Judge GINSBURG. I have.

Senator HATCH. It isn't a tough question. I mean I am not asking—

Judge GINSBURG. You asked me what was in the fifth amendment.

Senator HATCH. Right.

Judge GINSBURG. The fifth amendment uses the word "capital." I responded when you asked me what is the state of current precedent. But if you want me to take a pledge that there is one position I am not going to take—

Senator HATCH. I don't want you to take a pledge.

Judge GINSBURG [continuing]. That is what you must not ask a judge to do.

Senator HATCH. But that is not what I asked you. I asked you is it in the Constitution, is it constitutional?

Judge GINSBURG. I can tell you that the fifth amendment reads "no person shall be held to answer for a capital or otherwise infamous crime, unless" and the rest. But I am not going to say to this committee that I will reject a position out of hand in a case as to which I have never expressed an opinion. I have never ruled on a death penalty case. I have never written about it, I have never spoken about it in the classroom.

I can tell you that I have only one passion and it is to be a good judge, to judge fairly. But I must avoid giving any forecast or hint about how I might decide a question I have not yet addressed.

Senator HATCH. I will accept that, but I have to say that—

Senator COHEN. Would the Senator yield?

Senator HATCH. Yes.

Senator COHEN. As I recall, with all due respect, I believe that Clarence Thomas was asked—

Senator HATCH. Both Souter and Thomas answered that question very—

Senator COHEN [continuing]. Was asked the question whether he had ever had a discussion about the case of *Roe v. Wade*, and he

was ridiculed by many members, and indeed the press at large for saying he had never had a conversation.

Senator HATCH. No, he didn't say that. What he said was—and the press, even as late as this morning, one of our eminent press people criticized obliquely Thomas for having never discussed abortion.

What Thomas said was—and I will be honest with you, he did it to get off the subject, Senator Leahy was asking the question—he said "yes," we did discuss it, but we were more interested in *Griswold v. Connecticut*. That is basically what he said. Then Senator Leahy came back, "Yes, but did you ever discuss *Roe v. Wade*?" And Thomas responded, I think very cleverly, and Senator Leahy did get off the subject, he said, "I never debated it." Now, that is a far cry from saying I never discussed it.

Now, the reason I am asking this question is there are very few—give me a break, the fact of the matter—give Justice Thomas a break, not you, Judge, but the media out there—they have been misquoting that for years, ever since the hearings. But he was vilified all over this country and slandered and libeled and criticized, because he never discussed *Roe v. Wade*, as though that is the paramount prime issue in our society. And it is one of them, no question about it, regardless of what side you are on or whether you are not on any side.

But I cannot imagine any particular subject that has been more on the minds of the American people in criminal law through the years than the death penalty. Let me just say this: I will take your answer the way it has been given. You know, there are some who believe that there has been an evolution of standards regarding what constitutes cruel and unusual punishment. But even this theory cannot escape the express references in the Constitution to capital punishment.

It seems to me that any evolution to societal standards with respect to the death penalty cannot be divorced from the fact that the Constitution mentions capital crimes. And such an evolution of standards by society which would deem the death penalty cruel and unusual punishment or cruel and unusual I think would have to be represented in the form of a constitutional amendment or by repeal of the existing death penalty statutes.

Having said that, I just feel it is an important issue and one that—I don't want a political answer.

Senator METZENBAUM. Could I respectfully point out to my colleague—

Senator HATCH. On your own time, you can.

Senator METZENBAUM. On my time. I don't wish to interrupt him, but this same issue was before us in 1987 when Judge Kennedy was up for confirmation, and at that time Judge Kennedy stated, "I have taken a position with your colleagues on the committee that the constitutionality of the death penalty has not come to my attention as an appellate judge and that I will not take a position on it. If it is found constitutional, I think it should be efficiently enforced."

Senator HATCH. Fine.

Senator METZENBAUM. So this is not the first time that we have had a nominee who has declined to respond on this.

Senator HATCH. No, but as we defined further, demanding of members of this committee during the Souter and Thomas hearings, they had to answer that question. That is all I am saying. Now, I am going to let it go, because I respect the Judge and I have a great deal of fondness and appreciation for her. But I don't think that is a tough question, is it in the Constitution, is it constitutional.

Judge GINSBURG. Senator, I have read that sentence and know there is another reference to "capital," as well. I am glad you respect my position. I have told you my view of judging.

There are other people on this committee who would like to pin me down to what am I going to do in the next case.

Senator HATCH. Well, I am not one of them.

Judge GINSBURG. Even Senator Metzenbaum wants me to say whether I would be with three or with two on some issues, and I wouldn't answer. I have tried to be consistent in saying I believe in this process, I have written about it, and I have said how important I think the Senate role is. I also said I hope that we come to this with mutual understanding.

One of the things Senator Metzenbaum said was that Congress should be more thoughtful and more deliberate about the role of a judge. So I have tried to be as forthcoming as I can, while still preserving my full and independent judgment.

Senator HATCH. I understand, Judge, and I accept that. I do think, though, that some of the cheap shots in the media about Thomas ought to cease and they ought to read the doggone transcript before they make any more of them. As late as today, one of our learned members of the journalism community misrepresented again.

Let me move on to something else. I would like to followup on some of the exchanges you had with Senators Simpson and Leahy regarding government funding. Now, you agree, as I understand it, that the first amendment does not impose on government an affirmative duty to fund speech, is that right?

Judge GINSBURG. Yes, I think it imposes on government a duty to be impartial, and so I said if it chooses to fund political speech, it can't choose between the Republicans and the Democrats.

Senator HATCH. Right. Rather, it prohibits government from censoring or interfering with individual expression, and I believe that is your position as you have said.

For example, freedom of speech doesn't mean that the Government has to finance a lecture series for anyone who wants to speak his or her mind, or that the Government must give people megaphones or loudspeakers or, likewise, freedom of the press does not mean that the Government has to buy publishing equipment for aspiring journalists.

But in a recent concurring opinion, you wrote, the Government taxing and spending decisions "are most troublesome and in greatest need of justification, when distinctions are drawn based on the point of view a speaker espouses, or when a benefit is provided contingent and an individual is relinquishing a civil right." Now, that was the case of *FEC v. International Funding Institute* in 1992.

I would like to probe just one aspect of that statement, specifically, your apparent view that government spending decisions are

"most troublesome and in greatest need of justification, when distinctions are drawn based on the point of view a speaker espouses."

Let's assume that the Government decides that not smoking is better than smoking and that it subsidizes an antismoking campaign through a grant program. May the Government give grants only to those who adhere to the antismoking campaign or viewpoint, or does the Constitution compel the Government to also subsidize prosmoking campaigns by cigarette manufacturers?

Judge GINSBURG. I may get myself into difficulty with the Senators from tobacco States, and I am a reformed sinner in that respect myself. But this is a question of safety and health. I think the Government can fund antismoking campaigns and is not required equally to fund people who want to put their health and the health of others at risk. So my answer to that question is "yes," the Government can fund stop smoking campaigns and it doesn't have to fund smoking is intoxicating and fun campaigns. Yes, the Government can fund programs for the safety and health of the community.

Senator HATCH. Congress, as you know, has established a National Endowment for Democracy, and, you know, some might say is engaging in unlawful viewpoint discrimination unless it also establishes a national endowment for the opposite side, say communism or fascism or something like that.

The point that I am making is that I respectfully submit that your statement in your concurring opinion in the *International Funding* case may be overbroad. Government-funded programs are designed to serve certain policy goals. Those speakers who choose not to promote these goals will naturally be excluded from the funding.

And to impose viewpoint neutrality on government funding programs simply because they happen to involve speech would be to revolutionize government as we know it. And just as the taxpayers need not subsidize the first amendment right of free speech, the issue then arises do they need to subsidize abortions. Just as government programs may fund antismoking speech without funding prosmoking speech, the Government Medicaid Program may cover the expenses of childbirth, without covering the expenses of abortion.

The Supreme Court, as you know, settled this question in its 1977 ruling in *Maher v. Roe*, and then in its 1980 ruling in *Harris v. McRae*. It ruled in those cases that the taxpayers do not have to federally subsidize abortion. In some of your academic and advocacy writings before you took the bench, you did criticize those Supreme Court cases and, as an advocate, that is easy to understand.

But in the *International Funding* case, you cited *Harris v. McRae* favorably in support of a distinction you drew between funding restrictions that are permissible and those that are not. Irrespective of your views on the policy of abortion funding, do you agree that *Maher* and *Harris*, those two cases, were decided correctly?

Judge GINSBURG. I agree that those cases are the Supreme Court's precedent. I have no agenda to displace them, and that is about all I can say. I did express my views on the policy at stake, but the people have not elected me to vote on that policy.

Senator HATCH. I understand, but yesterday you endorsed the so-called constitutional right to abortion, a right which many, including myself, think was created out of thin air by the Court.

Judge GINSBURG. But you asked me the question in relation to the Supreme Court's precedent, and you have just asked me another question about the Supreme Court's precedent. The Supreme Court's precedent is that access to abortion is part of the liberty guaranteed by the 14th amendment.

Senator HATCH. That was just reaffirmed by a 5-to-4 decision just a year ago, and this issue is going to be before the Court for a long time in the future. But today, having opened the door on specific issues such as abortion—

Judge GINSBURG. I think your microphone is off again, Senator.

Senator HATCH. I am sitting back and not—

The CHAIRMAN. Thank you, Madam Chairman. [Laughter.]

Senator HATCH. I have got to speak louder, I think, when I sit back in my chair.

The CHAIRMAN. Will the Senator yield? It is obvious, Professor, you have been a professor for a long time, I think it is an endearing quality.

Senator HATCH. I think what the question is that I am asking is do taxpayers, in your view, have a constitutional obligation or duty to fund abortions.

Judge GINSBURG. Taxpayers don't have an obligation or duty to do anything other than what Congress tells them they must do. I know there is a taxpayers' protest movement, but people have to pay their taxes, and you decide what their tax payments should fund, as you are engaged in doing at this very moment.

Senator HATCH. I understand.

Judge GINSBURG. The only point I tried to make is that, of all the distinctions in the speech area, the ones we are most nervous about are distinctions based on viewpoint. As I said, the Government decides how it wants to spend its money. I think we would all agree that if the Government pays for Republican speech but not Democratic speech, that is not democratic.

Senator HATCH. I would agree with that.

Let me move on to another issue. In your response to the committee questionnaire on judicial activism, you stated,

It is a reality that individuals and groups reflecting virtually every position on the political spectrum have sometimes attacked the Federal judiciary, not because judges arrogated authority but because particular decisions came out, in the critics' judgment, the wrong way.

Judge Ginsburg, in the 1857 case of *Dred Scott v. Sanford*, the Supreme Court ruled that the fifth amendment's due process clause prevented Congress from outlawing slavery in the territories. In essence, in its first use of what we now call substantive due process, the Court invented out of thin air a right to own slaves in the territories. Abraham Lincoln, among others, was highly critical of this holding in the *Dred Scott* case.

Now, do you think that the Supreme Court arrogated authority in this holding in the *Dred Scott* case? And if so, why? And if not, why not?

Judge GINSBURG. I think it was an entirely wrong decision when it was rendered. The notion that one person could hold another person as his or her property is just beyond the pale of—

Senator HATCH. So they arrogated authority to themselves in that case.

Judge GINSBURG. I think they made a dreadfully wrong decision.

Senator HATCH. You and I agree.

The same thing in the *Lochner* era, with the *Lochner v. New York* case. The Court arrogated its own authority to decide that minimum wage laws were really on the basis of liberty of contract. They invalidated State laws on minimum and maximum hours that bakery workers could work in a week.

Judge GINSBURG. The Court in the 1930's rejected the so-called *Lochner* line. The Court, in that line of decisions consistently overturned economic and social legislation passed by the States and even by the Federal Government. That era, in which the Court attempted to curtail economic and social legislation, is over. Although there may be some voices for a return of that kind of judicial activism, I think it is generally recognized that the guardian of our economic and social rights must be the legislatures, State and Federal.

Senator HATCH. I agree with you on that, but how do you distinguish as a matter of principle between the substantive due process right of privacy that the Supreme Court has developed in recent decades from the rights the Supreme Court developed on its own accord in *Dred Scott v. Sanford* and the *Lochner v. New York* case?

Judge GINSBURG. I don't think, Senator Hatch, that it is a recent development. I think it started decades ago, as I tried to explain in one of the briefs you have, one of the briefs that I referred to yesterday, *Struck*.

Senator HATCH. Right.

Judge GINSBURG. It started in the 19th century. The Court then said no right is held more sacred or is more carefully guarded by the common law. It grew from our tradition, and the right of every individual to the control of his person. The line of decisions continued through *Skinner v. Oklahoma* (1942), which recognized the right to have offspring as a basic human right.

I have said to this committee that the finest expression of that idea of individual autonomy and personhood, and of the obligation of the State to leave people alone to make basic decisions about their personal life, Justice Harlan's dissenting opinion in *Poe v. Ullman* (1961).

Senator HATCH. Right.

Judge GINSBURG. After *Poe v. Ullman*, I think the most eloquent statement of it, recognizing that it has difficulties—and it certainly does—is by Justice Powell in *Moore v. City of East Cleveland* (1977), the case concerning the grandmother who wanted to live with her grandson.

Those two cases more than any others—*Poe v. Ullman*, which was the forerunner of the *Griswold* (1965) case, and *Moore v. City of East Cleveland*—explain the concept far better than I can.

Senator HATCH. Well, you are doing a good job, but in my view it is impossible, as a matter of principle, to distinguish *Dred Scott v. Sanford* and the *Lochner* cases from the Court's substantive due process/privacy cases like *Roe v. Wade*. The methodology is the

same; the difference is only in the results, which hinge on the personal subjective values of the judge deciding the case.

Judge GINSBURG. In one case the Court was affirming the right of one man to hold another man in bondage. In the other line of cases, the Court is affirming the right of the individual to be free. So I do see a sharp distinction between the two lines.

Senator HATCH. I think substantively there may be, but the fact of the matter is it is the same type of judicial reasoning without the constitutional underpinnings.

Now, one of the things I admired about your criticism of *Roe v. Wade* is at least you would put a constitutional underpinning under it by using the equal protection clause rather than just conjure something out of thin air to justify what was done. And at least that would be a constitutional approach toward it.

See, one criticism of judicially invented rights like some call privacy is the inability in any principled fashion to determine their boundaries. In other words, whether or not such a right will be recognized in a particular context depends upon the predilection of the judge deciding the case. And some of the most vocal supporters of the right to privacy in the context of abortion would be the first to object if the Supreme Court employed the same methodology looking outside the text of the Constitution to protect economic rights, say to cut back on the liberal welfare state. There would be just as much objection to that.

Now, one can favor various privacy interests as a matter of policy and support legislation to protect them—and that is being done here—and still recognize the illegitimacy of judges making up rights that aren't found in the Constitution. Don't you agree with that statement?

Judge GINSBURG. Senator Hatch, I agree with the *Moore v. City of East Cleveland* statement of Justice Powell. He repeats the history to which you have referred, the history of the *Lochner* era, and says that history "demonstrates there is reason for concern lest judicial intervention become the predilections of those who happen at the moment to be members of the Court." I know that is what your concern is.

Senator HATCH. That is what my concern is, as it should be.

Judge GINSBURG. He goes on to say that history "counsels caution and restraint," and I agree with that. He then says, "but it does not counsel abandonment," abandonment of the notion that people have a right to make certain fundamental decisions about their lives without interference from the State. And what he next says is, history "doesn't counsel abandonment, nor does it require what the city is urging here"—cutting off the family right at the first boundary, which is the nuclear family. He rejects that. In taking the position I have in all of my writings on this subject, I must associate myself with Justice Powell's statements; otherwise, I could not have written what I did. So I—

Senator HATCH. You mean with the position of Justice Powell?

Judge GINSBURG. The position I have stated here. You asked me how I justify saying that *Roe* (1973) has two underpinnings, the equal dignity of the woman idea, and the personhood idea of individual autonomy and decisionmaking. I point to those two decision opinions as supplying the essential underpinning.

Senator HATCH. I understand, but at least—see, I differ with you on using the 14th amendment to justify it. But at least you found some constitutional underpinning. You would have written the opinion so that at least there was a constitutional argument for the right as you believe in it. And that I respect, even if I do disagree with you on it.

But, you know, some people would argue that the constitutional right to contract is a fundamental right as well and that that right can be interfered with just as much through substantive due process as anything else. But in your view, does the generalized constitutional right to privacy encompass, say, the following activities—because judges could decide this on their own because of their own predilections. If they use a theory of substantive due process, whatever they want to decide, regardless of what the language says, regardless of the Constitution or the statutes or anything else enacted by those elected to enact them say.

Judge GINSBURG. Senator Hatch, I believe that it is healthy for an academic or a judge to be exposed to criticism. You know that my position, the position that I developed in this, I thought, sleeper of a lecture, has been criticized from all sides. I have been criticized for saying that legislators have any role in this. I have been criticized for saying that the Court should not have solved it all in one fell swoop. So I appreciate that I am never going to please all of the people all of the time on this issue. I can only try to say what my position is and be as open about it as I can.

Senator HATCH. You have been, and I agree with that. As you know, I admire you personally. But this is more important.

Senator MOSELEY-BRAUN. Mr. Chairman, Mr. Vice Chairman, I would like, on a point of personal privilege—

Senator HATCH. Sure.

Senator MOSELEY-BRAUN. This line of questioning I find to be personally offensive, and I am very sorry to break the train of thought and the demeanor of this committee. But I find it very difficult to sit here as the only descendent of a slave in this committee, in this body, and hear a defense, even an intellectual argument, that would suggest that there is a rationale, an intellectual rationale, a legal rationale, for slavery that can be discussed in this chamber at this time—

Senator HATCH. Well, Senator, Senator, that is—

Senator MOSELEY-BRAUN. Well, no, Senator, you just—

Senator HATCH [continuing]. Not what I said.

Senator MOSELEY-BRAUN. You just a moment ago said that some would say that there was a constitutional right to contract which could not be impaired by a judicial decision.

Senator HATCH. That has nothing to do with *Dred Scott v. Sandford*.

Senator MOSELEY-BRAUN. That was your statement, though, Senator, and I—

Senator HATCH. Well, if I can—

Senator MOSELEY-BRAUN. I just submit, Senator Hatch—and we have had a very fine relationship—

Senator HATCH. Oh, we do.

Senator MOSELEY-BRAUN [continuing]. Since I have been here, and I have every respect for your intellect. I have every respect for

your judgment. We may disagree on issues, but we have never had occasion to be disagreeable. And I think, as a point of personal privilege, it is very difficult for me to sit here and even to quietly listen to a debate that would analogize *Dred Scott* and *Roe v. Wade*. It is very, very difficult for me to listen to—

Senator HATCH. Well, that is not what I am doing, so—

Senator MOSELEY-BRAUN [continuing]. And so I want just to give you my own sensitivity on this issue. That is why I asked as a point of personal privilege that if there are questions going to the current state of the law that are not as offensive that would elicit the same kind of responses, or if there is some other way that you can probe the judge's opinions on this area, I would very much, on a personal level, appreciate that you take another approach.

Senator HATCH. Well, thank you, but just to make that clear—then I would like to conclude, and I would appreciate taking a little additional time. I have been attacking both of those cases and the line of cases, both the *Dred Scott v. Sanford* case—there is no way that anybody—I don't think anybody should misconstrue what I am saying. I thought the *Dred Scott* case is the all-time worst case in the history of the country. I think there are others that are bad, but nothing that even approaches the offensiveness of that case.

If the Senator has misconstrued what I am saying—and I think you have—I apologize. But that isn't what I was saying.

Also *Lochner*, I think that is a ridiculous case. My whole point here is these are ridiculous cases and that they were conjured out of thin air by this role of substantive due process.

Now, whether I agree or disagree with *Roe v. Wade*, I still think that approach toward judging is wrong. There is no question you could have found constitutional underpinnings to have righted both of those wrongs in those two cases. But nobody should misconstrue what I am saying here into thinking that I am trying to find some justification for slavery. My gosh, I wouldn't do that under any circumstances.

So I certainly apologize if I haven't made myself clear, but I am attacking this whole area of substantive due process which attacks *Dred Scott v. Sanford*, where judges just conjure things out of thin air to justify their own predilections or their own ideas of what the law ought to be. So in that sense, I would certainly never offend my dear friend—and we are good friends, and we work closely together, and I think we are going to do a lot of things around here together. But I want to make that clear.

Senator MOSELEY-BRAUN. Thank you. I—

Senator HATCH. Nor do I support *Lochner* because I raised the issue—and that was in the context of *Lochner*—that there is a right of contract mentioned in the law that is very, very important, that some people think is fundamental. *Lochner* went way beyond that by denying that the States had any rights to do what was in the general welfare of the people. And I disagree with *Lochner*, and I decry both of those cases.

Now, let me just finish. Judge—

Senator MOSELEY-BRAUN. Again—and I am delighted with your statement, but let me just say that as part of the debate, as part of the intellectual argument that you were engaging in with the judge, you come back—you, in fact, did come back and say to her,

well, there are some who would defend the right of contract in this situation. And I am just saying to you that even listening to this debate is very difficult to me, and on a point of personal privilege—

Senator HATCH. I understand.

Senator MOSELEY-BRAUN [continuing]. If there is another way that you can approach the criticism of judicial activism, I would appreciate your taking it.

Senator HATCH. Well, if you construed that to mean go back to *Sanford*, that is wrong because that certainly wasn't meant. And I apologize if I was inarticulate in what I was saying, but I don't think I was.

But let me just point out how important this is. When we have the right in judges to just throw substantive due process or just decide cases based upon their own ideas of what is right and wrong rather than what is in the Constitution or is in the statute, we run into these difficulties. You know, with regard to the generalized constitutional right to privacy, does it encompass the following activities or does it not?

Let me just give you one illustration. Some people believe in a right to privacy that would allow almost anything, say prostitution. Let me note that in 1974, in a report to the U.S. Civil Rights Commission, you wrote, Judge, "Prostitution as a consensual act between adults is arguably within the zone of privacy protected by recent constitutional decisions." That is in "The Legal Status of Women Under Federal Law" in 1972, I believe. You were citing *Griswold*, *Eisenstadt*, and *Roe v. Wade*.

You could push it farther. How about marijuana use in one's own home? Is that a right to privacy that we should—

Judge GINSBURG. I said "arguably." I said it has been argued—

Senator HATCH. I know. You were making an academic point. I understand. I am not trying to indicate that you were justifying prostitution. But the point is some people believe this right of privacy is so broad you can almost justify anything.

Does it justify marijuana use in one's own home? Does it justify physician-assisted suicide? Does it justify euthanasia? Does it justify homosexual marriage that some people think should happen and shouldn't happen? Does it justify infanticide of newborn children with birth defects?

I use these examples in this hearing not to offer my own views on any of these subjects, on whether or not they should be protected conduct, but it is my point that people who believe that such conduct should be protected must, under the functioning of our system, turn to the legislatures and not to the Federal courts to determine whether or not they should be protected.

The point is that under an amorphous constitutional right of privacy, whether or not conduct is protected does not depend on any neutral principle of adjudication, but on the subjective predilection of the judge deciding the case. And that is not the rule of law. That is government by judiciary.

Let me just end by saying that with regard to the chairman's discussion yesterday or the day before of *Dred Scott*, the chairman stated that he wishes that the *Dred Scott* Court had moved ahead of the times to engage in progressive judicial activism—at least

that is the way I interpreted it—rather than the reactionary judicial activism that it did engage in. And I would simply like to point out that judicial restraint would have led the Court to uphold the Missouri Compromise. There was no need for and no justification for judicial activism of any stripe. And rather than moving ahead of the country, the Court need only have recognized the validity of the law passed 37 years before its decision. And had it done so, we wouldn't have had a substantive due process case or the disastrous result that *Dred Scott v. Sanford* really was.

The broader lesson, of course, is that there is no principled basis for obtaining only the judicial activist results that one likes as a judge. And to approve of substantive due process, which is nothing more than a contradiction in terms to me, is to accept *Dred Scott* and the *Lochner* line of cases. And more generally, the Constitution is suited to a changing society, not because its provisions can be made to mean whatever activist judges want them to mean, but because it leaves to the State legislatures and the Congress primary authority to adapt laws to changing circumstances.

Well, you could go on and on, but this is an important issue. And I know that you understand it, and I just want you to think about it because if we get to the point where judges just do whatever they want to do and they ignore the statutes or the Constitution and the laws as they are written and as they were originally meant to be interpreted, then we wind up with no rule of law at all. And that is the point that I am making.

And I admit there are some fine lines where it is very difficult to draw the line between when a judge is actively trying to resolve a problem and when the judge is just doing it on their own volition.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

The Senator did—and I will accommodate other Senators, as well—did go close to 50 minutes, but there was as continuous line of questioning, and hopefully it means the next round will be a lot shorter.

We are about to have a vote, Judge, but I will start my questions. We will probably end up with a break here anywhere from 3 to 5 minutes into the questioning, and then I will resume it.

We sometimes make statements over our long careers in the Senate that we either wish we didn't make or, although proud of having made them, we are reminded of them at times. I am about to engage in that.

Senator Hatch, when Judge Souter was before us, and some were pressing Justice Souter for a specific answer on an issue like the death penalty, said:

Judge Souter, I hope you will stand your ground, when you sincerely believe you are being asked for answers which you clearly cannot provide and have the good faith to be able to act as a Supreme Court Justice later. The Senate will not probe into the particular views of a nominee on a particular issue or public policy, let alone impose direct or indirect litmus tests on specific issues or cases. If it does, the Senate impinges upon the independence of the judiciary. It politicizes the judging function. The confirmation process becomes a means of influencing outcome.

Now, I am sure having read that, I will have statements that I made during the process read back to me. But I do think it is appropriate to point out, Judge, that you not only have a right to choose what you will answer and not answer, but in my view you

should not answer a question of what your view will be on an issue that clearly is going to come before the Court in 50 different forms, probably, over your tenure on the Court.

So, I just want to inject what we never have in politics—consistency. Then again, if we were consistent, it would be very dull.

Let me move on. As a matter of fact, I have just been told the vote—and I want to make sure my colleague from Illinois knows it this time, I told her there is a vote—the vote has just begun, and so I think this is an appropriate time to break. I will come back with my round of questions. It will probably take us, as you have probably observed by now, Judge, somewhere between 10 and 15 minutes to get over and vote and come back.

So we will recess for whatever time it takes to get to the floor and back.

Judge GINSBURG. Thank you.

[A short recess was taken.]

The CHAIRMAN. The committee will come to order.

Welcome back, Judge. I started to say in another context, when you talk about the Madison lecture, welcome to the club of realizing that nothing you say will ever fully satisfy everyone. But now you are in a new arena, where nothing you say will satisfy the same person twice, even if you say the same thing twice.

I find the press fascinating and I love them, and this will get their attention.

When a former Justice was before us, I asked a number of tedious questions about natural law, because this particular Justice has written a great deal on natural law, all the press wrote articles about how tedious and boring it was.

After he got on the Court, one of the leading newspapers in America ran a long article about why didn't we ask more about natural law. Part of the problem is the press is like us, they sometimes don't understand the substance of issues.

So the good news is your nomination has not been controversial. The bad news is that if it is not controversial, then we will discuss other things. I just want to point out that I am flattered that the press noticed I comb my hair a different way, which is a major issue these days. I would be happy to have a press conference on that and give you all advice later on how to do that, if you would like.

But it is a fascinating undertaking, and so I can assure you that when you finish, as brilliant as you are, you will not be satisfying to anyone all the time, let alone all the people all the time. But I think you are doing a brilliant job.

Let me point out—and my colleague is, as we say in this business, necessarily absent as I speak. As a matter of fact, I can see him at this moment being interviewed. So I am not going to take the time to wait until he returns to make the statement I am about to make, although I say this not as a criticism to him.

I would indicate that, historically, I think you have laid out very clearly from the outset the basis upon which the right of privacy has been found to exist under our Constitution. Because the first question you answered, you talked about the liberty clause; you talked about the ninth amendment; you talked about the common law and the common-law traditions.

I would point out to my colleague that there has, in fact, with a notable aberration period in our history, always been a distinction in the common law, as well as constitutional interpretation, between the degree of protection and the wide berth that matters relating to personal privacy and property have been treated, especially the last 50 years. There have been distinctions historically made in terms of how the Court approaches the degree of protection warranted in those areas, and in terms of how and under what circumstances government can interfere with either of those rights, one's personal private rights and one's property rights.

I would like to pursue a little bit—I didn't intend on going in quite this direction, but in light of the line of questioning, which I think was appropriate, the line of questioning of my colleagues just had—I would like to discuss with you the issue of unenumerated rights, particularly the right to privacy.

The right to privacy recognized by the Court includes such things, as you have mentioned, as the right to marry free from government interference. And in response to one of the best columnists in the country who says we repeat things all the time, part of the reason we repeat things all the time is an attempt to educate people a little bit. Most Americans, I have found in surveys, if you ask them if I can marry whom I want, they will say "yes". If you say what right do you have for that, they say the Constitution guarantees it.

Nowhere in the Constitution is the word "marry" mentioned; nowhere in the Constitution is the right to marry mentioned. There is nowhere in the Constitution where the right of a married couple to use birth control is mentioned, but Americans think that it is.

Senator GRASSLEY. Are you arguing that a brother has a right to marry a sister?

The CHAIRMAN. No, I am arguing that the right to marriage is one that is a right of privacy that most Americans think is constitutionally guaranteed, and only under exceptional circumstances can the State interfere with your choice of who you want to marry. They have to be able to prove there is some overwhelming reason for their interfering with your right to marry. That is why they call it a fundamental right.

Now, that test has been met in the minds of the courts, when you say I wish to marry my brother or my sister. There is an overwhelming reason why the State can prohibit that, an overwhelming State interest. But it is a fundamental right, and most Americans think it is written into the Constitution. Most Americans think, as they should, that that is something that is a fundamental right.

Just like what happened—and I will get back to this, Senator, in light of the understandable interruption—when the States used to come along and say, hey, white folks can't marry black folks. The Court went, wait a minute, what's the rationale for that? Why can't white folks marry black folks or black folks marry white folks—the so-called antimiscegenation laws. The Court said, hey, wait a minute, that doesn't make any sense.

I am confusing a little bit right to privacy and some of these issues, but I don't want to—in a generic sense, the answer to your question, Senator, is they have to have an overwhelming reason to interfere with certain of our rights of privacy.

So the right to make decisions about how to raise and educate one's children free from government interference has been recognized by the courts. You told Senator Leahy, Judge, that there is a constitutional right to privacy. I think that is what you said to him, which you described as "the right to make basic decisions about one's life course"—well stated, well articulated, and similarly articulated by other Justices whose ranks you are about to join.

But I was as little unsure from your answer to Senator Leahy's question about how strong you thought that right of privacy was. The Supreme Court has recognized these rights about marriage, child rearing, and family, and when they have, they have generally referred to them—and I think in all those three areas—as fundamental rights.

As you and I both know, when the Court uses the word "fundamental," it is a term of art as they use it. Now, there usually is a need to make a distinction, when in the law there is a difference between fundamental rights and other kinds of rights and how the courts look at them. This means that the Government must have an extraordinary or compelling justification for interfering with a personal decision of the kinds I have mentioned.

Now, when Senator Leahy asked you about the right to privacy, you first agreed with the statement that the Government could not interfere with that right, absent a very compelling reason. But you then went on to say that the Government "just needs a reason." There is a big difference, as you know, between the two, just needing any old reason and needing a compelling reason. The Government has reason for almost any action they take, a compelling reason for only a few of the actions that we take.

Now, it may have been just a semantic difference. But what I want to go back to, having read the record, is do you agree that the right of privacy is fundamental, meaning that it is so important—I am not asking about any specific rights of privacy—meaning that it is so important, that the Government may interfere with it only for compelling reasons, when it finds that such a right exists, the right of privacy?

Judge GINSBURG. The line of cases that you just outlined, the right to marry, the right to procreate or not, the right to raise one's children, the degree of justification the State must have to interfere with those rights is large.

The CHAIRMAN. That is what I thought you meant, but there was a line in your response that you have now clarified for me. I am not pressing you about other rights, unfounded, unrecognized, arguably existing. I am not asking you about those. I am not asking you about consensual homosexual marriages or anything else. I am just dealing with the line of cases that have already been decided on procreation, in this case the *Griswold* case, starting with it, and family decisions and the like. I am not pressing you to where you are going to go from here. I just wanted to make sure I understood you viewed these cases as requiring a compelling government reason.

Judge GINSBURG. You mentioned *Meyer v. Nebraska* (1923) and *Pierce v. Society of Sisters* (1925). Although pigeonholed in the free exercise of religion area, I would put the *Yoder* (1972) case in that same line.

The CHAIRMAN. I agree with you. Again, the reason I raised this is that at least two of the last five Justices who have come before us have argued that either the right does not exist, should not exist, that the Court made incorrect decisions in that line of cases, or that if it exists, it is not a fundamental right. And that is why I am pursuing this, to make sure I understood what your answer was. I now understand it.

Now, another critical question concerning the method you would use to determine whether or not personal decisions are included within the zone of decisions protected by the right of privacy has been raised by my friend from Utah. He indicates there is no principled means by which one could find a right to privacy, a notion I strongly disagree with, from the standpoint of legal scholarship. There is a principled rationale that has been employed to find the right to privacy.

But there is a debate that exists. I am not going to ask you about how you decide any specific case, but I would like to determine where you are, in a general sense, in this debate over the methodology that should be employed to determine in the first instance whether or not there is a principled reason for finding a right of privacy in the Constitution.

Now, Judge Scalia, a brilliant jurist who you know well, who apparently wants to be on an island with you somewhere—[laughter].

By the way, please note in the record that people laughed. That was—

Judge GINSBURG. Compared to what. He didn't say I would be his first or second choice. He said compared to what. He was given a tightly circumscribed choice.

The CHAIRMAN. Well, if I had to be on an island with a man for any extended period of time, I might pick Judge Scalia. The reason I would, sincerely, is I think he is brilliant, I think he is dead wrong most of the time, as he thinks I am, and it would be, as another nominee who came before us once said, when asked why he wanted to be on the Court, it would be an intellectual feast.

A slight digression: I had a conversation with Justice Scalia after you had been nominated, to tell him that I was about to say in an interview the vote I most regretted casting out of all the ones I ever cast was voting for him, because he was so effective. He said what are you doing now? I said I am teaching a course in constitutional law at Widener University. He said, oh, my God, I had better come and tell them the truth. [Laughter.]

So I am sure he would have an opportunity to educate me, if we were on an island together.

Having said that, Justice Scalia, on a very serious note, has offered one method, a methodology to determine whether or not a right of privacy, a personal right that is not enumerated, not mentioned in the Constitution, warrants constitutional protection. And he has written that the only interests protected by the liberty clause of the 14th amendment are those interests which are defined in the most narrow and specific terms, where historical safeguards from government interference have existed.

Now, as you know better than I do—again, at the expense of offending my brethren in the press, I am going to be very fundamen-

tal about this, to use a phrase from another context—when in the past we determined whether or not fundamental rights of privacy exist, one of the things they go back and do, as courts have done, is look at history. They say what have we done in the past, as a people, what has our country done, what has our English jurisprudential system recognized, not only here in the States, but in England, in the common law? And they look back at that as one of the guideposts, not the only one, not necessarily determinative, but that is what they have done.

I think, by inference, Justice Scalia acknowledges that is an appropriate method, at least a starting point to determine whether or not an unenumerated right should be recognized as protected by the Constitution.

So Justice Scalia says that when you go back, determining whether or not there is an interest protected by the liberty clause of the 14th amendment, you go back and look at those interests defined in their most narrow and specific terms. So the question for Justice Scalia, in deciding whether the Constitution protects a particular liberty, including a particular privacy interest, is whether years and years ago the Government recognized that precise specific interest.

Now, that approach of Justice Scalia, which was outlined by him in the *Michael H.* case, that approach is very different from another that I would characterize as the traditional approach for determining whether or not these unenumerated rights that we have recognized exist.

The traditional approach, in my view, looks to whether the Constitution expresses a commitment to a more general interest, and then asks how that commitment should be applied in our time to a specific situation. The difference between these two approaches can make all the difference in the world on where a Justice comes out on the finding of whether such a right exists or doesn't.

For example, under Justice Scalia's approach, the right to marry someone of a different race is not protected by the Constitution, at least arguably, based on things he has said, because the right to marry is nowhere specifically mentioned in the Constitution. And when you go back to look at whether or not—which is one of the methods used by all Justices to determine whether or not there is an unenumerated right that should be protected—when you go back in history and look, there is no place you can say that, under our English jurisprudential system, our courts or the English courts have traditionally recognized the specific right of blacks and whites to marry. And since you can't find that back there, then the right doesn't exist.

Whereas, in footnote 6, for example, as you well know, although Justices Kennedy and O'Connor agreed with the overall finding on that case—which I won't bother you with the facts, which you know well and are not particularly relevant to my point—they said we dissent from the methodology used by Justice Scalia in arising at a decision, which is the right decision—my words—but for the wrong reason. And they said you go back and you look at the general proposition of whether or not the general interest seeking protection under the Constitution is in fact one we have historically protected.

So they say when you go back, you should look at whether we historically protected the right and recognized the right of individuals to marry who they want to marry. So you go back and, depending on what question you ask, you get a different answer. If you go back and say, OK, we will recognize—and I am oversimplifying—we are going to recognize, determine whether or not antimiscegenation laws are constitutional, and the basis on which they are being challenged is I have a privacy right to marry who I want to marry, so let's see if that right is protected by the Constitution.

Scalia's approach, you go back and look at all the history and say, hey, there is no place where blacks and whites were protected. But if you used the O'Connor approach, you go back and say have we recognized the right to marry? You say yes, we have done that, ergo, we can say, using that methodology of looking at the general proposition, there may be a principled rationale to acknowledge or recognize the right to marry a black man or a white woman or a white man or a black woman, that may fall within the domain of my right of privacy guaranteed by the Constitution.

Senator HATCH. Would you yield just for a second on that point?

The CHAIRMAN. I would like to finish just this line, so I don't confuse anybody.

Senator HATCH. I just want to mention that I really don't think Justice Scalia would fail to find, under the 14th amendment protection clause, that *Loving v. Virginia* is the correct decision.

The CHAIRMAN. A valid point.

Senator HATCH. I don't think he would have had the interpretation—

The CHAIRMAN. He may have come up with the exact same decision of saying that it would, in fact, be inappropriate and unconstitutional for the State of Virginia to have such a law. But he would not have found it, if you used his methodology, because that is where the right of privacy has most often been found by the courts since *Pierce*.

Now, in contrast, as I said, under the more traditional approach recognizing unenumerated rights, the courts ask not whether the legal system historically had protected interracial marriages, but whether the legal system historically had protected the institution of marriage generally. Because it had, because our legal system long had understood the importance of family integrity and independence, the Court held in *Loving v. Virginia* that the particular right to marry someone of another race is also protected.

Now, in thinking about how the Constitution protects unenumerated rights, including rights of privacy, will you use—I am not asking you where you are going to come out on any issue, but will you use the methodology that looks to going back to a specific right being sought, guaranteed, or will you use the more traditional method of more broadly looking at the right that is attempting, seeking constitutional protection before the Court? What methodology will you use? What role will history and tradition play for you in determining whether or not a right exists that is not enumerated?

Judge GINSBURG. Mr. Chairman, if I understand your question correctly, including the exchange between you and Senator Hatch,

if you are asking whether I would have subscribed to both parts of *Loving* (1967)—that is, both the equal protection and due process—

The CHAIRMAN. No. Let me be very clear. I don't care about *Loving*. I was using *Loving* as an illustration as to how you would arrive at a different decision depending on which methodology. I am asking you very specifically—

Judge GINSBURG. *Loving* was the case Justice O'Connor used to—

The CHAIRMAN. Illustrate.

Judge GINSBURG. To distinguish her position from the position Justice Scalia took in the *Michael H.* (1989) case. That case, as you know, had nothing to do with the issue raised in *Loving*. The controversy centered on a footnote in the Court's opinion, in Justice Scalia's opinion, a footnote added to the opinion in response to the dissent. The footnote was rather long, as I remember—it is not in front of me. The note appears at least to Associate Justice Scalia with a first step that some people wouldn't take; that is, he appears to recognize the existence of an unenumerated right. Then the question is: How does one define that right? He is not saying there are no unenumerated rights.

I have a colleague who has written a wonderfully amusing article, which I think he means us to take seriously. It is an article by my chief judge, Abner Mikva. It says, "Good-bye to Footnotes." And perhaps—

The CHAIRMAN. Well, the footnote here, Judge, is irrelevant. Let's just put it all aside. I am just using that as an illustration. The debate among people today in your business is: What principled rationale do you use in determining whether or not, under the liberty clause of the 14th amendment, a privacy right exists?

Judge GINSBURG. Senator Biden, I have stated in response to Senator Hatch that I associate myself with the dissenting opinion in *Poe v. Ullman* (1961), the method revealed most completely by Justice Harlan in that opinion. The next best statement of it appears in Justice Powell's opinion in *Moore v. City of East Cleveland* (1977).

My understanding of the O'Connor/Kennedy position in the *Michael H.* case is that they, too, associate themselves with that position. Justice O'Connor cited the dissenting opinion in *Poe v. Ullman* as the methodology she employs. She cited *Loving* as her reason for not associating herself with the footnote, the famous footnote 6 in Justice Scalia's *Michael H.* opinion, a footnote in which two Justices concurred. That is about all I can say on that subject.

The CHAIRMAN. Well, I think that answers the question. It seems to me that based on what you have said, you believe the more traditional principled rationale for arriving at whether or not such a right exists as it relates to the use of historical precedent is the one that you would use, rather than very narrowly speaking to a very specific right to determine whether or not it was protected.

Now, I have used up 15 minutes. When I come back, I can tell you, I want to move from that to talk about the *Chevron* case and what methodology you use in terms of deciding—and it is a different issue there. It is legislative intent that is going to be the issue, and what deference is given to it. I know we have raised

questions about that before, but I would like to nail down a few more points.

I appreciate your answer, and I am not going to go beyond the 15 minutes. I will now yield to the Senator from Pennsylvania.

Senator COHEN. Does that mean I am precluded from raising that issue before it comes back to you, the *Chevron* issue?

The CHAIRMAN. Not at all. Not at all.

Senator SPECTER. Mr. Chairman, thank you very much. You asked for an indication of time. I would expect to use the full 30 minutes.

Judge Ginsburg, I begin by expressing my own concern about the scope of the answers. The chairman said that he wished you would have answered a little more. I would join Senator Biden in that. I appreciate the fact that you have to make your own judgment as to what you will answer.

My own reading of the prior nominees has been that, as a general rule, there were more answers. Some answered less. Justice Scalia answered virtually nothing.

The CHAIRMAN. That is why I would like to be on an island with him. [Laughter.]

Senator SPECTER. He is a very engaging gentleman and a squash player, and I haven't yet been able to persuade him to do that. But when he was before this panel, I think Senator Biden is correct that he answered much less than you have.

You will not find any quotations from me in the record about praising nominees before our panel, and this is the eighth occasion I have been a party to them—praising nominees for not answering questions. I read one of your articles, and as you know, I wrote to you because you had commented that you believed the committee had crossed the line with Judge Bork in questions we asked. I wrote to you and asked for some examples, and I can understand your being too busy to give them.

My own observations have been that nominees answer about as many questions as they have to for confirmation, and I think that Chief Justice Rehnquist, for example, came back and answered some questions. It was a 65-33 vote. The tenor of these hearings has been very laudatory from this side of the bench, and I would join in that, as I said, about your academic and professional and judicial career. So that I don't think there is any doubt about your nomination not being in any jeopardy, but I would just add my voice to those who have commented about an appreciation on our side for more information.

When I asked the question about the death penalty yesterday, I tried to articulate it in as gentle a way as possible. I would not ask you, as Senator Hatch did—and he had every right to ask, and you had every right to decline—about issues moving toward how cases might be decided and whether you agreed with Justices Marshall and Brennan on capital punishment being cruel and unusual punishment in violation of the eighth amendment.

But I think that capital punishment is sort of a landmark issue on law enforcement, its deterrent effect and its ability to be a beacon, so to speak. That is one of the areas where I would have appreciated a little more.

I mention those comments to you at the outset because I think it is important, and this is obviously going to be an area where there are going to be lots of differences of opinion, not only with you today but with the nominees who will follow.

Let me now move to the substantive area that I consider to be very important, and that is the role of the Court on refereeing disputes between the President and the Congress on the War Powers Act issue, about which you wrote a concurring opinion in *Sanchez-Espinoza v. President Reagan*.

The issue of the gulf war was very problemsome, and President Bush asserted very late into December 1990 the intent to move into a conflict with Iraq over Kuwait without congressional approval. The leadership in the Congress stated their intention not to bring the matter to the floor. It was in a very unusual procedural setting where we had swearing-ins on January 3, and Senator Harkin of Iowa brought the issue up in a way which I think forced the hand of the leadership, and the issue did come up and we did have a vote on the resolution for the use of power.

Let me move to your concurring opinion in *Sanchez-Espinoza*, as the fastest way to get into the issue and into a dialog, where you said that you:

would dismiss the War Powers claim for relief asserted by congressional plaintiffs as not ripe for judicial review. The judicial branch should not decide issues affecting the allocation of power between the President and Congress until the political leaders reach a constitutional impasse. Congress has formidable weapons at its disposal: the power of the purse and investigative resources far beyond those available in the third branch.

I would suggest to you, Judge Ginsburg, that the power of the purse is not very helpful if the President goes into Kuwait without authorization from Congress were the Congress to cut off his funding. It obviously can't be done when fighting men and women are at risk.

And when you talk about the investigate resources far beyond those available in the third branch, I don't believe that our investigative resources, which are customarily very important, really bear on this issue.

If we are to have a resolution between the Congress and the President, where we have a Korean war without a declaration of war, we have a Vietnam war without a declaration of war, and we have an issue about a violation of the War Powers Act in El Salvador as the issue came before your court, how can this dispute of enormous constitutional proportion be decided unless the Court will take jurisdiction and decide it?

Judge GINSBURG. Senator Specter, in that case, in the portion you read, I said that the question was not ripe for our review.

Senator SPECTER. I did.

Judge GINSBURG. It is a position developed far more extensively than in the abbreviated statement I made in the *Sanchez-Espinoza* (1985) case. The principal exponent was my colleague, Carl McGowan. He wrote persuasively on congressional standing and the concept of ripeness for review. His position was essentially adopted by Justice Powell in *Goldwater v. Carter* (1979). That case concerned the termination of the Taiwan Defense Treaty.

Senator SPECTER. It was Justice Powell who just had a single line: "Although I agree with the result reached by the Court, I would dismiss the complaint as not ripe for judicial review." But I do not believe that either the Supreme Court or the circuit court—and the circuit had it in *Crockett v. Reagan*—has ever really dealt with the issue.

I tried with Justice Souter, asked him if he thought the Korean war was a war. I answered the question in the question, because I think the Korean war was a war, and he said he would have to think about it. I said, "I am going to ask you the next round," and over the weekend he came back. I said, "Have you thought about it?" And he said, "Yes, I have." And I said, "Well, was the Korean war a war?" And he said, "I don't know."

I think this is a matter that we really ought to explore with a nominee—standing, ripeness. You have written expansively and I have admired your work on standing. I think that the Court dismisses too many cases on the standing issue. But isn't the Supreme Court there really to referee big, big issues? It is harder to have a bigger issue than the constitutional authority of the Congress to declare war or whether the President exceeds the War Powers Act if we don't come to you. And we can hardly come to you when the troops are in the field.

Judge GINSBURG. Senator Specter, the question for me was: Who is the "we"? I have not ruled out the ultimate justiciability of a question of the kind you have raised. What I said was that I associate myself with the position taken by Justice Powell, and in both decisions and law review articles by Carl McGowan, the position that legislators must stand up and be counted in their own House before they can come to court. If Congress puts itself in conflict with the Executive by passing a resolution, by a majority of both Houses, saying we, the Congress, take the position that the Executive is acting in opposition to our will, at that point I could not say there isn't a ripe controversy. But unless and until that occurs, I have taken the position—whether it is Republican Senators or Democratic Senators—that no ripe controversy exists between Congress and the Executive. The controversy ripens only when legislators who oppose to the Executive's position win in their own branch. Until that point is reached, in my view, there is no justiciable controversy between the two branches of government.

The President is a unitary. The President takes a position. For Congress to take a position, Congress must act by majority vote. I do not think a group of Senators can come to court and ask the third branch to resolve a clash between the legislative and the executive branches. That is my position on ripeness. I have stated that position in an abbreviated way in *Sanchez-Espinoza* (1985). Others take different positions. Members of my court have taken other positions.

As I see it, there must be a majority vote in Congress before the Executive and the Congress can have a controversy ripe for court to review. If a group of legislators does not prevail in Congress, that group cannot come to court for resolution of a clash that, in my mind, does not exist until it becomes the position of the Congress.

That is about all I can say, Senator Specter, on that subject.

Senator SPECTER. Judge Ginsburg, do you believe that the Korean war was a war?

Judge GINSBURG. That is the kind of question on which you might ask a law teacher to expound. If you are asking me how I would rule as a judge—and you are considering me to be a judge, not a legislator—I would have to say the Korean conflict was a complex operation. If I were presented with the record, the briefs, the arguments, I would be required to make a decision on it on the basis of what the parties present to me. I am afraid I can't do any better than Justice Souter did on that question.

The job for which you are considering me is the job of a judge, and a judge has no business expounding on a question like that apart from the record, the briefs, the presentations of the parties. We do have a great attachment in our system of justice to the principle of party presentation. Judges in our system are not inquisitorial. They do not take over the proceedings and pursue what they will. Senator Hatch reminded me of that very forcefully. Very dear to our system of procedure is the principle of party, not judicial, presentations.

I can't answer the question about the Korean war off the top of my head. If I were confronted with it as a judge in a case where the issue was justiciable, I would make my decision on the basis of the record, the briefs, and the arguments before me; out of that setting I am not prepared to answer the question.

Senator SPECTER. May I respectfully suggest, Judge Ginsburg, that a question as to whether the Korean conflict was a war does not come within the confines of justiciable issues where briefs are required and oral argument is required on a narrowly focused matter. As a matter of common life experience, people have a view as to whether the Korean conflict, involving thousands of people with a lot of military action, was or was not a war.

In citing the Korean conflict, I cite something which is not going to come before the Court, and I would expect that that would be the kind of a question where at least we could get some idea as to your life experience and your general approach to a matter of some magnitude, but I am not going to press it.

Let me move to another issue. I have been very much concerned about the Supreme Court functioning as a super legislature. As I said earlier, I am very much concerned about the issue of judicial activism, and would cite two cases where the Court acted as a revisionist Court. The *Griggs* decision was handed down in 1971 on a matter involving the Civil Rights Act, and then *Ward's Cove* came along in 1989 and, in my view, overruled *Griggs*. Congress changed that and returned to *Griggs* with the Civil Rights Act of 1991.

Senator Kennedy asked you earlier today if you agreed with the decision of the Supreme Court in one of those series of cases, and I am going to have to recheck the record to see if that was really answered. But the case I want to take up with you is the case of *Rust v. Sullivan*, and the concern that I have here is with an activist-revisionist Court which is going to make new law.

*Rust v. Sullivan* is the gag rule case, and that involved a situation where the provisions of the Public Health Services Act of 1970 relating to counseling on planned parenthood, was passed in 1970, and a regulation was promulgated in 1971 that there could be

counseling on abortion issues. Then in 1988, the Secretary of Health and Human Services issued a new regulation to the contrary, that there could not be counseling. Even though the earlier regulation had stood for some 17 years, Congress had not acted to alter it, strongly suggesting congressional approval of the regulation.

Then in a 5-to-4 decision, the Supreme Court upheld to new regulation, pointing out, among other things, that the new regulation was "in accord with the shift in attitude against the elimination of the unborn children by abortion." I was surprised to see the Court rest its opinion in part on a shift in attitude, shift in public opinion, to come out with a new regulation.

My question to you, as this is now a decided issue, do you agree with the Supreme Court's judgment in *Rust v. Sullivan*?

Judge GINSBURG. Senator Specter, remind me of the prior history of that case. It was a question, was it not, of the deference due to the Health and Human Services—

Senator SPECTER. That was a factor in the case, on the deference due a regulation promulgated by the executive branch, but within the context where there had previously been a contrary regulation, which had been in existence for 17 years, and no congressional action to change it during that time.

Judge GINSBURG. You said that you were going to check to see what my answer was about *Griggs* (1971) and *Ward's Cove* (1989). I hope I have been consistent in saying I think that the court, my court, and the Supreme Court, endeavored to determine what Congress meant. *Griggs*, was a unanimous decision authored by Chief Justice Burger, was it not?

Senator SPECTER. It was.

Judge GINSBURG. And wasn't *Ward's Cove* a divided decision?

Senator SPECTER. Five-to-four.

Judge GINSBURG. And then Congress said what it meant. I gave some other examples of such congressional clarification or correction. But I am uncomfortable about inquiries concerning how I would cast my vote in a particular case. I will address and explain, to the extent I am able, any vote I have cast. But you are raising a question about—one of your colleagues said he would inquire about *Chevron* (1984) deference and ask what that means to me.

I will confess I am the judge who wrote the decision that was reversed in *Chevron*. I regard *Chevron* as stating a canon of construction, which Congress is at liberty to say it doesn't want applied. I don't want to sit here before this committee, however, and write the opinion I would have written in the *Rust v. Sullivan* case.

Senator SPECTER. Judge Ginsburg, I am not asking you about *Chevron*. The specific case that Senator Kennedy asked you about I believe was *Patterson*, and in response to his question about whether you agreed with the opinion—and I believe it was *Patterson*—he said since they won't come back, you responded about—I don't believe you answered his question—you responded about the Congress changing the law on title VII cases applying to sex discrimination, and then about the *Goldman* case.

But I have moved away from *Patterson* and I haven't brought up *Chevron*, and the decision involving the gag rule, *Rust v. Sullivan*, is an example of a revisionist Court, in my opinion. It is a decided

case. What is the problem, on a matter which has been litigated and is finished, in having a Senator on the Judiciary Committee ask a nominee for the Supreme Court whether that case was correctly decided? It is a finished matter. Just as Senator Kennedy asked you about *Patterson* this morning, as he put it, the case won't come back.

Judge GINSBURG. It isn't clear to me, Senator, that the case won't come back, simply because we have a different regulation now. The gag rule was withdrawn in the very first week of this new administration. But it isn't far-fetched to think the rule could return in another administration.

Again, I sense that I am in the position of a skier at the top of that hill, because you are asking me how I would have voted in *Rust v. Sullivan* (1991). Another member of this committee would like to know how I might vote in that case or another one. I have resisted descending that slope, because once you ask me about this case, then you will ask me about another case that is over and done, and another case. So I believe I must draw the line at the cases I have decided.

You asked about my statement in *Sanchez-Espinosa*, and I answered that question. If you inquire about something I have written, or an authority on which I have relied, I will do my best to respond. But if you ask how I would have voted on an issue that can come back, I must abstain. I can address an issue or case that is never going to come before the Court again—*Dred Scott*, for example, a decision I said was wrong for all times.

The issue in *Rust* is one that may come back. You can't rule it out, any more than I can. You can say for now the gag rule has been removed, the President removed it in his very first week in office. But it was put in place by the prior administration. I can't rule out the possibility that another administration will put the gag rule back. If I address the question here, if I tell this legislative chamber what my vote would be, then my position as a judge could be compromised. And that is the extreme discomfort I am feeling at the moment. You are asking me to tell you how I would vote on a case you call over and gone, one that can't come up again. I know the case is not going to come up again in the next 4 years. I can't see beyond that. I know that—

Senator SPECTER. How about 8 years? [Laughter.]

Judge GINSBURG. I am not going to predict the result of the next election, any more than you are, Senator.

Senator SPECTER. Judge Ginsburg, do you agree with the decisions of the Supreme Court in the 1930's, when the Supreme Court of the United States invalidated a whole series of congressional enactments on the New Deal, on the ground of substantive due process? Do you agree with those decisions?

Judge GINSBURG. Senator Specter, I think that line of authority has been so discredited by so many Supreme Court decisions, that if anything is well established, it is well established that the *Lochner* era is over. One cannot say of a recent 5-to-4 decision what one can say about the repudiation of the *Lochner* line of cases.

Senator SPECTER. Good. Now that we are finished with the thirties, we can move into the forties.

Judge Ginsburg, do you think that Congress has the authority to take away the jurisdiction of the Supreme Court of the United States to decide the constitutionality of issues under the equal protection clause of the 14th amendment?

Judge GINSBURG. You are asking me, what if Congress decided to do that, and if it were challenged in court—I don't think Congress has ever done that, right?

Senator SPECTER. *Ex Parte McCordle* dealt with that right after the Civil War.

Judge GINSBURG. There is *McCordle* (1869) and there is *Klein* (1872), and I don't think there is much more. If Congress were ever to do what your question hypothesizes, there would almost certainly be a challenge and it would almost certainly come before the Court. I can recite the names of the cases that exist, but I can't say anything beyond that. Any further statement would not be in the best interests of the Supreme Court.

Senator SPECTER. Did you answer—I believe you did yesterday—that you agreed with *Marbury v. Madison*?

Judge GINSBURG. I believe—

Senator SPECTER. I don't ask that question lightly, because some don't.

Judge GINSBURG. I believe the institution of judicial review for constitutionality is well established—I think I expressed myself to that effect yesterday. It is a hallmark of this Nation that our courts exercise that function.

We have served as a model for the world in that regard. After World War II, a number of states that never had the institution of judicial review for constitutionality looked to our system as a model. Yes, I feel comfortable that I am not doing any damage to the Supreme Court or the Federal judiciary by saying I believe *Marbury v. Madison* (1803) is here to stay.

Senator SPECTER. The time goes fast when I am questioning, maybe more slowly for you, Judge Ginsburg. The red light is on. If I may just pursue this for a moment or two more, Mr. Chairman.

*Marbury v. Madison* established the supremacy of the Supreme Court to decide the constitutionality of issues, and there are some up to this moment who dispute that. I asked you the question about whether Congress can take away the power of the Supreme Court to decide the constitutionality of issues under the equal protection clause of the 14th amendment, because you are the foremost champion of that clause.

But when you declined to answer that question, the thought occurs how do you have inviolate Supreme Court standing to decide constitutional issues, if the Congress can take away the authority of the Supreme Court to decide it, take away the jurisdiction.

When Justice Rehnquist was up for confirmation for Chief Justice, I asked him the question as to whether the Congress could take away the jurisdiction of the Supreme Court, and he declined to answer. Overnight, one of the staffers found an article written by Chief Justice Rehnquist in 1958. It was in the Harvard Law Record. He was then William H. Rehnquist, no titles.

In that article, Mr. Rehnquist criticized the Judiciary Committee for not asking Justice Whittaker, a nominee, important questions on due process. I said to him the next morning, I said this article

was found by staff and this is what you said in 1958, and he had a great answer. He said, "I was wrong." Then I pursued the question, with some tenacity, perhaps, and he finally answered the question. He said the Court could not be stripped of jurisdiction in first amendment cases.

I then asked him what about fourth amendment cases. He said I am not going to answer that. How about fifth amendment cases, due process, right to counsel? No, I am not going to answer. Sixth amendment? I asked him what's the difference between saying the Court can't be stripped of jurisdiction in the first amendment, but you won't answer as to the fourth, fifth and sixth? I said I am not going to answer that, either. [Laughter.]

The CHAIRMAN. Senator, I have a feeling your tenacity is not likely to be rewarded with this Judge.

Senator SPECTER. Don't bet on it, Mr. Chairman.

My final question to you, Judge Ginsburg, for this round is how can your granddaughters have the protection of equal protection under the equal protection clause of the 14th amendment, and my granddaughters, too, if the Congress can take away the jurisdiction of the Supreme Court of the United States to decide those issues?

Judge GINSBURG. Senator Specter, so far I have only one granddaughter.

Senator SPECTER. Just wait.

Judge GINSBURG. I am hopeful. I never said the Congress could. I haven't got the case before me. Chief Justice Marshall, in *Marbury v. Madison* (1803), said you start with the case. As Madison said, before the courts can do anything, they must have a case of a judiciary nature. Then Chief Justice Marshall said, when I have a case, I must apply the law to it, and the highest law in the land is the Constitution. That fundamental law trumps other laws. But judges do not apply the Constitution to abstract questions. I am bound by the case, I must decide the case, that is where a judge gets his or her authority to expound on anything from, from what article III says, from a case or controversy, a case of a justifiable nature.

If I may, I do want to emphasize what I hope I have made clear to you, because I do not want to be misunderstood as having criticized this committee. In the article that you read, I confess to an ambiguity. The sentence I wrote was, "The distinction between judicial philosophy and votes in particular cases blurred as the questions and answers wore on." I would like to clarify that I was not criticizing this committee. Far from it. I appreciate now more than ever how difficult it is for the responder to maintain that line and not pass beyond it into forecasting or giving hints about votes in particular cases. I was speaking of the vulnerable responder, not the committee that asked the questions.

I might also say, on your question concerning the word "war," it depends on the context. Are you asking about the power of Congress to declare war, or are you speaking in lay terms? I can recite wise counsel that has always shored me up. What a word means depends on the context in which it is used.

That you define a word one way in one context doesn't necessarily mean that you should define that word the same way in every other context. The notion that you should, said a great law

professor, Walter Wheeler Cook, "has all the tenacity of original sin and must constantly be guarded against." So that is what I was guarding against by not answering the question, was the Korean conflict a war. I must ask in what context are you asking that question, are you asking me to decide whether the Executive, in that affair, violated the Constitution, which gives Congress the power to declare war?

Senator SPECTER. I thank you for your answers, Judge Ginsburg. I will return to the issue of war on the next round, because I don't think there is any context in which it wasn't a war.

I would conclude by saying, and I would ask for your reconsideration of this, that although you should not answer questions about cases which are likely to come before your Court, *Marbury v. Madison* could, and, just as that is rockbed, I would hope that we would have assurances from nominees that rockbed issues, like the jurisdiction of the Court to carry out *Marbury v. Madison* on constitutional issues, like the first amendment and like the equal protection clause, are inviolate. Those are rockbed issues which are not going to change, no matter who brings them to the Court, and we are willing to stand up and say so.

Judge GINSBURG. In a case of a judiciary nature, I am prepared to do what a judge does.

Senator SPECTER. Thank you.

The CHAIRMAN. Senator Metzenbaum.

Senator METZENBAUM. Judge Ginsburg, during my first round of questions Wednesday, we had a discussion of antitrust. Now, antitrust is sort of a phrase in the law that you are very familiar with, and a lot of Americans don't pay too much attention to it. But in this Senator's opinion, it really has—it is the bedrock of the whole free enterprise system.

The question really having to do with antitrust is whether conglomerates of business or economic power can be used to adversely affect the consumer in his or her right to buy or sell at a fair price.

I would like to follow up on the discussion that we had yesterday. As you may recall, I am concerned about the fact that the Supreme Court appears to be of two minds about certain antitrust cases. Its most recent decision on the subject seemed to favor a pro-big business approach to antitrust law based on economic theory instead of the facts. And that disturbs me much.

My question to you is: How would you view an antitrust case where the facts indicated that there had been anticompetitive conduct but the defendant attempted to justify it based on an economic theory such as business efficiency?

Judge GINSBURG. I am not going to be any more satisfying to you, I am afraid, than I was to Senator Specter. I can answer antitrust questions as they emerge in a case. I said to you yesterday that I believe the only case in which I addressed an antitrust question fully on the merits was the Detroit newspaper case. In my dissenting opinion in that case, I attempted faithfully to interpret the Newspaper Preservation Act. I sought to determine what Congress meant in allowing that exemption from the antitrust laws.

Senator METZENBAUM. Indeed you did.

Judge GINSBURG. Antitrust, I will confess, is not my strong suit. I have had, as you pointed out, some half a dozen—not many

more—cases on this court. I think I understand the consumer protective purpose, the entrepreneur, independent decisionmaking protective thrust of those laws, but I can't give you an answer to your abstract question any more than I could—I can't be any more satisfying on the question you are asking me than I was to Senator Specter on the question that he was asking.

If you talk about a particular case—my opinion in the Detroit newspapers case was a dissent. There was a division in the court on how to interpret the statute, the Newspaper Preservation Act. That case indicates my approach to determining what Congress meant.

Senator METZENBAUM. Well, let me ask you this: Do you think that anticompetitive conduct can ever be justified on the basis that you have to have it in order to achieve business efficiency? I am really not asking you how you would vote on a case. I am just sort of asking you generally.

Judge GINSBURG. As you know, there is a key decision by Justice Brandeis, *Chicago Board of Trade*, which teaches that restraints of trade which are not *per se* illegal can be justified if their effects are more procompetitive than anticompetitive. And that is the analysis one would have to undertake.

You asked me if the only purpose of the antitrust law is efficiency. The cases indicate that the antitrust laws are focused on the interests of the consumer. There is also an interest in preserving the independence of entrepreneurs. I don't think the antitrust laws call into play only one particular economic theory. The Supreme Court made that clear in the *Kodak* (1992) case. But out of the context of a specific case, I can't say much more. No, I don't think efficiency is the sole drive.

Senator METZENBAUM. In a totally different area, I recognize the majority of Americans, and a majority in Congress for that matter, support the death penalty as a means of dealing with violent crime. I have long opposed the death penalty because of my concern that our criminal justice system too often makes a mistake and sentences an innocent person to death.

I am frank to say that there are certain crimes with which I am familiar, which we all read about in the paper, we see on nightly TV, in which I would almost want to go out and shoot the criminal myself with a gun because they are so heinous. But so often, too often, mistakes are made.

Four months ago, this committee held a hearing on innocence and the death penalty, and we heard firsthand about two of the tragic mistakes the criminal system made. We heard from Walter McMillian, an African-American from Alabama, who was convicted of murdering a convenience-store clerk after a trial lasting all of a day-and-a-half. The jury recommended life imprisonment, but the State judge, who was an elected official, perhaps recognized the political aspects of the matter, overruled the jury and ordered the execution of McMillian. After 5 years on death row, Mr. McMillian was freed because he did not commit the murder.

We also heard from Randall Dale Adams, a white man who in 1979 came within a week—within a week—of being executed for the murder of a Dallas, TX, policeman. Ten years later, he was able to show his innocence and was released.

Another example occurred after our hearing. Just last month, a white man from Maryland, Kirk Bloodsworth, was set free after 9 years in prison when it was conclusively proven that he did not commit the heinous rape and murder of a young girl. He had been sentenced to die.

Our committee held a hearing to understand the problems with the Supreme Court's decision in the case of *Herrera v. Collins*. In that case, Mr. Herrera was sentenced to die and later obtained evidence that allegedly proved his innocence. A Reagan-appointed Federal judge, a district judge in Texas, wanted to conduct a timely hearing to review Herrera's new evidence of innocence. He was prepared to go forward with the hearing within 2 or 3 days. The State of Texas objected to the district court's decision to hold a hearing, and the case was sent to the Supreme Court for review.

The Supreme Court ruled that the Constitution does not require that a hearing be granted to a death row inmate who has newly discovered evidence which, if proven, could establish his innocence.

In the opinion for the Court, Chief Justice Rehnquist was unable to declare clearly and unequivocally that the Constitution forbids the execution of innocent people.

The attorney who represented the State of Texas went even further than the Chief Justice. She bluntly asserted that if a death row inmate receives a fair trial, it does not violate the Constitution to execute that inmate even if everyone agrees that he is innocent.

Now, frankly, that is a shocking statement that came from the prosecutor in that case. I am extremely concerned with the Court's opinion in *Herrera* and the argument made by the Texas prosecutor. Even though the Rehnquist opinion did not clearly hold that it was unconstitutional to execute an innocent person, it is possible to read that into his statements.

Do you believe the *Herrera* case stands for the principle that it is unconstitutional to execute an innocent person?

Judge GINSBURG. As I understand it—and the case is not fresh in my mind—what the Court said was that the evidence in that case was insufficient to show innocence. It did not exclude a different ruling in a case with a stronger record.

We heard yesterday from Senator Feinstein who expressed her anxiety about the number of cases that go on for years and years. The colloquy occurring here shows the tremendous tensions and difficulties in this area. Her concern was that there must be a time when the curtain is drawn, and your anxiety is that no innocent person should ever be put to death.

Those tensions are before you, some of them are presented in the Powell Commission report that you will address. My understanding of *Herrera* (1993) is that it is concerned with the situation of a prisoner asserting, say 10 years after a conviction and multiple appeals, "I didn't do it," and then the process would start all over again.

I can empathize tremendously with the concerns—

Senator METZENBAUM. No, I don't think anybody would argue that. I don't think anybody would argue that, Judge Ginsburg, that 10 years later he can "I didn't do it," because he has been saying for 10 years he didn't do it.

Judge GINSBURG. What the Court said—this is to the best of my recollection—is that the evidence was too slim in *Herrera* to make out that claim, and it left the door open to a case where there was stronger evidence of innocence. That case is yet to come before the Court. So my understanding of this case is that, based on its particular record, the Court found the evidence too thin to show innocence, but the Court left open the question whether one could maintain such a plea on a stronger showing than the one made in that case.

That is as far as the *Herrera* case went. The decision left open a case where a stronger showing could be made.

Senator METZENBAUM. Now, State courts, of course, should review any new claim of a death row inmate that he is innocent. But that review can be in an atmosphere of strong public pressure for execution, especially when the conviction is for a particularly heinous or vicious crime.

Public pressure in these circumstances is most worrisome when the State trial and appellate judges are elected. Historically, the Federal courts have played a significant role in reviewing State death penalty verdicts. Federal judges have lifetime appointments and are more immune to the strong public sentiments that surround death penalty cases for heinous and violent crimes.

Now, the *Herrera* case raised significant new questions about the availability of the Federal courts to hear the claim of a death row inmate that he has new evidence of his innocence. Would you care to explain your view on the general role Federal courts should play in hearing the claims of death row inmates who have newly discovered evidence of their innocence?

Judge GINSBURG. Senator Metzenbaum, the question of habeas review and its limits is before the Senate, before this committee, I believe—

Senator METZENBAUM. But not before the Court. Not before the Court, so I think it is entirely proper for you to respond.

Judge GINSBURG. I can tell you of the legislation Congress passed for the District in which I operate; that is, we generally do not have habeas review. You have given to the District of Columbia courts a fine postconviction remedy. It is identical to the Federal remedy. The Supreme Court said, some time in the middle 1970's, that one goes from the District of Columbia courts to the Supreme Court. If the Supreme Court turns down a review request, there is no collateral review in the Federal Courts.

Some States must wonder why Congress so values the District of Columbia courts and doesn't similarly value the State courts. But I am now simply stating that in my court we don't have the brand of habeas review that the regional circuits have because Congress has said we don't. One of the reasons is that the President appoints District of Columbia court judges. Although they are not life-tenured judges, they are not elected or appointed by the city government. They are Presidential appointees commissioned to serve as judges for the District of Columbia.

What happens next in Federal habeas review, what controls there should be in setting the difficult balance between fairness to the defendant and finality in the system, is going to be your call,

not the Court's call. The next step will be the legislative response to the Powell Commission report.

Senator METZENBAUM. But having said that it is our call, my question to you is: What role do you believe the Federal courts should play in hearing the claims of death row inmates who have newly discovered evidence of their innocence, absent any action by the Congress?

Judge GINSBURG. All one can say is that the evidence would have to be stronger than it was in the *Herrera* case, because that is the binding precedent at the moment. I can't give you an advisory opinion on a case that is not before me with a particular record, a particular showing of innocence of the defendant in question.

Senator METZENBAUM. I am not asking for an opinion in a case. I am asking whether you feel that the Federal courts do have a role to play in habeas proceedings where there is newly discovered evidence that the guilty man, the man already found guilty, is innocent?

Judge GINSBURG. I think the Supreme Court has indicated that they do, but not without a sufficient showing, a factual showing, of innocence.

Senator METZENBAUM. I would agree you would have to have sufficient evidence and factual showing of innocence, and I would accept that answer.

The holding in a recent District of Columbia Circuit Court, *U.S. v. Thomas Jones*, is very disturbing to me. The appeal to your court involved the sentencing guidelines and whether a trial judge could give a longer sentence to a defendant who admitted responsibility for a crime after trial than could be given to the same defendant if he had pled guilty and admitted responsibility for the crime before going to trial.

On its face, it is shocking to consider that a trial court on its own initiative could penalize an individual for exercising his constitutional right to go to trial. The majority opinion, which you joined, held that it was permissible for the trial judge to give a longer sentence after the trial. Frankly, I have difficulty in comprehending that.

The four dissenting judges in the case stated that the majority opinion improperly allowed for increased punishment of a defendant for exercising his constitutional right to go to trial.

Now, I realize that the *Thomas Jones* case involved complicated sentencing guidelines. Therefore, I won't ask you to go into the specifics of the case. But what I do ask is whether you believe that it is improper for a trial court on its own initiative to impose a harsher sentence on a defendant just because that defendant chose to exercise his or her constitutional right to go to trial rather than to plead guilty.

Judge GINSBURG. That was not the nature of the trial judge's decision in—

Senator METZENBAUM. No, I am not asking about that case.

Judge GINSBURG. The answer to the question, can you penalize someone for exercising a constitutional right, should be evident. One cannot be punished for exercising a constitutional right. That is not what happened in that case. The question was the degree of clemency, the degree of leniency, the court was going to give.

The judge did something extraordinary in that case. He applied the guidelines markedly in the defendant's favor. He gave the defendant credit for acceptance of responsibility, which immediately knocked the range down under the guidelines from a range of 151 months to 171 months, to one of 121 months to 151. He gave the defendant 6 additional months—to make the sentence 127 months instead of the very lowest that it could have been, 121 months—because the defendant accepted responsibility late. The trial judge thus took into account the point in the process at which the defendant accepted responsibility. And that is all that case was about. That was all the majority held. The court held that within the context of giving a defendant credit for accepting responsibility for the crime he committed, the district judge could take into account that the man had accepted responsibility late—not on day one, but only after a jury had found him guilty of the crime as charged.

That is what that case involved. It is easy to mischaracterize what the court ruled, but I believe my description is accurate.

Senator METZENBAUM. I am not trying to go into that case. I am asking the more broad general question of whether or not it is improper for a trial court—forget about that case—to impose a harsher sentence on a defendant who chooses to exercise his or her constitutional right to a trial rather than plead guilty?

Judge GINSBURG. If you are asking the question, Can you penalize someone, punish someone for exercising a constitutional right? We have constitutional rights and one can't be punished for exercising a constitutional right. Otherwise, the right is not real.

Senator METZENBAUM. But you haven't answered.

Judge GINSBURG. You can't punish someone for exercising a constitutional right. If you punish someone for exercising a constitutional right, that person has no right.

Senator METZENBAUM. OK. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. We will now, with your permission, Judge, break for lunch until 2:15, if that is OK.

[Whereupon, at 1:13 p.m., the committee recessed, to reconvene at 2:15 p.m., this same day.]

#### AFTERNOON SESSION

The CHAIRMAN. The committee will be in order.

Judge, welcome back. We are starting a few minutes later, because there has been a very controversial vote on the floor of the Senate, causing some Members to continue to engage in the debate, and that is why some Members are not here. Thank you. I hope you had a chance at least to get some lunch.

I now yield to our distinguished colleague from the great State of Iowa, which I do know well and have great love and respect for.

Senator Grassley.

Senator GRASSLEY. You notice how I only had to remind him once about Iowa.

Senator BROWN. I think he was referring to the State, not the Senator.

The CHAIRMAN. That is correct. I do like the Senator from Iowa. Senator GRASSLEY. I was referring to the State, as well.

In your 1986 article, "Interpretations of Equal Protection Clause," in the Harvard Journal of Law and Public Policy, you wrote that the greatest figures of the Federal judiciary "have not been born once or reborn later liberals or conservatives," and then you went on to say:

They have been independent thinking individuals with open, but not drafty minds, individuals willing to listen, and throughout their day to learn. They have been notably skeptical of all party lines. Above all, they have exhibited their readiness to reexamine their own premises, liberal or conservative, as thoroughly as those others.

Now, this may sound like a softball question, but I would like to ask you, from the standpoint of your years experience of judging—and the reason I ask is just to see how you have evolved as a judge—can you tell us whether any of your views have evolved or changed over time? I don't want a lot of examples, maybe one example would be enough. Is there something on which you have changed a particular view of yours. How did it come about and what was the view that changed, and why did it change.

Judge GINSBURG. Senator Grassley, I am glad you quoted that, because it is my creed. When I made my opening remarks, I quoted from Judge Learned Hand's "The Spirit of Liberty." He said "it is the spirit that is not too sure that it is right." When I was asked to enumerate the Justices I admire most, I left out some jurists one might think should be on that list; I did so because they were sometimes too sure they were right.

An example that comes immediately to mind is in the field of civil procedure. Civil procedure is a subject I taught for several years. When I graduated from law school and was clerking for a Federal district judge, I was absolutely sure of the answer to this question: Does a Federal district court have authority to transfer a case, although the transferee court lacked both subject matter and personal jurisdiction?

I had several conversations with the judge for whom I worked. It was, in the end, his decision, but the decision he made coincided with my own view—that the court was powerless to do anything but dismiss the case. The second circuit affirmed the dismissal. Then the Supreme Court reviewed the decision and held that the lower courts got it wrong. We have one Federal court system. A court without subject matter and personal jurisdiction could indeed transfer the case to another Federal court that had authority to hear it. That was the Supreme Court's decision.

I have come to recognize over the years that my thinking was too rigid, that the Supreme Court was indeed right in its view of the flexibility of the Federal court system. So that is an example that comes immediately to mind. I suppose it does, because procedure is the subject I taught for 17 years.

Senator GRASSLEY. Thank you.

I was supposed to inform Senator Biden whether or not I wanted 15 or 30 minutes, and I want to claim 30 minutes for my round.

I want to go on to something that you discussed briefly with Senator Simpson, and that was the issue of recusals. There was some confusion about the number of cases in which you were automatically recused by the clerk of the court of appeals. Senator Simpson thought it was 251, and Senator Biden's staff advised Senator

Leahy it might have been 108. My count of the list in your questionnaire shows that it was a little more than 300 cases involving more than 25 firms on the list. That is in addition to your 11 sua sponte recusals.

And while you recalled Tuesday that many of those recusals resulted from your minor child's ownership of one share of El Paso Natural Gas Co., I want to bring to your attention that none of the cases listed in your questionnaire appeared to involve El Paso Natural Gas. If I am wrong on that, you can correct me.

Rather, the cases that were listed on your questionnaire involved the major American firms on your recusal list, which I understand from your answers Tuesday are clients of members of your family who practice law. I am sure that you will agree that it is important that we clarify this matter, to make certain that conflicts of interest will not substantially impair your ability to perform your duties as an Associate Justice. I don't have any question that you will be impartial in how you make a decision, but I want to ensure your recusals don't impair the work of the Court.

As you noted Tuesday, recusals are far more significant on the Supreme Court, where every case is heard by nine Justices sitting as a full panel, as opposed to the District of Columbia Circuit, where any of the more than a dozen judges on the circuit court can be selected by the clerk to make up the three-judge panel that decides a case.

In close cases before the Supreme Court, the recusal of one Justice can substantially undermine the ability of a court to lay down a clear decisive ruling.

If confirmed, will you continue to recuse yourself from cases involving the firms listed in your questionnaire?

Judge GINSBURG. No, Senator Grassley, and I will not for this reason. The great bulk of those cases would not be on my recusal list next year in any event, no matter what court I served on. Let me explain.

The latest count I got from my chambers, and they checked last night, was 208 automatic recusals, 11 separately listed. You are quite right in reporting that, indeed, it was not my son's two shares of El Paso Natural Gas. In fact, in my early years on the court, there were only four automatic recusals. The great bulk came starting in 1984. A single corporate group my spouse represented from 1984 until this spring accounted for 111 of the 208 cases. That representation is now completed.

That representation meant that I tied for second place in the number of recusals listed for judges on my court. Eliminating that group, I would be at or probably below the middle point. But I can represent to you that the representation in question is indeed completed, so that the single corporate group that accounted for 111 of the 208 recusals should no longer be on my recusal list.

Senator LEAHY. If the Senator from Iowa will yield on my time, yesterday there had been a question on this, or 2 days ago during my discussion with Senator Simpson about recusals. I was acting chairman at that time and I was given by the chairman's staff an incorrect number which was the result of a typographical error. Now I am told the actual number was 208, not 108, as I had represented from the staff printout, and approximately 100 of them

were on matters relating to AT&T, a company which the Judge's husband no longer represents, if I am getting the correct numbers now.

Judge GINSBURG. Yes, I was reluctant to mention the name of the corporate group, but—

Senator LEAHY. I know, but we have had some question of this and a number of Senators have raised questions of whether the accurate numbers were given. That is why now the chairman has asked me to note that the correct number is 208. I also understand your husband no longer represents that client.

Judge GINSBURG. That representation is indeed completed.

Senator GRASSLEY. I think your answer is satisfactory to me. But I did have a concern, because, looking at those same firms and their involvement in appeals to the Supreme Court over a period of time, the LEXIS search found about 300 cases. Basically, what you are saying now is that there isn't any involvement by any member of your family with a large number of those firms, so there wouldn't be a need for recusal. Is that your answer?

Judge GINSBURG. That's correct, Senator.

Senator GRASSLEY. Thank you very much.

If I could go on to something that, to a nonlawyer like me, is a little more complicated. It involves a decision that you were involved in, *United States v. Jackson*. In that case, the defendant was indicted under the Armed Career Criminal Act. You were called upon to determine whether a part of the statute either enhanced an existing criminal penalty for repeat offenders, or, instead, created a new separate offense. You noted that the statute created a new offense, and Jackson's conviction would have to be thrown out, because the grand jury did not indict him for that new offense.

You found the statutory language to be ambiguous, but you did not apply the rule of lenity, where ambiguous criminal statutes are supposed to be construed in favor of the defendant. Instead, you upheld the conviction and, in so doing, it is my understanding, you relied to a great extent on the statute's legislative history.

To what extent should legislative history be used in interpreting criminal statutes? While everyone is presumed to know the law, how is a potential criminal to fairly foresee that a court will convict him based on legislative history, rather than how he might read the statute?

Judge GINSBURG. The meaning of a statute we would always like to get, Senator Grassley, from the text of the statute itself. Sometimes that meaning is not clear and we must resort to construction aids. Aid sometimes comes from legislative history, sometimes from an agency interpretation. I do not have the case that you mentioned in the front of my mind, and I would have to look at it to refresh my recollection. But I am certainly conscious of the need for fair notice to anyone in the criminal justice system.

Senator GRASSLEY. Why don't we do this, since it is not familiar to your mind, we will get you a copy of it and then you can answer at a later time in another round for me. Would that be OK?

Judge GINSBURG. That is fine.

Senator GRASSLEY. I would rather have you answer as thoroughly as you can.

I was here when Senator Biden talked about unenumerated rights. I was not here yesterday when the issue again came up, but I am glad that the chairman clarified whether the Constitution protects the right to marry. It doesn't protect the right to marry whomever a person chooses to marry. The Supreme Court has said the Constitution protects against State interference with the right to marry, if that State regulation is based on race. But the State can and does regulate the right to marry. For example, bigamy laws exist, and protection against people marrying their siblings exist. So you agree with Senator Biden's clarification, don't you, that the Constitution doesn't protect a right to marry whomever a person wants?

Judge GINSBURG. Yes, I agree with that. That has been recognized even in the face of a free exercise of religion challenge, as the bigamy case you mentioned demonstrates.

Senator GRASSLEY. Similarly, you know that there is no unenumerated constitutional right to get a job, assuming no race or gender discrimination. The Supreme Court has never held that anyone has a right to a job, and it is a fundamental part of constitutional law that protections against race and gender discrimination apply only to government actors, not to private employers. If the Constitution itself banned job discrimination, then there never would have been a need to enact the civil rights statutes, which are based on the congressional power to regulate interstate commerce, and not upon section 5 of the 14th amendment.

So you agree that the Constitution does not protect the right to a job, free of race or gender discrimination?

Judge GINSBURG. Yes, Senator Grassley, the Constitution is established by and for the people through the people's representatives. The individual rights recognized in the Constitution are phrased as restraints on Government. The Constitution says what Government may or may not do.

There is a conspicuous exception, an instance in which the Constitution directly applies to persons. That instance is the 13th amendment, which says that slavery shall not exist, slavery or involuntary servitude shall not exist in the United States. That provision governs everyone in these United States.

Senator GRASSLEY. But you are in no way saying that that confers a right to a job?

Judge GINSBURG. In our country, as opposed to some newer democracies, we guarantee directly against Government intrusion into fundamental civil and political rights. Economic and social rights are in the charge of the legislature. Our Constitution does not guarantee a right to work, a right to be fed, a right to be clothed, a right to have decent shelter. Our society is as respectful of those rights as any I know, but the respect comes through measures passed by the legislature, and not in the form of a constitutional command that courts are capable of implementing.

Senator GRASSLEY. Judge Ginsburg, you have declined to talk about the constitutionality of capital punishment. You have distinguished your discussions about abortion from your unwillingness to talk about the death penalty on the basis that you haven't written about or spoken about capital punishment. I hope I understand that that was your answer before. So I want to bring to your atten-

tion that during your tenure at the ACLU, you wrote an amicus brief in *Coker v. Georgia*, arguing that the death penalty for rape was not constitutional.

You have written, then, haven't you, on the death penalty?

Judge GINSBURG. I did not write on the general question of the constitutionality of the death penalty. The *Coker v. Georgia* (1977) brief said the death penalty for rape—where there was no death or serious permanent injury, apart from the obvious psychological injury—was disproportionate for this reason: The death penalty for rape historically was a facet of the view that woman belonged to man. First, she was her father's possession. If she suffered rape before marriage, she became damaged goods. The rapist was a thief. He stole something that belonged first to the father, then, when the woman married, to her husband. Once raped, a woman would be regarded as damaged goods.

We have seen that phenomenon recently in tragic incidents in many places in the world. Women in Bangladesh, for example, were discarded, were treated as worthless because they had been raped. That was what prompted my position in *Coker v. Georgia*. That is the whole thrust of the brief I co-authored. We emphasized that rape was made punishable by death because man's property had been taken from him by reason of the rape of his woman. That was the perspective that informed the *Coker v. Georgia* brief.

Senator GRASSLEY. Again, I am not a lawyer, so when I refer to something, if you want to tell me that I am missing a point, feel free to do it. But on page 22 of that brief, a heading, underlined, says the death sentence for rape is impermissible under the 8th amendment because it does not meet "contemporary standards regarding the infliction of punishment and is inadvisable since it diminishes legal protection afforded rape victims."

It seems to me it deals directly with the issue of the eighth amendment.

Judge GINSBURG. "Diminishes legal protections afforded rape victims." Senator Grassley, I urge you to read the entire *Coker v. Georgia* brief. I think you will find it to be exactly what I represented it to be.

One of the reasons why rapes went unpunished, why women who had been raped suffered the indignity of having the police refuse to prosecute, was statutes of that order.

Senator GRASSLEY. Please understand that the reason I brought it up wasn't that I want you to tell me any more than you were willing to tell other people on your position on the death penalty. I brought it up because you said you hadn't written on the subject, and I found something that you have written on the subject.

Judge GINSBURG. I have written on the subject of women who have been raped and society's attitude toward them. *Coker v. Georgia* fits into that category. My statements regarding that case should not be taken out of context to say or imply anything about any subject other than the one addressed in that brief. The position developed in the brief was that the death penalty for rape, the origin of that penalty and the perpetuation of it, was harmful to women. Far from resulting in conviction—

Senator GRASSLEY. Well, let me ask you this, then, separate from the issue of the extent of your writings: Did *Coker*, outside the fact

that it outlawed capital punishment in the case of rape, solve the purpose that your brief intended to solve?

Judge GINSBURG. It was a contribution to the proper way to look at this terrible crime. It was a contribution to the end of thinking of women as damaged goods because they had been raped. That is what I think about it.

Senator GRASSLEY. If I could go on to another point, yesterday in conversation with Senator Cohen, there was a discussion of whether judges should or should not follow opinion polls. In light of that statement, I wonder what you think of the approach to constitutional decisionmaking espoused by the authors of the joint opinion in *Planned Parenthood v. Casey*. And I don't want this to be a discussion about abortion. That is not my point.

I want to quote:

Where in the performance of its judicial duties the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe*, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.

Do you agree that Justices should consider the political dimensions of controversial cases, or is that the kind of constitutionally unprincipled "pleasing the home crowd" that you have criticized?

Judge GINSBURG. What those three Justices said in the *Casey* (1992) case I think has to be taken in the context of what they said before. They were talking about the importance of stare decisis, of precedent, in a judicial system. What I regard as most important, Senator Grassley, is what those Justices said just before the line you read. They talked about stability in the legal system. Was a precedent plainly established? How was it working in society? Had reliance interests been built up around it?

There is an expansive discussion of the principle of stare decisis in that portion of the *Casey* opinion. The sentences you read can't be detached from the three or four pages that go before it. The part that goes before stresses the reliance interest built up around a precedent, the generation of women who have grown up thinking that *Roe v. Wade* (1973) is the law of the land.

That is the central part of the stare decisis discussion, and not the very last part, the portion you read. To concentrate on that last part, I think, diminishes what is a very satisfactory, very complete discussion of the principle of stare decisis. Those last sentences seem to me not nearly as impressive as what went before. The discussion of stare decisis in the central part of the opinion is excellent and means much more than that last paragraph. Taken in isolation, the last paragraph might be misperceived. I think it must be read in context. I might express, regarding judicial opinions, the same things I say about legislation. The first rule is read, the next rule is read on, and the third rule is read back.

That is my view of the portion of the *Casey* opinion about which you inquired. I can't give that paragraph a mark apart from what precedes it. Taking it together with what precedes it, the whole is a very impressive statement of the doctrine of stare decisis.

Senator GRASSLEY. Well, without commenting on *Casey* or *Roe* or any other case, could you just simply comment whether judges

should, in any way, consider the effects of their rulings on external political disputes?

Judge GINSBURG. I have said here and in several other places that a judge—

Senator GRASSLEY. Should they be drafting political compromises?

Judge GINSBURG. A judge is not a politician. A judge rules in accord with what the judge determines to be right. That means in the context of the particular case, based on the arguments the parties present, in accord with the applicable law and precedent. A judge must do that no matter what the home crowd wants, no matter how unpopular that decision is likely to be. If it is legally right, it is the decision that the judge should render.

And I also said what a judge should take account of is not the weather of the day, but the climate of an era. The climate of the age, yes, but not the weather of the day, not what the newspaper is reporting.

Senator GRASSLEY. You addressed the standing issue to some extent yesterday with Senator Heflin, and you have talked with a number of Senators about deferring to Congress as you decide cases. I would like to talk about one case, that was a dissent of yours, that covers both issues.

In *Dellums v. Nuclear Regulatory Commission*, you called for deference to congressional predictions regarding the South African sanction laws. The plaintiffs were trying to sue the NRC over the importation of a commodity that wasn't specifically mentioned in those sanction laws. They argued its importation violated the law and, therefore, prevented a quicker end to the apartheid government.

The majority found that they lacked standing. You dissented. By deferring to congressional predictions, weren't you actually expanding the scope of constitutional standing and Federal court jurisdiction? And isn't there a line to be drawn between what you might have to look for that we just talked about, legislative history, congressional intent, and what are congressional predictions?

Judge GINSBURG. Senator Grassley, let me try to explain the *Dellums* (1988) case. The constitutional requirement for standing was that a person show injury in fact. Among the plaintiffs in that case—the one on whom I concentrated—was an exile, an outcast from his country, a South African black who had been banned from his native country because of his political activity.

Our Congress, you, had enacted an embargo on certain commodities from South Africa. In doing so, you said you thought that putting this kind of pressure on the South African Government would hasten the time when apartheid would end. When apartheid ended—or when it began to break down—that man could return to his native country.

He said he was injured by his outcast status. You said you were pursuing a policy designed to promote the end of apartheid, the day that this man would no longer be an outcast from his country.

I was following the constitutional requirement that to have standing to sue one must suffer an injury in fact. This man was claiming an injury, and I was relying on your factfinding that the

measure you took could hasten the day when his injury would end. That is the nub of my dissenting position.

The court majority disagreed with me and said he didn't sustain an injury in fact. I thought he did, and I relied on your factfinding that the reason you put an embargo on South Africa was not to do something futile, but to hasten the day when apartheid in that country would end. On that day, this man would no longer be an exile from his native land. That was my reasoning in the *Dellums* case.

You asked me before if I stand ready to reexamine my own decisions. If you asked me in this Chamber today: Do I think I was right in taking the position that the plaintiff in *Dellums* suffered an injury in fact within the meaning of article III of the Constitution, and that Congress had recognized his injury would abate as a result of the embargo? I thought my decision was right then, and I think it is right today, and I stand by my dissent in the *Dellums* case.

Senator GRASSLEY. As a taxpayer, I would like to have standing in court based on a prediction Congress makes. In fact, we are in the process of making a prediction right now that 4 or 5 years from now we will have \$500 billion less deficit than we have now. And if we don't meet that target, can a taxpayer sue me—not sue me—

Judge GINSBURG. A taxpayer has standing—

Senator GRASSLEY. Would it have standing in court?

Judge GINSBURG. No. The answer is "no." Under current precedent, a taxpayer has standing to challenge only one thing, and that is the State's involvement in establishing a church. A taxpayer—you are a taxpayer, and I am a taxpayer, and we have shared grievances about what the Government does with our money. But the plaintiff who had been declared an exile, an outcast from his native land, was not a taxpayer who shared with the generality of the public a common grievance. He was not complaining about the way the Government was spending his tax dollars. The cases are simply not comparable. There is only one category of case in which a taxpayer can sue. The paradigm case, under current precedent, is *Flast v. Cohen* (1968).

Senator GRASSLEY. Well, I was hoping that I would maybe have a friend on the Court who would want to overturn *Frothingham*.

My last question: In response to questions by Senator Pressler and Senator Moseley-Braun yesterday, you stated basic agreement with the Court's general holding in *Lucas v. South Carolina Coastal Council* that a regulatory taking which denies an owner of all economically beneficial uses of her property violated the fifth amendment.

Now I, of course, understand your unwillingness to elaborate on *Lucas* because there will be many, many more cases before the courts. But I would like to see if you could help me understand the rule of *Lucas*.

The Court said that when a regulation leaves an owner with no economic use of her property, the land has been taken for the benefit of the general public just as if the Government has physically occupied the land. Do you think that what I just said was an accurate statement of the holding in *Lucas*?

Judge GINSBURG. The Court said, just as you summarized it, that the Government cannot take, but it may regulate. There is a point at which the regulation is so enveloping that it becomes a taking. When the Government acts so as to deprive the owner of all of the value of the land, as the Supreme Court said in *Lucas* (1992), that is tantamount to a taking and it must be compensated.

The *Lucas* case itself went back to the lower court to determine whether that was, indeed, the case—had the owner been deprived of all the economic value of the land. But you are also right, Senator Grassley, that the point at which regulation becomes a taking is something that will be determined case by case. Many cases will come before the Court calling for development of the doctrine of the *Lucas* case.

Senator GRASSLEY. Thank you, Judge Ginsburg.

Senator LEAHY [presiding]. Thank you, Judge. You can see how these hearings have progressed. Once again, the back-benchers come in to chair the hearing. I would hope that you feel complimented by that lack of a full-court attention up here. I suspect it indicates more approval than disapproval.

Earlier this morning, I know that you and Senator Hatch had a dialog regarding Judge Thomas, now Justice Thomas' confirmation hearing. I had asked him some questions about *Roe v. Wade*. Both the questions and answers became a matter of some of the debate subsequently in Justice Thomas' confirmation hearings.

Without going further, I just want to make sure that when somebody dusts off these records they get it fully and accurately, and so I will place in the record at this point the transcript of the series of questions I asked then-Judge Thomas regarding *Roe v. Wade* and his responses to them. That is not directed as a question to you. I know you went through that this morning.

[The transcript follows:]

S. H.RG. 102-1084, Pt. 1

**NOMINATION OF JUDGE CLARENCE THOMAS TO BE  
ASSOCIATE JUSTICE OF THE SUPREME COURT  
OF THE UNITED STATES**

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**HEARINGS**  
BEFORE THE  
**COMMITTEE ON THE JUDICIARY**  
**UNITED STATES SENATE**  
**ONE HUNDRED SECOND CONGRESS**  
FIRST SESSION  
ON  
THE NOMINATION OF CLARENCE THOMAS TO BE ASSOCIATE JUSTICE  
OF THE SUPREME COURT OF THE UNITED STATES

**SEPTEMBER 10, 11, 12, 13, AND 16, 1991**

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**Part 1 of 4 Parts**

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kind of an effort to make difficult decisions in any area, a judge tries to examine the relevant evidence and tries to reach a reasoned conclusion and tries to reach a conclusion, without implicating or without involving his or her personal opinions.

Senator LEAHY. Judge, you were in law school at the time *Roe v. Wade* was decided. That was 17 or 18 years ago. You would accept, would you not, that in the last generation, *Roe v. Wade* is certainly one of the more important cases to be decided by the U.S. Supreme Court?

Judge THOMAS. I would accept that it has certainly been one of the more important, as well as one that has been one of the more highly publicized and debated cases.

Senator LEAHY. So, it would be safe to assume that when that decision came down—you were in law school, where recent case law is oft discussed—that *Roe v. Wade* would have been discussed in the law school while you were there?

Judge THOMAS. The case that I remember being discussed most during my early part of law school was I believe in my small group with Thomas Emerson may have been *Griswold*, since he argued that, and we may have touched on *Roe v. Wade* at some point and debated that, but let me add one point to that.

Because I was a married student and I worked, I did not spend a lot of time around the law school doing what the other students enjoyed so much, and that is debating all the current cases and all of the slip opinions. My schedule was such that I went to classes and generally went to work and went home.

Senator LEAHY. Judge Thomas, I was a married law student who also worked, but I also found, at least between classes, that we did discuss some of the law, and I am sure you are not suggesting that there wasn't any discussion at any time of *Roe v. Wade*?

Judge THOMAS. Senator, I cannot remember personally engaging in those discussions.

Senator LEAHY. OK.

Judge THOMAS. The groups that I met with at that time during my years in law school were small study groups.

Senator LEAHY. Have you ever had discussion of *Roe v. Wade*, other than in this room, in the 17 or 18 years it has been there?

Judge THOMAS. Only, I guess, Senator, in the fact in the most general sense that other individuals express concerns one way or the other, and you listen and you try to be thoughtful. If you are asking me whether or not I have ever debated the contents of it, that answer to that is no, Senator.

Senator LEAHY. Have you ever, in private gatherings or otherwise, stated whether you felt that it was properly decided or not?

Judge THOMAS. Senator, in trying to recall and reflect on that, I don't recollect commenting one way or the other. There were, again, debates about it in various places, but I generally did not participate. I don't remember or recall participating, Senator.

Senator LEAHY. So you don't ever recall stating whether you thought it was properly decided or not?

Judge THOMAS. I can't recall saying one way or the other, Senator.

Senator LEAHY. Well, was it properly decided or not?

Judge THOMAS. Senator, I think that that is where I just have to say what I have said before; that to comment on the holding in that case would compromise my ability to—

Senator LEAHY. Let me ask you this: Have you made any decision in your own mind whether you feel *Roe v. Wade* was properly decided or not, without stating what that decision is?

Judge THOMAS. I have not made, Senator, a decision one way or the other with respect to that important decision.

Senator LEAHY. When you came up for confirmation last time for the circuit court of appeals, did you consider your feelings on *Roe v. Wade*, in case you would be asked?

Judge THOMAS. I had not—would I have considered, Senator, or did I consider?

Senator LEAHY. Did you consider.

Judge THOMAS. No, Senator.

Senator LEAHY. So you cannot recollect ever taking a position on whether it was properly decided or not properly decided, and you do not have one here that you would share with us today?

Judge THOMAS. I do not have a position to share with you here today on whether or not that case was properly decided. And, Senator, I think that it is appropriate to just simply state that it is—for a judge, that it is late in the day as a judge to begin to decide whether cases are rightly or wrongly decided when one is on the bench. I truly believe that doing that undermines your ability to rule on those cases.

Senator LEAHY. Well, with all due respect, Judge, I have some difficulty with your answer that somehow this case has been so far removed from your discussions or feelings during the years since it was decided while you were in law school. You have participated in a working group that criticized *Roe*. You cited *Roe* in a footnote to your article on the privileges or immunity clause. You have referred to Lewis Lehrman's article on the meaning of the right to life. You specifically referred to abortion in a column in the Chicago Defender. I cannot believe that all of this was done in a vacuum absent some very clear considerations of *Roe v. Wade*, and, in fact, twice specifically citing *Roe v. Wade*.

Judge THOMAS. Senator, your question to me was did I debate the contents of *Roe v. Wade*, the outcome in *Roe v. Wade*, do I have this day an opinion, a personal opinion on the outcome in *Roe v. Wade*; and my answer to you is that I do not.

Senator LEAHY. Notwithstanding the citing of it in the article on privileges or immunities, notwithstanding the working group that criticized *Roe*?

Judge THOMAS. I would like to have the cite to it. Again, notwithstanding the citation, if there is one, I did not and do not have a position on the outcome.

With respect to the working group, Senator, as I have indicated, the working group did not include the drafting by that working group of the final report. My involvement in that working group was to submit a memorandum, a memorandum that I felt was an important one, on the issue of low-income families. And I thought that that was an important contribution and one that should have been a central part in the report. But with respect to the other comments, I did not participate in those comments.

Senator LEAHY. I will make sure that you have an opportunity to read both the footnote citation and the Lewis Lehrman article before we get another go-round. But am I also correct in characterizing your testimony here today as feeling that as a sitting judge it would be improper even to express an opinion on *Roe v. Wade*, if you do have one?

Judge THOMAS. That is right, Senator. I think the important thing for me as a judge, Senator, has been to maintain my impartiality. When one is in the executive branch—and I have been in the executive branch, and I have tried to engage in debate and tried to advance the ball in discussions, tried to be a good advocate for my points of views and listening to other points of views. But when you move to the judiciary, I don't think that you can afford to continue to accumulate opinions in areas that are strongly controverted because those issues will eventually be before the Court in some form or another.

Senator LEAHY. Of course, as Senator Metzenbaum pointed out earlier today, you have spoken about a number of cases, and I understand your differentiation in your answers to his question on that. But I wonder if those cases somehow fit a different category. The expression once was that the Supreme Court reads the newspapers, and I suppose we can update that today to say that Supreme Court nominees read the newspapers and know that this issue is going to be brought up.

But, Judge, other sitting Justices have expressed views on key issues such as—well, take *Roe v. Wade*. You know, Justice Scalia has expressed opposition to *Roe*. Does that disqualify him if it comes up? Justice Blackmun not only wrote the decision but has spoken in various forums about why it was a good decision. Is either one of them disqualified from hearing abortion cases as a result?

Judge THOMAS. Senator, I think that each one of them has to determine in his mind at what point do they compromise their impartiality or it is perceived that they have compromised their objectivity or their ability to sit fairly on those cases. And I think for me, shortly after I went on the court of appeals, I remember chatting with a friend just about current events and issues. And I can remember her saying to me, asking me three or four times what my opinion was on a number of issues, and my declining to answer questions that when I was in the executive branch I would have freely answered. And her point was that I was worthless as a conversationalist now because I had no views on these issues. And I told her that I had changed roles and the role that I had was one that did not permit me or did not comport with accumulating points of views.

Senator LEAHY. Well, I might just state parenthetically, I have been both a prosecutor and a defense attorney, and I have been before judges who have expressed very strong views on the idea that when they go on the bench, they do not go into a monastery—they still are part of the populace, able to express views. And I have been there when they have expressed views both for and against a position of a client I might be representing, whether it is the State on the one hand or the defendant on another. But I have also felt secure in knowing that they were fairminded people and

would set their own personal opinions aside, as judges are supposed to and as you have testified one should do in such a case.

Let me ask you this: Would you keep an open mind on cases which concern the question of whether the ninth amendment protected a given right? I would assume you would answer yes.

Judge THOMAS. The ninth amendment, I think the only concern I have expressed with respect to the ninth amendment, Senator, has been a generic one and one that I think that we all would have with the more openended provisions in the Constitution, and that is that a judge who is adjudicating under those openended provisions tether his or her ruling to something other than his or her personal point of view.

Now, the ninth amendment has, to my knowledge, not been used to decide a particular case by a majority of the Supreme Court, and there hasn't been as much written on that as some of the other amendments. That does not mean, however, that there—

Senator LEAHY. That is not what I am—

Judge THOMAS. That does not mean, however, that there couldn't be a case that argues or uses the ninth amendment as a basis for an asserted right that could come before the Court that does not—that the Court or myself, if I am fortunate enough to be confirmed, would not be open to hearing and open to deciding.

Senator LEAHY. You are saying that you would have an open mind on ninth amendment cases?

Judge THOMAS. That is right.

Senator LEAHY. I ask that because you have expressed some very strong views, as you know better than all of us, on the ninth amendment. You had an article that was reprinted in a Cato Institute book on the Reagan years. You refer to Justice Goldberg's "invention," of the ninth amendment in his concurring opinion in *Griswold*. And you said—and let me quote from you. You said, "Far from being a protection, the ninth amendment will likely become an additional weapon for the enemies of freedom." A pretty strong statement. But you would say, would you not, Judge, notwithstanding that strong statement, that if a ninth amendment case came before you, you would have an open mind?

Judge THOMAS. Again, Senator, as I noted, my concern was that I didn't believe that—in such an openended provision as the ninth amendment, it was my view that a judge would have to tether his or her view or his or her interpretation to something other than just their feeling that this right is OK or that right is OK. I believe the approach that Justice Harlan took in *Poe v. Ullman* and again reaffirmed in *Griswold* in determining the—or assessing the right of privacy was an appropriate way to go.

Senator LEAHY. That is not really my point. The point I am making is that you expressed very strong views—and you have here, too—about the ninth amendment. My question is: Notwithstanding those very strong views you have expressed about the ninth amendment—pretty adverse views about it—would you have an open mind in a case before you where somebody is relying on the ninth amendment?

Judge THOMAS. The answer to that is, Senator, yes.

Senator LEAHY. But if you were to express similar views regarding the principles and reasoning of *Roe v. Wade*, you feel that

somehow it would preclude you from having that same kind of objectivity as the views you have expressed about the ninth amendment?

Judge THOMAS. I don't believe, Senator, that I have expressed any view on the ninth amendment, beyond what I have said in this hearing, after becoming a member of the judiciary. As I pointed out, I think it is important that when one becomes a member of the judiciary that one ceases to accumulate strong viewpoints, and rather begin to, as I noted earlier, to strip down as a runner and to maintain and secure that level of impartiality and objectivity necessary for judging cases.

Senator LEAHY. Does that mean if you were just a nominee, a private citizen as a nominee to the Supreme Court, you could answer the question, but as a judge you cannot?

Judge THOMAS. I think a judge is even more constrained than a nominee, but I also believe that in this process, that if one does not have a formulated view, I don't see that it improves or enhances impartiality to formulate a view, particularly in some of these difficult areas.

Senator LEAHY. Thank you, Mr. Chairman. My time is up, but I am sure the judge realizes that we will probably have to revisit this subject a tad more. Thank you.

The CHAIRMAN. Thank you very much.

The Chair recognizes Senator Kennedy for a moment regarding a clarification of a quote that was used this morning.

Senator KENNEDY. Thank you, Mr. Chairman. I think there was just one area of clarification.

Yesterday I questioned Judge Thomas, and I used these words:

Mr. Sowell goes on to suggest that employers are justified in believing that married women are less valuable as employees than married men. He says that if a woman is not willing to work overtime as often as some other workers, needs more time off for personal emergencies, that may make her less valuable as an employee or less promotable to jobs with heavier responsibilities.

And then the judge went on and gave his response to that question.

In a response to a question earlier this morning from Senator DeConcini, Judge Thomas said, "There were questions on—I think the comment yesterday by Senator Kennedy, I believe, was something to the effect that women who were married weren't as good employees. And as an employer and someone who has employed a significant number of women, I did not find that to be true and made that very clear."

I would just like to ask consent that the record—I understood what Judge Thomas was trying to say this morning, and—

Judge THOMAS. I did not intend to attribute Professor Sowell's quotes to you. [Laughter.]

Senator KENNEDY. So I would just ask consent that the record reflect that modification at the appropriate point.

Senator LEAHY. I thought that was a little out of character there, Ted.

The CHAIRMAN. Without objection, the record will be corrected.

Senator KENNEDY. Thank you.

The CHAIRMAN. The Senator from Pennsylvania, Senator Specter.

Senator LEAHY. Yesterday you and I went through a number of very specific questions and you gave what I thought were, in the appropriate instances, some very specific responses, and in others you felt that you could not respond based on issues that may come before the Court. This morning around 1 or 2 o'clock, I was watching a replay on television of your responses to my questions and your responses to a number of other Senators' questions, and making notes about it.

I was thinking about what I might do today, and I would probably be a little bit less specific, but use the advise and consent process for what I have often felt it should be: a way of looking into your jurisprudential soul, or actually a way for the country to do so.

I realize that, as is appropriate, people pay not so much attention to who might be asking the questions, but, rather, to what you say, and it really is a way for the American people to know just how you think.

So let me ask you this: Judge, you have spoken eloquently of the reaction you had when you first got the call from the President, when he asked you if you would accept this nomination. You spoke eloquently in the Rose Garden. You have been a judge for a number of years in a prestigious court. You have certainly been a student of the Supreme Court from the time you were in law school, and you practiced before it, had to rely on cases from it in deciding how you might vote on individual cases.

Now you have had to think, I would assume, a great deal from the day the President asked you to accept this nomination, right up to this moment, just what you might or might not do as a Supreme Court Justice. In that, you have 200 years of history of the Court. Could you give me some of the cases you consider the most important Supreme Court cases, taken from whatever era, time, recent or not, just some of those that mean the most to you and why?

Judge GINSBURG. To start from the beginning, *Marbury v. Madison* (1803) established judicial review for constitutionality of other great decisions of the Marshall Court era, I might mention, as signal, *Gibbons v. Ogden* (1824). When I recited from the Pledge of Allegiance before, I said "one nation, indivisible." I would put *Gibbons v. Ogden* in the one nation camp.

Proceeding to our times, I would list the great dissents of Holmes and Brandeis in *Abrams* (1919) and *Gitlow* (1925), and Brandeis' concurring opinion in *Whitney v. California* (1927). People think free speech was always secure in this country. It really wasn't. That is a development of our current century, reflected in those great dissenting opinions that are now well accepted. But they were originally stated as dissenting positions. *Brown v. Board of Education* (1954) must be on any list.

That gives you about half a dozen.

Senator LEAHY. Judge, let me go to the dissents for a moment, because you and I talked about first amendment rights and freedom of speech before. How have you seen the evolution of our free speech rights in this country? Obviously, it is stated in the Bill of Rights from the beginning. But as you said, it has changed, evolved. We saw censorship during the Civil War and President Lincoln's time, everything from the suspension of habeas corpus

and suspension of freedom of speech. We have seen attacks on it that have been either direct government attacks or responses in fear. The McCarthy era comes to mind, when there were truly attacks on the first amendment.

Do you see that right as still evolving in this country?

Judge GINSBURG. Free expression was an ideal from the start. The Alien and Sedition Act, early on, severely limited free speech. That law was never declared unconstitutional by the Supreme Court, but it has been overturned by the history of our country since that time.

The idea was there from the beginning, though. I mentioned the Revolutionary War cartoon, "LIBERTY of speech for those who speak the speech of liberty." The idea was always there. The opposition to the government as censor was always there.

But it is only in our time that that right has come to be recognized as fully as it is today. The line of cases ending in *Brandenburg v. Ohio* (1969) truly recognizes that free speech means not freedom of thought and speech for those with whom we agree, but freedom of expression for the expression we hate.

New contexts undoubtedly will arise. But everyone accepts that the dissenting positions of Holmes and Brandeis have become the law. That is where we stand today.

Senator LEAHY. Do you consider *Brandenburg* as one of the great milestones in the Court's history?

Judge GINSBURG. I certainly do, yes. I think *Brandenburg* was a 1969 decision. The McCarthy era was well over by then. There were many brave judges in the period of McCarthy, including Learned Hand, who wrote one of the great early decisions in the *Masses* (1917) case. There were some outstanding decisions of Justice Harlan in that very difficult time for our country. But I think *Brandenburg* is not the least controversial now.

Senator LEAHY. I remember very well when it came down. I was a young prosecutor at the time in Vermont, and I remember some of the discussion there. We have gone through an interesting time during the McCarthy era, when at the University of Vermont, the oldest land grant university, there was a question of whether a professor was loyal enough. Our State's largest newspaper questioned his loyalty, actually trying to get him suspended. The same newspaper now, to its credit, stands up very strongly for free speech. But it shows just how the evolution could be.

In fact, it was a Senator from Vermont, Ralph Flanders, who was probably the greatest Vermont Senator of the century, who stood up and introduced a resolution condemning Senator McCarthy on the floor of the Senate, and finally started to bring to an end what was a very sad and I think sorry time in our history.

I wonder where democracy might be, had we not seen this right continuously expand. It is a momentary contraction, but I believe you would agree with me on this, during our 200-year history, it has continuously expanded, in the aggregate, it hasn't contracted.

Judge GINSBURG. I think we have been a model for the world in that regard. Recall the words from Ballard for America, "The right to speak my mind out, that's America to me." It is one of the great things about our country.

I was a student at Cornell during the McCarthy era. In those days, most students just wanted to make their own way in the world, and were not politically active.

I had a wonderful professor, his name was Robert Cushman, he was one of the teachers who was most important to me. He was in the government department, and I worked for him. He had me read Alan Barth. I scanned issues of "Red Channels" as he suggested. That way, I came to know about what was going on, about the people banned from the entertainment business, because they were considered, if not red, then pink-tinged. That was an indelible part of my upbringing. A great teacher forced me to think about the times in which we were living, when I really didn't want to.

Senator LEAHY. My parents ran a small weekly newspaper back in Vermont and they ran a printing business, and I recall, growing up, being encouraged to read whatever I wanted. Read whatever you want, but just read. It is not bad advice for any parent to give to their child, especially today.

But I am struck by the fact that, as various countries have moved toward democracy, from their new parliaments, they send people to our country to visit with Members of the Congress or State legislatures, and invariably with every single group that has come to my office, we have ended up in a discussion of how we have allowed free speech, an expanse of speech and difference of opinions, and how struck they have been by that, because so many of them have come from countries where there is anything but. There is a controlled press, there is controlled, allowable speech.

What I have always told them is I felt that in our first amendment we really have the whole groundwork for democracy. We have a freedom of religion or not to practice a religion, whichever you want, and freedom of speech, which guarantees diversity and diversity guarantees democracy.

I find now that we have the question of does it expand further in new technologies. I am chairman of the Technology Subcommittee here, and one scholar suggested a new amendment to the Constitution explicitly to extend constitutional freedoms including freedom of speech and also search and seizure protections to new technologies, computer technologies, I guess E mail and all the rest. Do you think we need a change in the Constitution, or do you think we can work it within the Constitution we have, as we deal with computer and other electronic technologies?

Judge GINSBURG. I think that our over 200-year-old Constitution has been able to deal with more difficult things than new computer technology. But I would like to consult my daughter on that question, because she is the copyright expert in our family.

Senator LEAHY. Judge, we all accept easily that political speech is protected. Again, just to expand a little bit on what we discussed yesterday about scientific speech, does it get the same kind of protection?

Judge GINSBURG. Senator, I am not sure I understand what you mean by scientific speech.

Senator LEAHY. If somebody is writing in an area of science, for example, do they have the same protection as if they were speaking just on political issues?

Judge GINSBURG. I can't imagine why not.

Senator LEAHY. What about in the area of entertainment?

Judge GINSBURG. Now we are getting into more slippery territory. It depends on what kind of entertainment, I suppose. The Supreme Court has a series of decisions about speech that is in the netherland between fully protected speech and unprotected speech, speech within the first amendment, but not entitled to the same level of protection as other speech.

The Supreme Court has made decisions about adult movie theaters that can be zoned for the safety of the neighborhood. A municipality can decide to spread them out so they won't be clustered, or can put them all together in one combat zone. There is a difference between the degree of tolerance for such expression and the greater respect accorded political speech.

Then, as you know, there is a category of speech that is unprotected by the first amendment, a category called obscenity. There is also a category of speech that is not out of the ballpark, but is subject to regulation, called indecent speech. That is an area that I can't talk about in specific terms, because it is one that has come before my court, and is coming before the Supreme Court in connection with broadcast regulation. But I recognize that there is that category of speech that does not get the full protection of the first amendment, but is not left out entirely.

Senator LEAHY. Political speech, that truly you feel has absolute protection?

Judge GINSBURG. It has the highest level of protection.

Senator LEAHY. Surpassing all other kinds of speech?

Judge GINSBURG. Yes.

Senator LEAHY. Judge, we have had a lot of discussion here about the impact of mandatory minimum penalties on the judiciary. We have passed a lot of laws in the Congress. We never have Members of the Congress stand up and say they are in favor of crime. Obviously, we are not. But usually in a spirit of showing just how much we disfavor crime, we pass laws to say people shan't do things, we say we will end crime by doubling the penalties or tripling the penalties. Usually the word doesn't get to the criminal, but it does make us feel better and it is nice at campaign time.

But mandatory minimum penalties, some of which I liked when I was a prosecutor, have now expanded greatly. Judge Billings, a Federal judge I respect very much in my State, has written that this type of statute denies that judges have a right to bring their conscience, experience, discretion, and sense of what is just into the sentencing procedure.

Now, you must have had discussions of this issue both in your own court and at judicial conferences. How do you feel about the mandatory penalties? Are they putting too much discretion over sentencing in the hands of prosecutors, and not in the hands of judges?

Judge GINSBURG. Senator Leahy, there was recently published a very intelligent comment by Judge Weinstein of the Eastern District of New York concerning mandatory sentences. He recommended appointment of a commission to do a careful study of how they are working out in practice.

The perception is very strong among many judges—I know this from conversations we have had at meetings of judges—that it is

deceptive to think discretion has been removed. It has indeed been removed from the sentencing judges, because mandatory minimums don't give the judges any choice. If there is an indictment for  $x$  amount of drug  $y$  and a conviction for that, then the sentence will be 10 years mandatory or 5 years mandatory, based solely on the character of the drug and the weight that the defendant was charged with distributing.

So the judges' sense is that the discretion has been transferred from them to the prosecutor, who can choose to indict for a lesser weight than the weight actually found at the time the defendant was arrested. There is much concern that these mandatory minimum sentences are transferring discretion from the judge to the prosecutor and that they may be deceptive in other respects, because the likelihood of apprehension—not the sentence length—may be the strongest deterrent. If someone is aware that the chance of being caught is very high and the sentence is sure, even if it is shorter, that awareness probably would be the greatest deterrent you could have.

Senator LEAHY. I remember when I was a prosecutor, I used to try to point out to legislative bodies—they say simply that their idea of good law enforcement is to double the penalties—if you have two buildings side-by-side, two warehouses, one with a very good burglar alarm system on it and one without, which one gets broken into? The penalty for breaking in is the same for either one of them, but obviously they are going to break into the one without the burglar alarm system, because you are not going to get caught or you are less apt to get caught.

I agree with you, it is the fear of apprehension, and then a prosecution, but also it is finality, which goes into a whole other issue. For whatever it is worth, I think that we have got to go back and review this whole question of mandatory minimum sentences. I think we have gotten too far down the road with it.

Judge GINSBURG. There has been enough experience with mandatory minimum sentences by now to make that kind of close look very valuable. I am sure the Federal Bureau of Prisons, too, would have a large contribution to make, to tell the ramifications of a burgeoning prison population. We went from a system where a sentence was effectively one-third of the time imposed; you served one-third of your time and then you were up for parole. Now there is no parole. Your sentence is what you serve.

So I think the time has come when a study, a close look at how mandatory minimums have been working would make a contribution of great value.

Senator LEAHY. Judge, when you came before our committee before for confirmation to the court of appeals, we could ask you questions about Supreme Court cases and you could say, as you did in one form or another, well, of course, if the Supreme Court has ruled that way, as a court of appeals judge, I am bound by it, stare decisis, and so on and so forth.

You don't have those fetters if you go on the Supreme Court. I looked back, and Justice Brandeis, in *Burnett v. Coronado Oil and Gas* in 1932, talked about stare decisis, and he said, "In cases involving the Federal Constitution, the Court bows to the lessons of experience and the force of better reasoning, recognizing that the

process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function."

I remember reciting that at different times when I was before our State supreme court as a young lawyer, when I wanted them to change past decisions.

Would you agree with Justice Brandeis, that the lessons of experience can prevail in cases involving the Constitution?

Judge GINSBURG. Yes, I do, but I also agree with something else Justice Brandeis said in that very same opinion. He liked it so much, that he said it twice. Because I was misquoted in my quotation from Justice Brandeis by the press this morning, I would like to repeat it. It says: "In matters of statutory interpretation, it is more important that the applicable rule of law be settled than that it be settled right. This is commonly true," Brandeis continued, "even when the error is a matter of serious concern, provided correction can be had by legislation." There he was making the distinction between construing legislation and constitutional interpretation. The press missed that essential point by stopping the quotation midstream.

Senator LEAHY. They won't miss it twice, Judge. [Laughter.]

Do you agree with that? Do you take that as your philosophy?

Judge GINSBURG. The statement that Brandeis made in *Burnet v. Coronado Oil* (1932) and again in *DiSanto v. Pennsylvania* (1927), yes. I have said so many times in print, quoting from Justice Brandeis. I believe, too, that stare decisis has an important role in constitutional interpretation. With the possible exception of the passage Senator Grassley read, I associate myself with what was said in *Casey* about settled expectations. I think, in the case of Brandeis, the overruling of *Swift v. Tyson* (1842) in *Erie v. Tompkins* (1938) is illustration of when stare decisis must give way.

One doesn't lightly overrule precedent even in the constitutional area. But Brandeis made an obvious point, although he said it so well. Correction can come by legislation if the Court messes up on a matter of statutory interpretation. That often can't be done when the question is one of constitutional interpretation.

Senator LEAHY. Well, but even that must have some changes. For example, you could reverse an obscure technical decision of the Securities and Exchange Commission. I don't mean to suggest they are obscure or technical, but say some minor IRS point or something like that. That is one thing. Or you can let it stand even though you don't think it creates justice. Or you could overturn a case like *Brown v. Board of Education* or *Taylor v. Louisiana*.

Judge GINSBURG. *Taylor v. Louisiana* (1975)? Heaven forfend. [Laughter.]

Senator LEAHY. Well, I thought I would just—it is getting late in the afternoon. I wanted to throw that one in.

But you see what I am getting at. Can the Brandeis test always be held? Sometimes the consequences might be horrendous. Is there a point where the circumstances are such that you have to strike out differently?

Judge GINSBURG. No doubt, and I think Brandeis was saying that himself. He said this is commonly truly, not this is always true.

Senator LEAHY. How much weight do you put on the extent to which a holding has guided and been relied upon by the public? Is that something that must weigh heavily on you if there is a body of law that seems so settled that it has been well relied upon? I am thinking now of the kind of thinking that must go through a Supreme Court Justice's mind if they are going to overturn a past decision of the Court. Are time and acceptance major factors to be considered?

Judge GINSBURG. Yes, both are. How it has been working? What expectations, what reliance interests has the decision generated? Those are major factors.

Senator LEAHY. Changed circumstances? A case that is settled in one era looking different in another?

Judge GINSBURG. Yes. The period could even be 10 years. Although I think the Supreme Court wrongly decided the women's jury service issue in 1961, by the time of *Taylor*, in 1976, there was a societal change that the Supreme Court came to understand. True, it took 100 years, practically, for appreciation of the changing position of women in society to be comprehended. But in the *Taylor* (1975) case, it finally was comprehended. *Taylor* upset what had been a unanimous precedent the other way.

Senator LEAHY. Then, lastly, Judge, what if you as an individual hold as your own moral belief that the earlier decision was wrong? Does that go against all—what weight does that have against, for example, some of the other things we have talked about—continuity, acceptance?

Judge GINSBURG. Well, that is why we have the law. That is why we have a system of stare decisis. It keeps judges from infusing their own moral beliefs, from making themselves kings or queens. That accounts for my answer to a question I have been asked here a few times. How do you feel about this or that? I responded that how I feel is not relevant to the job for which you are considering me.

Senator LEAHY. Would it be safe to say, however, Judge, that it can never totally disappear from your consideration?

Judge GINSBURG. Yes, that is certainly true. I have to be aware of it. I must know that it is there and guard against confusing my own predilections with what is the law.

Senator LEAHY. Thank you very much. I see my friend from Maine, Senator Cohen, is here, and I yield to him.

Senator COHEN. Thank you, Mr. Chairman. Let me explain, Mr. Chairman, that I have been given sort of a Hobson's choice. If I agree to be brief, we will continue with me. If I am not going to be brief, then we will take a break, and I will probably lose my turn.

Senator LEAHY. I am always the last to hear these things, Senator Cohen.

Senator COHEN. I will try to finish within 15 minutes. Is that satisfactory?

Judge GINSBURG. I think I can go 15 minutes, not a half-hour.

Senator LEAHY. Just so I fully understand, we will go until 4 o'clock. Is that OK with you?

Judge GINSBURG. Yes, I think I can manage that all right.

Senator COHEN. I will try and compress what I was going to say, and it may be more effective in that fashion, anyway.

On the way out during the last break that we had over lunchtime, I was asked the question, in essence: Why are you, meaning the Senators, prolonging either the agony or the ecstasy, depending upon one's viewpoint? The fact is that nothing that you say, Judge, is likely to change the outcome of these proceedings, so why are we continuing?

My response is that there is, nonetheless, a very important function that is being served by the attempt to explore these particular issues or cases with you. First, the general public, including us, I might add, is unlikely to ever see you in the future except on a personal appearance perhaps at some forum. So it is important that they have some comprehension of exactly who is this individual we are about to hand this scepter of power to. It is a very important delegation of power to you as a future Supreme Court Justice. I think it is important that they have an appreciation of the depth of your comprehension and your competence and judicial philosophy and general viewpoints.

Second, it allows us to explore and develop issues with you to perhaps sensitize you to some of the feelings that Members of the Senate will not be in a position to indicate to you in the future. We are unlikely to have any communication with you except perhaps on a purely social basis, and even that is likely to be remote.

The third, more cynical reason is that many here would like to have more air time. But let me go quickly to the questions I have.

I was curious in terms of your response to Senator Specter when he inquired about your article, the one you wrote saying that during the course of Judge Bork's confirmation hearing, the line between philosophy and votes tended to become blurred. Then you indicated today that the article was not necessarily a criticism of the committee but, rather, just a recognition of the morass into which one can step, and the blame should be placed squarely upon the nominee because you have an opportunity to say, Senator, I think that that is an inappropriate question and I am not going to answer it.

What I gathered, however, from your testimony this morning is that as a general proposition, if you have written about a subject, if you have taught a subject, if you have lectured on a subject, even though that subject matter may come before the Court at some future time, you feel that it is legitimate to talk about it, for example, abortion rights, equal rights amendments or other types of things on which you have expressed a view publicly either as a judge or as a professor or simply as an advocate. Is that correct?

Judge GINSBURG. If I have written something, either an opinion or an article, and you want to ask me about what I wrote, something you think should be clarified or questioned, then you can confront me with my writing. Yes, I think that is right.

Senator COHEN. Even though a permutation or some modification of that issue might at some future time come before the Court. That is a fair area for us to explore.

Judge GINSBURG. Senator Cohen, I have asked you to judge me on the basis of my written record, and I have said what that record

contains. So, yes. I regard this hearing as in the nature of an oral argument where I can clarify what is in that written record.

Now, it is true, as just occurred, that when one writes over 700 opinions in the course of 13 years, one must sometimes refresh one's recollection. One of your colleagues just said to me, well, in the case of *United States v. Jackson* (1987), you said such-and-so. Another of your colleagues said, in the *Xidex* (1991) case, where you were on the panel, the court unanimously ruled thus and so. In both instances, I had to refresh my recollection.

Senator COHEN. All right. Let me go to the *Goldman* case that we have talked about so many times before. You joined Judge Starr in his dissent.

The case originally was heard, and then there was a request made for a rehearing en banc, right?

Judge GINSBURG. Right.

Senator COHEN. In which case you wrote a very brief dissenting opinion from the majority of the appellate court that refused a rehearing.

Judge GINSBURG. Right.

Senator COHEN. OK. This is the so-called yarmulke case that we have been talking about the past 2 days.

Judge GINSBURG. Right.

Senator COHEN. Judge Starr's dissent I think is important, and I am going to quote excerpts from it.

He said:

It cannot be gainsaid that the judiciary is singularly ill equipped to sit in judgment on military personnel regulations. In matters touching upon the exigencies of military affairs, the courts have wisely exercised the restraint and caution that befits the unelected branch of Government.

Then he cited Justice Jackson in terms of Jackson's comments opposing the Korean conflict.

The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate [military] matters as the [military] must be scrupulous not to intervene in judicial matters.

This is part of Judge Starr's dissent.

He goes on to say, however, that

The military's claim that flexibility generates resentment, whereas arbitrariness keeps the corps content is utterly belied, however, by Dr. Goldman's own experience in serving his country.

He went on to say that

Dr. Goldman has been required to render to Caesar far too much for far too little reason.

I think you associated yourself with the eloquence of those remarks, but you went on to say that

A military commander has now declared intolerable the yarmulke that Dr. Goldman has worn without incident throughout his several years of military service, and at least the declaration suggests callous indifference to his religious faith.

That case went to the Supreme Court. By the way, Judge Scalia joined with you in that dissent.

Judge GINSBURG. Joined with me, right.

Senator COHEN. That case went to the Supreme Court, and the Supreme Court affirmed the military's position of denying Dr.

Goldman the opportunity to wear the yarmulke that he had worn for 13 or 15 years. The issue has been resolved, however, because Congress subsequently passed an act.

I am asking you this question because I would like to know your opinion. If Congress had reaffirmed by statute the regulations of the military relative to the wearing of religious apparel, would that have changed, in your judgment, the constitutional protection afforded to Dr. Goldman under the first amendment? In other words, Congress can enlarge the rights, but can it restrict them? What would be your conclusion if Congress were to statutorily incorporate the regulations pertaining to the prohibition against wearing a religious garment, for example?

Judge GINSBURG. If Congress had made a law in effect adopting the uniform code the service had at the time of Simcha Goldman's case? If Congress had enacted the uniform code into law, then the case would have come to Court challenging that law instead of the uniform regulation, and the Court would have divided over the law, as it did over the regulation. It would have been—was it five to uphold the regulation? It would have been five to uphold the law. I imagine that the Court would have divided just the same way whether the uniform code came up in the form of a regulation or in the form of a law. Judge Starr was very clear that he would have dissented.

My position for myself and then Judge Scalia was that this was a very important question, one that should be decided by the full Court. I did not feel at liberty to write an opinion because I was not on the original panel. I participated only at the petition for rehearing stage. I said we should rehear the case, and the full Court should be briefed on the issue.

But on your question, I think that the Court would have come out the same way whether the challenged measure were a law or a regulation.

Senator COHEN. In other words, Congress cannot—

Judge GINSBURG. I think Congress can enlarge, but it cannot shrink.

Senator COHEN. It cannot shrink. In other words, if the military were to pass a regulation and Congress incorporates that by statute, if the Court decides that infringes upon a fundamental right inherent in one of the amendments to the Constitution, the fact that we had incorporated that by statute would give it no greater weight. We can't restrict something that has been guaranteed by the Constitution. We can only enlarge.

Judge GINSBURG. I think you can exercise your authority under section 5 of the 14th amendment or under the necessary and proper clause. There are many fountains of congressional authority to expand rights.

Senator COHEN. But we cannot restrict them in violation of the Court's interpretation of what is a fundamental right.

Judge GINSBURG. Not unless the Court is to stop being the last resort on questions of constitutional interpretation. Not unless we are to overturn *Marbury v. Madison* (1803). The people do have another resort. The Constitution can be amended. The Supreme Court can be urged to rethink its decision.

Senator COHEN. Let me quote the language of the Supreme Court in that particular case.

But the First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by dress regulations. The Air Force has drawn the line essentially between the religious apparel that is visible and that which is not, and we hold that those portions of the regulations challenged here reasonably and evenhandedly regulate dress in the interest of the military's perceived need for uniformity.

That was the conclusion of the Court as recently as 1986. Correct?

Judge GINSBURG. That was the majority opinion in the *Goldman* (1986) case.

Senator COHEN. Right, and it was 5-to-4 decision.

Judge GINSBURG. Yes.

Senator COHEN. It becomes important because your elevation to the Court would, in fact, have changed the outcome in that particular case. It might very well have a major impact on cases that will be coming to the Court.

I say this in connection, for example, with your own very heartfelt and passionate feelings about discrimination in this country. There is a debate taking place on the floor right now that deals with a symbol, a symbol which is anathema to those of African-American descent. It deals with a flag and a charter of a group that has had that flag as its symbol for many years. Your feelings about discrimination are terribly important. Today in response to Senator Kennedy, you talked about discrimination, be it race discrimination or based on religion, gender, or sexual orientation and you said, "Rank discrimination is deplorable."

I assume by the word "rank" you mean intentional or institutional discrimination. Is that what you mean by rank?

Judge GINSBURG. Yes, I think base discrimination is deplorable and against the spirit of this country. Discrimination, arbitrary discrimination without reason—

Senator COHEN. No. Does rank mean institutional discrimination? Does it mean intentional discrimination? Does it mean arbitrary discrimination? Because as I understand the Constitution, it is permissible to discriminate or to classify provided there is a rational basis for it.

Judge GINSBURG. If I discriminate against a person for reasons that are irrelevant to that person's talent or ability, that is what I meant when I said rank discrimination. Arbitrary discrimination, unrelated to a person's ability or worth, unrelated to a person's talent, discrimination simply because of who that person is and not what that person can do.

Senator COHEN. Or what that person does. In other words, you draw it upon a person's status or conduct? Would there be a difference, in your judgment?

Judge GINSBURG. A person's birth status should not enter into the way that person is treated. A person who is born into a certain home with a certain religion or is born of a certain race, those are characteristics irrelevant to what that person can do or contribute to society.

Senator COHEN. What about sexual orientation?

Judge GINSBURG. Senator, you know that is a burning question virtually certain to come before the Court. I cannot address that question without violating what I said had to be my rule about no hints, no forecasts, no previews.

Senator COHEN. It seemed to me that you already did comment on that when you responded to Senator Kennedy this morning. He talked about race, religion, and gender and sexual orientation. I think your comment was rank discrimination is deplorable under all of those—

Judge GINSBURG. I think rank discrimination for any reason, hair color, eye color, you name it, rank discrimination is un-American. There must be a reason, as you said, for any classification. Government can't take action—

The CHAIRMAN. Will the Senator yield on that one point for clarification? We have used the phrase—

Senator COHEN. I have to wrap it very quickly. I promise I will be very brief.

The CHAIRMAN. All right.

Senator COHEN. I am sure she will clarify this as we go through.

The CHAIRMAN. Sure.

Senator COHEN. I believe that this issue is important, and your own experience and the passion with which you feel and express that past experience is important. I am not trying to, in any way, get you to commit how you are going to decide a case but, rather, to understand what you mean by rank discrimination being deplorable and perhaps unconstitutional in certain circumstances. I was curious in connection with your feeling in the *Goldman* case because there the Supreme Court in a 5-to-4 decision clearly indicated that it deferred to the military to engage in what clearly was a prohibition on a fundamental right, the wearing of a religious garment.

You and Judge Starr felt quite strongly, and I suspect Judge Scalia also felt strongly, that this did not meet the rational test basis.

At the time, the Supreme Court disagreed. Now we are going to have a new Supreme Court Justice, so I wanted to clarify what you meant by rank discrimination.

Judge GINSBURG. May I just say one further word about the *Goldman* case?

Senator COHEN. Surely.

Judge GINSBURG. The panel of the District of Columbia Circuit that decided the *Goldman* (1986) case said the very nature of a uniform regulation is its arbitrariness. That panel, as you know, was among the most "liberal" benches one could draw, if one labels judges liberal or conservative. Those three judges stressed the necessarily arbitrary nature of military uniform regulations. The panel was dealing with a discrete category; the opinion was not meant to spill over to any other area. Military uniforms could be arbitrary. That, in sum, was the decision of the panel of my court in—

Senator COHEN. The Court was saying that the military regulation was necessary in order to maintain uniformity. It was an issue of diversity and uniformity, and the Court deferred to the military in that case. That issue is obviously going to be before us and it is going to be before you, I suspect, at some future time. I just

wanted to explore with you your feeling about rank discrimination being deplorable. It is always deplorable. The question is, is it going to be constitutional under some circumstances.

Let me conclude. I made a pledge, Mr. Chairman, that we would break by 4, and I am already a minute or two over. I just wanted to conclude with an observation. I may not have an opportunity to come back and to participate further, Judge.

I know that you are a great student of Holmes. In fact, I was pleased that you placed him in the pantheon of your heroes on the judiciary, at least as far as those of the 19th and early part of the 20th century who are no longer with us.

Holmes wrote a letter to Cardozo, and Cardozo said it was one of his most prized possessions. In this letter, Holmes said:

I have always thought that not power or place or popularity brings one the success that one desires, but the trembling hope that one has come near to an ideal. The only thing that warrants us for not believing that we are living in a fool's paradise is the voice of a few masters, and I feel it so much I don't want to talk about it any more.

I hope that you will have this place, obviously, and the power and perhaps even the popularity. I hope that you will hold onto that ideal that Holmes spoke of and lived, and that you pay heed to those voices of the few masters that you cited as being among your heroes.

Judge GINSBURG. I hope so, too.

Senator COHEN. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Senator I was necessarily absent on the floor debating an amendment, I understand that you limited yourself to 4 o'clock, to accommodate the witness.

Senator COHEN. Right.

The CHAIRMAN. But I want you to know that, after we break, if you have more questions, you can continue, because we indicated that we would give people up to half an hour, if they wanted it. It is up to you. I know you have other things you have to do, as well.

Senator COHEN. We have an Armed Services Committee markup going on right now. Senator Brown was kind enough to let me go first, so I think I will wait until we complete another round.

The CHAIRMAN. The reason I attempt to interrupt, Judge—and I will recess in 60 seconds—is that when discussion was made about discrimination, the phrase used by the Senator was “the government has a rational basis,” and I did not want to let that stand.

Once the Court has concluded that a group is in a suspect category, they require strict scrutiny, not a rational basis, is that not correct? If you make a distinction based on race, race is in a suspect category, the government has to have more than a rational basis, does it not, to make a distinction based on race?

Judge GINSBURG. Yes, Mr. Chairman. Race classifications are subject to strict scrutiny, and the State must have a compelling interest to justify such a classification. We have not seen such an interest in some time.

The CHAIRMAN. I wasn't saying that in any way to imply that you didn't know that, Judge. You have that professorial look at this moment, and I feel mildly intimidated. [Laughter.]

Senator COHEN. It is called a prosecutorial look, not professorial.

The CHAIRMAN. No, the prosecutorial one doesn't bother me. The professorial one does bother me.

There may be two votes at 4:15, beginning at 4:15, and so I will recess until 25 after, unless there is an ongoing vote, in which case we will not reconvene until the vote has been concluded.

[A short recess was taken.]

Senator DECONCINI [presiding]. The committee will be in order.

With the concurrence of the chairman, Judge Ginsburg, we will go ahead and proceed. I know the day is getting long and I am sure you could find something else to do.

Judge I have paid some attention to your remarks, although I have not been here, and I appreciate your openness and candidness with the committee. I know you have gone over this subject matter. I just want to touch on it a little bit more, because it is troubling to me.

I want to go back over the issue you discussed with Senator Cohen yesterday. He asked you about the use of legislative history and statutory construction. Over the last few Supreme Court terms, almost 50 percent of the Supreme Court cases have involved issues of statutory interpretation and, thus, it has become more important to know a nominee's approach, and you have expressed that quite clearly.

During yesterday's hearing you told Senator Cohen that you do look at the legislative history, when the text is not clear. I was also encouraged to hear you tell Senator Kohl that you do not feel safe on "the same island of legislative intent" as Justice Scalia. Now, Justice Scalia is a proponent of so-called textualism. He attempts to limit the statutory interpretation to the text and ignores the legislative history. He does not look at committee reports, he does not look at congressional debate. Rather, he has decided that he will just look at the statute to determine congressional intent.

Now, congressional legislative history is not always clear, I am very cognizant of that, but I believe that ignoring it per se is a form of judicial activism, however you may define that term of art, that goes beyond what is acceptable. But there isn't anything we can do about judges who have been confirmed and sit there.

During his confirmation hearing, I asked Judge Souter his approach to legislative history. He stated the need to rely upon legislative history, when attempting to derive the meaning of an unclear statute. His approach on the Court has been consistent with his testimony.

Judge Thomas, on the other hand, told Senator Grassley during his confirmation hearing that a judge must "look to legislative history, we look to debate on the floor, of course, we look to committee reports, conference reports, we look to the best indications of what your intent was." However, in direct contradiction of that testimony, while on the Court, Justice Thomas has adopted the Scalia approach to legislative intent. For example—and there are several of them—Thomas alone concurred with Justice Scalia in the opinion last year, in which Scalia stated that reliance on legislative history was inappropriate.

Judge Ginsburg, interpreting statutes is a difficult process. Many statutes are subject to many different interpretations. If legislative

history is ignored altogether, what is a judge left with, in interpreting the vast number of statutes? Is there anything logically that you could do, other than look at the history of the legislation? I am just quite perplexed by Judge Scalia's, and what appears to be Judge Thomas', leaning.

I am not asking you to get into any fray with your future colleagues, if you are confirmed, but I just wonder, where else could you look?

Judge GINSBURG. Another source we look to as a way of determining congressional meaning is familiar canons of construction, like exceptions to the antitrust laws are to be strictly construed, like the specific prevails over the general—

Senator DECONCINI. General principles that you would look at. Not looking at the legislative history, and I realize it is certainly not binding, seems to me to may be a trend in the judiciary. As a scholar yourself and a judge, but more as a scholar, do you think it is a trend to go away from legislative history, or just a phenomena?

Judge GINSBURG. I don't see it as a trend in the Federal courts generally. Your colleague Senator Grassley was good enough to supply me with one of my decisions that I didn't remember until he handed it to me, *United States v. Jackson*, a 1987 decision of mine. I think it is typical. Yesterday, I tried to sum up how I approach legislative history. I said that I consult legislative history with an attitude of hopeful skepticism.

Senator DECONCINI. Yes, I saw that.

Judge GINSBURG. *Jackson* is a typical case where I said the statutory language we are obliged to construe is not free from ambiguity, and in light of the textual ambiguity, we must look elsewhere for clues to the legislators' intent. The legislative history of the act, while itself not free of ambiguity, which is often the case, offered more support for one position than for the other. I then referred to the Senate report and the House report, and continued for a page and a half citing material from the legislative history.

Senator DECONCINI. I guess in answer to my question, you don't think it is a trend, or do you have an opinion which you care to give, as to it being textualism or a veering away from legislative history?

Judge GINSBURG. I think a judge must try to find out what the legislature meant. One hopes Congress' meaning will be clear on the face of the statute, and it sometimes is. It sometimes is not, however. Then, I think, a judge will want to consult all of the sources that bear on the question, what does the statute mean. I also said yesterday that some parts of legislative history are more reliable than other parts. If everything in the legislative history goes one way, you feel more comfortable than you do when one statement goes one way and another statement goes another way.

To answer the question, what did the legislature mean, if it is not clear from the text, we need help, and legislative history can be a source of help that should be considered.

Senator DECONCINI. Thank you, Judge. I think that is quite adequate and I appreciate your response. I am sorry to drag you through that subject matter again, but I couldn't get it off my mind.

Judge Ginsburg, the famous case of *Miranda v. Arizona*, as you so well know, defined the parameters of police conduct for interrogating suspects held in custody. Since that decision, the Supreme Court has limited the scope of *Miranda* in certain cases. The process might be termed as kind of chipping away at it. *Miranda*, like the exclusionary rule, is a pragmatic rule that the Court adopted to provide better administration of constitutional rights.

I am interested in your opinion, if you would share with us: Should the Court be in the business of adopting pragmatic rules?

Judge GINSBURG. The purpose of the *Miranda* warnings is to make certain that a defendant's rights are known to the defendant, so the defendant can exercise them—the right not to speak and the information that, if you do, your words can be used against you, the right to an attorney and the knowledge that if you are unable to pay for counsel, a lawyer will be provided for you by the State. Those, it seems to me, are constitutional rights that should be brought home to every defendant.

Now, sophisticated defendants will know them without being told, but the unsophisticated won't. This practical approach, the *Miranda* warnings, has become familiar to all, thanks to television. I think it has worked.

Senator DECONCINI. You think it is a proper area for the Court to be involved in, certainly in the *Miranda* case, I suspect you do, but just in general of putting forth pragmatic rules?

Judge GINSBURG. In a situation like this, where the object is to ensure that a defendant knows about the right to counsel, knows that the defendant is not obliged to incriminate herself or himself, these are salutary rules that have safeguarded the constitutional right. Frankly, from my point of view, it makes the system run better because then one need not ask case-by-case: Did this defendant know that he had a right to counsel? Did he intelligently waive that right?

It avoids controversies. It is an assurance that people know their rights. It is an assurance that the law is going to be administered even-handedly, because, as I said, sophisticated defendants who have counsel ordinarily will know about their rights, so it is an assurance of the even-handed administration of justice.

Senator DECONCINI. Judge, let me go to another subject. I have been involved in this subject matter for a long time; it is judicial discipline. Had I been the member of the committee who heard your nomination some 13 years ago, I would have asked you this question. I was not, to my recollection.

So I would like to just give you some background of my interest. There are now 842 Federal judgeships. We are expecting that to increase to more than a thousand in the next decade, many more than the Framers of the Constitution I think ever possibly thought we would have.

The impeachment process is the only avenue to remove a judge. As we all know, the impeachment process is slow and cumbersome. It is left to the most egregious cases, some argue without adequate due process. Prior to 1986, the Senate hadn't heard an impeachment trial for 50 years, and since then there have been three. Furthermore, there are two more judges who have failed to resign, although they have been convicted. If only a fraction of the number

of sitting judges are accused of misconduct, the Congress could be just inundated with impeachment proceedings on an annual basis.

There have been a number of proposed constitutional amendments introduced over the years to address this problem. One approach would require that an article III judge who is convicted of a felony and has exhausted all appeals forfeit his or her office and all the benefits thereto.

Another approach would give Congress the power to legislatively set standards and guidelines by which the Supreme Court could discipline judges who have brought disrepute on the Federal courts or the administration of justice.

As a judge, do you think the impeachment process serves as a great enough deterrent to prevent the misconduct of judges? Is that a threat to a judge or intimidation at all in the process of a judge's conduct?

Judge GINSBURG. Senator DeConcini, I am afraid that there may be a real conflict of interest, possibility of bias and prejudice on my part. I am a member of the third branch of government; I prize my independence and the tenure I hold during good behavior. I think that Federal judges take their oaths to heart. Of course, there is always the rare exception, and I think it remains the very rare exception, even though, as the numbers go up, there is going to be—

Senator DECONCINI. Let me put it this way, Judge: Do you think there is any merit to a process within the judicial branch of government, which under a constitutional amendment, would permit the removal of a judge?

In other words, what if a constitutional amendment set up or gave authority to the judicial branch to set up procedures where complaints could be heard? A judge would have an opportunity to respond and to have a hearing and to appeal the hearing, and what have you, and the Supreme Court or somebody within the judicial branch could, in fact, dismiss the judge. Have you given that any thought?

Judge GINSBURG. I understand that the Kastenmeier Commission has been looking into the discipline and tenure of judges. The Commission has published a preliminary draft of its report. The Commission has been operating for some time; it has broad charter to take a careful look at all these areas. I will read the final report when it comes out with great interest, but I don't feel equipped to address that subject.

Senator DECONCINI. Let me ask you this: Is it offensive to you, if the judiciary had authority to discipline judges and that discipline could also include dismissal?

Judge GINSBURG. We already have an in-house complaint procedure, as you know.

Senator DECONCINI. Yes, I do.

Judge GINSBURG. And I think it has worked rather well. In all my years on the District of Columbia Circuit, no complaint has warranted a call for removal.

Senator DECONCINI. My problem, Judge, is what do you do with a convicted judge? Wouldn't it be appropriate for the judiciary to have a process where they could expel that judge? I mean I am giving you the worst of all examples. I am not talking about the litigants.

gant who is unsatisfied, doesn't like the ruling of the judge and, thereby, files a complaint as to moral turpitude of the judge, and then you have a hearing on that. I am talking about something that is so dramatic as a felony conviction of a judge.

Judge GINSBURG. Senator, I appreciate the concern you are bringing up. It isn't hypothetical. There are judges who are in that situation. They are rare, one or two in close to a thousand.

Senator DECONCINI. I think there are two.

Judge GINSBURG. So I appreciate the problem. When I was asked before about cameras in the courtroom, I was careful to qualify my own view. I said I would, of course, give great deference to the views of my colleagues on this subject. An experiment is going on right now in the Federal courts on that subject.

I don't feel comfortable expressing my own view, without information concerning the view of the U.S. Judicial Conference on this subject. I know that the judges are going to study the Kastenmeier report, and they are going to react to it. I can just say that I appreciate it is a very grave problem.

Senator DECONCINI. I won't beat it any further. It has troubled me and been a problem that I have dealt with here. I have legislation and constitutional amendments trying to get the court to be a bit more aggressive. They have set up the circuit disciplinary complaint procedures or whatever they are called, and there are some studies that show that they actually have taken some action.

What concerns me is all branches of government are suspect today, I think, by the public for a lot of reasons, some of it our own doing and some may be exaggeration by the press or whatever. And I am just trying to find a solution that would give more credibility to the judiciary. I would like to find that same solution for the legislative branch, but I am just really kind of grasping for thoughts and ideas without wanting to put you in an embarrassing situation that, my goodness sakes, what if the Judicial Conference turns down Kastenmeier or adopts it. And I am not absolutely sure what is in it, but I don't believe it goes near as far as I have suggested. And I was really looking for an opinion of a judge. I can probably find some other judges, and I have on many occasions, and most of them don't want it. Most of the judges I talk to that are personal friends of mine or people that I have been involved with for years in the judicial system, they just say no. Although, you know, candidly, some of them will say, yes, we should do that but it is impossible for us to do that, such as the charge or the opinion sometimes it is impossible for us in the Senate to criticize and really review our own conduct.

I am just looking for some thoughts on it without putting you in an embarrassing position because that is not my intent. And if you don't care to comment any further, I will let it go. I am just very frustrated about it. For almost 15 years now, I have tried to see and encourage the courts to be more involved in it, and going through the impeachment process here, it only frustrates me more because of our lack of being able to address that in a better procedural way.

Judge GINSBURG. Just as Members of Congress prize their speech or debate immunity, so judges prize their independence, the guarantee that they shall hold office during good behavior.

Senator DECONCINI. Thank you, Judge. I will try another judge.  
[Laughter.]

I have enjoyed, Judge, your frankness, and I want to compliment you again for it as we conclude my second round. I appreciate your attempt to be open with us and convey your views as much as you can. That is important to this Senator. I find this process not just fun, but trying to get inside the mind of a nominee to the Supreme Court without violating their oath and their potential conflicts, what have you, is fascinating, intellectually challenging, and very rewarding when you are as candid as you have been. And Judge Souter and others have fallen into that category.

As you noted in your opening statement, we hold these hearings to aid us in the performance of our task. I take it very seriously. I really don't think there is anything more important that I do as a Senator than addressing nominees to the bench, and particularly to the Supreme Court. The advice and consent duties here are extremely important, and I think Chairman Biden and the ranking member have certainly demonstrated that we take it seriously. And I know the nominees do.

If confirmed, our Constitution will endow you with immense power, and there is no doubt in this Senator's mind that you are well aware of that, having served as long as you have, and there is no doubt in my mind that you will take it extremely seriously and in a very wise manner. And I anticipate, unless something comes out in these hearings or in other procedures prior to the report of this committee, that you will be confirmed. And you have certainly demonstrated, I think, to the public and to this committee your knowledge of the law, your ability to be straightforward, your consciousness and sensitivity toward delicate issues that might come before the Court. And I give you high praise, Judge, for whatever that may be worth.

Judge GINSBURG. Thank you.

Senator DECONCINI. Thank you.

Judge GINSBURG. Thank you so much, Senator. I appreciate those kind words.

Senator DECONCINI. The Senator from South Dakota is recognized. Senator Pressler? North Dakota, not South Dakota.

Senator PRESSLER. Thank you very much.

Judge Ginsburg, I will take up where I left off yesterday. I have reviewed the answers to some of your questions in the area of Indian Country law and have found them lacking, very frankly, in terms of what some of the tribal leaders are looking for.

Let me say that many States west of the Mississippi are very involved in litigation, whether it is California or any of the States that have reservations or tribes or whatever they are referred to, as California uses a different name. I am told that 10 percent of all the cases decided by the Supreme Court last year involved Indian law questions, and it is a matter of growing concern with Indian gaming issues throughout the country, with issues of tribal lands, with issues of civil rights of Indian people. And yesterday you frequently responded by saying that Congress is responsible. And, indeed, it is and I am a great critic of Congress for not acting more.

But on the other hand, 80 years ago Congress passed a law regarding property rights and deeded land, and courts have ruled on the issue. In the last 10 or 15 years, there has been probably more law made by the Supreme Court and the courts regarding tribal law than has been made by Congress. That is probably not appropriate, but it is the way things have been done. I am a great critic of Congress, and Congress should do more. But in some cases, Congress has taken action and passed legislation, such as regarding patented deeded land, but the courts have ruled otherwise.

Congress has taken steps regarding the codification of tribal court decisions. Except for the Navajos, there is no judicial codification of tribal court decisions and no judicial training involved. The *National Farmers Union Insurance* case in the Supreme Court created such a situation of confusion that tribal leaders tell me insurance is hard to obtain on the reservations.

The case in Wisconsin where a Federal judge decided against congressional actions regarding fishing rights, where there had never been any history of netting fish, suddenly a district judge ruled that certain areas had to be set aside for netting fish at great expense to the State of Wisconsin. And this is a judicial decision without Congress acting.

Many of these are social policy decisions made by district court judges and appealed, and they end up in the Supreme Court. It is amazing the number of tribal laws and tribal matters that end up in the Supreme Court. As I said, it appears the Supreme Court, you can correct me on this, only takes about 100 or so cases a year, and perhaps 10 percent of those decided each year deal with Indian law.

I guess tribal leaders want to know—they want to get some feeling, and you have expressed your feelings in other areas—what it is that you know about Indian law, your familiarity from your years of teaching and from your years on the bench. They want to get a feel for your thinking.

Can you give us some response?

Judge GINSBURG. Senator Pressler, I would bring to this area of the law the same care and the same thought I bring to the vast array of Federal law I have handled in the last 13 years on the District of Columbia Circuit. I did not have any familiarity with Indian law as a student. I didn't take any course on that subject in law school. I did not teach in that area. I have not written in that area. That is true of most of the business I have handled on the District of Columbia Circuit, and it is true of most of my colleagues. With the wealth of Federal law, none of us can possibly be specialists in most of the cases that come before us.

I have had to deal with many cases involving complex questions about the environment, about surface mining, for example, cases using terms I had never heard of before I got the particular case. But then I boned up as hard as I could, with the information from the record, the information supplied to me by the capable attorneys in each case. And although I felt very much at a loss at the start, by the time I reached the point of making a decision I felt confident that I knew what was necessary to make a sound decision. And I would bring that same approach and hard work to bear on this question.

In fact, one of my colleagues, who observed the questions you asked me yesterday; was it yesterday? When I got back to Chambers, had placed an article on my desk, with a note that said, "In view of the questions you have been asked, I regret that I did not send this to you earlier." And it is a fine article called "Criminal Jurisdiction on the North Carolina Cherokee Indian Reservation: A Tangle of Race and History." It is by my colleague, David Sentelle. So there are in many parts of the country, as you have indicated, these very complex problems.

I cannot pretend to any special knowledge in this area of the law, but I can undertake that I will approach it in the same way I have approached all other difficult areas I have had to confront in my 13 years on the District of Columbia Circuit.

Senator PRESSLER. I did raise this issue, so I am not surprising you with questions here. I did raise it when you were in my office, and I sent you a series of questions that I would ask in advance.

But, in any event, I have got two or three questions here, and then I will conclude this area of questions. It isn't that I expect you to know detailed things about Indian law, but it is the basics that concern me. It is what the tribal leaders, non-Indians, Western States, and the State attorneys general are concerned with. The Western States attorneys general have meetings on these issues frequently.

Yesterday in your answers to my line of questions in regard to Indian sovereignty, Indian civil rights, tribal jurisdiction, and law enforcement in Indian country, you were very consistent in stating your view that Congress has full power, or plenary power, over Indian affairs, and that the Federal courts will follow the policy Congress sets in this area.

I guess the point I am trying to make here is that in many cases where Congress has acted, the courts in the last few years have overruled, in such as the deeded and patented land cases, the Wisconsin case, the insurance case, and so forth. Indeed, the courts have felt an obligation to act.

I am interested in finding out what you believe to be the limits on Congress' power when dealing with Indian affairs or courts. While it is true that Congress has plenary power in this area, the Court has not been clear identifying the source of Congress' power in this area. Early cases attributed this power to the treaty clause of the Constitution, the property clause, and the war power.

In an 1886 case, *United States v. Kagama*, the Supreme Court attributed the power to enact a major crimes act to the trust relationship. The Court rejected the Indian commerce clause as a basis because crimes are not commerce.

However, in a 1973 case, *McClanahan v. State Tax Commissioner*, the Court acknowledged the confusion regarding the source of Federal authority over Indian matters. It rejected the trust relationship as a source of congressional power and instead recognized that such power derives from the language in the commerce clause dealing with Indian tribes and from Federal treatymaking authority.

Now, I guess my questions are: To what do you attribute Congress' plenary power over Indian matters? And does the source of the authority vary with the subject matter of the legislation?

Judge GINSBURG. The Supreme Court has said repeatedly that Congress has full power over Indian affairs. A major source of that authority is, of course, article I, section 8, where the power is lodged in Congress. It surely is not lodged in the courts. The one thing that is clear is that the courts are obliged faithfully to follow the treaties and laws in this area as set by Congress. The courts do not have any law-creation role to play. This is not a common law area. This is an area for Congress to control. It is a very difficult area, and the courts will have construction questions presented to them. But that the Congress has the lead role and not the courts I think is plain.

I have done my best, Senator, to answer your questions on this subject. As I have explained, a judge works from a specific case. I have said that in answer to a number of your questions. I can't answer abstract inquiries even in areas I have studied. I can't answer an abstract issue. I work from a specific case based on the record of that case, the briefs that are presented, the parties' presentations, and decide the case in light of that record, those briefs. I simply cannot, even in areas that I know very well, answer an issue abstracted from a concrete case. That is not the way a judge works.

Senator PRESSLER. It is the feeling of many tribal leaders that the courts currently make more law on reservations than does Congress, because of court rulings and the Congress' inaction. So they are very interested in what goes on in the court system, because that is where most of the new law comes from.

My second question—as you may know, many members of Indian tribes, in their relations with their tribes, do not enjoy the protections other Americans have through the Constitution's Bill of Rights. They have a statutory bill of rights which Congress enacted, but it is not as complete as the Constitution's Bill of Rights.

Yesterday, I asked you whether the Native Americans are entitled to the same constitutional protection in Federal courts afforded to all American citizens. You answered, "All I can say is that Congress does have the full power over Indian affairs, and the Federal courts will follow the policy that Congress sets in this area."

My question is, If you feel Congress has full power over Indian tribes, you must regard Congress' abrogation of the U.S. Supreme Court's decision in *Duro* as constitutional, even though it delegated criminal jurisdiction over nonmember Indians who do not have constitutional bill of rights protection against the authority of the tribe. Would that be a fair interpretation of your view?

Judge GINSBURG. I have no question about the authority of Congress to override the Supreme Court decision in *Duro v. Reina* (1990).

Senator PRESSLER. Are there any limits to Congress' power to delegate to the tribes criminal or civil jurisdiction over non-Indians?

Judge GINSBURG. I can only repeat the answer that I gave you, Senator Pressler, that Congress has full power over Indian affairs. There is no restriction on a Native American to live in any community that he or she chooses. So we are discussing only the difficult concept of tribal sovereignty and how Congress has chosen to treat that. I certainly didn't mean to suggest that a Native American

outside of a tribal setting doesn't have the same rights as you and I do.

Senator PRESSLER. Are you uncomfortable that the Constitution's Bill of Rights does not extend to Native Americans?

Judge GINSBURG. I can't express my personal view on that subject. I know that there are many people who care deeply about the concept of tribal sovereignty. I am not a member of one of those communities and, as a judge, I will do my best to apply faithfully and fairly the policy that Congress sets with respect to tribal governance.

Senator PRESSLER. I have been informed that Indian tribes, the tribal leadership—and this is complained about by some of the tribal members—successfully convinced the American Civil Liberties Union not to take cases regarding the civil rights of Indian tribal members in their relations with their tribes. As I said earlier, Indians in their relations with their tribes have only limited statutory bill of rights protections and do not have the full panoply of constitutional rights available to most Americans.

Given these circumstances and I believe your prior involvement with the ACLU in winning civil rights cases involving sex discrimination, are you aware of any ACLU policy or understanding regarding taking cases involving the civil rights of Indians in their relationships with the tribes, and, if so, what was that policy or understanding or your reaction to it?

Judge GINSBURG. Senator, I have no knowledge or recollection of any policy of the kind that you have just described.

Senator PRESSLER. My final question in this area: Yesterday, I asked you a question on an Indian tribe's ability to impose fines and forfeiture against non-Indians who reside on a reservation with regard to activities on the land owned by non-Indians. Again, you answered this was an area that is particularly committed to the judgment of Congress.

My questions are, do non-Indians have any due process rights or property rights which they can assert against the authority of the tribal government? And, two, similarly, what due process rights are guaranteed to Indians who are not members of the tribe against a tribal government?

Judge GINSBURG. The authority of the tribal courts is something for Congress to decide. I believe that was my answer yesterday. Those courts will have such authority as Congress chooses to give them, and judges are bound to respect the decisions Congress has made.

Senator PRESSLER. The problem is that the courts have frequently overruled or defined Congress' mandates. Of course, I suppose it is Congress' fault, in the sense that maybe it should pass another law. But much of this ends up in the Supreme Court and the Supreme Court makes the law. That is the way it seems to a lot of people living in the West.

Judge GINSBURG. But the Supreme Court, as any court, has an obligation to construe and apply the laws Congress passes faithfully, and on whatever court I serve that would be my endeavor, no matter what area of the law.

Senator PRESSLER. That concludes my questions. Thank you very much.

Judge GINSBURG. Thank you.

Senator SIMON. The Chairman is tied up and I am going to—  
The CHAIRMAN. Please go right ahead.

Senator SIMON. All right.

Judge, you and your family will be pleased to know in the second round I have only one question.

Judge GINSBURG. Yes, I am pleased. [Laughter.]

Senator SIMON. You will bring to the Court more background in international law than any other member of the Court. You will certainly be the only member of the Court who has ever translated Swedish law into English, I am absolutely positive of that. Though, come to think about it, Chief Justice Rehnquist, that is a very Swedish name, and he may—

Judge GINSBURG. Swedish or Norwegian.

Senator SIMON. He is Norwegian?

Judge GINSBURG. It could be. Swedish or Norwegian, I don't know.

Senator SIMON. It sounds Swedish, but we will have to check that very important question. [Laughter.]

The U.S. Supreme Court, in what I think was a terrible 6-to-3 decision, the *Alvarez* decision, said that the FBI could legally go into another country and kidnap someone, because the kidnapping was not covered by the extradition law. It is the only case I can think of where every country around the world condemned what we did, and Senator Moynihan and I have legislation in to make sure this doesn't happen again.

Article VI of the Constitution, as you know, says treaties made or which shall be made under the authority of the United States shall be the supreme law of the land. I do not want to ask you about the *Alvarez* case, because I am sure you would, understandably, decline to comment on that.

But if you would comment on the general theory that because something is not covered in an extradition treaty—and you have had, at least my staff has discovered at least seven cases where you have been involved in international law on the appeals court, and one, *Ward v. Rutherford*, in 1991, involved extradition law—if an extradition treaty does not cover going in and kidnapping someone, or if a country owes us some money, does not cover going in and robbing a bank or any number of illegal activities, what is your opinion about the legality of our doing things that are understood by all the countries of the world to be in violation of international law?

Judge GINSBURG. Senator Simon, I can only tell you the code of conduct I would adopt for myself wherever I am, here or abroad, and that is the Constitution of the United States. I would consider it binding on me.

I can perhaps cite an example. There is a good book called "Judgment in Berlin," written by a former Federal judge, Judge Stern, who was sent to judge a hijacking case in Berlin. It was a sensitive case in the international community. A plane was hijacked from Poland, I believe, to take people who had been in East Germany into West Germany. The hijacking presented a sensitive question within Germany. So a court that had been created in World War

II, called the United States Court for Berlin, was resurrected, and a U.S. district judge, Judge Stern, was sent there.

He was told by the State Department that the alleged hijackers would have only such rights as the State Department chose to give them. Judge Stern said, I am a Federal judge, the Constitution is my law, and that is the law I am going to apply in any proceeding over which I preside.

He made sure that defendants had very able counsel—there were two defendants—and that they got the full panoply of rights we accord criminal defendants. He did something remarkable in a country that does not use juries. He insisted that there be a jury trial. The case was tried under German law, under German substantive law, but according to U.S. procedures. And that procedural law was largely determined by the rights guaranteed in the U.S. Constitution. It is a wonderful example, I think, of the way any Federal official should behave at home or abroad. The Constitution and the Federal law should be our guide wherever we are.

Senator SIMON. If I could get you to be a little more specific here, if I can ask, not in commenting on the substance of the *Alvarez* case—incidentally, he was tried in the United States and not found guilty—but were you at all startled, when you heard about the results of the *Alvarez* case?

Judge GINSBURG. If I may, Senator, I would not like to comment on my personal reactions to that case. I think I told you what my view is on how U.S. officials should behave, and I would like to leave it at that. You have cited a decision of the U.S. Supreme Court. I have tried religiously to refrain from commenting on a number of Court decisions raised in these last couple of days.

Senator SIMON. I understand. Let me just say that I hope you were startled, and my hope is that this particular case—first, I hope we overturn it in Congress, so that this cannot happen again. But the fact that an extradition treaty doesn't spell out that we can't go in and kidnap people in another country or we can't rob banks or we can't do all kinds of other things doesn't give us the authority to do those things. My hope is that this is one case where, if we don't pass something in Congress, that you will not let precedent stand in the way of what the international community believes is in our best interest.

If I may add one other thing, Mr. Chairman, that has nothing to do with this procedure: I was over on the floor of the Senate, and I believe you were, too, when our colleague Senator Heflin made a speech that took an incredible amount of courage. I just want him to know I have never been prouder to serve in the U.S. Senate than when I heard that speech.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

I, too, heard that speech and, for the public listening to this, the Senator made a very moving and eloquent speech, as a son of the Confederacy, acknowledging that it was time to change and yield to a position that Senator Carol Moseley-Braun raised on the Senate floor, not granting a Federal charter to an organization made up of many fine people who continue to display the Confederate flag as a symbol. The charter would have given them the right, the imprimatur of the Federal Government to do that.

It had nothing to do with the first amendment, Judge, so don't worry. But the Senator made a very significant speech rivaled only, in my view, by a private speech given to me personally by a man whose office I now occupy, Senator John Stennis from Mississippi.

Judge, I hope some day you are able to come to my office and see the conference table in my room, which Judge Stennis—he was a judge—Senator Stennis presented to me as he left the Senate. It was a table that he referred to as "the flagship of the confederacy," where he indicated to me that every Wednesday, I believe it was, the Senators from the old Confederate States would meet with the most powerful member of the U.S. Senate, from what I hear, in the last 40 years, Senator Richard Russell of Georgia. They would sit at this table at lunch, and to quote Senator Stennis, beginning in the late fifties through the early sixties, plan the demise of the civil rights legislation in the Senate.

The first time I came to his office, as a young Senator at age 29, just having been elected, he asked me why I ran for public office. And being as impolitic as I am, not stopping to think, I said civil rights, Mr. Chairman. As soon as I said that, I realized who I was speaking to, and I remember the beads of perspiration breaking out on my forehead, and he said, "Remember the first time you came to me see me."

And I hadn't, Judge, and he reminded me it was to pay my respect as a young Senator, and he said, "I wanted to tell you then what I want to tell you now." He said,

It's appropriate that this table, the flagship of the confederacy, is now yours, for the Nation has changed, and it is good that it has.

I got up to leave, and he said to me, "One more thing." He said, "The civil rights laws in America have done more to free the white man than the black man."

I thought that was an astounding statement for a then 84-year-old man, I believe, who had served in the Senate over 42 years, and in the minds of young activists or semiactivists, like me in the sixties, was one of the symbols of resistance to change.

You have never been a symbol of resistance to change, but you have been a symbol of courage, and today was one of those days. For the Senator from Illinois, Senator Simon, and me to cast the vote we did today, it takes no political courage. But for you it did, and it was moving.

Senator SIMON. Mr. Chairman, if I may just add, I wish you the best, Judge Ginsburg. I think you are going to bring honor to the U.S. Supreme Court. I will cast my vote for you with great pride.

Judge GINSBURG. Thank you so much, Senator Simon.

The CHAIRMAN. I have attempted to survey my colleagues on both sides of the aisle to see who has additional questions, and I understand that Senator Brown and Senator Heflin have some additional questions, and Senator Specter has some additional questions. I have a very few, maybe 5 minutes worth.

I asked the staff now, I put the staff of all the Senators here on notice that it is my intention to excuse the witness this evening at whatever time, so that she need not come back and is able to see a good movie this weekend or whatever she would like to do. So I would ask you to ask your Senators, if you would, please, in the

next 20 minutes or so to let me know if they have a desire to ask additional questions.

I understand you have begun this round, Judge, at about 5 after 5. If it is appropriate, I would yield now to Senator Brown, whose turn it is to ask questions. After his round of questions, depending on how long they go, you can let me know whether you would like to break then or we should continue with Senator Heflin and his questions. But, hopefully, we will get you home at a reasonable hour, and you will be able to do what I am sure you will, watch the remainder of the proceedings on television. I am sure you will be glued to your television. But that is my intention, if that is appropriate, if that is all right with you.

Judge GINSBURG. That is the greatest thing I have heard all day. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Brown.

Senator BROWN. Thank you, Mr. Chairman.

Judge Ginsburg, I appreciate the long day that you put in. The only thing I know that is somewhat comparable to this process is the bar exam. The only difference, of course, is this is oral and that is written. In this case, many of the people who grade the test have different answers, so it is more of a challenge.

The CHAIRMAN. And they are not as informed as you, and I include myself in that category.

Senator BROWN. I never thought that was a major impediment for people who took the bar exam.

Judge GINSBURG. That was 2 days, at least when I took it, back in ancient times. The bar exam was 2 days. I don't know what it is now.

Senator BROWN. I guess in the older days when I took it, it was 3.

The CHAIRMAN. It was 3 for me as well, but maybe the Senator and I were slower.

Senator BROWN. Our State was less benign. [Laughter.]

It is really quite an extraordinary treat to have you here. You not only have a distinguished academic record that we have talked about, but really a very excellent record in terms as an adjudicator and as a teacher.

If I were to describe an area of the law where perhaps you have as much or more experience than anyone we have had the pleasure of coming before the committee, it would be on the equal protection clause. We touched on it in our earlier discussions, and I thought I would follow up with questions in this area. And I appreciate the sensitivity with regard to how you would rule, and I would want to direct this more to the pleadings and your writings in this area. I say that because I think people should keep in mind that when you are filing pleadings you are an advocate. That doesn't necessarily mean that it is how you would rule. I think anyone who reviews your record knows that.

But with that in mind, as I review the equal protection clause, I guess my first question is if you feel that that clause suggests, in effect, a sex-blind standard with regard to legislation and programs?

Judge GINSBURG. In most instances, that is correct. "Nor shall any person be denied the equal protection of the laws." It is my firm belief that for purposes of being whatever a person wishes and is able to be, sex is not a relevant criterion.

One of the things I think is so wonderful about being the second woman and looking forward to the third and the fourth, is that I am thought of as judge, who happens to be a woman.

Recently, I sat on a complex case with Judge Karen Henderson and my former Chief Judge, Patricia M. Wald. When the three of us left the courtroom at the conclusion of argument we noticed there were three women. We sat together for close to 3 hours. And nobody even remarked on it. That was a tremendous change from the way it was 10 years ago. We were judges who happened to be women, but we were judges. So I think for most purposes, sex is not a relevant criterion for choosing.

Senator BROWN. I particularly appreciated your comment the other day or observation that sometimes that which has been included in our laws that are defined as favors, sometimes is not that at all in the long run for women. And we explored that a bit yesterday. My mother had gone through law school in the 1940's and worked as an attorney in the 1950's and 1960's, and I know from firsthand experience with her life that that is a keen observation.

What I thought I might do is go through questions that occurred to me, though, as I thought about the application of the equal protection clause and ask you to help me understand it, help us understand certain instances in which it may or may not apply.

Nan and I were lucky enough to have twins. They turned out to be a boy and a girl. In the process of their growing up, we have run into occasions where the law and the world treats them differently. I suppose the first thing that happened was that my son had the opportunity to register for the draft, which my daughter did not. Indeed, a provision of the law which may not be extended; the draft is obviously up before Congress right now. But as it is structured now, young men register for the draft; young women do not.

Is this an example of unequal protection under the laws?

Judge GINSBURG. Senator Brown, once it was just that way with jury duty, not that long ago. It wasn't a question that your son had the opportunity. He had the obligation. And so it was with jury duty. Men had the obligation, and women, it was thought, had the opportunity. They could serve if they wanted to. And we may see someday a similar change in this area.

It is not unknown in the world that women are obliged to serve their country as men are. That is something that has been before Congress, and may be before it again.

Senator BROWN. About that time also, both got driver's licenses, and we had the unique pleasure, as I know you have in your family, to add a rider to your policy or to secure different auto insurance rates. As it turned out, the auto insurance companies that we dealt with seemed to think that my son was a significantly greater risk than my daughter. An observation, incidentally, which appears to have some basis in fact.

Judge GINSBURG. Boys drive more, drink more, and commit more alcohol-related offenses. That, on average, is certainly true, and the

Supreme Court acknowledged it in a case called *Craig v. Boren* (1976).

Senator BROWN. This is obviously not a function so much of our statutes as a function of our market system with insurance. That is not to say we don't legislate insurance rates. Sometimes we do.

Is this an area where the equal protection of the laws may well require uniform insurance rates?

Judge GINSBURG. Not unless the Government takes over the business of insurance. You know that differentials of that same nature work the other way for pensions. Women, on average, live longer than men. Many women die young; many men live long. But, on average, it is unquestionably true that women live longer than men. And so, until not so long ago, when people retired, the women got less than the men because it was thought that there was actuarial equality. Women would live longer. Women, on average, would live longer so, in the end, they would get the same amount, but it would be stretched out over a longer period of time.

Lawsuits were brought challenging that differential under title VII. The hook was not the Constitution because the Constitution restricts government action, not private action. It was the civil rights, equal employment opportunity legislation Congress had passed. Title VII is applicable to the private sector. And it was often private employers who were providing these plans to their employees. The private employer is covered by title VII and cannot discriminate on the basis of sex, not because of the Constitution but because of the law that Congress passed.

So in group plans connected with employment, those differentials are unlawful. They aren't unlawful yet—unless Congress passes a law so regulating the insurance industry—on an individual basis. If I want to buy an annuity from a private insurance company, then, barring some State law, the insurance company can still say I will get less per month than a man of identical age because, on average, women live longer than men. But in group plans that is no longer permissible because of title VII.

It isn't true for individual plans any more than it is for automobile insurance, and I know just what you are talking about because we had the identical experience when my son got his driver's license. Our premium went way up.

Senator BROWN. I certainly hope that that differential was not as justified as it is in some families. [Laughter.]

Judge GINSBURG. I will remain silent on that subject.

Senator BROWN. I don't know that there is any bar to incrimination of your family.

One of the other areas that comes to mind is the whole question of affirmative action. You have drawn, I think, a very clear and succinct differentiation between government programs and the private sector with your last response in the application of the constitutional protections for equal protection.

Affirmative action comes, I guess, as a remedy for areas where discrimination has been spotted and perhaps well may involve governmental standards that restrict discrimination.

Would the equal protection clause apply to affirmative action programs?

Judge GINSBURG. The equal protection clause applies to government action, and there have been two cases that have come up in the course of these discussions: one, the *Croson* (1989) case, involving city plans, and the other, *Metropolitan Broadcasting* (1990), involving Federal plans. Government action is restricted; it is controlled by the equal protection guarantee. Private action in the employment sector is controlled by title VII prohibiting discrimination on the ground of race, national origin, religion, sex.

So while the equal protection principle doesn't apply, the title VII legislation does apply and does control affirmative action programs in the private sector.

Senator BROWN. I wanted to cover one last area, and it may be an area you would prefer not to explore. If you do, I would certainly understand.

I believe earlier on Senator Cohen and others had brought up a question with regard to homosexual rights. I would not expect you to comment on something that may well involve a case before the Court in the future. But there is a question I thought you might clear up for us that I think has some relevance here.

The equal protection clause, as we have explored it this afternoon, requires, in effect, sex-blind standards with regard to government action or legislation. That relates to classes of people; in this case, males and females. Obviously, there are other classes.

In the event we are dealing with forms of behavior—and I appreciate that is not a foregone conclusion with regard to homosexuals. In other words, it is open to debate whether or not it is a class of people or forms of behavior. But in the event we are dealing with forms of behavior, would homosexuals be protected under the provisions of the equal protection clause?

Judge GINSBURG. Senator Brown, I am so glad you prefaced your inquiry by saying you would understand if I resisted a response, because in this area, I sense that anything I say could be taken as a hint or a forecast of how I would treat a classification that is going to be in question before a court, and ultimately the Supreme Court. So I think it is best that I not say anything that could be used as a prediction of how I might vote with regard to that classification.

Senator BROWN. Judge, thank you for your responses.

Mr. Chairman, I yield back.

The CHAIRMAN. Thank you. It is a convenient time. There are 6 minutes left for us to go vote. Why don't we break now for 15 minutes?

Judge, I think we are moving along. Senator Specter, I was going to ask his staff, it might be appropriate to ask him after the vote if he wishes to question after we come back. I know he has questions. And I don't think there are any other questions on our side of the aisle. I have a couple, but I may submit them in writing to you, on *Chevron*. But at this moment I am not sure anyone would understand except you Chevron from Chivron.

So we now will recess for 15 minutes to go vote, and come back, and then we will see where the next round takes us. But we are getting there, Judge.

Judge GINSBURG. Thank you. I appreciate that.

[A short recess was taken.]

Senator MOSELEY-BRAUN [presiding]. The Judiciary Committee will reconvene.

Senator COHEN. It is quite a day for you, isn't it?

Senator MOSELEY-BRAUN. Tell me about it.

I understand that Senators Grassley, Specter, and Cohen have questions of the nominee.

Senator GRASSLEY. Madam Chairman, for the benefit of my colleagues, I only have questions that probably will take no more than 5 or 6 minutes.

Senator MOSELEY-BRAUN. And I understand—and perhaps I am wrong about this—that you were going to defer to Senator Specter to go first?

Senator GRASSLEY. Not if he will let me go first.

Senator SPECTER. How can I stop him?

Senator MOSELEY-BRAUN. Senator Grassley.

Senator GRASSLEY. Judge Ginsburg, I would like to discuss something with you that we probably would have discussed at our session tomorrow, but if we discussed it tomorrow, we still probably would have to discuss it again in open session anyway. So for the benefit of time, I would like to go ahead with something I have corresponded with you about. If I could put you at ease, recent correspondence that you have had with me basically satisfies me, but I want to go ahead and bring it out for the record, anyway.

I want to address your membership in the Woodmont Country Club. This committee has looked at the club membership of nominees to determine if the club engaged in any discrimination, and you know about our concern about that on this committee. At least for the last several years it has been a major concern. It is even something we debated as recently as our last two executive meetings.

You belonged to the Woodmont Country Club in Rockville for several years in the 1980's. You said you resigned after the club changed its by-laws and you felt it caused Judge Harry Edwards, the only black member of the club, to resign.

So I would like to explore not that aspect of it, but another aspect of this club membership, and that is the ethical implications of your membership at Woodmont. When you joined the club, you did not pay any initiation fee, is that correct?

Judge GINSBURG. That's correct, Senator. We paid dues, but not initiation for the period from August 1980 when I joined, until April 1983, when I resigned.

Senator GRASSLEY. OK. Then you have answered another question I was going to ask, and that was whether or not you paid dues or fees.

The next point is, do you know the amount of initiation fee that was paid by incoming members at that particular time?

Judge GINSBURG. No, but I do know what the dues were at the time that I resigned, I mean the initiation. The initiation at the time I resigned, which Judge Harry Edwards and I were asked to pay, I believe was \$25,000.

Senator GRASSLEY. I thank you for that very certain answer. There were press reports to the effect that it was somewhere between \$20,000 and \$25,000. It is my understanding today's initi-

ation fees would be about \$65,000. You could buy a good Iowa farm for that.

Anyway, moving on, the ABA Judicial Code of Conduct prohibits the acceptance of gifts, bequests, favor or loan, except in limited circumstances. Canon 4 requires that if a gift or favor meets one of the exemptions and is accepted, and it must be reported like compensation, if its value exceeds \$150. And at the time you joined, it is my understanding that that was \$100.

In addition, the Code of Judicial Conduct of the Judicial Conference contains a similar provision in canon 5. I know that you did not consider the waiver of the initiation fee to be a gift, because you only accepted special membership or at least a membership that was classified as special, as opposed to the regular. As you explained in your written response to me, that category of membership did not entitle you to voting privileges. In addition, you could not pass on your membership to your children.

Other than these two distinctions, were there any other restrictions to your special membership?

Judge GINSBURG. It was terminable at will, as I understand it. My membership was a membership category that was terminable by the club at any time.

Senator GRASSLEY. So that was an additional restriction.

Judge GINSBURG. Those three, as I understand it: no right to vote; no right to obtain any membership for my children; and the membership was terminable by the club at any time.

Senator GRASSLEY. You did have a good reason for resigning, but if there had not been that reason for resigning, and considering the fact that you could expect to be on the Court for life, you could have had membership in the club for the rest of your life, as long as you were still a sitting judge, presumably?

Judge GINSBURG. The membership was terminable by the club at any time, as it in fact was. We were not given notice. We didn't know in advance, because we weren't voting members. Both Judge Edwards and I were informed that our special membership would be terminated, and that is what led to my resignation.

Senator GRASSLEY. I don't argue with that and I am only trying to make the point that, at the time you had it and until they notified you that you would have to pay an initiation fee to stay in, that special membership could have been, by the waiving of the initiation fee, could have been good for the rest of your life.

Judge GINSBURG. It could have been for the term of my Government service.

Senator GRASSLEY. Yes. I think I will go on.

You had full use of club facilities, but a waiver of initiation fees. At the time you received this benefit, you did not consider it a gift or favor. But in a letter you wrote to me dated July 21, and which I received today, you indicated that you should have regarded this as a gift and disclosed it, as required under the code of conduct. I am glad to hear that you acknowledge that the waiver of the initiation fee should have been reported.

I would like to have that letter placed in the record, Madam Chairman.

Senator MOSELEY-BRAUN. Without objection.

[The letter referred to and responses of Judge Ginsburg to questions of committee members follow:]

UNITED STATES COURT OF APPEALS  
DISTRICT OF COLUMBIA CIRCUIT  
WASHINGTON, DC 20001

RUTH BADER GINSBURG  
UNITED STATES CIRCUIT JUDGE

July 21, 1993

The Honorable Charles E. Grassley  
135 Senate Hart Office Building  
Washington, D.C. 20510

Dear Senator Grassley:

In my July 16 response to your question, did I regard Woodmont Country Club's special government membership category -- in which I participated from August 1980 to April 1983 -- as conveying a gift to me, I said no. My responses to your question pointed out that regular membership, which required the payment of initiation fee as well as annual dues, was voting and permanent and carried with it the significant right to obtain memberships for the member's children. Special membership required payment of dues but not the payment of initiation fee; a special membership was terminable by the Club at any time, terminating automatically when government service ended, and included no right to vote or to obtain any membership for children of the special member.

I did not regard special membership as a gift from Woodmont, because the lower cost of special membership, embodied in the absence of an initiation fee, reflected the lower level of privileges and rights that inhered in the special membership class.

Nonetheless, following preparation of my response to your questions, I inquired through the White House counsel's office of the Administrative Office of the United States Courts concerning applicable Judicial Branch regulation, if any, of a judge's acceptance of a social club special membership. In a response from the Administrative Office General Counsel I have learned these things.

First, neither of the primary sources of such regulation -- the regulations of the Judicial Conference concerning gifts made under Title III of the Ethics in Government Act of 1978 as amended, and the Code of Conduct for United States Judges, as adopted by the Judicial Conference -- expressly addresses the question at hand.

Second, in 1975 in Advisory Opinion No. 47 the Judicial Conference Advisory Committee considered a factual variant of the question at hand. The 1975 case asked the propriety of a judge's accepting a complimentary country club membership under which the judge would not be required to pay either dues or an initiation fee. Assuming, as was also true of Woodmont, that the club would not likely be a litigant in the federal court and that the special membership was not proffered to exploit the judge's position, the Committee concluded:

- The judge's receipt of the membership was permitted under Canon 5C(4)(c).

- The value of the membership, if in excess of \$100, should be reported as a permitted gift on the judge's financial disclosure form.

My 1980-83 special membership in Woodmont is different from the situation in Advisory Opinion No. 47, in that the initiation fee was waived and annual dues were not. Despite that distinction, however, I believe it would be reasonable to conclude that the Woodmont membership should be reported as a gift under Advisory Opinion No. 47 because the money value of the initiation fee waiver exceeded \$100.

Accordingly, applying the conclusions of Advisory Opinion No. 47, I now believe that prior to 1984 I should have disclosed, on my annual financial disclosure form, as a permitted gift the special membership I held in Woodmont County Club during the period August 1980 to April 1983.

I sincerely regret that I was not in the period 1980-83, and indeed until now, aware of the conclusion embodied in Advisory Opinion No. 47.

Sincerely,



Ruth Bader Ginsburg

---

**RESPONSES OF JUDGE RUTH BADER GINSBURG  
TO JULY 16, 1993 QUESTIONS FROM  
THE SENATE JUDICIARY COMMITTEE  
CONCERNING HER MEMBERSHIP IN  
WOODMONT COUNTRY CLUB**

1(a). When did you join Woodmont Country Club?

I joined Woodmont Country Club in or about August 1980.

1(b). Did you pay an initiation fee upon joining the Club?

No.

1(c). Was the fee you paid the standard fee paid by other individuals joining the Club?

As explained more fully below in the answer to question 3(b), I was a member of Woodmont in a special membership category. Initiation fee was not charged to special members. Individuals joining Woodmont as regular members did pay an initiation fee.

2(a) Did you pay monthly dues and fees during the time you held membership at Woodmont Country Club?

Yes.

- 2(b). Were the dues and fees you paid the standard rates paid by other Club members?

I believe so, but I am not certain. See my answer to question 3(b).

- 3(a). If any answer to 1(b), (c), 2(a), (b) above is no, did you regard your membership at Woodmont Country Club as a gift?

No.

- 3(b). If not, why not?

Woodmont Country Club, in common I understand with other clubs in the Washington metropolitan area, for many years has maintained a special membership category open to Senators, Representatives, higher officers in the Executive branch, and, prior to a 1983 change in Woodmont's by-laws (described below in the answer to question 4(a)), federal judges. Special members do not pay initiation fee, but do pay annual dues and fees. To the best of my knowledge, dues and fees charged special members and regular members were the same.

At Woodmont the privileges of regular membership and the privileges of special membership differed. Regular membership was tenured; provided he or she continued to pay annual dues, a regular member maintained membership in Woodmont for life. The child of a regular member, upon becoming an adult, was permitted to become a regular member of Woodmont in addition to and ultimately in replacement of the parent member.

At Woodmont a special membership was temporary. Special membership was tied to continued government service; termination of government service automatically terminated membership in the Club. In addition, the Board of Governors could terminate a special member at any time. Special members did not vote. The child of a special member, upon becoming an adult, did not become a member of Woodmont either in addition to or in substitution for the parent special member, and instead lost the privilege of using the Club facilities.

The lower cost of special membership, embodied in the absence of an initiation fee, reflected the lower level of privileges and rights that inhered in the special membership class. A regular member, paying initiation fee, was assured permanence of membership and the right to pass membership on to children. A special member, not charged initiation fee, was not able to pass membership on to children, lost membership upon termination of government service, and could at any time be terminated as a special member by action of the Board of Governors.

- 4(a). Please explain in detail in Woodmont Country Club by-laws which caused your resignation from the Club.

When I joined Woodmont Country Club in August 1980 as a special member, that category of governmental membership, I was informed, had existed for a great many years and throughout that period had encompassed federal judges as well as other government officials above a certain level on the protocol list. At the time I joined Woodmont, I was told, there were a number of special members from Congress and the Executive, but, while other federal judges had been special members in the past, I was currently the only federal judge special member. In

March 1982 Judge Harry Edwards, a D.C. Circuit colleague and friend, joined Woodmont as a special member. Judge Edwards is black.

In November 1982 Woodmont circulated to the regular members a set of proposed changes in the by-laws of the Club. Among the proposed changes was a revision in the special membership category that would, among other things, eliminate federal judges as special members. Proposed by-law changes were not circulated to special members, because they did not vote, and thus Judge Edwards and I, although we were the only two members of Woodmont directly affected by the proposal, received no notification of it in November 1982.

In March 1983 I received a letter from Woodmont for the first time informing me that a change in the by-laws had been adopted under which federal judges were no longer eligible to be special members. The letter told me that I could remain in the Club until the end of 1984 at which time either my membership would terminate or, upon payment of initiation fee, I could opt to become a regular member. The letter also informed me that, to facilitate that choice, I would be given priority on the waiting list for regular membership in the Club. I correctly assumed that an identical letter was simultaneously sent to Judge Edwards.

This change in the by-laws, in my view, had the practical effect of strongly discouraging Judge Edwards from continuing his membership beyond 1984, and in fact upon receiving the Club's letter Judge Edwards promptly resigned. I can not with certainty say that prompting that resignation was the purpose of the by-law change, but the circumstances were, to me, suggestive of that conclusion.

Immediately upon receiving the letter notifying me of the by-law change, I attempted to initiate a reversal of that action. My spouse, who was our family's active user of the Club facilities, met the following day with members of Woodmont's Board of Governors. The Board, however, was unwilling to reverse the by-law change and, although the president of Woodmont did confer with Judge Edwards in an effort to retain him as a member, that effort did not succeed.

No longer comfortable at Woodmont, like Judge Edwards I promptly resigned my membership.

- 4(b) How did this change affect you and your judicial colleague who also resigned at the same time you did?

See my answer to question 4(a).

- 5(a) When did the by-law change become effective?

As explained in my answer to question 4(a), the revised by-laws were adopted sometime after November 1982 and before April 1983. I do not know the exact date because I received no notification of the proposed change until after the change had been adopted. Also as explained in my answer to question 4(a), I was informed that I could retain special membership in Woodmont until the end of 1984. I did not elect to do so.

- 5(b) When did your resignation become effective?

I do not recall the exact date, but I believe it was in early April 1983, although it may have been on a date toward the end of March 1983.

Senator GRASSLEY. The rule against accepting gifts and favors, I believe, is designed to ensure the impartiality of judges. In fact, the canon that covers gifts states that judges are prohibited from accepting gifts or favors where the donor is a party to a case or other persons who has come or is likely to come or whose interests have come or likely to come before a judge.

Did you give any consideration, in accepting the waiver of the initiation fee, to the possibility of other Woodmont members or their interests would come before you, as a judge, and did you have a recusal policy with respect to the country club?

Judge GINSBURG. I did not think that the membership in that golf club would present a conflict. But, of course, if any affair involving the Woodmont Country Club had come before my court, I would have recused myself. I was hardly the first member of my court to be a special member of that club. A long-time Chief Judge of my court, Judge Bazelon, had been a member, and a few of the district judges, I believe, had been members. But at the time of my membership, the only other Federal judge in the club was Judge Edwards. He took up golfing and came, particularly with my husband, to play at Woodmont; he liked it, and therefore joined the club. At the time of my resignation, only Judge Edwards and I were members of Woodmont, but earlier Judge Bazelon and a couple of district judges held memberships.

Senator GRASSLEY. You may not even be in a position to answer this, I recognize that, and I wouldn't have thought of it, except for the statement you just made. Because of colleagues' membership in the same club, do you know of any recusal by any member because of potential conflict?

Judge GINSBURG. I don't recall any matter having to do with Woodmont Country Club during my tenure on the court having come before the court.

Senator GRASSLEY. Judge, I am satisfied with your answer. From my perspective, this oversight is not necessarily a disqualifier. As I said when the media one time asked me about Clarence Thomas trying marijuana, my answer was that we weren't confirming him for sainthood, we were confirming him for the Supreme Court. We are all human and all fallible, and I am satisfied that we have had an opportunity to discuss this.

I thank you and I yield the floor.

Senator MOSELEY-BRAUN. At this time, I have questions as a member of the committee, but I don't know if it is appropriate. Senator Specter had indicated that he wanted to—

Senator HATCH. It is entirely appropriate for you to go ahead, and then we will go to Senator Specter after. How is that?

Senator MOSELEY-BRAUN. I didn't know whether or not you had a reason for wanting to leave now.

Senator SPECTER. I would be glad to wait my turn, Madam Chairman.

Senator MOSELEY-BRAUN. Fine. Thank you very much, Senator Specter. That is very nice of you.

Judge I would like to talk about the first amendment a little bit, particularly in the area of violence or having to do with violence. Obscene expression is considered by the Court to be unprotected speech, that is longstanding law, and it may, therefore, be prohib-

ited. Expression which is sexually explicit may be indecent, but not obscene, and, therefore, under the rule in *FCC v. Pacifica Foundation* and other cases, that speech may be regulated, but not prohibited.

Indeed, you wrote an opinion in the case of *Action for Children's Television v. FCC*, which involved an attempt by the FCC to regulate material which was indecent, but not obscene, and which was having to do with the protection, the notion being that the children should be protected in terms of the hours that such material might be viewed.

There are many, including this Senator, who believe that violence in our media, in the television and the movies, has had a profound effect on our society, and particularly on our young people. Indeed, in a hearing here regarding Senator Simon's initiative in this area, one of the witnesses testified that it is no longer debatable, but that the depiction of violence does have the effect of increasing young people's proclivity to violence.

In your decision in *Action for Children's Television v. FCC*, you have upheld, in part, the FCC's attempt to regulate obscene material, and so my question to you is: One, do you think that violence may be categorized as indecent material in the first instance? And what standards do you think ought to be applied to violence as speech? The threshold question is do you see violence as an expression which would rise to the level of being speech? Then, second, do you think that it, therefore, can be categorized as indecent, if not in extreme cases obscene speech, and then, if so, what standards do you think ought to be applied to violence as speech in the media?

Judge GINSBURG. Senator, I can begin with that question. You referred to *Action for Children's Television* (1988), which is still in the courts. My opinion at a prior stage of the litigation differentiates between regulating in the interest of children, which my court said was entirely lawful, and overregulating to the extent that adults have no access.

We know that regulations permissible for the broadcast media are impermissible for the print media. The question of violence is one that may well come up, and I don't want to deal in the speech area with a category that the FCC, under Congress' direction or on its own initiative, may decide to regulate. Then it will come before the Court, just as the indecent speech question came before the Court, so I don't want to be seen as prejudging it.

Senator MOSELEY-BRAUN. Without looking at just regulatory action in this area, if challenged on constitutional grounds as obscene or indecent, would you be inclined to see extreme violence, gratuitous violence as unprotected speech, or as speech which might be amenable to regulation?

Judge GINSBURG. Speech that is obscene is outside the first amendment. Speech that is indecent is inside, but subject to regulation. Where this would fit has not come up yet, where this category of speech would belong I can't say at this time.

I can say to you, as a parent, that I am as concerned, perhaps more concerned about the exposure of children to violence, and I have had some experience with a controlled system, as my daughter will confirm. When she was with me in Sweden, violent films

were off-limits to children. Children were not permitted to attend such films, and it was the first time it had occurred to me that a State reasonably might regulate in that area. But I can tell you that this has not yet occurred. It may very well occur. It would certainly be subject to challenge on first amendment grounds, and so I don't want to express any legal opinion on it.

But if I may, after we had our conversation yesterday, I was uncomfortable with an answer I gave you. When I went back to the courthouse, I read the *Presley v. Etowah County Commission* (1992) case, and can tell you a little more than I did earlier. The Court's opinion focused solely on section 5. But the Court said nothing in the opinion that implies the conduct at issue in these cases is not actionable under a different remedial scheme. The *Etowah County* case, as I understand it, is back in the lower court for consideration of other claims made. These include title VI of the Civil Rights Act and the constitutional claim of deliberate discrimination in removing the functions of individual commissioners when the first black commissioner was elected.

So the case is still alive in Court. It is still possible that there may be a further ruling. But what the Court said under section 5 is not the end of the road for that particular case.

Senator MOSELEY-BRAUN. I appreciate that followup. I guess my concern in *Presley* really was a matter of your view of the language of the statute, the specific language of section 5 of the Voting Rights Act, and, given the facts of that case, whether or not the Court gave too narrow an interpretation of the language in such a way that essentially frustrated the meaning of the statute as a whole.

Judge GINSBURG. I avoided commenting on Supreme Court decisions when other Senators raised that question, so I must adhere to that position.

Senator MOSELEY-BRAUN. Then another softball in the first amendment area. The Senate has been dealing fairly extensively, in fact, just recently passed legislation in the area of campaign finance regulation. As you are aware, in *Buckley v. Valeo*, the Court considered the constitutionality of the act of 1971 and upheld contribution limits, disclosure and reporting provisions of the public financing scheme, but invalidated the limitation of expenditures. In short, the Court took the view that contributions could be limited, because contributions are only a means of expressing one's views, but that expenditures could not be limited, because to limit expenditures would effectively limit the total quantity of an individual or a candidate's speech.

In an important passage, the Court declared in *Buckley* that "it is wholly foreign to the first amendment for government to restrict the speech of some elements of our society, in order to enhance the relative voice of others." In other words, although the Government can attempt to improve the marketplace of ideas in a variety of ways, including contribution limitations, it cannot constitutionally attempt to improve public debate by silencing those who already have too much speech.

Implementing that proposition, the Court, in *First National Bank of Boston v. Bellotte*, invalidated a Massachusetts statute prohibiting corporations from making contributions.

Following the decision in that case, Justice White wrote a scathing dissent, in which he said it is critical to obviate or dispel the impression that Federal elections are purely and simply a function of money, that Federal officers are bought and sold, or that political races are reserved for those who have the facility or the stomach for doing whatever it takes to bring together those interest groups and individuals that can raise or contribute large fortunes, in order to prevail at the polls.

My question to you, Judge Ginsburg is, Do you believe with Justice White that the Supreme Court's decision in the *Buckley* case was an example of judicial activism into an area that Congress itself should have ruled on?

Judge GINSBURG. That falls in the same category as the prior question. You are inviting comment on Supreme Court opinions, or separate opinions, in an area live with business. We get Federal election campaign business regularly in the District of Columbia Circuit. The Supreme Court gets some of that business. So this is a vibrant area for challenge.

Senator MOSELEY-BRAUN. All right. Well, to move along, if I understand you to say you can't answer that question. You might say that I couldn't possibly comment, as they might say.

In *Red Lion v. FCC*, the Court, as you know, rejected an attack by a Pennsylvania radio station on the fairness doctrine—And I don't know. Have these questions been asked already? I was on the floor a little while this afternoon. OK. Thank you—which required radio broadcasters to permit people attacked on the air the opportunity to reply.

The station was resisting an FCC order to give free time to an author who had been accused of Communist activities on the air. NBC and CBS joined the station, arguing, as Justice White put it, that the first amendment secured the station's right to "broadcast whatever they chose and to exclude whomever they chose."

Justice White, in writing for a unanimous Court, said, "There is no sanctuary in the first amendment for unlimited private censorship operating in a medium not open to all." It was not simply that Government had granted the radio station its FCC license. The point was that the first amendment protected the public's right to have a dialog, not the corporation's right to censor that dialog.

Again, to quote Justice White,

The right of free speech of a broadcaster, the use of a sound truck, or any other individual does not embrace the right to snuff out the free speech of others.

And so I guess my question in this area goes to the extent to which you see a role for the Court in the absence of—we have developed standards in regards to obscenity. We have developed standards with regard to sexually explicit speech on the one hand. But in areas going to other forms, other important forms of speech, such as violence, such as campaign expenditures and the use of the media, the air waves to communicate in this area, the Court has been less clear.

Just as a broad, general question, do you see a need for the development of standards that will give us some guidelines as to an approach to those issues going to speech which are, frankly, non-traditional? When the early first amendment cases came down, we didn't have to worry about satellite transmission of campaign com-

mercials, but now we do. And we have the specter of violence again that we have never had before. And so I suppose my question to you, Judge Ginsburg, is: Do you see a need for some clarity there? Because, after all, that is supposed to be the role, to have some certainty, some clarity in the areas of conduct that is permissible under our Constitution? Do you see some need for clarity in those areas?

Judge GINSBURG. You brought up the *Red Lion* (1969) case, which indicates one line that has been drawn. There is no right to reply to a newspaper comment. There is no fairness doctrine applicable there. *Tornillo* (1974) is the rule. The different regime for the broadcast media was once explained on the basis of the scarcity of the spectrum. That is a less tenable ground for distinction today. The fairness doctrine is up for consideration again. The must carry rules are alive and are in litigation. Again, I can refer to the distinction drawn between the print media and the broadcast media. But beyond that, I can't comment on the fairness doctrine or the "must carry" rules, the differential regulation of the broadcast media. You said it so well, and in a lot fewer words than I have been using. I can't go further at this point.

Senator MOSELEY-BRAUN. Judge Ginsburg, thank you very much. I would have loved to have taken a class with you.

Judge GINSBURG. You are so kind, and I know it has been a very busy, important day for you.

Senator MOSELEY-BRAUN. Thank you very much.

Senator Specter.

Senator SPECTER. Thank you very much, Madam Chairwoman.

I will try to be relatively brief, Judge Ginsburg. It has been a long day. But there are a number of other subjects that I would like to touch on with you.

At the conclusion of our last round, you made reference to an exchange of correspondence that you and I had had when I wrote to you about a comment in your article on confirming Supreme Court Justices, thoughts on a second opinion rendered by the Senate. And referring to Judge Bork, you had stated, "The distinction between judicial philosophy and votes in particular cases having blurred as the questions wore on." And I then asked you to provide me with examples of such questions to Judge Bork in order to help us in the course of your hearing. And I just wanted to make for the record my letter to you dated July 15 and your reply to me dated July 16 and my reply to that dated July 19 a part of the record.

[The letters follow:]

JOSEPH R. BIDEN, JR., DELAWARE CHAIRMAN  
 ERIC M. KENNEDY MASSACHUSETTS  
 HOWARD M. METZNER DAUM, OHIO  
 ROBERT RECONCILIAZIO, ARIZONA  
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 ALAN K. SIMPSON, WYOMING  
 CHARLES E. GRASSLEY, IOWA  
 ARLEN SPECTER, PENNSYLVANIA  
 WILLIAM S. CHAM, MAINE  
 LARRY PRESSLER, SOUTH DAKOTA

## United States Senate

COMMITTEE ON THE JUDICIARY  
 WASHINGTON, DC 20510-6275

July 15, 1993

Hon. Ruth Bader Ginsburg  
 U. S. Court of Appeals  
 Washington, D.C. 20001

Dear Judge Ginsburg:

Thanks again for your offer to meet with me; and, as you know, I would like to do that before the hearings are concluded.

In the meantime I do have one question which I would appreciate your answering before the hearing.

I have just read the article in the University of Illinois Law Review entitled "Confirming Supreme Court Justices: Thoughts on the Second Opinion Rendered by the Senate."

In that article you said, as I read it, that there should be a difference before Judge Bork's answers and responses from Chief Justice Rehnquist and Justice Kennedy. Referring to Judge Bork at page 114 you state:

"The distinction between judicial philosophy and votes in particular cases having blurred as the questions wore on."

I would appreciate your providing me with examples of such questions to Judge Bork. I would be most interested in any such questions, as you see it, which were asked by me.

I hope this request is not unduly burdensome; but it would obviously be helpful to me in preparing questions for the hearings to have your specific views on which questions, you think, went too far with Judge Bork.

Thank you for your consideration of this request.

Sincerely,  
  
 Arlen Specter

AS/ml  
 HAND DELIVER

UNITED STATES COURT OF APPEALS  
 DISTRICT OF COLUMBIA CIRCUIT  
 WASHINGTON, DC 20001

RUTH BADER GINSBURG  
 UNITED STATES CIRCUIT JUDGE

July 16, 1993

The Honorable Arlen Specter  
 Senate Committee on the Judiciary  
 United States Senate  
 Washington, D.C. 20510

Dear Senator Specter:

Thank you for your letter of July 15, and for your kindness in offering to meet with me soon so that we may become better acquainted.

Your letter refers to my article "Confirming Supreme Court Justices: Thoughts on the Second Opinion Rendered by the Senate," published in 1988 in the Illinois Law Review. You called my attention, specifically, to a sentence on page 144. The sentence comments that, although Judge Bork explained at the outset of his hearings that he would not say how he would vote in any particular case, "[t]he distinction between judicial philosophy and votes in particular cases . . . blurred as the questions and answers wore on." You asked me to provide you with specific examples of such "questions to Judge Bork," and particularly such questions asked by you.

The sentence you cite was not designed to criticize the Senate for asking questions that blurred the line between general judicial philosophy and particular cases. Rather, my aim was to indicate, in the context of Judge Bork's stated intention to draw a line between the two, that in the course of his hearings it became increasingly difficult for him to do so. (I am just now, as you will appreciate, all the more sensitive to both the need to, and the difficulty of, adhering to the distinction.)

It has been five years since the Illinois article was published and I have long since discarded my notes for the article. At this distance in time, I am unable to cite particular exchanges in point. However, I can represent with assurance that my concern focused on instances in which Judge Bork, confronting a question of constitutional interpretation or judicial philosophy, descended the slope and answered in more detail than he first declared he would. As you know, the purpose of my article was to examine the historical antecedents to the modern problems facing the Committee and the nominees who come before it, not to suggest that the Senate or the Committee had overstepped its bounds in questioning.

I hope this brief explanation of the sentence at page 144 will suffice, at least for now. If you wish, I will be glad to review the transcript of Judge Bork's hearings anew and supply a more detailed response, once next week's hearing concludes.

Please call if there is anything further you would like me to supply before July 20.

Sincerely,

*Ruth Bader Ginsburg*  
 Ruth Bader Ginsburg

JOSEPH R. BIDEN JR., DELAWARE, CHAIRMAN  
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 SHARON FROST, MINORITY CHIEF COUNSEL

## United States Senate

COMMITTEE ON THE JUDICIARY  
 WASHINGTON, DC 20510-6275

July 19, 1993

Hon. Ruth Bader Ginsburg  
 U. S. Court of Appeals  
 Washington, D.C. 20001

Dear Judge Ginsburg:

Thanks very much for your letter of July 16, 1993.

I appreciate your assurance that you were not criticizing Senators for any questions asked during Judge Bork's hearings.

While I would be interested academically in your response after your hearings are concluded, that would obviously not be helpful in determining the appropriate range of questions to you during your hearings.

Perhaps you could supply a few examples -- even two or three would be helpful. If not, I understand.

Sincerely,  
  
 Arlen Specter

AS/ml  
 HAND DELIVER

Senator SPECTER. We are working through the whole process as to appropriate lines of questions. I have already expressed my own respectful disagreement with the limited answers that you have provided, and you had offered to give examples as to Judge Bork after the hearings were over. If you have the time to do so, I think it would be of interest, although obviously it could not be of assistance in the formulation of questions to you during these hearings.

A couple of substantive areas that I want to cover with you: The area of hate speech is one which is on the horizon, and whether it will come before the Court, I don't know. The Supreme Court in a very important decision, *Wisconsin v. Mitchell*, upheld enhanced sentencing because the defendant had picked out the victim based on race. And that case, while not based on speech because it involved conduct, has some bearing on the whole subject of hate speech.

I have personally always felt that Justice Holmes' dissenting opinion that the marketplace of ideas requires the broadest range of speech was very, very important, but have since had some second thoughts in line with the hate speech which is coming out. I was personally a victim going to college, having a swastika outside of the Pi Lam House at the University of Oklahoma many years ago. The discriminated-against groups, the victims of the hate, are now making a pretty strong case that it is not a matter of being offensive speech, that it is a matter of being injurious speech that actually interferes with their ability to work, their livelihood, and their enjoyment of liberty.

They are raising a concept in rather novel terms of a liberty interest under the Constitution that ought to be balanced off against freedom of speech. I find it both intriguing and meritorious and wonder if you would have a comment as to how you would approach philosophically, judicial ideology, a balancing of interests in this complex emerging area.

Judge GINSBURG. Senator Specter, may I say I appreciate your indulgence. I would like to comment on the first question. In response to a question by another Senator, I tried to explain the sentence to which you referred: "The distinction between judicial philosophy and votes in particular cases blurred as the questions and answers wore on." I apologize for any ambiguity in that sentence. I meant to refer to the answers. I said that had come home to me all the more in these last few days. I am appreciating, in a way that I never could in the closeness of my chambers, how easy it is to slip down the slope from speaking on a lofty philosophical plane to addressing specific cases. I meant to imply no criticism of the committee. I meant to say how difficult it is for the responder to adhere to that line.

The question you just raised is one very much alive on colleges across the country, and university administrators are struggling with it. As you know, there are hate-speech codes on a number of campuses. Faculties try hard to teach students that in an academic setting there should be free but civil discourse. On the other hand, there is harassment of individuals. There has been an attempt to distinguish between speech on the corner of a campus, speech on a campus mall, that anyone who doesn't want to hear it can avoid,

and following an individual and harassing that individual. Those kinds of distinctions have been attempted in these codes.

They have come before courts. A case in Michigan is one example. I think it is almost certain that these questions are going to come before the Federal courts and ultimately the Supreme Court.

I understand the competing tugs. I understand the importance of the free speech value. And I understand the difficulty university administrators have in trying both to be tolerant of speech and to deal with youngsters who, for the first time, are free from their parents' control. They are in an atmosphere in which they sometimes behave very badly with little or no regard for the feelings of their fellow students.

I appreciate the tremendous difficulties in this area, the effort to teach tolerance and the value of reasoning together. The line between speech and harassing an individual is not an easy one to draw and apply. That matter is likely to come before the Court, and all I can do is repeat what you have already stated. There are competing considerations. We are a society that has given, beyond any other, maximum tolerance for the speech that we hate; on the other hand, we have a deep concern for the equality and dignity of individuals. Those two principles collide in this area.

Senator SPECTER. Well, Judge Ginsburg, do you think that there is a liberty interest or an equality interest under the Constitution to be balanced off—I am not asking how you would decide it—to be balanced off on one side against freedom of speech on the other?

Judge GINSBURG. Senator Specter, I have said that there is a free speech value on one side. There is the equal dignity of the individual on the other side. I cannot say more on that subject except this is an area where two values are in tension. How they will be resolved in any given case will depend on the facts of that particular case.

Senator SPECTER. Well, you articulated in terms of an equal dignity interest, which is a little different than a liberty interest or an equality interest. But do you see an equal dignity interest rising to constitutional proportion?

Judge GINSBURG. The arguments are being made, Senator Specter, as you well know, in constitutional terms, and they are being made on both grounds. They are being made in terms of the community, the group that is being assaulted, and also in terms of the individual, who is being denigrated or harassed because of the individual's membership in that particular group.

This is a very trying issue for our time: the individual's right to be free and the individual's respect for others. One hopes that we can reason together and get the message of mutual respect across to our young people so that there will not be the kind of clashes that we have seen.

But our country has gone through this periodically. I remember in the late 1960's—what was that movement called? It was particularly big in California. The free speech movement, was it not? I remember teaching in New Jersey in the late 1960's when there was turmoil all over, and I vividly recall a class I was teaching, a procedure class. A student sat in a tree outside the classroom thumbing his nose at me throughout the class. I had to face the question,

should I call the police to take him away, or should I try to ignore him?

In 1965 or 1966, Earl Warren came to Newark, NJ, to attend the dedication of our law school building. People paraded around the block in various costumes to mimic cases he had decided. The police asked him, should we remove these people because they are causing a disturbance? And he said, "No, let them demonstrate. Let them exercise their free speech rights."

I can recall on that campus, again in the late 1960's, when universities contended with both racial turmoil and the free speech movement, that some minority students charged genocide against the Jews for their treatment of the Palestinians. I placed on a bulletin board, side by side with their charge, an explanation of the U.N. Genocide Convention and how it had come about, how it had emerged from the Holocaust. And I watched as some students, looking at what I posted, said, "We really got a rise out of that Jew, didn't we?" That was their response to my attempt to be reasonable, to reason with them about the Genocide Convention.

So I know how difficult these situations are to resolve. I know how much, as an individual with emotions, I would want to call in the police and say, this person is doing an injury to me, to my feelings. But I never did, Senator Specter, because I know, too, the lesson Holmes tried to teach about maximum freedom for the speech we hate.

I can tell you those personal experiences, and say that what we are witnessing is not something new. What we are seeing on our college campuses now, altogether we have seen before. And somehow we came through that period of the late 1960's. We went back to the relative calm and peace of the universities we knew before then and will know again. And that is about what I can say on this subject.

Senator SPECTER. Judge Ginsburg, you responded to a question by Senator Kennedy quoting your opposition to discrimination against gays, saying that you were against discrimination as to all people. And I don't know to what extent you will comment about this based on the answers you have given so far, but I want to ask the question.

In considering the discrimination in our society to a variety of categories of individuals—disabled, gays, mentally ill—to what extent do you think it appropriate for the Court to use the standard which you articulated as an advocate in favor of women's rights under the equal protection clause, looking to the rights of various groups discriminated against as I have particularized them? Would you think it appropriate for the Court to employ in general terms the boldly dynamic interpretation, radically departing from the original understanding of the 14th amendment, which you wrote about in the Washington University Law Quarterly as interpretation as to women's rights?

Judge GINSBURG. I have no comment on that, Senator Specter. I have said that these issues will be coming before the Court. I will not say anything in this legislative Chamber that will hint or forecast how I will vote in cases involving those particular classifications.

Senator SPECTER. Judge Ginsburg, again as to rights for women, you have urged the strict scrutiny standard for equal protection. Do you think that strict scrutiny is any less applicable to the free exercise clause of the first amendment, free exercise of religious freedom under the first amendment?

Judge GINSBURG. Senator Specter, I will address questions that come to me in the context of a specific case, on the basis of the facts of that specific case, on the record that is presented in that case, on the arguments the lawyers make, and on the applicable law and precedent, but I will not address an abstract issue. Issues do not come before judges in that form.

Senator SPECTER. Well, I ask it as a matter of judicial philosophy or judicial ideology, but let me move on.

On the establishment clause, the dictum of Jefferson has been quoted repeatedly and it does not go to the heart of the *Lemon* test or the divergence over establishment, but I would be interested, if you would care to respond, to whether you agree with the Jefferson doctrine that the clause against establishment of religion was intended to erect a wall of separation between church and state.

Judge GINSBURG. Senator Specter, the first amendment prohibits the establishment of religion and protects the free exercise thereof. How the line is drawn between those two safeguards will depend upon the facts of the specific case. I am not going to expound on the matter at large and answer an abstract question. I have said what I feel comfortable saying on that subject.

Senator SPECTER. The final question I have, Judge Ginsburg, relates to the habeas corpus, which is the Federal procedure for considering State cases, and there has been some reference and you have been asked about this to some extent, and it creates enormous delays on the carrying out of the death penalty as a deterrent, and I just want to call one case to your attention. Based on the responses you have given, I anticipate an unwillingness to answer here, but I want to raise the issue.

It is a case which came out of Philadelphia captioned *Castile v. Peoples*, and there was challenge under habeas corpus to the constitutionality of the conviction, and the district court said that the defendant had not exhausted his State remedies, the Third Circuit reversed and said the defendant had exhausted his State remedies—this is somewhat technical for some who may be listening, but I know this is something that is before the courts consistently—and then the Supreme Court of the United States reversed the Third Circuit, saying that the defendant had not exhausted his State remedies, because when it got to the Pennsylvania Supreme Court they turned down what is called a petition for allocatur or on discretionary grounds. The Supreme Court held that that discretionary turndown may or may not have been considered by the State court, and then they sent it right back down for reconsideration.

It is the kind of a case which perplexes law enforcement officers and legislators. Rather than ask you a question about it, let me just conclude by saying that I hope that, if confirmed, there would be more of an effort by the Court to try to deal with these issues, with as minimal procedural entanglements as possible. If you would care to comment, I would be pleased, but it is your choice.

Judge GINSBURG. The only comment that I have, Senator Specter, is that I appreciate the difficulty that State and Federal courts alike have had in this area. I have explained that in the District of Columbia Circuit, we do not have such cases. We do not engage in habeas review over State court decisions. Our counterpart to State courts, our District of Columbia courts, have their own postconviction remedy identical to 28 U.S.C. 2255, and applications for review go from there to the Supreme Court, with no collateral review, no collateral attack in the Federal courts.

So, if confirmed, this will be new business for me. I know it is very difficult business for State and Federal courts in the regional circuits across the country, but I will come to it, if confirmed, new. It is not business I have had, as my colleagues on other Federal courts have had.

Senator SPECTER. Thank you very much, Judge Ginsburg. I end with a compliment, as I began, on your academic, professional, and judicial career. I compliment you on your stamina.

Judge GINSBURG. Thank you.

Senator SPECTER. Thank you.

Senator HATCH. Senator Cohen, do you have any questions?

Senator COHEN. One brief one.

Senator MOSELEY-BRAUN. Senator Cohen.

Senator COHEN. I am told we are going to start voting in about 5 minutes, and I just have one question I think perhaps you can clarify for me, Judge Ginsburg.

Earlier today, Senator Specter asked the question about the resolution of war powers. Whenever you have a conflict between the executive branch and the legislative branch, the Court is generally reluctant to intervene, particularly as it involves foreign policy.

I think you suggested that one way of bringing this to a state of ripeness before the Court would be in a situation in which the President has committed forces. Congress could pass a resolution objecting to the action taken by the President, and that might in and of itself present a justiciable issue or a ripe issue for the Court. Am I correct?

Judge GINSBURG. Such a controversy, whatever other threshold barriers might be argued, would be ripe only if Congress as a body put itself in opposition to the Executive.

Senator COHEN. Through a legislative action.

Judge GINSBURG. Right.

Senator COHEN. I would like to just ask the one question in another field. It does involve foreign policy, but it is something that we have dealt with. I will not ask you how you would rule on the issue, but, rather, the process which Congress might follow.

In the field of foreign policy, the President generally asserts the fact that the President is the primary mover, as such, in the field of foreign policy, the spokesperson for the institution that executes foreign policy. But Congress also have a role to play and a major role to play in the formulation of foreign policy. That is clear when we talk about overt programs.

We move into a somewhat different field when we talk about covert programs. There has always been a conflict between the Executive and the congressional branches dealing with the so-called covert actions. We saw that during Iran-Contra.

We have a law on the books, that was passed I believe back in 1980, in which Congress said that if a covert action is to be undertaken, then the President should notify the requisite members, heads of the committees, intelligence committees and the majority and minority leaders in both Houses in advance. If that were not possible to do, then it should be done within a reasonable time-frame. The assumption was it would be within a relatively short period of time, a day or two.

During Iran-Contra, of course, there was no notification of a covert action that was undertaken by the Executive, and an interpretation was delivered by the Justice Department. The Attorney General wrote an opinion which indicates that the President could give notice whenever he, or conceivably she, decides to give notice. It could be a day, it could be 2 days, it could be a week, it could be a month, it could be 6 months, whenever the President decides. So you have a basic conflict between the two branches.

What I would like is to ask you, again not the result, but the process. Suppose that Congress passes a law which mandates that a President must notify the congressional leaders of a proposed covert action within, let's say, a 48-hour period. The President either allows the bill to become law without signing it or he vetoes it and the veto is overridden, and the President were to challenge it at that point, saying it is unconstitutional.

My assumption would be—and I am very rusty on this issue—my assumption would be the Court would probably decline to hear it, because it was not yet ripe, that there was no justiciable issue before the Court. You can either nod or not, under those circumstances.

But let me just take it one step further. Let's suppose the President vetoes the bill, does not challenge its constitutionality, but simply it is overridden, it becomes law, as such, even though the President still maintains it is unconstitutional. Let us assume that he goes forward with a covert action. Congress is placed in a very difficult position. On the one hand, we can't disclose that the President has undertaken the action, without violating our own responsibilities here. Second, it might very well endanger the lives of those individuals who are undertaking that particular covert action. So we are presented with a dilemma. We cannot cut off funding, we cannot go public, we cannot really do very much about it.

Would you recommend under those circumstances, in order to get a case before the Court procedurally, that Congress pass a resolution in order to bring the case to the Court, without violating its own rules about disclosing that—how would we get the case to the Court is what I am asking you. I am asking you as Professor Ginsburg, not as Judge Ginsburg.

Judge GINSBURG. But I am not Professor Ginsburg. I am Judge Ginsburg and I belong to the third branch. You have a very able Senate counsel. He has appeared before us a number of times. I would refer that question to the Office of Senate Counsel for advice. One thing I can't do is give an advisory opinion, even if the parties file pleadings for one.

Senator COHEN. I thought you gave one to Senator Specter earlier about the War Powers Act. One a day?

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.

The CHAIRMAN. I think he likes you, Judge. I only have another hour-and-a-half of questions. [Laughter.]

Judge, as I announced earlier, tomorrow morning at 9 a.m., we will get to see you again pursuant to Senate rule XXVI. Pursuant to that rule, the Senate will go into closed session to review the FBI report on you and to consider any other investigative issue any member wishes to raise, if there are any, in a closed session. An FBI report is filed on every single nominee, so there is no connotation of an FBI report being filed.

The closed session will be held in Senate Dirksen room 212, which is a small room on the other side of this wall in the other building. This is a separator. The open portion of that hearing will begin because we will have to have a vote to go into closed session under the rules.

The committee will vote in open session. We will then go into closed session. The transcript of the closed session with you will be part of the confidential record of the nomination, made available to all Senators for inspection in a confidential briefing prior to the vote on the Senate floor.

As I have said before, from this point forward, starting with you—and it is delightful to start with you because it is so easy—a closed hearing will be conducted for every Supreme Court nominee so that the holding of such a hearing cannot be taken to demonstrate that the committee has received adverse confidential information about that nominee, and also to protect the privacy of the nominee.

And so, Judge, I concur with the assessment of my friend from Utah. You have been an extremely good witness. I would also point out that my concerns about your not answering questions have been met. You have answered my questions the second day and third day. At least from my perspective, you have been as forthcoming as any recent witness we have had. But as I suggested, we probably will never have a witness to be as forthcoming as we would like them to be, as I would like them to be. But I understand the line you have drawn. I respect it, and I respect you.

So as far as any further public testimony, Judge, with the grace of God, as my mother would say, and the goodwill of the neighbors, there will be no more public testimony for you. I have been handed this gavel. My staff is more anxious for me to rap it than maybe you are. And so this hearing will adjourn until 9 a.m. tomorrow morning, where you will go into closed session with us for what I expect to be a relatively brief meeting, and then we will move for the staff and the public. After that hearing is concluded, the closed session, we will move into public session again in this room with six panels of witnesses who wish to testify relative to this hearing, this nominee.

And it is my intention to take that hearing as long as is necessary to finish tomorrow night. If we do not finish tomorrow night because of the panels, we will be here Saturday. I know the press is anxious for that to occur. Every one of them knows it is great to spend Saturday up here. But I don't expect that will go to Saturday. And it is my expectation, Judge, we will close down the hearing Friday night or Saturday sometime, and with a little bit of

luck, we will vote in the committee on your nomination very shortly thereafter, within a week.

My intention is to try to get a vote on the floor of the entire Senate to put you on the Court before we adjourn for August. And that is the first show of emotion I have seen on the part of your husband, which you could not see. He sat behind you and went like that. I go like that too.

We are adjourned.

[Whereupon, at 7:53 p.m., the committee was adjourned, to reconvene at 9 a.m., Friday, July 23, 1993.]

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

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**FRIDAY, JULY 23, 1993**

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

The committee met, pursuant to notice, at 9:58 a.m., in room 216, Hart Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee), presiding.

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

The CHAIRMAN. The hearing will come to order.

Rule XXVI of the United States Senate provides for committees to move into closed session for several enumerated reasons. One provision of that rule permits closure of a meeting if a matter discussed "will tend to charge an individual with a crime or misconduct, to disgrace or injure the professional standing of an individual, or otherwise to expose an individual to public contempt \* \* \* or will represent a clearly unwarranted invasion of the privacy of an individual."

A second provision of that rule permits cloture of a meeting if issues discussed may divulge matters required to be kept confidential—that is, the FBI report—under other provisions of law or Government regulations.

We will now vote in open session whether or not my colleagues believe there is sufficient reason under rule XXVI to go back into closed session. If the vote is that we go back into closed session, we will retire to the conference room directly behind this wall. We will discuss the FBI report and the confidential investigative efforts of the minority and majority staff, and will, as I indicated earlier, beginning with this nominee and future nominees, call the nominee into the room to discuss those matters whether or not there is anything in either of those reports that warrants any serious discussion.

Senator COHEN. Would the Senator yield just on one point?

The CHAIRMAN. Yes, I will yield to the Senator from Maine.

Senator COHEN. Would you make clear for me and the committee that while we talk about "FBI reports," there is no such thing as a report? It is an FBI file.

The CHAIRMAN. That is correct.

Senator COHEN. It is a compilation of interviews conducted by FBI agents who make no analysis, who seek out no contradiction and no rebutting witnesses. It is simply a compilation of information. It is not a report.

The CHAIRMAN. That is absolutely correct, Senator, and I know the Senator from his vast experience on the Intelligence Committee knows this, and I think it warrants being stated again in public, which I stated numerous times at the end of the last Supreme Court hearing.

The FBI routinely, on every single, solitary nominee for the Court—as a matter of fact, on every nominee for a significant position in the executive branch—routinely does a background check on that nominee. As part of that background check, it goes and interviews employers, folks with whom the individual worked, people they went to school with, neighbors, and it is almost all on a random basis that they do it.

When they conduct an interview, the FBI agent has a pad of paper and takes notes, does not even record it, comes back and put those notes in a file.

All of that background information is then made available to this committee for us to peruse. The FBI does not reach any conclusion as to whether or not someone is good, bad, or indifferent. It is like that old thing on that program that used to be on in the 1950's: The facts, ma'am, nothing but the facts. In this case, it is not the facts. It is: Hearsay, sir, nothing but hearsay. That is what gets put in the file.

Senator COHEN. The statements made by individuals are not necessarily identified, they are not made under oath, and they are not subject to cross-examination.

The CHAIRMAN. That is exactly correct, unless we then direct the FBI to go back and do that.

One other point warrants being made with regard to FBI files. There is a Federal law designed to protect the person being investigated routinely, as well as protecting those who participate in the investigation. When the FBI agent goes to interview a person regarding a nominee, that agent says to that interviewee, "Your name will be kept confidential." It is a useful investigative tool, allowing the FBI to garner information that they might not otherwise be able to garner if they went to the person and said, "By the way, speak to us and everything you say to me will be made public."

We are not even allowed under the law to share with the nominee the contents of the FBI report by identifying individuals who say things within the report. The reason for that is to protect the anonymity of people who, in fact, are willing to talk to the FBI. It is an investigative tool.

Second, we are not allowed to divulge to the public or anyone under any circumstances any information in the FBI report because that would violate the rights of the person being investigated. It would violate their civil rights because what is in that report is purely hearsay. It has not been corroborated. It has not been followed up on. It does not relate to any matter of proof. It is one individual anonymously telling an FBI agent something.

You say, well, if that is the case, why do it? It is an investigative tool that is the first step in determining whether or not there is a need to seek out any further information.

I know there is a vote, but this is so important and so often confused by the press, by the public, and by our colleagues.

Senator DECONCINI. Mr. Chairman.

The CHAIRMAN. So, now—yes, Senator.

Senator DECONCINI. Mr. Chairman, I intend to vote to go into closed session. I have looked at some of the FBI report, but I want to—I do this because I think the chairman has established the correct policy that we do this on all such nominees, leaving no inference whatsoever that my review of the report indicates that there is anything in question here.

The CHAIRMAN. That is correct. That is the committee position. Now we will vote. The clerk will call the roll about going into closed session in the conference room behind this large room.

The CLERK. Mr. Kennedy.

The CHAIRMAN. Aye, by proxy.

The CLERK. Mr. Metzenbaum.

The CHAIRMAN. Aye, by proxy.

The CLERK. Mr. DeConcini.

Senator DECONCINI. Aye.

The CLERK. Mr. Leahy.

The CHAIRMAN. Aye, by proxy—no, I beg your pardon. We don't have a proxy. And, by the way, I might note Senator Leahy's son is having a serious operation today, and that is why he is absent.

The CLERK. Mr. Heflin.

Senator HEFLIN. Aye.

The CLERK. Mr. Simon.

Senator SIMON. Aye.

The CLERK. Mr. Kohl.

Senator KOHL. Aye.

The CLERK. Mrs. Feinstein.

Senator FEINSTEIN. Aye.

The CLERK. Ms. Moseley-Braun.

Senator FEINSTEIN. Aye, by proxy.

The CHAIRMAN. Aye, by proxy.

The CLERK. Mr. Hatch.

Senator HATCH. Aye.

The CLERK. Mr. Thurmond.

Senator HATCH. Aye, by proxy.

The CLERK. Mr. Simpson.

Senator SIMPSON. Aye.

The CLERK. Mr. Grassley.

Senator GRASSLEY. Aye.

The CLERK. Mr. Specter.

[No response.]

The CLERK. Mr. Brown.

Senator BROWN. Aye.

The CLERK. Mr. Cohen.

Senator COHEN. Aye.

The CLERK. Mr. Pressler.

[No response.]

The CLERK. Mr. Biden.

The CHAIRMAN. Aye. The vote is 15 to 0 to go into closed session. The committee will now adjourn. We will go vote, come back and go into closed session. When that session is completed, we will come back for the public witnesses who wish to testify on this nomination.

[The committee recessed to closed session at 10:06 a.m.]

[A short recess was taken.]

[The committee resumed in open session at 11:50 a.m.]

The CHAIRMAN. The hearing will come to order.

We will now begin the portion of the hearing where outside witnesses will come and testify. As is the tradition of the committee for Lord knows how many years, all the years that I have been here, over 20—and I think well before that—the honor and in a sense the duty of the first outside panel, the first person to testify other than the witness himself or herself has been, on matters relating to the Supreme Court, the American Bar Association.

By way of very brief background, we ask the American Bar Association, as does the administration—and all have—to do their professional analysis of the competence and capability and the fitness of the nominee to sit on the bench, not only for the Supreme Court but for all Federal courts. They do their job, in my view, diligently and, I might add, without remuneration and at considerable expense of their time and effort. The committee appreciates it very much.

Let me call now our first panel of William E. Willis, Esq., Chairman of the Standing Committee on Federal Judiciary, the American Bar Association, and Mr. Best, also an attorney, the D.C. Circuit Representative on the Standing Committee on the Federal Judiciary, the American Bar Association in Washington, DC.

Gentlemen, welcome, and as we have indicated ahead of time, we have had the advantage of your report, and we are aware of it. We would truly appreciate it if you would summarize in 5 minutes, if you would, the findings of the committee. Then we will yield to committee members for any questions they might have.

Mr. Willis, welcome.

**STATEMENT OF WILLIAM E. WILLIS, CHAIRMAN, STANDING COMMITTEE ON FEDERAL JUDICIARY, AMERICAN BAR ASSOCIATION, ACCOMPANIED BY JUDAH BEST, D.C. CIRCUIT REPRESENTATIVE, STANDING COMMITTEE ON FEDERAL JUDICIARY, AMERICAN BAR ASSOCIATION**

Mr. WILLIS. Thank you. Mr. Chairman, members of the committee, my name is William E. Willis. I practice law in New York City and am Chair of the American Bar Association's standing committee on Federal judiciary. With me today is Judah Best of Washington, DC, one of our committee members who took a principal role in this investigation. Bob Watkins, another of our members, intended to be here but was called away today.

We appear here to present the views of the American Bar Association on the nomination of the Honorable Ruth Bader Ginsburg, judge of the United States Court of Appeals for the District of Columbia Circuit, to be Associate Justice of the Supreme Court of the United States.

At the request of the White House, our committee investigated the professional competence, judicial temperament, and integrity of Judge Ginsburg. Our work included discussions with more than 625 persons, including Justices of the Supreme Court, Federal and State judges, a national cross-section of practicing lawyers, and law school deans and faculty members, some of whom are specialists in constitutional law, as well as experts on Supreme Court practice. In addition, Judge Ginsburg's opinions were independently reviewed by three reading groups—a reading team of lawyers who have practiced actively in the Supreme Court, chaired by Rex E. Lee, former Solicitor General of the United States and currently president of Brigham Young University; and two panels of law professors, one chaired by Professor Ronald J. Allen at Northwestern University Law School and one chaired by Dean Mark G. Yudof of the University of Texas Law School. And finally, Judge Ginsburg was interviewed personally by three members of this committee.

Our committee began its investigation of Judge Ginsburg on June 14, 1993, and concluded on July 13, 1993. Based upon our evaluation, we reported to the White House and to this committee that the Standing Committee is unanimously of the opinion that Judge Ginsburg is entitled to the committee's highest evaluation for a nominee to the Supreme Court of the United States: well qualified. That evaluation is reserved for those who are at the top of the legal profession, have outstanding legal ability and wide experience, meet the highest standards of professional competence, judicial temperament and integrity, and merit the committee's strongest affirmative endorsement.

I have filed with the Judiciary Committee a letter describing the results of our investigation and shall not repeat those results in detail here. I request that the letter be included in the record of these proceedings.

The CHAIRMAN. We will make it a part of the record.

Mr. WILLIS. Thank you.

[The letter follows:]

AMERICAN BAR ASSOCIATION,  
STANDING COMMITTEE ON FEDERAL JUDICIARY,  
*Washington, DC, July 19, 1993.*

Hon. JOSEPH R. BIDEN, Jr.,  
*Chairman, Committee on the Judiciary,*  
*Dirksen Senate Office Bldg., Washington, DC.*

Re: Honorable Ruth Bader Ginsburg.

DEAR MR. CHAIRMAN: This letter is submitted in response to the invitation from the Senate Committee on the Judiciary to the Standing Committee on Federal Judiciary of the American Bar Association (the "Committee") to present its report regarding the nomination of the Honorable Ruth Bader Ginsburg to be an Associate Justice of the Supreme Court of the United States.

The Committee's evaluation of Judge Ginsburg is based on its investigation of her professional qualifications, that is, her integrity, judicial temperament and professional competence. Consistent with the Committee's long standing policy it did not undertake any examination or consideration of Judge Ginsburg's political ideology or her views on any issues that might come before the Supreme Court.

To merit the Committee's evaluation of *Qualified* or *Well Qualified* the Supreme Court nominee must be at the top of the legal profession, have outstanding legal ability and wide experience and meet the highest standards of integrity, professional competence and judicial temperament. The evaluation of *Well Qualified* is reserved for those found to merit the Committee's strongest affirmative endorsement.

I am pleased to report that the Committee finds Judge Ginsburg to be *Well Qualified* for appointment as an Associate Justice of the Supreme Court of the United States. This determination was unanimous.

#### THE PROCESS

The investigation of Judge Ginsburg began on June 14, 1993 and ended on July 13, 1994. Judge Ginsburg was interviewed personally by members of the Committee.

In conducting the investigation members of the Committee personally interviewed over 400 federal judges, including present and retired members of the Supreme Court of the United States, members of the Federal Court of Appeals, members of the Federal District Courts, Federal Magistrate Judges, Federal Bankruptcy Judges, and members of State Courts. The investigation included colleagues of Judge Ginsburg from the United States Court of Appeals for the District of Columbia Circuit.

Members of the Committee personally questioned approximately 225 others, including practicing lawyers throughout the United States, former law clerks and lawyers who have appeared before Judge Ginsburg. Committee members inquired of law school deans, faculty members of law schools and constitutional scholars throughout the United States, including professors at Rutgers University and Columbia University Law School, where Judge Ginsburg served as a member of the faculty.

The Committee also had at its disposal the report prepared in 1980 by the Committee in connection with the investigation of Judge Ginsburg for appointment to the United States Court of Appeals for the District of Columbia Circuit. She was at that time found by a majority of the Committee to be *Exceptionally Well Qualified* and by a minority *Well Qualified* for appointment to that court.<sup>1</sup>

It has been the practice of the Committee to ask groups of distinguished legal scholars and Supreme Court practitioners to review independently all of the opinions of nominees for the Supreme Court. This practice was followed again here and Judge Ginsburg's opinions were reviewed by: (1) a Reading Group of distinguished lawyers chaired by Rex E. Lee, formerly Solicitor General of the United States and presently President of Brigham Young University. This group consisted of 11 lawyers, all of whom have practiced and argued cases in the Supreme Court; (2) a Reading Group chaired by Professor Ronald J. Allen of the Northwestern University School of Law, consisting of 21 members of that law school's faculty; and (3) a Reading Group composed of 12 professors from the University of Texas Law School, chaired by its Dean, Mark G. Yudof.<sup>2</sup>

The three Reading Groups reported to the Committee their independent analyses of Judge Ginsburg's opinions. These reports were evaluated by the members of our Committee, each of whom also read opinions of Judge Ginsburg and her published writings on a variety of legal subjects.

#### EVALUATION

##### *Integrity*

Judge Ginsburg has earned and enjoys an excellent general reputation for her integrity and her character. No one interviewed by the Committee had any question or doubt in this respect.

##### *Temperament*

Judge Ginsburg's judicial temperament also meets the high standards set by the Committee for appointment to the Supreme Court.

A very few who were interviewed commented on what they perceived as her tendency to be a "loner" and questioned her ability to be collegial. Such reservations were wholly dispelled by comments from her colleagues who have known and worked closely with her over the years who uniformly found her to be collegial and to be a consensus builder.

The Committee also investigated a published comment claiming that Judge Ginsburg had bad relationships with her law clerks. Our investigation, including interviews with virtually all of her former clerks now living throughout the country, found such claim to be without foundation. From our interviews with her former law clerks it is apparent that she enjoys a group of fiercely loyal former clerks who regard her with admiration and respect and who enthusiastically support her appointment. Moreover, she and her clerks have remained in close personal contact over

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<sup>1</sup>In 1980 the Committee's highest rating for lower court judges was *Exceptionally Well Qualified*. This rating was subsequently discontinued. The highest rating is now *Well Qualified* for all courts.

<sup>2</sup>Members of the three Reading Groups who participated are listed on Exhibit A to this letter.

the years, and she has regularly followed and supported the family and professional development of many of them. The training received by the clerks in Judge Ginsburg's chambers resulted in many being selected as law clerks by several Supreme Court Justices.

There were isolated comments from several lawyers who had practiced in her court that she could on occasion be impatient in questioning at oral argument. Such comments were carefully investigated. Judge Ginsburg is a judge who prepares thoroughly for every oral argument by reading the briefs, defining the issues and formulating questions to present to counsel. The overwhelming majority of counsel respect this preparation, welcome the judge's questions, and find no basis for any complaint as to her questioning during oral argument.

Judge Ginsburg clearly possesses and exhibits the highest level of judicial temperament.

#### *Professional Competence*

Judge Ginsburg's educational background amply prepared her for Supreme Court service. She graduated at the top of her class at Cornell University, attended Harvard Law School for two years and served with its top students on its Law Review and completed her legal training at Columbia Law School where she also was at the top of the class and served as an editor of its Law Review.

Her scholarship led to an academic career which began at Rutgers University Law School, where she served for 9 years and was named Professor of Law, and continued at Columbia Law School, where she served with distinction as Professor of Law for 8 years.

She also comes with extensive experience as an appellate advocate, including six cases in which she was counsel of record and argued in the Supreme Court. She has not had trial experience, but she served for two years as law clerk to one of New York's most distinguished district judges.

She has developed and maintained broad interests. Throughout her career she has participated actively in bar association work, serving in leadership capacities in several organizations, is an active member of the American Law Institute, serving on its Council, has participated actively in the work of the American Bar Association, and since ascendancy to the Bench has been active in court administration and the preparation of a history of the District of Columbia Circuit.

Her extensive scholarly writings cover wide-ranging subjects. She has, for example, written extensively on the law of Sweden, civil rights, the rights of women, private international law, constitutional law issues and even the confirmation process for Supreme Court Justices. These writings not only reflect the high level of her scholarship but the breadth of her interests, qualities that will contribute to her effective service as a Justice of the Supreme Court.

The comprehensive reports submitted to us by the three Reading Groups of scholars and Supreme Court practitioners confirm the Committee's own conclusions concerning the scholarship and writing ability of Judge Ginsburg.

One group used such words in describing her opinions as "lawyerly" "thoughtful" "careful" "measured, clear, precise and judicious."

The report of another of the three Reading Groups summarized Judge Ginsburg's writings as follows: Judge Ginsburg has an unmistakable and deeply ingrained style of decision. She invariably lays out the case with remarkable clarity, informing the reader of the relevant procedural background and precisely what is to be decided. She then proceeds to explain the decision the court has reached with great care and attention to detail in direct and accessible prose. She has no rhetorical or literary flair that we observe, but what her opinions lack in inspiration they compensate for in lucidity. She obviously strives hard to be fair, even-handed, and open-minded, and she adequately addresses all relevant arguments in the cases she decides.

The third group commented with respect to her opinions that they "are uniformly well crafted" and that their "greatest virtue . . . is their clarity." "The reader comes away convinced that no stone has been left unturned in rehearsing the state of the record, the parties' contentions or the applicable doctrines." The report noted that after recognizing and identifying critical issues "she sets forth facts pertaining to the issues and then deals with the cases and other apposite authority in a scholarly fashion." There were also favorable comments on the brevity and conciseness of her opinions. One of the Reading Group members noted: "She is bright, able, sincere, and apparently a hard worker. Moreover, she is committed to being an excellent jurist and is a better writer than many of her colleagues. She graces the bench with style and understanding and the confidence of one with a well-trained mind and a sense of herself."

This group also specifically commented on her concern with the institutional needs of the court and the necessity for maintaining collegiality. A member noted

that "few of [her] opinions have an edge or sting to them," and that her comments "are usually relatively mild in dismissing an argument that she finds unpersuasive or unfounded." The report noted that from the tone of her opinions "she genuinely cares about the collegial dimension of appellate judging."

Our Committee is fully satisfied that Judge Ginsburg meets the highest standard of professional competence required for a seat on the Supreme Court. Her academic training, her work as an appellate advocate, her service on the faculties of distinguished law schools, her scholarly writings and her distinguished service for thirteen years on the Court of Appeals dealing with many of the same kind of matters that will come before the Supreme Court fully establish her professional competence.

#### CONCLUSION

Based on the information available to it, the Committee is of the unanimous opinion that Judge Ginsburg is *Well Qualified* for appointment to the Supreme Court of the United States. This is the Committee's highest rating for a Supreme Court nominee.

The Committee will review its report at the conclusion of the public hearings and notify you if any circumstances have developed that would require a modification of these views.

On behalf of our Committee, we wish to thank you and the members of the Judiciary Committee for the invitation to participate in the confirmation hearings on the nomination of Honorable Ruth Bader Ginsburg to the Supreme Court of the United States.

Respectfully submitted,

**WILLIAM E. WILLIS, Chair.**

#### EXHIBIT A

##### LAWYERS READING GROUP

*Rex E. Lee, Chair*

Hon. Arlin M. Adams, Schnader, Harrison, Segal & Lewis (former Federal Court of Appeals judge)

Professor Sara Sun Beale, Duke University School of Law

William T. Coleman, Jr., O'Melveny & Myers

Professor John H. Garvey, University of Kentucky Law School

Philip A. Lacovara, Mayer, Brown & Platt

Kathryn A. Oberly, Associate General Counsel, Ernst & Young

Benna Ruth Solomon, Chief Assistant Corporation Counsel City of Chicago

Hon. Philip W. Tone, Jenner & Block (former Federal Court of Appeals judge)

Professor Richard G. Wilkins, Brigham Young University Law School

Professor Charles Alan Wright, University of Texas Law School at Austin

##### NORTHWESTERN UNIVERSITY SCHOOL OF LAW

*Professor Ronald J. Allen, Chair*

Professor Kenneth W. Abbott

Professor Steven Calabresi

Professor Charlotte Crane

Professor John Donohue

Professor Meade Emory

Professor Thomas L. Eovaldi

Professor Mayer G. Freed

Professor Thomas Geraghty

Professor Stephen B. Goldberg

Professor John P. Heinz

Professor Keith Hylton

Professor Gary Lawson

Professor Thomas Merrill

Professor Michael Perry

Professor Daniel Polsby

Professor Philip Postlewaite

Professor Stephen Presser

Professor Paul Robinson

Professor Victor Rosenblum

Professor David VanZandt

## UNIVERSITY OF TEXAS SCHOOL OF LAW

*Dean, Mark G. Yudof, Chair*

Professor David A. Anderson  
 Professor George E. Dix  
 Professor Mark Gergen  
 Professor Julius G. Getman  
 Professor Steven J. Goode  
 Professor Douglas Laycock  
 Professor Thomas O. McGarity  
 Professor L.A. (Scot) Powe, Jr.  
 Professor David M. Rabban  
 Professor John J. Sampson  
 Professor Jordan Steiker

**Mr. WILLIS.** To summarize our findings, the committee is fully satisfied that, by virtue of her academic training, her work as an appellate advocate, her academic service, her scholarly writings, and her distinguished service for 13 years on the court of appeals, Judge Ginsburg meets the highest standards of professional competence required for a seat on the Supreme Court. She enjoys the admiration and respect of her colleagues on and off the bench, and her integrity is above reproach.

We are pleased to have the opportunity to appear here today to present the committee's findings and would be happy to respond to any questions about our evaluation.

The CHAIRMAN. Thank you very much.

I only have one question. Was there any dissenting vote on the committee at all?

**Mr. WILLIS.** There was no dissenting vote whatsoever, Mr. Chairman.

The CHAIRMAN. So it was unanimous that the highest rating that the American Bar Association gives in this circumstance was unanimous; each individual, no one abstaining, voted for that rating?

**Mr. WILLIS.** No abstentions. Every member of the committee voted for the rating of well qualified.

The CHAIRMAN. I have no further questions. I only want to thank you again because I think people vastly underrate the incredible amount of work that you all undertake. We in this committee know because our staffs read every one of the opinions. We know what it is like.

You are in active practice at the time while you are doing it. We appreciate it, and I would like to publicly extend my thanks to you, both of you, and to the Bar Association generally for being willing to perform this function.

I yield now to my friend from Utah.

Senator HATCH. I want to join in that praise because I think the changes that have been made at the ABA and the renewed look at the committee and the restructuring of the committee have been very excellent. And I know that it takes a lot of time. It is a lot of effort. You folks are doing a tremendous job for the benefit of the legal community at large, but really for the public at large. And I just want to personally compliment you. I am glad to see that the committee has approached this in an apolitical way, as it should, and I just want to personally acknowledge that in front of everybody here today.

So thank you for the efforts you have put forth, the testimony you have given, and the work that you all have done.

The CHAIRMAN. Thank you very much.

Mr. WILLIS. Thank you, Senator.

The CHAIRMAN. Senator Metzenbaum.

Senator METZENBAUM. I want to join my colleagues in thanking you for your efforts, but I sort of think that my good friend from Utah's comment was a little bit negatively pregnant with the fact that you have suddenly gotten religion and now you are doing a good job. And I have the feeling that you have done a good job over the years. I haven't always agreed with your conclusions. Most of the time I have. But I thought I was really bemused when sometimes in the past the ABA was accused of being too liberal. I was a practicing lawyer, and I have been a member of the ABA for a long time. And I never thought it was a liberal organization. Quite the opposite, I thought it was too damn conservative.

But having said that—

Senator HATCH. Of course, he thinks everything is too damn conservative. [Laughter.]

Senator METZENBAUM. Especially you, Orrin. [Laughter.]

Senator HATCH. Well, I think I probably am.

The CHAIRMAN. So far things are going well. Senator, do you have any further comment?

Senator METZENBAUM. With that said, thanks very much for all your efforts.

The CHAIRMAN. The Senator from Pennsylvania.

Senator SPECTER. Thank you, Mr. Chairman.

I would like to take just a moment or two to discuss the one question which really concerns me about the confirmation proceedings, and I join in expressing appreciation for the work that your organization has done. Your work, of course, was completed before these hearings started. I have already expressed my concerns about how much information we got on judicial ideology and judicial philosophy.

I was concerned, illustratively, that on a question about whether the Korean military engagement was a war raising the constitutional issue about the authority of the Congress to declare war. Judge Ginsburg wanted to have it briefed and argued before she would make a statement. Certainly the Korean conflict is not going to come before the Court, and I think many of the other questions which were asked on ideology and philosophy come into the same line.

When we had Justice Scalia, then Judge Scalia, for confirmation and I asked him about *Marbury v. Madison* as a pillar of constitutional interpretation that the Supreme Court is the final word, he wouldn't answer the question because it was an issue which he thought might come before the Court. At that time I expressed the sentiment, as I did with Judge Ginsburg, that so far as I am concerned that issue is rockbed; and if someone is not going to uphold *Marbury v. Madison*, I don't think that person is fit to serve on the Supreme Court.

I think Justice Scalia would uphold *Marbury v. Madison*, which was my conclusion, and I voted for him. But he wouldn't say. The question about whether the Congress has the power to take away jurisdiction of the Court on constitutional issues, I think, is also rockbed. I don't think that is subject to being litigated.

I asked Judge Ginsburg whether she would rule out Congress' authority to take away the jurisdiction of the Court on equal protection, an issue on which she is really a champion. And in my questioning of Judge Scalia, it took all the way to a question of, "Will you let somebody litigate after you are on the Supreme Court the question of whether you have an obligation under your oath to uphold the Constitution?" "Judge Scalia: I think you have finally gone over the edge of certainty so much that I have to say of course not."

But that is what it took to find an answer for Justice Scalia that he wouldn't have litigated before his Court.

Judge Ginsburg wrote an article on the authority of the Senate giving a second opinion after the President gives the first opinion, said it was not a secondary opinion; and at the conclusion of the article, she accepted the language of her former Columbia colleague, Prof. Louis Henken, to this effect: In an appointment to the U.S. Supreme Court, the Senate comes second but is not secondary. The standards the Senate should apply are the same as those that should govern the President, what would serve the national interest, not simply for today's cases but for the long term.

And I would just like your opinion, if you would give it to me, Mr. Willis, Mr. Best. Do you think it is within the purview appropriately of a Senator to vote against a nominee who won't answer questions, say to the extent that Judge Scalia took a question about challenging his oath before he would respond?

Mr. WILLIS. I won't myself pretend to give advice to a Senator on a subject like that. I think the Senator has to use his own conscience and conviction in deciding what action to take.

I should emphasize that the work of our committee is limited to investigating the qualifications of the nominee with respect to integrity, judicial temperament, and professional competence. We do not get into philosophy. We do not get into where the judge, the judicial candidate stands with respect to a particular issue.

Obviously the interest of this body may very well be broader than that, but when it comes to integrity, professional competence, and judicial temperament, Judge Ginsburg has our very strong endorsement.

Senator SPECTER. Mr. Willis, you are a New Yorker?

Mr. WILLIS. Yes, sir.

Senator SPECTER. I hope you run for the Senate so you can give me some advice.

Mr. Best, you are from the District of Columbia. I hope you have a chance to run for the Senate.

Mr. BEST. Well, I would be pleased to have that opportunity sometime, Senator.

Senator SPECTER. What is your view on my question?

Mr. BEST. Well, my view is coincident with Bill Willis. We have a very narrow spectrum of interest, and certainly if I ever decide to run for the Senate, then maybe I could address the issue of whether or not there is discretion in a U.S. Senator on the issue that you have presented.

Senator SPECTER. Thank you very much, Mr. Best. Thank you, Mr. Willis.

The CHAIRMAN. Thank you.

Senator Heflin.

Senator HEFLIN. I just got here. Does somebody else want to ask questions?

The CHAIRMAN. All right. Senator Feinstein.

Senator FEINSTEIN. I have no questions. Thank you.

The CHAIRMAN. Senator Heflin.

Senator HEFLIN. Well, I have always enjoyed listening to you, and I think you all do a very thorough job on this type of work. I always somewhat feel like somehow you ought to have a professional staff. It calls for a tremendous amount of work that is called upon for each individual member, in particular relative to the Circuit Court of Appeals in the District Court. It does call for a tremendous amount of work. I at one time made a speech on the floor advocating that you consider a staff, but you always felt like it was more of a lawyer approach that you wanted.

But, anyway, we appreciate the effort by the American Bar, and I think it does have a great deal of weight pertaining to nominees, in particular the work that you do reading every opinion and researching everything else. It is rather remarkable that you spend as much time as you do.

But as I understand it, you are unanimous in the highest rating here. Is that correct?

Mr. WILLIS. That is correct, Senator. The entire committee reviewed the entire record and concluded unanimously, without any dissent or abstention, that Judge Ginsburg deserved the highest recommendation.

Mr. BEST. And without any hesitation.

Senator HEFLIN. Well, that is remarkable. Without any debate?

Mr. WILLIS. There was obviously discussion. I don't think it got to the level of debate, but I think that every member participated actively in the discussions that followed the completion of the record.

Senator HEFLIN. I believe that is all.

The CHAIRMAN. Thank you very much.

Gentlemen, again, thank you. Please thank the entire committee. I sincerely mean it when I say that on behalf of the whole committee, we appreciate the incredible amount of work you do, and the service you provide.

Mr. WILLIS. I will do that, Senator, and thank you very much.

Senator HATCH. Mr. Chairman, Senator Grassley may have some questions. His staff member was trying to find him. But what we will do, if we can keep the record open to submit those questions in writing, I think that would be fine.

The CHAIRMAN. Without objection, that will be done.

[The prepared statement of Mr. Willis follows:]

#### PREPARED STATEMENT OF WILLIAM E. WILLIS

Mr. Chairman and Members of the Committee:

My name is William E. Willis. I practice law in New York City, and I am Chair of the American Bar Association's Standing Committee on Federal Judiciary. With me today is Judah Best of Washington, D.C., one of our Committee members who took a principal role in this investigation.

We appear here to present the views of the American Bar Association on the nomination of the Honorable Ruth Bader Ginsburg, Judge of the United States Court of Appeals for the District of Columbia Circuit, to be Associate Justice of the Supreme Court of the United States.

At the request of the White House, our Committee investigated the professional competence, judicial temperament and integrity of Judge Ginsburg. Our work included discussions with more than 625 persons, including Justices of the Supreme Court, federal and state judges, a national cross section of practicing lawyers, and law school deans and faculty members, some of whom are specialists in constitutional law, and experts on Supreme Court Practice. In addition, Judge Ginsburg's opinions were independently reviewed by three reading groups—a reading team of lawyers who have practiced actively in the Supreme Court, chaired by Rex E. Lee, former Solicitor General of the United States and currently President of Brigham Young University, and two panels of law professors, one chaired by Professor Ronald J. Allen at Northwestern University Law School and one chaired by Dean Mark G. Yudof of the University of Texas School of Law. And finally, Judge Ginsburg was interviewed by three members of our Committee.

The Committee began its investigation of Judge Ginsburg on June 14, 1993, and ended on July 13, 1993. Based upon our evaluation, we reported to the White House and to this Committee that the Standing Committee is unanimously of the opinion that Judge Ginsburg is entitled to the Committee's highest evaluation for a nominee to the Supreme Court of the United States: *Well Qualified*. That evaluation is reserved for those who are at the top of the legal profession, have outstanding legal ability and wide experience, meet the highest standards of professional competence, judicial temperament and integrity, and merit the Committee's strongest affirmative endorsement.

I have filed with the Judiciary Committee a letter describing the results of our investigation, and shall not repeat those results in detail here. I request that the letter be included in the record of these proceedings.

To summarize our findings, the Committee is fully satisfied that, by virtue of her academic training, her work as an appellate advocate, her academic service, her scholarly writings, and her distinguished service for thirteen years on the Court of Appeals, Judge Ginsburg meets the highest standards of professional competence required for a seat on the Supreme Court. She enjoys the admiration and respect of her colleagues on and off the bench and her integrity is above reproach.

We are pleased to have the opportunity to appear here today to present to Committee's findings and would be happy to respond to questions about our evaluation.

**The CHAIRMAN.** Now our next panel is comprised of leading figures in the legal community. The first is William T. Coleman, Jr., of O'Melveny and Myers. Mr. Coleman served as Secretary of Transportation during the Ford administration from 1975 to 1977, and Mr. Coleman stands as one of the Nation's pre-eminent lawyers, particularly civil rights lawyers, having argued many landmark cases with the last Justice Thurgood Marshall. As a matter of fact, I believe he was Thurgood Marshall's attorney as well. He also is presently chairman of the board of the NAACP Legal Defense and Education Fund.

Welcome, Mr. Secretary.

Next is Judge Shirley Hufstedler. She is a former United States Circuit Court of Appeals judge for the Ninth Circuit, and served as Secretary of Education during the Carter administration. She is presently a partner in a leading law firm.

Joining them are Chesterfield Smith of Holland & Knight of Miami, FL, former president of the American Bar Association. Good to see you back, Mr. Smith.

**Mr. SMITH.** Thank you.

**The CHAIRMAN.** And Ira Millstein, a senior partner of Weil, Gotshal, and Manges in New York City.

We welcome you all, and I should say, with no reflection on Mr. Millstein and Mr. Smith, were I president two of the four people sitting before me would be my choices for the Supreme Court of the United States, and I say that without reservation. Mr. Coleman, you would make a great Supreme Court Justice. I wish I had had an opportunity to participate in having you on the Court; as well

as you, Judge Hufstedler. I know you both well, and it is a compliment to the nominee that you two are here, as well as the other two of your colleagues are here.

Senator HEFLIN. I will take exception at your omission of Chesterfield Smith. I don't know Mr. Millstein as well, but he—

The CHAIRMAN. Mr. Millstein, you are qualified as well to be on the Court, but I mean it. I think the Nation would have been served extremely well had William T. Coleman been a Supreme Court Justice.

But having said that, enough of my advertising for future nominees for the Court. Let me—

Senator SPECTER. It may be yet, Mr. Chairman.

The CHAIRMAN. I know. I said that. That is why I don't want to continue to advertise, because I learned one lesson, at least as it related to my children in the colleges and universities they attend. Whatever university you want your child to attend, do not mention it. Whoever you would like to see appointed to the Supreme Court, don't tell the President.

But, at any rate, Mr. Coleman, why don't you begin.

**PANEL CONSISTING OF WILLIAM T. COLEMAN, JR., O'MELVENY AND MYERS, WASHINGTON, DC; CHESTERFIELD SMITH, HOLLAND & KNIGHT, MIAMI, FL; SHIRLEY M. HUFSTEDLER, HUFSTEDLER, KAUS, AND ETTINGER, LOS ANGELES, CA; AND IRA M. MILLSTEIN, WEIL, GOTSHAL AND MANGES, NEW YORK, NY**

**STATEMENT OF WILLIAM T. COLEMAN, JR.**

Mr. COLEMAN. Mr. Chairman, members of the committee, I have submitted a seven-page statement, but then there are attached some memoranda because I either read or had people read and then explain to me most of the judge's cases. I certainly think that with her background and everything she certainly should be considered well qualified.

But I would like just to indicate to you why in my judgment this is a superb appointment, because I think that you have to look to the character of the person, for in the end, particularly in constitutional matters, the only sense on a Justice's exercise of power is his or her own sense of self-restraint.

Now, the factors that I think that you ought to consider, first, is what she has been exposed to and done with her life in the last 60 years: a great education, a superior mind, great intellect and intelligence, her seizing of every opportunity, and her just being able to discharge both the responsibilities in the profession, but also as a wife and mother.

She certainly has made an outstanding record as a jurist. I think if you would look at her readings and just walk through her library and just watch the diversity of things that she has read, in addition you often will see her at the opera, the theater, the symphony, the ballet, the art museum, the Council on Foreign Relations. And she has, as you already know, a very wide range of friends. And, believe me, as quiet as she is, she will discuss and argue almost any issue with them. She has written in a lot of different fields.

With it all, however, we still know the great Justices had to have something that touched them with fire. Holmes had his Civil War. Frankfurter had his battles as an immigrant coming to this country at age 12, not speaking a word of English, and, as once he said, "belong[ing] to the most vilified and persecuted minority in history." Chief Justice Marshall had his battles to make this country a Nation, and Thurgood Marshall his battles to end racial segregation and all the deleterious effects thereof.

In Ruth Bader Ginsburg, I have confidence that the fire was set by the discrimination Ruth Bader Ginsburg encountered when she first came to the bar and by the challenges she met in developing legal theories which ended some of such discrimination and unfairness. But even more important, that fire rests in her disciplined desire that she excel as a judge, as a legal scholar, as an American, and as a human being.

So I urge this committee to advise and consent favorably for this nomination. I also want to congratulate the country, the legal profession, President Clinton, our great educational and cultural institutions, and the Ginsburg family that in this case the process and system worked, and worked quite well.

I would like to conclude by adding something which may create a slight controversy. That is, on the first day when Judge Ginsburg was introduced, the senior Senator from New York indicated that Justice Frankfurter would not even interview her. I speak as a former Justice Frankfurter law clerk. I would ask that be checked and not be made a part of history. I became his law clerk in 1948. I know that in 1953 when a lady whose last name was Holmes and was the first one to make the Harvard Law Review, that he at that time indicated that, gee, she would be a great law clerk.

In addition, because the statement was made that he would not interview her, the fact is that Justice Frankfurter would interview no one. I was not interviewed by him. His law clerks were selected by Henry Hart, Paul Freund, and, later on, Al Sachs. I say that only to try to keep the record straight. In my heart, I just feel that Felix Frankfurter had the judgment and wisdom that I know Judge Ginsburg has to have the vision that in this country we have the ability to recognize those of great ability.

Thank you.

[The prepared statement of Mr. Coleman follows:]

PREPARED STATEMENT OF WILLIAM T. COLEMAN, JR.

The country is fortunate that the end result of the Presidential selection process to fill the vacancy on the Supreme Court of the United States arising from the retirement of the Honorable Justice Byron Raymond White was the nomination of someone with the talent of Judge Ruth Bader Ginsburg who with her heart, character, determination and background gives promise that she will be a worthy addition to the highest Court.

Among the bar and in the academic community, there is no doubt that Judge Ginsburg ranks among the best jurists who presently sit on the various Courts of Appeals in the United States.<sup>1</sup>

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<sup>1</sup> I have read or caused to be read and explained to me all of the cases that Judge Ginsburg has written that could be classified as civil rights cases, all cases dealing with the standing to raise such issues, including personal constitutional issues, and all cases dealing with constitutional issues involving individuals rights. Attached hereto are three interesting and excellent memoranda that were of great aid in this task.

She brought to the Court of Appeals bench a mind well honed by training at two of the nation's best law schools—Harvard and Columbia—served on the law review of each of these schools and had a magna cum laude performance. Previously there-to she was a stellar student at Cornell University. Thereafter she became a law professor, teaching conflict of laws, civil procedures, both national and international, constitutional law and also acquired learning in the law of Sweden. So as not to be completely cloistered in the life of academia, she got involved in litigation that helped women greatly on their road to equality. All who have been exposed to her recognize that she is bright, able, sincere and apparently (so much of a jurist's and scholar's work is done in solitude) a hard worker. Moreover, she is committed to being an excellent jurist and is a better writer than many of her colleagues. She graces the bench on which she presently serves with style and understanding and the confidence of one with a well trained mind and a sense of herself.

But initiates know that excellent technical skill as a federal Court of Appeals or district court judge or as a judge on any state court, does not necessarily mean that that person will do well on the Supreme Court. For as Justice Felix Frankfurter reminded us:

"... One is entitled to say without qualification that the correlation between prior judicial experience and fitness for the functions of the Supreme Court is zero. The significance of the greatest among the Justices who had such experience, Holmes and Cardozo, derived not from that judicial experience but from the fact that they were Holmes and Cardozo. They were thinkers, and most particularly legal philosophers. The seminal ideas of Holmes, by which to so large an extent he changed the whole atmosphere of legal thinking, are formulated by him before he ever was a judge in Massachusetts. And while the court of appeals gave Cardozo an opportunity to express his ideas in opinions, Cardozo was Cardozo before he became a judge. On the other side, Bradley and Brandeis had the preeminent qualities they had and brought to the Court, without any training that judicial experience could have given them." 105 U. of Penn. L. Rev. 781 (1957).

Thus for me and more particularly for you we must find elsewhere the indicia to predict success on the Supreme Court of the United States. Such search requires some informed judgment as to the possible issues that will come before the Court during the nominee's tenure. For the issues before the Supreme Court are usually difficult, novel and few judges on the courts below have come to grips with them on a regular basis. The great issues other than the few that involve war and peace, international relations, basic business relationships, and the reach of statutes enacted to benefit the general welfare, deal with how to balance the existence of a democratic society based upon majority rule with the fact that minorities, women and other discrete groups have rights and concerns that often are not properly recognized (or indeed sometimes are denigrated) by the majority. This grows in part out of the fact that two groups not present at the Constitutional Convention in 1789 were blacks and women. And the poor in this country, though not small in number, often have no champions in the federal and state legislative chambers despite Mr. Lincoln's statement that God must have loved the poor because he made so many of them.

Each of us can pick the issues that will likely come before the Court that we hope a resilient, acute and understanding mind can resolve correctly. Abortion is and will be with us for a long time. Church and state, free speech, and privacy are always recurring issues; the important issues of the rights of a criminal defendant in a civilized society, including the recurring issues of habeas corpus and search and seizure and the right to adequate counsel. Questions surrounding sexual orientation and complicated voting rights issues have an increasing call on the Court docket. And though we have become one nation, federalism for many of us is thought to be a strength and calls upon the Court to revisit the issues of state sovereignty every so often. If we would ask civil rights lawyers to describe some of the challenges before the Court they would include:

(1) how to overrule *Crosson* or distinguish it so that state and local set aside programs are still valid; (2) how to preserve the provisions of the Voting Rights Acts of 1965 and 1982 designed to ensure election of more representatives who are responsive to minority voters (in other words, to overrule or limit greatly the effect of Justice O'Connor's decision in *Shaw v. Reno*, 61 U.S.L.W. 4818 (June 28, 1993) (5-4 decision)); (3) how to make effective the provisions of the 1991 Civil Rights Act concerning burdens of proof in employment discrimination cases (including to limit or overrule *St. Mary's Honor Center v. Hicks*, 61 U.S.L.W. 4782 (June 25, 1993) (5-5 decision); and (4) how to overrule or minimize the effect of *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (5-4 decision), which refused to upset a Texas school finance system which permitted poor, mostly minority, children living

in poor school districts to study in much lower quality schools than children living in affluent, mostly white school districts.

And, if the political process with respect to eliminating poverty continues to fail the society as it did on race and sexual issues until 1960, the Court may be asked to take bold steps to address that problem.

What is there in Judge Ginsburg's record and background that would give you confidence that, if given the opportunity, she will approach each of the difficult issues properly, even though you may or may not agree with the result? For so much of the confidence and acceptance of Court decisions in difficult social and political issues depend upon the integrity of the opinions written and the character of the Court's members. For in the end, particularly in constitutional matters, the only check on a Justice's exercise of power is his or her own sense of self-restraint. First is what she has been exposed to and done with herself over the last 60 years—a great education, a superior mind, great intellect and intelligence, her seizing and taking advantage of opportunities in both the academic and professional worlds and mixing with great success her professional life and responsibilities as a mother and a wife. Second, she has acquitted herself extremely well as a jurist recognized by the bar and greatly appreciated by her colleagues. Third, her reading and experiences are far beyond the law. She is as familiar with Locke, Rousseau, Keynes, Nietzsche, Santayana, Voltaire, Longfellow, Montesquieu and de Tocqueville, to name a few of her reading companions, as she is with Holmes' *Common Law*, Cardozo's *The Nature of the Judicial Process* and Blackstone. (A visit to her well used library at home would be a treat and a challenge to us all.) You will often see her at the opera, the theater, the symphony, the ballet, art museums, the Council on Foreign Relations. Next she has a wide range of friends and will discuss just about any subject. She has written books and law review articles, given talks in many diverse fields and traveled extensively.

With it all, however, we still know that the great justices had something that "touched them with fire." Holmes had his Civil War battles, Frankfurter had his battles as an immigrant coming to this country at 12, not speaking a word of English and, as he once said, "belong[ing] to the most vilified and persecuted minority in history."<sup>2</sup> Chief Justice Marshall his battles to make this country a nation and Thurgood Marshall his battles to end racial segregation and all the deleterious effects thereof.

In Judge Ruth Bader Ginsburg I have confidence that that fire was set by the discrimination Ruth Bader Ginsburg encountered when she first came to the bar and by the challenges she met in developing legal theories which ended some of such discrimination and unfairness. That fire also rests in her disciplined desire that she excel as a judge, as a legal scholar, as an American, and as a human being.

I thus urge that your Committee recommend that the Senate favorably advises and consents to the President's nomination of Judge Ruth Bader Ginsburg as an Associate Justice of the Supreme Court of the United States. And I congratulate the country, the legal profession, President Clinton, our great educational and cultural institutions, and the Ginsburg family that in this case the process and system worked and worked quite well.

**The CHAIRMAN.** Thank you very much.

**Mr. Chesterfield Smith,** former president, but once a president, always a president. Mr. President.

#### STATEMENT OF CHESTERFIELD SMITH

**Mr. SMITH.** Forever.

The greatest interest of my life as a trial lawyer has been the justice system, the quality of justices and judges. I have worked at it. I have cared about it. I have been right and wrong in my positions. I have changed and modified. But in an unyielding and unceasing way, I have been devoted to it.

Without reservation, Circuit Judge Ruth Bader Ginsburg in my opinion will, if confirmed, be an absolutely magnificent Supreme Court Justice. As both a lawyer and a person, I know her quite well, perhaps extremely well. I believe that she possesses the temperament, the character, and the professional skills and abilities

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<sup>2</sup> *Board of Education v. Barnette*, 319 U.S. 624, 646 (1943).

necessary to go up to my standard of an absolutely superior member of the U.S. Supreme Court.

She is scholarly, reflective, judicious, and humane. She knows when to act with vigor, but equally important, she knows when not to act. And she has the wisdom and experience to know in those actions the value of judicial restraint.

As both a lawyer and a judge, she is extremely experienced in appellate practice and procedure at all levels. As a lawyer, she herself has both briefed and orally argued with great skill multiple cases in the U.S. Supreme Court. And as an appellate judge, her industry and skill have been recognized nationwide for more than a dozen years.

However, she is not limited to just appellate skills. She is a person well versed and experienced in all aspects of the law as it will be presented from time to time for decision by the U.S. Supreme Court.

While I recognize it to be a very broad statement, I firmly believe—and I have a large acquaintance in the American law establishment because I was a bar politician for so many years. I firmly believe that there is no single lawyer in America, male or female, better qualified to be a Supreme Court Justice. Truly she is exceptional. Certainly I personally like Ruth Ginsburg. I have served and participated through the years with her in multiple activities. But I fervently assert that my endorsement of her to you for confirmation is based solely on my idea of merit. Over the years I have become convinced that she has one of the superior legal minds that I have ever been around, talked to, argued with, discussed or debated.

Her legal writing suits me. It is succinct, pithy, concise, scholarly, and absolutely on target. She conserves energy and words. While her experience and intent perhaps have been focused primarily on procedure and constitutional law, I find that she has a broad and roving interest in all aspects of law and justice. She truly loves the law, and she represents it as its best.

Additionally, she is a completely well-rounded person who has the professional and personal capacity to bring to her judicial duties wisdom, moderation, compassion, and justice in the myriad areas of the law routinely a part of the Supreme Court docket.

As a citizen, I strongly urge that you speedily confirm her appointment to the Court. As a trial lawyer, I tell you that she is the kind of judge that I want to go before and advocate causes because I believe that she will consider the facts and the law of that case and make a right and proper decision under the law.

Thank you very much.

[The prepared statement of Mr. Smith follows:]

#### PREPARED STATEMENT OF CHESTERFIELD SMITH

Without reservation, Circuit Judge Ruth Bader Ginsburg in my opinion will if confirmed be a magnificent Supreme Court Justice. As both a lawyer and a person, I know her quite well—extremely well. I believe that she possesses the temperament, the character and the professional skills and abilities necessary to be an absolutely superior member of the United States Supreme Court. She is scholarly, reflective, judicious and humane. She knows when to act with vigor, equally important she knows when not to act, and she has the wisdom and experience to know in those actions the value of judicial restraint. As both lawyer and judge, she is extremely experienced in appellate practice and procedure at all levels. As a lawyer, she her-

self has both briefed and orally argued with great skill multiple cases in the United States Supreme Court; as an appellate judge, her industry and skill have been recognized nationwide for more than a dozen years. However, she is not limited to just appellate skills; instead, she is a person well versed and experienced in all aspects of the law as it will be presented from time to time for decision to the United States Supreme Court.

While I recognize it to be a very broad statement, I firmly believe that there is no lawyer in America, male or female, better qualified to be a Supreme Court Justice. Truly, she is exceptional. I do personally like Ruth Bader Ginsburg (I have served and participated throughout the years with her in multiple organized bar activities) but I fervently assert that my endorsement of her to you for confirmation is based solely on merit. Over the years I have become convinced that she has one of the superior legal minds that I have known.

Her legal writing is succinct, pithy, concise, scholarly, and absolutely on target. While her experience and intent have perhaps focused primarily on procedure and constitutional law, I find that legally she has a broad and roving interest in all aspects of justice. She truly loves the law and she represents it at its best. Additionally, she is a completely well-rounded person who has the professional capacity to bring to her judicial duties wisdom, moderation, compassion and justice in the myriad areas of the law routinely a part of the Supreme Court docket.

As a citizen and lawyer, I strongly urge that you speedily confirm her appointment to the Supreme Court.

The CHAIRMAN. High praise, Mr. Smith. Thank you.  
Judge, welcome.

#### **STATEMENT OF JUDGE HUFSTEDLER**

Judge HUFSTEDLER. Thank you very much, Mr. Chairman.

Because I was admitted to the bar 43 years ago when the number of women who went into law were very, very few, in my enthusiastic endorsement of Ruth Bader Ginsburg for the U.S. Supreme Court I thought it might be useful to place what Ruth has accomplished in a somewhat broader historical framework.

When President Johnson appointed me to the U.S. Court of Appeals for the Ninth Circuit in 1968, I was the second woman in the history of the United States ever to be appointed to a Federal appellate court. The honor of being the first went to Florence Allen, and the President who appointed her was Franklin Delano Roosevelt in 1934. When she was appointed, she was then a justice of the Supreme Court of Ohio, a position to which she was elected by the women who had worked with her to obtain passage and ratification of the amendment to the U.S. Constitution permitting women to vote. Judge Allen had died before I was appointed, and it was to be many years before another woman was to have that honor.

I resigned from the bench in 1979 when President Carter asked me to become Secretary of Education of the United States. The U.S. Supreme Court, however, has been a matter of intense scholarly scrutiny and more than slight interest to me during my entire professional life.

The Court has been called upon, as each of you are aware, to interpret and apply the Constitution under circumstances of more than 200 years of history. That great charter of government is also the Nation's great charter of freedom in the Bill of Rights. The Supreme Court has been repeatedly required to decide the issues that most deeply divide our citizens one from the other, invoking that great Bill of Rights. Those rights include not only the right to worship as one pleases, to own property, to have the right to petition for grievances, but also the right to equal protection of the laws,

no matter what may be the color of skin or previous condition of servitude, our Nation of origin, our race, our ethnicity, or our gender.

When the membership of the Supreme Court has been equal to that awesome task, the results have been great. When the membership of the Court sometimes has not, the results have been tragic. No one here needs to be reminded of the impact of the tragic decision of the *Dred Scott* case when that Court could not face the challenge of human slavery under the Constitution of the United States. But when the majority of the Court has had depth of understanding to interpret the Constitution to meet the vast needs of this country, the results have been not only fine, but oftentimes brilliant.

The Warren Court knew that this Nation could not long endure with legalized apartheid any more than it could have endured half slave and half free. The Warren Court, after that decision and immediately before it, created decision after decision which made it possible to start stripping away the elements and remnants of slavery and the change of bigotry that affected black men.

Unfortunately, the Court was much slower to recognize that the only persons subject to invidious discrimination were not limited to black men. That discrimination was affecting adversely half the population of the United States—women.

Even the gifted group of colonial gentlemen who drafted the Constitution were unable to escape the dictates of custom, the dicta of St. Paul, and centuries of dominance by men that had systematically reduced women to second-class citizenship.

Until nearly the end of the 19th century, women were denied the basic rights of citizenship. Not one of them could vote. With trivial exceptions, women could not own property, or even their own wages. Single women were slightly better off, however, than were their married sisters because, under the eyes of the law, when a woman married the personalities of the husband and wife merged, and the wife's disappeared altogether.

Women who were married were classified by the law as were infants and idiots. The traditional excuse for that blatant discrimination was expressed by Justice Bradley in a deservedly famous, or perhaps infamous, opinion to which Senator Feinstein adverted during her commentary earlier. Every member will recall that the issue was whether Myra Bradwell had had her privileges and immunities rights under the Constitution violated by the law of the State of Illinois, which refused to permit her entrance into the practice of law. And Justice Bradley explained in his special concurring opinion the reason why, explaining that that sex was not entitled to the privileges and immunities granted to males. He said, "The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life \* \* \*. The paramount destiny and mission of women is to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."

Now, Justice Bradley knew perfectly well that tens of thousands of women were performing hard physical labor under conditions anything but dainty. And he also knew that other thousands of pioneer women were fighting side by side with their husbands under

conditions that were downright perilous. Then why in the world did he say that? Because he had persuaded himself that God, not man, had prescribed women's roles, and those who did not follow those assignments were either biological curiosities or victims of humankind's inexcusable rebellion against God's will. Justice Bradley and those who shared his views confused the signs of a dominant culture with the signs of the Creator, and he mistook the laws of man for the laws of nature.

It took decades of struggle for suffragettes, like Florence Allen, and the men who could be enlisted into their cause to amend the Constitution to give women even the right to vote. It took decades of more work for the Supreme Court of the United States to realize that women, as well as men, were entitled to equal protection of the laws.

As late as 1948, Justice Frankfurter, bless him, wrote the majority opinion upholding a State statute that forbade women to obtain licenses as bartenders unless the women were wives or daughters of the male owner of the establishment. To uphold the statutory classification, Justice Frankfurter harked back to Shakespeare's ribald ale wife and stated that the 14th amendment "did not tear history up by the roots." And then he said, re-echoing much of what Justice Bradley's sentiment had earlier revealed,

The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in the vices that men have long practices, does not preclude the States from drawing a sharp line between the sexes \* \* \*. [T]he oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight \* \* \*. [W]e cannot give ear to the suggestion that the real impulse behind this legislation was the unchivalrous desire of male bartenders to try to monopolize the calling.

A majority of men perhaps in this country may have applauded that decision, but the women did not. Like every campaign that has been successful in constitutional law, there has to have been an architect. One of the major architects to change the Supreme Court's collective mind about the place of women in the Constitution of the United States is Ruth Bader Ginsburg. Then Professor Ginsburg knew very well, and she still remembers extremely well, that in constitutional adjudication the Supreme Court does not make major progress in miles, but in millimeters.

The particular case that was chosen for making her points in constitutional law, like so many others that have seemed to be trivial, was the case called *Reed v. Reed*. And what was the issue? The question was the constitutionality of a State law which granted automatic preference to men over women when both were equally qualified to administer decedents' estates. She argued that that law giving mandatory preference to men over women without any regard to their individual qualifications violated the equal protection clause of the 14th amendment.

Now, in making that argument, Ms. Ginsburg was after larger constitutional game than the right of women to administer dead men's estates. The point she succeeded in establishing was that the statutory classification based on sex, like that based on race, is constitutionally suspect, thereby requiring strict scrutiny. The result is that a statute cannot be upheld constitutionally merely on that basis that a legislature could have had some rational reason for en-

acting it. And that was the standard that Mr. Justice Frankfurter adverted to in the case I earlier described, along with the traditional deference paid to any legislation that bans liquor.

The importance of the principle decided in *Reed* became apparent to less sophisticated scholars in the *Frontiero* case where the question was the validity of a Federal statute which gave special privileges and perks to servicemen with respect to their wives, but denied exactly those perks to servicewomen.

Writing for the majority of the Court, Justice Brennan relied heavily on *Reed's* holding and observed that the Nation's unfortunate history of sex discrimination had been rationalized on bases of "romantic paternalism." And he said, and I quote, "the practical effect put women, not on a pedestal, but in a cage."

She won that case, and with it she succeeded in building the equal protection platform upon which not only she, but many others, representing both men and women, were able to establish gender as a subject of deep concern under the equal protection clause.

Long before I knew Judge Bader Ginsburg personally, I had admired her work very much as a legal scholar and as an extraordinarily able constitutional advocate. Since she has been appointed U.S. circuit judge for the District of Columbia Circuit, Ruth Bader Ginsburg has performed her judicial role as successfully as she did her earlier roles—as a professor, as a scholar, as a constitutional advocate. She has been obliged to follow the law as laid down by the U.S. Supreme Court whether she agreed with it or not, and she has faithfully done so.

Her judicial writings, like her briefs and also like her scholarly writings as a professor, are concise, tightly reasoned, and persuasive. She has also proved herself to be a healer of rifts that always exist in any close structure such as the judiciary. She is an excellent negotiator. She is a moderator who has, nevertheless, managed to maintain her intellectual integrity and her dedication to her ideals of equality for all Americans under the law.

Perhaps it would not unduly disturb Justice Bradley's ghost to know that she well performs, very well performs the only roles he would have permitted her to have: As wife, mother, and as loyal, marvelous friend.

This committee has had very few nominees come before it who begin to have the qualities of distinction that Ruth Bader Ginsburg has. She deserves your votes for swift confirmation. Her appointment is a credit to the President. Her swift confirmation will be a credit to you, and as Justice of the Supreme Court of the United States, she will be a credit to the Nation.

Thank you.

[The prepared statement of Judge Hufstedler follows:]

#### PREPARED STATEMENT OF SHIRLEY M. HUFSTEDLER

My name is Shirley M. Hufstedler. I was admitted to the Bar 43 years ago. Half of my professional life has been devoted to private law practice and half to public service. I was a judge on state and federal courts, trial and appellate. When President Lyndon B. Johnson appointed me United States Circuit Judge for the United States Court of Appeal for the Ninth Circuit in 1968, I became the second woman in the history of the United States to be appointed to a federal appellate court.

The first was Florence Allen who was appointed by President Franklin Roosevelt to the United States Court of Appeals for the Sixth Circuit in 1934. At the time of her appointment she was a Justice of the Ohio Supreme Court, a position to

which she had been elected by the woman of Ohio who had worked with her to obtain ratification of the Constitutional Amendment giving women the right to vote. Judge Allen had died when I was appointed, and thereafter it was many years before another woman was appointed to the federal appellate bench.

I resigned from the bench in 1979 when the Senate confirmed President Jimmy Carter's nomination of me as the Nation's first Secretary of Education. When I returned to private life in 1981, I became a partner in the law firm in which I continue to practice, Hufstedler, Kaus & Ettinger, with time out to teach as Phleger Professor of Law at Stanford Law School and to lecture in other universities and colleges throughout the United States and abroad.

The United States Supreme Court has the awesome task of interpreting and applying the United States Constitution. That great charter of our government is also, in the Bill of Rights, our great charter of freedom. The Supreme Court has been repeatedly been called upon to interpret the Bill of Rights in deciding the issues that most deeply divide our Nation. Those issues include not only the rights to speak, to follow our own religions, to vote, to own property, to enjoy privacy, but also the right to equal protection of the law no matter what may be the colors of our skins, our previous condition of servitude, our race, our ethnicity, or our gender.

When the membership of the Supreme Court has proved unequal to their task, the results have been tragic. We remember the *Dred Scott* case in which the Court's failure to resolve the issue of Black slavery was one of the causes of the country's tearing itself apart in the Civil War. When the majority of the Justices in the 1930's were unable to accommodate their Nineteenth Century views of the Constitution to the urgent demands of the country, the majority imperiled the Court itself.

When the Justices have been equal to their task, the Court has succeeded admirably—often brilliantly. Thus, the Warren Court decided that the Nation could no more long endure with legalized apartheid than it could with human slavery. The Court unanimously decided *Brown v. Board of Education* to strike down racial segregation in the public schools. The Warren Court produced decision after decision carefully dismantling the remnants of slavery and diminishing invidious discrimination against Black men.

The Court was much slower to recognize that invidious discrimination was not limited to Black men, but extended to all women. Even that gifted group of Colonial gentlemen who drafted the noble words of the Constitution were unable to escape the dictates of custom, the dicta of St. Paul, and centuries of dominance by men that had systematically locked women into second class citizenship. Although human slavery was recognized, women were conspicuously missing in the Constitution.

Until nearly the end of the Nineteenth Century, women were denied basic rights of citizenship. None could vote. With trivial exceptions, they could not own or dispose of their property, even their own wages. Single women were slightly better off than their married sisters because, in the eyes of the law, the personalities of the husband and wife merged on marriage, and the wife's disappeared.

The traditional excuse for that blatant discrimination was expressed by Justice Bradley in his famous concurring opinion in *Bradwell v. Illinois* in which a majority of the Supreme Court held that, in barring Ms. Bradwell from admission to practice law, the State of Illinois did not violate the Privileges and Immunities Clause of the Constitution.<sup>1</sup> Justice Bradley explained: "The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. \*\* \* The paramount destiny and mission of a women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."<sup>2</sup>

Justice Bradley knew perfectly well that tens of thousands of women were performing hard physical labor and that frontier women worked side by side with their husbands under grueling and often perilous circumstances. He nevertheless persuaded himself that God, not man, had prescribed women's destinies, and those who did not follow their assignments were either biological curiosities or the victims of humankind's inexcusable rebellion against God's will. Justice Bradley and those who shared his views confused the signs of a dominant culture with the signs of the Creator, and he mistook man's laws for the laws of nature.

It took decades of struggle by the suffragettes, like Florence Allen, and the men who would be enlisted in the cause, to amend the Constitution to give women the right to vote. It took decades of more work before the Supreme Court would realize that women, as well as men, were entitled the equal protection of the laws.

As late as 1948, Justice Frankfurter wrote the majority opinion upholding a state statute forbidding a woman to obtain a license as a bartender unless she was "the wife or daughter of the male owner" of the establishment, To uphold the statutory

<sup>1</sup>83 U.S. (16 Wall.) 130 (Bradley, J., concurring) (1873).

<sup>2</sup>83 U.S. at 141-42.

classification, Frankfurter harked back to Shakespeare's sprightly and ribald ale wife and stated that the Fourteenth Amendment "did not tear history up by the roots." He then reechoed Justice Bradley's sentiments: "The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes. \* \* \* [T]he oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protection oversight. \* \* \* [W]e cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling."<sup>3</sup>

A majority of men undoubtedly applauded, but women did not. One of the major architects of the campaign that changed the Supreme Court's collective mind about women is Ruth Bader Ginsburg. Like every sophisticated constitutional advocate, Ruth Bader Ginsburg knew that Supreme Court's constitutional interpretations, with very rare exceptions, move forward by millimeters, not miles.

The particular case that the Supreme Court chooses for each nudge may at first seem almost trivial. The case that Ms. Ginsburg argued, *Reed v. Reed*,<sup>4</sup> was just such a case. The issue was the constitutionality of a state statute providing that, when two individuals are otherwise equally entitled to appointment as an administrator of a decedent's estate, the male applicant must be preferred to the female. She argued that the statutes giving mandatory preference to men over women without regard to their individual qualifications violated the Equal Protection Clause of the Fourteenth Amendment.

In making that argument, Ms. Ginsburg was after larger constitutional game than the right of women to administer decedents' estates. The point she succeeded in establishing was that statutory classifications based on sex, like those based on race, were constitutionally suspect, thereby requiring strict scrutiny. The result is that a statute cannot be upheld constitutionally merely on the basis that the legislature could have had some rational basis for creating it—the standard invoked by Justice Frankfurter in the women bartenders' case.

The importance of the principle decided in *Reed* became apparent to less sophisticated lawyers when she won *Frontiero v. Richardson* in 1973.<sup>5</sup> In that case, the question was the validity of a federal statute that gave servicemen the right to claim medical and other benefits on behalf of their wives who were dependents, but denied the same rights to servicewomen on behalf of their husbands.

Writing for the majority of the Court, Justice Brennan relied heavily on *Reed's* holding that classification based on sex are inherently suspect and must be subjected to close judicial scrutiny. Justice Brennan observed that the Nation's unfortunate history of sex discrimination "was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." Citing Justice Bradley's opinion as an example of such stereotypical notions, he concluded that "statutory distinctions between the sexes often have the effect of invariably relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members."<sup>6</sup>

After she had successfully built the equal protection platform for women, she was able to argue case after case dismantling the legal cages in which women had been so long enclosed.<sup>7</sup> Other advocates used the same platform to carry on her work in extirpating gender discrimination.

Long before I knew Ruth Bader Ginsburg personally, I admired her work as a legal scholar and as an outstanding constitutional advocate.

When those qualities came to the attention of President Carter, she was appointed United States Circuit Judge for the Untied States Court of Appeals for the District of Columbia Circuit. She has performed her judicial role as successfully as she did her earlier roles as a professor of law and a constitutional advocate. As a Circuit Judge, she is required to follow the law as laid down by a majority of the Supreme Court, whether she agrees with it or not. She has done so. Her opinions have nevertheless expressed her conspicuous concern for civil rights for all Americans. Like her scholarly writings as a law teacher and her briefs as an advocate, her judicial opinions are concise, tightly reasoned, and persuasive. She has also

<sup>3</sup> *Goesaert v. Cleary*, 335 U.S. 464, 465-66 (1948).

<sup>4</sup> 404 U.S. 71 (1971).

<sup>5</sup> 411 U.S. 677 (1973).

<sup>6</sup> *Id.* at 686-87.

<sup>7</sup> Time does not permit my even mentioning them all. Here are a few: *Califano v. Westcott*, 443 U.S. 76 (1979); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978); *Duren v. Missouri*, 439 U.S. 3057 (1979); *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Califano v. Goldfarb*, 430 U.S. 199 (1977).

proved herself to be a healer of rifts among judges, as excellent negotiator, and a judicial moderate who has nonetheless maintained her intellectual integrity and her dedication to the ideals of equality before the law for all our people.

Perhaps it would not disturb the shade of Justice Bradley too much to know that Judge Ginsburg has also admirably fulfilled the only roles he would have permitted her to play: She is a devoted wife and mother and a treasured friend of all those who have come to know her.

This Committee has had few nominees for appointment as Associate Justice of the Supreme Court of the United States who as richly deserve your votes for swift confirmation. Her appointment is a credit to the President. Her confirmation will be a credit to you, and she will be a credit to the Nation as Justice Ginsburg.

The CHAIRMAN. Thank you very much, Judge.

Mr. Millstein.

#### STATEMENT OF IRA M. MILLSTEIN

Mr. MILLSTEIN. Thank you. Mr. Chairman, I submitted a statement which I hope will be incorporated in the record, and I will try to be brief.

The CHAIRMAN. It will be.

Mr. MILLSTEIN. I have known Ruth and Martin Ginsburg since the summer of 1957 when Martin joined our firm as a summer associate. We were then about 20 lawyers located on 42nd Street in New York. And we are now about 650 in the same city, and in about nine different locations.

I have been their friend since 1957, even though we lost Marty as our partner in 1980, when Ruth came down to become a circuit court judge—a moment I remember as sort of bittersweet: sweet in being able to help her on that task, and a real loss to the firm in losing one of the very best tax lawyers in the United States when Martin's geography caused him to separate from the firm.

Ruth Ginsburg's moderate views on the interstitial role of the judiciary and the need for collegiality on the appellate benches has been demonstrated well in the last few days, and I don't intend to replicate or duplicate. You don't need to hear any more from me on that subject.

I think something else of importance is happening for the bench and the bar, and I don't think we ought to let that moment pass without comment.

Having chosen as a candidate a lawyer/judge from a pool, a very small pool of very highly qualified people, I would like to think that President Clinton and soon you in the Senate have chosen with gender-blindness a person who just happens to be a woman. If perhaps that is an overstatement this time, maybe it won't be the next time.

I have practiced law now for about 45 years, and I have watched the bench and the bar become populated with women, but ever so slowly and with a great deal of room for improvement.

Martin, Ruth, my wife Diane, also a professional woman, and I were friends when our children were small in the 1960's and 1970's. We saw each other and our children quite often. I watched with growing concern over the unfairness and indignities which were met by both of them, Ruth and Diane, and by the women lawyers whom we had begun to hire in our firm.

In those years, a person with Ruth's qualifications should have been fought over and sought for by law firms on graduation. It didn't happen. She should have had no trouble securing tenure on

a faculty like Harvard, Yale, or Columbia, and that didn't happen either. And it is no wonder that in the 1970's Ruth turned her quality mind to gender issues under the Constitution of the United States and began to focus the whole profession's conscience on what we had been ignoring for such a long time.

The legal profession had not been great in making room for women and racial minorities. It is getting better, but we are not there yet.

Now, how does our profession overcome this? Only by training and learning ourselves, sensitizing ourselves to the need to deal with gender and race in a diverse workplace, and then actually making progress.

Now, the workplace for most of us is our partnership and the courtrooms. We lawyers normally behave ourselves in courtrooms, and sometimes we take that good behavior with us out of the courtroom. When it becomes commonplace for us to appear before highly qualified, diverse judges, gender and racial distinctions in our law firms will disappear further, especially as it becomes obvious, as it is here today, that a highly qualified person is being chosen who just happens to be a woman, not because she is a woman. Happily, this is becoming easier for most of us now because there are pools of highly qualified lawyers of diversity, so the choosing can be gender-blind. And maybe today, in Ruth, marks a beginning of gender-blindness for both the bench and the bar.

Senator Hatch deserves a very honorable mention in this respect, which I would like to talk about for just a minute. When President Carter nominated Ruth to the District of Columbia Circuit toward the end of his 4-year term, it seemed to us as though the appointment would languish until after the November 1980 election. In that event, the likelihood of Ruth's confirmation, we now know, would have been slim or none. Opposition to Ruth was largely based on the assertion that she was a single-issue lawyer—women's rights.

I knew Senator Hatch from some prior dealings; I have forgotten now about what, Senator. I personally knew him to be open-minded. We didn't often agree on substance, but I was always treated courteously, and he heard me out.

I called the Senator and asked for an audience for Ruth, urging him to listen and make up his mind on the evidence, not on gossip and rumor. He agreed. We three met somewhere for lunch and talked for quite some time. I don't even remember the total substance.

When we were done, the Senator apparently concluded that Ruth Ginsburg was, indeed, a legal scholar from no ideological school, who quite certainly had some strong ideas on the laws relating to gender. But Ruth Ginsburg also demonstrated that she clearly had the makings of a judge before whom lawyers of all ideologies and persuasions would like to appear and have cases decided. The opposition thereafter seemed to have melted away.

And Ruth was confirmed and on her way to today. Senator Hatch and I recently reminisced about that day, as two proud colleagues. Coming as we do from our respective political philosophies, this is true diversity in action.

So, to repeat and conclude, the candidate is well qualified, exceptionally well qualified. That the candidate is a woman truly is incidental. When she is confirmed, President Clinton and the Senate will have taken a large step in demonstrating that gender should be and is irrelevant. The eminently well-qualified Justice O'Connor was the first woman on the Court. There had to be a first. There always has to be a first. But now, hopefully, we may be over "firsts," and into quality without regard to gender. To me it is a major event for the bar and the country. And I think we ought to pause for just one moment and acknowledge it.

Thank you.

[The prepared statement of Mr. Millstein follows:]

**PREPARED STATEMENT OF IRA M. MILLSTEIN**

I've known Ruth and Martin Ginsburg since the summer of 1957 when Martin joined our firm as a summer associate. We were then about 20 lawyers—all male—in smallish quarters on 42nd Street in New York City; we are now 650-plus lawyers in about nine geographic locations, at last count. I've been their friend throughout, even though we lost Marty as our partner in 1980 when Ruth became a Judge on the District of Columbia Circuit Court—a moment I recall with some bitter-sweetness. Sweetness at Ruth's appointment, her confirmation, and at being able to assist Ruth in that process; disappointment at losing from my firm the best tax lawyer in the United States, when they moved to Washington, away from our home base in New York City.

You've heard, and this morning no doubt will continue to hear, from Supreme Court scholars and practitioners about Ruth's talents and potential for being one of the great, not just good, Supreme Court Justices; surely you don't need still another exegesis on that subject. What may not have been emphasized enough is what I (and others such as Stanford Law School's outstanding Constitutional Scholar—Professor Gerald Gunther who is here today) perceive to be her greatest qualification—her non-ideological scholarship. She will be a Justice who applies the law carefully, analytically and with integrity in a clear and lean manner. She will not, however, operate in a vacuum, but, because she is who she is and has been, she will be ever mindful of the world she lives in and the men and women who inhabit it.

One recent decision, *Roosevelt v. DuPont*, 958 F.2d 416 (D.C. Cir. 1992), exemplifies my view of her judicial approach about as well as any decision of hers that I've read. It's meaningful to me because it deals with my practice area—business-related issues.

There, Judge Ginsburg flexibly entertained an issue first raised on appeal—because the Supreme Court had earlier suggested that appellate courts not by-pass, on technicalities, "issues of importance to the administration of federal law." She concluded that in "exceptional circumstances" Courts of Appeal "are not rigidly limited" solely to issues raised below. Moving to the merits of an important proxy issue, her reasoning followed a model process of clarity and precision. Dealing with a federal statute—she first looked to Congressional intent, and found a delegation of authority to the SEC, with very modest guidance from Congress as to how that delegated authority should be exercised. She next turned to the SEC action at issue to see if it coincided with Congress' intent. She obviously considered relevant judicial precedents, and importantly looked to expectations built upon a rather consistent interpretation of the law. Again, showing regard for not wasting litigator and judicial time with remands, she accepted a public statement of facts not strictly within the record below, but necessary to the outcome. Her decision was widely acclaimed—but, to me, the key was her flexibility, the scope of her inquiry and reasoning, and the concise nature of an opinion that said a great deal in a very short compass. You are dealing with a quiet person who possesses a legal mind of enormous scope, who recognizes the role of the Judiciary as one branch of government that, while working with co-equal branches, must be ever mindful of individual rights. And, by now, you must know that.

Her moderate views on the interstitial role of the Judiciary, and the need for collegiality on the Appellate Benches, are nowhere better stated than in her own "Madison Lecture" of March 9, 1993.

So, let's pass her obvious talents and non-ideological—rather ideal—approach to judicial decision-making. You have in Judge Ginsburg a Judge—and soon I hope a Justice—who practitioners would conclude will not only give them a fair shake, but

will do so with care and erudition. One can't ask for more from any Bench, or for any less from the Country's most important Bench.

But something even more important may be happening, and we shouldn't let the moment pass without comment. Having chosen as a candidate a lawyer/judge from a small pool of the very best quality available, I would like to think that President Clinton, and soon you and the Senate, have chosen, with gender-blindness, a person who happens to be a woman. If perhaps that is an overstatement this time, the day will soon come when it won't be.

Practicing now for almost 45 years I've watched the Bench and Bar become populated with women, but ever so slowly, and with a good deal of room for improvement. I serve with Cy Vance and others on a New York City Bar Association Committee on Diversity, which is a nice way of describing a Committee that is asking ourselves how we're doing with gender and race. The answer is: we're trying—but probably not hard enough—and there are ways we can improve.

Judge Ginsburg and my wife (also a professional woman) are among the reasons for my concern about diversity. Through both, and though the women who have become my partners at my firm, I've seen the indignities and unfairness which still exist; less than Ruth and my wife Diane grew up with—but far more than should still exist.

Marty, Ruth, Diane and I were friends when our children were small in the 60's and 70's. We saw each other and each other's children often. But then we all became busy on respective career paths in the 80's and 90's, and geography intervened. When we talk though—it's as if no time at all has passed.

In those early years, a person with Ruth's qualifications should have been fought over and sought by the law firms upon her graduation. It didn't happen. She should have had no trouble securing tenure on a Harvard, Yale or Columbia faculty. It didn't happen. I remember Marty's frustration and anger when Ruth was turned down for a professorship at a law school where we all thought we could help. I'm convinced that the only issue was gender on the faculty; and gender was still an issue in law partnerships around the country. It is no wonder that in the 70's Ruth Ginsburg turned her quality mind to gender issues under the United States Constitution and focused the profession's conscience on an issue the majority had been ignoring. The profession wasn't great in making room for women and racial minorities. I recall early on inviting a woman associate—our firm's first—to accompany me to a Bar Association lecture and reception—and being roundly ribbed and jabbed for doing so. I was embarrassed for us all. It's not so great—even now. I witnessed, just within the year, a small example. One of my women partners and I met a male who welcomed me warmly, and then invited us into his office—turning to my partner and saying, "C'mon honey, this way." I'm sure, it was said without thought or to denigrate, but nonetheless it was indicative of an attitude that hasn't died easily in our profession. My partner didn't flinch.

How does our profession overcome this? Only by training ourselves actively, and sensitizing ourselves to dealing with gender and race in a diverse workplace.

But actually making progress is even more important. And gender and racial diversity in our workplace becoming commonplace, is the single most important proof of progress in our profession. The workplaces for most of us are our partnerships, and the courtrooms. We lawyers normally behave ourselves in courtrooms, and sometimes take our good behavior with us out of the courtroom. When it becomes commonplace to appear before diverse judges, gender and racial distinctions will disappear further. The Bar's task is to make diversity acceptable and commonplace in our firms; the Executive and Legislative Branches should do likewise for the Judiciary. Happily, this is now becoming much easier for all of us. None of us can hide behind the old shibboleth that said: show me a dedicated and qualified woman and she'll make partner (or Judge, or Commissioner, or whatever). Of course, for years we defined "dedicated and qualified" to exclude 99 percent of those who applied. After a long struggle however, definitions have been clarified and there are now pools of highly qualified lawyers of diversity—so that choosing can be gender blind—and perhaps this day (and Ruth) should mark a beginning of gender blindness—for both the Bench and the Bar.

Senator Hatch deserves a very honorable mention in this process. When President Carter nominated Ruth to the D.C. Circuit towards the end of his four year term, it seemed as though the appointment would languish until after the election of November 1980. In that event, the likelihood of Ruth's confirmation, we now know, would have been slim to none. Opposition to Ruth was largely based on the assertion that she was a single issue lawyer—"women's rights".

I knew Senator Hatch from some prior dealings, the substance of which I now forget. But, of all the Republicans on this Committee, I thought I had the best relationship with him. I, personally, knew him to be open-minded. We didn't often agree

on substance—but I was always treated courteously and he heard me out. I called the Senator and asked for an audience for Ruth—urging him to just listen and make up his mind on the evidence—not gossip and rumor. He agreed. We three met somewhere for lunch and then talked for quite some time. The talk ranged over cabbages and kings and lawyers and judges, and I can't recall specifically.

When we were done, the Senator apparently concluded that Ruth Ginsburg was a legal scholar from no ideological school—who indeed had strong ideas on the law relating to gender issues. As she recently pointed out to this Committee, her gender work in the 70's was toward \* \* \* "the advancement of equal opportunity and responsibility for women and men in all fields of human endeavor." Ruth Ginsburg also demonstrated that she clearly had the makings of a judge before whom lawyers of all ideologies and persuasions would like to appear and have cases decided. The opposition melted away.

And Ruth was confirmed and on her way to today. Senator Hatch and I recently reminisced about that day, as two proud colleagues. Coming, as we do, from our respective political philosophies—that is true diversity in action.

So to repeat and conclude: This candidate is qualified—exceptionally qualified. That the candidate is a woman truly is incidental. When she is confirmed—President Clinton and the Senate will have taken a large step in demonstrating that gender should be, and is, irrelevant. The eminently well-qualified Justice O'Connor was the first woman on the Court—there had to be a first—there always has to be a first. But now, hopefully, we may be over "firsts" and into quality without any regard to gender. It's a major event for the Bar and the Country. Let's pause for one moment and acknowledge it.

**The CHAIRMAN.** Thank you very much. I thank you all. Your words were eloquent. They obviously speak for themselves. I have no questions.

Senator Hatch.

**Senator HATCH.** I just want to welcome all of you here and thank you all for appearing. I think you made very good statements that everybody should be listening to.

**The CHAIRMAN.** Senator Feinstein.

**Senator FEINSTEIN.** Just a small observation. As one who has usually in my prior life seen lawyers through the lens of an individual case, it is wonderful to see the breadth and the macro picture of the law. And I think it would lead every American to have a very great respect for the law. So I want to very sincerely thank you for coming, particularly Judge Hufstedler, whom I know. And I think we are going to see the glass ceiling shattered, and I must say I concur with your views 100 percent.

Thank you very much.

**The CHAIRMAN.** I thank you all.

**Mr. COLEMAN.** Mr. Chairman, since I am the only one that observed the 5 minutes, if I——[laughter].

**The CHAIRMAN.** No, Mr. Millstein observed the 5 minutes. Mr. Smith was close, and the judge, because she is a judge, is not bound by any rules. [Laughter.]

Judge HUFSTEDLER. Thank you.

**Mr. COLEMAN.** I just want to add my thanks to this committee that you would spend the three or four days airing this, although I am pretty sure after the first day everybody felt that in this case the nomination would be reported favorably. I think you have greatly educated the American people as to what the law is about, what this country is about, and how responsible politicians and judges try to meet the demands of the American people. And I thank you very much for taking the time and effort and providing the brains and brilliance in the way you conducted yourself.

The CHAIRMAN. Thank you very much, Mr. Secretary. Nice comment. I thank you all.

Senator HATCH. Thank you.

The CHAIRMAN. Our third panel is comprised of two very prominent members of the legal academic community. I might add that we could have had 150 members of the legal academic community who were willing and anxious to come and testify. But there was such unanimity that we responded to two in particular. The first is Prof. Gerald Gunther, the William Nelson Cromwell Professor of Law at Stanford Law School. Professor Gunther served as a law clerk for Chief Justice Earl Warren, and prior to his appointment at Stanford was a member of the faculty at Columbia University School of Law. Welcome, Professor. It is nice to have you back. And thank you, I might add parenthetically, for always being available to this committee for any information we ask and any input we have asked of you.

Next we have Herma Hill Kay, who is a dean of the University of California at Berkeley, Boalt Hall, School of Law. It is nice to see you again, Dean. Again, I thank you, every time I have asked for your input, you have provided it. She is a coauthor with the nominee of a casebook on sex-based discrimination and was among the first full-time women law professors in this country.

I welcome you both, and I will yield to you in the order you have been recognized.

**PANEL CONSISTING OF GERALD GUNTHER, WILLIAM NELSON CROMWELL PROFESSOR OF LAW, STANFORD UNIVERSITY, STANFORD, CA; AND HERMA HILL KAY, DEAN, SCHOOL OF LAW, UNIVERSITY OF CALIFORNIA, BERKELEY, CA**

**STATEMENT OF GERALD GUNTHER**

Mr. GUNTHER. Thank you, Mr. Chairman, members of the committee; that is, Senator Feinstein, my own Senator, a Stanford alumna, our last, most recent commencement speaker. I am really personally overjoyed and proud as well as professionally heartened that this committee is considering the nomination of Ruth Bader Ginsburg for a seat on the Supreme Court.

I speak as a teacher of constitutional law for more than 35 years, and as someone who has known Ruth Ginsburg well for almost as long a time. I am entirely confident that she possesses all of the qualities you should cherish in a Supreme Court Justice.

Ruth Ginsburg was my student at Columbia Law School. She was a brilliant student. She demonstrated extraordinary intellectual capacities, as she has in everything she has undertaken all her life. In the 1950's, I set up a program at Columbia to place our graduates as judicial law clerks, and I assisted her selection by a fine, originally recalcitrant, Federal judge.

I have followed her work closely in the years since. I admired her scholarly capacity as a faculty member at Rutgers and then at Columbia, and especially her historic work on behalf of women's rights, as a brief-writer and oral advocate before the Supreme Court.

In 1980, Ruth was named, as you know, to the Court of Appeals for the District of Columbia Circuit. I was asked then to speak at

her investiture ceremony and to speak about the task of judges. I had just begun work on a biography of one of our greatest Federal judges, Judge Learned Hand. In my address before the District of Columbia Circuit, I understandably spoke about Hand and compared Ruth Ginsburg's potential talents to his.

Although I do not claim a great track record in predicting anything—football, soccer, elections, you name it—I have taken special delight in the fact that my expectations about Ruth were entirely, and to me not surprisingly, fulfilled. I said then that I knew Ruth to be modest, thoughtful, penetrating, fair and open-minded, and I suggested that those qualities equipped her ideally for the bench.

I also said that she has the character and temperament, the persistence, the sense of responsibility, the modesty as well as the courage and strength reflected in Learned Hand's words and deeds. I read her opinions on the court of appeals for the last 13 years with great interest as they were handed down, and she disclosed precisely those qualities.

Ruth Ginsburg, I am convinced, possesses the ingredients, the moral qualities Hand thought essential for greatness. And I am confident she will confirm that greatness on the Supreme Court. She clearly possesses the requisite intellect, temperament, and character. Her opinions reflect an obvious belief in and fidelity to the law, careful attention to the records before her, and an appropriate respect for the force of precedent. She has demonstrated integrity and analytical skills. She is also characteristically sympathetic to the fact that the disputes before her involved human beings and that a court's rulings have an impact on those human beings. One would expect no less in a person who is herself a splendid human being, who has managed to integrate with great skill her roles as lawyer and teacher and judge as well as wife and mother, and who overcame the many obstacles that confronted her and other women who were entering the profession in the 1950's.

You have an opportunity to recommend the confirmation of an individual who will be a great Justice, a person who will contribute immensely to the collegiality, the intellectual quality, and the wisdom of the Supreme Court of the United States.

Now, I fully expect to criticize Justice Ginsburg's opinions on the Court. After all, that is my professional task. I am confident, however, I will never have reason to doubt her integrity, her judicial temperament, and her analytical abilities. I know that I, like most of my fellow academics, look forward to evaluating the work of a Supreme Court with Ruth Ginsburg on it.

I have tried to summarize my remarks. I have submitted a longer statement for the record.

The CHAIRMAN. Without objection, your entire written remarks will be placed in the record. It is hard to see how they could improve upon what you have said.

Mr. GUNTHER. Well, I did actually include a copy, as a matter of ultimate egomania, of the speech I delivered before the D.C. Circuit, because I well remember, Senator, the reaction at the reception afterwards when everyone I talked to winked at me when I tried to compare Ruth Ginsburg to the qualities of Learned Hand, and they said, "Nice job. But, of course, she is not going to turn

out that." I have never been happier about being right on something in my life.

[The prepared statement of Mr. Gunther follows:]

**PREPARED STATEMENT OF GERALD GUNTHER**

I am personally overjoyed and proud as well as professionally heartened that this committee is considering the confirmation of Ruth Bader Ginsburg for a seat on the Supreme Court.

I speak as a teacher of constitutional law for more than thirty-five years, and as someone who has known Ruth Ginsburg well for almost as long a time. I am confident that she possesses all of the qualities you should cherish in a Justice.

Ruth Ginsburg was my student at Columbia Law School. She was a brilliant student; she demonstrated extraordinary intellectual capacities, as she has in everything she has undertaken throughout her life. In the 1950's, I set up Columbia's program for placing graduates as judicial law clerks, and I assisted her selection by a fine federal trial judge. I have followed her work closely in the years since; I admired her scholarly capacity as a faculty member at Rutgers and then at Columbia, and especially her work on behalf of women's rights, as a brief-writer and oral advocate before the Supreme Court.

As a teacher of constitutional law and the author of a casebook in my field, I am very familiar with her central, indeed historic, role in shaping the modern law of gender discrimination. To this day, I—and, I suspect, most teachers in my field—speak admiringly of her singular contribution.

In 1980, Ruth Ginsburg was named to the U.S. Court of Appeals for the District of Columbia Circuit. I was asked to speak at her investiture ceremony. I had just begun work on a biography of one of our greatest federal judges, Learned Hand (a biography that will be published in a few months). In my address before the D.C. Circuit, I understandably spoke about Hand and compared Ruth Ginsburg's potential talents with those of my subject. (I am taking the liberty of attaching my 1980 address as an appendix to this statement.) Although I do not claim a great track record in predictions, I have taken special delight in the fact that my expectations about Ruth Ginsburg were fulfilled. I said then that I knew Ruth to be "modest, thoughtful, penetrating, fair and open-minded," and I suggested that these qualities equipped her ideally for the bench. I also said that "she has the character and temperament, the persistence, \* \* \* the sense of responsibility, the modesty as well as the courage and strength reflected in Learned Hand's words and deeds." Hand's greatness, in my view, stems from a special combination of character and temperament and intellect that, in combination, produces the capacity to be a "modest but creative judge" who "is heedful of limitations stemming from the judge's own competence and [from] the presuppositions of our constitutional system." I read her opinions on the Court of Appeals for the last thirteen years with great interest as they were handed down, and she disclosed precisely those qualities.

In my close attention to Ruth's career over the years, especially her judicial career, some of Hand's words often come to mind as aptly describing Ruth Bader Ginsburg. Hand once said that the prime condition of great judging is a "capacity for detachment." He went on to say: "There are those who insist that detachment is an illusion; that our conclusions, when their bases are sifted, always reveal a passional foundation. Even so; though they be throughout the creatures of past emotional experience, it does not follow that that experience can never predispose us to impartiality. A bias against bias may be as likely a result of some buried crisis, as any other bias." A great judge, he also said, acts "with patience, courage, insight, self-effacement, understanding, imagination and learning."

Ruth Bader Ginsburg, I am convinced, possesses the ingredients, the "moral" qualities, Hand thought essential for greatness. I am confident that she will confirm that greatness on the Supreme Court. She clearly possesses the requisite intellect, temperament, and character. Her opinions reflect an obvious belief in and fidelity to the law, careful attention to the records before her, and an appropriate respect for the force of precedent. She has demonstrated integrity and analytical skills. She is also characteristically sympathetic to the fact that the disputes before her involve human beings and that a court's rulings have an impact upon those human beings. One would expect no less in a person who is herself a splendid human being, who has managed to integrate with great skill her roles as lawyer and teacher and judge as well as wife and mother, and who overcame the many obstacles that confronted women when she entered the profession.

You have an opportunity to confirm an individual who will be a great Justice, a person who will contribute immensely to the collegiality, intellectual quality, and wisdom of the Court.

I fully expect to criticize Justice Ginsburg's opinions on the Court—after all, that is my professional task. I am confident, however, I will never have reason to doubt her integrity, her judicial temperament, and her analytical abilities. I know that I, like many of my fellow academics, look forward to evaluating the work of a court with Ruth Bader Ginsburg on it.

The CHAIRMAN. Dean Kay.

#### STATEMENT OF HERMA HILL KAY

Ms. KAY. Thank you, Chairman Biden. I want to say before I start that I do not yield to my colleague, Professor Gunther, in his admiration for our Senator from California, Senator Feinstein. It is a pleasure to see her here today on this committee.

It gives me great pleasure to be here and to participate in your deliberations as you prepare to recommend to the Senate the advice it should give to President Clinton on his nomination of Judge Ruth Bader Ginsburg to the U.S. Supreme Court.

President Clinton's choice of Judge Ginsburg is wise and inspired, sound and practical. In Judge Ginsburg, President Clinton has found a constitutional scholar who knows from her own experience what it means to be excluded despite outstanding credentials solely because of sex. In the early 1970's, she brought that experience—and her flawless logic—to the bar of the U.S. Supreme Court, where she will soon take her seat. In case after case, she hammered home the point that for the law to assign preexisting roles to men and women is limiting to both sexes and is forbidden by the equal protection clause.

It is a point that, 20 years later, many regard as self-evident. But the High Court seemed unable to grasp that point prior to Judge Ginsburg's advocacy, instead taking as its starting position the belief that a legislative distinction drawn on the basis of sex was a rational classification that passed constitutional muster.

Ruth Bader Ginsburg's strategy of written and oral advocacy to help the nine men then sitting on the Supreme Court understand the irrationality of sex-based classification was one of patient instruction. She chose cases, as Judge Hufstedler said, in which the law's unequal treatment of men and women was evident and the consequent need for a broader interpretation of the equal protection clause could be clearly established and readily accepted. The result is that her cases are now constitutional classics: *Reed v. Reed*, 1971: A mother can administer a deceased child's estate as capably as a father. *Frontiero v. Richardson*, 1973: A service-woman's Air Force pay earns the same fringe benefits for her dependent spouse that a serviceman's pay provides for his. *Weinberger v. Wiesenfeld*, 1975: A widowed father is entitled to the same insurance benefits available to a widowed mother to help him care for his infant son after his wife's death. *Califano v. Goldfarb*, 1977: A deceased wife's earned income provides the same survivor's benefits to her widowed husband that a deceased husband's widow would receive.

These are some of the legal propositions that Judge Ginsburg established as an advocate, and she used them to help the Court forge a new understanding of the equal protection of the laws. It

was Ruth Bader Ginsburg's voice, raised in oral argument before the U.S. Supreme Court, that opened new opportunities for the women of this country. She was in the forefront of the creation of the legal precedents that advocates who have followed her have used, time and time again, to build a strong edifice against discrimination that now protects many groups. She left her enduring mark on the Constitution even before taking her place on the Supreme Court.

I speak today not only as an academic observer of Judge Ginsburg's works, but also as her co-author and friend. I have had the privilege of working with her on our casebook on "Sex-Based Discrimination," published in 1974. She and I are both among the first 20 full-time women law professors in the country. We continue to serve together on the Council of the American Law Institute. From those vantage points, I can say that hers is a courageous intellect, and that she is as steadfast and loyal a colleague and friend as anyone could wish. Her standards are exacting. She produces the best and most precise work, and she expects the same from others.

As this confirmation process has shown the Nation, she thinks deeply and chooses her words with care. But I can tell you that her compassion is as deep as her mind is brilliant. In Ruth Bader Ginsburg, the President has offered the country a Justice worthy of the title. I urge this committee to recommend that the Senate give its enthusiastic consent to her appointment to the U.S. Supreme Court.

Thank you, Mr. Chairman.

[The prepared statement of Ms. Kay follows:]

#### PREPARED STATEMENT OF HERMA HILL KAY

Senator Biden, Members of the Judiciary Committee, it gives me great pleasure to be here and participate in your deliberations as you prepare to recommend to the Senate the advice it should give President Clinton on his nomination of Judge Ruth Bader Ginsburg to the United States Supreme Court.

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Ruth Bader Ginsburg's strategy of written and oral advocacy to help the nine men then sitting on the Supreme Court understand the irrationality of sex-based distinctions was one of patient instruction. She chose cases in which the law's unequal treatment of men and women was evident and the consequent need for a broader interpretation of the equal protection clause clearly established and readily accepted. The result is that her cases are now constitutional classics: *Reed v. Reed*, 1971: A mother can administer a deceased child's estate as capably as a father. *Frontiero v. Richardson*, 1973: A servicewoman's Air Force pay earns the same fringe benefits for her "dependent" spouse that a serviceman's pay provides for his "dependent" spouse. *Weinberger v. Wiesenfeld*, 1975: A widowed father is entitled to the same insurance benefits available to a widowed mother to help him care for his infant son after his wife's death. *Califano v. Goldfarb*, 1977: A deceased wife's earned income provides the same survivor's benefits to her widowed husband that a deceased husband's widow would receive.

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The CHAIRMAN. Thank you, Dean.

I have been in the Senate 20 years, and I have sat through a lot of nomination hearings for the court generally, and the Supreme Court in particular. I must say I have never heard higher praise for a nominee than I have heard from those who have testified today. I thank you for adding your insight to these deliberations. And your reputations individually precede you, and it means a great deal that you think so highly of this nominee, and it reinforces in my mind, and the minds of the committee as a whole, that our initial judgment about Judge Ginsburg was correct, and that the wisdom of the President was demonstrated in his choice. But I thank you both. I have no questions.

I will yield to my friend from Utah.

Senator HATCH. Well, we are happy to welcome both of you here, and we appreciate the excellent testimony you have given. I had to listen to a degree while I was meeting with some people in the back room here, but I don't know that Judge Ginsburg could have had two better law professors come in and speak for her and on her behalf.

Don't you forget, Professor Gunther, when that book on the judge comes out, Learned Hand—

Mr. GUNTHER. Will you make clear, Senator, that we don't have an agreement? That gives me the opening to say it will be published in February 1994 by Knopf.

Senator HATCH. He is going to publish a wonderful book on Learned Hand. February of 1994, you say?

Mr. GUNTHER. Yes.

Senator HATCH. Knopf. I expect an autographed copy, is all I can say.

Mr. GUNTHER. It is yours.

Senator HATCH. I appreciate it, and we are happy to have both of you here. Thank you for coming.

The CHAIRMAN. Senator Feinstein?

Senator FEINSTEIN. Nothing other than to say, Mr. Chairman, you have before you, as you well know, two of—

The CHAIRMAN. I beg your pardon.

Senator FEINSTEIN. I was addressing my comments to you. You have two of California's finest representatives, I think, from two of the greatest universities in the world. And my observation would be, after sitting through these hearings, Dean Kay and Professor Gunther, that if Mrs. Ginsburg were of another religion, she might even be canonized at the end of this.

The CHAIRMAN. I imagine we will work that out before it is over. [Laughter.]

I thank you both, and thank you for taking the time to make the trip. We appreciate it.

The CHAIRMAN. We are going to move out of order here a little bit because the next panel was under the impression, understandably, that we were going to break for lunch. But it is not my intention to break for lunch, and they are presently in the cafeteria on their way back. But our fifth panel is a panel comprised of a former law clerk, former client, and former ACLU colleague of Judge Ginsburg.

Edith Roberts was a law clerk to Judge Ginsburg from 1989 to 1990, and she is presently a staff attorney at the Environmental Law Institute.

I understand Stephen Wiesenfeld is the litigant Judge Ginsburg represented in the landmark gender discrimination case, and he is not here. We will add him to the sixth panel.

Kathleen Peratis was a colleague of Judge Ginsburg while she was head of the American Civil Liberties Union, Women's Rights Project, during the 1970's. Today she is a lawyer in private practice in New York City.

I welcome you both and invite you, starting with you, Ms. Roberts, to give your testimony within 5 minutes, if you would, please.

**PANEL CONSISTING OF EDITH LAMPSON ROBERTS,  
WASHINGTON, DC, AND KATHLEEN PERATIS, NEW YORK, NY**

**STATEMENT OF EDITH LAMPSON ROBERTS**

Ms. ROBERTS. Mr. Chairman and members of the committee, it is an honor for me to be here today to speak in support of the nomination of Judge Ruth Bader Ginsburg to the Supreme Court of the United States. I have had the privilege of knowing Judge Ginsburg in a variety of contexts. She has been my employer, when I served as her law clerk from 1989 to 1990; my mentor, discussing career choices with me after my clerkship ended; my friend, holding a surprise wedding shower for me at her apartment; and the officiator at my marriage to another of her clerks, my husband Matt.

In all these roles, Judge Ginsburg's influence and example have been an inspiration. As her law clerk, I was granted a close-up view of the way Judge Ginsburg approaches her work on the bench. Her thorough knowledge of the letter of the law is matched only by her deep respect for its spirit. Even in the District of Columbia Circuit, with its high proportion of administrative law cases that some might characterize as abstruse and unexciting, Judge Ginsburg comes to each case with fresh enthusiasm, interest, and a commitment to reaching the result the law requires. This commitment manifests itself in her extraordinarily thorough and careful work habits. Long after her clerks have departed each night, and

despite persistent phone calls from a husband requesting her presence at the dinner table, Judge Ginsburg stays in her chambers reading the briefs and pondering the arguments in every case. The precision of the reasoning by which she arrives at a decision is reflected in the conciseness and clarity of her opinions, written and edited with an exact sense of when something is "just right."

This is not the deliberation of an ivory-tower perfectionist. Judge Ginsburg's devotion to reaching the right conclusion, and to explaining it in the clearest possible manner, stems from her keen awareness of the importance of the judge's role in our society. Every day judges make decisions that have real-world effects on individuals and groups. Such decisions cannot be made casually, but require careful and thorough consideration. Judge Ginsburg's sensitivity to those real-world effects has led her to take her law clerks on a tour of Lorton Reformatory on several occasions in order to see a side of the criminal justice system that cannot be conveyed in legal citations or through oral argument.

The precision that marks Judge Ginsburg's approach to judging also reflects her appreciation of the delicate balance by which order is maintained in our system of government. Preserving that balance—between the various branches of government as well as within the judiciary itself, between trial and appellate courts—demands a delicate touch. Judge Ginsburg's command of that touch motivates one of the conventions of her opinion writing. Unlike many appellate court judges, Judge Ginsburg scrupulously avoids referring to the authors of decisions under review in a District of Columbia Circuit as "the lower court" or "the court below." Referring to the "trial court" or the "district court" instead, she instructed us early in our clerkship, conveys appropriate respect for the crucial role played by the judiciary's front line.

All of these hallmarks of Judge Ginsburg's style as a lawyer and a jurist began to influence my own approach to the work of a lawyer during my clerkship. Judge Ginsburg taught me not only how to reason through a case, and to convey the result clearly and concisely, but also how to do so without being divisive or harsh. Her example demonstrated that persuasion, the lawyer's hallmark, does not need to be shrill or strident. Calm assurance can win the day as effectively, and perhaps more enduringly, than grandstanding.

These lessons learned during my clerkship shaped my own approach to the practice of law. But it was not until the clerkship had ended and I entered the professional world, got married, and began to contemplate raising a family, that I recognized the true force of Judge Ginsburg's example. Her ability to attain the summit of professional accomplishments, while still raising a family and building a rich and fruitful marriage, make her a prime role model for a young woman lawyer—or, for that matter, for a young male lawyer—seeking to reconcile the conflicting demands of career and family.

Judge Ginsburg is much more than a role model for professional women. A role model often leads only by example and remains removed from those who seek to emulate her. One as accomplished and as disciplined as Judge Ginsburg might easily have climbed as high as she has, and then have remained content merely to inspire others by her stature. But Judge Ginsburg was not satisfied with

attaining success for herself and her own family alone. She vowed to change the system so that others, perhaps less determined than she or endowed with fewer intellectual gifts, not only could follow in her path, but could find their own, quite different paths. She wanted not just to set an example, but to enable others actually to benefit from what she had achieved, in whatever way they chose. By succeeding in that effort, Judge Ginsburg has become much more than a one-dimensional prototype for professional women. She has helped to engineer changes in our society that enable all individuals to look beyond static social expectations and to fulfill their goals and ideals on their own terms. It is this compassionate commitment to equality without stereotypes that characterizes Judge Ginsburg as a jurist and as a person.

I look forward with confidence and hope to Judge Ginsburg's accession to the Supreme Court. If she is confirmed, I know that she will serve as a thoughtful and caring custodian of what is best in our society for all our children. Thank you.

[The prepared statement of Ms. Roberts follows:]

#### PREPARED STATEMENT OF EDITH LAMPSON ROBERTS<sup>1</sup>

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<sup>1</sup>Edith Lampson Roberts worked as a law clerk to Judge Ruth Bader Ginsburg from 1989 to 1990. She is now a staff attorney at the Environmental Law Institute.

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#### BRIEF BIOGRAPHY OF EDITH LAMPSON ROBERTS

Edith Lampson Roberts received her law degree in 1989 from Harvard Law School, where she was an editor of the Harvard Law Review. From 1989 to 1990, she worked as a law clerk to Judge Ruth Bader Ginsburg on the U.S. Court of Appeals for the District of Columbia Circuit. After her clerkship, she practiced law for two years as a litigation associate at the Washington, D.C. law firm of Miller, Cassidy, Larroca & Lewin. She is now a staff attorney at the Environmental Law Institute, a non-partisan, non-profit center for research and education in the field of environmental law.

The CHAIRMAN. Well done.

Ms. Peratis.

#### STATEMENT OF KATHLEEN PERATIS

Ms. PERATIS. I would like to begin by differing with what some of the earlier speakers have said. I don't think that Ruth Bader Ginsburg should be thought of as someone who has been chosen just because she is the best and her sex, her gender, is irrelevant. I think it is very relevant. I think it is crucial. I think that having another woman in the Supreme Court is central to the importance of what is going on today. I think we had a graphic example yesterday of how crucial it is that there is an African-American in Congress. I think that Senator Moseley-Braun's race is not irrelevant, and I think that Judge Ginsburg's sex is not irrelevant.

I have worked with Judge Ginsburg, or I did work with her through most of the seventies. I met her in 1973, and she hired me a few months later to succeed her at the ACLU. So I had the great privilege of watching this grand strategy unfold and working at her side and at her feet for a good part of it.

She was not only all the wonderful things that you have heard, creating this entire area of gender discrimination law under the Constitution, but she shaped a whole generation of women lawyers. There were dozens and dozens and scores of women who worked with her, and worked with her very closely, and were infected by her vision of social justice.

What we have seen in the last week is a very careful judge who takes her responsibilities seriously, who knows the law in its breadth and depth as well as anybody in the country, and perhaps more than most. But what we saw at the ACLU was a grand strategy for revolutionizing the constitutional law of this country.

I think that she has a broad vision of social justice. She has a broad and expansive notion of using the law as a tool of achieving social justice.

When she was at the ACLU and when she was teaching at Columbia and running the ACLU Women's Rights Project, her vision of social justice was instructive to all of us. People were amazed at how accessible Judge Ginsburg was during those years. She was always reachable by women lawyers who were trying to figure out what we ought to do next, and she not only chose her own cases with care, but she had a broad range of control over all the sex discrimination litigation that took place in the seventies. She stopped cases that should have been stopped. She encouraged cases that should have been encouraged. And she counseled us on which case was which. And we took her instruction very seriously, and when we failed to follow her advice and pursued a case that she counseled against, we usually lost because she knew, as she knows as a judge, that you have to take one step at a time and not ask judges to go too far too fast. Because if you do, you may lose what you might have won.

I think that her litigation strategy as an advocate will be reflected in her vision as a Justice on the Supreme Court. I think she has a vision, and I think that her constraint as an appellate judge is an indication of how she follows the rules. As a litigator, she followed the rules by never citing a case for something it didn't stand for, by being extremely careful, and by being reliable. And she has been careful and reliable as a court of appeals judge.

Her nomination to the Supreme Court I think fulfills her destiny. I have believed, since 1974 at least, that she would end up on the Supreme Court. I think there is a whole generation of women who are now, as I am, women of a certain age who were young lawyers in the early seventies, who believed that she would end up on the Supreme Court. She has said that she didn't think about it. We thought about it. We believed it.

My first daughter was born in 1977, and I named her after Ruth Ginsburg. I told her, my daughter, that she was named after the woman who would be the first woman on the U.S. Supreme Court. When Sandra Day O'Connor was appointed in 1981—

The CHAIRMAN. She thought her name was Sandra?

Ms. PERATIS. My daughter said, "Mom, what's the deal here? You told me that Ruth was first on the Supreme Court." I had to give her a little political lecture.

But the fact that Ruth has now been nominated and apparently will be confirmed is a fulfilling of her destiny and the fulfillment of a dream of a whole generation of women lawyers for whom her gender is not irrelevant. Her gender is central and crucial, and we are all proud. We are proud, and as you can see in a lot of respects, Ruth is humble. She has done her work carefully and with dedication for many years, and I think that will continue. And as a Supreme Court Justice, I believe she will walk humbly and do justice for the rest of her life.

Thank you.

[The prepared statement of Ms. Peratis follows:]

#### PREPARED STATEMENT OF KATHLEEN PERATIS

I am Kathleen Peratis. I am a lawyer in private practice in New York City. I am here as a friend and colleague of Ruth Bader Ginsburg. I am also here as a representative of the thousands of women lawyers, judges and law students and women who aspire to be lawyers, judges and law students who Ruth has inspired and for whom she has served as a role model over the last 25 years.

I met Ruth in 1973 at a national conference of feminist lawyers held in New York City. There were, at that time, no more than several dozen of us in the whole country. I had graduated from law school four years earlier, and in my class of about 150, there had been 6 women.

Although our numbers were few, and although our task, justice for women, was monumental, we knew that our time was nearly come. We knew this for a number of reasons, but chief among them was that we were led by Ruth Bader Ginsburg.

In 1971, Ruth had won a case in the United States Supreme Court, *Reed v. Reed*, in which for the first time in our history, a discriminatory gender classification was declared unconstitutional. When that happened, we had been heartened, inspired and suddenly overcome with the notion that justice was possible.

And so, when I actually met Ruth in 1973, it was like meeting Joan of Arc. She offered me a job a few months later, to succeed her at the ACLU when she became a full time law professor at Columbia Law School. Thus began five of the most exciting and professionally rewarding years of my life, although she was full time at Columbia, she was also full time at the ACLU. I watched her, the foremost women's rights lawyer in the country, implement her constitutional strategy for undoing 200 years (or more, depending upon your perspective), of entrenched gender discrimination. She did it case by case, and she won every one—except the one she knew should never have gone to the Supreme Court in the first place, but was unable to stop. More of that in a moment.

Ruth's overarching principle was equality. Her fundamental commitment was to the proposition that gender classification, even those that purported to be benign, always hurt women and usually hurt men. Her faith was abiding that men were by and large people of good will, and that if the harmfulness of gender classification were rationally and carefully explained to them, they would understand and respond by working with us to undo the injustice, piece by piece.

Her litigation strategy called for identifying gender classifications that embodied stereotypical notions of women which were harmful both to the non-stereotypical woman and also to her spouse. That is the common denominator of *Frontiero*, *Weisenfeld*, *Struck*, *Moritz* and a host of others. *Kahn*, the only one she lost, does not fit that pattern, and she knew it. She never wanted that case to go to the Supreme Court, and tried very hard, albeit unsuccessfully, to stop it. She thought it was a loser, and she was right. It seemed to benefit certain women and hurt none. The invidiousness was too subtle and the Court didn't understand.

As her strategy was unfolding, Ruth became a mentor and a role model for a whole generation of feminist lawyers who, like me, are now women of a certain age. She not only inspired us with her success, she was present on a day to day basis to help us. People were always amazed at how easy it was to get in touch with Ruth. She was almost always by the phone either at Columbia or at home, and she always had time to talk about a problem or issue, to review a brief, and make comments and suggestions, or to meet with groups of women to discuss policy or strategy. She was always very clear that our work had to advance us toward one goal—

equality. Thus, any argument or strategy that required an assumption that women were better than men, or that implied that mere equality was not enough, provoked a steely stare. She would then remind us that the gender classification we endorse today will be precedent for the gender classification that puts us or keeps us in our place tomorrow. Today's pedestal is tomorrow's cage.

Her litigation strategy in the '70's turned out to be a good fit for her later judicial philosophy of the '80's. She insisted then that we attempt to develop the law one step at a time. Present the Court with the next logical step, she urged us, and then the next and then the next. Don't ask them to go too far too fast, or you'll lose what you might have won. She often said "It's not time for that case." We usually followed her advice and when we didn't, we invariably lost.

It's no wonder my colleagues and I, Ruth's acolytes by the score, assumed from quite early on, certainly by the mid 1970's, that Ruth would be the first woman on the Supreme Court. When my first daughter was born in 1977, and I named her after Ruth, I told my daughter that her namesake would be the first woman on the Supreme Court. When Justice O'Connor was appointed, in 1981, I had some explaining to do.

Ruth has not only been role model and colleague, she has been a friend. She has shared my joys with me and allowed me to share some of hers with her. She is generous with her time and affection, and devoted to her family and friends. She is accessible, patient and almost wholly without what is negatively described as ego. She is, in short, at least off the bench, thoroughly non-judgmental.

As I know her, Ruth is an overpowering intellect and a dear and compassionate friend. Because of these qualities of mind and spirit, my belief is that as a Supreme Court Justice, she will, as she has for her entire professional life, walk humbly and pursue justice.

The CHAIRMAN. Thank you very much. Well said.

Senator HATCH. Thank you very much for appearing.

The CHAIRMAN. Senator Feinstein, do you have any questions?

Senator FEINSTEIN. I have no question.

You are free to go. Thank you very much.

Senator HATCH. Senator Cohen?

The CHAIRMAN. I beg your pardon. I'm sorry. Senator Cohen?

Senator COHEN. No questions.

The CHAIRMAN. Thank you all very much.

Now we will go back to our fourth panel. Our next panel is comprised of representatives of a number of groups wishing to testify in opposition to the nomination of Judge Ginsburg.

The first is Paige Comstock Cunningham, who is president of the Americans United for Life, in Chicago, IL. Next is Rosa Cumare, a partner in the firm of Hamilton & Cumare, Pasadena, CA. We also have with us Nellie Gray, who is the president of the March for Life Education and Defense Fund, and has been a welcome witness at a number of hearings. This is not her first time to testify at this and other hearings, and we welcome her.

Susan Hirschmann, executive director of the Eagle Forum, in Washington, DC. Also on this panel is Kay Coles James, vice president of the Family Research Council, but I understand she is in the hearing in the Labor Committee at this time. And last, but certainly not least, is Howard Phillips, chairman of the Conservative Caucus, who is testifying on behalf of the U.S. Taxpayers Party, is that correct, Howard?

Mr. PHILLIPS. On behalf of both organizations.

The CHAIRMAN. On behalf of both organizations.

I welcome you all, and I would invite your testimony in the order in which you have been recognized.

Ms. Cunningham, welcome.

PANEL CONSISTING OF PAIGE COMSTOCK CUNNINGHAM, PRESIDENT, AMERICANS UNITED FOR LIFE, CHICAGO, IL; ROSA CUMARE, HAMILTON & CUMARE, PASADENA, CA; NELLIE J. GRAY, PRESIDENT, MARCH FOR LIFE EDUCATION AND DEFENSE FUND, WASHINGTON, DC; SUSAN HIRSCHMANN, EXECUTIVE DIRECTOR, EAGLE FORUM, WASHINGTON, DC; KAY COLES JAMES, VICE PRESIDENT, FAMILY RESEARCH COUNCIL, WASHINGTON, DC; AND HOWARD PHILLIPS, CHAIRMAN, THE CONSERVATIVE CAUCUS, VIENNA, VA

**STATEMENT OF PAIGE COMSTOCK CUNNINGHAM**

Ms. CUNNINGHAM. Thank you, Mr. Chairman.

Mr. Chairman and members of the Judiciary Committee, I thank you for this opportunity to testify on the nomination of Ruth Bader Ginsburg to the U.S. Supreme Court.

I am an attorney, a graduate of Northwestern University School of Law. I am a wife and I am a proud mother of three children. I think all those things bear on the testimony that I am giving today, because it is likely that I have reaped in my own career from the seeds that were sown by Judge Ginsburg in her efforts to abolish sex discrimination.

As you mentioned, I am also the president of Americans United for Life, which is the legal arm for the pro-life movement, and we are the oldest national pro-life organization in this country. We are nonpartisan and we are secular, and we are committed to the protection of the vulnerable and the innocent human life from conception to natural death.

Although Judge Ginsburg may possess the credentials to sit on the Supreme Court, we are concerned about the process by which she was nominated and her views on abortion, and appreciate this opportunity to fully educate the Nation, and that is what I appreciate about this process of a thorough look and an opportunity to speak.

I am troubled because, in the first time in our history, a Supreme Court nominee has been required to pass a test, an abortion litmus test. President Clinton made this very clear before he nominated Judge Ginsburg to the High Court. This is a litmus test which prior nominees were wrongly accused of passing, and why one of them was defeated.

I think it is a tragedy that supporting an act which ends the life of one being and scars the future of another should be considered the supreme test for the Supreme Court. And just as disturbing as this unprecedented litmus test is Judge Ginsburg's attempt to justify the decision in *Roe v. Wade* on the ground that abortion is somehow necessary for women's equality, that women cannot be equal in the law or in society, without abortion, through all 9 months of pregnancy for any reason.

Outside of abortion, *Roe v. Wade* has done absolutely nothing to advance women's rights. State and Federal courts have handed down dozens of decisions striking down various forms of sex discrimination, and few, if any, of these courts, including the Supreme Court, have relied on or even mentioned *Roe*.

The real advances in women's rights have come not through the court cases, but through laws enacted by Congress and by State

legislatures. These are the laws that have banned sex discrimination in public and private employment, in the sale and rental of housing, in education, laws that mandate equal pay for equal work, to name just a few. Do you know what? Not one of those laws depends on abortion.

Judge Ginsburg has repeatedly stated that abortion is protected by the equal protection clause of the Constitution or that that ought to have been the basis, rather than the due process clause. But she has gone farther than the Court and suggested in her writings that there ought to be a public policy supporting taxpayer funded abortions.

Her writings also reveal that she would oppose laws protecting women in crisis pregnancies, laws upheld by the Supreme Court just a few months ago, last year, laws such as a woman's right to know, a 24-hour reflection period to think about information about a decision that she cannot change and that she will live with for the rest of her life, laws involving parents. These laws received overwhelming public support. After all, they are reasonable laws.

Judge Ginsburg has testified before you that abortion is central to a woman's dignity. But what is this legacy of *Roe*? Has a generation of abortion on demand solved any of the problems for which it was offered? Has abortion reduced the rates of child abuse or illegitimacy or teen pregnancy or the feminization of poverty? Has it enhanced respect for women? After 20 years of abortion on demand, abortion has flunked the test as the miracle cure for the social problems it promised to solve.

The only obvious benefit of legalized abortion is the economic one. A \$300 abortion is much cheaper than a \$3,000 delivery of a baby. But what about the cost to women's bodies and women's lives? Thousands of women now bear the scars of perforated uteruses, lost fertility and higher breast cancer risks. Close to 70 percent of all relationships end in the first year after an abortion. Many women are abandoned by the baby's father as soon as the crisis of pregnancy is solved by abortion.

Some women say they can't even pass a playground or turn on a vacuum cleaner, because it sounds like a suction machine. All too often, they fall into a pattern of self-abuse, that abuse which mirrors their abuse by others. The destruction and tragedy caused by 28 million abortions is a gaping national wound, a wound whose ugliness is covered up by polite tolerance and rhetoric about a woman's right to choose and keeping government out of private choices.

And make no mistake about it, coercion to have abortions is real. The coercion may be possible precisely because abortion is legal. That is the unspoken price for progress in our careers. Female medical residents, in an article in the New England Journal of Medicine, reported that tragedy. We attorneys have discovered that same price. And why not? Because if a woman demands that complete autonomy in her abortion decision, it only seems fair that she bear complete responsibility for the consequences of that, and women once again are left alone to pay the price.

Our radical abortion policy, which Judge Ginsburg apparently supports wholeheartedly, would not expand or advance women's issues. I believe it has actually set the clock back on women's dig-

nity, including the dignity of motherhood. Children should be a shared responsibility. Our educational goals and professional dreams should not depend on an elective surgery that creates second-class citizens out of the voiceless.

Abortion goes against the core values of feminism, equality, care, nurturing, compassion and nonviolence. If we women, who have so recently gained electoral and political voice, do not stand up for the voiceless and the politically powerless, who will? Those who promote abortion rights do not represent the women of America. The 1.8 million members of the National Women's Coalition for Life prove that you can be pro-woman and pro-life. Our feminist pioneers, including Susan B. Anthony and Elizabeth Cady Stanton, cited with approval by Judge Ginsburg, were strongly against abortion and recognized it as child murder and a crying evil.

Judge Ginsburg wrote that the greatest judges "have been independent thinking individuals, with open, but not empty minds, individuals willing to listen and to learn." Unless there is convincing evidence that Judge Ginsburg is willing to reexamine her premises about abortion, which she has so recently stated, then we cannot withdraw our objection to her confirmation.

We ask the committee to seriously consider this statement and our more extensive written testimony. The future of women, men and generations of many yet unborn depend on it.

Thank you.

[The prepared statement of Ms. Cunningham follows:]

TESTIMONY

OF

PAIGE COMSTOCK CUNNINGHAM, ESQ.  
PRESIDENT, AMERICANS UNITED FOR LIFE

CONCERNING

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

INTRODUCTION

Mr. Chairman, Senator Hatch, and Members of the Committee, thank you for the opportunity to testify regarding this nomination. My name is Paige Comstock Cunningham. I am an attorney, a graduate of Northwestern University Law School, a wife, and a proud mother of a girl and two boys. It is likely that I have reaped some of the benefits, in my professional career, from the seeds sown by Judge Ginsburg in her efforts to abolish sex-based discrimination in the law.

I am also the President of Americans United for Life (AUL), a national non-profit public interest law firm and educational organization. Both the staff and board of directors are diverse, crossing political, philosophical and religious lines. Indeed, one of AUL's strengths is its nonpartisan, professional and scholarly approach to issues affecting the protection of human life.

Americans United for Life aims to establish, through law and education, protection of innocent persons from conception to natural death against abortion, infanticide and euthanasia.

Although my main area of interest is in state legislation, I have co-authored several amicus briefs. One of those was filed on behalf of the American Association of ProLife Obstetricians and Gynecologists and the American Association of Pro-Life

Pediatricians in Webster v. Reproductive Health Services, in 1989. In her concurring opinion, Justice O'Connor relied on a portion of that brief in her discussion of viability.

The nomination of Judge Ginsburg has evoked much less furor and outcry than the past three or four Supreme Court nominations. This may reflect the Committee's unwillingness to repeat past spectacles, that the majority of the Committee belongs to the President's party, or that special interest groups who have launched massive campaigns against previous nominees are silent because their "ox is not being gored."

In any case, the purpose of this testimony is to address certain aspects of Judge Ginsburg's philosophy and approach to decision making on the Court that may not be fully or fairly explored. Briefly, those issues are: the proper role of the judiciary; Judge Ginsburg's views on judging; her views on gender discrimination; her views on abortion; and the injury to women caused by legalized elective abortion.

Judge Ginsburg is well qualified in many ways to serve on the Supreme Court. Her work as a litigator, advocate, professor, legal analyst and appellate judge have given her broad experience. I hesitate to mention her gender, for that is the very kind of distinction she has worked so tirelessly to eradicate. And if her presence on the bench is promoted as a "good thing" for women, or if she is expected to hold some special regard for "women's rights," then recognition for that reason alone contradicts her entire record as an advocate for the Women's Rights Project she established while General Counsel of the American Civil Liberties Union.

Judge Ginsburg is frequently described as "moderate." If that label holds true when she sits on the Supreme Court, then all of us may be well-served. If she continues ruling carefully, as she has so often done, we would not expect her to support radical shifts in constitutional doctrine.

On the other hand, if Judge Ginsburg brings her personal

views as litigator, academic and advocate to a Court whose rulings are not subject to review, then we have reason to be concerned. For those views cannot fairly be described as moderate. She would be likely to urge the Court to take leaps in constitutional doctrine, leaps that affect issues in which AUL has a direct interest, such as abortion and euthanasia.

#### I. ABORTION AS THE "LITMUS TEST"

A troubling aspect of this nomination is its unprecedented focus on one single issue: abortion. President Clinton's promise to employ an abortion litmus test is historic. This is the first Supreme Court nomination in American history in which a personal commitment to unlimited abortion rights is the "bottom line." Although Judge Ginsburg has not litigated an abortion rights case, her support of abortion rights has been made quite clear, by the President, by her writings, and by her public statements. Whether or not she was asked the question directly is a distinction without a difference, since her views are plainly evident from her own record.

All other things being equal, this is hardly an appropriate measure of one's fitness to serve on the Supreme Court. There is a clear implication that abortion is the "first right." On behalf of myself and millions of women and families in these United States, I object to this highly political use of abortion advocacy as the determining factor for non-representative, unelected service on the Supreme Court.

#### II. JUDGE GINSBURG'S VIEWS ON THE ROLE OF A JUDGE

In our constitutional scheme, the Framers secured liberty and controlled the power of the State through a separation of powers among the three branches of the federal government---executive, legislative, and judicial. It is the people who are the original source of authority for the Constitution and whether

and how it should be amended. Federal judicial power is not inherent; it is derived from Article III of the Constitution.

Nor is the Court intended to be a representative body. Rather than being elected, the Justices are given life tenure precisely to insulate them from temporary political passions that rock any nation from time to time in order for them to interpret faithfully the original design of our government, as modified by the people through the amendment process provided for in Art. V.

Yet, Judge Ginsburg implies that she sees the Court as a representative body and that the Justices do have authority to change the principles of the Constitution through interpretation.<sup>1</sup> This is seen in her view that the judiciary may "repair unconstitutional legislation."<sup>2</sup> This is also seen in her implicit belief that the Constitution requires public funding of abortion and her criticism of the Court's contrary decisions of the 1970's as "incongruous" and "most unsettling."<sup>3</sup> Indeed, her writings have focused not on the legitimacy of different methods of constitutional interpretation, but on the strategic and tactical political advantages that expansive methods of interpretation might provide.<sup>4</sup>

Judge Ginsburg's dissent in DKT Memorial Fund v. Agency for Intern. Dev., 887 F.2d 275, 277 (D.C. Circuit 1989), illustrates the inconsistencies in her alleged moderate and deferential judicial philosophy. It appears that at least in the case of abortion, Judge Ginsburg may be willing to find new constitutional doctrine in support of policy goals she favors.

DKT was a case in which abortion advocates challenged an executive order prohibiting indirect aid to foreign organizations which promoted abortion as a method of family planning, and denied funding to foreign organizations which used private funds for abortion activities, or which collaborated with organizations which advocated abortion.<sup>5</sup> The majority opinion in DKT upheld the ban of federal foreign aid funding of organizations that perform or promote abortion. Judge Ginsburg would have

invalidated this restriction. In her dissent, she wrote that "government may demand only that public funds be segregated by the grantee so that they are used solely for the specified family planning services, and not for abortion related activity." DKT, 887 F.2d at 300.<sup>6</sup> Judge Ginsburg equated the choice not to fund abortion indirectly with punishing abortion advocates or providers. DKT, 887 F.2d at 305-306.<sup>7</sup>

Two years later, however, the Supreme Court in Rust v. Sullivan, 111 S.Ct. 1759 (1991), upheld regulations prohibiting abortion counseling and referral: "no funds appropriated for the project may be used in programs where abortion is a method of family planning," and a doctor employed by the project may be prohibited in the course of his project duties from counseling abortion or referring for abortion." Rust, 111 S.Ct. at 1772. The Court explained that the regulation was not a case of government suppression of ideas, but a prohibition on a project grantee or its employees from engaging in activities outside of its scope. Rust at 1772-1773. Clearly, Judge Ginsburg would have decided Rust differently, for she wrote in DKT that "it is now settled" that when government funding is dependent upon the restriction of activities paid for through private sources, the government has exacted impermissible penalties on protected expression.<sup>8</sup>

The Rust decision was 5-4, Justice White voting with the majority to uphold the abortion funding-promoting restriction. If Judge Ginsburg had been on the Court instead of Justice White, the vote would have been 4-5, and the funding restriction invalidated. The critical point here is not the wisdom of congressional policy regarding the funding of abortion. Such policies change from time to time as Congress changes and public sentiments change. That, of course, is the role of the legislature, and the genius of elective self-government. But Judge Ginsburg is not a legislator, nor is the Supreme Court an elected body subject to defeat or recall by the voters at the

polls. The disturbing aspect of Judge Ginsburg's dissenting opinion in DKT is that it shows her readiness to override public policy set by the politically accountable branches of government, even to the extreme of overturning public funding decisions which are far removed from the realm of judicial competence. If this is what her supporters mean when they say she is a moderate and not a judicial activist, then they are misstating their case.

Judge Ginsburg's long-standing belief that poverty is cured by abortion can be seen in the phrasing of her dissent in DKT, where she characterizes abortion as both a "facet of comprehensive world population planing,"<sup>9</sup> and also as a "necessary last resort given current conditions of poverty, ignorance, physical insecurity, and fear in which many women live."<sup>10</sup> She wryly notes that U.S. policy at that time meant that "government need not spend public funds on abortion services; it may, instead, encourage the indigent pregnant woman to reproduce by paying the full medical costs of childbirth, as well as child support thereafter (citations omitted)."<sup>11</sup> Judge Ginsburg apparently believes that the government entices poor women to "reproduce" by offering them assistance in their difficult circumstances. This suggests a preference for aborting the children of the poor, rather than seeking other ways to alleviate suffering.<sup>12</sup> "Helping" the poor through abortion may indicate misguided compassion, or an attitude bordering on eugenics; in either case, abortion is seen as a positive good, and its potentially negative effects on individual women are ignored. In her dissent in DKT, Judge Ginsburg makes reference to the legal status of abortion in some foreign countries without addressing the U.S. Government's concern about coerced abortion. Would Judge Ginsburg support foreign nations forced abortion policies as a means of controlling world population? Does she recognize the subtly coercive aspects of U.S. abortion policy in our own country where the Court has declared, in effect, that an untimely pregnancy is the personal problem of each individual woman?

**III. JUDGE GINSBURG'S VIEWS ON SEX DISCRIMINATION****A. Her "Immoderate" Recommendations**

In April 1977, the United States Civil Rights Commission issued a Report entitled, "Sex Bias in the United States Code" ("Report"). The "initial research and draft" of the Report was developed by Judge Ginsburg, then a professor of law at Columbia Law School, and Brenda Feigen Fasteau, former director of the ACLU's Women's Rights Project.<sup>13</sup> The report which Judge Ginsburg co-authored "was used as the basis for the Commission study."<sup>14</sup> Although some aspects of the Report have merit, others raise disturbing questions regarding how Judge Ginsburg would apply her "equal rights principle" in practice. The Report clearly illustrates the rigidity and formality of her views on sex-based distinctions and, unfortunately, a lack of common sense.

Although the Report addresses a number of areas of sex-based distinctions, it did not mention abortion, which, of course, is not regulated by the U.S. Code. However, other laws which address the sexual exploitation of women were challenged. In her unyielding adherence to gender neutrality, Judge Ginsburg would eradicate laws which protect vulnerable women from coercion and exploitation by men.

Completely outside the opinions of mainstream America, the Report recommends the abolition of statutory rape statutes that punish men who engage in sexual relations with girls, but not women who engage in sexual relations with boys, and lowering the age of consent from 16 to 12.<sup>15</sup> Do these recommendations suggest that Judge Ginsburg would strike down statutory rape statutes that are intended to protect girls from the sexual advances of men? or that she would strike down laws that impose an older age of consent?

The Report suggests that "[p]rostitution, as a consensual act between adults, is arguably within the zone of privacy protected by recent constitutional decisions."<sup>16</sup> The Report

recommends "unqualified decriminalization [of prostitution] as sound policy, implementing equal rights and individual privacy principles."<sup>17</sup> Would Judge Ginsburg would strike down laws against prostitution?

Her perceived moderation may be due more to her skill as a tactician,<sup>18</sup> than to a genuine commitment to centrism or collegiality. In Appellant's Brief in Reed v. Reed, she argued that gender-based classifications should be treated as "suspect," yet in this and subsequent cases, the laws she sought to have declared unconstitutional were fairly minor and without significant public support.

#### B. The Consequences of Judge Ginsburg's Views on Sexual Equality

It seems clear that, if there is one central purpose that has guided Judge Ginsburg's career, it is her lifelong determination to see her view of "sexual equality" written into American law and she undoubtedly views herself as representing American women to accomplish this.<sup>19</sup> Regrettably, her view of "sexual equality" is formal, abstract, artificial, and narrow, based on a resistance to virtually any gender-based distinctions in the law and a seeming resistance to the survival of traditional roles for any women. Abstractions predominate and the practical impact on women is absent from in her vision.

This is seen in Judge Ginsburg's belief that, under her sexual equality rationale for Roe v. Wade, the Constitution compels publicly funded abortion if government provides financial assistance for childbirth.<sup>20</sup> In the abstract world of "sexual equality," if government provides financial assistance for childbirth, it must fund abortion. In the real world, prenatal care and costs for childrearing are many times more than a \$250 abortion, and government assistance can only partially offset the greater cost of childbirth and the pressure toward abortion. It is a fiscal reality that if the state has to fund abortion

whenever it funds childbirth, there are less benefits available for the substantially greater costs of childbirth. Women with the greater cost of childbirth lose and the pressure to abort is compounded.<sup>21</sup>

Rigid formalism is also seen in Ginsburg's view that Roe was justified by the stigma that women faced from unmarried pregnancy.<sup>22</sup> She seems not to have considered that perhaps the stigma was the social problem that needed to be addressed, not abortion, or that the stigma might diminish, as in fact it has over the past 20 years.

Unlimited abortion rights, including strongly stated views on population control,<sup>23</sup> are clearly part of her view of "sexual equality."<sup>24</sup> As she stated in February, 1981, at a dinner for the Women's Rights Collective at Georgetown University, "My optimism rests primarily on social and economic conditions that appear irreversible, among the most prominent, small family norms and effective birth control necessary to preserve the planet . . ."<sup>25</sup>

The abstraction and formalism in her view of sexual equality is seen in her call for an "equal-regard conception of women's claims to reproductive choice . . . unsteered by government."<sup>26</sup> In her view, anti-abortion laws violate a woman's ability "to participate equally in the economic and social life of the Nation." She has said that the problem with Roe is that it did not focus "more precisely on the women's equality dimension" or that it did not "place[] the woman alone . . . at the center of its attention."<sup>27</sup> This forecloses any public policy, expressing the will of the people, protecting the life or health of the unborn child at any time of pregnancy.

Why can we be so certain of the stark and rigid implications of Judge Ginsburg's theories about abortion law? First, because her view that abortion should be viewed under a sexual equality (or Equal Protection) rationale---though never accepted by the Court---has been raised repeatedly by her compatriots in abortion

rights litigation to strike down state regulations.<sup>28</sup> Second, the former ACLU attorneys in the Center for Reproductive Law and Policy---who have opposed any state regulation of abortion in the courts for the past 20 years---instigated a letter writing for Judge Ginsburg's nomination to the Supreme Court, stating that she was their ideal candidate.<sup>29</sup> Perhaps they assume that she will press for abortion rights to be grounded in the Equal Protection clause.

Her criticisms of Roe v. Wade have focused on style or process, not on its outcome.<sup>30</sup> Initially, a superficial reading of that speech raised concern in some quarters that she might not be sufficiently "committed" to Roe and abortion rights. However, in the transcript of that speech, she made her commitment to legalized abortion even clearer and stronger.

It is helpful to look at the law review article upon which that speech is based.<sup>31</sup> Her chief criticism of the majority opinion in Roe is that it went too far, too fast. If the Court had ruled more narrowly, in Ginsburg's view, and simply struck down the Texas statute in question, it would not have sparked the adverse popular reaction.<sup>32</sup> She believes the right to life movement might not have been born but for the extremism of Roe's holding and reasoning.<sup>33</sup> And contrary to popular impression, her alternative rationale would prohibit the parental notice laws and informed consent laws that the Court has finally allowed 20 years after Roe v. Wade in Planned Parenthood v. Casey.<sup>34</sup>

Yet, her apparent deference to the democratic process is clearly conditioned on that process achieving the "right" results. If it does not do so, Judge Ginsburg has insisted that the judiciary has the power to step in.

In the case of her functional critique of Roe v. Wade, she presumed that the democratic process would yield unlimited abortion rights. When it did not, she advocated greater judicial intervention. Judge Ginsburg's statements about leaving abortion to the legislative process are belied by her own opposition to

the Hyde Amendment, which restricts federal funding of medicaid abortions. Although the Hyde Amendment was upheld by the Supreme Court, and is an example of the democratic process at work, apparently Judge Ginsburg would override the will of Congress and require federal abortion funding. She earlier criticized the Court's 1977 decisions upholding refusal to fund non-therapeutic abortions and the right of a public hospital to exclude abortions. She has admitted that courts may need to "legislate a bit" until the legislature comes up with the result she believes to be appropriate.

#### **IV. ABORTION AND THE REALITY OF WOMEN'S LIVES**

Because women have been not merely the bearers of life, but also the primary care givers to the young, the old, and the ill, one would hope to see in Judge Ginsburg's writings a deep respect for these customary roles of women. However she has displayed a disappointing lack of respect for women's substantial contributions within the family.

That lack of respect is most poignantly revealed in Judge Ginsburg's advocacy of abortion as necessary for "women's dignity." The notion that elective abortion is necessary for women to achieve equal status in American society is profoundly misguided and wrong. This is part and parcel of the formalistic and abstract way in which Judge Ginsburg views women's rights. It is critical to understand the context of abortion rights before one can clearly see the full impact of abortion on women in America.

It is simplistic and misleading to view abortion as merely a means by which women can alleviate an immediate obstacle to education or career. From a philosophical and biological perspective, it ignores the values of nurturance and connectedness in women that feminism has specifically revered.<sup>35</sup> From a practical perspective, it ignores the pressures which push women toward abortion and away from other alternatives, the

freedom that it gives to men to abandon any sexual responsibility, and the physical and psychological injury to women that surpasses the transitory relief of quickly alleviating what appears to be an obstacle.

#### **Abortion is Not Necessary for Women's Equality**

Judge Ginsburg's own record demonstrates that Roe v. Wade is not necessary to secure or preserve equal opportunity for women in American society. Roe struck down no practice relevant to women and their educational and career objectives. In fact, it may have made discrimination against pregnant women in college and the workplace easier.

Before and after Roe, the Supreme Court has shown a sensitivity to sex discrimination claims,<sup>36</sup> but there is no evidence that Roe itself enhanced that sensitivity. No decision of the Supreme Court on gender-based discrimination relies upon Roe v. Wade. Roe has been cited in less than a dozen lower court cases involving sex-discrimination and was dispositive in none.<sup>37</sup>

Under current Supreme Court doctrine, gender-based discrimination is subject to "heightened scrutiny", an intermediate standard of review, more rigorous than rational-basis, less rigorous than strict scrutiny. Under this standard, classifications based upon gender cannot be sustained under the Constitution unless they bear a "substantial relationship" to "important governmental objectives."<sup>38</sup> The Court, however, has not yet said that sex-based classifications must be treated as race-based classifications. A fair reading of Judge Ginsburg's writings suggests that she would adopt the "strict scrutiny" standard of review for laws that discriminate on account of sex. This position, however, fails to reflect an appreciation of and a deference to the exclusive means by which the Constitution may be changed, by an amendment approved by Congress and ratified by three-fourths of the States. Former Justice Powell recognized

this limitation when he refused to adopt, by judicial fiat, the proposed Equal Rights Amendment.<sup>39</sup>

Judge Ginsburg, apparently, would not wait for the people to decide whether the Constitution should be amended. Her willingness to adopt such a standard should give pause because of the rigidity of the strict-scrutiny standard. Moreover, adoption of such a standard is unnecessary. The principal gains in achieving equality of rights for women under the law have been made through the action of legislative bodies, not courts. The Congress has enacted many laws promoting equality of rights under the law by forbidding sex discrimination in public and private employment,<sup>40</sup> public works projects,<sup>41</sup> unemployment compensation,<sup>42</sup> sale or rental of housing,<sup>43</sup> and education,<sup>44</sup> and by mandating equal pay.<sup>45</sup> Many States have supplemented this legal structure with their own anti-discrimination laws and equal rights amendments.<sup>46</sup>

#### IV. ABORTION LAWS AS A TYPE OF "SEX DISCRIMINATION"

##### A. Ginsburg's Criticism of the Rationale of Roe:

###### Equal Protection vs. Due Process

In the previously-discussed Madison Lecture delivered at New York University in March, 1993, Judge Ginsburg posited a different approach and rationale for Roe v. Wade. Rather than premising the abortion right on the right of privacy found in the due process clause, she would have treated it as an issue of gender-based discrimination, and grounded the abortion right in the equal protection clause. This view, that laws regulating or restricting abortion are sex-discriminatory, is radical. Not all women think this way, and not even all who call themselves "feminist" would share her view.

Judge Ginsburg argues that abortion implicates "a woman's autonomous charge of her full life course."<sup>47</sup> Autonomy language, of course, is more appropriate for the due process/right of privacy rationale than equal protection

analysis. Nonetheless, this view of the autonomous woman is startling. To argue that abortion laws are, by definition discriminatory, avoids any balancing of the interests at stake. At least with the balancing test, competing interests are taken into consideration. Inclusion of abortion within equality principles is contrary to the doctrine itself. For to do so would require the subordination of others, and other interests.

Even under *Roe*, there is a recognition of some of those competing interests: that of the state in protecting potential life, which becomes "compelling" at viability; the interest of parents in their minor daughter's decision about abortion; and even the child's interest in life itself. Under this equal protection analysis, there is no competing interest worthy of constitutional consideration, let alone protection. Thus, abortion becomes a matter between a woman and her conscience, with no regard for the father of the child, the grandparents of the child, society's interest in present and future generations, or even the developing daughter or son in the womb. The woman's autonomy would always trump other interests voiced.

The argument that abortion rights should be premised on equal protection, rather than due process, grounds, is an apparent concession that they do not now stand on solid footing, and that an abortion right is not rooted in the Constitution. It would be illuminating for the Committee to ascertain whether Judge Ginsburg believes an Equal Rights Amendment is necessary for constitutional protection of abortion rights. If it is neither necessary for, nor relevant to, the abortion question, then that should be made clear also.

Apart from judicial considerations, an autonomy/equal protection approach to the abortion question contradicts many of the core values of feminism, values which are shared by millions of American women who do not consider themselves to be feminist. These are the values of care, nurturance, compassion, non-violence and inclusion. These values include care for those who

are less fortunate, less able to speak for themselves. For many of us, it requires no great leap to include the preborn child within the circle of care and protection. Out of the natural biological connection between the intrauterine child and mother arises recognition of that dependent relationship which deserves heightened protection, both in law and in society.

Judge Ginsburg's lack of appreciation for the traditional roles of women appears in her statement that some feminists argue forcibly (sic) that women, at least as childbearers, perform a service for society that nature did not equip men to perform, a service essential to the survival of the human race, one that should attract special recognition and rewards. (People concerned with population growth, one might note, have doubts about encouraging such service.)<sup>48</sup>

Her view of traditional roles may be colored by her apparent belief that those roles were inferior and that dependency allowed or encouraged considerable suffering and legal disadvantage for women.<sup>49</sup>

It is possible to recognize the historical problems women have faced without denigrating traditional roles, or assuming that only through wholesale restructuring of family life can women have equal "stature" with men.<sup>50</sup> As an advocate for the ERA Judge Ginsburg argued that the Constitution had excluded women,<sup>51</sup> and that gender cases prior to 1971 demonstrated social and legal hostility toward women. She supported the "grand" and general language of the ERA as giving a textual basis for equal rights for women, which would strip away laws which demeaned women, but extend genuine protection to all. In fact, Judge Ginsburg was either telling only part of the story or was just plain wrong on all points.

Most of the Constitution deals with the structure of our government; the bill of rights protecting individuals did not trump states' rights of legislating matters related to the

family, employment and voting, even after the incorporation of the Civil War Amendments--not really until the last three decades of this century. To present cases such as Bradwell (1873) (challenging a law barring women from practicing law) or Happersett (1873) (challenging state law barring women from voting) as evidence of the law's inherent devaluation of women is to misrepresent those cases, which were decided on the basis of the states' right to set policy in these matters, not on a fundamental hostility toward women.<sup>52</sup> The High Court's attitude to many gender rights cases prior to the middle of this century echoes that of the Happersett court: "If the law is wrong, it ought to be changed; but the power for that is not with us."<sup>53</sup> Feminist revisionist readings of cases regarding women's rights can produce a powerful emotional response from an audience, but does not encourage careful, thoughtful analysis of our constitutional principles.

Seeking to ground rights on Constitutional test is laudable, but for Judge Ginsburg to insist that the "grand" language of the ERA is still a workable approach to equity for women requires her to ignore some social changes of the past two hundred years. At the time the Constitution was ratified, it was not intended to embody the whole of our law; state law was taken seriously, and the family and the church were strong social institutions which provided a guide for individual and familial behavior. With the growth of the welfare state, and the increasing reliance on the Constitution as a guarantor of unenumerated fundamental rights, the family and church appear to be weaker, and the absolute language of the amendment could be interpreted in ways that may not help women.

Our recent history suggests that while it may be theoretically possible to envision an ERA that would preserve genuinely protective laws and expand them to include all persons, courts more frequently strip away protective laws than extend them<sup>54</sup> because striking down legislation as unconstitutional is

clearly within the power of the judiciary, while extending benefits of the law to persons not included by legislative mandate edges toward judicial overreaching.

#### B. The Dangers of an Equal Protection

##### Basis for Legalized Abortion

An equal protection argument would greatly change the cast of constitutional doctrine for abortion regulation. The equal protection rationale was considered and rejected by the Supreme Court, in the recent case of Bray v. Alexandria Women's Clinic, 113 S.Ct. 753 (1993). The Court found that protest against abortion did not reflect a class-based (gender-based) animus against women.

An equal protection rationale would also, as noted above, avoid any consideration of the interests of the unborn child. This stands in contradiction to developments in virtually every other area of law pertaining to the unborn child, such as fetal homicide, prenatal injuries and wrongful death. Twenty-one States, by statute or court decision, treat the intentional, knowing, reckless or negligent killing of an unborn child (outside the context of abortion) as a form of homicide, and nearly half of these States do so without regard to the stage of pregnancy when the injury was inflicted or when the death occurred.<sup>55</sup> Virtually all States and the District of Columbia recognize a common law cause of action for nonfatal, prenatal injuries.<sup>56</sup> No case denying a cause of action for such injuries has been decided for almost twenty-five years.<sup>57</sup> And the overwhelming majority of jurisdictions (36 States and the District of Columbia) also recognize a statutory wrongful death action for prenatal injuries, even where those injuries result in stillbirth.<sup>58</sup>

Under an equal protection rationale, abortion could be treated as just a form of "post-coital birth control." Apparently, there is virtually no regulation affecting abortion

that would pass constitutional muster, unless of course, it did not "affect" or "unduly burden" the abortion decision. It is not at all clear that Judge Ginsburg would defer to the will of the Congress, most recently expressed in the significant majority approval of the Hyde Amendment by the House of Representatives. This measure ensures that taxpayer dollars do not pay for elective abortions. Would Judge Ginsburg follow precedent or her own inclinations if faced with a challenge to this appropriations limitation? Would she uphold laws requiring physicians to notify parents before aborting their daughter? What about regulations requiring that a woman receive complete and accurate information prior to undergoing abortion. These are currently constitutional expressions of public policy.

#### **V. The Consequences of Abortion**

Continued legalized abortion will only further injure women. Abortion has not solved any of the problems for which it was offered, and its continued legal sanction simply postpones the day when society will have to grapple with some of the serious issues affecting women and families. Abortion has not ameliorated any of these problems: unwed motherhood, teen pregnancy, child abuse, spouse abuse, or the feminization of poverty. A cynic might note that the main "problem" abortion solves, in cold economic terms, is avoiding the cost of having a baby. It is, of course, much less costly to terminate a pregnancy by abortion, than to give birth.

Abortion has negatively affected women's lives in many ways. Its legality does not guarantee its safety for the woman's life, physical or psychological well-being.

There is a growing body of evidence that abortion is a psychological stressor, and for many women, the psychological consequences are severe and long-lasting.

There is also a high social and personal cost for the women who undergo abortion, particularly if they are unmarried. Eighty

percent of all abortions are performed on unmarried women.<sup>59</sup> In such a relationship, the man bears no legal obligation unless the child survives. By its very nature, such a relationship creates the greatest potential for coercion, his denial of responsibility, and abandonment of the woman by her erstwhile partner when pregnancy results.

A study by Carol Gilligan, one of the foremost feminist analysts of women's abortion rights and independent decision-making, revealed that many of the aborted women she studied did not make independent, moral choices, but were influenced by the lack of moral and material support from the men in their lives for continuing their pregnancies.<sup>60</sup>

One survey of women experiencing post-abortion distress revealed that "more than one-third felt they had been coerced into their decision."<sup>61</sup> That coercion is subtly present in the work force as well. A study of female medical residents reported open hostility to pregnant residents from program directors and colleagues. The rate of abortion among female residents was three times that of the control group.<sup>62</sup>

Similarly, women lawyers are aware of the same subtle bias against having children. An article in the National Law Journal noted that law firms have been unable or unwilling to create an environment supportive of working mothers.<sup>63</sup> In another incident, the New York City Department of Corrections settled a lawsuit filed by several female officers who had been told to have abortions; many who refused were given physically grueling jobs.<sup>64</sup>

Pressure to have an abortion is reflected in court cases of various kinds. For example, men have sued to "enforce" a contract to undergo an abortion.<sup>65</sup>

Abortion certainly has not improved the problem of relationships between men and women. Abortion does not stabilize a relationship, whether or not the pregnancy was viewed as a threat.

The most common male response to unwanted pregnancy when it occurs outside of marriage has been to "take off," leaving the woman to bear the physical, the emotional and, often, the financial brunt of either having an abortion or carrying the pregnancy to term. Studies of abortion and its aftermath reveal that, more often than not, relationships do not survive an abortion: the majority of unmarried couples break up either before or soon after an abortion.<sup>66</sup>

Abortion unfortunately isolates women from those who should bear direct responsibility--fathers of aborted children, and from the society that ought to support her in her decision to give birth.

Judge Ginsburg seems to approve of the notion in Casey that:

people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the even that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.<sup>67</sup>

The implication that women organize their lives around "abortion availability" would come as a great surprise to many women. Abortion is not the defining issue for women. As the 1.8 million members of the National Women's Coalition for Life agree, it is possible--and right--to be both pro-woman and pro-life. Even for those women who do not consider themselves "pro-life," abortion is not a top priority. A New York Times July 1989 poll revealed that most women were more concerned about job discrimination, child care and balancing work and family than about abortion.<sup>68</sup> More men than women favor abortion rights, and women tend to be more protecting of unborn human life than men.<sup>69</sup>

The expectation that women rely on elective surgery to advance a career or continue an education ignores the broader contexts and issues that shape women's lives. This notion is inimical to Carol Gilligan's principles of "care, concern, responsibility and non-violence."<sup>70</sup>

Judge Ginsburg's own life and record provide the solution to the dilemma of women's equality and abortion. She began her career in challenging distinctions in the law based solely on

gender. Under her influence, many discriminatory laws were struck down under the equal protection doctrine. But none of these involved abortion. Although Judge Ginsburg would incorporate abortion rights into the line of cases based on equal protection, this is not necessary to women's full equality and participation in society. Since no case advancing women's opportunity has relied on Roe, abortion is not legally necessary or relevant for preservation of those gains. Indeed, the unsightly thread of the abortion doctrine could easily be removed without unraveling any of the garment.

#### CONCLUSION

This Committee should carefully look at the impact of a nominee's commitment to abortion rights that supersedes our traditional understanding of the proper role of the judiciary and the legislative process, and should carefully weigh what impact the Court, with Justice Ginsburg, will have on the future of the women and families of this nation.

Thank you.

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#### FOOTNOTES

1. Ginsburg, Inviting Judicial Activism: A "Liberal" or "Conservative" Technique?, 15 Ga. L. Rev. 539, 550 (1981) ("the need for interventionist decisions . . . would be reduced significantly if elected officials shouldered their full responsibility for activist decision making"); Ginsburg, "Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation," 28 Clev. St. L. Rev. 301 (1979).

2. In Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), the Court struck down a provision of the Social Security Act which gave benefits to surviving women of a deceased wage earner (widows) but not to surviving men (widowers). The Court invalidated the provision under the Fifth Amendment and actually ordered Social Security payments by Congress to such men. Judge Ginsburg observed that "the Court wrote into the statute [what] Congress had left out." And she wrote approvingly of "judicial extension of under inclusive statutes" when "the class benefitted by the judicial repair [is] limited, and the legislative will [is] minimally touched." Ginsburg, "Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation," 28 Clev. St. L. Rev. 301, 305 (1979).

3. Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 N.C.L. Rev. 375, 386; Ginsburg, Gender in the Supreme Court: The 1976 Term, in Constitutional Government in America 224 (1980).

Judge Ginsburg has also implied that any legislation conferring "uneven" benefits must be subject to careful judicial review under the Equal Protection Clause. Ginsburg, Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation, 28 Clev. St. L. Rev. at 303.

4. See e.g., "Policymaking by judges goes back to Marbury v. Madison in 1803..." Ginsburg, 15 Ga. L. Rev. at 540

5. Congress authorized the President to furnish to foreign nations, assistance with voluntary family planning. President Reagan announced the "Mexico City Policy," which stated in part:

The United Nations Declaration of the Rights of the Child (1959) calls for legal protection for children before birth as well as after birth. In keeping with this obligation, the United States does not consider abortion an acceptable element of family planning programs and will no longer contribute to those of which it is a part. Accordingly, when dealing with nations which support abortion with funds not provided by the United States Government, the United States will contribute to such nations through segregated accounts which cannot be used for abortion. Moreover, the United States will no longer contribute to separate nongovernmental organizations which perform or actively promote abortion as a method of family planning in other nations. DKT, at 277.

6. Judge Ginsburg apparently relied on Planned Parenthood v. Arizona, 789 F.2d. 1348 (9th Cir.) aff'd mem. sub nom. Babbitt v. Planned Parenthood Fed'n, 479 U.S. 925, 107 S.Ct., 391, 93 L.Ed.1d 346 (1986). It bears noting that the Court affirmed only the judgment of the lower court, not the rationale for the judgment, therefore, Judge Ginsburg's reliance is misplaced. Mandel v. Bradley, 432 U.S. 173, 176 (1977).

7. Indirect funding comes when the government subsidizes some family planning activities, thus freeing up private funds to be used for abortions.

8. DKT 887 F.2d at 306-307, citing FCC v. League of Women Voters, 468 U.S. 364 (1984).

9. DKT, at 305.

10. DKT, 887 F.2d at 306.

11. DKT, 887 F.2d at 299.

12. This is a puzzling attitude for Judge Ginsburg to hold, whether applied at home or abroad, given her acknowledgement that there are "communities with poverty so dire and conditions for women so low we cannot comprehend their situation." DKT 887 F.2d 302, n.4.

13. Report at iii (Letter of Transmittal).

14. Id., at v (Acknowledgements).

15. Id. at 102.

16. Report, at 97, citing, in addition to Griswold and Eisenstadt, Roe v. Wade, 410 U.S. 113 (1973).

17. *Id.*, at 215-16. The Report also recommends repeal of the Mann Act, which forbids transportation of women and girls across state lines for prostitution and other illicit purposes. *Id.*, at 96-99. The Report ridicules the Mann Act as one "that was meant to protect weak women from bad men." *Id.*, at 98-99.

18. In a law review article, Judge Ginsburg cautioned the audience to "repeat winning formulas . . . and resist bold initiatives." Ginsburg, Where Do We Go From Here?, 37 Rutgers L. Rev. 1093 (1985).

19. Indeed, many of her law review articles are repetitive in stressing these identical themes with the same phrasing and substance. See e.g., Ginsburg, Sex Equality and the Constitution, 52 Tul. L. Rev. 451 (1978); Ginsburg, Some Thoughts on Benign Classification in the Context of Sex, 10 Conn. L. Rev. 813 (1978); Ginsburg, Sexual Equality under the Fourteenth and Equal Rights Amendment, 1979 Wash. U.L.Q. 161.

20. Ginsburg, 63 N.C.L. Rev. at 384-86.

21. See e.g., Hope v. Perales, 595 N.Y.S. 2d 948, 955 (Murphy, J., dissenting) (1993)

22. Ginsburg, 63 N.C.L. Rev. at 382.

23. "Several factors have contributed to the movement for equal rights and responsibilities for men and women . . . perhaps most important, effective birth control has become possible at a point in history when continued population growth jeopardizes our civilization." Ginsburg, Sex and Unequal Protection: Men and Women as Victims, 11 J. Fam. L. 347, 349 (1971).

24. In Judge Ginsburg's formulation, the "disadvantageous treatment of a woman because of her...reproductive choice is a paradigm case of discrimination on the basis of sex."

She has recognized that Roe v. Wade invalidated the abortion laws of all 50 states and that the states attempted to respond with merely regulations requiring parental notice or fully informed consent. Ginsburg, 63 N.C.L. Rev. at 381-82.

25. Address by Judge Ruth Bader Ginsburg, Susan B. Anthony Dinner of the Women's Rights Collective, Georgetown University Law Center (February 17, 1981).

26. Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 N.C.L. Rev. 375, 386 (1985).

27. Ginsburg, 63 N.C.L. Rev. at 382.

28. See e.g., Jane L. v. Bangertner, 794 F.Supp. 1537, 1549 (D. Utah 1992); Brief for Petitioners and Cross-Respondents in Planned Parenthood v. Casey, 112 S.Ct. 2792 (1992), at 46; Brief for the National Coalition Against Domestic Violence as Amicus Curiae Supporting Appellees, in Webster v. Reproductive Health Services, 492 U.S. 490 (1989) at 2, 5-6 (citing Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 N.C.L. Rev. 375 (1985)); Brief for Black Women for Choice, et al., in Sojourner T. v. Edwards, 974 F.2d 27 (5th Cir. 1992), cert. denied sub. nom. Edwards v. Sojourner T., 113 S.Ct. 1414 (1993).

29. Cauchon, Opposition Hard to Come By, USA Today, June 15, 1993, at 10A.

30. Her sentiments expressed in her March, 1993 speech at NYU were

not new or novel, having been expressed in substance in her 1985 article and before. Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 N.C.L. Rev. 375, 381 (1985).

31. Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 N.C.L. Rev. 375 (1985).

32. See e.g., Ginsburg, On Muteness, Confidence, and Collegiality: A Response to Professor Nagel, 61 U. Colo. L. Rev. 715, 718-19 (1990).

33. In fact, on this point Judge Ginsburg may have missed the mark. The movement against the legalization of abortion preceded Roe by several years. Americans United for Life, for example, was founded in 1971.

34. Casey, 112 S.Ct. at 2792 (1992).

35. See e.g., Carr, Neither Sound Nor Sight, 3 Yale J.L. & Fem. 153 (1991).

36. See, e.g., Reed v. Reed, 404 U.S. 71 (1971) (invalidating state law giving preference to men in issuing letters of administration to probate estate); Frontiero v. Richardson, 411 U.S. 677 (1973) (striking down federal laws requiring dependents of servicewomen, but not servicemen, to prove their dependence to receive quarters allowances and medical and dental benefits); Cleveland Board of Education v. LeFleuer, 414 U.S. 632 (1974) (mandatory pregnancy leave policy for public school teachers violated Due Process Clause because policy had no valid relationship to State's interest in preserving continuity of instruction and was based upon an impermissible irrebuttable presumption that every teacher who is four or five months pregnant is physically incapable of continuing her duties); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (striking down provisions of Social Security Act that allowed benefits to be paid to widow and minor children of deceased husband and father covered by the Act but only to minor children and not widower of deceased wife and mother) (Due Process Clause of Fifth Amendment); Stanton v. Stanton, 421 U.S. 7 (1975) (striking down state law establishing different ages of majority for males and females) (Equal Protection Clause); Craig v. Boren, 429 U.S. 190 (1976) (same, with respect to statutes setting different ages at which men and women could purchase beer); Califano v. Goldfarb, 430 U.S. 199 (1977) (provision of Social Security Act denying benefits to widower who could not prove that he was receiving at least one-half of his support from his deceased wife but did not require same evidence of dependency from widow violated Equal Protection Clause of the Fourteenth Amendment); Caban v. Mohammed, 441 U.S. 380 (1979) (statute which required consent of natural mother, but not natural father, to adoption of child born out-of-wedlock and never legitimized violated Equal Protection Clause); Kirchberg v. Feenstra, 450 U.S. 455 (1981) (striking down, on equal protection grounds, state statute that allowed husband, as "head and master" of property jointly owned with his wife, the unilateral right to dispose of such property without his spouse's consent).

37. Crawford v. Cushman, 531 F.2d 1114, 1124 (2d Cir. 1976) (striking down former Marine Corps regulation mandating discharge of woman Marine who became pregnant) (decided on constitutional grounds); Buckley v. Coyle Public School System, 476 F.2d 92, 96 n.3 (10th Cir. 1973) (questioning mandatory maternity leave policy--school teachers); In re National Airlines, Inc., 434 F.Supp. 249, 258 (S.D. Fla. 1977) (striking down mandatory maternity leave policy--flight attendants) (decided under Title

VII); Driessen v. Freborg, 431 F.Supp. 1191, 1195 (D. N.D. 1977) (same--school teacher); Ponton v. Newport News School Board, 632 F.Supp. 1056, 1061-62 (E.D. Va. 1986) (same); Lewis v. Delaware State College, 455 F.Supp. 239, 248-49 (D. Del. 1978) (college could not refuse to renew employee's contract because she bore child out-of-wedlock) (impermissible irrebuttable presumption); Brown v. Porcher, 502 F.Supp. 946, 956 n.19 (D. S.C. 1980), aff'd, 660 F.2d 1001 (1981), cert. denied, 459 U.S. 1150 (1983) (women could not be denied state unemployment benefits because they left most recent work due to pregnancy) (decided under Federal Unemployment Tax Act).

38. Craig v. Boren, 429 U.S. 190, 197 (1976).

39. Frontiero v. Richardson, 411 U.S. 677, 692 (1973) (Powell, J. concurring in the judgment.)

40. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1992), Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), 5 U.S.C. §§ 2302(b)(1) (1989), 7201 (1989).

41. Public Works and Economic Development Act Amendments of 1971, 42 U.S.C. § 3123 (1989), 23 U.S.C. § 324 (1989).

42. Federal Unemployment Tax Act, 26 U.S.C. § 3304(a)(12) (1989).

43. Fair Housing Act, as amended, 42 U.S.C. § 3604 (1989).

44. 20 U.S.C. §§ 1681 et seq., 2302(b)(1) (1992).

45. Fair Labor Standards Act of 1938, as amended by the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1989).

46. Seventeen state constitutions have equal rights provisions which prohibit discrimination on account of sex. Alaska Const. art. 1, § 3; Colo. Const. art. II, § 29; Conn. Const. art. I, § 20; Haw. Const. art. I, §§ 3, 5; Ill. Const. art. I, § 18; La. Const. art. I, § 3; Md. Const. art. 46; Mass. Const. part 1, art. CVI [§ 252] (amending § 2); Mont. Const. art. II, § 4; N.H. Const. part 1, art. 2; N.M. Const. art. 2, § 18; Pa. Const. art. I, § 28; Tex. Const. art. I, § 3a; Utah Const. art. 4, § 1; Va. Const. art. I, §§ 2, 3 & art. 6, § 1.

47. Ginsburg, 63 N.C.L. Rev. at 383.

48. "Some Thoughts on the 1980's Debate Over Special Versus Equal Treatment for Women," 4 Law and Inequality 143, 145 (1986).

49. See, for example, her discussion of "the law's differential treatment of men and women, typically rationalized as reflecting 'natural' differences between the sexes, historically (which had tended to contribute to women's subordination--their confined 'place' in man's world--even when conceived as protective of the fairer, but weaker and dependent-prone sex." Some Reflections on the Feminist Legal Thought of the 1970's" 198 U. Chicago Legal Forum 9, 11 (1989).

50. "Some Reflections on the Feminist Legal Thought of the 1970's," 1989 . U. Chicago Legal Forum 9, 13, (1989).

51. Judge Ginsburg noted in 1989, that "as framed in 1787, the Constitution was intended to be a document of governance by and for an elite--white, propertied adult males, people free from dependence on others, and therefore considered to be trustworthy citizens, not susceptible to influence or control by master, overlords, or supervisors," "Some Reflections on the Feminist

Legal Thought of the 1970's" 1989 U. Chicago Legal Forum 9, 12 (1989).

52. Judge Ginsburg grudgingly describes the basis for the decisions in Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) and Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874), explaining that "from the perspective of nineteenth century jurists, allowing women to contract, control their own earnings, vote, and hold public office was not fit subject matter for federal constitutional resolution." "Sex Equality and the Constitution," 52 Tulane Law Rev. 451, 453. In fact, the Court viewed these matters as subject to state, rather than federal law, but there is no indication that the female plaintiffs, or women in general were disparaged in these opinions.

53. Happersett 88 U.S. (21 Wall.) at 177.

54. The Court in Intern. Union, UAW v. Johnson Controls, 111 S.Ct. 1196 (1991) viewed the moral and ethical concerns of a battery manufacturer about the potential harm to the offspring of female employees as a ruse for keeping women out of high-paying blue-collar jobs. IN a decision sometimes bordering on derisive in tone, the Court notes that "despite evidence in the record about the debilitating effect of lead exposure on the male reproductive system, Johnson Controls is concerned only wit the harms that may befall the unborn offspring of its female employees." Johnson at 1203. Rather than extending protection to the offspring of male employees, however, theCourt concluded that "decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents. Id at 1207.

55. Nine States define the killing of an unborn child as a form of homicide, regardless of the stage of pregnancy: Ariz. Rev. Stat. § 13-1103(A)(5) (West 1989) (manslaughter); Cal. Pen. Code, § 187(a) (1988) (murder) (an early decision of the California Court of Appeals reading a viability requirement into the statute, People v. Smith, 59 Cal. App.3d 751, 129 Cal.Rptr. 498 (1976), has been rejected recently by another Court of Appeals decision, see People v. Davis, Cal.App.4th\_\_\_\_\_, 19 Cal. Rptr.2d 94 (1993); Ill. Comp. Stat., ch. 720, §§5/9-1.2, 5/9-2.1, 5/9-3.2 (1992) (murder, manslaughter); Ind. Code Ann., § 35-42-1-6 (Burns 1985) (feticide); La. Stat. Ann., §§ 14:2(7), 14:32.5-14:32.8 (West 1986 & 1992 Supp.) (murder, feticide); Minn. Stat. Ann., §§ 609.266, 609.2661-609.2665, 609.268(1) (1987 & 1992 Supp.) (murder, manslaughter); Mo. Rev. Stat., §§ 1.205, 565.024 (Vernon 1986) (involuntary manslaughter), as construed by the Missouri Supreme Court in State v. Knapp, 843 S.W.2d 345 (Mo. 1992); N.D. Cent. Code, §§ 12.1-17.1-01 to 12.1-17-04 (1991 Supp.) (murder, manslaughter); Utah Code Ann., § 76-5-201 et seq. (1990 & 1992 Supp.) (any form of homicide).

Six States define the killing of an unborn child after quickening as a form of homicide: Fla. Stat. Ann., § 782.09 (West 1992) (manslaughter); Off. Code Geo. Ann., § 16-5-80 (1992) (feticide); Mich. Comp. Laws Ann., § 750.322 (West 1968) (manslaughter) (limited by judicial decision to viability, see Larkin v. Cahalan, 389 Mich. 533, 208 N.W.2d 176 (1973)); Miss. Code Ann., § 97-3-37 (1972) (manslaughter); Okla. Stat. Ann., tit. 21, § 713 (West 1983) (manslaughter); Wash. Rev. Code Ann., § 9A.32.060(1)(b) (1986) (manslaughter).

Three States define the killing of an unborn child after viability as a form of homicide: Iowa Code Ann., § 707.7 (West 1979) (feticide); Tenn. Code Ann., § 39-13-214 (Michie 1991) (criminal homicide); R.I. Gen. Laws, § 11-23-5 (Michie 1981) (manslaughter).

One State defines the killing of an unborn child after the twenty-fourth week of pregnancy as a form of homicide: N.Y. Pen. Law, § 125.00 (McKinney's 1987) (homicide).

In addition to these nineteen States, two other States--Massachusetts and South Carolina--have held, without the benefit of a specific fetal homicide statute, that the killing of a viable unborn child is a form of homicide. See Commonwealth v. Cass, 392 Mass. 799, 467 N.E.2d 1324 (1984) (vehicular homicide); Commonwealth v. Lawrence, 404 Mass. 378, 383-84, 536 N.E.2d 571, 575-76 (1989) (involuntary manslaughter); State v. Horne, 282 S.C. 444, 319 S.E.2d 703 (1984) (homicide).

56. Wolfe v. Isbell, 291 Ala. 327, 330-31, 280 So.2d 758, 761 (1973) (express statement in context of wrongful death action); Walker by Pizano v. Mart, 164 Ariz. 37, 41, 790 P.2d 735, 739 (Ct. App. 1990) (*dictum* in wrongful life action); Cal. Civ. Code, §29 (West 1982); Keleman v. Superior Court, 136 Cal.App.3d 861, 865, 186 Cal. Rptr. 566, 568 (1982) (prenatal injury); Endo Laboratories, Inc. v. Hartford Ins. Group, 747 F.2d 1264 (9th Cir. 1984) (applying California law); Empire Cas. v. St. Paul Fire & Marine, 764 P.2d 1191, 1195-97 (Colo. 1988) (by implication in recognizing pre-conception tort action); Simon v. Mullin, 34 Conn. Supp. 139, 147, 380 A.2d 1353, 1357 (1977) (prenatal injury); Morgan v. Greggo & Ferrara, Inc., 50 Del. 258, 128 A.2d 557 (Super. Ct. 1956) (same); Luff v. Hawkins, 551 A.2d 437, 438 n.1 (Del. Super. Ct. 1988) (express statement in context of wrongful death action); Greater Southeast Community Hospital v. Williams, 482 A.2d 394, 396 & n.2 (D.C. Ct. App. 1984) (prenatal injury); Jones v. Howard University, Inc., 589 A.2d 419, 423 n.8 (D.C. Ct. App. 1991) (same); Day v. Nationwide Mut. Ins. Co., 328 So.2d 560, 562 (Fla. Dist. Ct. App. 1976) (same); Horbuckle v. Plantation Pipe Line Co., 212 Geo. 504, 93 S.E.2d 727 (1956) (prenatal injury); Volk v. Baldazo, 103 Idaho 570, 572, 651 P.2d 11, 13 (1982) (express statement in context of wrongful death action); Renslow v. Mennonite Hosp., 67 Ill.2d 348, 352-53, 367 N.E.2d 1250, 1252-53 (1977) (express statement in recognizing cause of action for pre-conception tort); Cowe by Cowe v. Forum Group, Inc., 541 N.E.2d 962, 967-68 (Ind. App. 1989), transfer granted, 575 N.E.2d 630, 636-37 (Ind. 1991) (prenatal injury); Humes v. Clinton, 246 Kan. 590, 596, 792 P.2d 1032, 1037 (1990) (*dictum* in wrongful death action); Mitchell v. Couch, 285 S.W.2d 901 (Ky. 1955) (by implication in wrongful death action); Danos v. St. Pierre, 402 So.2d 633 (La. 1981) (by implication in wrongful death action); Group Health Ass'n, Inc. v. Blumenthal, 295 Md. 104, 116-19, 453 A.2d 1198, 1206-07 (1983) (express statement in context of wrongful death action); Torigian v. Watertown News Co., 352 Mass. 449, 225 N.E.2d 926 (1967) (by implication in wrongful death action); Payton v. Abbott Laboratories, 386 Mass. 540, 560-64, 437 N.E.2d 171, 182-85 (1982) (prenatal injury); Womack v. Buchhorn, 384 Mich. 718, 187 N.W.2d 218 (1971) (same); Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949) (by implication in wrongful death action); Rainey v. Horn, 221 Miss. 838, 72 So.2d 434 (1954) (express statement in wrongful death action); Bergstresser v. Mitchell, 448 F. Supp. 10, 14-15 (E.D. Mo. 1977), aff'd, 577 F.2d 22, 25-26 (8th Cir. 1978) (by implication in recognizing cause of action for pre-conception tort); Miller v. Duhart, 637 S.W.2d 183, 186 (Mo. App. 1982) (*dictum*); Weaks v. Mounter, 88 Nev. 118, 121, 493 P.2d 1307, 1309 (1972) (prenatal injury); White v. Yip, 85 Nev. 527, 532-34, 458 P.2d 617, 620-21 (1969) (express statement in context of wrongful death action); Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958) (prenatal injury); Smith v. Brennan, 31 N.J. 353, 362, 157 A.2d 497, 502 (1960) (same); Davila v. Bodelson, 103 N.M. 243, 704 P.2d 1119 (Ct. App. 1985) (same); Kelly v. Gregory, 282 A.D. 542, 543-44, 125 N.Y.S.2d 696, 697 (1953) (same); Stetson v. Easterling, 274 N.C. 152, 155-56, 161

S.E.2d 531, 533-34 (1968) (express statement in context of wrongful death action); Gay v. Thompson, 266 N.C. 394, 399, 146 S.E.2d 425, 429 (1966) (by implication in wrongful death action); Hopkins v. McBane 359 N.W.2d 862, 864 (N.D. 1985) (adopting §869(1) of the Restatement (Second) of the Law of Torts (1979)); Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949) (prenatal injury); Evans v. Olson, 550 P.2d 924, 927 (Okla. 1976) (express statement in context of wrongful death action); Mallison v. Pomeroy, 205 Or. 690, 291 P.2d 225 (1955) (prenatal injury); Sinkler v. Kneale, 401 Pa. 267, 273, 164 A.2d 93, 96 (1960) (same); Sylvia v. Gobeille, 101 R.I. 76, 220 A.2d 222 (1966) (same); Hall v. Murphy, 236 S.C. 272, 113 S.E.2d 790 (1960) (express statement in context of wrongful death action); Shousha v. Matthews Drivurself Service, Inc., 210 Tenn. 384, 396, 358 S.W.2d 471, 476 (1962) (same); Delgado v. Yandell, 468 S.W.2d 475 (Tex. Crim. App. 1971), writ ref'd n.r.e. per curiam, 471 S.W.2d 569 (Tex. 1971) (prenatal injury); Vaillancourt v. Medical Center Hospital of Vermont, Inc., 139 Vt. 138, 141-43, 425 A.2d 92, 94-95 (1980) (by implication in wrongful death action); Kalafut v. Gruver, 389 S.E.2d 681, 683-84 (Va. 1990) (adopting §869(1) of the Restatement (Second) of Torts); Seattle-First National Bank v. Rankin, 59 Wash.2d 288, 291-92, 367 P.2d 835, 837-38 (1962) (prenatal injury); Harbeson v. Parke-Davis, Inc., 98 Wash.2d 460, 480, 656 P.2d 483, 495 (dictum in wrongful life case); Baldwin v. Butcher, 155 W.Va. 431, 437-38, 184 S.E.2d 428, 431-32 (1971) (express statement in context of wrongful death action); Puhl v. Milwaukee Auto. Ins. Co., 8 Wis.2d 343, 354-57, 99 N.W.2d 163, 169-71 (1959) (dictum in prenatal injury case); Kwaterski v. State Farm Mut. Auto. Ins. Co., 34 Wis.2d 14, 17, 148 N.W.2d 107, 109 (1967) (express statement in context of wrongful death action).

57. See Lawrence v. Craven Tire Co., 210 Va. 138, 169 S.E.2d 440 (1969); Marlow v. Krakep, 20 Mich. App. 489, 174 N.W.2d 172 (1969).

58. In addition to the cases cited in n. 56, supra, from Delaware, the District of Columbia, Idaho, Kentucky, Louisiana, Minnesota, Mississippi, Nevada, North Dakota, Oklahoma, Vermont, West Virginia and Wisconsin, are: Eich v. Gulf Shores, 292 Ala. 95, 300 So.2d 354 (1974); Summerfield v. Superior Court, 144 Ariz. 467, 698 P.2d 712 (Sup. Ct. 1985); Espadero v. Feld, 649 F.Supp. 1480 (D. Colo. 1986); Gorke v. Leclerc, 23 Conn. Supp. 256, 181 A.2d 448 (1962); Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955); Wade v. United States, 745 F.Supp. 1573 (D. Haw. 1990); Chrisafogorjis v. Brandenberg, 55 Ill.2d 368, 304 N.E.2d 88 (1973); Britt v. Sears, 150 Ind.App. 487, 277 N.E.2d 20 (1971); Hale v. Manion, 189 Kan. 143, 368 P.2d 1 (1962); State ex rel. Odham v. Sherman, 234 Md. 179, 198 A.2d 71 (1964); Mone v. Greyhound Lines, Inc., 368 Mass. 354, 331 N.E.2d 916 (1975); O'Neill v. Morse, 385 Mich. 130, 188 N.W.2d 785 (1971); Jarvis v. Providence Hospital, 178 Mich.App. 586, 590, 444 N.W.2d 236, 238 (1989); O'Grady v. Brown, 654 S.W.2d 904 (Mo. 1983); Polinquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957); Salazar v. St. Vincent Hosp., 95 N.M. 150, 619 P.2d 826 (Ct. App. 1980); Dibonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489 (1987), reh'g den., 320 N.C. 799, 361 S.E.2d 73 (1987); Werling v. Sandy, 17 Ohio St. 3d 45, 476 N.E.2d 1053 (1985); Libbee v. Permanente Clinic, 268 Or. 258, 518 P.2d 636 (1974), reh'g den., id., 520 P.2d 361 (1974); Amadio v. Levin, 509 Pa. 199, 501 A.2d 1085 (1985); Presley v. Newport Hospital, 117 R.I. 177, 365 A.2d 748 (1976); Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964); Re Certification of Question of Law from United States District Court, 387 N.W.2d 42 (S.D. 1986); Tenn. Code Ann. § 20-5-106(c) (Supp. 1991) (legislatively overruling Hamby v. McDaniel, 559 S.W.2d 774 (Tenn. 1977); Moen v. Hanson, 85 Wash.2d 597, 537 P.2d 266 (1975).

59. See Appendix (hereinafter "Butler"), citing Koonin, et al. Abortion Surveillance, United States, 1988, 40 CDC Surveillance Summerier, Morbidity and Mortality Weekly Report 22 (July 1991) (Table 1) (79.7% in 1988).
60. Butler at 120-121.
61. Butler at 120, citing Franco, et al., Psychological profile of dysphoric women post-abortion, 44 J. Amer. Med. Women's Assoc 113 (July/August 1989).
62. Butler at 124, citing Shulkin & Bari, Letter to the editor, 324 New Eng. J. Med. 630 (Feb. 28, 1991).
63. Butler at 124, citing Stern, Female Talent at Lawfirms, Natl. L. J. 15-16 (Mar. 18, 1991).
64. Butler at 124, citing Martin, Women Given Cruelest Choice Now Fight Back, N. Y. Times, Oct. 21, 1989, at A27.
65. Butler at 120, citing Breidenbach v. Hayden, No. 90-CI-00021 (Jefferson Co., Ky., Cir. Ct. Div. 2).
66. Butler at 122, citing K. McDonnell, Not an Easy Choice: A Feminist Re-examines Abortion 59 (1984) (emphasis supplied).
67. Planned Parenthood v. Casey, 112 S.Ct. 2791, 2809 (1992). The repeat rate for abortions (abortions sought by women who have had one or more prior abortions) is now close to 40%. This cannot be explained by contraceptive method failure alone, but by use failure.
68. A New York Times July 1989 poll revealed that most women were more concerned about job discrimination, child care and balancing work and family than about abortion. Butler at 103, citing Dionne, Struggle for Work and Family Fueling Women's Movement, N. Y. Times, Aug. 22, 1989, at A18.  
In ranking personal issues, women put abortion behind equal pay, day care, rape, maternity leave and job discrimination.  
Butler at 107, citing Wallis, Onward, Women! Time, Dec. 4, 1989 at 80.
69. Butler at 105-107.
70. Butler at 120, citing C. Gilligan, In A Different Voice: Psychological Theory and Women's Development (1982).

APPENDIX  
TO THE  
TESTIMONY  
OF

PAIGE COMSTOCK CUNNINGHAM  
PRESIDENT, AMERICANS UNITED FOR LIFE

The authors present the 1990 Gallup Organization Abortion and Moral Beliefs Survey from which they conclude that Americans are woefully ignorant about the state of law on abortion. Basically, U.S. Americans know that a woman has a legal right to an abortion because of the landmark decision *Roe v. Wade*. However, there is great confusion as to when during a pregnancy a woman may exercise her legal right. Additionally, the authors look at such issues as abortion and free choice, the impact of abortion on women's health and the relationship of the equality of women to *Roe v. Wade*. In conclusion they find that "the abortion privacy doctrine has spawned a great host of ills for women, without remedying any of the real historical injustices against them."

"Is Abortion the 'First Right' for Women?"  
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## 4 • Is Abortion the "First Right" for Women?: Some Consequences of Legal Abortion

*Paige Comstock Cunningham, J.D.,<sup>1</sup> and  
Clarke D. Forsythe, J.D.<sup>2</sup>*

### I. Introduction

Freely available, legal abortion in the United States is of relatively recent vintage. Prior to 1960, abortion in virtually all circumstances was a crime in every state.<sup>3</sup> In the

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<sup>3</sup>Colorado (in 1968) and New Mexico (in 1919) permitted abortion only for "serious and permanent bodily injury." Maryland (in 1867) permitted abortion for the mother's "safety." Alabama (in 1951) and the District of Columbia (in 1901) allowed abortion when necessary for the mother's "life or health." By judicial interpretation, Massachusetts allowed abortion for the mother's life and physical or mental health. *Kudish v. Board of Registration on Medicine*, 356 Mass. 98, 99–100, 248 N.E. 2d 264, 266 (1969) and cases cited therein. Linton, *Enforcement of State Abortion Statutes After Roe: A State-by-State Analysis*, 67 U. Detroit L. Rev. 157 (1990); Witherspoon, *Reexamining Roe: Nineteenth Century Abortion Statutes and the Fourteenth Amendment*, 17 St. Mary's Law Journal 29, 45–49 (1985).

The notion that legal abortion was available before the 19th century and at common law has been exploded by recent scholarship. J. Keown, *Abortion, Doctors & the Law* (1988); Dellapenna, *The Historical Case Against Abortion*, No. 13 Continuity 59 (1989); Dellapenna, *The History of Abortion: Technology, Morality & Law*, 40 U. Pitt. L. Rev. 359 (1979); Dellapenna, Brief of the American Academy of Medical Ethics as Amicus Curiae, in *Hops v. Peralta*, No. 21073/90 (N.Y. Sup. Ct. App. Div. Jan. 1992).

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1960s, a movement that sought to abolish abortion laws had some success: By the time of the Supreme Court's decision in *Roe v. Wade*<sup>4</sup> in 1973, 19 states had "liberalized" their abortion laws to various degrees.<sup>5</sup> Numerous rhetorical arguments were raised in justification of legalized abortion "as a humane solution to a critical social problem."<sup>6</sup> Legalized abortion was needed for population control,<sup>7</sup> to promote maternal health,<sup>8</sup> to reduce child abuse,<sup>9</sup> to alleviate poverty<sup>10</sup> and to eliminate unsafe "back-alley abortions."<sup>11</sup> Many of these arguments were implicitly relied upon in the Supreme Court's opinion in *Roe v. Wade*,<sup>12</sup> in which the Court legalized abortion on demand through all nine months of pregnancy.<sup>13</sup> In less than a decade, the status of abortion changed from being a crime in all 50 states to being widely perceived as a "constitutional right," a "fundamental freedom."<sup>14</sup> As Lawrence Lader wrote, "[T]he Court went far beyond any of the 18 new state laws the movement had won since 1967, with only New York's law approaching its scope. It climaxed a social revolution whose magnitude and speed were probably unequaled in United States history."<sup>15</sup>

Yet the public rhetoric has shifted dramatically in the 20 years since *Roe*:

<sup>4</sup>410 U.S. 113 (1973).

<sup>5</sup>Linton, *supra* note 3; See generally, L. Lader, *Abortion II: Making the Revolution* (1973); F. Ginsburg, *Contested Lives: The Abortion Debate in an American Community* 35-37, 64-71 (1989). However, shortly before the Supreme Court's decision in *Roe v. Wade*, Michigan rejected a state referendum by a 61% majority that would have introduced elective abortion up to five months. J. Noonan, *A Private Choice: Abortion in America in the Seventies* 34 (1979); Distro, *Abortion and the Constitution*, 53 Cal. L. Rev. 1250, 1337-38 (1975). North Dakota rejected a similar referendum by a 77% majority. *Id.*

<sup>6</sup>L. Lader, *supra* note 5, at 43. See generally, Tietze & Lewit, *Abortion*, 220 *Scientific Amer.* 21 (Jan. 1969); A. Neier, *Only Judgment: The Limits of Litigation in Social Change* 116 (1982); Callahan, *An Ethical Challenge to Prochoice Advocates: Abortion & the Pluralistic Proposition*, *Commonweal*, Nov. 23, 1990, at 681, 682-83.

<sup>7</sup>L. Lader, *supra* note 5, at 14, 54; Hardin, *Abortion and Human Dignity*, in A. Guttmacher, ed., *The Case for Legalized Abortion Now* 83 (1967). For a more recent statement, see "Population size can't be overlooked as an environmental danger," *New York Times*, October 31, 1988, at A18.

<sup>8</sup>Cf. the statement of Mary Calderone, medical director of Planned Parenthood Federation of America, in 1960: ". . . medically speaking, that is, from the point of view of diseases of the various systems, cardiac, genitourinary, and so on, it is hardly ever necessary today to consider the life of the mother as threatened by a pregnancy." Calderone, *Illegal Abortion as a Public Health Problem*, 50 *Am. J. Pub. Health* 948 (July 1960). Ten years later, Christopher Tietze acknowledged: "Abortion is much more widely approved as an emergency measure than as an elective method of birth regulation." Tietze & Lewit, *Abortion*, 220 *Scientific Amer.* 21, 23 (Jan. 1969) (chart).

<sup>9</sup>L. Lader, *supra* note 5, at 23-24; Hardin, *supra* note 7, at 82. A more recent argument of this kind is made in H. P. David, et al., *Born Unwanted: Developmental Effects of Denied Abortion* (1988).

<sup>10</sup>Hardin, *supra* note 7, at 84-85. Cf. *Beal v. Doe*, 432 U.S. 438, 463 (1977) (Blackmun, J., dissenting) ("And so the cancer of poverty will continue to grow").

<sup>11</sup>Maginnis, *Elective Abortion as a Woman's Right*, in A. Guttmacher, *supra* note 7, at 132. For a recent version of this argument, see E. Messer & K. May, *Back Rooms: An Oral History of the Illegal Abortion Era* (Torchstone paperback ed. 1989).

<sup>12</sup>410 U.S. 113, 116, 153 (1973) ("In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.").

<sup>13</sup>See *infra* note 21. The phrase "abortion on demand" appears first coined by abortion advocates, not opponents. B. Nathanson, *Aborting America* 176-77 (Life Cycle Books paperback 1979); Guttmacher, *Abortion—Yesterday, Today & Tomorrow*, in A. Guttmacher, *supra* note 7, at 13 ("Today, complete abortion license would do great violence to the beliefs and sentiments of most Americans. Therefore I doubt that the U.S. is as yet ready to legalize abortion on demand, and I am therefore reluctant to advocate it in the face of all the bitter dissension such a proposal would create.")

<sup>14</sup>L. Lader, *supra* note 5, at iii.

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*The most striking ideological development has been the emergence into leadership positions in the prochoice movement of some feminists who have scanned many of the original arguments for abortion reform. They have shifted the emphasis almost entirely to a woman's right to an abortion, whatever her reasons and whatever the consequences.<sup>15</sup>*

Today, the argument, almost exclusively, is that abortion—for any reason, at any time of pregnancy—is the “first right” for women; that is, women’s unlimited access to abortion is essential for sexual equality and is the nonnegotiable prerequisite for all other social, economic or legal rights.<sup>16</sup> As one abortion-rights activist has put it, “[w]e can get all the rights in the world . . . and none of them means a doggone thing if we don’t own the flesh we stand in . . .”<sup>17</sup> Nevertheless, a sober assessment of this new justification for elective abortion suggests that it was not founded on a genuine consideration of women and their needs or on an accurate understanding of elective abortion in practice.

The Supreme Court will have an opportunity to conform the legal reality more closely to the philosophical and political reality of abortion’s tragic impact on women and society by upholding all provisions of the law challenged in *Planned Parenthood v. Casey*.<sup>18</sup> The Pennsylvania law sets forth minimal protections for women’s physical and psychological well-being. For example, it requires fully informed consent, with a 24-

<sup>15</sup>Callahan, *supra* note 6, at 681, 683. Cf. A. Neier, *Only Judgment: The Limits of Litigation in Social Change* 116 (1982).

<sup>16</sup>See, e.g., R. Peachesky, *Abortion and Woman’s Choice* 5 (Rev. ed. 1990) (“A woman’s right to decide on abortion when her health and her sexual self-determination are at stake is ‘nearly allied to her right to be’”); Wattleton, *Reproductive Rights Are Fundamental Rights*, *The Humanist*, Jan/Feb. 1991, at 21, 22 (“Without reproductive autonomy, our other rights are meaningless”); Paul & Schap, *Abortion and the Law in 1980*, 25 N.Y.L. School L. Rev. 497, 498 (1980) (“without which other legal rights have little significance”). See generally, B. Harrison, *Our Right to Choose* (1983).

Lawrence Lader said much the same thing in 1973. L. Lader, *supra* note 5, at 18. But the message was not so single-minded. Indeed, Lader claims that “Friedan, one of the most impressive militants of her time, avoided the abortion issue at first” and that, early on, he urged on her (implicitly to no avail) the proposition that “all feminist demands hinged on contraception and abortion and a woman’s control over her own body and procreation.” *Id.* at 36.

<sup>17</sup>Quoted in K. Luker, *Abortion & the Politics of Motherhood* 97 (U. Cal. Press paperback 1985).

Those who view abortion as the “first right” are generally the same advocates of abortion rights who refuse to debate the morality of abortion because it is “off-limits” (DeParle, *Beyond the Legal Right: Why Liberals and Feminists Don’t Like to Talk about the Morality of Abortion*, *Washington Monthly* 28 (April 1989). Even some modern abortion-rights supporters recognize the incongruity here.

If, for some people, to have choice is itself the beginning and end of morality, for most people it is just the beginning. It does not end until a supportable, justifiable choice has been made, one that can be judged right or wrong by the individual herself based on some reasonably serious, not patently self-interested way of thinking about ethics. That standard—central to every major ethical system and tradition—applies to the moral life generally, whether it be a matter of abortion or any other grave matter. An unwillingness to come to grips with that standard not only puts the prochoice movement in jeopardy as a political force. It has a still more deleterious effect: it is a basic threat to moral honesty and integrity. The cost of failing to take seriously the personal moral issues is to court self-deception, and to be drawn to employ arguments of expediency and evasion. —

Callahan, *supra* note 6, at 682.

<sup>18</sup>947 F.2d 682 (3rd Cir. 1991), cert. granted, 112 S. Ct. 931–932 (1992).

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hour waiting period to digest the information, and abortion statistical reporting. As discussed below, in the profitable abortion marketplace, women are often deceived or coerced into undergoing abortions they do not want. With an opportunity to evaluate meaningful alternatives to abortions or to consult with a parent (in the case of a minor), many unnecessary, unwanted abortions may be avoided.

## II. Do Women Consider Abortion the "First Right"?

### A. Current Public Opinion

People who claim to speak for women and their fundamental reliance on completely accessible abortion dominate the airwaves, the press and academic journals. Yet opinion polls taken in recent years do not substantiate the alleged importance of abortion rights to the majority of American women. For example, a New York Times poll of July 1989 indicated that most women were concerned more about job discrimination, child care and balancing work and family than about abortion.<sup>19</sup> These opinion polls did not deeply probe underlying attitudes about abortion and other social issues.

In 1990, the Gallup Organization conducted the largest and most comprehensive survey of U.S. attitudes on abortion to date, the Abortion and Moral Beliefs Survey.<sup>20</sup> One of the most striking conclusions from the survey is that Americans are woefully ignorant about the state of U.S. law on abortion. *Roe v. Wade* legalized abortion throughout pregnancy for any or no reason.<sup>21</sup> Nine out of ten Americans simply do not know the extent to which abortion is legally available.

<sup>19</sup> Dionne, *Struggle for Work and Family Fueling Women's Movement*, New York Times, Aug. 22, 1989, at A18. See *infra* note 28 and accompanying text.

<sup>20</sup> Abortion and Moral Beliefs Survey (May 1990) [hereinafter Survey]. In this survey, the Gallup Organization conducted interviews with 2,174 adults and asked 200 questions concerning abortion and related areas of moral belief and public policy, requiring a 45-minute personal interview. Gallup conducted the survey interviews and tabulated the survey findings. Question design and development was conducted by a team of social scientists, including James Davison Hunter, Ph.D., of the University of Virginia, Carl Bowman, Ph.D., of Bridgewater College in Virginia, and Robert Wuthnow, Ph.D., of Princeton University. James Rogers, Ph.D., of Wheaton College, Wheaton, Illinois and a Senior Research Associate at Northwestern University School of Medicine, analyzed and interpreted the data. The margin of error does not exceed +/− 3% for questions asked of the entire sample. For questions asked of a subsample, the margin of error may be greater. This survey was commissioned by Americans United for Life and is on file with the authors.

<sup>21</sup> The Supreme Court in *Roe v. Wade* held that the states could not prohibit any abortions prior to viability. After viability, the Court said, the states may prohibit abortion, "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Roe*, 410 U.S. at 165. But the Court then expanded the exception for "health of the mother" in a way to make it impossible for states to prohibit abortions. The Court held that *Roe v. Wade* and *Doe v. Bolton* "are to be read together," *id.* at 165, and the Court defined "health" in *Doe* as "all factors—physical, emotional, psychological, familial and the woman's age—relevant to the well-being of the patient. All these factors may relate to health." *Doe v. Bolton*, 410 U.S. 179, 192 (1973). Both the Supreme Court and the lower federal courts have applied "health" in the third trimester in a very broad manner. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *Colautti v. Franklin*, 439 U.S. 379, 400 (1979) ("women's life and health" requires that "all factors relevant to the welfare of the woman may be taken into account by the physician in making his decision" after viability); *American College of Obstetricians and Gynecologists v. Thornburgh*, 737 F.2d 283, 299 (3d Cir. 1984), *aff'd* 476 U.S. 747 (1986); *Schulte v. Douglas*, 567 F.Supp. 522 (D.Neb. 1981); *Margaret S. v. Edwards*, 488 F.Supp. 181, 196 (D.La. 1980).

Commentators, likewise, have also understood the third trimester "health" exception to be very broad. *Wood & Hawkins, State Regulation of Late Abortion and the Physician's Duty of Care to the Viable Fetus*, 45 Mo. L. Rev. 394 (1980); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J.

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Survey respondents were asked whether they were "very familiar," "fairly familiar," "not too familiar" or "not at all familiar" with "the 1973 Supreme Court decision on abortion known as *Roe v. Wade*." Only one in four of those who said that they were "very familiar" with *Roe v. Wade* could accurately state its outcome. Forty-two percent of the sample who stated that they were "very familiar," "fairly familiar" or "not too familiar" thought *Roe* legalized elective abortion only in the first three months. Among women who claimed at least some familiarity with *Roe*, 24% thought *Roe* meant that "abortions are legal only during the first three months, and only when a mother's life or health is threatened"; 39% thought *Roe* meant that "abortions are legal during the first three months, regardless of a woman's reasons for wanting one." Only 18% of this subsample correctly indicated that *Roe* meant that "abortions are legal for the duration of pregnancy, regardless of a woman's reason for wanting one."

This ignorance applies as well to the Supreme Court's July 1989 decision in *Webster v. Reproductive Health Services*.<sup>22</sup> Although the Abortion and Moral Beliefs Survey was conducted 10 months after the decision, during which time there was extensive media coverage, 8 out of 10 respondents stated that they were "not at all familiar" with the decision. Respondents were asked whether they thought they were "very familiar," "fairly familiar" or "not at all familiar" with "the 1989 Supreme Court decision on abortion in the *Webster* case." Among women, 81% conceded that they were "not at all familiar" with *Webster*. Among women who stated that they were "very familiar" or "fairly familiar" with the decision, 23% thought that "the legal outcome of the *Webster* decision" was "best described" as "abortions are permitted only during the first three months and only when a mother's life or health is threatened"; 10% thought that "abortions are now legal during the first three months, regardless of a woman's reason for wanting one"; and another 51% thought that "abortions that are legal in one state may be illegal in another." Only 5% knew that *Webster* means "abortions are legal for the duration of the pregnancy regardless of a woman's reason for wanting one."<sup>23</sup>

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<sup>22</sup> 921 n.19 (1973); Editorial, *Abortion: The High Court Has Ruled*, 5 Fam. Plan. Perspect. 1 (Winter 1973) ("Even New York's law appears to be overbroad in proscribing all abortions after 24 weeks except to preserve the woman's life, since the Court has held that an exception must also be made for preservation of the woman's health (interpreted very broadly)").

<sup>23</sup> 492 U.S. 490 (1989).

<sup>24</sup> In *Webster*, the Supreme Court did not explicitly overrule *Roe v. Wade*; nor did the Court uphold any prohibition on abortion for any reason at any time of pregnancy. Rather, the Supreme Court upheld the constitutionality of several provisions of a Missouri abortion statute, including a preamble, tests for fetal viability at or after 20-weeks gestation and prohibitions on public funding for abortion.

The ACLU, in a brief filed before the Ninth Circuit Court of Appeals, has characterized *Webster* as follows:

In *Webster*, the Court found constitutional provisions of a Missouri statute that, unlike those enjoined here, dealt with the use of public resources for abortions and required certain tests to determine viability. The Court determined only that "none of the challenged provisions of the Missouri Act properly before [it] conflict with the Constitution." 109 S. Ct. at 3058. The *Webster* plurality modified *Roe* only "to the extent" required to uphold the Missouri statute. 109 S. Ct. at 3058. Although Justice O'Connor, the critical fifth vote, mentions with approval her dissenting opinion in *Abortion*, she uses the standards of *Roe*, and the majority opinions in *Abortion* and *Thornburgh*, to measure the constitutionality of the viability testing requirement and sustains the Missouri law under that test. *Webster*, 109 S. Ct. at 3060-64 (O'Connor, J., concurring). Justice O'Connor agreed with the Chief Justice that

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The survey demonstrates that, after 19 years of legalized abortion nationwide, the American public still does not understand *Roe* and its policy of abortion on demand throughout pregnancy. If they did, they might not select the "prochoice" label so readily.<sup>24</sup> In fact, the majority of Americans disapprove of the majority of abortions.<sup>25</sup> Approximately 25% of the sample disapproved of abortion in almost all circumstances except to save the life of the mother (the "consistently disapproves" group). Another 26% disapproved of abortion when it is used for "birth control" or "sex selection" (the "seldom disapprove" group). The largest group, which makes up nearly 50% of the sample, disapproved of abortion except for certain "hard cases"—including danger to the life or physical health of the mother, rape, incest or serious fetal deformity (the "often disapprove" group). Yet, these cases represent no more than 5 percent of the 1.6 million abortions performed each year.<sup>26</sup>

The survey also showed that Americans have strong opinions about the nature of the unborn. Seventy-seven percent of the respondents believed that abortion is either "an act of murder as bad as killing a born human being" (37%), "an act of murder but not as bad as killing a born human being" (12%) or "the taking of human life" (28%). Only 16% believed that abortion is merely a surgical procedure or the removal of tissue. Fully 50% of the respondents believed that, from the moment of the child's conception, the unborn child's right to be born supersedes the woman's "right to choose." Only 23% believed that "the child's right to be born" does not outweigh "the woman's right to choose" until viability (16%) or birth (7%).

Contrary to conventional wisdom, the survey demonstrated that there is no "gender gap" on abortion, or at least not the one commonly assumed.<sup>27</sup> More women than men

there was "no necessity to accept the State's invitation to reexamine the constitutional validity of *Roe v. Wade*." *Id.* at 3060 (O'Connor, J., concurring). Thus, Justice Blackmun observed in his dissent, "the Court extricates itself from [Webster] without making a single, even incremental change in the law of abortion." 109 S. Ct. at 3067. And Justice Scalia severely chastises the Court for failing to take that step. *Id.* at 3064 (Scalia, J., concurring).

Brief of Appellees in *Guam Society of Obstetricians and Gynecologists v. Ada*, No. 90-16706 (9th Cir.), at 22-23.

The "legal outcome" of *Webster*, therefore, is that it leaves *Roe* undiluted. In the aftermath of *Webster*, abortions are still legal throughout pregnancy virtually for any reason in almost all states. The jurisprudential door has been opened, however, for potentially greater state regulation of abortion. The "practical outcome" is that abortion is perceived as less available and that abortion rights are in jeopardy.

<sup>24</sup>Thirty-three percent of the respondents identify themselves as "moderately prochoice" or "strongly pro-choice."

<sup>25</sup>Answers to 29 questions in the survey were submitted to a statistical procedure known as "cluster analysis."

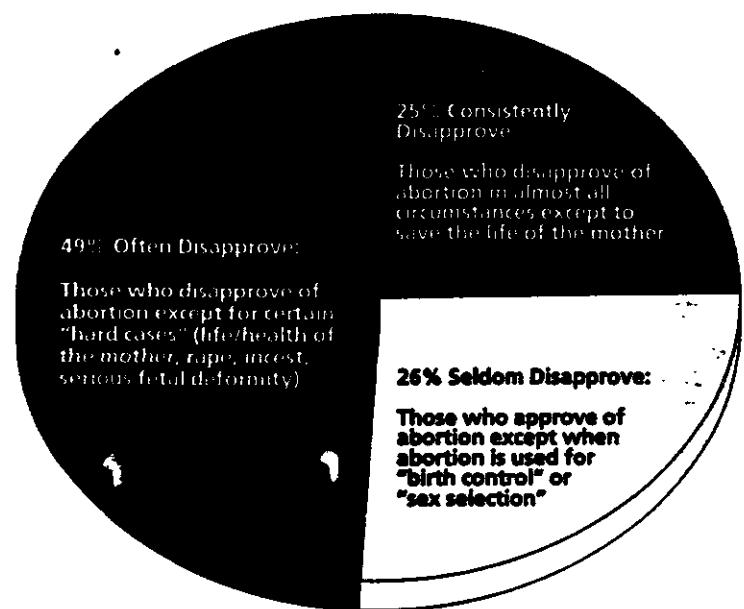
The purpose of this analysis was to find groups of individuals who generally hold the same patterns of beliefs regarding abortion. The cluster analysis tests for the consistency of response through a range of questions and plots the attitudes of the survey respondents accordingly. As a result of this analysis, three clusters of public belief emerged:

- those who "consistently disapprove" of abortion (25%)
- those who "often disapprove" of abortion (49%)
- those who "seldom disapprove" of abortion (26%)

<sup>26</sup>See *infra* note 174-76 and accompanying text.

<sup>27</sup>The Abortion and Moral Beliefs Survey was designed by the Gallup Organization to represent the nation as a whole and not any subgroup of the total population. However, although a subgroup analysis may be suggestive of the views held by that particular segment of the population (women) and is valuable for purposes of guiding future research, it should not be portrayed as conclusive evidence of the views of the subgroup in the general population.

### Cluster Analysis Identifying American Opinion on Abortion



Source: Abortion and the Supreme Court, May 1990. The Gallup Organization conducted interviews with 2,174 adults and tabulated results. Funded by Americans United for Life. Margin of error is not greater than ± 3 percent.

(53% to 46%) believed that "the unborn child's right to be born" outweighs the "woman's right to choose whether she wants to have the child at the moment of conception." Sixty-two percent of the women (49% of men) stated that "the fertilized egg inside a mother's womb first becomes a person at the moment of conception," compared to 15% of women (18% of men) who said "when the mother first feels movement," 13% of

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women (14% of men) who said "when the baby could survive on its own" and 5% of women (10% of men) who said at the "moment of birth." When women were asked, "[W]hich of these statements best describes your feelings about abortion?" 42% (compared to 32% of men) responded that "abortion is just as bad as killing a person who has already been born; it is murder." In general, women in this sample were more protective of unborn human life than were men.<sup>28</sup>

Abortion is often portrayed as an issue that pits most women (assumed to be abortion supporters) against most men (assumed to be abortion opponents). This portrayal fails to explain why *more* men than women favor abortion rights in public opinion surveys. It may be that men perceive greater benefits from freely available, relatively cheap abortion. Why else is the Playboy Foundation such a strong supporter of abortion rights—securing the exercise of the Playboy ethic with no fault, no mess for men?<sup>29</sup> "It is difficult to be loving and caring. It is challenging, demanding, exhausting, and expensive to provide the care and support needed by women in distress. It is much easier, quicker, and cheaper to send a woman to an abortionist."<sup>30</sup> A recent article in *Esquire* about men and abortion reveals that in many cases the male partner suggested the abortion first.<sup>31</sup>

Not only are women less supportive of abortion than men are, public opinion surveys and studies consistently show that many other issues—whether personal or public—are more important to women than abortion.<sup>32</sup> Although women expressed concern about the abortion issue, they were more concerned about other issues nearly a year after the *Webster* decision. The Abortion and Moral Beliefs Survey revealed that, although 52% of the women were "very concerned" and 29% were "concerned" about abortion, a higher percentage were "very concerned" about other public issues: child abuse (85.8%), drug abuse (84.8%), AIDS (68.5%), environmental pollution (61.6%) and homelessness (58.2%).<sup>33</sup> In ranking abortion among personal issues, women are more concerned about equal pay (94%), day care (90%), rape (88%), maternity leave (84%) and job discrimination (82%) than they are about abortion (74%).<sup>34</sup> These levels of concern were expressed after the *Webster* decision when "abortion rights" were considered to be in jeopardy. The rankings are consistent with a poll taken just days before *Webster* when women were asked what should be the most important goal for

<sup>28</sup>Other surveys indicate that more women than men support criminal penalties for women who injure their unborn child *in utero* through drug use. Curriden, *Holding Mom Accountable*, 76 ABA Journal 50, 51 (March 1990) ("A survey of 15 southern states by the *Atlanta Constitution* found that 71 percent of the 1,500 people polled favored criminal penalties for pregnant women whose illegal drug use injures their babies. Another 45 percent favored prosecuting women whose use of alcohol and cigarettes during pregnancy harms their offspring. Surprisingly, the survey found that more women than men were in favor of criminalizing 'fetal abuse.'").

<sup>29</sup>C. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* 99 (1987); MacKinnon, *Roe v. Wade: A Study in Male Ideology*, in J. Garfield & P. Hennessey, eds., *Abortion: Moral and Legal Perspectives* 51 (1984).

<sup>30</sup>Smith, *Abortion as a Feminist Concern*, in J. Hensley, ed., *The Zero People* 79 (1983).

<sup>31</sup>Baker, *Men on Abortion*, Esquire 114 (March 1990). See also, Goodman, *Men and Abortion*, Glamour 178 (July 1989).

<sup>32</sup>See, e.g., A. Hochschild, *The Second Shift: Working Parents and the Revolution at Home* (1989); Wallis, *Onward, Women!* Time 80 (Dec. 4, 1989).

<sup>33</sup>Survey, *supra* note 20.

<sup>34</sup>Wallis, *supra* note 32, at 82 (poll taken Oct. 23-25, 1989).

## A Comparison of Male and Female Attitudes on Abortion

**Question 124: Which of these statements best describes your feelings about abortion?**

Females

Males

1. Abortion is just as bad as killing a person who has already been born; it is murder.

41.9%

31.6%

2. Abortion is murder, but it is not as bad as killing someone who has already been born.

11.3%

12.4%

3. Abortion is not murder, but it does involve the taking of human life.

23.9%

30.8%

4. Abortion is not murder, it is a surgical procedure for removing human tissue.

16.4%

13.0%

5. Can't say.

6.6%

7.2%

Source: "Abortion and Moral Beliefs Survey," May 1980. The Gallup Organization conducted interviews with 2,174 adults and tabulated results. Study commissioned by Americans United for Life. Margin of error is not greater than ± 3.8 percent.

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women's organizations. Abortion ranked last (2%) behind job equality (27%), equal rights (14%) and child care (5%).<sup>35</sup>

#### B. Women's Values and Self-Understanding

Despite the opinion of American women as revealed in polls, the organized women's movement has come to stand predominantly for abortion advocacy. There is an obvious discrepancy between the political agenda of the women's movement—and its philosophical underpinnings in academic feminism—and the needs of the majority of mainstream American women. There are several reasons why this may be the case. First, as the Abortion and Moral Beliefs Survey reveals, the women's movement is out of touch with the fact that for a majority of women access to abortion is a low priority. It is also out of touch with the feelings of the majority of women who consider abortion to be murder or killing. Finally, the claim that abortion is a *sine qua non* negates women's own understanding of themselves. One feminist legal scholar has characterized women as valuing intimacy, nurturance, community, responsibility and care.<sup>36</sup> Another observer—an approving male—lauded four virtues of feminist thought, virtues that he perceived abortion as violating: nonviolence, ecological harmony (the "deep connection between our bodies and the earth"), community (inclusivity) and egalitarian power-sharing (co-operation as a replacement for competition).<sup>37</sup> These "feminine" values contrast with allegedly "masculine" values.

*Women respond to their natural state of inequality by developing a morality of nurturance that is responsible for the well-being of the dependent, and an ethic of care that responds to the greater needs of the weak. Men respond to the natural state of equality with an ethic of autonomy and rights.<sup>38</sup>*

Yet much of the rhetoric of and philosophical support for the abortion-rights movement is couched in "masculine" terms of autonomy ("it's my body") and rights ("not the church, not the state, women must decide their fate").

No matter what explanation is preferred, abortion advocacy fails both the political and philosophical analysis. Politically, the women's movement has abandoned the very people it claims to serve. Philosophically, the abortion ethic contradicts the essence of women by seeking to destroy, rather than protect and nurture, the one with whom the pregnant woman is so intimately connected. Abortion advocacy ignores, or at least buries, the intuitive knowledge of women throughout the centuries. Long before the emergence of rabbit tests or ultrasound, women (and therefore society) have intuitively known the obvious: The entity conceived through intercourse is a child, their child.<sup>39</sup>

<sup>35</sup>Doane, *supra* note 19, at A1. Concern about abortion tied with balancing work and family (2%); the "all other problems" category was 18%.

<sup>36</sup>West, *Jurisprudence and Gender*, 56 U. Chi. L. Rev. 1, 28 (1988).

<sup>37</sup>Liau, *The Internal Threat to Feminism*, New Oxford Rev. 4 (Oct. 1990).

<sup>38</sup>West, *supra* note 36, at 28. Despite her recognition that nurturance is a feminine quality, West nonetheless defends the right to abort as necessary to defend against the "danger" of "invasion of the body by the fetus and the intrusion into the mother's existence following childbirth." *Id.* at 70.

<sup>39</sup>See, e.g., Flodin, *Why I Don't March*, Newsweek, Feb. 12, 1990, at 8 ("I was pregnant, I carried two unborn children and I chose, for completely selfish reasons, to deny them life so that I could better my own"). In 1960, the medical director of Planned Parenthood Federation of America acknowledged that "abortion is the taking of a life . . ." Calderone, *supra* note 8, at 951.

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A recent, frank revelation on this score is that of California psychologist, Susan Nathanson, in her 1989 book, *Soul Crisis*.<sup>40</sup> Nathanson's account of her abortion, at four weeks' gestation, an abortion that occurred after she had previously given birth to three children, is unique for her candid, strongly stated certainty about the humanity of her fourth, unborn child from conception.<sup>41</sup> "My wish to have this unborn, though very alive, fourth child is so strong it is palpable."<sup>42</sup> In contrast, she writes, the baby "doesn't have much reality" for her husband.<sup>43</sup> Her experience is not unique. Women appear to identify and connect with the fetus as a child—their child—more than men do.<sup>44</sup> Nathanson cites an account of a friend who, upon revealing her own abortion of years ago, said she felt as though she had committed "murder."<sup>45</sup> Years later Nathanson continues to have these feelings: ". . . in ending the life of my child, I also annihilated a part of myself . . ."<sup>46</sup> Nathanson does not retreat from her conclusion. Rather, armed with this belief, she argues that abortion is a version of infanticide; women and society now must accept an ethic that allows (and perhaps encourages) women to both conceive and kill their children according to their individual and family needs.<sup>47</sup> Her goal is to help women reconcile and embrace their power as both life-givers and "murderers."<sup>48</sup> Pro-choice feminist periodicals ignored Nathanson's book, perhaps because she recognizes abortion as murder.<sup>49</sup>

Nathanson's conclusions pinpoint the basis of the profound conflict over abortion among women. Abortion advocacy illustrates the different views of self that women hold, as Faye Ginsburg recognized in *Contested Lives*, a study of women in the pro-choice and pro-life movements.<sup>50</sup> The essential difference in the two concepts of self

<sup>40</sup>S. Nathanson, *Soul Crisis: One Woman's Journey Through Abortion to Renewal* (Signet paperback ed. 1990).

<sup>41</sup>*Id.* at 2 ("Once a new life has been conceived, there is no turning back; an unalterable event—physical and psychological—has occurred"); *id.* at 26 ("but we are not talking about the choice of whether to conceive a child; this child is a reality, taking shape already deep within my body"); *id.* at 27 ("This fourth child exists, it's here, it's a reality. It's the fate of this child that we have to decide.").

<sup>42</sup>*Id.* at 29.

<sup>43</sup>*Id.* at 40.

<sup>44</sup>Cf. Goodman, *supra* note 31, at 210 ("For me, that fetus wasn't a child yet. For her, it was.").

<sup>45</sup>S. Nathanson, *supra* note 40, at 203–204 ("Liz").

<sup>46</sup>*Id.* at 194.

<sup>47</sup>See *id.* at 218 ("I wish now that my fourth child could have been sacrificed with my love and tears, even with my own hands, in the circle of a family or a community of women . . . and not as it was, in a cold and lonely hospital room with instruments of steel."); *id.* at 217 ("I meditate again upon what a different world it would be if we could each become aware of and take responsibility for our capacity to annihilate others!"); *id.* at 209 ("Women have to develop themselves psychologically so that they can accept the consciousness of having the power and capacity to choose to end a life that is also part of their very own being"); *id.* at 205 ("Someday I hope our culture will evolve a new attitude, one that will enable women to bear the responsibility for choosing life or death for our offspring in a different way than is possible now . . .").

<sup>48</sup>*Id.* at 204–206. "Women have to develop themselves psychologically so that they can accept the consciousness of having the power and capacity to choose to end a life that is also part of their very own being." *Id.* at 209.

<sup>49</sup>The *Reader's Guide to Periodical Literature* reveals only one cursory review of *Soul Crisis*—85 Booklist 1493 (May 1, 1989). In addition, a manual review of many issues of *Glamour*, *Ms.*, *Ladies Home Journal*, *Mademoiselle*, *McCall's*, *Mother Jones*, *Working Woman*, *Savvy Woman*, *Vogue* turns up no review of the book since publication.

<sup>50</sup>F. Ginsburg, *Contested Lives: The Abortion Debate in an American Community* (1989). See also S. Hewlett, *A Lesser Life: The Myth of Women's Liberation in America* 323–337 (1986); Callahan, *supra* note 6 at 684; Bayles, *Feminism and Abortion*, *Atlantic Monthly* 79 (April 1990); cf. Quarles, *Letter to the Editor*,

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among women is between those who consider child-bearing to be essential to the definition of womanhood and those who see it as a mark of inequality with men that must be neutralized.<sup>51</sup> As moral philosopher Janet Smith has written:

*[B]ehind women's demands for unlimited access to abortion lies a profound displeasure with the way in which a woman's body works and hence a rejection of the value of being a woman. Whereas one might hope that the women's movement would be based on the assertion that it is great to be a woman and that women would endeavor to promote the powers and qualities which are theirs, the popularity of abortion indicates quite the opposite. Abortion is a denigration of women, a denial of one of the defining features of being a woman—her ability to bear children. Now some may deny that this is a defining characteristic of women. But is there any more certain criterion? A woman is a woman because she can bear children . . .*

*Child-bearing is basic to them. We might expect that deliberate and violent denial of such a potential may be devastating. Some women argue that the fetus (be it a human being or not) is a part of their bodies and that they may do with it what they will. In one sense—a very different sense—the argument is true. Pregnancy and childbearing are perfectly normal conditions for women, and hence a part of her physical and psychological make-up. To have an abortion is to destroy part of one's self. It is normal for a woman to carry the children she conceives to term. To remove that child forcibly interrupts and harms the healthy functioning of her body. To put it bluntly, an abortion amounts to a mutilation of the woman's body and to a denial of her nature.<sup>52</sup>*

Implicit in the position of those feminists who favor abortion rights is the view that men's inability to conceive is somehow superior to women's unique ability to bear children; women must be able "to have sex on a man's terms, not on a woman's."<sup>53</sup> It is this philosophical difference about the nature of unborn human life and pregnancy more than any other, that distinguishes women's positions on abortion in America and explains why, for many women, elective abortion can never be considered a basic right.

Pro-life women question whether the assertion of "choice" and "rights" in relation to aborting an unborn child can be reconciled with nurturance and other values cherished by feminists. Ginsburg writes that "[i]n opposition to the market relations of capitalism, nurturance stands for noncontingent and self-sacrificing support and love . . ."<sup>54</sup>

*One of the central notions in the modern American construct of The Family is that of nurturance . . . a relationship that entails affection and*

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Ms. Magazine, 19-20 (Jan./Feb. 1989) with Harmon, *Letter to the Editor*. Ms. Magazine 20 (Jan./Feb. 1989).

<sup>51</sup> Maggie Gallagher observed that some women consider a child to be "a crucial life goal; a primary form of self-identification." M. Gallagher, *Enemies of Eros* 68 (1989).

<sup>52</sup> Smith, *supra* note 30, at 81, 84.

<sup>53</sup> *Id.* at 86.

<sup>54</sup> F. Ginsburg, *supra* note 50, at 18.

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*love, that is based on cooperation as opposed to competition, that is enduring rather than temporary, that is noncontingent rather than contingent upon performance, and that is governed by feeling and morality instead of law and contract.*<sup>55</sup>

Abortion, a self-centered act, contradicts the very notion of nurturance as "self-sacrificing support and love."<sup>56</sup> Abortion as a prerequisite for equality with men contradicts the value of cooperation. Abortion as a protection against the "invasion" of the unborn child contradicts connectedness with, and care for, that child. Ginsburg perceptively noted that, "[p]ro-life advocates critique a cultural and social system that assigns nurturance to women yet degrades it as a vocation."<sup>57</sup>

Commitment to the family and its associated values of nurturance, love, cooperation, and permanence is not limited to identifiable pro-life advocates. One woman attorney who had a "high-powered job as a commercial litigator" surprised herself when she gave up part-time day care for her infant son in order to be home with him full time. She observed:

*It is easy to talk about combining kids and careers until you really do the mixing. The problem is not, as many of the young feminists I meet at the law school apparently believe, that some repressive male chauvinists are bent on keeping women in the home, and trying to recreate a stupid, sexist way of having a family. The problem is that women care too much about their children to abandon them to someone else . . .*

*Women naturally love their children and want to spend time with them. To say otherwise, to try to fit ourselves into a new model, is itself a terrible oppression of women—an oppression often by the very people who call themselves feminists.<sup>58</sup>*

Only recently is the feminist movement waking up to this woman's concerns. Columnist Susanne Fields commented, "Almost every poll tells us that mothers of young children would like to spend more time at home with them. Liberal feminists, who have until now stressed individual rights of women over the collective needs of the family, are getting that message."<sup>59</sup> The continuing demand for elective abortion starkly contrasts with this reawakening to family needs. And this reawakening may further erode support for abortion rights.

No individual or group can tolerate forever a basic inconsistency with its human nature, whether this contradiction is imposed by government, religion or academia. Most women affirm their identity as life-giver, child-bearer, nurturer and cooperator and their connectedness with the vulnerable. A claim of the power and right to wield the knife of abortion, whether at her own hands or the physician's, violates the core of woman's values and being. Last but not least, it also stands starkly outside the mainstream of historical feminist thought.

<sup>55</sup> F. Ginsburg, *supra* note 50, at 254 n.19.

<sup>56</sup> *Id.* at 18.

<sup>57</sup> *Id.* at 18.

<sup>58</sup> Presser, *Mom, a sound concept*, Chicago Tribune, Nov. 20, 1989, sec. 1, p. 19, col. 2.

<sup>59</sup> Fields, *Even feminists now boost the family*, Chicago Sun-Times, May 7, 1991, at 23.

### C. The Early Feminist Views on Abortion

Contemporary women's strong convictions against abortion were shared by the early American feminists in the 19th century, who "celebrated motherhood itself as a uniquely female power and strength that deserved genuine reverence."<sup>60</sup> Indeed, "the founding mothers of the women's movement staunchly opposed abortion, even to the point of supporting the late nineteenth century legislative campaign against it."<sup>61</sup>

Early feminist opposition to abortion has been dismissed as nothing more than an insufficient philosophical divorce from 19th century patriarchal society.<sup>62</sup> But this is a superficial reading. The 19th century leaders of the women's movement did not view legalized abortion as a solution to the oppression and disenfranchisement of women. They understood that abortion occurred because of that inequality. They understood that abortion is something done to women, by men, for men. Early feminists were uniformly opposed to abortion—including Susan B. Anthony, Elizabeth Cady Stanton, Matilda Gage, Victoria Woodhull, Sarah F. Norton and Mattie H. Brinkerhoff. They commonly called it "ante-natal child murder,"<sup>63</sup> "child murder"<sup>64</sup> and "infanticide."<sup>65</sup> They believed that "[l]ife must be present from the very moment of conception."<sup>66</sup>

The early feminists condemned not only the practice of abortion. They were equally concerned about its causes: ignorance about sexuality and reproduction, the view of pregnancy as a pathological condition, the double standard that promoted male irresponsibility, social pressures against illegitimacy and lack of economic support to single mothers.<sup>67</sup> Susan B. Anthony's and Elizabeth Cady Stanton's journal, *The Revolution*, often contained articles or editorials denouncing abortion's causes and tragic effects. Mattie Brinkerhoff wrote:

*[A]s law and custom give to the husband the absolute control of the wife's person, she is forced to not only violate physical law, but to outrage the holiest instincts of her being . . . When a man steals to satisfy hunger, we may safely conclude that there is something wrong with society—so when a woman destroys the life of her unborn child, it is an evidence that either by education or circumstances she has been greatly wronged.<sup>68</sup>*

Dr. Charlotte Lozier, a New York physician, in 1869 reported to the authorities a man who brought a young woman to her for an abortion. She then extended other

<sup>60</sup>M. Derr, "Man's Inhumanity to Woman, Makes Countless Infants Die": The Early Feminist Case Against Abortion i (1991) (privately published); on file with the authors.

<sup>61</sup>Derr, *supra* note 60, at i.

<sup>62</sup>R. Petchesky, *Abortion & Women's Choice* 44–45 (Rev. ed. 1990); J. Mohr, *Abortion in America: The Origins & Evolution of National Policy* 112–113 (1978).

<sup>63</sup>Woodhull & Claflin's Weekly, Nov. 19, 1876. (Sarah F. Norton).

<sup>64</sup>I The Revolution 215–16, April 9, 1868. (Matilda E. J. Gage).

<sup>65</sup>I The Revolution 65, Feb. 5, 1868. (Elizabeth Cady Stanton).

<sup>66</sup>A. Stockham, *Tokology* 246 (1887). Historian Carl Degler has noted that this valuation of fetal life at all stages "was in line with a number of movements to reduce cruelty and to expand the concept of the sanctity of life . . . the elimination of the death penalty, the peace movement, the abolition of torture and whipping in connection with crimes"—all movements that feminists supported. "The prohibiting of abortion was but the most recent effort in that larger concern." C. Degler, *At Odds: Women and Family in America From the Revolution to the Present* 247 (1980).

<sup>67</sup>See generally *Brief of Feminists for Life, et al. in Bray v. Alexandria Women's Health Clinic*, No. 90–985, at 10–25 (U.S. 1991).

<sup>68</sup>3 The Revolution 138, Sept. 2, 1869.

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assistance to the young woman. For this act, Lozier was praised in *The Revolution* a eulogized after her death by Pauline Wright Davis, an eminent suffragist:

*[Lozier's] sense of justice would not allow her to let the wrong-doer escape the penalty of the law, while at the same time she pitied and tenderly cared for the victim. We have been amazed to hear her denounced for this brave, noble act on the ground of professional privacy. It is said she had no right to expose the outrage of having one thousand dollars offered her to commit murder. The murder of the innocents goes on. Shame and crime after crime darken the history of our whole land. Hence it was fitting that a true woman should protest with all the energy of her soul against this woeful crime.<sup>69</sup>*

The 19th century feminists forcefully wrote that the only remedy for this "fearful ravage" was "the education and enfranchisement of women."<sup>70</sup> They originated the then-radical philosophy of "voluntary motherhood," which declared a woman's right to avoid pregnancy as she chose, through birth control or abstinence but *not* through abortion. They sought "prevention, not merely punishment. We must reach the root of the evil."<sup>71</sup>

Their desire for legal reform to protect and improve the circumstances of women<sup>72</sup> was accompanied by support for legal sanctions against the proliferating abortion trade, known commonly as "Restellism." *The Revolution* editorialized in favor of legislation to restrict abortifacient drugs and remedies on grounds that "Restellism has long found in those brothels of Bellzebub, its securest hiding place."<sup>73</sup>

In the early 20th century, opposition to abortion by feminists continued. Alice Paul, founder and chair of the National Woman's Party and author of the original Equal Rights Amendment in the 1920s, is recognized as "the foremost feminist of this century." She said that "[a]bortion is just another way of exploiting women."<sup>74</sup> Contemporary women's opposition to abortion thus has a clear philosophical link to the origins of American feminism.

#### D. Contemporary Feminist Understanding of Women

It was not until the late 1960s that the women's movement began demanding abortion rights. The movement was conceived and portrayed as a revolt against "the traditional female role," inspired in part by Betty Friedan's book, *The Feminine Mystique*.<sup>75</sup> The stated goal of the women's liberation movement was freedom and autonomy on an

<sup>69</sup>M. Dent, *supra* note 60, at 4 (citing 4 *The Revolution* 346, Dec. 2, 1869; 5 *The Revolution* 41–42, Jan. 20, 1870).

<sup>70</sup>I *The Revolution* 63, Feb. 3, 1868.

<sup>71</sup>4 *The Revolution* 4, July 8, 1869.

<sup>72</sup>At the same time, these feminists sought reform in marital property laws, the right to vote and the right to trial by a jury of her peers—women—for women, including the "frenzied mother, who, to save herself from exposure and disgrace, ended the life that had but just begun . . ." S. Anthony, M. Gage, E. Stanton, eds., *History of Women Suffrage* 397–98 (1881).

<sup>73</sup>I *The Revolution* 2, Feb. 5, 1868.

<sup>74</sup>Personal correspondence from Evelyn K. S. Judge to Wendy E. Stone, Nov. 1, 1991 (copy on file with the authors). Judge was a longtime political coworker of Paul's and lobbied with her for 18 years on Capitol Hill and at the United Nations.

<sup>75</sup>B. Friedan, *The Feminine Mystique* (1963).

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equal basis with men. This encompassed an effort to attain biological sameness as well. Some women hated the uniqueness of the female body and one called gender differences "metaphysical cannibalism."<sup>76</sup> Abortion was deemed necessary to avoid the burdens of pregnancy, which men would not share. This "female oppression" was seen as the "most deeply ingrained injustice in history."<sup>77</sup>

However, the reality of gender differences could not be ignored. Women came to the realization that being treated exactly like a man was not the panacea they had hoped. "Sameness" did not yield equality. Women learned that the rigors they encountered in the workplace were just as brutalizing to men. In addition, many women ended up going home from work to face the "second shift," where women perform 75% of the housework and child care.<sup>78</sup> Academic feminist thought eventually took into account the reality that this "first-stage" feminism or "equality feminism" lets men have it both ways—enjoying the second income of the wife while expecting her to fulfill a more traditional role at home.<sup>79</sup>

Even Betty Friedan now recognizes the "superwoman" fallacy. Speaking at Smith College's commencement, Ms. Friedan told the audience that "having it all" and being a "superwoman" have been

*a cruel illusion. Women have been spared pent prejudice only to be met with personal catastrophe. For the first time in American history, women work far harder than their mothers. And they miscarry more, are divorced more, abandoned more, abused more, and fall into poverty more.*<sup>80</sup>

Contemporary feminism then tried to compensate for its disillusionment with "absolute equality" by developing "difference feminism" or "second-stage feminism."<sup>81</sup>

*None of the very real problems facing women today, from finding ways to combine fruitful work with a nurturing family life, to rescuing women from the economic disaster of divorce, can be resolved without abandoning the failed doctrine of sexual androgyny. That is, without firmly and quite unashamedly acknowledging the distinctive needs, desires, and contributions of women.*<sup>82</sup>

Difference feminism "questioned the move towards full assimilation of female identity with public male identity and argued that to see women's traditional roles and activities as wholly oppressive was itself oppressive to women, denying them historic subjective and moral agency."<sup>83</sup> Dr. Barbara Bardes, dean of the University College of Loyola University in Chicago, calls this the "post-feminist age:" "It represents a consciousness that women acknowledge their desire to be mothers—that they want to be different but

<sup>76</sup> Bayles, *supra* note 50, at 79, 84 (quoting Ti-Grace Atkinson).

<sup>77</sup> *Id.*

<sup>78</sup> See generally A. Hochschild, *supra* note 32.

<sup>79</sup> Wallis, *supra* note 32, at 86.

<sup>80</sup> As quoted in K. Moore, *The Writing on the Wall*, The Harvard Salient 1 (Nov. 1990). See also Betty Friedan's recent book, *The Second Stage* (1986).

<sup>81</sup> Bayles, *supra* note 50, at 79.

<sup>82</sup> M. Gallagher, *supra* note 51, at 70. See Bayles, *supra* note 50, at 85.

<sup>83</sup> Bayles, *supra* note 50, at 85 (quoting Jean Bethke Elstain, emphasis in original).

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equal."<sup>84</sup> This second-stage feminism (or difference feminism) acknowledges and accepts that women are biologically different than men. Second-stage feminism looks at each problem or human condition from the unique perspective of women. But not all feminists who acknowledge sexual differences seek equality. Some make ". . . no pretense of [desiring] equal treatment but rather the pursuit of privilege to compensate for the great range of psycho-sexual differences between the genders."<sup>85</sup>

Nonetheless, this trend in feminism acknowledges values that most women intuitively share: nurturing, responsibility, caring for others and a sense of community. Carol Gilligan concluded in *In a Different Voice* that men reason from ideas of individual rights and fair play, while women reason from ideas of individual responsibility and concern for others.<sup>86</sup> This, of course, is the age-old dichotomy between justice and mercy, that, together, establish the foundation of the human community. But these "feminine" values are not unique to women. Men, too, can be nurturing and care for others, just as women may pursue autonomy and individual rights. But to negate or compromise nurturance and inclusivity destroys the essence of women's self-concept, a deep, inseparable, part of who they are. Thus, the assumption that women need abortion as their "first right" represents a profound misunderstanding of the nature of women.

The commitment to abortion rights creates some glaring inconsistencies for feminism. "Today, this inconsistency shows up in the heat of political debate, as pro-choice activists switch back and forth between the two kinds of feminism to defend the absolute right to abortion."<sup>87</sup> The reason for this dilemma is not difficult to understand: "It is not easy to reconcile the feminine metaphors of motherhood and community with the feminist defense of abortion on the grounds of individual right."<sup>88</sup> This inability of abortion advocates to reconcile these conflicts, accompanied by determined adherence to abortion rights, leaves many American women—those who do not "<sup>89</sup> the trends in feminist theory—unpersuaded. Despite the self-proclaimed success of some women's organizations, particularly as abortion advocates, a 1989 survey found that only 25% of women agreed that women's organizations have done something that "made your life better."<sup>90</sup>

This confusion—about who women are, what women want and what women believe "woman's role" to be—is no more evident than in the view of unborn children. If feminine values are nurturing and inclusive, does abortion fit in? As individuals with abilities and aspirations, women make moral choices as women, in the context of relationships. Those relationships include those who are dependent and vulnerable. And the one who is most dependent on a woman—for her nurturance, compassion, strength, courage and wisdom—is the child in her womb. Mature feminism, therefore, would contemplate that society accommodate the reproductive capacities of women, that child-bearing and rearing be valued just as much as, if not more, than establishing financial security and job satisfaction.

The deep needs and feelings of many American women may more accurately be reflected by what has been described as "conservative feminism" or "classical femi-

<sup>84</sup> Dione, *supra* note 19, at A1.

<sup>85</sup> Amiel, *Feminism Hits Middle Age*, *National Review* 23 (Nov. 24, 1989).

<sup>86</sup> C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development* 19–22 (1982).

<sup>87</sup> Bayles, *supra* note 50, at 85.

<sup>88</sup> R. Bray, *No Feminist Is an Island*, *The New York Times Book Review* 12 (May 5, 1991) (quoting and reviewing E. Fox-Genovese, *Feminism Without Illusions* [1991]).

<sup>89</sup> Dione, *supra* note 19, at A11.

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nism." In her essay, "What Do Women Want?", Katherine Kersten concludes that classical feminism "teaches women that their horizons should be as limitless as men's."<sup>90</sup> She explains:

*What sets me apart from most contemporary feminists is that—more than anger at the injustices done to women in the past—I feel gratitude toward the social and political system that has made much-needed reform possible . . .*

*Consequently, I propose an alternative to the feminism of the women's studies departments and "public interest" lobbies. I envision a self-consciously conservative feminism, inspired by what is best in our tradition, that can speak to women's concerns in both the private and public spheres. Such a feminism is based on three premises: first, that uniform standards of equality and justice must apply to both sexes; second, that women have historically suffered from injustice, and continue to do so today; and third, that the problems that confront women can best be addressed by building on—rather than repudiating—the ideals and institutions of Western culture.<sup>91</sup>*

The conservative feminist seeks the full participation of women in all aspects of cultural and personal development "to develop their talents, to follow their interests to their natural conclusion, to seek adventure, to ask and answer the great questions, and to select from a multitude of social roles," Kersten says.<sup>92</sup>

This view embraces feminine values, seeing "the special bond of motherhood not as evidence of oppression, but as cause for thanksgiving."<sup>93</sup> Many women would agree. Abortion as the "first right" thus stands outside the early tradition of feminism and most contemporary women's self-perception. And although it may be politically correct to espouse abortion as the foundation for women's freedom and progress, it has not truly benefited women. Abortion promotes neither the core values of women, such as inclusiveness and nurturance, nor the premises of autonomy and choice upon which it is based.

### III. Is Abortion Really a Free Choice?

#### A. Male Coercion, Pressure, Denial, Abandonment

Abortion as women's "first right" is premised on abortion as a free, self-determined choice. The abortion-rights movement raised up "freedom of choice" as its ubiquitous slogan in the 1980s. *Roe v. Wade* symbolizes "freedom" to choose abortion. Press releases and advertising suggest that, unless *Roe v. Wade* is overturned and restrictive abortion laws are reinstated, abortion will remain a "free choice." But is the abortion choice really free?

The creation and expansion of the unlimited abortion doctrine first enunciated in *Roe v. Wade* actually isolated women in their contemplation of abortion. First, in *Roe*,

<sup>90</sup>Kersten, *What Do Women Want?* Policy Review 4, 6 (Spring 1991).

<sup>91</sup>*Id.* at 4.

<sup>92</sup>*Id.* at 10.

<sup>93</sup>*Id.* at 9.

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the Court held that a woman had the "right" to decide to have an abortion for any and every reason at any time of pregnancy. Three years later, in *Planned Parenthood v. Danforth*,<sup>94</sup> the Court imposed a revolutionary social law on American men, women, and children: Men have no rights whatever to protect their child before birth. Ironically, the Court recognized that although the woman presumably makes the abortion decision "with the approval of her physician but without the approval of her husband . . . it could be said that she is acting unilaterally."<sup>95</sup> Nonetheless, it approved the unilateral power of the woman to prevent her *husband* (much less a man to whom she is not married) from protecting his own offspring. These two decisions placed all "choice"—the choice to abort or not to abort—on the pregnant woman. By necessary implication, whether the child lives or dies is solely up to the pregnant woman. Since that exclusive power over the child's life is under the woman's control, the determination whether the father will become the father of born offspring and incur child-support obligations falls entirely on the mother. She becomes the only one who can eliminate this expense.

The logic of women's exclusive control over reproduction is not lost on men. By vesting all rights to abort in the mother alone and by stripping the man of all his parental rights, it psychologically divests the man of all responsibility as well. It undermines healthy relationships between men and women. It destroys responsible communication by creating an artificial barrier to discussing a matter that deeply affects not only the woman but her partner as well. Men naturally may respond with distrust. The motives of all women, both those who demand and those who refuse abortion, come under suspicion. True intimacy cannot develop when a relationship lacks trust and communication. Coercion, pressure, abandonment and denial of responsibility all result.

What exacerbates this legal wedge in the relationship between men and women is the fact that 80% of all abortions are performed on single women.<sup>96</sup> In such a relationship, the man bears no legal obligation unless the child survives. Frequently, he neither prepares for nor desires any child. By its very nature, such a relationship creates the greatest potential for male coercion, denial of responsibility and abandonment when pregnancy results.

One of the myths of the abortion liberty—and *Roe v. Wade*—is that it only created a right to choose abortion for women who wanted abortion; it did not force anyone to abort or to participate in abortion. But over the past 15 years, it has become increasingly clear that coercion and pressure on women play a significant role in many, if not most, decisions to have an abortion.<sup>97</sup>

One of the most compelling accounts is Susan Nathanson's story about her abortion and subsequent psychotherapy.<sup>98</sup> Nathanson is no pro-life advocate. Indeed, she wrote

<sup>94</sup>428 U.S. 52 (1976).

<sup>95</sup>428 U.S. at 71.

<sup>96</sup>Koonin, et al., *Abortion Surveillance, United States, 1988*, 40 CDC [Centers for Disease Control] Surveillance Summaries, *Morbidity and Mortality Weekly Report* 22 (July 1991) (Table 1) (79.7% in 1988).

<sup>97</sup>D. Reardon, *Aborted Women: Silent No More* 2 (1987). See, e.g., Linda D. v. Fritz C., 38 Wash. App. 288, 687 P.2d 223, 225 (1984) ("When she informed the father [that she was pregnant], he asked her to have an abortion. She refused."); L. Frische, *The Ambivalence of Abortion* (1978). See also S. Nathanson, *supra* note 40, at 201; Baker, *supra* note 31; Goodman, *supra* note 31.

<sup>98</sup>S. Nathanson, *supra* note 40, at 3 ("I did not anticipate how profoundly I would suffer emotionally, or how long my suffering would endure").

<sup>99</sup>*Id.* at 2-5. See also Nathanson-Elkind, *Perspectives on the Abortion Debate*, San Francisco Examiner-Chronicle, July 8, 1990, at 1 (review of Laurence Tribe, *Abortion: The Clash of Absolutes*). Susan Nathanson is not related to Bernard Nathanson, M.D.

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her book to make the argument for abortion rights and to support *Roe v. Wade*.<sup>99</sup> But she writes honestly. The night before her abortion she sat, watching out the window of her house: "But mostly I sit with the life of my fourth child growing inside me, trying to contemplate this ending, and I grieve and grieve and grieve and grieve."<sup>100</sup>

Coercion by her husband played a primary and determinative role in her abortion. "I am absolutely clear that I do not want a fourth child under any circumstances," he said.<sup>101</sup> "If you don't choose to abort this child, I will push you to do it."<sup>102</sup> Nathanson felt she had little alternative: "It is at this moment that I know that I will take responsibility for the decision that must be made and that I will have an abortion, even though Michael and I will repeat this discussion over the next few days with no variation in our positions."<sup>103</sup> Some time after the abortion, her husband realized that he "pushed [her] to make the decision to have an abortion."<sup>104</sup> Much of the last part of her book describes her post-abortion counseling. It does not seem to help when, five years later, her husband suggests that they could have had that fourth child after all: "I was so worried about my physical well-being then. I don't have that apprehension now. Now I feel as if we really could have managed to raise that child."<sup>105</sup> Unable to respond to his untimely admission, Nathanson has "no answer" for her husband. What is remarkable about this account is that it happened *within* an apparently healthy marriage—under ideal economic, social and emotional conditions to support mother and child. If the abortion liberty can prompt such coercion within an intact marriage, its impact on extramarital relationships can only breed more disastrous consequences.

Coercion or pressure to have an abortion is reflected in court cases of various kinds around the country.<sup>106</sup> In some cases, fathers raise the woman's "right to abortion" as an affirmative defense to child support. The defense is usually framed in the following terms: The woman got pregnant by a man to whom she was not married; he did not want to get married or to support the child; she could have had an abortion, and he offered to pay for that abortion; she has a constitutional right to get an abortion, and he is legally helpless to prevent it; by her failure to obtain an abortion, she took sole responsibility for the child; therefore, the man should not be liable for any child support. Fortunately for the women and children involved, all courts have apparently rejected this defense.<sup>107</sup> But they have done so only by evading the logic of *Roe v. Wade*. In other variations on this theme, men have sued to "enforce" a contract to undergo an

<sup>99</sup> S. Nathanson, *supra* note 40, at 41.

<sup>100</sup> *Id.* at 25.

<sup>101</sup> *Id.* at 28.

<sup>102</sup> *Id.* at 29 (emphasis in original); *id.* at 28 ("this man who is pressuring me to give up my fourth child"); *id.* at 29–30 ("the final responsibility for the choice clearly rests with me alone").

<sup>103</sup> *Id.* at 154.

<sup>104</sup> *Id.* at 287–88.

<sup>105</sup> See, e.g., *Noto v. St. Vincent's Hosp. & Med. Center*, 142 Misc.2d 292, 537, N.Y.S.2d 446 (1988), *aff'd*, 559 N.Y.S.2d 510 (1990) (abortion after "affair" with hospital psychiatrist; pressure to have abortion alleged); *J.L.S. v. W.C.*, No. PI 90-2333 (Hennepin County Dist. Ct., 4th Jud. Dist., Minn. filed Feb. 8, 1990) (coercion to have abortion alleged).

<sup>106</sup> *People in Interest of S.P.B.*, 651 P.2d 1213 (Colo. 1982); *D.W.L. v. M.J.B.C.*, 601 S.W.2d 475 (Tex. Civ. App. 1980); *Harris v. State*, 356 So.2d 623 (Ala. 1978); *Dowey v. English*, 390 A.2d 1133 (Md. Ct. App. 1978); *Dauksas v. Rataj*, No. 87 CH 3206 (Cook Co. Ill. Cir. Ct. filed May 28, 1987). See also *In re Inc.*, 28 Or. App. 71, 558 P.2d 1253 (1977), *appeal dismissed*, 434 U.S. 806 (1977); *In re Goodwin*, 30 Or. App. 425, 567 P.2d 144 (1977); *Isabella S. v. John S.*, 132 Misc.2d 475, 504 N.Y.S.2d 367 (1986). See generally *Swan, Abortion on Maternal Demand: Paternal Support Liability Implications*, 9 Val. U.L. Rev. 243 (1975).

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abortion.<sup>108</sup> Women have been subjected to unconsented abortion performed by a physician-lover,<sup>109</sup> defenses to child support for "misrepresenting" the nonuse of contraception<sup>110</sup> or clauses in surrogate mother contracts requiring the surrogate mother to undergo an abortion for various reasons. Few disputes end up in court, and even fewer appear in published court decisions. There are countless scenarios in which the man threatened nonsupport but did not follow through with a lawsuit.<sup>111</sup>

Coercion to have an abortion is also reported in scholarly journals. A survey from the Medical College of Ohio examined a sample of 150 women who "identified themselves as having poorly assimilated the abortion experience."<sup>112</sup> Of the 81 women who responded, "more than one-third felt they had been coerced into their decision"; less than one-third of these women initially considered the abortion themselves.

There is a tendency to suggest that male coercion is simply a kink that needs to be worked out of our policy of legalized abortion.<sup>113</sup> But male coercion is an inevitable tragic consequence of legal abortion on demand inaugurated by *Roe*. This endemic coercion is revealed in Carol Gilligan's work, *In a Different Voice*.<sup>114</sup> Gilligan determined that the women she interviewed processed their abortion decision consistent with objective moral reasoning and based on principles of care, concern, responsibility and non-violence. Gilligan suggested, "The sequence of women's moral judgment proceeds from an initial concern with survival to a focus on goodness and finally to a reflective understanding of care as the most adequate guide to the resolution of conflicts in human relationships."<sup>115</sup> Gilligan's sample, however, reveals that many decisions were not independent, moral choices. Male coercion played an important role in a number of cases.<sup>116</sup> Harvard Law Professor Mary Ann Glendon observed: "It is striking how many

<sup>108</sup> Breidenbach v. Hayden, No. 9C-CI-00021 (Jefferson Co., Ky., Cir. Ct. Div. 2); Breidenbach v. Hayden, No. 91-CI-00591 (Jefferson Co., Ky., Cir. Ct. Div. 2) (custody action). A surgeon allegedly impregnated his secretary during an affair, paid her \$20,500 to have an abortion, and then sued for breach of contract for her failure to comply. The physician alleged the woman's failure to return his money and also objected to fully supporting the child once it was born. After a paternity suit and proof that the physician was indeed the father of the child, he asked for visitation rights and custody or joint custody. Wolfson, *Lawsuit raises novel questions in abortion case*, Louisville Courier-Journal, Mar. 28, 1991, at 1.

<sup>109</sup> Collins v. Thakkar, 552 N.E.2d 507 (Ind. Ct. App. 1990), *appeal denied*, No. 30AO1-8911-CV-00460 (Ind. Oct. 11, 1990), *on remand*, Collins v. Thakkar, No. 73CO1-9005-CP-0074 (Shelby Co., Ind., Cir. Ct.) (physician allegedly aborted three-month-old fetus during pelvic examination against Collins' wishes). The same physician allegedly drugged another woman, aborted her eight-month-old unborn child, then killed the infant. Hertzinger v. Thakkar, No. 29CO1-8903-CT-00174 (Hamilton Co., Ind. Cir. Ct. 1991); Caleca, *Doctor sued over abortions can't move or hide assets*, Indianapolis Star, Feb. 21 1989, at 1. Dr. Thakkar was found guilty of seducing three women and aborting or attempting to abort their pregnancies without their consent. *Chicago Tribune*, June 13, 1991, at 24.

<sup>110</sup> Linda D. v. Fritz C, 38 Wash. App. 288, 687 P.2d 223 (1984); L. Pamela P. v. Frank S., 449 N.E.2d 713, 59 N.Y.2d 1 (1983); Hughes v. Hunt, 455 A.2d 623 (Pa. 1983); Stephen K. v. Roni L., 105 Cal. App. 3d 640, 164 Cal. Rptr. 618 (1980). See also Barbara A. v. John G., 145 Cal. App. 3d 369, 193 Cal. Rptr. 422 (1983).

<sup>111</sup> See, e.g., D. Reardon, *Aborted Women: Silence No More* (1987).

<sup>112</sup> Franco, et al., *Psychological profile of dysphoric women postabortion*, 44 J. Amer. Med. Women's Assoc. 113 (July/August 1989). See also M. Zimmerman, *Passage Through Abortion: The Personal and Social Reality of Women's Experiences* (1977).

<sup>113</sup> Callahan, *supra* note 6, at 684.

<sup>114</sup> Gilligan, *supra* note 86. It should be noted that the interviewing group totaled 24 women and "no effort was made to select a representative sample of the clinic or counseling service population." *Id.* at 3.

<sup>115</sup> *Id.* at 105, 82-83, 99.

<sup>116</sup> See, e.g., *id.* at 80 (Cathy), 81 (Denise), 90-91 (Sarah).

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of Carol Gilligan's subjects in her chapter on the abortion decision stated that one of the reasons they were seeking abortions was because the men in their lives were unwilling to give them moral and material support in continuing with pregnancy and childbirth. This fact surely must have been central to their moral dilemma, but Gilligan, surprisingly, never picks up on this aspect of her data.<sup>117</sup> Gilligan—who has a reputation as the foremost feminist analyst of women's abortion rights and independent decision-making—evidently could not distinguish independent judgment from coercion.

Gilligan's conclusions have been challenged by moral philosopher Janet Smith and others on precisely this point.<sup>118</sup> Gilligan does not approve of being "self-sacrificing." Nor does she believe that any act, including abortion, is intrinsically immoral, though she believes that abortion is often the "morally responsible" choice.<sup>119</sup> How can the demand for arbitrary life-and-death power over one's own children be morally "responsible," as Gilligan claims? This claim for exclusive dominion over the fetus is nothing short of viewing the child as property.<sup>120</sup> This directly conflicts with what women know about their own children: "This child is flesh of my flesh and bone of my bone." "This daughter has my blue eyes; this son has my dark hair." It was not so long ago that wives were treated as the property of their husbands (and, in some parts of the world, they still are).<sup>121</sup> If it is wrong for men to treat others as possessions, it is wrong for women, too.

Who has abortion freed? Legalized abortion has helped create a sexual climate throughout our country by which men are freed to engage in the most irresponsible sexual relations, and the consequences fall directly and solely upon the woman. Women are left to pay the price. Kathleen Kersten highlights the painful consequences of sex without commitment:

*Feminists often explain traditional restraints on women's sexual freedom in one-dimensional terms, dismissing them as male attempts to wrest control of women's vital reproductive functions.*

*. . . But women are wrong to assert that sex without commitment is no more dangerous for women than it is for men. We know now that sex of this sort has led to an epidemic of abortions, venereal disease, and female infertility; a host of unwanted children; and a sorry legacy of educations and careers—women's, not men's—cut short.<sup>122</sup>*

Contrary to what might be the popular impression, abortion does not solve or heal relationships. Indeed, it usually dissolves them. "When one partner wants a child and the other doesn't, an abortion often leads to a breakup."<sup>123</sup>

<sup>117</sup> M. Glendon, *Abortion and Divorce in Western Law* 52 (1987).

<sup>118</sup> Smith, *Abortion and Moral Development Theory: Listening with Different Ears*, 28 Inter. Phil. Q. (March 1988); reprinted in 13 Inter. Rev. 237 (Fall/Winter 1989).

<sup>119</sup> *Id.* at 246–248.

<sup>120</sup> See Ryan, "The Argument for Unlimited Procreative Liberty: A Feminist Critique," Hastings Center Report 6 (July/Aug. 1990).

<sup>121</sup> Elizabeth Cady Stanton wrote in 1873, "When we consider that women are treated as property, it is degrading to women that we should treat our children as property to be disposed of as we wish." Monroe, *supra* note 80, at 12.

<sup>122</sup> Kersten, *supra* note 90, at 13.

<sup>123</sup> Goodman, *supra* note 31, at 179.

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*The most common male response to unwanted pregnancy when it occurs outside of marriage has been to "take off," leaving the woman to bear the physical, the emotional and, often, the financial brunt of either having an abortion or carrying the pregnancy to term. Studies of abortion and its aftermath reveal that, more often than not, relationships do not survive an abortion: the majority of unmarried couples break up either before or soon after an abortion.*<sup>124</sup>

Men are freed to engage in behavior without serious personal consequences, knowing that it is both the woman's "right" and "responsibility" to get an abortion if anything goes "wrong."<sup>125</sup> He has the "security" that the woman can obtain an "easy," "safe," "painless," "quick" abortion, for which he might pay \$200 to \$300.<sup>126</sup>

Freely available legal abortion thus encourages the very kind of male behavior that feminists have railed against for generations. "Modern ideology makes it easy for men to rationalize their defection from family life. . ."<sup>127</sup> Even an abortion rights advocate like Daniel Callahan can see this: "If legal abortion has given women more choice, it has also given men more choice as well. They now have a potent new weapon in the old business of manipulating and abandoning women."<sup>128</sup> Since 80% of abortions are performed on single women, who are outside the protective circle of family life, it is probable that the man is strongly inclined to not want their child.<sup>129</sup> His pressure on the woman to "choose" her legally endorsed alternative is virtually inevitable.<sup>130</sup> The notion among modern feminists that restrictive abortion laws support "male domination" is tragic foolishness. It is directly contradicted by real human experience with abortion on demand in the United States over the past 19 years.

#### B. Parental Coercion

Men are not the only source of coercion. Parental coercion of teens does occur, and it can be overwhelming.<sup>131</sup> The extent of this pressure is difficult to document, but one example illustrates the extremes to which parents may go to compel their daughter to have an abortion. ChristyAnne Collins is executive director of an organization that provides crisis pregnancy assistance: counseling, medical services and placement services. She was appointed by a Rockville, Maryland circuit judge as legal guardian for a 16-year-old woman ("Jane Doe") who wanted to continue her pregnancy.<sup>132</sup> The previous year, Jane Doe had been forced by her parents to abort an earlier pregnancy.<sup>133</sup>

<sup>124</sup> K. McDonnell, *Not an Easy Choice: A Feminist Re-examines Abortion* 59 (1984) (citing M. Zimmerman, *supra* note 112).

<sup>125</sup> D. Reardon, *supra* note 97, at xi (1989).

<sup>126</sup> Goodman, *supra* note 31, at 179, 209.

<sup>127</sup> M. Gallagher, *supra* note 51, at 116.

<sup>128</sup> Callahan, *supra* note 6, at 684.

<sup>129</sup> Goodman, *supra* note 31, at 209, 210.

<sup>130</sup> M. Gallagher, *supra* note 51, at 108-110.

<sup>131</sup> See generally Ciolfi, *Abortion and Consent: Limiting minors' access in next court battleground*, New York Newsday, Sept. 25, 1989, pp. 3, 21; Feder, *Parents in the dark on abortion*, Boston Herald, Dec. 11, 1989; Herrmann, *Fifty percent of teens tell their parents*, Chicago Sun Times, June 26, 1991, p. 42.

<sup>132</sup> In the matter of Jane Doe, C.A. No. 70796 (Mont. Co. Md. Cir. Ct., Feb. 1, 1991).

<sup>133</sup> Telephone conversation with ChristyAnne Collins, May 10, 1991. Her parents appeared to acquiesce in their daughter's refusal. When Jane, accompanied by her parents, agreed to go to a clinic to test for sexually transmitted diseases, she again refused to sign abortion consent papers. The last thing she remembers is the nurse drawing blood for a test. She woke up from anesthesia two hours later with her unborn child aborted.

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In order to exercise her choice to carry her second pregnancy to term, Jane Doe had to turn to the courts for protection from her parents. It is ironic that this occurred in Maryland, a state that excludes parental influence in preventing an abortion.

Another teenager, this time the victim of rape, was taken against her will to a Bremerton, Washington abortion clinic. Although she screamed that she did not want an abortion, the abortionist and nurse, in unsanitary clothing, forced this teen to undergo the procedure. Police detective Linda Johnson—who had been ordered against her will to gather the fetal remains as evidence against the rapist—attempted suicide more than a dozen times and was treated at a mental health clinic.<sup>134</sup>

A more widely published example of coercion—not choice—is that of Denise Lefebvre in Florida. Denise is apparently psychotic and routinely takes lithium, an anti-psychotic drug known to cause birth defects. In 1990, she stopped taking the drug when she suspected she was pregnant, even though her condition renders her dangerous to herself and others when she is not medicated. She apparently stopped the medication to protect her unborn child, and spent virtually all her pregnancy confined to a hospital—strapped to the bed for her own protection. The assistant public defender who eventually represented her said, "This woman is very lucid regarding her baby. Everyone wanted to give the woman an abortion except her."<sup>135</sup> Indeed, the physicians involved, and even her father, sought to order an abortion against her will. They argued that there was a chance of fetal defect based on possible exposure to lithium. Florida law provides for "termination of pregnancy" for incompetent women if certain procedural safeguards are extended.<sup>136</sup> For example, a three-member examining committee must be appointed before a determination of incapacity is made, and written consent of the woman's court-appointed guardian must be obtained before the pregnancy can be terminated. Lefebvre was originally denied all the procedural protections due her, and the trial court ordered an abortion. The appeals court reversed the decision solely on procedural error. A healthy baby boy was born just after Christmas. At last report, the baby was scheduled to be adopted by other Lefebvre family members.<sup>137</sup>

### C. Social Pressure

Perhaps as much as direct coercion, women cite a lack of alternatives—or their belief that they had no alternative—as the reason for abortion.<sup>138</sup> Some women view abortion as a "forced response to a problem, rather than an affirmative action in their lives."<sup>139</sup> This may be due, at least in part, to inadequate counseling.<sup>140</sup> This situation seems not to have changed in 30 years. In 1960, Mary Calderone, the medical director of Planned Parenthood Federation of America, wrote:

<sup>134</sup>Johnson v. City of Bremerton, No. 89-2-00218-5 (Kitsap Co., Wash. Sup. Ct. 1990); Marez, *Former police officer sells about "abortion duty."* Bremerton (Wash.) Sun, Oct. 18, 1990, at B1, col. 1.

<sup>135</sup>Psychotic's pregnancy stirs legal fight. Chicago Tribune, Aug. 24, 1990, sec. 1, p. 20; Baby born after abortion fight may be up for adoption, Chicago Tribune, Jan. 2, 1991, sec. 1, p. 3, col. 2.

<sup>136</sup>Fla. Stat. § 394.467 (1989); Fla. Stat. § 744.331 (1989); Fla. Stat. 390.001(4)(1989).

<sup>137</sup>Lefebvre v. North Broward Hosp. Dist., 566 So. 2d 568 (Fla. App. 1990); Los Angeles Times, Jan. 1, sec. A-22, col. 1.

<sup>138</sup>D. Reardon, *supra* note 97; Quarles, Letter to the editor, Ms. Magazine, 19-20 (Jan./Feb. 1989); "Women who have the fewest choices of all exercise their right to abortion the most." Tidale, *We Do Abortions Here: A Nurse's Story*, Harper's 66, 70 (Oct. 1987).

<sup>139</sup>Franco, *supra* note 109, at 115 (citing Freeman, *Influence of personality attributes on abortion experiences*, 47 Am. J. Orthopsychiatry 503 (1977)).

<sup>140</sup>Callahan, *supra* note 6, at 687.

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*Conference members agreed, and this was backed up by evidence from the Scandinavians, that when a woman seeking an abortion is given the chance of talking over her problem with a properly trained and oriented person, she will in the process very often resolve many of her qualms and will spontaneously decide to see the pregnancy through, particularly if she is assured that supportive help will continue to be available to her.*<sup>141</sup>

Besides feeling alone and without resources, a pregnant woman may also sense the pressure of the workplace. For example, a recent study of female medical residents reported open hostility to pregnant residents from program directors and colleagues.<sup>142</sup> The percent of abortion among female residents was threefold that of the control group.<sup>143</sup> And those residents and physicians who chose to carry their pregnancies to term were "more likely to underreport their symptoms in order to minimize the influence of their pregnancy on their work."<sup>144</sup>

Similarly, women lawyers are aware of the same subtle bias against having children. An article in the *National Law Journal* noted that law firms have been unable or unwilling to create an environment supportive of working mothers.<sup>145</sup> Women who want to make partner are told not to get pregnant until the partnership is secure. Those who do choose motherhood are often put on the "mommy track," with no likelihood of achieving partnership. In another recent incident, the New York City Department of Corrections settled a lawsuit filed by several female officers who had been told to have abortions; many who refused were given physically grueling jobs.<sup>146</sup>

#### D. Failure to Protect Wanted Children

Abortion-rights advocacy goes to such lengths as to vigorously fight against any legislative attempts to protect the child of the woman who chooses nurturance. For example, in 1991 the New Hampshire legislature considered and passed a fetal homicide bill that would penalize the killing of an unborn child by a third person (other than an abortionist). A criminally assaulted pregnant woman who did not previously choose abortion presumably desires to carry her child to term. The bill was opposed by the National Abortion Rights Action League of New Hampshire. Spokesperson Peg Dobbie argued that it would lead to limitations or restrictions on "a woman's reproductive right."<sup>147</sup> A similar bill was defeated by abortion-rights advocates in Delaware in 1991.<sup>148</sup> Thus the pro-choice position claims that a woman who chooses to give birth should be given no legal protection, even after viability, for the child she carries in her womb.

<sup>141</sup> Calderone, *supra* note 8, at 951.

<sup>142</sup> Shulkin & Bari, Letter to the editor, 324 New Eng. J. Med. 630 (Feb. 28, 1991).

<sup>143</sup> Klebanoff, Shiono & Rhoads, *Outcomes of Pregnancy in a National Sample of Resident Physicians*, 323 New Engl. J. Med. 1040, 1041 (Oct. 11, 1990).

<sup>144</sup> Letter, *supra* note 142, at 630.

<sup>145</sup> Stern, *Female Tales at Lawfirms*, National Law Journal 15-16 (Mar. 18, 1991).

<sup>146</sup> Martin, *Women Given Cruelest Choice Now Fight Back*, New York Times, Oct. 21, 1989, at A27. See New York Daily News, May 24, 1989 (More than a dozen women claimed they were told to have abortions or resign their jobs. One suffered a miscarriage, although she pleaded with supervisors to allow her to see a doctor. Another who became pregnant was told to "stay home and collect (welfare) checks or get rid of it.").

<sup>147</sup> Keay, *What Is Life Worth in New Hampshire?* Manchester Union Leader, Feb. 14, 1991, at 45.

<sup>148</sup> Alan Guttmacher Institute, *State Reproductive Health Monitor*, vol. 2, no. 3 at 4 (Sep. 1991).

Nor does the pro-choice position permit state encouragement of healthy prenatal care. This has led to a strange alliance between the National Organization for Women (NOW) and tavern owners in New York, both of whom oppose mandatory posting of signs that warn pregnant women of the dangers of alcohol consumption. The warning-sign legislation is an attack on the woman's right to "choose," according to state NOW president Marilyn Fitterman.<sup>149</sup>

"Freedom of choice" appears to be a one-way street when the issue is abortion. For Denise Lefebvre and Jane Doe, their choice *not* to have an abortion was opposed by those with more power; this resonates of patriarchy and chauvinism. These women, and many like them, are vulnerable to a system that is geared to deal with problem pregnancies by eliminating the unborn child. Feminism supposedly stands against patriarchy and paternalism. Yet silence or outright opposition from the women's movement in the face of real harm to real women belies their claim to represent women. "Choice" has come to mean that abortion is a moral good, and any law that might influence a woman to consider an alternative to abortion or that establishes governmental protection for the child *in utero* is suspect. The "choice" agenda is not truly about protecting women; it is about promoting abortion.

#### IV. The Impact of Abortion on Women's Health

##### A. The Use and Misuse of Abortion Statistics

A current abortion-rights slogan is, "Keep abortions safe and legal!" The phrase fosters the assumption that, invariably, legal abortions are safe and illegal abortions are not. The evidence fails to support this claim.

Prior to *Roe v. Wade*, proponents of legalized abortion sought to eradicate "back-alley abortions," alleging they were dangerous because they were illegal. In their view, illegality meant that only criminal abortionists—unskilled and uncaring—performed abortions.<sup>150</sup> Liberalization of abortion laws should therefore eliminate, or at least substantially reduce, abortion morbidity. Part and parcel of this campaign was the claim about the large number of illegal abortions performed before 1973. Based on a 1955 conference sponsored by Planned Parenthood, a figure of 200,000 to 1,200,000 was widely cited for the next 20 years.<sup>151</sup> Although there is anecdotal evidence of illegal

<sup>149</sup>Sack, "Unlikely Union in Legislative Battle: Feminists and Liquor Sellers," *New York Times*, April 5, 1991, at A16.

<sup>150</sup>A typical example of this broad brush, undocumented "parade of horribles" is L. Lader, *supra* note 5, at 21–24.

<sup>151</sup>Both Calderone and Tietze relied on the 1955 conference estimate. The papers and discussion from the conference were later published in a book edited by Calderone. M. Calderone, ed., *Abortion in the United States* (1958). Calderone later said, "The best statistical experts we could find would only go so far as to estimate that, on the basis of present studies, the frequency of illegally induced abortion in the United States might be as low as 200,000 and as high as 1,200,000 per year." Calderone, *supra* note 8, at 950. See also, Schwartz *Abortion on Request: The Psychiatric Implications in Abortion, Medicine, and the Law* 331 (J. D. Butler & D. Walbert eds. 3d ed. 1986), ("1 million" each year, citing Tietze & Lewit, *Abortion*, 220 *Scientific Amer.* 21, 23 (1969)). Yet, Calderone wrote, "I would like to enlist public health in an effort to establish better figures on the incidence of illegal abortion. Actually, of course, we know that the nature of this problem is such that one will never get accurate *ex post facto* figures." Calderone, *supra* note 8, at 952.

A 1981 study arrived at a much lower estimate. "During the years 1940–1967, the largest possible number of criminal abortions in any one year was approximately 210,000 . . . in 1961 and the least number in this prelegalization era was 39,000 in 1950; the mean was 98,000." Syska, Hilgers & O'Hare,

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abortions and illegal abortion counseling and referral, the actual number of abortions is very difficult to quantify. Most of the anecdotes appear to stem from the 1960s.<sup>152</sup> Just a few years later, both the incidence and dangers of abortion were in question. In 1960, Mary Calderone, Planned Parenthood's medical director, concluded that "90% of all illegal abortions are presently done by physicians."<sup>153</sup>

Calderone wrote:

*Abortion is no longer a dangerous procedure. This applies not just to therapeutic abortions as performed in hospitals but also to so-called illegal abortions as done by physicians. In 1957 there were only 260 deaths in the whole country attributed to abortions of any kind . . . Two corollary factors must be mentioned here: first, chemotherapy and antibiotics have come in, benefiting all surgical procedures as well as abortion. Second, and even more important, the [1955 Planned Parenthood] conference estimated that 90 per cent of all illegal abortions are presently done by physicians. Call them what you will, abortionists or anything else, they are still physicians, trained as such; and many of them are in good standing in their communities. They must do a pretty good job if the death rate is as low as it is. Whatever trouble arises usually comes after self-induced abortions, which comprise approximately 8 per cent, or with the very small percentage that go to some kind of nonmedical abortionist. Another corollary fact: physicians of impeccable standing are referring their patients for these illegal abortions to the colleagues whom they know are willing to perform them, or they are sending their patients to certain sources outside of this country where abortion is performed under excellent medical conditions . . . So remember fact number three; abortion, whether therapeutic or illegal, is in the main no longer dangerous, because it is being done well by physicians.<sup>154</sup>*

Nonetheless, later reports exaggerated the numbers of maternal deaths from illegal abortion as ranging from 5,000 to 10,000 deaths annually.<sup>155</sup> One founder of the Na-

<sup>152</sup> *An Objective Model for Estimating Criminal Abortions and Its Implications for Public Policy*, in Hilgers, Horan & Mall, *New Perspectives on Human Abortion* 171 (1981).

<sup>153</sup> F. Ginsburg, *supra* note 50, at 37, n. 20. Lader sets forth evidence tending to show that supply increased demand when clergy consultation services arose after the opening of the first service in New York City in May 1967. L. Lader, *supra* note 5, at 42-54, 72-79.

<sup>154</sup> Calderone, *supra* note 8, at 948, 949. Tietze repeated the 90% figure in 1969, relying on Kinsey's studies of sexual behavior. 220 *Scientific Amer.* at 23. Lader provides similar evidence at various points. Lader, *supra* note 5, at viii ("performed in the offices of licensed physicians").

<sup>155</sup> Calderone, *supra* note 8, at 949 (emphasis added).

<sup>156</sup> L. Lader, *Abortion* 3 (Beacon Press paperback 1967) ("5,000 to 10,000 abortion deaths annually"); Manganis, *Elective Abortion as a Woman's Right*, in A. Gottmacher, ed., *supra* note 7, at 132 ("some 5,000 to 10,000 deaths yearly"); Editorial, *Start on Abortion Reform*, *New York Times*, April 29, 1967, at 34, col. 1 ("the needless death of 4000 mothers each year").

Lader acknowledged that "Dr. Tietze places the figure nearer 1,000" (*Abortion*, at 3). The late Dr. Christopher Tietze of the Alan Guttmacher Institute called the 10,000 figure "unmitigated nonsense." Graham, *Fetus Defects Pose Abortion Dilemma*, *New York Times*, Sept. 7, 1967, at 38, col. 2. He would have put the figure at under 1,000. Tietze & Lewit, *supra* note 8, at 21, 23. But Tietze also wrote: "Nor do we have reliable data for determining the number of deaths from illegal abortions in the United States."

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tional Association for the Repeal of Abortion Laws (now the National Abortion Rights Action League—NARAL) later conceded, in retrospect, that such claims were completely false and were for rhetorical purposes only.<sup>156</sup> These allegations ignored evidence of the tremendous reduction in abortion-related deaths in the prior 30 years due to advances in medical care.<sup>157</sup> The Centers for Disease Control in Atlanta reported 39 *illegal* abortion-related deaths and 24 *legal* abortion-related deaths in 1972, the last full year before abortion was nationally legalized by *Roe v. Wade*.<sup>158</sup>

Abortion proponents, who argued that legalized abortion would prevent maternal deaths from childbirth, have cited national statistics to prove that abortion is physically safer than childbirth.<sup>159</sup> This argument is undermined, however, by technological advances in the 1960s by which "medical science has now made it possible for all but the most severely medically ill women to give birth safely."<sup>160</sup> Mary Calderone said in 1960, "Medically speaking, that is, from the point of view of diseases of the various systems . . . it is hardly ever necessary today to consider the life of a mother as threatened by a pregnancy."<sup>161</sup> Both general maternal mortality and abortion-related maternal mortality have been on a steady downward trend for decades. The legalization of abortion has had little effect on this trend.<sup>162</sup> Claims that "abortion is safer than childbirth"

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Other sources cite other statistics. D. Callahan, *Abortion: Law, Choice, and Morality* 132-36 (1970); Louisell & Noonan, *Constitutional Balance*, in J. Noonan, ed., *The Morality of Abortion: Legal and Historical Perspectives* 231-32 n.53 ("[a]pproximately 250 women each year are known to have died as a result of abortions") (citing *Vital Statistics of the United States*—235 maternal deaths from abortion in 1965; 189 maternal deaths from abortion in 1966); Hilgers & O'Hare, *Abortion Related Maternal Mortality: An In-Depth Analysis*, in Hilgers, Horan & Mall, *New Perspectives on Human Abortion* 80 (1981) (abortion-related maternal deaths: 235 in 1965, 189 in 1966, 160 in 1967, 133 in 1968, 132 in 1969, 128 in 1970, 99 in 1971, 70 in 1972, 36 in 1973) (citing II *Vital Statistics of the United States: Mortality, Part A, 1960-1977*). Tietze also acknowledged the NCHS statistic of 235 from all abortions in 1965 but then said, without documentation or citation, "Total mortality from illegal abortions was undoubtedly higher than that figure . . ." Tietze & Lewit, *supra* note 8, at 23.

<sup>156</sup> "How many deaths were we talking about when abortion was illegal? In N.A.R.A.L., we generally emphasized the drama of the individual case, not the mass statistics, but when we spoke of the latter it was always '5,000 to 10,000 deaths a year.' I confess that I knew the figures were totally false, and I suppose the others did too if they stopped to think of it. But in the 'morality' of the revolution, it was a useful figure, widely accepted, so why go out of our way to correct it with honest statistics. The overriding concern was to get the laws eliminated, and anything within reason which had to be done was permissible." B. Nathanson, *Aborting America* 193 (1979).

<sup>157</sup> Dr. Andre Hellegers, Professor of Obstetrics and Gynecology at Georgetown University Hospital, cited a reduction in abortion related deaths from 1,231 in 1942 to 120 in 1971. *Abortion—Part 2: Hearing Before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary of the United States Senate on S.J. Res. 119 and S.J. Res. 130*, 93d Cong., 2d Sess. 107 (1976) (April 25, 1974, statement of Andre Hellegers).

<sup>158</sup> U.S. Public Health Service, Centers for Disease Control, *Abortion Surveillance* 61 (Nov. 1980).

<sup>159</sup> Cates, et al., *Mortality from Abortion and Childbirth: Are the Statistics Biased?*, 248 J.A.M.A. 192 (1982); Le Bolt, et al., *Mortality from Abortion and Childbirth: Are the Populations Comparable?*, 248 J.A.M.A. 188 (1982).

<sup>160</sup> Schwartz, *supra* note 151, at 325.

<sup>161</sup> Calderone, *supra* note 8, at 948.

<sup>162</sup> Hilgers & O'Hare, *supra* note 155, at 68, 73.

In Illinois, for example, maternal deaths (defined as deaths attributed to "complications of pregnancy, childbirth, and the puerperium") dropped from 1,141 in 1920, to 699 in 1930, to 114 in 1950, to 40 in 1972 (the last full year before *Roe*). Between 1972 and 1981, however, maternal deaths only dropped from 40 to 27, and the rate only dropped from 2.2 to 1.5. Illinois Dept. of Public health, *Vital Statistics Illinois 1981* 1.11 (March, 1984) (Table A).

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are compromised not only by the likelihood that deaths relating to abortion are underreported but also by the fact that the methods employed by some statisticians do not represent a valid comparison between abortion and childbirth: Most studies consider as deaths related to "childbirth" virtually all cases of maternal mortality not related to abortion, why and whenever they occur. When comparison is made between abortion and natural pregnancy during corresponding periods of gestation, natural pregnancy is shown to be safer than induced abortion at every stage.<sup>163</sup>

In contrast to unsubstantiated claims about the danger of illegal abortion and the risks of childbirth, legal abortion has been consistently publicized since *Roe* as "safe" and "easy." Abortion advocates vehemently assert that recriminalizing abortion will inevitably make it unsafe. Likewise, proponents allege that legal abortion has little negative psychological impact. At most, abortion advocates concede short-term negative psychological reaction but no long-term negative consequences. And in any case, psychological consequences from abortion are alleged to be less than, or no greater than, those following childbirth.<sup>164</sup> (The psychological impact of legal abortion is discussed in subsection E. below.)

In truth, the physical effects of legalized abortion are difficult to quantify accurately. The late Christopher Tietze, Planned Parenthood's statistician, wrote in a prior edition of this book:

*Abortion-related deaths are of course only the proverbial tip of the iceberg. Nationwide information on the incidence of nonfatal complications of legal abortion, including major complications requiring inpatient care, is far less complete than information on abortion-related mortality. This is so because there is no agreement among investigators as to what constitutes a major complication, and no system of surveillance is in place.*<sup>165</sup>

Only two national agencies have the capacity to compile national data about abortion, the Centers for Disease Control (CDC) in Atlanta (a division of the federal Department

<sup>163</sup> It is difficult to determine an objective relationship between legality and safety. "Legal abortion" is defined by CDC officials "as a procedure performed by a licensed physician or by someone acting under the supervision of a licensed physician," while an "illegal abortion" is defined "as a procedure performed by the woman herself or by someone who was not a licensed physician and was not acting under the supervision of a licensed physician." Atrash, et al., *Legal Abortion in the United States: Trends and Mortality*, 35 *Contemp. Ob. Gyn.* 58, 59 (Feb. 1990). But if any abortion is defined as "legal" merely if a physician is licensed and safety is attributed to this fact alone, then most abortions performed before 1973 were, in effect, "legal abortions" as well. Tietze & Lewit, *supra* note 8, at 23; Calderone, *supra* note 8, at 949.

<sup>164</sup> Hilgers & O'Hare, *supra* note 155, at 86-89 (comparison of maternal mortality rates from induced abortion and natural pregnancy during first 20 weeks and final 20 weeks of pregnancy); Lassila, et al., *Mortality from Abortion and Childbirth*, 250 *J.A.M.A.* 361-362 (1983) (correspondence, emphasizing that "maternal mortality caused by abortion should be compared with both vaginal delivery and caesarean delivery separately . . . the results suggest that the mortality rate among women who had an abortion is almost twice as high as maternal mortality rates for women who have vaginal deliveries.");

<sup>165</sup> Schwartz, *supra* note 151, at 331 (citing David, *Abortion in Psychological Perspective*, 42 *Am. J. Orthopsychiat.* 61 [1972]; Brewer, *Incidence of Post-Abortion Psychosis: A Prospective Study*, 1 *Brit. Med. J.* 476 [1977]).

<sup>166</sup> Tietze, *Demographic and Public Health Experience with Legal Abortion: 1973-1980*, in J. Douglas Butler & David F. Walbert, eds., *Abortion, Medicine, and the Law* 303 (3d Rev. ed. 1986).

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of Health and Human Services) and the Alan Guttmacher Institute (AGI), a private organization that historically was the research arm of Planned Parenthood.<sup>166</sup> There is no federal abortion statistics reporting law.<sup>167</sup> The CDC relies on voluntary reporting and on reporting made to the individual state departments of health pursuant to state statute. This is a patchwork compilation since abortion reporting laws vary from state to state and some states have no reporting law in effect.<sup>168</sup> Many states have attempted to collect accurate medical data through confidential abortion reporting.<sup>169</sup> Yet these have been regularly struck down by the courts.<sup>170</sup> Some providers may not report or may underreport abortions, as well as deaths and complications, to state authorities.<sup>171</sup> The CDC admits that it annually underreports abortions and abortion deaths and complications.<sup>172</sup> As a result, the CDC reports are not entirely reliable. At the same time, the AGI's ideological support for the broadest abortion rights has enabled it to collect abortion statistics directly from providers for the past 15 years.<sup>173</sup> But the providers have an obvious interest in not releasing complete reports of deaths or complications. And these data are apparently unavailable to the CDC and even less available to the public. As a

<sup>166</sup>Gormley, *Abortion in the Heartland*, Washington Post Health Section, Oct. 2, 1990, at 12-13 ("the Alan Guttmacher Institute, a research organization formerly funded by Planned Parenthood . . .").

<sup>167</sup>*Teen Pregnancy: What Is Being Done? A State by State Look*, Report of the House Select Committee on Children, Youth and Families, 99th Cong., 2d Sess., 5 (Dec. 1986).

<sup>168</sup>Atrash, et al., *The Need for National Pregnancy Mortality Surveillance*, 21 Fam. Plan. Perspect. 25 (Jan./Feb. 1989). Francke noted this more than a decade ago: "The discrepancy in numbers [of abortions] results from the fact that the CDC receives its abortion data from state health departments, many of whom have not established complete or indeed any reporting systems since the legalization of abortion in 1973. The Alan Guttmacher Institute, on the other hand, seeks out abortion statistics from the actual providers of abortion, and the CDC generally accepts those statistics as more accurate." L. Francke, *The Ambivalence of Abortion* 16 (1978).

As a result of a suit by the ACLU, Illinois, for example, has been prevented by federal court injunction from collecting abortion statistics since 1984. See *Keith v. Daley*, No. 84-5602 (N.D. Ill. Sept. 28, 1984) (concluding temporary restraining order in effect, by agreement of the parties, for more than seven years).

<sup>169</sup>See generally Wardle, *infra* note 225, at 958 (citing, e.g., Cal. Health & Safety Code § 25955.5 [West 1984]; Fla. Stat. § 390.002 [1989]; Rev. Stat. § 338-9 [1988]; Idaho Code § 18-609 (4) (1987); Ill. Rev. Stat. ch. 38, ¶ 81-30.1 [1989]; Ind. Code Ann. § 35-1-58.5-5 [Burns 1985]; Ky. Rev. Stat. Ann. § 213.055 [Baldwin 1982]; La. Rev. Stat. Ann. 40:1299.35.8 [West Supp. 1989]; Me. Rev. Stat. Ann. tit. 22, § 1596 (2) [1980]; Md. Health-Gen. Code Ann. § 20-208 [1987]; Mass. Ann. Law ch. 38, § 6, ch. 112, § 12R [1983]; Mich. Comp. Laws Ann. § 333.2835 [West 1980]; Minn. Stat. Ann. § 145.413 [West 1989]; Mo. Ann. Stat. § 188.052 [1983]; Mont. Code Ann. § 50-20-110 [1989]; Neb. Rev. Stat. § 28-343 [1985]; Nev. Rev. Stat. § 442.256, § 442.265 [1986]; N.J. Stat. Ann. § 30:4D-6.1 [1981]; N.M. Stat. Ann. § 24-14-18 [1978]; N.C. Gen. Stat. § 14-45.1 [1986]; N.D. Cent. Code § 14.02.1-07 [1981]; Okla. Stat. Ann. tit. 63, §§ 1-738, 1-739 [West 1984]; Or. Rev. Stat. § 435.496 [Supp. 1987]; 18 Pa. Cons. Stat. Ann. § 3207 (a)-(b), 3214 [Purdon Supp. 1989]; S.C. Code Ann. § 44-41-60 [1988]; S.D. Codified Laws Ann. § 34-23A-19 [1986]; Tenn. Code Ann. § 39-4-203 [1982]; Utah Code Ann. § 26-2-23 (3), 76-7-313 [1989]; Va. Code Ann. § 321.1-264 [1988]; Wash. Rev. Code Ann. § 43.20A.625 [West 1983]; W. Va. Code § 16-2F-6 [1985]; Wis. Stat. Ann. 69.186 [West Supp. 1989]; Wyo. Stat. §§ 35-6-107, 35-6-108 [Michie 1977]).

<sup>170</sup>*Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986). Compare the proposal of the medical director of Planned Parenthood in 1960:

We will never find out how many illegal abortions have been performed, but how about trying to find out how many are being asked for? Suppose requests for abortion were made reportable? Why not? Suppose that every time a woman comes to a doctor asking for an abortion, he makes a note of it along with some easily obtained information and sends this note to his health officer. Suppose that after a few such efforts, physicians discovered that the sky did not fall in on them in the person of the law and that the privacy of their patients

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result, there is substantial reason to doubt the accuracy of currently cited national abortion statistics. However, because they are the only available national statistics, the figures are common currency.

This underreporting of abortion deaths and complications is problematic. If women's health and well-being are truly served by "safe and legal abortions," then accurate statistics should confirm this. Abortion providers should have nothing to hide and nothing to fear from revelation of the truth. On the other hand, if women are maimed or killed by legal abortion, they need protective safeguards. Abortion advocates should be demanding comprehensive, nationwide reporting—open to public scrutiny—if only to substantiate their claim that legal abortions are safe.

Nor do statistics support the argument that legal abortion is necessary to protect women's health. A profile compiled from the available data indicates that few abortions are performed for reasons of "medical necessity."<sup>174</sup> That is, abortion is rarely sought because of a genuine health risk. The typical abortion patient today is white, single and young and is seeking abortion for reasons other than serious health concern, rape or incest.<sup>175</sup> "[T]wo percent of all abortions in this country are done for some clinically identifiable entity—physical health problem, amniocentesis, and identified genetic disease or something of that kind. The overwhelming majority of abortions . . . are performed on women who for various reasons do not wish to be pregnant at this time."<sup>176</sup>

Abortion advocates are thus relying on inaccurate, incomplete and unreliable statistics to support their campaign to keep "safe" legalized abortion on demand. As discussed below, legal abortion is not necessarily safe for women (and obviously is not "safe" for unborn children). Neither was illegal abortion the great killer of thousands of women. Abortion is not needed to avoid death by childbirth. And rarely is it sought for genuine reasons of medical necessity. Consequently, the proposition that legal abortion is needed to protect women's health rests on faulty assumptions.

#### B. Physical Effects and Legal, "Back Alley" Abortions

Despite the clamor to "keep abortions safe and legal," evidence from the CDC's own experts indicates that the incidence of abortion complications and even death is serious:

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was being respected. At the end of two or three years we might really know something about this disease of society.

<sup>174</sup> Calderone, *supra* note 8, at 952–53.

<sup>175</sup> Atrash, et al., *supra* note 162, at 58, 60. "[S]tate vital statistics have also been found to underestimate maternal deaths by 17–73 percent." Atrash, Ellerbrock, Hogas & Smith, *The Need for National Pregnancy Mortality Surveillance*, 21 *Fam. Plann. Perspect.* 25 (Jan/Feb. 1989).

<sup>176</sup> Francke cites former CDC official Willard Cates: "'Go with the Guttmacher figures,' said Willard Cates, Jr., chief of the Abortion Surveillance Branch. 'Some states require the reporting of fetal deaths due to abortion. Others don't. We think we're pretty lucky to have 85 percent of them recorded.' " Francke, *supra* note 168, at 16. See also, Atrash, Ellerbrock, Hogas & Smith, *supra* note 171, at 25.

<sup>177</sup> Atrash, et al., *supra* note 162, at 60; Francke, *supra* note 168, at 16.

<sup>178</sup> Torres & Forrest, *Why Do Women Have Abortions?* 20 *Fam. Plnn. Perspect.* 169 (1988).

<sup>179</sup> *Id.*; Atrash, et al., *supra* note 162, at 58.

<sup>180</sup> *Constitutional Amendments Relating to Abortion: Hearings on S.J. Res. 17, S.J. Res. 18, S.J. Res. 19 and S.J. Res. 210 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 97th Cong. 1st Sess. 158 (Oct. 14, 1981) (statement of Irvin M. Cutner, M.D., M.P.H., U.C.L.A. School of Public Health). See also Torres & Forrest, *supra* note 174, at 169 (of 1,773 abortion patients surveyed, 3%

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*The scope of the problem of abortion complications is large, both numerically and economically. For example, in 1977, nearly 100,000 women in the United States sustained complications of abortion, and 16 died . . . Excluding the indirect costs of lost productivity, the estimated direct cost of treating women who suffered complications in 1977 was over \$22 million.*<sup>177</sup>

Deaths from legal abortion do occur. One study, by the CDC's own statistician relying on CDC data, concluded that there were 213 "legal abortion-related" deaths between 1972 and 1985—an average of 15 per year.<sup>178</sup> Other studies report different totals for deaths of women from legal abortion.<sup>179</sup>

Follow-up on other abortion complications is compounded by women's refusal to admit to the procedure, even when questioned confidentially. Former Surgeon General C. Everett Koop, in a January 9, 1989, letter to President Reagan, noted that reliable assessment of the statistical impact of abortion on women is made difficult by the fact that: an estimated "50 percent of women [who] have had an abortion apparently deny having had one when questioned."<sup>180</sup>

Observers, independently of the pro-life movement, agree that the legalization of abortion has not eliminated "back-alley" abortions; it has merely moved them to Park Avenue.<sup>181</sup> Investigative journalist Debbie Sontag, in her exposé of the Dadeland Family Planning Center in Florida, wrote: "Even in the days of legal abortion, the back alley persists—on a commercial street, in a medical building, with a front door, and sometimes even with a state license."<sup>182</sup>

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cited maternal health considerations as most important factor for choosing abortion. 1% cited rape or incest).

<sup>177</sup> Grimes & Cates, *Abortion: Methods and Complications*, in E. Hafez, ed. *Human Reproduction: Conception and Contraception* 796 (2d ed. 1980).

<sup>178</sup> Atrash, et al., *supra* note 162, at 58. But 540 deaths were examined as "possibly abortion-related." This article also concluded that among blacks, there is a higher rate of abortion and a higher rate of abortion mortality.

<sup>179</sup> Atrash, Check & Hogue, *Legal abortion mortality and general anesthesia*, 158 Am. J. Ob. Gyn. 420 (1968) (citing 193 deaths nationally between 1972 and 1983); Grimes, Kafriissen, O'Reilly & Binkin, *Fatal Hemorrhage from Legal Abortion in the United States*, 157 Surg. Gyn & Ob. 461 (1983) (citing 194 deaths nationally between 1972 and 1979); 248 J.A.M.A. 188 (1982) (citing 138 deaths nationally between 1972 and 1978); Cates, Smith, Rochat, Patterson & Dolman, *Assessment of Surveillance and Vital Statistics Data for Monitoring Abortion Mortality, United States, 1972-1975*, 108 Am. J. Epidemiol. 200 (1978) (citing 240 deaths, "legal," "illegal," and "spontaneous" between 1972 and 1975). In none of these articles is the critical criteria ("legal" abortion versus "illegal" abortion) ever clearly defined.

<sup>180</sup> Letter from C. Everett Koop, Surgeon General of the United States to President Ronald Reagan, January 9, 1989, 21 Fam. Plan. Perspect. 31, 32 (Jan/Feb 1989).

<sup>181</sup> The Louisville Courier Journal reported the temporary closing of an abortion clinic. Operating room equipment was dirty, dusty and in disrepair. Some intravenous medications were administered without any physician present. Patients were not given postoperative instructions. Gil, *Clinic can resume first trimester abortions*, Louisville Courier Journal, Nov 1, 1990, p. B1; Gil, *Doctor at abortion clinic not disciplined by board*, Louisville Courier Journal, May 17, 1991, p. B1.

<sup>182</sup> Sontag, *Do Not Enter*, Miami Herald, Sept. 17, 1989, at 8. "In 1983, four women died from botched abortions at Hipolito Barreiro's notorious Biscayne Boulevard clinic called the Women's Care Center. The media closely followed the closing of the clinic by court order, Barreiro's arrest on charges of manslaughter and his ultimate conviction of practicing medicine without a license." "And in response, the Dade County [Florida] grand jury called for greater state regulation of abortion clinics—regulations previously declared unconstitutional by the Florida Supreme Court." *Id.* at 22.

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Legal, "unsafe" abortions are often ignored by abortion activists. Yet reported cases of maternal death and injury may indicate that more women die and are injured from legal abortion than many are willing to admit.<sup>183</sup> And countless more women are physically injured, often permanently. Enormous damages have been levied against physicians for botched abortions.<sup>184</sup> Countless more lawsuits are unreported because the case is settled prior to trial or appeal. Anecdotal information and lawsuits reveal that women suffer mild to severe physical injury and trauma from legal abortions, including punctured uterus,<sup>185</sup> incomplete abortions,<sup>186</sup> pelvic inflammatory disease<sup>187</sup> or stroke.<sup>188</sup>

Occasionally, abortion clinic abuses are publicized and investigated.<sup>189</sup> In Chicago, Illinois, the *Chicago Sun-Times* and the Better Government Association conducted an undercover investigation in the late 1970s into the practices of Chicago abortion clinics. This resulted in a 12-part series in the *Sun-Times*.<sup>190</sup> Their joint investigation discovered *a dozen previously unreported deaths from legal abortion*.<sup>191</sup> In addition, they found that abortions were performed by incompetent, unlicensed or unqualified physicians un-

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<sup>183</sup> *Atlanta Obstetrics v. Coleman*, 260 Ga. 569, 396 S.E.2d 16 (1990); *Collins v. Thakkar*, 552 N.E.2d 507 (Ind. App. 1990); *Kirby v. Jarrett*, 190 Ill. App. 3d 8, 545 N.E. 2d 965 (1989); *Joplin v. University of Mich. Bd. Regents*, 173 Mich. App. 140, 433 N.W.2d 830 (1988); *Sherman v. Ambassador Ins. Co.*, 670 F.2d 251 (D.C. Cir. 1981); *Martinez v. Long Island Jewish Hillside Medical Center*, 70 N.Y.2d 697, 518 N.Y.S.2d 955, 512 N.E.2d 538 (1987); *Hunte v. Hinkley*, 731 S.W.2d 570 (Tex. App. 1987); *Jean-Charles v. Planned Parenthood*, 99 A.D.2d 542, 471 N.Y.S.2d 622 (1984); *Delaney v. Krafe*, 98 A.D.2d 128, 470 N.Y.S.2d 936 (1984); *Veltch v. Furr*, 482 A.2d 811 (D.C. Ct. App. 1984); *Mears v. Alhadeff*, 88 A.D.2d 827, 451 N.Y.S.2d 133 (1982); *Pierro v. McCroskey*, No. 69039 (Ham. Co., Tenn. Ch. Ct. Jan. 3, 1990) (\$400,000 settlement for wrongful death from abortion on October 10, 1989); *Keys v. Capitol Women's Center* No. 90-00926 (D.C. Sep. Ct. 1991) (\$565,000 settlement for alleged incomplete abortion and ruptured uterus). See, generally, Roberts, *Medical Malpractice in Abortion Cases*, 3 Am. J. Trial Ad. 259 (1979).

Thirteen-year-old Dawn Ravenell choked to death under anesthesia for a 21-week abortion at Eastern Women's Center, New York City's second-largest abortion center; her parents were awarded \$1.2 million. Under cross-examination, defendant Dr. Allen Kline noted his lack of concern for her youth: "I've done 13-year-olds before. When they're 10, maybe I'll notice." Kerrison, *Horror tale of abortion*, New York Post, Jan. 7, 1991, at 2, 25; New York Post, Dec. 11, 1990, at 7. A second woman died after an abortion at Eastern Women's Center. She was 21. Kerrison, *Abort patients' naivete leads to another death*, New York Post, Aug. 5, 1991, at 2.

Sixteen-year-old Erica Kat Richardson of Cheltenham, Maryland was injured during an abortion without parental knowledge. She was left without attention on the operating table for four hours and died in a hospital emergency room. Perl, *Teen's death after abortion brings suit*, Prince George's Journal Weekly, May 30/31, 1990.

Teresa Causey, a 17-year-old, died a few hours after an abortion from which she never awakened. Fischer, *Macon teen dies after abortion*, Macon Telegraph and News, Dec. 5, 1988, at 1.

Angela Duarte, a 21-year-old mother of two, bled to death after an abortionist performed her sterilization. Vega, *Abortion death investigated*, San Francisco Examiner, Nov. 4, 1991, at A-7.

Glenda Davis died on March 14, 1989, as a result of an abortion performed three days earlier at Aaron Family Planning Clinic of Houston. *David Davis v. Aaron Family Planning Center of Houston*, No. 89-028771 (Harris Co., Tex. July 12, 1989). Just a few months later, a woman died at another Houston clinic, *Joe and Janet Montoya v. Women's Pavilion of Houston*, No. 89-16747 (Harris Co., Tex. April 20, 1989).

Seventeen-year-old Latashie Vail died after an abortion performed by Dr. Robert Crist, who previously had been sued five times for botched abortions, one resulting in the woman's death. Most were second-trimester abortions. Bravley & McGuire, *Doctor investigated in post-abortion death*, Kansas City Star, Nov. 6, 1991, at A1.

Dr. Abe Hayat's medical license was suspended by the New York Department of Health after he severed the arm of an infant who survived a third-trimester abortion. He had been cited in eight previous

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der unsterile conditions, on women who were not pregnant, without anesthesia or before anesthetics could take effect; results of pregnancy tests were intentionally withheld from patients; because of unsanitary conditions and haphazard clinic care, many women suffered debilitating cramps, massive infections and such severe internal damage that all of their reproductive organs were removed; because of assembly-line techniques and severe overcrowding, patients were forced to leave the recovery room while they were still in pain; medical records, including patients' vital signs, were fabricated or falsified; clinics failed to order critical postoperative pathology reports, and ignored the results or mixed up specimens; women received incompetent counseling by untrained staff who often were paid on a commission basis; unscrupulous sales techniques were used to pressure women into having abortions; and kickbacks were paid for abortion referrals. Some of the doctors investigated continued to practice.<sup>192</sup>

In subsequent years, dozens of abortion malpractice cases were filed against Chicago-area clinics and doctors, including the Michigan Avenue Medical Center,<sup>193</sup> Bio-

cases, including the death of a teenager. Belkin. *Manhattan doctor loses state license over abortion cases*. New York Times, Nov. 26, 1991, at A12.

Earle, Adm. v. Armstrong, No. 91-1343 (Lucas Co., Ohio Ct. Common Pleas, April 24, 1991).

<sup>194</sup> Thomas v. Family Planning Medical Center of Mobile, No. CV-87-000899 (Mobile Co., Ala. Cir Ct. June 5, 1991) (\$10 million jury verdict); Ruckman v. Barrett and Central Center for Women, No. CV-188-675CC (Greene Co., Mo. Cir. Ct. Jan. 28, 1991), appeal docketed, No. 17453-2 (Mo. Ct. App. Mar. 26, 1991) (\$330,000 actual damages and \$25 million aggravating damages awarded by jury in wrongful death suit); Gallagher v. Barton, No. 80 L 1539 (Cook Co. Cir. Ct. April 14, 1989), rev'd sub. nom., Northern Trust Co. v. Upjohn Co., 213 Ill. App. 3d 390, 572 N.E.2d 1030 (1991) (\$9.4 million jury award for "severe brain damage reversed for failure to establish standard of care"), Chicago Tribune, April 15, 1989, at sec. 1, p. 6, col. 2; Thompson v. Washington Hospital Center (D.C. Super. Ct.) (\$4.6 million for irreversible brain damage), Abramowitz, *Brain damaged patient awarded \$4.6 million*, Washington Post, March 24, 1989, at B4, col. 3.

Ellen Williams' family was awarded \$1 million after her death at the hands of Dr. Chatoor Bisal Singh and Dr. Nabil Ghali in 1985, resulting from an infection due to a perforated uterus and bowel. Sontag, *supra* note 182, at 12.

<sup>195</sup> The New York Health Department suspended Brooklyn physician Dr. Colin Bailey on April 3, 1991, for cases in which one woman suffered a punctured uterus and another suffered a heart attack. *New York Physician Suspended*. Abortion Report, April 5, 1991, at 2.

<sup>196</sup> Dr. Ming Kow Hah, a Queens, New York doctor, was suspended from medical practice by the New York State Health Department in November 1990 after an alleged incomplete abortion in which the fetal head was retained by the woman. Holland, *State Mulls Fate of Queens Abortion Doctor*, New York Newsday, Feb. 4, 1991, at 29; Holland, *State Hears 1st Witnesses Against Doctor*, New York Newsday, Nov. 27, 1990, at 27; Holland, *Why They Suspended Doctor Hah*, New York Newsday, Nov. 25, 1990, at 1, 3, 65; Fischer, "Danger" Cited in Suspension of Queens Doc, New York Newsday, Nov. 17, 1990, at 3. This same physician was one of several physicians who were the focus of the Chicago Sun-Times 1978 series entitled, *The Abortion Profiteers*, *infra* note 190. See also Watson v. Ming Kow Hah, No. 79 L 24780 (Cook Co. Ill. Cir. Ct.).

<sup>197</sup> Flodin, *Why I Don't March*, Newsweek, Feb. 12, 1990, at 8.

<sup>198</sup> Atlanta Obstetrics v. Coleman, 260 Ga. 569, 398 S.E.2d 16 (1990).

<sup>199</sup> See, e.g., People v. Floreando, 95 Ill.2d 155, 447 N.E.2d 282 (1983); People v. Bickham, 89 Ill.2d 1, 431 N.E.2d 365 (1982).

<sup>200</sup> Zelman & Warren, *The Abortion Profiteers*, Chicago Sun-Times, November 12, 1978, at 1; *Meet the Profiteers*, Nov. 13, 1978, at 1; Nov. 16, 1978, at 19; Nov. 19, 1978, at 25.

<sup>201</sup> Id. The series listed abortion deaths of the following women: Evelyn Dudley (March 16, 1973), Julia Rogers (March 28, 1973), Jane Roe No. 1 (no date), Dorothy Muzorewa (August 23, 1974), Linda Fondeen (Fondren) (Jan. 20, 1974), Dorothy Brown (Aug. 16, 1974), Sharon Floyd (Mar. 28, 1975), Sandra Chmiec

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genetics Ltd.,<sup>194</sup> Albany Medical Corp.,<sup>195</sup> Concord Medical Center,<sup>196</sup> Women's Aid Clinic,<sup>197</sup> Park Medical Center,<sup>198</sup> American Women's Medical Group<sup>199</sup> and Dr. Ulrich Klopfer.<sup>200</sup> The clinic regulations adopted in Chicago in the 1970s—prior to the *Sun-Times* investigation—had been enjoined by a federal court.<sup>201</sup> The clinic regulations adopted by the Illinois General Assembly in the wake of the 1978 investigative series were also enjoined by a federal judge in 1985 and were eventually scrapped by the Illinois Attorney General in a settlement with the ACLU.<sup>202</sup>

Because of the lack of a nationwide reporting system, it is impossible to provide anything more than a sample of cases on a national scale. But identified abortion malpractice cases have been filed in Alabama,<sup>203</sup> California,<sup>204</sup> Illinois,<sup>205</sup> Michigan,<sup>206</sup> Minnesota,<sup>207</sup> Kentucky,<sup>208</sup> North Dakota,<sup>209</sup> Ohio,<sup>210</sup> Tennessee<sup>211</sup> and West Virginia,<sup>212</sup> among others. Los Angeles County is another metropolitan area with confirmed, but officially unreported abortion morbidity and mortality. Between 1970 and 1987, at least 20 deaths occurred from legal abortion.<sup>213</sup>

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(June 3, 1975), Jane Roe No. 2 (Springfield, 1975), Jane Roe No. 3 (1975), Diane Smith (Sept. 11, 1976), Jane Roe No. 4 (1977), Sherry Emry (Jan. 2, 1978). Another woman, Barbalee Davis, died in Granite City, June 14, 1977. Subsequent cases were filed for wrongful death from abortion in Cook County, Illinois. Gilbert v. Women's Aid Clinic, No. 85 L 10455; Moore v. Bickham, No. 87 L 15971; Benson v. Biogenetics, No. 89 L 2906.

<sup>192</sup> See *supra* note 186 regarding Dr. Ming Kow Hah. See *infra* note 215 regarding Dr. Arnold Bickham.

<sup>193</sup> Dr. Florendo, was sued at least ten times between 1977 and 1990 for alleged abortion malpractice: Roberts v. Florendo, No. 77 L 20887; Mears v. Florendo, No. 79 L 19386; Magerkarni v. Florendo, No. 79 L 19366; Wallace v. Florendo, No. 82 L 19014; Tate v. Florendo, No. 83 L 18423; Forsythe v. Florendo, No. 84 L 4948; Henning v. Florendo, No. 85 L 9757; Boykins v. Florendo No. 85 L 18957; Taylor v. Florendo, No. 88 L 4085; Somile v. Florendo, No. 88 L 22540. Other abortion malpractice suits were filed against other doctors at the clinic—Belisle v. Palmer, No. 78 L 1452; Davis v. Perna, No. 79 L 374; Watson v. MAMC, No. 79 L 24780; Chizan v. Agustin, No. 82 L 8727; Liggett v. MAMC, 84 L 6197; Bates v. MAMC, No. 84 L 8588; Wolff v. MAMC, No. 85 L 7571; Jordan v. MAMC, No. 85 L 9488; Lyons v. MAMC, No. 85 L 12356; Williams v. MAMC, No. 85 L 14494; Lockwood v. MAMC, No. 85 L 18607; Parham v. Urban Health Services, MAMC, No. 85 L 18688; Washington v. Perez, No. 85 L 18822; Thomas v. Perez, No. 85 L 19262; Wilson v. Perez, No. 86 L 5824; Ross v. Urban, No. 88 L 5853; Cunningham v. Cruz, No. 89 L 8639; Scott v. Urban, No. 89 L 14859; Spagnola v. Agustin, No. 79 L 16622; Kernaghan v. Agustin, No. 87 L 2097; Colbert v. Agustin, No. 89 L 206. The authors are grateful for the original research identifying these suits by Timothy Murphy and the Pro-Life Action League of Chicago.

<sup>194</sup> Deane v. Bickham, No. 76 L 12753; Kim v. Bickham, No. 77 L 23879; Harrington v. Bickham, No. 78 L 9382; Kroetz v. Baldoceda, No. 78 L 23724; Young v. Baldoceda, No. 79 L 5313; Moreno v. Biogenetics, No. 79 L 8163; Rudowicz v. Zivkovic, No. 79 L 5639; Jones v. Zivkovic, No. 79 L 28651; Najera v. Biogenetics, No. 82 L 9851; Cole v. Baldoceda, No. 82 L 22100; Daylie v. Biogenetics, No. 83 L 12294; Mitchell v. Baldoceda, No. 83 L 13383; Payton v. Baldoceda, No. 83 L 20888; Weidner v. Baldoceda, No. 83 L 23448; Pitt v. Motian, No. 84 L 22841; Patterson v. Biogenetics, No. 85 L 16375; Stinger v. Biogenetics, No. 88 L 19456; Benson v. Biogenetics, No. 89 L 2906; Fernandez v. Okwueje, No. 89 L 13460. Other suits have been filed against physicians at this clinic: Hammond v. Obasi, No. 85 L 717; Pierce v. Obasi, No. 89 L 15375; Patterson v. Obasi, No. 89 L 17575; Harris v. Zapata, No. 84 L 2410; Kernaghan v. Zapata, No. 87 L 2097. See also, Robinson & Petrone, *Michigan Avenue abortionist slain*, Chicago Sun-Times, Nov. 4, 1979, at 1 (Biogenetics owner Kenneth Yellin shot to death). The authors are grateful for the original research identifying these suits by Timothy Murphy and the Pro-Life Action League of Chicago and for the research for footnotes 195–200, 213.

<sup>195</sup> Kozlowski v. Albany, No. 76 L 22826; Harris v. Albany, No. 77 L 4168; Miles v. Myers, No. 79 L 4988; Budnick v. Taperia, No. 79 L 6074; Insalaco v. Albany, No. 79 L 6562; Mourning v. Albany, No. 79 L 8864; Weston v. Albany, No. 79 L 18870; Archambault v. Myers, No. 80 L 23068; Ostinski v. Myers, No. 81 L 448; Sadowski v. Albany, No. 81 L 10591; Hoffman v. Albany, No. 81 L 16554; Jaffe

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It is apparent from abortion malpractice cases and from newspaper stories that the legalization of abortion has not eliminated abortion deaths and injuries or "back-alley abortions" and unskilled abortionists.<sup>214</sup> Many of these physicians are still in business and still operate their clinics in major metropolitan areas.<sup>215</sup> Because some abortion experts assert that the safety of abortion is directly related to the experience of the abortionist,<sup>216</sup> one might think that the physicians who have been sued for malpractice have performed relatively few abortions. Quite the opposite is true. Many of the physicians who are sued in such cases have performed thousands of abortions.<sup>217</sup> They continue to practice in the name of "choice," insulated from government regulation and largely immune from effective private redress.

Despite official support for abortion from major medical organizations like the American Medical Association and the American College of Obstetricians and Gynecologists, a strong and growing stigma against performing elective abortion exists among doctors. Perhaps for this reason, the number of physicians willing to perform abortions

v. Rebandel, No. 82 L 11472; McGowan v. Myers, No. 82 L 15203; McKenna v. Albany, No. 82 L 22499; Hawk v. Albany, No. 84 L 5490; Bartyzel v. Blumenthal, No. 84 L 18187; Schindel v. Albany, No. 84 L 23584; Schmidt v. Albany, No. 85 L 11809; Konczak v. Rebandel, No. 85 L 17203; Smiley v. Albany, No. 86 L 17935; Ahmed v. Albany, No. 87 L 15875; Mazalan v. Blumenthal, No. 88 L 2016; DiMartino v. Albany, 88 L 5723; Herskovitz v. Myers, No. 88 L 22225. All cases are filed in Cook County, Illinois, Circuit Court.

<sup>214</sup> Allen v. Concord, No. 75 L 17343; Bouwense v. Concord, 79 L 25110; Roe v. Zapata, No. 80 L 1301; Helm v. Zapata, No. 80 L 4880; Wiegand v. Hankin, No. 80 L 8508; Bynum v. Salimi, No. 80 L 25796; Pekala v. Kim, No. 81 L 7731; Burwell v. Kuo, No. 81 L 16352; Sowinski v. Bozorgi, No. 81 L 17059; Levy v. Pelta, No. 81 L 24691; Brandt v. Kim, No. 81 L 26210; Chomsky v. Ventura, No. 82 L 6446; Greve v. Ventura, No. 82 L 14030; Dunn v. Salimi, No. 82 L 17572; Deon v. Concord, No. 83 L 5203; Crum v. Salimi, No. 84 L 13660; Garcia v. Kuo, No. 87 L 7938; Kang v. Bozorgi, No. 88 L 18636; Robuson v. Hankin, No. 90 L 4882. All cases are filed in Cook County, Illinois, Circuit Court.

<sup>215</sup> Kerstein v. Turow, No. 75 L 15616; Jones v. Turow, No. 75 L 1; Vogel v. Turow, No. 76 L 10066; Jewell v. Olsen, No. 77 L 16890; Wehnaski v. Turow, No. 78 L 8125; Dobson v. Turow, No. 79 L 16059; Kahn v. Turow, No. 79 L 10033; Kelly v. Turow, No. 79 L 20392; Pinto v. Turow, No. 79 L 29343; Vanderhyden v. WAC, No. 80 L 18035; Alexandria v. Turow, No. 81 L 24043; Stanley v. Pirnazar, No. 82 L 19115; Mai v. Turow, No. 83 L 13861; Pope v. Turow, No. 84 L 13350; Cohen v. Olsen, No. 84 L 13571; Kuehne v. Turow, No. 84 L 20307; Goedecker v. Turow, No. 85 L 10455; Hamlin v. Turow, No. 85 L 14364; Skocz v. Pirnazar, No. 88 L 9809. All cases are filed in Cook County, Illinois, Circuit Court.

<sup>216</sup> Goryl v. Nemerovski, No. 80 L 23157; Robinson v. Nemerovski, No. 82 L 21661; Kenny v. Nemerovski, No. 82 L 21835; Peita v. Arora, No. 83 L 12727; Powell v. Park Medical Center, No. 85 L 17633. See also Jackson v. Arora, No. 85 L 19584; Woolworth v. Moragne, No. 91 L 6791. All cases are filed in Cook County, Illinois, Circuit Court.

<sup>217</sup> Ginton v. Barton, No. 75 L 1541; Caprio v. Barton, No. 76 L 5835; Duggins v. Barton, No. 78 L 21281; Besenhofer v. Barton, No. 79 L 4629; Guzik v. Barton, No. 81 L 3932; Szosak v. Barton, No. 85 L 19546; Walker v. Barton, 87 L 17994. All cases are filed in Cook County, Illinois, Circuit Court.

<sup>218</sup> Herrera v. Chicago Loop Mediclinic, No. 79 L 26661; Carson v. Chicago Loop Mediclinic, No. 80 L 3966; Tebbens v. Marcowitz Medical Service Corp., No. 82 L 6309. See also Zekman, *Abortion Units Under Fire Here Closed*, Chicago Sun-Times, Jan. 3, 1980, at 18, col. 1. All cases are filed in Cook County, Illinois, Circuit Court.

<sup>219</sup> Friendship Medical Center v. Chicago Bd. of Health, 505 F.2d 1141 (7th Cir. 1974), cert. denied, 420 U.S. 997 (1975); Miner, *Two more reports of hysterectomies after abortions at the Friendship center*, Chicago Sun-Times, Mar. 24, 1973, at 12, col. 4 (noting three women undergoing hysterectomies in March 1973, after undergoing abortions at Friendship Medical Center).

<sup>220</sup> Ragsdale v. Turnock, 841 F.2d 3239 1358 (7th Cir. 1988), juris. postponed, 109 S. Ct. (1989) (stayed pending hearings below). Subsequently, the Illinois attorney general settled the case with the plaintiff,

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is declining.<sup>218</sup> At the same time, the stigma diminishes the number of hospitals that permit abortions, thereby increasing the extent to which abortions are performed in great numbers in specialty abortion centers. Today, most abortions are performed in approximately 800 specialty centers in the United States.<sup>219</sup>

In many clinics, abortion counseling is either nonexistent or inadequate. Physicians spend little time, if any, with their patients, even if the patients are young girls.<sup>220</sup> Bottom-line profitability controls most abortion practice, and the physician is typically paid per abortion, not for time spent in counseling.<sup>221</sup> The situation was effectively summarized by Justice Sandra Day O'Connor, in her 1983 dissent in *City of Akron v. Akron Center for Reproductive Health*: "It is certainly difficult to understand how the Court believes that the physician-patient relationship is able to accommodate any interest that the State has in maternal physical and mental well-being in light of the fact that the record in this case shows that the relationship is nonexistent."<sup>222</sup> As a practical matter, for women, this means that an increasing percentage of abortions are performed in assembly-line fashion by anonymous doctors who spend little time with their patients.

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virtually eliminating the strength of many of the regulations, which was approved by the federal district court. The federal court of appeals affirmed, and the Supreme Court denied an appeal brought by intervenors, ending the litigation. *Ragsdale v. Turnock*, 734 F. Supp. 1457 (N.D. Ill. 1991), *aff'd in part, dismissed in part*, 941 F.2d 501 (7th Cir. 1991), *cert. denied sub. nom.*, *Murphy v. Ragsdale*, 112 S. Ct. 879 (U.S. Jan. 13, 1992).

<sup>218</sup> *Stanford v. Planned Parenthood of Alabama* No. 90-6411 (Jefferson Co., Ala., Cir. Ct. Aug. 21, 1990).

<sup>219</sup> *Schloss v. Planned Parenthood*, No. 349599 (San Mateo Co., Cal., filed Mar. 21, 1990).

<sup>220</sup> *Shirk v. Kelsey*, No. 84 L 13308 (Cook Co., Ill., Cir. Ct. Feb. 5, 1991), *appeal filed*, No. 91-0738 (Ill. App. Mar. 8, 1991) (\$375,000 jury award of punitive and compensatory damages for abortion increased to \$525,000; incomplete abortion at nine weeks gestation); *Lamar v. Obasi*, No. 89 L 13692 (Cook Co., Ill. Cir. Ct. filed Oct. 12, 1989) (alleged wrongful death); *Patterson v. Obasi*, No. 89 L 17575 (Cook Co., Ill. Cir. Ct. filed Dec. 6, 1989) (alleged incomplete abortion, performed uterus). See *supra* notes 191-196.

<sup>221</sup> *Stanton v. Detroit Macomb Hosp.*, No. 85-502-157 (Wayne Co., Mich., Cir. Ct.).

<sup>222</sup> *Maki v. Mildred S. Hanson*, M.D., No. 89-15330 (Minn. 4th Jud. Dist. Ct. filed Sept. 9, 1989) (alleging negligence, battery, infliction of emotional distress, lack of informed consent); *Jodel Field v. Mildred S. Hanson*, M.D., No. 91-5057 (Hennepin Co., Minn. 4th Jud. Dist. Ct. filed Mar. 1, 1991) (alleging negligence, battery, breach of implied contract); *J.L.S. v. J.M., M.D. and G.H.I.*, No. 90-3303 (Minn. 4th Jud. Dist. Ct. filed Feb. 23, 1990) (alleging abortion on teenager, negligence, malpractice); *M.G. v. Planned Parenthood of Minnesota and Dr. Valgamae*, No. 90-9090 (Hennepin Co., Minn. 4th Jud. Dist. Ct. filed May 23, 1990) (alleging malpractice of abortion on teenager). The authors are grateful to Michael DeMoss, Esq., for identifying these cases.

<sup>223</sup> *Muckle v. Banchongmanee*, No. 89-CI-006286 (Jefferson Cir. Ct., Dist. 12) (twins aborted without mother being informed that she carried twins; mother expelled head of one twin at home after the abortion). This abortionist's Louisville clinic was shut down by the state of Kentucky in September 1990, but a state judge ordered the state to allow him to resume abortions up to 14 weeks gestation in November 1990. *Gill, Clinic can resume first-trimester abortions*, Louisville Courier Journal, Nov. 1, 1990, at B-1; *State v. Women's Health Services*, (Jefferson Cir. Ky., Cir. Ct. Nov. 1, 1990).

<sup>224</sup> *Tamara Green v. Robert Lucy, M.D., Jane Bovard, and Fargo Women's Health Organization, Inc.*, No. 90-1491 (Dist. Ct. E. Central Jud. Dist. Cass Co., N.D. filed Aug. 16, 1990) (alleging malpractice, excessive bleeding, hysterectomy); *Nancy Sabot v. Fargo Women's Health Organization, Inc., and George Mills, M.D.*, No. 89-91 (Dist. Ct. E. Central Jud. Dist. Cass Co., N.D. served Nov. 2, 1988) (alleging malpractice, incomplete abortion, lack of anesthesia).

<sup>225</sup> *Perrine v. Dayton Women's Clinic*, No. 89-4426 (Montgomery Co., Ohio Ct. Common Pleas, filed Dec. 18, 1989); *Perrine v. Ray Robinsons, M.D.*, No. 90-3266 (Montgomery Co., Ohio Ct. Common Pleas filed Aug. 9, 1990) (final appealable orders sent to all parties Feb. 26, 1992); *Passmore v. Geajean*, No. 175142 (Cuyahoga Co., Com. Pleas Ct. filed Aug. 24, 1989); *Tarr v. Mahoning Women's Center*, No. 89 CV 1679 (Mahoning Co., Com. Pleas Ct. filed Aug. 11, 1989); *Loftus v. Cleveland Center for Reproductive Health*, No. 91977 (Cuyahoga Co., Com. Pleas Ct. filed May 23, 1985).

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For the vast majority of women, the notion that abortion is "between a woman and her physician" is utterly a myth.

### C. The Protection of Women's Health

How are women, as health care consumers, to be protected from abortion medical malpractice? In the aftermath of the Supreme Court's legalization of abortion on demand in every state in 1973, many states tried to enact consumer protection laws, including clinic regulations, informed consent requirements, waiting periods and confidential statistical data reporting requirements. All these were challenged immediately by abortion activists and have largely been invalidated by the federal courts. Abortion advocate Dr. Willard Cates has acknowledged that the judiciary "has influenced the practice of abortion most profoundly"—more than the mass media, legislators or regulatory agencies.<sup>223</sup> As a result, abortion in America is a largely unregulated industry.<sup>224</sup>

After *Roe*, many states enacted clinic regulations.<sup>225</sup> However, court decisions have effectively prevented the states from enforcing many of those regulations.<sup>226</sup> This out-

<sup>221</sup> Bradford v. Chattanooga Women's Clinic, No. 91CV0467 (Ham. Co., Tenn. Cir. Ct. filed Feb. 25, 1991) (patient alleged botched abortion, resulting in shock, massive bleeding and transfer to a hospital emergency room).

<sup>222</sup> CAB and BAB v. Women's Health Center of West Virginia, Inc. and Dr. John Hogan, M.D., No. 91C687 (Kanawha Co. Cir. Ct., W. Va. filed March 1, 1991) (alleging malpractice, perforated uterus, lacerated cervix).

<sup>223</sup> Sara Doe, No. 70-8468 (L.A. County Coroner's Report); Janet Doe, No. 71-9846 (L.A. County Coroner's Report); Blevins v. County of Los Angeles, No. C 24787 (Sup. Ct. Cal., L.A. Co.); Margaret Doe, No. 72-7647 (L.A. County Coroner's Report); Kathryn Doe, No. 72-9587 (L.A. County Coroner's Report); Natalie Doe, No. 72-11445 (L.A. County Coroner's Report); Kathy Doe, No. 73-14675 (L.A. County Coroner's Report); Cheryl Doe, No. 75-9493 (L.A. County Coroner's Report); Mitsue Doe, No. 75-10935 (L.A. County Corr. 'n' Report); Lynette Doe, No. 75-11665 (L.A. County Coroner's Report); Maria Doe, No. 76-5654 (L.A. County Coroner's Report); Jacqueline Doe, No. 77-14563 (L.A. County Coroner's Report); Jennifer Doe, No. 82-8251 (L.A. County Coroner's Report); Cora Doe, No. 83-15079 (L.A. County Coroner's Report); Chacos v. Avalon Memorial Hospital, No. 84-2948 (L.A. County Coroner's Report); Tanner v. Inglewood Hospital, No. C 355 261 (Sup. Ct. Cal., L.A. Co.); Mary Doe, No. 84-16016 (L.A. County Coroner's Report); Garcia v. Family Planning Associates Medical Group, No. SOC 82220 (Sup. Ct. Cal., L.A. Co.); Byrd v. Inglewood Women's Hospital, No. SWC 90298 (Sup. Ct. Cal., L.A. Co.).

Abortion-related deaths continue in California. In a 15-month period, one physician was allegedly responsible for the deaths of three women. *Ellis, State Panel Accuses MD of Negligence in 3 Deaths*, Los Angeles Times, May 5, 1990, at B1, Col. 5.

<sup>224</sup> *Tragic End of Ghanaian's Dream*, New York Newsday, June 9, 1989, at 6; "Battlefield Conditions" Reported at Hospital in Inglewood, Los Angeles Times, Dec. 3, 1987, at II-8, col. 4; *3 Die after Abortions at Clinic*, Los Angeles Herald Examiner, Feb. 22, 1988, at A-1; *Radio, Scrutiny of abortion clinic standards will continue*, St. Petersburg Times, Oct. 13, 1989, at 20A.

<sup>225</sup> Zekman, *supra* note 190, at 1. One of the physicians publicized in the series, Arnold Bickham, still practiced abortion until 1986, when an abortion he performed allegedly resulted in the death of an 18-year-old woman. *Board Urges Penalty for Doctor*, Chicago Tribune, Aug. 28, 1988, sec. 2, p. 2; *Charges Sought Against Doctor in Woman's Post-Abortion Death*, Chicago Tribune, Mar. 2, 1987, sec. 2, p. 3. See also *Under the Knife*, transcript of June 25, 1989, report of the Channel 2 Investigative Team, WBBM-TV, Chicago.

Dr. Rosachai Banchomangie, whose Louisville abortion clinic was shut down for operating illegally without a license (the clinic was dirty and in disrepair and performed abortions through the 22nd week of pregnancy), was allowed to reopen less than two months later. Gil, *supra* note 206, at B1.

<sup>226</sup> W. Henn, *Abortion Practice* (1984).

<sup>227</sup> The physician who performed the abortion on Dawn Ravenell (*supra* note 183), resulting in her death, had admittedly performed 5,000 abortions since 1971.

<sup>228</sup> "Under siege from protesters and largely isolated from medical colleagues, doctors who perform abortions say they are being heavily stigmatized, and fewer and fewer doctors are willing to enter the field." Kolata,

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come is affirmed by abortion advocates. In an increasingly familiar pattern, people who call themselves pro-choice oppose clinic regulations, even for such blatantly abusive places as the Florida Dadeland Family Planning Center. Full-time activist Janis Compton-Carr explained, "In my gut, I am completely aghast at what goes on at that place. But I staunchly oppose anything that would correct this situation in law."<sup>227</sup> In a recent "60 Minutes" exposé of the Hillview abortion clinic in Maryland, Meredith Vieira discovered that "Many pro-choice leaders knew about problems at Hillview, but didn't want them publicized."<sup>228</sup> When confronted with the opposition of Barbara Radford, executive director of the National Abortion Federation, Vieira concluded, "even though those laws could make clinics safer, they [pro-choice leaders] usually fight them." Pro-choice Maryland State Senator Mary Boergers found that her support of laws to make clinics safer made her "the enemy" of the pro-choice movement. She accurately perceived that "all arguments from the pro-choice community can become suspect."<sup>229</sup>

Just as relevant to women's health as clinic regulations, and apparently just as offensive to advocates of "choice," is fully informed consent.<sup>230</sup> Since *Roe v. Wade*,

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*Under Pressures and Stigma, More Doctors Shun Abortion*, New York Times, Jan. 8, 1990, at 1; Gorney, *Abortion in the Heartland*, Washington Post Health Section, Oct. 2, 1990, at 13, col. 2 ("the increasing reluctance of physicians to participate directly in abortion"); Joutsaitis, *Group: Rural areas lose abortion access*, Chicago Tribune, May 1, 1991, sec. 1, at 10, col. 1. Apparently because of market forces, "abortion services are not available in 83 percent of the nation's counties." *Id.*; Wolinsky, *Doctor lag limits access to abortion, group says*," Chicago Sun-Times May 1, 1991, at 3, col. 1; O'Hara, *Abortion: MDs who do them and those who won't*, Amer. Med. News, Dec. 8, 1989, at 17.

<sup>227</sup>Tomes & Forrest, *supra* note 174, at 169 n.\* (nonhospital facilities that performed 400 or more abortions in a year—constituting only 25% of all abortion providers—accounted for 81% of all abortions).

<sup>228</sup>The counseling . . . occurs entirely on the day the abortion is to be performed . . . It lasts for two hours and takes place in groups that include both minors and adults who are strangers to one another . . . The physician takes no part in this counseling process . . . Counseling is typically limited to a description of abortion procedures, possible complications, and birth control techniques . . . The abortion itself takes five to seven minutes . . . The physician has no prior contact with the minor, and on the days that abortions are being performed at the (clinic), the physician may be performing abortions on many other adults and minors . . . On busy days patients are scheduled in separate groups, consisting usually of five patients . . . After the abortion (the physician) spends a brief period with the minor and others in the group in the recovery room . . . Planned Parenthood v. Danforth, 428 U.S. 52, 91 n.2 (1976) (Stewart, J., concurring) (ellipses in original).

<sup>229</sup>See Scutag, *supra* note 182.

<sup>230</sup>462 U.S. at 473 (citing 651 F.2d at 1217 [Kennedy, J., concurring in part and dissenting in part]). It is worthwhile noting that the only two women judges who considered the City of Akron's informed consent ordinance (Justice O'Connor and Circuit Judge Kennedy) would have upheld it.

<sup>231</sup>Cates, *The First Decade of Legal Abortion in the United States: Effects on Maternal Health*, in Butler & Walbert, *supra* note 151, at 307.

<sup>232</sup>CBS Television, *60 Minutes*, April 21, 1991, transcript at 17. Only in the most severe cases—usually involving abortion deaths—will state medical officials step in. See, e.g., Department of Professional Regulation v. Obasi, No. 89-2096 (Ill. Dept. of Prof. Reg. Oct. 25, 1989) (temporarily suspending license of Inso Obasi, M.D., after three alleged botched abortions, including one abortion death and two performed inaccurately).

<sup>233</sup>See generally Wardle, *Time Enough: Webster v. Reproductive Health Services and the Prudent Pace of Justice*, 41 Fla. L. Rev. 881, 938 (1989) (citing, e.g., Ala. Stat. § 18-16.010 [a] [2]; Ark. Stat. Ann. § 20-9-302 [1987]; Fla. Stat. § 797.03 [1]-[2] [1989]; Ga. Code Ann. § 16-12-141 [b] [Supp. 1989]; Idaho Code § 18-608 [1987]; Ill. Rev. Stat. ch. 111 1/2, ¶ 157-8.1 to -8.16 (1989); Kan. Stat. Ann. § 21-3407 [2] [a]; Ky. Rev. Stat. Ann. § 311.760 (1989); Minn. Stat. Ann. § 145.412 [2] [West 1989]; 18 Pa. Cons. Stat. Ann. § 3207 [a]-[b] [Pardon Supp. 1989]; S.C. Code Regs. § 61-12 sec. 101-609 [1976]; S.B. No.

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many states have enacted informed consent requirements.<sup>231</sup> The Supreme Court and lower federal courts have routinely struck down laws requiring the doctor to provide certain information to women contemplating abortion.<sup>232</sup>

The Supreme Court and the lower federal courts have also struck down even a brief, 24-hour waiting period before abortion.<sup>233</sup> (In France, by contrast, a week-long "reflection period" is required, as is a counseling session with a psychologist.<sup>234</sup>) These laws, modeled after other consumer protections, have been regularly struck down in the name of "women's choice." There seems to be an underlying fear that too much information might lead a woman to choose childbirth over abortion. Ironically, the result of judicial invalidation of virtually all abortion regulations is that women are forced to rely on private enforcement—on their individual effort to shed their anonymity and initiate a lengthy, emotionally draining lawsuit in court.

Whether or not the Court reverses *Roe* in *Planned Parenthood v. Casey*, it can at least rectify some aspects of abortion exploitation. If the Court upholds the Pennsylvania regulations, protections such as informed consent would be constitutional. As long as

<sup>204</sup> General Assembly of Tennessee [June 2, 1989]; Tex. Rev. Civ. Stat. Ann. art. § 4512.8 [Vernon Supp. 1989].

<sup>235</sup> *Ragsdale v. Turnock*, 841 F.2d 1358 (7th Cir. 1988), *juris. postponed*, 109 S. Ct. 3239 (1989) (stayed pending hearings below) *settlement approved*, 734 F.Supp. 1457 (N.D. Ill. 1990), *aff'd in part, dismissed in part*, 941 F.2d 501 (7th Cir. 1991), *cert. denied sub. nom.*, *Murphy v. Ragsdale*, 112 S. Ct. 879 (U.S. Jan. 13, 1992). *Birth Control Centers, Inc. v. Reizen*, 743 F.2d 352 (6th Cir. 1984); *Hallmark Clinic v. North Carolina Dept. of Hum. Res.*, 519 F.2d 1315 (4th Cir. 1975); *Friendship Medical Center, Ltd. v. Chicago Board of Health*, 505 F.2d 1141 (7th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975); *Florida Women's Medical Center v. Smith*, 746 F. Supp. 89 (S.D. Fla. 1990) (refusing to modify 1982 injunction against abortion clinic regulations); *Pilgrim Medical Group v. New Jersey State Board of Medical Examiners*, 613 F.Supp. 837 (D.N.J. 1985); *Florida Women's Medical Clinic v. Smith*, 536 F.Supp. 1048 (D.Fla. 1982), *appeal dismissed*, 706 F.2d 1172 (5th Cir. 1983); *Florida Women's Medical Clinic v. Smith*, 478 F.Supp. 233 (D.Fla. 1979), *appeal dismissed*, 620 F.2d 297 (5th Cir. 1980); *Women's Medical Center of Providence v. Cannon*, 463 F.Supp. 531 (D.R.I. 1978); *Fox Valley Reproductive Health Care v. Aftl*, 446 F.Supp. 1072 (E.D. Wis. 1978); *Mobile Women's Medical Clinic v. Board of Commissioners*, 426 F.Supp. 331 (S.D. Ala. 1977); *Village of Oak Lawn v. Marcowitz*, 86 Ill.2d 406, 427 N.E.2d 36 (1981) (striking Illinois regulations).

<sup>236</sup> *Sontag, supra* note 182, at 14.

<sup>237</sup> *60 Minutes, supra* note 224, at 15.

<sup>238</sup> *Id.* at 16.

<sup>239</sup> See generally Renfer, Hegarty & Shaheen, *The Women's Right to Know: A Model Approach to the Informed Consent of Abortion*, 22 Loyola U. Law Rev. 409 (1991).

<sup>240</sup> See generally Wardle, *supra* note 225, at 962 (citing, e.g., Del. Code Ann. tit. 24, § 1794 (1987); Fla. Stat. § 390.001 [4] (1989); Ga. Code Ann. § 15-11-112 [a] [2] [Supp. 1988]; Idaho Code § 18-609 (1987); Ill. Rev. Stat. ch. 38, § 81-26 [6] (1989); Ind. Code Ann. § 35-1-58.5-2 [1] [B] (Burns 1985); Iowa Code Ann. § 707.8 (West 1979); Ky. Rev. Stat. Ann. § 311.726, 311.729 [Baldwin 1986 & Supp. 1988]; La. Rev. Stat. Ann. 40:1299.33 [D], 40:1299.35.6 (West 1977); Me. Rev. Stat. Ann. tit. 22, § 1599 (Supp. 1988); Md. Health-Gen. Code Ann. § 20-211 [d] (1987); Mass. Ann. Law ch. 112, § 125 (1983); Minn. Stat. Ann. § 145.412 [4] (West 1989); Mo. Ann. Stat. § 188.027, 188.039 (Vernon 1983); Mont. Code Ann. §§ 50-20-104 [3] [c], 50-20-106 [1987]; Neb. Rev. Stat. § 28-327 [1985]; Nev. Rev. Stat. Ann. § 442.252 (Michie 1987); N.Y. Penal Law § 125.053 [Kinney 1987]; N.D. Cent. Code § 14-02.1-03 [1] [1981]; Ohio Rev. Code Ann. § 2929.12 [A] (Anderson 1987); Okla. Stat. Ann. tit. 63, § 1-738 (West 1984); 18 Pa. Cons. Stat. Ann. §§ 3205, 3208 [Purdon Supp. 1989]; R.I. Gen Laws § 23-4.7-2 (1985); S.C. Code Ann. § 44-41-20 (1985); S.D. Codified Laws Ann. §§ 34-23A-7, 34-23A-10.1 (1986); Tenn. Code Ann. §§ 39-4-201 [c], 39-4-202 (1982); Utah Code Ann. § 76-7-303.5 [Supp. 1989]; Va. Code Ann. § 18.2-76 (1988); Wash. Rev. Code Ann. § 9.02.070 (1988); Wis. Stat. Ann. § 146.78 (West 1989]).

<sup>241</sup> *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Barnes v. Moore*, No. J-91-0425 (S.D.

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abortion remains legal, women should be protected from its most obvious abuses. Information about health risks, coupled with a meaningful opportunity to evaluate abortion outside the stress and pressures of a for-profit abortion center, should be provided to every woman contemplating an abortion.

#### D. RU486 as an Alternative to Surgical Abortion

As abortion advocates have become more aware of the physical trauma and complications of surgical abortion, as well as the very public nature of clinics, they have sought an alternative means for aborting a pregnancy. In the past two years, increasing publicity has been given to the abortifacient RU486 (Mifepristone), the so-called French abortion pill, and its potential effect on women and abortion in the United States.<sup>235</sup> The drug has also been touted as a treatment for brain tumors, but the benefits are minor and results are preliminary.<sup>236</sup> Congress has held hearings about the distribution of the drug in the United States.<sup>237</sup> It appears widely suggested, and believed, that RU486 is an easy, safe, preferable solution to surgical procedures, such that it will quickly replace surgical abortion and make abortion a safe, easy, at-home experience. Abortion clinics will become a thing of the past, and the accompanying demonstrations in front of clinics will be eliminated. Women will no longer need doctors to perform abortions. It will be a private matter, and no one will know the difference. The abortion issue will simply evaporate from the lack of an identifiable target.<sup>238</sup>

Miss. 1991), *appeal docketed*, No. 91-1953 (5th Cir. 1991); *Fargo Women's Health Organization v. Sinner*, No. 91-95 (D.N.D. Aug. 23, 1991).

<sup>235</sup> *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 449-51 (1983).

<sup>236</sup> Van Biema, *The Abortion Pill*, Life 75, 76 (July 1990). Nathanson records the irony that she could have proceeded with the abortion immediately but no, with a tubal ligation. Her doctor said, "You'll need to sign a release in advance for permanent sterilization—that's to prevent impulsive decisions, since it's an irreversible procedure." Nathanson, *supra* note 40, at 36.

<sup>237</sup> See, e.g., Wickenden, *Drug of choice: the side effects of RU 486*, 203 *The New Republic* 24 (Nov. 26, 1990); Van Biema, *supra* note 234, at 73; Sanders, *Whose Right to Choose?* 2 *New Statesman & Society* 29 (Sept. 29, 1989); Schumer, *The Pill that isn't*, 10 *Savvy Woman* 94 (Oct. 1989); Carey, *Can the 'abortion pill' save lives?* *Business Week* 56 (Dec. 17, 1990); Pro-con (excerpts from congressional investigations concerning the drug RU-486), 109 U.S. *News & World Rep.* 15 (Dec. 3, 1990); *A pill worth testing*, 54 *The Progressive* 9 (Dec. 1990); Wright, *Fertility Rites*, *Scientific American* 14 (Dec. 1988); *About-Face Over an Abortion Pill*, *Time* 103 (Nov. 7, 1988); Langone, *After-the-Fact Birth Control*, *Time* 103 (Oct. 10, 1988).

<sup>238</sup> Greenberg, Weiss, et al., *Treatment of Unresectable Meningiomas Antiprogestrone Agent Mifepristone*, 74 *J. of Neurosurgery* 861-866 (June 1991).

<sup>239</sup> Supliss, *Hill Holds Heated Hearing on RU 486*, *Washington Post*, Nov. 20, 1990, at A21, col. 2.

<sup>240</sup> See, e.g., Lader, *RU486* (1991) (book jacket: "RU486 is a pill that ends an unwanted pregnancy quickly, safely, and without an invasive procedure"); Editorial, *A Mayoral Boost for RU-486*, *New York Times*, April 8, 1991, at A14 ("would be as private a decision as it should be and considerably safer than it now is with surgical procedures"); Van Biema, *supra* note 234, at 78 ("If the pro-choice movement is founded on the proposition that abortion is a woman's private decision, here was a magic wand to make it a correspondingly private procedure. The woman would act alone, excluding the host of other participants and spectators . . ."); Goodman, *Abortion: By Pill*, *Washington Post*, July 29, 1989, at A-17, col. 1; *About-Face over An Abortion Pill*, *Time* 103 (Nov. 7, 1988) ("Administered within the first five weeks of pregnancy, it causes abortions by blocking the action of the hormone progesterone, thus provoking the uterine lining to slough off the embryo. If taken with a prostaglandin . . . RU 486 is about 95 percent effective. Some 8,000 women have used the pill, which has been available only in hospitals and medical clinics and has no harmful side effects"); Pogash, *Science v. Religion*, *San Francisco Examiner* (Image Sunday magazine), April 14, 1991 at 10 (Women anywhere in the world would be able to abort "in the privacy of their own homes").

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However, a review of the medical and popular literature based on the drug's use in France suggests otherwise.<sup>239</sup> The process of using RU486 is more extensive and cumbersome than commonly known and requires, in France, four trips to a clinic.<sup>240</sup> First, the woman visits the clinic to have her pregnancy confirmed by a urine or blood test and clinical examination. If pregnant, she is a candidate for using RU486, which is most effective during the seventh week of pregnancy.<sup>241</sup> The woman returns a week later and is given a 600-mg. oral dose of RU486, which induces an abortion by inhibiting proper implantation or by inducing a sloughing from the uterine wall after implantation.<sup>242</sup> In short, the process induces a miscarriage with "heavy menstrual bleeding."<sup>243</sup> But because Mifepristone by itself is only 50% to 85% effective,<sup>244</sup> the woman must return a third time for administration of a prostaglandin to induce uterine contractions. This allegedly increases the effectiveness rate to 95%.<sup>245</sup> Nausea may set in before the prostaglandin is administered, and the prostaglandin may exacerbate the nausea. The woman spends a few hours in a hospital bed. "A few women . . . expel [the fetus] before coming in for the injection, most do so while at the hospital, and for some it will happen later, at home."<sup>246</sup> For some, the expulsion may be delayed at home as long as five days.<sup>247</sup> The woman must go to the clinic a fourth time, eight to twelve days later. If the abortion is not complete, a surgical abortion must be performed.<sup>248</sup> Even with the combination of RU486 and a prostaglandin, there is still an incomplete abortion rate of 3% to 4%, and a continued pregnancy rate of about 1%.<sup>249</sup>

For most women, the process is like a very heavy menstrual period, with bleeding lasting on average from six to 16 days. During this process, some women require analgesic shots for pain.<sup>250</sup> The French inventor of RU486, Etienne-Emile Baulieu, warns that, "In an out-patient setting, this method requires strict medical supervision in order to monitor cases of aggressive blood loss,"<sup>251</sup> which may continue for as much as three weeks after the prostaglandin is taken. Consequently, Baulieu recommends that any

<sup>239</sup> An exception to the rosier descriptions in the popular media is Wickenden, *supra* note 232, at 24; Allen, *The Mysteries of RU-486*, *The American Spectator* 17 (October 1989).

<sup>240</sup> Armstrong, *RU-486: The abortion pill*, Santa Clara Mercury News, Feb. 20, 1990, at 1C.

<sup>241</sup> Baulieu, *Contraception and other clinical applications of RU486, an Antiprogestrone at the Receptor*, 245 *Science* 1351, 1354 (Sept. 22, 1989).

<sup>242</sup> Ulmann, Teutsch & Philibert, *RU 486*, 262 *Scientific American* 42 (June 1990). "RU" comes from the maker's name, Roussel-Uclaf. The authors of this article are employees of Roussel-Uclaf who oversaw the testing of the drug.

<sup>243</sup> Van Biema, *supra* note 234, at 75 (July 1990).

<sup>244</sup> Some reports say RU486 is only 60% effective alone. Riding, *Frenchwoman's Death Tied to the Use of Abortion Pill*, *New York Times*, April 10, 1991, at A4, col. 1. Baulieu reports 1% to 10% cases of complete failure, 10% to 30% cases of incomplete expulsion and 60% to 85% cases of complete expulsion. Baulieu, *supra* note 241, at 1354.

<sup>245</sup> Prostaglandin is a naturally occurring compound that stimulates uterine contractions. It can also be synthesized chemically. There are several types. *Dorland's Illustrated Medical Dictionary* 1077-1078 (26th ed. 1985). Some World Health Organization studies are using a different prostaglandin—gemeprostin—as a vaginal suppository. A third type of prostaglandin is being tested. Riding, *supra* note 244, at A4 col. 1.

<sup>246</sup> Van Biema, *supra* note 234, at 80.

<sup>247</sup> *Id.*

<sup>248</sup> Armstrong, *supra* note 240, at 2C. "Also, follow-up is necessary in cases of failure that may be related to ectopic (extrauterine) pregnancies . . ." Baulieu, *supra* note 241, at 1355.

<sup>249</sup> Baulieu, *supra* note 241, at 1355.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

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distribution of RU486 be done only by gynecologists in clinics.<sup>252</sup> *Life* magazine described the side effects this way: "The bleeding RU486 causes, the disagreeable cramps and nausea that sometimes results from the prostaglandin, and the extension of a process normally completed in a few traumatic hours over several emotionally taxing days. This last is the most surprising to those who expect the pill to be quick."<sup>253</sup> Dorothy Wickenden wrote in *The New Republic*, "There is no denying that RU486 is an eerie drug."<sup>254</sup>

Even aside from the complexity of the process, the literature indicates that RU486 is not the simple abortifacient that has been commonly thought. It is only effective for about a three-week period, between six and eight weeks of pregnancy.<sup>255</sup> The American Medical Association, which supports RU486 research, agrees with the FDA ban on importing the drug, noting that RU486 "poses a severe risk to patients unless the drug is administered as part of a complete treatment plan under the supervision of a physician."<sup>256</sup> The side effects of the drug make it anything but easy and effortless.<sup>257</sup> These side effects include incomplete abortion, heavy bleeding or hemorrhage, nausea and vomiting and abdominal pain. There is anecdotal evidence that RU486 is stressful and painful.<sup>258</sup> For women with undetected tubal (ectopic) pregnancies, taking RU486 would not end the pregnancy; undetected continuation of the pregnancy might result in a rupture of the fallopian tubes.<sup>259</sup> It is necessary to ensure that every woman returns after taking RU486 for the prostaglandin dosage; otherwise an incomplete abortion may result.<sup>260</sup> As a result, some researchers do not believe that RU486 will ever replace suction abortions.

The death of a French woman from RU486 was reported in April 1991.<sup>261</sup> French authorities had previously "recommended against nonsurgical abortion in cases when the women are smokers or have heart problems, diabetes and high cholesterol."<sup>262</sup> In

<sup>252</sup> Van Biema, *supra* note 234, at 83. A 1990 memo signed by the French director general of health, the director of hospitals and the director of pharmacy and medication noted that the use of the prostaglandin Nalador with RU486 caused "serious undesirable side effects of the cardio-vascular type." The memorandum recommended that the method of use be scrupulously noted and that "training of personnel and the proper use of material are indispensable." The procedures included: 1) the woman must be in a prone position during and after administration of the drug for several hours; 2) cardiopulmonary resuscitators must be available; 3) the patient should have blood pressure taken every half-hour for several hours; 4) electrocardiogram should be given if the patient notes chest pain. (Memorandum on file with authors.)

<sup>253</sup> Van Biema, *supra* note 234, at 76.

<sup>254</sup> Wickenden, *supra* note 235, at 27.

<sup>255</sup> Baulieu, *supra* note 241, at 1354; Allen, *supra* note 239, at 18.

<sup>256</sup> Sutcliffe, *Hill Holds Heated Hearing on RU 486*, Washington Post, Nov. 20, 1990, at A21, col. 1.

<sup>257</sup> See generally Allen, *RU-486, the French Abortion Pill: What Is Safe?* Wall Street Journal, A20 col. 3 (Oct. 31, 1989) (Midwest Edition); Allen, *supra* note 239, at 17.

<sup>258</sup> One patient stated during the process of taking the drug: "But what's really hard to take is the mental side of it. The emotional side. To feel the egg is in the process of dying. And you are almost . . . assisting in this death for forty-eight hours—forty-eight hours between the pills and the shot and what comes next." Van Biema, *supra* note 234, at 80.

<sup>259</sup> *Id.* at 83.

<sup>260</sup> *Id.* at 83.

<sup>261</sup> Riding, *Frenchwoman's death tied to the Use of Abortion Pill*, New York Times, April 10, 1991, at A4, col. 1. Her death was attributed to her reaction to the hormone prostaglandin injected with the Mifepristone. This article also reported that three other women had died and four had suffered heart attacks after taking the prostaglandin, Nalador, alone. At least another two had suffered heart attacks after taking RU486 with the prostaglandin in 1990.

<sup>262</sup> Riding, *supra* note 261, at A4.

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April 1991, shortly after the woman's death, the French Ministry of Health banned the use of RU486 for women who are regular smokers or who are older than 35.<sup>263</sup>

RU486 has created a dilemma for abortion advocates who are also concerned about women's health. In addition to the risks from the procedure, the long-term effects are unknown. The drug may suppress ovulation for three to seven months after it is taken.<sup>264</sup> If RU486 is unsuccessful in aborting the pregnancy, although the effects on the fetus are uncertain,<sup>265</sup> it may cause birth defects.<sup>266</sup> It is not recommended either as a "morning after" pill or as a "once a month" menses inducer,<sup>267</sup> although NOW and the Fund for a Feminist Majority have promoted it as such.<sup>268</sup> Also, it can cause "dysynchrony," a phenomenon "in which a woman's ovulating and menstrual cycles become unlinked," reducing the drug's effectiveness in terminating any pregnancy.<sup>269</sup>

The National Women's Health Network "has serious qualms about introducing reproductive products onto the market without adequate testing."<sup>270</sup> In contrast to extensive testing with Norplant—a time-release contraceptive capsule placed in a woman's arm and allegedly effective for up to five years that underwent over 20 years of research—a coalition of NOW, Fund for a Feminist Majority, the Population Council and Planned Parenthood is pushing to have RU486 approved by the FDA within four years.<sup>271</sup> If protection of abortion availability were not the issue, one would expect aggressive feminist concern about the health ramifications of RU486. One of the few pro-choice feminist groups to question the safety of RU486 is the Institute on Women and Technology; it has been heatedly criticized by other pro-choice feminists.<sup>272</sup> Abortion advocates should still remember the devastation of the Dalkon shield and the first-generation birth control pills. But they ignore, apart from moral or philosophical concerns, the genuine health risks to American women. Their single-minded pursuit of abortion-on-demand by any means belies any legitimate claim to represent the interests of American women.

#### E. Psychological Effects

Even if aborted women escape physical trauma or death, they have another hurdle to overcome: damage to their psychological and emotional well-being. The psychological impact of abortion may be even more hotly denied by feminists than are physical complications. To admit that abortion causes guilt, remorse or regret violates the fundamental premise that abortion is a "first right." Margaret Liu McConnell, who had an all-too-easy abortion in college, discovered too late: "For all the pro-choice lobby's talk of abortion as a deep personal moral decision, casting abortion as a right takes the weight of morality out of the balance. For, by definition, a right is something you need

<sup>263</sup>France Forbids Pill Treatment, *Wall Street Journal*, May 14, 1991, at B1, col. 6; How RU 486 Works, *USA Today*, May 20, 1991, at 10A, col. 4.

<sup>264</sup>Allen, *supra* note 239, at 18.

<sup>265</sup>Baulieu, *supra* note 241, at 1355.

<sup>266</sup>Allen, *supra* note 239, at 18.

<sup>267</sup>*Id.*

<sup>268</sup>Allen, *supra* note 239, at 19.

<sup>269</sup>Allen, *supra* note 239, at 18.

<sup>270</sup>*Id.* at 20.

<sup>271</sup>*Id.* at 17.

<sup>272</sup>Feminist Group Dissents on RU-486 Use for Abortion, *Science* 199 (Oct. 11, 1991). See J. Raymond, et al., *RU 486: Misconceptions, Myths and Morals* (1991).

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*not feel guilty exercising.*"<sup>273</sup> Precisely. If abortion is a "right," why does it feel so wrong?

Abortion has long been recognized to have devastating effects on at least some women. There is evidence that the psychological effects of abortion on women were publicized in the middle of the last century.<sup>274</sup> The contemporary debate over the psychological impact of abortion spans 30 years.<sup>275</sup> Studies prior to the liberalization of abortion concluded that abortion had negative psychological consequences.<sup>276</sup> Indeed, Dr. Mary Calderone stated in 1960, based on the 1955 conference of experts sponsored by Planned Parenthood: "I am mindful of what was brought out by our psychologists . . . that in almost every case, abortion, whether legal or illegal, is a traumatic experience that may have severe consequences later on."<sup>277</sup> But writings and research by abortion-rights advocates in the late 1960s concluded that abortion had neither negative nor positive psychological consequences.<sup>278</sup> Later articles by abortion-rights advocates admitted that negative consequences do in fact occur.<sup>279</sup> However, they minimized the impact by claiming that the psychological sequelae from abortion may be less than that following childbirth.<sup>280</sup> Mary Zimmerman, a sociologist who interviewed women who had aborted, suggests that the abortion experience is not uniform for women: Neither the "abortion as crisis" view (by the antiabortion movement) nor the "abortion as harmless" view (by those who favor abortion) fully explains the abortion experience. These two views result in abortion being seen as an "either/or issue . . . either abortion

<sup>273</sup> McConnell, *Living With Roe v. Wade*, Commentary 34, 36 (Nov. 1990) (emphasis added).

<sup>274</sup> Elizabeth Evans, *The Abuse of Maternity* (Philadelphia: Lippincott 1875).

<sup>275</sup> See, e.g., Schwartz, in Butler & Walbert, eds., *supra* note 151, at 323; Pfeiffer, *Psychiatric Indications or Psychiatric Justification of Therapeutic Abortion*, 23 Arch. of Gen. Psychiat. 402 (1970); Bolter, *The Psychiatrist's Role in Therapeutic Abortion: The Unwitting Accomplice*, 119 Am. J. of Psychiat. 312 (1962).

<sup>276</sup> See, e.g., Bolter, *supra* note 270, at 312; Galdsson, *Other Aspects of the Abortion Problem: Psychiatric Aspects*, in M. Calderone, ed., *Abortion in the United States* (1958); Wilson, *The Abortion Problem in the General Hospital*, in *Therapeutic Abortion* (H. Rosen, ed. 1954); Taussig, *Effects of Abortion on the General Health and Reproductive Functions of the Individual*, in H. Taylor, ed., *The Abortion Problem* (1942).

<sup>277</sup> Calderone, *supra* note 8, at 951.

<sup>278</sup> See, e.g., Notman, *Pregnancy and Abortion: Implications for Career Development of Professional Women*, 208 Annals of the N.Y. Acad. of Science 205 (1973); Payne, et al., *Methodological Issues in Therapeutic Abortion Research*, in H. Ososky and J. Ososky, eds., *The Abortion Experience: Psychological and Medical Impact*, (1973); Athanasiou, et al., *Psychiatric Sequelae to Term Birth and Induced Early and Late Abortion: A Longitudinal Study*, 5 Family Planning Persp. 227 (1973).

<sup>279</sup> Schwartz, in Butler & Walbert, *supra* note 151, at 331. Of the 32 articles that Schwartz examined, only 11 were written after 1973 (the year *Roe v. Wade* legalized abortion), and only 2 of the 32 were written as late as the 1980s. See also M. Zimmerman, *Passage Through Abortion: The Personal and Social Reality of Women's Experiences*, 3, 20-24 (1977).

One factor that may affect research outcome is that the attitudes of professional psychologists dramatically changed in the 1960s: "Whereas in 1967 only 24 percent of members of the American Psychiatric Association responding to a poll favored abortion on request, 72 percent were in favor by 1969. By the end of the decade, two of the most influential organizations within the profession [the Group for the Advancement of Psychiatry and the American Psychiatric Association] had published official statements favoring legalization of abortion." Schwartz, *supra* note 151, at 324 (cit. omitt.).

<sup>280</sup> Schwartz, in Butler & Walbert, *supra* note 151, at 331 (citing David, *Abortion in Psychological Perspective*, 42 Am. J. Orthopsychiat. 61 [1972]); Brewer, *Incidence of Post-Abortion Psychosis: A Prospective Study*, 1 Brit. Med. J. 476 (1977)).

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is viewed as a crisis or not; either it constitutes a major disruption or it does not."<sup>281</sup> Women's responses vary.

In any case, because no longitudinal studies have been conducted, the scientific reliability of all previously completed studies has been questioned.<sup>282</sup> A recent article examined all studies published in English between January 1966 and April 1988 that "quantitatively examined psychological sequelae" from abortion through original empirical data.<sup>283</sup> The authors questioned the scientific reliability of many of those studies. Validity is compromised when, for example, "systematic attrition occurs, the reliability of an assessment instrument is unknown, or a sample size is too small to reliably generalize to the underlying population."<sup>284</sup>

Despite the lack of comprehensive national statistics, abortion does affect individual women deeply. Anecdotal evidence of negative reactions is plentiful.<sup>285</sup> In her autobiography, actress Patricia Neal wrote of her abortion of Gary Cooper's child and of the trauma she suffered for 30 years thereafter.<sup>286</sup> Sue Nathanson, in *Soul Crisis*, conveyed the devastation of her abortion in a startling and direct way. She wrote of "the psychological descent into despair I made after the abortion and tubal ligation."<sup>287</sup> She grieved on each anniversary of her abortion.<sup>288</sup> Even five years after her abortion, she felt compelled to "acknowledge the reality and permanence of the pain of my loss. My grief for my unborn fourth child, though perhaps different in quality than the grief I would have for any living child, is just as palpable."<sup>289</sup>

In *Passage Through Abortion*,<sup>290</sup> Mary Zimmerman conducted personal interviews with 40 women from one community who underwent abortion in 1975. She found that

<sup>281</sup> M. Zimmerman, *supra* note 279, at 3.

<sup>282</sup> Re., *rs.* Stoms & Phifer, *Psychological Impact of Abortion: Methodological and Outcomes Summary of Empirical Research between 1966 and 1988*, 10 *Health Care for Women Int'l* 347 (1989). See also Posovac & Miller, *Some Problems Caused By Not Having a Conceptual Foundation for Health Research: An Illustration From Studies of the Psychological Effects of Abortion*, 5 *Psych. & Health* 13 (1990).

<sup>283</sup> Rogers, Stoms & Phifer, *supra* note 282, at 369.

<sup>284</sup> *Id.* at 369.

<sup>285</sup> See, e.g., Lyons, *After Abortion: Stress disorder strikes women (& men) years later*, New York Daily News, March 11, 1991, at 18.

Sandra Kaiser underwent an abortion, without her mother's knowledge, when she was 14. Prior to the abortion, she had been hospitalized three times for psychiatric problems, but the clinic failed to elicit this information. Sandri jumped to her death. Her mother sued the clinic but lost. Jackson, *Jury Considering Abortion-Suicide Suit*, St. Louis Post-Dispatch, March 1, 1991, at 3A, col. 1.

<sup>286</sup> P. O'Neal, *As I Am: An Autobiography* 134 (1988) ("But for over thirty years, alone, in the night, I cried. For years and years I cried over that baby. And whenever I had too much to drink, I would remember that I had not allowed him to exist. I admired Ingrid Bergman for having her son. She had guts, I did not. And I regret it with all my heart. If I had only one thing to do over in my life, I would have that baby."); N. Sorel, *Ever Since Eve: Personal Reflections on Childbirth* 243, 247 (1984) (Gloria Swanson: "The greatest regret of my life has always been that I didn't have my baby, Henri's child, in 1925. Nothing in the whole world is worth a baby, I realized as soon as it was too late, and I never stopped blaming myself.").

<sup>287</sup> *Id.* at 270.

<sup>288</sup> "At some deep place in my mind, I continue to track the development of my unborn child as if he or she were alive." *Id.* at 285.

<sup>289</sup> *Id.* at 268. See *id.* at 285 ("the permanent place occupied by the abortion and tubal ligation . . ."); ". . . I understood yet another underpinning of the horror of abortion. The death of a child, whether unborn or living, triggers an archetypal panic . . .". *Id.* at 287.

<sup>290</sup> M. Zimmerman, *supra* note 112.

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*social change such as is involved in the legalization of abortion exacts severe personal costs from the women she studied. The legitimizing of abortion, followed by the provision of institutional settings where abortions are routinely obtainable—although not uniformly available—has not been accompanied by parallel changes in the moral definitions of abortion. Among many, abortion continues to be viewed as an immoral act. For the individuals involved in this study . . . the guilt feelings which result from the discrepancy between what is legally permissible and moral belief is the price which they must pay.*<sup>291</sup>

It is ironic that so many women are opposed to or ambivalent about an act they also claim as their legal, fundamental right. Zimmerman observed that "the most dramatic trend remains that by far the majority of women studied (70%) reported that they had disapproved of abortion to some degree prior to their own experience with it."<sup>292</sup> About half of the group Zimmerman interviewed were troubled in the first few weeks following their abortion.<sup>293</sup> It is worth noting that the women Zimmerman studied had abortions just two years after *Roe*. They grew up with abortion largely prohibited; few knew anything factual about abortion or had ever discussed it with anyone.<sup>294</sup> However, even for women who have no memory of the pre-*Roe* years, the moral uncertainty, ambivalence and secrecy remain.<sup>295</sup> Why?

One reason may be the inescapably human nature of the fetus, as illuminated by fetal photography and modern developments in medical science. Many women considering abortion have at least a general idea of what a developing fetus looks like.<sup>296</sup> Scientific confirmation of the humanity of the fetus cannot be attributed to the "moralists" in the pro-life movement or shrugged off as the survival of traditionalist or anti-feminist morals. Medical care for the unborn child as a patient preceded the *in utero* photography and technology in the 1960s—and it will survive any demise of the pro-life movement.<sup>297</sup> Traditionally, concern for the fetus has been an essential aspect of prenatal care, intended to promote the health of mother and child.<sup>298</sup> That approach is

<sup>291</sup> *Id.* at vii (Foreword by Harold Finestone).

<sup>292</sup> Zimmerman, *supra* note 112, at 69–70.

<sup>293</sup> *Id.* at 182–185. This study covered only immediate aftereffects; most interviews were conducted between six and ten weeks after the abortion. *Id.* at 43.

<sup>294</sup> *Id.* at 62–63.

<sup>295</sup> McConnell, *supra* note 273, at 34, 35–36 ("I longed for those days I knew only from old movies and novels, those pre-60's days when boyfriends visiting from other colleges stayed in hotels (!) and dates ended with a lingering kiss at the door . . . I am not in the habit of exposing this innermost regret, this endless remorse to which I woke too late.")

<sup>296</sup> On a December 28, 1991, visit to the Museum of Science and Industry in Chicago, one of the coauthors was surprised that one of the longest lines was at the fetal development exhibit.

<sup>297</sup> Cf. Zimmerman, *supra* note 279, at 1–2; Callahan, *supra* note 6, at 683.

<sup>298</sup> See generally D. Danforth & J. Scott, *Obstetrics and Gynecology* 5 (3rd ed. 1986); H. Speert, *Obstetrics and Gynecology in America: A History* 142–43 (A.C.O.G. 1980). Direct therapy for unborn infants appeared as far back as 1928, when transabdominal application of drugs for fetal asphyxia was introduced. Dudenhausen, *Historical and ethical aspects of direct treatment of the fetus*, 12 J. Perinatal Med. 17 (1984 Supp.). "Prior to the recent developments in fetal surgery, the fetus generally was considered a medical patient and certain defects were treated with medicines administered to the mother or directly into the amniotic fluid." Blank, *Emerging Notions of Women's Rights and Responsibilities During Gestation*, 7 J. Legal Med. 441, 461 (1986). "[T]he health of the fetus has always been a concern . . . In some obvious

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reflected in current medical practice as well. The American College of Obstetricians and Gynecologists Ethics Committee, in their Opinion No. 55, states that the "current ethical position of the medical community is that a physician treating a pregnant woman in effect has two patients, the mother and the fetus, and should assess the risk and benefits attendant to each in advising the mother on the course of her treatment."<sup>299</sup>

A recent issue of *Discovery* magazine brought into popular view the latest developments in fetal surgery and medicine that have been growing throughout the 1970s and 1980s.<sup>300</sup> It is now possible to care for the unborn child *in utero* at virtually every stage of pregnancy.<sup>301</sup> *In utero* treatments have been performed successfully for hydrocephalus, hydrops fetalis associated with maternal Rh sensitization, congenital adrenal hyperplasia, urinary tract malformation, congenital hydronephrosis, perinatal asphyxia and congenital cystic adenomatoid malformation.<sup>302</sup> Intrauterine blood transfusions have been performed for a variety of fetal diseases.<sup>303</sup> Fetal surgery has also been performed to correct some fetal anomalies *in utero* by removing the fetus from the uterus, operating and then replacing the fetus into the uterus,<sup>304</sup> and to remove a dead fetal twin.<sup>305</sup> These medical developments reaffirm that the fetus is a human child, loved and cared for and highly valued by her parents and society.

Developing technology and surgical techniques, which reinforce traditional prin-

nontechnical sense, the fetus has always been regarded as a patient." Shinn, *The Fetus as Patient: A Philosophical and Ethical Perspective*, in Milunsky & Annas, eds., *Genetics and the Law III* 318 (1985).

<sup>299</sup> American College of Obstetricians and Gynecologists, *Patient Choice: Maternal-Fetal Conflict* (October 1987) (as cited in *In re A.C.*, 573 A.2d 1235, 1246 n.13 (D.C. Ct.App. 1990)).

<sup>300</sup> Ohlendorf-Moffat, *Surgery Before Birth*, *Discovery* (Feb. 1991).

<sup>301</sup> Proper control of a diabetic mother's fuel metabolism at conception is advised and proper control at six to eight weeks of gestation can prevent fetal malformations. Wilson, *Diabetics and Pregnancy: Control Can Make a Difference*, 61 Mayo Clin. Proc. 825 (1986). Additional therapy available for preivable, unborn children in the first trimester include treatments for congenital adrenal hyperplasia, some vitamin-responsive unborn errors of metabolism, neural tube defects and fetal cardiac arrhythmias. Schulman, *Treatment of the Embryo and the Fetus in the First Trimester*, 35 Am. J. Med. Genetics 197 (1990).

<sup>302</sup> Frigoletto, et al., *Antenatal Treatment of Hydrocephalus by Ventriculoamniotic Shunting*, 248 J.A.M.A. 2496 (1982); McCullough, *A History of the Treatment of Hydrocephalus*, 1 Fetal Ther. 38 (1986); Editorial, *Prenatal Treatment of Congenital Adrenal Hyperplasia*, 355 Lancet 510-511 (March 3, 1990); Golbus, et al., *In utero treatment of urinary tract obstruction*, 152 Am. J. Ob. Gyn. 383 (1982); Harrison, et al., *Management of the fetus with a urinary tract malformation*, 246 J.A.M.A. 635 (1981); Manaing, et al., *Aneparturient chronic fetal vesicoamniotic shunts for obstructive uropathy: a report of two cases*, 145 Am. J. Ob. Gyn. 819 (1983); Vallancien, et al., *Percutaneous Nephrostomy in Utero*, 20 Urology 647 (1982); Harrison, et al., *Fetal Surgery for Congenital hydronephrosis*, 306 N. Eng. J. Med. 591 (1982); Kirkkinen, et al., *Repeated transabdominal renocentesis in a case of fetal hydronephrotic kidney*, 142 Am. J. Ob. Gyn. 1049 (1982); Jacobs, et al., *Prevention, Recognition, and Treatment of Perinatal Asphyxia*, 16 Clin. Perin. 785 (1989); Nugent, et al., *Prenatal Treatment of Type I Congenital Cystic Adenomatoid Malformation by Intrauterine Fetal Thoracentesis*, 17 J. Clin. Ultra. 675 (1989).

<sup>303</sup> Gonsoulin, et al., *Serial Maternal Blood Donations for Intrauterine Transfusion*, 75 Ob. Gyn. 158 (1990); Kackstein, et al., *Intrauterine treatment of severe fetal erythroblastosis: intravascular transfusion with ultrasonic guidance*, 17 J. Perin. Med. 341 (1989); Pattison, et al., *The Management of Severe Erythroblastosis Fetalis by Fetal Transfusion: Survival of Transfused Adult Erythrocytes in the Fetus*, 74 Ob. Gyn. 901 (1989); Peters, et al., *Cordocentesis for the Diagnosis and Treatment of Human Fetal Parvovirus infection*, 75 Ob. & Gyn. 501 (1990); Pringle, *Fetal surgery: It has a Past, Has it a Future?* 1 Fetal Ther. 25 (1986).

<sup>304</sup> Harrison, *Successful Repair in Utero of a Fetal Diaphragmatic Hernia after Removal of Herniated Viscera from the Left Thorax*, 332 N. Eng. J. Med. 1582 (1990).

<sup>305</sup> Van, *Rare fetal surgery has happy ending*, *Chicago Tribune*, Apr. 20, 1991, at sec. 1, p. 1.

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ples of medical ethics, will be promoted by physicians and sought out by parents, whether or not the pro-life movement disappears in this country.<sup>306</sup> Not only activists in the pro-life movement but physicians outside that movement ask the same ethical question: How and why do we provide surgery and treatment for one unborn child while another unborn child—at the same gestational age and in better health—is legally aborted?<sup>307</sup> Medical technology is thus another factor highlighting the tension over abortion as a legal “right” and a moral “wrong.” Women contemplating abortion are vulnerable to this tension.

Not surprisingly, assessment of the psychological effects of abortion continues. Some accepted conclusions demand an appropriate response. One example is the frequent aborter—experts appear to agree that women who have multiple abortions suffer more.<sup>308</sup> The rate of repeat abortions has risen over the past 15 years and now stands at 42%.<sup>309</sup> Some women suffer “anniversary reactions” on the date of the abortion or the date of the predicted birth of the child.<sup>310</sup> An extreme example of mental and emotional suffering is the woman who commits suicide after her abortion.<sup>311</sup>

The aftermath of abortion is detrimental for many, if not most, women. For some of them, the effects may be both severe and long-lasting. As long as abortion is legal, women deserve to know about all possible risks before making any decision. These risks should give pause to those who espouse the position that abortion is an unqualified good, the “first right,” “morally responsible,” or “safe and easy.”

<sup>306</sup> “The more that parents actually see the fetus and recognize a human form, the more valuable will that fetus become in their eyes . . . [S]ince ultrasound is being more routinely used in obstetrical practice and is indicated for many high-risk pregnancies, we have good reason to believe that a more complex and progressively more human relationship will begin to develop between parents and fetuses.” M. Harrison, M. Golbus & R. Filly, *The Unborn ‘Patient’: Prenatal Diagnosis and Treatment* 163 (1984).

<sup>307</sup> “The fetus now begins to make serious claims for a right to nutrition, to protection, to therapy. How can tolerance of abortion be morally reconciled with those claims?” Ruddick & Wilcox, *Operating on the Fetus*, 12 *Hast. Cent. Rep.* 10, 11 (1982) (quoting Richard McCormick); “The paradox here for the abortion debate is evident: a moral status that is denied the fetus when abortion is sought is given the fetus when its future healthy development is desired, though the same generic organism is under consideration.” Callahan, *How Technology Is Reframing the Abortion Debate*, 16 *Hast. Cent. Rep.* 33, 37 (1986). See generally, K. Maeda, ed., *The Fetus as a Patient ’87 Proceedings of the Third Inter’l Symposium* (1987); A. Kurjak, ed., *The Fetus as a Patient. Proceedings of the First International Symposium* (1985); M. Harrison, et al., *The Unborn Patients: Prenatal Diagnosis and Treatment* (1984); E. Volpe, *Patient in the Womb* (1984); Manning, *Reflections on Future Directions of Perinatal Medicine*, 13 *Sem. Perin.* 342 (1989); Mahoney, *Editorial: The Fetus as Patient*, 150 *West. J. Med.* 459 (1989); Newton, *The Fetus as a Patient*, 73 *Med. Clin. N. Amer.* 517 (1989); Rosner, et al., *Fetal Therapy and Surgery: Fetal rights versus maternal obligations*, 89 *N.Y. State J. Med.* 80 (1989); Broder, et al., *Fetal Therapy: Ethical and Legal Implications of Prenatal Intervention and Clinical Application*, 2 *Fetal Ther.* 57, 58 (1987); Chervenak, et al., *Ethical Analysis of the intrapartum management of pregnancy complicated by fetal hydrocephalus and macrocephaly*, 68 *Obst. & Gyn.* 720 (Nov. 1986); Chervenak & McCullough, *Perinatal ethics: a practical method of analysis of obligations to mother and fetus*, 66 *Obst. & Gyn.* 442 (1985).

<sup>308</sup> Franco, et al., *Psychological profile of dysphoric women postabortion*, 44 *J. Amer. Med. Women’s Assoc.* 113, 115 (1989).

<sup>309</sup> Henshaw, et al., *The Characteristics and Prior Contraception Use of U.S. Abortion Patients*, 20 *Fam. Plann. Perspect.* 158, 159 (1988) (Table 1).

<sup>310</sup> Franco, et al., *supra* note 308, at 113, 115 (42% of women studied who “poorly assimilated” their abortion reported “anniversary reactions”).

<sup>311</sup> *Eidson v. Reproductive Health Services*, No. 87206358 (St. Louis City Cir. Ct. Div. 9 March 1, 1991). A verdict was rendered in favor of the defendants.

**F. Effects on Minor Women**

The impact of abortion on minor women can be particularly negative. Many of them are not sufficiently mature to receive and assimilate the information needed to make a life-impacting decision. These adolescents fluctuate back and forth between dependence on the familial/parental community and the need for self-expression and individuation. Ironically, many adults reflect this same ambiguity in their attitudes toward, and descriptions of, teenagers and pregnancy. There is a great deal of public concern about "children having children," implying that 14- and 15-year-olds are too young to become mothers (although if they are pregnant, they already *are* mothers). On the other hand, these same adults oppose parental involvement legislation that would promote communication and assist these "children" in making responsible decisions about their own children, claiming that the same 14- or 15-year-old—by virtue of her biological ability to get pregnant—is sufficiently mature to make an independent decision to abort.

The open bias toward abortion is clear. Abortion is invariably advocated as the best choice for minors, even when it conflicts with significant feminine values. Why do some feminists fight against another woman's ability and obligation to raise, rear and care for her minor daughter in the context of the minor's abortion? When a daughter is in the midst of a crisis pregnancy, the core values of feminism—connectedness, care, community—are implicated. The mother is connected to her daughter and also to her granddaughter. Her embrace is ample enough to encompass this tiny, vulnerable new member of the family. Both mother and father of a minor daughter are expected to care deeply for her and to prudently exercise their constitutional right to rear their child, along with their obligations and responsibilities toward her.

The need for parental connection with a minor daughter in a stressful time is substantiated by the social sciences and recent litigation concerning parental notice laws. The scope of the problems of teen pregnancy and abortion is vast. Adolescent psychology and targeted research into adolescent abortion provides evidence that elective abortion uniquely impacts minors. Nearly 200,000 abortions are performed every year on minors age 17 or younger, including more than 15,000 on girls 14 years old or younger.<sup>312</sup> More than 40% of all teenagers with confirmed pregnancies obtain abortion.<sup>313</sup> This is 60% higher than the abortion rate for teenagers in 1973, the first year of nationwide legalized abortion.<sup>314</sup>

Nearly 80% of all abortions performed on teenagers are done in abortion clinics.<sup>315</sup> In these unfamiliar surroundings, minors often are furtive, frightened visitors subjected to assembly-line techniques. One study of Minnesota found that, in 1982, four Minnesota abortion clinics performed 78% of the 5,082 abortions performed on minors under 19 years of age.<sup>316</sup>

<sup>312</sup> Henshaw, Benker, Blaine & Smith, *A Portrait of American Women who Obtain Abortions*, 17 Fam. Plan. Perspectives 90, 92 (1985).

<sup>313</sup> Henshaw, et al., *supra* note 312, at 93; Russo, *Adolescent Abortion: The Epidemiological Context*, in G. Melton, ed., *Adolescent Abortion: Psychological-Legal Issues* 40, 49 (1986).

<sup>314</sup> Russo, *supra* note 313, at 49.

<sup>315</sup> Henshaw & O'Reilly, *Characteristics of Abortion Patients in the United States 1979-1980*, 15 Fam. Plan. Perspect. 5, 11 (1983).

<sup>316</sup> Blum, et al., *The Impact of Parental Notification Law on Adolescent Abortion Decision-Making*, 77 Am. J. Pub. Health 619 (1987).

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Despite this high incidence of teen pregnancy and abortion, few family planning clinics have parental consent policies. Less than half of the abortion clinics nationwide require parental notice even for teenagers 15 years of age or younger; even fewer require parental notification before performing abortions on minors age 16 or older.<sup>317</sup> This drives a deeper wedge in what may be fragile parent-child communication; teenagers in crisis often feel unable to confide in their parents. In one survey, nearly half (45%) of the 1,170 teenager abortion patients interviewed admitted to getting an abortion without parental knowledge; this figure obviously could not include teenagers who denied the clandestine nature of their abortion.<sup>318</sup>

Adolescence is a time of tremendous transition in the life of an individual. "Guidance is essential if the transition is to be made successfully and with minimum psychological damage."<sup>319</sup> There is enhanced risk of "replacement pregnancy" and multiple abortions for adolescents.<sup>320</sup> Ambivalence and confusion regarding the abortion decision are even greater for adolescents. "The here and now of an abortion decision for adolescents is more complicated than it is for most adult women."<sup>321</sup> One researcher found

*[t]he decision to have an abortion was not an easy one. One of the young women admitted getting off the table at the abortion clinic before the procedure began. Another was not told that she was having an abortion and was confused about what was occurring . . . Attitudes about the acceptability of abortion also demonstrate the ambivalence of many [adolescents] who had abortions. Looking back to the time before the abortion, less than one-half approved of abortion at that time . . . less than one-quarter approved of it after the abortion.<sup>322</sup>*

One study found that "[a]lmost one third of the young women (31.8%) changed their minds once or twice about continuing the pregnancy or having the abortion, 18% changed their minds even more frequently, but 50% did not change their minds at all."<sup>323</sup> An-

<sup>317</sup>Torres, Forrest, & Eisman, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 Fam. Plan. Perspect. 284, 285 (1980) (Table 1) [hereinafter Torres].

<sup>318</sup>Torres, *supra* note 317, at 289 (Table 7), 287. See also Rosen, Benson & Stack, *Help or Hindrance: Parental Impact on Pregnant Teenagers' Resolution Decisions*, 31 Fam. Relations 271, 279 (1982); R. Mnookin, *In the Interests of Children* 158 (1985).

<sup>319</sup>E. Hurlock, *Adolescent Development* 15 (4th ed. 1973).

<sup>320</sup>Henshaw, et al., *supra* note 305, at 92; Teitze, *Repeat Abortions. Why More*, 10 Fam. Plan. Perspect. 205, 206 (1978); Steinhoff, et al., *Women Who Obtain Repeat Abortions: A Study Based on Record Linkage*, 11 Fam. Plan. Perspect. 30 (1979).

<sup>321</sup>Brown, *Adolescents and Abortion: A Theoretical Framework for Decision Making*, 12 J. Ob. Gyn. & Neonatal Nursing 241, 246 (1983).

<sup>322</sup>Horowitz, *Adolescent Mourning Reactions to Infants and Fetal Loss*, 59 Social Casework 551, 557 (Nov. 1978). See also L. Francke, *supra* note 165, at 178-206 (1978); Olson, *Social and Psychological Correlates of Pregnancy Resolution Among Adolescent Women*, 30 Am. J. Orthopsychiatry 432, 437-41 (1960); Bohman & Goldman, *A Study in Teenage Pregnancy*, 128 Am. J. Psychiat. 755 (1971).

<sup>323</sup>Klemmer, Bracken, Jekel & Bracken, *The Delivery-Abortion Decision Among Adolescents*, in Streat & Weiss, ed., *Pregnancy in Adolescence: Needs, Problems, and Management* 219, 227 (1982); Wallerman, Kurtz & Bar-Din, *Psychosocial Sequelae of Therapeutic Abortion in Young Unmarried Women*, 27 Arch. Gen. Psychiat. 828 (1972).

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other study confirms this ambivalence: "About one-quarter of women having a later abortion [defined as 16 or more weeks' gestation] said their delay was attributable (at least in part) to the long time they had needed to make the abortion decision."<sup>324</sup>

Teenagers who choose abortion typically have more difficulty with the decision than pregnant teenagers who reach other decisions. They are also relatively uninformed. They typically talk with fewer people and receive substantially less counseling than pregnant teenagers who chose to keep the baby or place it for adoption.<sup>325</sup> However, adolescents who choose abortion typically make that decision much more hastily (nine days) than teens who choose to keep the baby (56 days) or place it for adoption (more than 100 days).<sup>326</sup>

There has been inadequate empirical study of the impact of parental notice of abortion statutes on minors and their abortions because the minimal ingredients for such a study—a simultaneous enforcement of a parental notice law and state abortion data reporting—have been in effect in only a handful of states over the past 20 years. Federal or state courts have repeatedly enjoined parental notice and parental consent statutes.<sup>327</sup> One notable exception is the Minnesota parental notice law, which was in effect from August 1, 1981 until it was enjoined by a federal district court on March 2, 1986. The notice requirement applied to teens below the age of 18.<sup>328</sup> The federal district court in Minnesota acknowledged that it was the first district court "ever to examine a parental notification or consent substitute statute in actual operation."<sup>329</sup> The experience of Minnesota during the four and one-half years that its parental notice of abortion law was in

<sup>324</sup> Torres & Forrest, *supra* note 171, at 169, 174, 175 (Table 5).

<sup>325</sup> Klerman, et al., *supra* note 323, at 231, 233; Paulsen, *Correlation of Outcomes of Premarital Pregnancy*, 18 Fam. Plan. Perspect. 25, 29 (Winter 1984).

<sup>326</sup> Paulsen, *supra* note 325, at 28.

<sup>327</sup> See, e.g., Planned Parenthood v. Neesley, No. 89-489 (D. Ariz. 1989); Smith v. Bentley, 493 F. Supp. 916 (E.D. Ark. 1980); American Academy of Pediatrics v. Van de Kamp, No. 88457 (Cal. Super. Ct. Dec. 28, 1987), *aff'd*, 263 Cal. Rptr. 46, 214 Cal. App. 3d 831 (1989); *In re T.W.*, 551 So.2d 1186 (Fla. 1989); Eubanks v. Brown, 604 F.Supp. 141 (W.D. Ky. 1984), *aff'd in part, rev'd in part, sub nom.* Eubanks v. Wilkinson, 937 F.2d 1118 (6th Cir. 1991); Glick v. McKay, 616 F.Supp. 322 (D.Nev. 1985), *aff'd*, 937 F.2d 434 (9th Cir. 1991); Planned Parenthood v. Casey, 686 F.Supp. 2089 (E.D.Pa. 1988) (preliminary injunction), 744 F.Supp. 1323 (E.D. Pa. 1990), *aff'd in part, rev'd in part*, 947 F.2d 682 (3d Cir. 1991), *cert. granted*, 112 S. Ct. 931-932 (1992); Planned Parenthood Assoc. v. McWhorter, 716 F.Supp. 1064 (M.D. Tenn. 1989), *vacated & remanded with instructions to dismiss the case*, No. 89-6026 (6th Cir. Sept. 30, 1991).

<sup>328</sup> Minn. Stat. Ann. 144.343 (2)-(7) (West 1989). In this analysis, it was assumed that any change in the incidence of pregnancy, abortion and childbirth because of the notice law would most heavily fall on teens 17 and below, who were directly affected by the notice law (Minn. Stat. Ann. 645.451 [West 1989]); less heavily on teens ages 18 to 19 who would have recently been subject to the law; somewhat less on women ages 20 to 24; and least on women ages 25 to 54. The notice law itself does not define "minor" by age, and thus it is possible that there was some confusion as to who, among 17- to 19-year-olds, was covered by the law. Moreover, some teens who gave birth at 18 might have been 17 at the time they became pregnant and thus were directly affected by the law. Those who were 18 or 19 in 1983-1986 were subject to the law in 1981, and the group as a whole could reasonably have been influenced by the law through socialization, including schooling and peer contacts. Similarly, some in the 20-24 age group in later years would have been subject to the law in earlier years of its enforcement. Women age 25-54 would never have been personally affected by the law.

<sup>329</sup> Hodgson v. Minnesota, 648 F.Supp. 756, 774 (D.Minn. 1986), *cert. denied*, 479 U.S. 1102 (1987), *rev'd*, 853 F.2d 1452 (8th Cir. 1988), *aff'd*, 110 S.Ct. 2926 (1990).

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effect gives some indication of the positive effect of parental notice of abortion laws on minors.<sup>330</sup>

The data collected by the Minnesota Department of Health tell a broader public health story—not only about those Minnesota teens who aborted (.60% in 1982) but also about those who never got pregnant (98.7%) and those who carried their children to term (.66%). The department's data demonstrate that the notice law is reasonably related to protecting the health of minor women because it requires parental notice without causing any increased health problems for minors and, in fact, possibly decreases adolescent pregnancy and abortion rates *without* causing increased birth rates. There is apparently no evidence of even a single report of child abuse caused by the parental notification law or a single report of medical complications caused by the law, or a single case of parental prevention or coercion of an abortion.<sup>331</sup> This is an extraordinary benefit for teens in Minnesota.

The data show that pregnancies for Minnesota preteens and teens, ages 10 to 17, *declined* between 1981 and 1986 while the notice law was in effect. The number of pregnancies in this age group *increased* by 9.0 percent between 1975 and 1980 and *fell* by 27.4 percent from 1980 to 1986. In this age group, the highest number of adolescent pregnancies occurred in the year before the notice law went into effect. For the 18–19 age group, pregnancies *increased* 27.8 percent between 1975 and 1980 and *fell* by 33.8 percent between 1980 and 1986.

The department's data also show that abortions for preteens and teens, ages 10 to 17, declined between 1980 and 1986 while the notice law was in effect. Abortions in this age group *increased* 54.4% from 1975 through 1980 and *fell* by 33.6% from 1980 to 1986. For the eighteen-to-nineteen age group, abortions grew markedly between 1975 and 1980 before decreasing between 1980–1986. Abortions *rose* 92.3% between 1975 and 1980 before *falling* 29.8% between 1980 and 1986.

Finally, it might be speculated that if a parental notice law caused abortions to fall for teens, births would increase, but the Minnesota data show just the opposite. Births for girls ages 10 to 17 declined while the notice law was in effect. Births dropped 18.7% from 1975 to 1980, but they continued to drop 20.3% from 1980 to 1986. For the 18–19 age group, births *increased* by 4.0% from 1975 to 1980 but *decreased* by 36.6% from 1980 to 1986.

The rates of teen pregnancies, abortions and births also fell during the four and one-half years that the parental notice law was in effect.<sup>332</sup> The pregnancy rate for the 10–17 age group rose from 12.7 (12.7 per 1,000) in 1975 to a high of 15.6 in 1980, the year before the notice law took effect, and then declined to a low of 11.3 in 1983 and 12.4 in 1986. Thus, even though the population of 10- to 17-year-olds declined between 1975 and 1986, the pregnancy rate declined as well, by 20.5% between 1980

<sup>330</sup>Rogers, et al., *Impact of the Minnesota Parental Notification Law on Abortion and Birth*, 81 Am. J. Pub. Health 294 (March 1991). See also, *Brief of the Association of American Physicians and Surgeons (AAPS) as Amicus Curiae in Support of State of Minnesota*, in *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990). One of the authors was counsel of record in the U.S. Supreme Court on this brief.

<sup>331</sup>*Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990), Cross Petitioners' Brief (Cross Pet.Br.) at 10–11, 18.

<sup>332</sup>Because raw figures do not take into account possible changes in Minnesota's population for a particular age group from year to year, rates for pregnancies, abortions and births were also calculated based on the department's data. Rates, in this study, equal the occurrence (incidence) of a phenomenon per 1,000 females. This data relies on the department's data for the entire population of Minnesota, not just on a sample.

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and 1986. The pregnancy rate for the 18-19 age group rose substantially from 75.5 (75.5 per 1000) in 1975 to a high of 98.5 in 1980, the year before the notice law went into effect, but then fell after 1980 to 96.0 in 1981 and to 73.5 in 1986, *below the 1975 level*. Thus, again, even though the population in Minnesota for the 18-19 age group fell between 1976 and 1986, the pregnancy rate for 18- to 19-year-olds declined 25.4% between 1980 and 1986.

The abortion rate also declined. The abortion rate for the 10-17 age group rose from 4.9 in 1975 to a high of 8.4 in 1980 and then fell 27.4% percent between 1980 and 1986 for 10- to 17-year-olds. The abortion rate also fell for the 18-19 age group. The abortion rate rose from 20.4 in 1975 to a high of 40.1 in 1980 and then fell 4.8% to 38.20 in 1981 and a further 16.8% to a low of 31.80 in 1986. The abortion rate for 18- to 19-year-olds thus rose 96.6% between 1975 and 1980 and fell 20.7% between 1980 and 1986.

Finally, the birth rate fell for 10- to 17-year-olds and for 18-to 19-year-olds. The birth rate for the 10-17 age group fell from 7.8 in 1975 to 7.2 in 1980, but it continued to fall to 7.0 in 1981, to a low of 5.8 in 1983 and then to 6.3 in 1986. The birth rate for 10- to 17-year-olds thus fell 7.7% between 1975 and 1980 but fell 12.5% between 1980 and 1986. The birth rate for the 18-19 age group rose from 54.6 in 1975 to 58.0 in 1980 but fell to 57.4 in 1981 and to a low of 41.5 in 1986. Thus, the birth rate for 18-to-19 year-olds rose 6.2% from 1975 to 1980 but fell 28.4% between 1980 and 1986.

What does this public health story say for young women in Minnesota? The comparison of the pregnancy, abortion and birth rates in Minnesota between 1975-1980 and 1981-1986 supports the conclusion that the notice law effectively caused a decrease in the pregnancy rate in those years. This cannot be absolutely proven because this statistical study did not control for all other possible factors. However, since the abortion rate fell 27.4% for 10- to 17-year olds and 20.7% for 18- to 19-year-olds, while the birth rate throughout Minnesota simultaneously fell 12.5% for 10- to 17-year-olds and 28.4% for 18- to 19-year-olds, the pregnancy rate must have also declined, as the data confirm, supporting the conclusion that the notice law in fact changed adolescent behavior. In other words, since it seems undisputed that the notice law directly decreased abortion rates, while birth rates simultaneously decreased, the law must have decreased abortion rates by affecting pregnancy rates. Decreased unwed pregnancy for young women means decreased abortion and childbirth at a vulnerable age and time in their lives. A law that positively deters young women from pregnancy and abortion benefits young women.

#### V. Does Legal, Economic, and Social Equality for Women Hinge on *Roe v. Wade*?

As noted above, many feminist abortion advocates view abortion rights as the fundamental basis for all other freedoms. Abortion on demand is seen as necessary not only for freedom from male sexual oppression and domination,<sup>333</sup> but also as a legal basis

<sup>333</sup> Radical feminist Catherine MacKinnon believes abortion is an essential tool for women's liberation:

A pregnant woman is the reification of male sexuality. Aggression, strength, and potency have triumphed over vulnerability, softness, and passivity. Pregnancy is the manifestation of male dominance and female submissiveness. A similar objectification of children from the male epistemology, in which children are defined in relation to male issues of potency, of continuity as a compensation for mortality, of the thrust to embody themselves or the

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for other economic, educational and social rights. Thus, from this perspective, the legal guarantee of readily available abortion, whether based on a right of privacy or some other constitutional claim, is paramount. *Roe v. Wade* must be preserved in order to preserve and promote the development of female equality. In the face of often vociferous argument, it is worthwhile to examine the foundation for women's legal, social and economic rights.

*Roe* is rarely cited as a precedent for women's rights in any area other than abortion.<sup>334</sup> Virtually all progress in women's legal, social and employment rights over the past 30 years has come about through federal or state legislation and judicial interpretation wholly unrelated to and not derived from *Roe v. Wade*.<sup>335</sup> Many specific measures to advance women's rights over the past 30 years have been the result of congressional action. These developments began at least a decade before *Roe*. Congress passed the Equal Pay Act in 1963,<sup>336</sup> Title VII of the Civil Rights Act of 1964<sup>337</sup> and the Pregnancy Discrimination Act amendments in 1978.<sup>338</sup> Additional workplace protections have been added. For example, in 1978 the first appellate court held that sexual harassment

image of themselves, also underlies the issue of abortion. As MacKinnon notes: 'the idea that women can undo what men have done to them on this level seems to provoke insecurity sometimes bordering on hysteria.' Abortion, to MacKinnon, is a threat to the fundamental premise of male sexuality: the domination of female sexuality.

Cossman, *The Precarious Unity of Feminist Theory and Practice: The Praxis of Abortion*, 44 *Toronto Fac. L. Rev.* 85, 87 (1986) (citing to C. MacKinnon, *The Male Ideology of Privacy: A Feminist Perspective on the Right to Abortion* [1983] 17 *Radical America* 23 at 24 [footnote omitted]).

<sup>334</sup> Although *Roe* has been cited in almost 100 cases by [the Supreme Court], and in more than 1,000 cases by other federal and state courts, these citations, outside the context of abortion regulation, have been largely superfluous to the issues decided in those cases. Hundreds of the cited cases involve some regulation of abortion; this body of law will understandably be altered by the reversal of *Roe*. Of the remaining cases, however, very few, if any, could not be resolved by principles other than those pronounced in *Roe*.

Westlaw indicates that *Roe* has been cited in 99 opinions or summary dispositions by this Court. Of these, 18 were cases involving state regulation of abortion, or limitations on abortion funding. Eleven more were summary dispositions, issued shortly after *Roe* reversing and remanding cases to lower courts in light of *Roe*. In 13 cases, *Roe* was cited for its holding on the issue of mootness. See e.g., *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 398 (1980); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 593 (1984) (Blackman, J., dissenting); *Edgar v. Mite Corp.*, 457 U.S. 624, 655 (1982) (Marshall, J., dissenting). In 16 cases *Roe* was cited in the body of an opinion, but as part of a string citation. See e.g., *Block v. Rutherford*, 468 U.S. 576, 597 (1984) (Blackman, J., concurring); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639 (1974). In 23 cases, *Roe* was cited in memorandum opinions or dicta therefrom. See e.g., *Whisenhunt v. Spradlin*, 464 U.S. 965 (1983) (Brennan, J., dissenting).

The remaining cases, numbering 18, consist of more substantial reliance upon, or distinguishing of, *Roe*. See e.g. . . . *Carry v. Population Services Int'l*, 431 U.S. 678, 684 (1977); *Zablocki v. Reddell*, 434 U.S. 374, 386 (1978); *Kelley v. Johnson*, 425 U.S. 238, 244 (1976).

However, in no case has this Court relied on *Roe*, to the exclusion of other caselaw, in extending individual rights under the Due Process Clause of the Fourteenth Amendment.

*Brief Amicus Curiae of Hon. Christopher Smith, et al., in Support of Appellants* at 24–25 & n.53, in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

<sup>335</sup> See generally H. Kay, *Sex-Based Discrimination: Text, Cases and Materials* (2d ed. 1981); B. Babcock, A. Freedman, E. Norton & S. Ross, *Sex Discrimination and the Law: Causes and Remedies* (1975).

<sup>336</sup> 77 Stat. 56, 29 U.S.C. § 206(d) (1988).

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in the workplace was sex discrimination, prohibited by Title VII (equal employment opportunity).<sup>339</sup> Two years later, the Equal Employment Opportunity Commission (EEOC) adopted similar guidelines, prohibiting sexual harassment as a form of sex discrimination.<sup>340</sup> State agencies, as well as federal and state courts, have followed the EEOC's *Guidelines'* basic definition of sexual harassment.<sup>341</sup> Title IX of the Education Amendments of 1972 prohibits sexual discrimination against women in sports in federally funded schools.<sup>342</sup> Sex equity in education was established by the Women's Educational Equity Act of 1974<sup>343</sup> and expanded by the Women's Educational Equity Act of 1984.<sup>344</sup> The Federal Equal Credit Opportunity Act of 1974 prohibits sex discrimination in credit practices.<sup>345</sup> Other developments have come about through presidential order. For example, Executive Order No. 11,246 ensures equal opportunity in federal employment.<sup>346</sup> Progress has been facilitated simultaneously by state legislation. Some states have equal pay laws;<sup>347</sup> fair employment laws barring sex discrimination;<sup>348</sup> prohibitions on sex discrimination in state employment;<sup>349</sup> and prohibitions on sex discrimination in credit and financing practices,<sup>350</sup> sale, lease or rental of property,<sup>351</sup> insurance

<sup>339</sup> Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000e to 2000e-17 [1988]). See *Mentor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (holding that plaintiff may establish a violation of Title VII by proving that discrimination grounded in sexual harassment has created a hostile or abusive work environment); *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983) (per curiam) (holding state annuity plan violates Title VII); *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978) (holding employer plan that required female employees to make larger contributions to pension fund violates Title VII).

<sup>340</sup> Pregnancy Discrimination Act of 1978, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e [k] [1982]) (overturning *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976)). See *International Union, U.A.W. v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991) (holding "fetal protection policy" that barred "all women, except those whose infertility was medically documented, from jobs involving actual or potential lead exposure" violates Pregnancy Discrimination Act); *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983) (holding pregnancy limitation in employer's health plan that provides for fewer benefits for spouses of male employees violates Pregnancy Discrimination Act); *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977) (denial of accumulated seniority to persons who take mandatory pregnancy leave violates Title VII).

<sup>341</sup> *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1978).

<sup>342</sup> Equal Employment Opportunity Commission Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11 (1988).

<sup>343</sup> *Linton*, Feminist Jurisprudence: The Difference Method Makes, 41 Stanford L. Rev. 751 at 769 (1989). See also, *Mentor Savings Bank v. Vinson*, 477 U.S. 57 1986).

<sup>344</sup> See M. Nelson, *Are We Winning Yet?: How Women are Changing Sports and Sports are Changing Women* (1991).

<sup>345</sup> Section 408 of P.L. 93-380.

<sup>346</sup> Title IV of the Education Amendments of 1984, P.L. 98-511, 98 Stat. 2389 (1984), codified at 20 U.S.C. § 3341 (1982).

<sup>347</sup> P.L. 93-495; 15 U.S.C. § 1601, 1691 (1982); 12 C.F.R. § 202 (1991).

<sup>348</sup> Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965), reprinted in, 42 U.S.C. § 2000e app. (1982).

<sup>349</sup> See, e.g., Alas. Stat. § 18.80.220(X) (1986 & Supp. 1986); Ariz. Stat. § 23-341 (1983); Ark. Stat. § 11-4-601, -612 (1987); Cal. Lab. Code § 1197.5 (1989); Colo. § 8-5-102 (1986); Conn. § 31-75 (1987); Del. tit. 19, § 1107A (1985); D.C. Code Section 1-2502, -2512 (1987 & Supp. 1990); Fla. Stat. § 48.07 (02), 725.07 (1) (1988 & Supp. 1991); Ga. §§ 34-5-3, 34-5-1 (1991); Idaho § 67-5909 (1989); Ill. Rev. Stat. Ch. 48, ¶ 1004 (b) (Supp. 1990); Ind. § 22-2-2-4 (1986); Kan. § 44-1205 (1986); Ky. § 337.423 (Supp. 1990); La. § 23:1006 (1985); Me. Tit. 26, § 628 (1988); Mass. Ch. 149, 105A (1989); Minn. 181.67 (1) (Supp. 1990); Mo. § 290.410 (1965); Mont. § 39-3-104 (1) (1989); Neb. § 48-1219, -1221 (1984); Nev. § 608.017 (1987); N.H. § 275:37 (1987); N.M. § 28-1-7 (1987); N.Y. Labor 194 (1986); N.D. § 34-06-1-03 (1980); Ohio § 4111.17 (1991); Okla. Tit. 40, § 198.1 (1986); Ore. § 652.220 (1989); R.I. § 28-6-17, -18 (1986); S.C. § 1-13-80(a) (1) (1976 & Supp. 1990); S.D. § 60-12-15, (1978); Tenn. § 50-2-202 (1983); Tex. Civ. article 6825; article 5221(k), 2.01, 5.01 (1960 & Supp. 1991); Utah § 34-35-6 (1990); Vt. Tit.

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practices<sup>352</sup> and public accommodations.<sup>353</sup> States have also enacted legislation targeted at domestic violence.<sup>354</sup> In the realm of education, "[t]he states too have been active partners in developing programs to achieve educational equity."<sup>355</sup> At least 14 states have laws modeled on the federal Title IX.<sup>356</sup>

Legislative progress was subsequently buttressed by judicial interpretation of the equal protection clause of the fourteenth amendment. Prior to 1971 the Supreme Court exercised great deference toward legislatively established gender classifications.<sup>357</sup> In 1971 the Court first held that sex discrimination violates the equal protection clause in *Reed v. Reed*.<sup>358</sup> Other similar decisions have followed, striking down some gender classifications.<sup>359</sup>

Few, if any, of these legal and legislative developments rest on *Roe v. Wade*. Some of these events preceded *Roe v. Wade*. And the judicial decisions rely on interpretations of congressional or state policy-making, rather than on *Roe*.

The single-minded pursuit of abortion rights has arguably sidetracked progress on the legal, economic and social issues that are most important to most women: equal

<sup>352</sup> 21. 465(1) (1987 & Supp. 1990); Va. § 40.1-28.6 (1990); Wash. § 49.12.175 (1990); W.Va. Section 21-5b-3 (1989); Wis. § 111.36(1) (a) (1988); Wyo. § 27-4-302 (1987).

<sup>353</sup> See, e.g., Alas. Stat. § 18.80.200 (Supp. 1990); Ariz. Stat. 41-1461 (1985); Cal. Gov. Code §§ 12920, 12926 (1980 & Supp. 1990); Colo. § 24-34-402 (Supp. 1986); Conn. § 46a-51(17), -60(a) (1)2a(10) (Supp. 1991); Del. tit. 19, § 710, 711 (1985); D.C. Code § 1-2502-2512 (1987 & Supp. 1991); Fla. § 760.02, .10 (1986); Idaho § 67-5909 (1989); Ill. Rev. Stat. Ch. 68, § 2-102 (1989); Ind. Stat. § 22-9-2-2, -1, -3 (1986); Iowa § 601A.6 (1988 & Supp. 1991); Kan. Stat. § 44-1009(1) (1986); Ky. Stat. § 344.030, .040, .050, .060, .070 (1983 & Supp. 1990); La. Rev. Stat. § 23:1004 (1985); Me. Tit. 5, 4553(4), 4572-a (1989 & Supp. 1990); Utah § 34-35-6 (1990); Mass. Ch. 151b, sec. 1 (1989 & Supp. 1990); Minn. § 363. 2(1) (1991); Mich. § 49-2-310 (1989) ("reasonable maternity leave"); Neb. § 48-1101, -1102(2), -1104 (1984); Nev. § 613.330 (1987); N.H. § 354:8.8, -x(k)(1) (Supp. 1990); N.J. § 10:5-5, -12 (Supp. 1990); N. M. § 28-1-7 (1987); Ohio § 4112.02(a); 4112.01(b) (1991) (pregnancy); Ore. § 659.010(6), .030(1)(a) (1989 & Supp. 1990); Pa. Cons. Stat. Tit. 43, § 955 (1991); R.I. § 28-5-5, -6(b), -7 (Supp. 1991); S.C. § 1-13-30, -80 (1986 & Supp. 1990); S.D. § 20-13-1, -10 to -12 (1987); Tenn. §§ 4-21-401, 4-21-404 (1985); Tex. Civ. art. 5221 (K), 2.01, 5.01 (Supp. 1991); Vt. Tit. 21, § 495 (1987 & Supp. 1990); Wash. § 49.60.180 (1990); W.Va. § 5-11-1 to 9 (1990); Wis. 111.31 to .36 (1988 & Supp. 1990); Wyo. § 27-9-102(b), -105 (1987 & Supp. 1990).

<sup>354</sup> See, e.g., Alas. Governor's Code of Fair Practices by State Agencies, art. I (Aug. 11, 1967); Ariz. Exec. Order No. 83-5 (Aug. 31, 1983); Cal. Fair Employment & Housing Act, Cal. Gov. Code § 12926(c) (Supp. 1991); 4 Code of Colo. Regs. § 801-1 (1982); Conn. § 46a-70(a), -51(10) (1986 & Supp. 1991); Del. Exec. Order No. 9, Tit. 19, § 710(2) (1985); D.C. Code § 1-507, 1-607.7 (1987), Mayor's Order No. 79-89 (1979) (sexual harassment); Fla. § 110.105, 760.02 (1982), Exec. Order No. 80-69 (1981) (sexual harassment); Idaho § 67-5902(6)(b) (1989), Exec. Order No. 78-4 (1978); Ill. Rev. Stat. ch. 68, § 2-101, -105(B) (1989 & Supp. 1990), Exec. Order No. 80-1 (1980) (sexual harassment); Ind. § 22-9-1-3(b) (1986).

<sup>355</sup> See, e.g., Alas. Stat. § 18.80.200, .210, .250 (Supp. 1990); Ariz. Stat. § 4-87-104 (1987).

<sup>356</sup> See, e.g., Alas. Stat. § 18.80.200, .210, .240 (Supp. 1990); Ariz. Stat. § 20-1548 (1990) (mortgage guaranty insurance only).

<sup>357</sup> See, e.g., Alas. Stat. § 21.36.090 (Supp. 1990); Ariz. Stat. § 20-448 (1990).

<sup>358</sup> See, e.g., Alas. Stat. 18.80.200, .230 (Supp. 1990).

<sup>359</sup> See, e.g., Alas. Stat. § 25.35.060 (Supp. 1990); Ariz. Stat. § 13-3601 (1989); Cal. Welf. & Inst. Code § 18291 (1980 & Supp. 1991); Cal. Penal Code §§ 262, 264, 273.5 (1988 & Supp. 1991); Colo. §§ 14-2-101; 14-4-101 (1987); Conn. §§ 46b-15, 53a-71 (1986 & Supp. 1991); Del. tit. 10 §§ 901(9), 921(6) (1975 & Supp. 1990); D.C. Code §§ 16-1001, 22-2801 (marital rape) (1989); Fla. §§ 415.602, 415.603 (spousal abuse), § 741.30, § 794.011 (spousal rape) (1986 & Supp. 1991); Ga. § 19-13-1 (1990); Idaho § 39-5202 (1985); Illinois Domestic Violence Act of 1986, Ill. Rev. Stat. ch. 40, § 2311-1 (1989); Ill. Rev. Stat. ch. 40, § 2401 (1989) (domestic violence shelters).

<sup>360</sup> NOW Legal Defense Fund, *The State-By-State Guide to Women's Legal Rights* 48 (1987).

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pay, day care, maternity leave, job discrimination. Minority women in particular are concerned about issues that directly affect the health and welfare of their families: access to education, adequate health care and safe neighborhoods for their children.<sup>360</sup> Despite the "success" of achieving freely available, legal abortion, women's economic rights in domestic-relations law have not progressed; in fact, the opposite has been true. "Divorce reform," which was achieved in the name of equality, has been devastating for women. The "feminization of poverty" is a reality caused, at least in part, by modern divorce laws.<sup>361</sup> With no-fault divorce laws in 43 states, women have suffered *more* than with previous divorce laws. No-fault laws eliminate alimony and force the sale of the family home. There is a 73% drop in the standard of living for the wife and children, and a 42% increase for the husband.<sup>362</sup> The presence of "abortion rights" is irrelevant at best, and at worst, has paralleled women's economic decline.

There may be countless other ways that *Roe* and the expansion of the abortion doctrine have been ineffective and irrelevant in advancing those issues and meeting the needs that are most important to women. The full impact on women and society may not be known for several generations.

#### VI. Conclusion

Abortion as the "first right" for women runs counter to all the principles of feminism and to the basic human value of protecting the weak and defenseless. By promoting the death of one's own offspring as a positive "good," abortion violent contradicts the core values that are the very essence of a woman's being: nurturance, care, compassion, cooperation, inclusivity, community and connectedness. It denies basic civil rights to an entire class of prenatal human beings. Women, who so recently have begun to achieve equality and opportunity, should be the first to recognize that the diminution of the rights of other human beings threatens the rights of women as well.

The abortion privacy doctrine has spawned a great host of ills for women without remediying any of the real historical injustices against them. Abortion on demand has isolated women, subjected them to coercion, maimed their bodies and wounded their psyches. The abortion-on-demand mentality that *Roe v. Wade*, more than anything else, fostered has not truly benefited women, whether examined from the perspective of women's self-perception, the psychological and physical consequences of abortion, the impact on minors or the relationships between women, their families and their communities. No

<sup>360</sup> See, e.g., Alas. Stat. § 14.18.010 (1990); Cal. Educ. Code §§ 40, 230, 51500, 51501, 66016 (1978 & Supp. 1991); Cal. Gov. Code § 12943 (1980).

<sup>361</sup> See, e.g., Hoyt v. Florida, 368 U.S. 57 (1961); Goessner v. Cleary, 335 U.S. 464 (1948); Muller v. Oregon, 208 U.S. 412 (1908); Bradwell v. Illinois, 83 U.S. 130 (1873).

<sup>362</sup> 404 U.S. 71 (1971).

<sup>363</sup> Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980); Califano v. Westcott, 443 U.S. 76 (1979); Califano v. Goldfarb, 430 U.S. 199 (1977); Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Weissfeld, 420 U.S. 636 (1975); Taylor v. Louisiana, 419 U.S. 522 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973).

<sup>364</sup> Wallis, *Onward, Women!*, Time, Dec. 4, 1989 at 80.

<sup>365</sup> M. Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (1991); D. Medved, *The Case Against Abortion* (1989); L. Weitzman, *The Divorce Revolution* (1985); M. Gallagher, *Enemies of Eros* (1989).

<sup>366</sup> See Weitzman, *supra* note 354.

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essential legal, economic and social rights for women will be undermined when *Roe v. Wade* is overruled. If anything, eradication of legalized abortion on demand will allow energy to be refocused on economic and social targets. Perhaps the most critical is the restoration of relationships of mutual responsibility between women and men and prompting society to affirm women and protect the fruit of their unique procreative ability: children.

### STATEMENT OF ROSA CUMARE

Ms. CUMARE. Distinguished Senators, it is a great honor and privilege to address you today on this historic occasion of the confirmation hearings for the second woman to be nominated to a seat on the Supreme Court.

When my parents and I emigrated to the United States in 1965 from Venezuela via Holland, we never conceived of the notion that I would one day be speaking my mind to the U.S. Senate on a subject of such importance.

But then, ever since my arrival in this country, I have enjoyed much that America has to offer, from an undergraduate in legal education at the University of Southern California to a graduate education at Harvard University. That education led to a job at Munger, Tolls & Olson, one of the leading law firms in Los Angeles, and the training I received there recently enabled me to carry out the American dream of going into business for myself, by hanging out a shingle with a partner to practice labor and employment law.

I am also privileged to serve as a member of the board of directors of Holy Family Counseling and Adoption Services, the largest private nonprofit adoption agency in southern California.

I am deeply grateful for the many opportunities America has given me, because, before coming to this country, my family had personally experienced the consequences of having our options curtailed by an intrusive government.

I hope you will consider my presence here today, among other things, as a reminder of our Nation's diversity, of backgrounds and beliefs, and remember that respect for each person's uniqueness lies at the heart of our democracy.

As a woman and lawyer, I admire Judge Ginsburg for her achievements over the years and the personal qualities she demonstrated here before this committee. She has been rightly lauded as a pioneer in developing our current laws dealing with equal protection and gender discrimination.

Unfortunately, Judge Ginsburg's pioneering efforts appear to be inextricably linked to her view that women must have an unfettered right to abortion. In fact, Judge Ginsburg's words, when speaking of the so-called right to choose, demonstrate that she considers a woman's ability to abort her child a precondition to equality. During these very hearings, she said, in response to Senator Brown's questioning,

I said on the equality side of it that it is essential to a woman's equality with man that she be the decisionmaker, that her choice be controlling.

Judge Ginsburg's writings underscore this thesis. Her now famous article in the North Carolina Law Review quoted with approval scholarly commentary that "solidly linked abortion prohibitions with discrimination against women," and viewed the conflict in the abortion issue as—

Not simply one between a fetus' interests and a woman's interests narrowly conceived, nor is the overriding issue State versus private control of a woman's body for a span of 9 months. Also in the balance is a woman's autonomous charge of her full life course, her ability to stand in relation to man, society and the State as an independent self-sustaining equal citizen.

Why aren't we all shocked and outraged by these views? Why is Judge Ginsburg hailed for being a moderate jurist? The implications of her statements are clear: Unless women are also able to put an end to life, they cannot be regarded as equals in our society. Only by being legally permitted to do violence to their bodies and their children, can women achieve full human dignity. Women will not achieve parity with men until they are able to negate their anatomical differences.

These notions appear firmly based on Judge Ginsburg's acceptance of the idea that child-bearing is a burden and not a blessing, that child-rearing poses problems, instead of being a source of joy, and that women, but not men, are disadvantaged by what their bodies do.

Moreover, Judge Ginsburg regards as closed the question of whether men who beget children have any rights in the matter of bringing those children into the world. One is led to wonder if her gender discrimination personal autonomy analysis would lead her to strike down State laws that require men to support children they do not want.

My life, unlike Judge Ginsburg's, has not been blessed with the love and support of a husband and children, so I cannot testify from personal experience about the rewards of such a life. But I can tell you that I consider my potential ability to bear children to lie at the core of my being and establishes my place in the human family.

I can also tell you, based on my association with Holy Family Adoption Services, that many men and women consider their lives diminished because they cannot have children. If I thought it was true that, in America, the potential to become a mother is regarded as a handicap to be overcome before I could be considered the equal of a man, I would be far less grateful for being an American.

I believe, however, that one of the primary reasons we don't all cry out at the horror of Judge Ginsburg's expressed opinions and their consequences is that they have been drummed into our ears by the media and by powerful, though unrepresentative women's organizations.

One of the reasons I have come all the way across the country to be here today is to tell you that an organization like California Women's Lawyers, which will appear before you shortly, does not represent the interests of over 30,000 women attorneys in the State of California, as I believe they claim. California Women Lawyers does not represent me, nor many women lawyers who believe, as I do, that abortion kills innocent human life.

It is a sad fact of my professional life that I and other pro-life women and men cannot in good conscience join California Women Lawyers nor the American Bar Association, the Los Angeles County Women's Law Association and similar legal societies, because of their pro-choice policies.

Ironically, many of the same women who fought in the name of equal rights to open up formerly all male bastions of the legal profession are now discriminating against another group, those who are pro-life. In the name of equality, these women impose conformity. To my way of thinking, that is profoundly un-American and antidemocratic. Worse yet, I suspect these groups laud themselves

for having advanced the woman's cause, because they are pro-choice.

I know that my name came up as a participant in these proceedings, because I was one of the women lawyers who actively opposed the pro-choice position adopted in recent years by the L.A. County Bar Association and the ABA. I argued then, as I am arguing now, that these organizations do nothing to help women lawyers in their everyday lives as lawyers, when they declare that they are pro-choice.

This position does not address the problems of juggling home and career or the discriminatory attitudes of male judges and colleagues who measure achievement and success solely in male terms of power and victory, or the scarcity of women as law professors, judges and managing partners. Instead, it pays lip-service to the cause of women, while providing women lawyers with no tangible support or gains.

Likewise, to the extent you, as Senators, are inclined to confirm Judge Ginsburg, because she appears to represent women, without careful consideration of precisely what is implied by the particular views she holds of women's place in society, you will not be advancing the cause of American women. Instead, I regret to say you will be granting lifelong authority to a woman who believes we should deny our womanhood to be an equal with men.

Because Judge Ginsburg holds this view, I oppose her nomination and urge you to vote against confirmation.

Thank you.

Senator HATCH [presiding]. Nellie.

#### STATEMENT OF NELLIE J. GRAY

Ms. GRAY. I am Nellie Gray, president of March for Life Education and Defense Fund.

We are deeply concerned and have been for more than 20 years now about the value and dignity of life in America. What I see is certainly that abortion is the most visible sign of a callous disregard for our right to life. Abortion is murder. Yet, Mr. Chairman, after listening to some of the hearings this week, I come to you today in strong opposition to the confirmation of Judge Ginsburg as a Justice of our Supreme Court, because she has, by her own testimony, shown a personal and professional inclination to factors which disqualify any American as one to decide the fate of human beings; namely, she has shown prejudice against a whole class of innocent human beings. She has shown privilege for criminal behavior of women. She has shown a fatal error of both fact and law, and this whole coverup of this terrible error about murdering innocent children.

I want to address the prejudice and also the privilege first. What I see is that no American and no nominee to the Supreme Court may announce with impunity that any member in a whole class of innocent human beings is a nonperson who is the subject of deliberate killing by another human being. Yet, the nominee seeking confirmation by this committee indicated in her testimony that she is prejudiced against preborn human beings. She has elevated her prejudice to the right of a pregnant mother to murder her own

child. This open and notorious show of prejudice alone disqualifies this nomination for any official position.

Before considering this nominee further, I think the committee might ask also the nominee to open eyes and heart and mind and ears to the simple fact, not an opinion, but the simple fact of the humanity of each preborn child. To deny that a preborn human being is in existence at fertilization is either intellectual dishonesty or culpable ignorance.

Information on the humanity of a child is in popular shows and magazines, and the committee and the nominee could take notice of that fact. A unique human being is in existence when the father's sperm fertilizes the mother's ovary. Abortion is murder of that individual human being in existence.

The elements of murder are here, first, the criminal act of one human being killing another human being, and, second, the criminal intent of deliberately killing an innocent human being. Abortion is not merely to terminate a pregnancy. Abortion is to deliver a dead baby. Thus, the right to life of each human being in existence at fertilization must be protected by the laws of the United States, without any exception. And the Supreme Court, in its footnote 54 of *Roe v. Wade* made it very clear that it is inconsistent and untenable for society and its laws to treat the murder of a preborn child as a crime of less degree than the murder of a born human being.

I was particularly struck by the privilege that the nominee was asking for a woman. She has stated, in effect, that only a woman shall decide whether or not to have an abortion. That means a pregnant mother shall decide whether or not to hold her innocent child captive and deliver the child to a killer at the abortatorium. This is advocating raw privilege based on female gender, and not equal rights for male and female.

The nominee has demonstrated and spelled out her avowed devotion to privilege for females, her preference for the equal rights amendment, her tendency to be acutely aware of sex discrimination, not for males, but only for females.

The nominee has openly declared that she has prejudged that the abhorrent behavior of murder, when decided to be perpetrated by a pregnant mother against her preborn child, is privileged behavior, but the same abhorrent behavior decided by a male would not be privileged.

Women libbers have been unfortunately successful in intimidating the males not to really take issue with the women libbers. It is extremely important now that men no longer wimp out with the women libbers and let them have their way on this ugly and radical behavior. Otherwise, men will have denied themselves the rights of fatherhood and the responsibility to protect their own lives and born and preborn sons and daughters.

She has also shown a discrimination against only for, in favor of the born females to treat preborn, male and females, as property. I see nothing in any of her testimony or her indications of a responsibility that she is looking for from born females. In addition, data suggest that this female privilege has developed into an ugly area of genocide.

One example is the District of Columbia, where almost 80 percent of the abortions for DC residents were suffered by black pregnant mothers. Would this be tolerated, if it was occasioned by anything other than women libbers' ugly demand for privileges?

There is an equal care and protection for both mother and the child. The pregnant mother and the physician are the natural protectors of a child. But the nominee has set up an unnatural and a needless conflict between a pregnant mother and her child. After all, the mother doesn't own the right to life of anyone. No one owns the right to life of another human being, and the rights of the mother and the child are compatible and are not in conflict, and the government have a valid interest in protecting the life of both the mother and the child.

The nominee has shown a fatal error of fact in not recognizing the human being as a human being, a fatal error of law in not recognizing that it is a crime against humanity, as enunciated by the Nuremberg Trials, to kill human beings. Abortion is not legal, and the Supreme Court did not make it so with *Roe v. Wade*. Rather, the Supreme Court is bound by the principles of the Nuremberg tribunal, which talks about the crimes against humanity and states that individual persons and governments are responsible for these crimes against humanity, of which abortion and genocide are included.

There is a big coverup, also, about the evil of abortion, and I would like the committee to ask the nominee some important questions: Can the woman be just a little bit pregnant? What really goes on behind the closed doors of an abortion chamber? Why do press and media not show us what abortion looks like?

But the women libbers have used euphemisms to try to cover up, and so what we have is the unfortunate situation of a nominee to the Supreme Court asking for the privilege of killing the innocent children. Our country suffered with other classes of people, namely, the slaves, and the holocaust. And now, as we saw from the message at the Holocaust Museum, this must never happen again, and people do not stand by while these errors of both fact and law go on. Our country cannot suffer any more the slaughter of the innocence.

Mr. Chairman and members of the committee, I ask respectfully not to confirm the nomination before you.

[The prepared statement of Ms. Gray follows:]



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July 23, 1993

Testimony of

Miss Nellie J. Gray  
*MARCH FOR LIFE Education and Defense Fund*

before the  
SENATE JUDICIARY COMMITTEE

in opposition to the  
Confirmation of Judge Ruth Bader Ginsburg as Justice of the Supreme Court

\* \* \* \* \*

Mr. Chairman, and Members of the Committee,

I am Nellie J. Gray, President of *MARCH FOR LIFE Education and Defense Fund*, which is guided by our *Life Principles*. We are a non-profit, non-partisan and non-sectarian corporation, with the purpose of assuring that our laws shall protect the unalienable and paramount right to life of each born and preborn human being in existence at fertilization. NO EXCEPTIONS! NO COMPROMISE! We are an organization of volunteers, working throughout the United States.

I come before this Senate Judiciary Committee at this time because of our long-standing and deep concern that there is a depreciation of the inherent value and dignity of innocent human beings, and that this depreciation is supported by actions of even our government through the Executive, Legislative and Judicial Branches. Yet, all Branches of our Federal Government have the power and authority to reaffirm the unalienable right to life of each human being in existence at fertilization, and then to act to assure that this paramount right is protected by our Constitution and Statutes.

In America today, the most prominent visible sign of callous disregard for our right to life is through abortion. Abortion is murder -- born human beings deliberately killing a preborn human being in existence at fertilization. Abortion terminates a child's life -- not merely a mother's pregnancy.

Therefore, Mr. Chairman, after listening to some of the hearings this week, I come to you today in strong opposition to confirmation of Judge Ginsburg as a Justice of our Supreme Court, because she has, by her own testimony, shown a personal and professional inclination to factors which disqualify any American as one to decide the fate of human beings, namely, (1) prejudice against a class of innocent human beings, (2) privilege for criminal behavior of women, (3) fatal error of fact and law, (4) cover-up of right fact and law, and (5) disrespect for the history of America which has bought freedom at home and abroad with the blood of patriots. And, I conclude with (6) what to do now.

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**I. PREJUDICE**  
*Against A Whole Class of Innocent Human Beings*

No American, and no nominee to the Supreme Court, may announce with impunity that any member in a whole class of innocent human beings is a non-person who is the subject of deliberate killing by another human being. Yet, the nominee seeking confirmation by this august Committee indicated in her testimony that she is prejudiced against preborn human beings, and has elevated her prejudice to the "right" of a pregnant mother to murder her own preborn child. This open and notorious show of prejudice, alone, disqualifies this nominee for any official position.

Mr. Chairman, before considering this nominee further, the Committee must open its eyes, head, heart, and ears to the simple fact -- not opinion -- of the humanity of each preborn child.

I say it is simple -- and I truly mean that. To deny that a preborn human being is in existence at fertilization is either **intellectual dishonesty or culpable ignorance**. Information on the humanity of a preborn child is available in popular literature and on TV shows, of which this Committee can take notice.

A unique human being comes into existence when the father's sperm fertilizes the mother's ovum. The genetic code is set, and the preborn human being, in the natural habitat of the mother's womb, grows until birth, and then grows from infancy throughout a natural continuum of life. At no period of that life span is that human being more or less human than at fertilization.

Abortion is murder -- that is, the elements are present: (1) the criminal act of one human being killing another human being, and (2) the criminal intent of deliberately killing an innocent human being. Abortion is not merely to terminate a pregnancy, it is to deliver a dead baby.

Thus, the right to life of each human being in existence at fertilization must be protected by the laws of the United States. NO EXCEPTIONS! NO COMPROMISE! The Supreme Court made it clear in footnote 54 of *Roe v. Wade* that it is inconsistent and untenable for a society and its laws to treat the murder of a preborn child as a crime of less degree than the murder of a born human being.

To deny facts and embrace inconsistency about human life is to pre-judge that an innocent preborn human being is property. Our country has suffered that error before in our history, as indicated, below.

**II. PRIVILEGE FOR BORN FEMALE**

*Not Equal Rights for Male and Female, Born and Preborn, But Privilege for Born Females*

The nominee has stated, in effect, that only a woman shall decide whether or not to have an abortion -- that is, only a pregnant mother shall decide whether or not to hold her innocent preborn child captive and deliver her child to the paid killer at the abortatorium. This is advocating raw privilege based on female gender and not equal rights for male and female. The nominee has demonstrated and spelled out her avowed devotion to privilege for females, her preference for the Equal Rights Amendment, and her tendency to be acutely aware of possible "sex discrimination" against females -- not males. All of this strongly suggests that the nominee has a long-standing inability to judge fairly on the basis of gender.

The nominee has openly declared that she has pre-judged that the aberrant behavior of murder, when decided to be perpetrated by a pregnant mother against her preborn child, is privileged behavior, but the same aberrant behavior decided by a male would not be privileged. Women libbers have been successful in intimidating men to let females have their unprincipled way, even for killing preborn children. Observation over the past several years indicates that women libbers gained this remarkable achievement by aggressive and ugly behavior to put-down men, by loud name-calling, such as "male chauvinist pigs," and a hate-filled attitude toward men, women, preborn children, family, church, government, army, country, and much else. It is extremely important that men no longer wimp-out before the women libbers'

onslaught of ugly and radical behavior. Otherwise, men will have denied themselves their rights of fatherhood and their responsibility to protect their own wives and born and preborn sons and daughters.

Further, the nominee has declared that she has pre-judged to extend the raw "privilege" of abortion/murder to ~~born~~ females and treats preborn male and female human beings as property at the disposal of her favored and privileged born female. There is no indication that a born female has serious responsibility to the well-being of self, child, family, husband, law, order, or society.

In addition, data seem to suggest that the female privilege has developed into the ugly area of genocide. One example is the District of Columbia, where almost 80% of all abortions for DC residents were suffered by black pregnant mothers. Would this be tolerated if occasioned by anything other than women libbers ugly demands for "privileges."

#### **EQUAL CARE AND PROTECTION FOR BOTH MOTHER AND PREBORN CHILD**

The pregnant mother and physician are the natural protectors of a preborn child. But, the nominee has set up an unnatural and needless conflict between a pregnant mother and her preborn child, whereby the mother would have sole decision over the right to life of her preborn child. The nominee tries to establish an untenable notion that a pregnant mother "decides" about the life or death of her preborn child, even though no one owns the right to life of another human being. With a pregnancy, there are two human beings, each of whom has an unalienable right to life vested in each human being at fertilization. These rights are compatible and are not in conflict. Nor does the protection of the right to life of a preborn child establish self-defense for the pregnant mother. And, the government has a valid interest in protecting the life of both the pregnant mother and her preborn child, because murder is well-established as such anti-social behavior that society must protect itself against this felonious crime.

There is no justification for deliberately killing a preborn child. For the record, I shall submit a longer statement on "Equal Care for both Mother and Preborn Child."

#### **PREJUDICE IS DISQUALIFYING**

This nominee has indicated her determination to pre-judge, by which she shall extend the raw "privilege" of murder to a pregnant mother. In doing so, she has demonstrated her inability to view fairly a case before her on the facts and evidence of record, which prejudice is totally inconsistent with basic qualifications for any Judge or Justice. And, when the prejudice would result in attempting to give license to the deliberate killing of an innocent preborn child, the nominee's qualifications are fatally flawed.

#### **III. FATAL ERROR OF FACT AND LAW**

**Abortion is Not Respectable and is Not "Legal"**

*Not Learning from History that Prejudice and Privilege are Anathema to Any Society*

As stated, above, it is a simple and indisputable fact that a human being is in existence at fertilization. The unalienable and paramount right to life of each human being endowed by Our Creator is vested at fertilization. The government does not give us our right to life. No one owns the right to life of another human being in existence at fertilization.

#### **ERROR OF FACT.**

It is an error of fact that any human being in existence at fertilization is a non-person to be treated as property. Our country has suffered through this error on at least three separate occasions: Slavery, Hitler's Final Solution, and Abortion. Each of these situations produced unrelenting conflict for our country because each was based on the error of fact in defining a whole class of human beings as non-persons. This error of fact created error of law, which, for a time, permitted innocent human beings to

be denied dignity, freedom, protection and life.

The apportionment clause of our Constitution defined slaves as three-fifths man and two-fifths property, and a Federalist paper argued for this dual character of the slave in order to gain a compromise and ratify the Constitution. However, the compromise did not bring peace, because people could not tolerate a society in which each human being did not have full protection of the law. Slavery was such provocation to the society that there was finally open conflict to eliminate the odious definition as "less than human." Our Constitution was amended to provide due process and equal protection for all.

Nazis defined a whole class of people as non-Aryan, and fashioned a Final Solution, by which Nazis enslaved and killed human beings in the defined class. Allied forces not only fought to end the Final Solution, but also held the Nuremberg Trials to establish a firm precedent that crimes against humanity would not be tolerated by free people. We World War II veterans participated in an Allied effort to stop forever the absolute evil of killing innocent human beings, which occurred "over there."

It is incongruous to see that the absolute evil of deliberately killing even one innocent human being could happen "over here" in our beloved America. It is even more incongruous to see that any public official would try to elevate this absolute evil as a "right" protected by our Constitution. In doing so, of course, abortion is provoking unrest, because no people can tolerate the slaughter of the innocents.

#### *ERROR OF LAW*

Our country must not suffer the innocent blood of even one preborn brother or sister. The government must protect the right to life of each human being in existence at fertilization. No one and no government may take away the right to life of another human being in existence at fertilization. The Nuremberg Trials reaffirm that there is no justification for an individual to participate in crimes against humanity, which include abortion and genocide. Abortion is not "Legal," as indicated by the following principles applied by the Nuremberg Tribunal, by which our government participated in hanging Nazis found guilty of crimes against humanity.

It is oft-heard that the Supreme Court "legalized" abortion by its infamous decisions of January 22, 1973. What has really happened is that the Supreme Court has declared in *Roe v. Wade* that, for now, punishment will not be administered under federal, state or local law for the crime against humanity of born human beings killing innocent preborn human beings.

The court is now in the anomalous position of trying to "legalize" an abomination. Further, the Court is in the anomalous position of running counter to history, when our own Government has stated and acted on the principle that "Crimes Against Humanity" cannot be made legal by any individual or governmental power.

We look to history for some standards by which a government, elected and appointed official, individual, and organization can be tested. For instance, there are standards set out by the Tribunal sitting in Nuremberg in 1945 in judgment of our foreign enemies. Surely, the same level of standards should apply to domestic organizations. The Charter of Tribunal, in setting forth the jurisdiction and general principles, provides in Article 6 that:

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

\* \* \*

(c) CRIMES AGAINST HUMANITY: namely, murder, against any

civilian population, . . . whether or not in violation of domestic law of the country where perpetrated.

Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a Common Plan or Conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.

Article 7 provides that an official position shall not be considered as freeing anyone from responsibility or mitigating punishment. Article 8 provides that the fact that an individual acted pursuant to order of his Government or of a superior shall not free him from responsibility. Articles 9 and 10 provide that an organization can be declared to be criminal, and individuals may be tried for membership in such organizations.

It is interesting to note that our Government, sitting in judgment of foreign enemies at the Nuremberg trials, held those enemies to a standard of humanness above and beyond what was "legal." Similarly, merely because abortion has been said to be "legal" in our country today, does not make the act of abortion less inhumane or less a crime against humanity.

Further, any government, elected or appointed official, individual, or organization which supports abortion, even though abortion is decriminalized, is subject to a serious question of accountability, now or later, for crimes against humanity.

**ERROR IN SELECTIVELY APPLYING THE LAW**

The nominee has indicated a strong preference for assuring that individuals may make decisions about their own action without governmental interference, unless the action interferes with another human being. Our government does assert its right now to protect society in many areas of civil rights -- such as employment, education, welfare, housing -- by interfering with individual decisions and actions. Our government even asserts its rights over the policies of civil rights of foreign sovereign nations, and may withhold assistance on the basis of a poor civil rights record. But, this nominee selectively would permit the deliberate murder of an innocent preborn child, and declare that the murderous acts by a pregnant mother, physician, counsellor, and other collaborators do not impinge on the right to life of a preborn child, or the rights of the father or of society.

The Nuremberg Trials reaffirm that there is no justification for an individual to participate in crimes against humanity, which include abortion and genocide. The Trials reaffirm that those who participate in these crimes are individually responsible for the crimes, and have no tenable defense that they were merely a "good soldier" following orders or that the crime was authorized by the government.

In order to embrace the error in fact and law that abortion is not murder, we must ask what other disqualifying leap into error of fact and law is possible for this nominee.

**IV. COVER-UP OF ABORTION EVIL**

*There is no Description of What is Abortion*

Just a short time ago, the word "abortion" was so evil that it was not uttered in private or public. Abortion not only murders a preborn child but also traumatizes and devastates a mother's mind and body. However, women liars have managed to cover-up the evil of murder/abortion so effectively that the word "abortion" is used casually in these hearings before this Committee to determine the qualifications -- or lack thereof -- of a nominee to the Supreme Court. Here on public TV we hear the word "abortion" used as if it were a respectable act -- a "right," a "service," and a "necessity." But, no matter how women liars try to make abortion respectable, it is still just murder of the preborn and destruction of mothers.

Mr. Chairman, it is necessary, therefore, to ask some pertinent questions of Members of this Committee and of the nominee:

- Can a woman be just "a little bit pregnant?"
- What really goes on behind the closed front doors of an abortion chamber?
- Why do press and media not show the American public what abortion looks like, just as they show us what slavery and the Final Solution look like?
- Is there really informed consent for a pregnant mother and her preborn child entering an abortion chamber?

**NO JUSTIFICATION FOR MURDERING PREBORN CHILDREN**

Yes, America, the intent of abortion is to kill a baby. But, in order to try to justify murdering preborn children, abortionists use rhetoric to divert away from and cover up the torturing of pregnant mothers and killing of preborn children inside their abortion chambers. For instance:

- *Divisive Rhetoric.* Abortionists do not truthfully and accurately describe their evil deeds inside their abortoria. Rather, they use euphemisms, such as: pro-choice (to murder a son or daughter), termination of pregnancy (by murdering a son or daughter), right of privacy (to murder a son or daughter), and who decides (to murder a preborn son or daughter). Abortionists must

tell the truth about what happens to a pregnant mother and her preborn child behind the abortionists' front doors.

- **Define Away A Person.** Abortionists want to define a preborn human being as not a "person." But, abortionists may not unilaterally decide who is and who is not a "person," in order selectively to kill an innocent human being in existence at fertilization.
- **Most Abortions are Performed During the First Trimester.** Murder by abortion is murder, whether the human subject is a few seconds old as a fertilized ovum or whether the preborn child is several weeks or months old and in the second or third trimester.
- **Establish and Maintain a "Proper" Value of Life.** No one has a right to determine whether or not another human being has a "value" of life sufficient to protect the other human being from murder.
- **Death Chambers Not Health Clinics.** Abortionists refer to their killing centers as "medical facilities." This is an aberration. Nothing relating to "health" occurs in an abortatorium. A pregnant mother's body and mind are violated and her preborn child is murdered. Hitler called his Death Chambers "Relocation Centers," as indeed we now know they were.
- **No "Need" to Murder - Equal Care.** Abortionists refer to the "need" for abortion, or that abortion is "medically indicated." But, there is no malady for which the standard treatment is "murder a preborn child." In a pregnancy, there are two separate and distinct patients: a pregnant mother and her preborn child. The standard treatment is to provide equal care for both the mother and her child. Please see "Equal Care," page 3, above.
- **Privacy or Equal Protection.** Abortionists plead that abortion is protected by the right of privacy. Abortion is murder, and homicide is always a public matter for any society, as we see from the principles of the Nuremberg Trials. Murdering preborn children is done in public facilities, with public dollars, and can never be tolerated as a matter of right of "privacy" or "equal protection" for anyone -- pregnant mother, father, preborn child, or society.
- **Poor Women.** Abortionists plead for tax dollars from the public treasury to help "poor women." That is, they plead that if a rich woman can afford to murder her preborn child, the public must pay for a poor woman to murder her preborn child. Neither rich nor poor pregnant mothers may murder their preborn children with impunity in America. And, our Land of the Free is great enough to provide true benefits to poor families rather than the wherewithal to murder their children. No society shall reduce the welfare rolls by murdering the young, and public dollars for abortion is really forced abortions for poor families who deserve respect and dignity.
- **Teenagers.** Abortionists plead for tax dollars to "help" teenagers. Abortionists provide murdering a preborn child as their response to the violation and destruction of statutory rape. Abortionists destroy the family by using secret abortion to build a wedge between parents and their teenagers. Abortion is the cause rather than the solution for any problem facing young people today.

N.B. These are the same old tired arguments which were repudiated for slavery and the Holocaust. The slave-owner said that the slave was his property with which he could do as he decided and without governmental interference. Nazis acted as sovereigns who decided life or death. Now, abortionists want to decide life or death, and inflict America with the shame of administering the "death penalty" to more than 4,000 innocent preborn human beings each day. And, abortion shall be repudiated by America in favor of life.

#### V. DISRESPECT FOR THE AMERICAN WAY OF LIFE

The protection of the right to life of each human being in existence at fertilization was purchased for

us as a country and a generation by the blood of patriots shed since the declaration of our independent Nation. This same patriotic blood bought for us an end to slavery and threats by foreign nations to impose a Final Solution on our freedoms and way of life.

It is untenable disrespect for our hard-won freedoms that our Nation may permits the shedding of innocent blood of our preborn brothers and sisters by decriminalized murder/abortion. To condone, tolerate or participate in this disrespect is disqualifying for anyone to serve in a position of public trust for our country.

#### **VI. WHAT IS TO BE DONE!**

Mr. Chairman, and Members of the Committee,

Why will the controversy about abortion not go away in our country, even though it is now two decades since the Supreme Court handed down its infamous *Roe v. Wade* decision? There is no mystery about this conflict -- it is heated because it involves life or death, and there is no in-between position for compromise. The abortion issue must and shall be decided in favor of life for both the pregnant mother and her innocent preborn child. The contentious issue of slavery lingered for decades because it had no compromise, and our Nation decided it in favor of freedom. Certainly, Germany has learned by its past inglorious history, and has decided not to commit more crimes against humanity by murder/abortion.

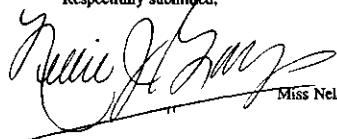
N.B. At the dedication of the Holocaust Museum here in Washington a few weeks ago, survivors gave a strong message of (1) Never Again, and (2) Do Not Stand By. This message was not for just another time and another place, but for all time and for all places, including the United States to stop slaughter of the innocents now.

Mr. Chairman, and Members of this Senate Judiciary Committee,

Our country suffers if the law of our land permits the deliberate killing of even one born or preborn human being in existence at fertilization. Our country suffers if even one elected or appointed public official operates under the wrong impression that the law of our land permits the deliberate killing of even one born or preborn human being in existence at fertilization.

It is your responsibility to assure that Judge Ruth Bader Ginsburg is not confirmed to be a Justice of our Supreme Court, because her own testimony indicates her disqualification based on pre-judging and selectively permitting privileges.

Respectfully submitted,



Miss Nellie J. Gray  
President

The CHAIRMAN. Thank you for your testimony.  
Ms. Hirschmann.

**STATEMENT OF SUSAN HIRSCHMANN**

Ms. HIRSCHMANN. Mr. Chairman and members of the committee, thank you for the opportunity today to testify before you on this important occasion.

My name is Susan Hirschmann, and I am the executive director of Eagle Forum, a national conservative, pro-family organization headed by Phyllis Schlafly, of Alton, IL.

We are concerned that Judge Ginsburg's record has not been given the thorough examination that the writings of other recent Supreme Court nominees have had. I have included a list of 20 questions that will be part of my testimony that we believe should be answered before she is confirmed.

Most of these questions are based on the book she coauthored in 1977, called "Sex Bias in the U.S. Code," which was published by the U.S. Commission on Civil Rights, for which she was paid by the Federal taxpayers under contract No. CR3AK010. The purpose of the book was to identify how Federal laws must be changed to conform to the "equality principle" for which she is a leading advocate.

So the questions that I think should be asked before she is confirmed will follow:

Do you still believe, as you wrote in 1977, that the equality principle means that women must be drafted into military service anytime men are?

Do you still believe, as you wrote in 1977, that there is a "need for affirmative action" for women in the armed services?

Do you still believe, as you wrote in 1977, that the age of consent for sexual acts should be lowered to 12 years?

Do you still believe that the equality principle requires that statutory rape laws be eliminated, because they only protect minor girls?

If you would approve of statutory rape laws, at what age would you favor having them take effect?

Do you still believe, as you wrote in 1977, that the equality principle requires that prostitution be legalized or decriminalized?

Do you still believe, what you wrote in the 1974 Report of Columbia Law School Equal Rights Advocacy Project on the Legal Status of Women under Federal Law, that "replacing Mothers Day and Fathers Day with Parents Day should be considered as an observance more consistent with a policy of minimizing traditional sex-based differences in parental roles," as you wrote?

Do you still believe, as you wrote in 1977, that the equality principle requires that prisons and reformatories be sex-integrated?

Do you still believe, as you wrote in 1977, that the Boy Scouts and the Girl Scouts must change their names and become sex-integrated, in order to conform to the equality principle and eliminate the "stereotyped sex roles"?

Do you still believe, as you wrote in 1977, that the equality principle requires that college fraternities and sororities be sex integrated into "social societies"?

Do you think that young adults on college campuses should not be allowed to make their own choices of organizations, but that the

government should dictate what gender-based organizations are not allowed?

Do you still believe, as you wrote in 1977, that the concept of a breadwinner husband and homemaker wife "must be eliminated from the code, if it is to reflect the equality principle?"

Do you still believe, as you wrote in 1977, that the equality principle "should impel development of a comprehensive program of government-supported child care"?

In your 1977 book, you wrote that "the Constitution \* \* \* was drafted using the generic term man." Will you show us in what still-operative section of the U.S. Constitution the term "man" appears?

Do you still disagree with the Supreme Court decisions ruling that taxpayers do not have to pay for abortions, as you wrote in 1980 in the book "Constitutional Government in America"? Do you believe that the equality principle requires taxpayers to pay for abortions for women?

Do you believe that the equality principle requires that there be no legal restrictions on a woman's right to abortion?

Is the New Republic magazine article correct in its August 2 issue, wherein it states that, during the 1970's, you artfully concealed the effect the equal rights amendment would have on abortion rights, in order to assist ratification of ERA, but after it was dead, you then made public your theory that the principle of gender equality requires legal access to abortion?

Do you believe in affirmative action for women in the workplace?

Finally, exactly what changes in the law do you favor, in order to attain the equality principle for which you are known as the leading advocate?

We think that, if these questions are answered, the myth of Judge Ginsburg as a "moderate" will be debunked. In fact, her writings betray her as a radical feminist, far out of the mainstream.

I would ask that these oral remarks, as well as additional written remarks be included as part of my testimony.

The CHAIRMAN. Without objection, it will be.

Ms. HIRSCHMANN. I would like to express my appreciation for you allowing another side to be presented today. Thank you very much for the opportunity to testify.

[The prepared statement of Ms. Hirschmann follows:]

**TESTIMONY RE: RUTH BADER GINSBURG**

by: Susan Hirschmann, Executive Director  
Eagle Forum  
To the Senate Judiciary Committee  
July 23, 1993

Ruth Bader Ginsburg's writings show her to be a radical, doctrinaire feminist, far out of the mainstream. She shares the chip-on-the-shoulder, radical feminist view that American women have endured centuries of oppression and mistreatment from men. That's why, in her legal writings, she self-identifies with feminist Sarah Grimke's statement, "All I ask of our brethren is that they take their feet off our necks," and with feminist Simone de Beauvoir's put-down of women as "the second sex." (De Beauvoir's most famous quote is, "Marriage is an obscene bourgeois institution.")

A typical feminist, Ruth Bader Ginsburg wants affirmative action quota hiring for career women but at the same time wants to wipe out the special rights that state laws traditionally gave to wives. In a speech published by the Phi Beta Kappa Key Reporter in 1974, Ginsburg called for affirmative action hiring quotas for career women, using the police as an example in point. She said, "Affirmative action is called for in this situation."

On the other hand, she considered it a setback for "women's rights" when the Supreme Court, in Kahn v. Shevin (1974), upheld a Florida property tax exemption for widows. Ginsburg disdains what she calls "traditional sex roles" and demands strict gender neutrality (except, of course, for quota hiring of career women).

Ginsburg's real claim to her status as the premier feminist lawyer is her success in winning the 1973 Supreme Court case Frontiero v. Richardson, which she unabashedly praised as an "activist" decision. She obviously shares the view of Justice William Brennan's opinion that American men, "in practical effect, put women, not on a pedestal, but in a cage," and that "throughout much of the 19th century the position of women in our

society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes."

Anyone who thinks that American women in the 19th century were treated like slaves, and in the 20th century were kept in a "cage," has a world view that is downright dangerous to have on the U.S. Supreme Court. She's another Brennan, and no conservative should vote to confirm her.

Of course, Ginsburg passed President Clinton's self-proclaimed litmus test for appointment to the Supreme Court — she is "pro-choice." But that's not all; she wants to write taxpayer funding of abortions into the U.S. Constitution, something that 72% of Americans oppose and even the pro-abortion, pro-Roe v. Wade Supreme Court refused to do.

It has been considered settled law since the Supreme Court decisions in a trilogy of cases in 1977 (Beal v. Doe, Maher v. Roe, and Poelker v. Doe) that the Constitution does not compel states to pay for abortions. These cases were followed by the 1980 Supreme Court decision of Harris v. McRae upholding the Hyde Amendment's ban on spending federal taxpayers' money for abortions. The Court ruled that "it simply does not follow that a woman's freedom of choice [to have an abortion] carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."

Ginsburg has planted herself firmly in opposition to this settled law. In a 1980 book entitled Constitutional Government in America, Judge Ginsburg wrote a chapter endorsing taxpayer funding of abortions as a constitutional right and condemning the high Court's rulings.

"This was the year the women lost," Ginsburg wrote in her analysis of the 1977 cases. "Most unsettling of the losses are the decisions on access by the poor to elective abortions." Criticizing the 6-to-3 majority in the funding cases, Ginsburg asserted that "restrictions on public funding and access to

public hospitals for poor women" were a retreat from Roe v. Wade, as well as a "stunning curtailment" of women's rights.

The phony "concern" expressed by pro-abortion lobbyists like Kate Michelman is just a smokescreen. Ginsburg's article criticizing Roe v. Wade, which has received some attention since her nomination, merely complained that the Court didn't adopt the "women's equality" theory that she had personally developed in the 1970s. Ginsburg's article was not a legal criticism, but a political one: if the Court had been less categorical in its Roe language, she said, it would not have provoked the "well-organized and vocal right-to-life movement." Ginsburg preferred to legalize abortion with arcane and obtuse legal gobbledegook that didn't agitate the grassroots.

#### Feminists Want to Change Our Laws

Ruth Bader Ginsburg is a longtime advocate of the extremist feminist notion that any differentiation whatsoever on account of gender should be unconstitutional. Her radical views are made clear in a book called Sex Bias in the U.S. Code, which she co-authored in 1977 with another feminist, Brenda Feigen-Fasteau, for which they were paid with federal funds under Contract No. CR3AK010.

Sex Bias in the U.S. Code, published by the U.S. Commission on Civil Rights, was the source of the claim widely made in the 1970s that 800 federal laws "discriminated" on account of sex. The 230-page book was written to identify those laws and to recommend the specific changes demanded by the feminist movement in order to conform to the "equality principle" and promote ratification of the Equal Rights Amendment, for which Ginsburg was a fervent advocate. (The ERA died in 1982.)

Sex Bias in the U.S. Code is a handbook which shows how the feminists want to change our laws, our institutions and our attitudes, and convert America into a "gender-free" society. It clearly shows that the feminists are not trying to redress any

legitimate grievances women might have, but want to change human nature, social mores, and relationships between men and women — and want to do that by changing our laws. Despite the noisy complaints of the feminists about the oppression of women, a combing of federal laws by Ruth Bader Ginsburg, then a Columbia University Law School professor, and her staff under a federal grant of tax dollars, unearthed no federal laws that harm women! The feminists' complaints about "discriminatory laws" are either ridiculous or offensive.

Here are some of the extremist feminist concepts from the Ginsburg book, Sex Bias in the U.S. Code:

. . . in the Military

1. Women must be drafted when men are drafted.

"Supporters of the equal rights principle firmly reject draft or combat exemption for women, as Congress did when it refused to qualify the Equal Rights Amendment by incorporating any military service exemption. The equal rights principle implies that women must be subject to the draft if men are, that military assignments must be made on the basis of individual capacity rather than sex." (p. 218)

"Equal rights and responsibilities for men and women implies that women must be subject to draft registration . . ." (p. 202)

2. Women must be assigned to military combat duty.

"Until the combat exclusion for women is eliminated, women who choose to pursue a career in the military will continue to be held back by restrictions unrelated to their individual abilities. Implementation of the equal rights principle requires a unitary system of appointment, assignment, promotion, discharge, and retirement, a system that cannot be founded on a combat exclusion for women." (p. 26)

3. Affirmative action must be applied for women in the armed services.

"The need for affirmative action and for transition measures is particularly strong in the uniformed services." (p. 218)

## . . . in Moral Standards

1. The age of consent for sexual acts must be lowered to 12 years old.

"Eliminate the phrase 'carnal knowledge of any female, not his wife, who has not attained the age of 16 years' and substitute a federal, sex-neutral definition of the offense. . . . A person is guilty of an offense if he engages in a sexual act with another person, . . . [and] the other person is, in fact, less than 12 years old." (p. 102)

2. Bigamists must have special privileges that other felons don't have.

"This section restricts certain rights, including the right to vote or hold office, of bigamists, persons 'cohabiting with more than one woman,' and women cohabiting with a bigamist. Apart from the male/female differentials, the provision is of questionable constitutionality since it appears to encroach impermissibly upon private relationships." (pp. 195-196)

3. Prostitution must be legalized; it is not sufficient to change the law to sex-neutral language.

"Prostitution proscriptions are subject to several constitutional and policy objections. Prostitution, as a consensual act between adults, is arguably within the zone of privacy protected by recent constitutional decisions." (p. 97)

"Retaining prostitution business as a crime in a criminal code is open to debate. Reliable studies indicate that prostitution is not a major factor in the spread of venereal disease, and that prostitution plays a small and declining role in organized crime operations." (p. 99)

"Current provisions dealing with statutory rape, rape, and prostitution are discriminatory on their face. . . . There is a growing national movement recommending unqualified decriminalization [of prostitution] as sound policy, implementing equal rights and individual privacy principles." (pp. 215-216)

4. The Mann Act must be repealed; women should not be protected from "bad" men.

"The Mann Act . . . prohibits the transportation of women and girls for prostitution, debauchery, or any other immoral purpose. The act poses the invasion of privacy issue in an acute form. The Mann Act also is offensive because of the image of women it perpetuates. . . . It was meant to protect from 'the villainous interstate and international traffic in women and girls,' 'those women and girls who, if given a fair chance, would, in all human probability, have been good wives and mothers and useful citizens. . . . The act was meant to protect weak women from bad men." (pp. 98-99)

5. Prisons and reformatories must be sex-integrated.

"If the grand design of such institutions is to prepare inmates for return to the community as persons equipped to benefit from and contribute to civil society, then perpetuation of single-sex institutions should be rejected. . . . 18 U.S.C. §4082, ordering the Attorney General to commit convicted offenders to 'available suitable, and appropriate' institutions, is not sex discriminatory on its face. It should not be applied . . . to permit consideration of a person's gender as a factor making a particular institution appropriate or suitable for that person." (p. 101)

6. In the merchant marine, provisions for passenger accommodations must be sex-neutralized, and women may not have more bathrooms than men.

"46 U.S.C. §152 establishes different regulations for male and female occupancy of double berths, confines male passengers without wives to the 'forepart' of the vessel, and segregates unmarried females in a separate and closed compartment. 46 U.S.C. §153 requires provision of a bathroom for every 100 male passengers for their exclusive use and one for every 50 female passengers for the exclusive use of females and young children." (p. 190)

"46 U.S.C. §152 might be changed to allow double occupancy by two 'consenting adults.' . . . Requirements for separate bathroom facilities stipulated in Section 153 should be retained but equalized so that the ratio of persons to facility is not sex-determined." (p. 192)

. . . in Education

1. Single-sex schools and colleges, and single-sex school and college activities must be sex-integrated.

"The equal rights principle looks toward a world in which men and women function as full and equal partners, with artificial barriers removed and opportunity unaffected by a person's gender. Preparation for such a world requires elimination of sex separation in all public institutions where education and training occur." (p. 101)

2. All-boys' and all-girls' organizations must be sex-integrated because separate-but-equal organizations perpetuate stereotyped sex roles.

"Societies established by Congress to aid and educate young people on their way to adulthood should be geared toward a world in which equal opportunity for men and women is a fundamental principle. The educational purpose would be served best by immediately extending membership to both sexes in a single organization." (pp. 219-220)

3. Fraternities and sororities must be sex-integrated.

"Replace college fraternity and sorority chapters with college 'social societies.'" (p. 169)

4. The Boy Scouts, the Girl Scouts, and other Congressionally-chartered youth organizations, must change their names and their purposes and become sex-integrated.

"Six organizations, which restrict membership to one sex, furnish educational, financial, social and other assistance to their young members. These include the Boy Scouts, the Girl

Scouts, Future Farmers of America . . . , Boys' Clubs of America . . . , Big Brothers of America . . . , and the Naval Sea Cadets Corps. . . . The Boy Scouts and Girl Scouts, while ostensibly providing 'separate but equal' benefits to both sexes, perpetuate stereotyped sex roles to the extent that they carry out congressionally-mandated purposes. 36 U.S.C. §23 defines the purpose of the Boy Scouts as the promotion of '. . . the ability of boys to do things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues. . . .' The purpose of the Girl Scouts, on the other hand, is '. . . to promote the qualities of truth, loyalty, helpfulness, friendliness, courtesy, purity, kindness, obedience, cheerfulness, thriftiness, and kindred virtues among girls, as a preparation for their responsibilities in the home and for service to the community. . . .' (36 U.S.C. §33.)" (pp. 145-146)

"Organizations that bestow material benefits on their members should consider a name change to reflect extension of membership to both sexes . . . [and] should be revised to conform to these changes. Review of the purposes and activities of all these clubs should be undertaken to determine whether they perpetuate sex-role stereotypes." (pp. 147-148)

5. The 4-H Boys and Girls Clubs must be sex-integrated into 4-H Youth Clubs.

"Change in the proper name '4-H Boys and Girls Clubs' should reflect consolidation of the clubs to eliminate sex segregation, e.g., '4-H-Youth Clubs.'" (p. 138)

6. Men and women should be required to salute the flag in the same way.

"Differences [between men and women] in the authorized method of saluting the flag should be eliminated in 36 U.S.C. §177." (p. 148)

. . . in the Family

1. The traditional family concept of husband as breadwinner and wife as homemaker must be eliminated.

"Congress and the President should direct their attention to the concept that pervades the Code: that the adult world is (and should be) divided into two classes — independent men, whose primary responsibility is to win bread for a family, and dependent women, whose primary responsibility is to care for children and household. This concept must be eliminated from the code if it is to reflect the equality principle." (p. 206)

"It is a prime recommendation of this report that all legislation based on the breadwinning, husband-dependent, homemaking-wife pattern be recast using precise functional description in lieu of gross gender classification." (p. 212)

"A scheme built upon the breadwinning husband [and] dependent homemaking wife concept inevitably treats the woman's efforts or aspirations in the economic sector as less important than the man's." (p. 209)

2. The Federal Government must provide comprehensive government child-care.

"The increasingly common two-earner family pattern should impel development of a comprehensive program of government-supported child care." (p. 214)

3. The right to determine the family residence must be taken away from the husband.

"Title 43 provisions on homestead rights of married couples are premised on the assumption that a husband is authorized to determine the family's residence. This 'husband's prerogative' is obsolete." (p. 214)

4. Homestead law must give twice as much benefit to couples who live apart from each other as to a husband and wife who live together.

"Married couples who choose to live together would be able

to enter upon only one tract at a time." (p. 175) "Couples willing to live apart could make entry on two tracts." (p. 176)

5. No-fault divorce must be adopted nationally.

"Consideration should be given to revision of 38 U.S.C. §101(3) to reflect the trend toward no-fault divorce." (p. 159) "Retention of a fault concept in provisions referring to separation . . . is questionable in light of the trend away from fault determinations in the dissolution of marriages." (pp. 214-215)

. . . in Language

1. About 750 of the 800 federal laws that allegedly "discriminate" on account of sex merely involve the use of so-called "sexist" words which the ERAers wanted to censor out of the English language. "The following is a list of specific recommended word changes" which the feminists want censored out of Federal laws (pp. 15-16, 52-53).

Words To Be Removed	Words To Be Substituted	13
manmade	artificial	
man, woman	person, human	
mankind	humanity	
manpower	human resources	
husband, wife	spouse	
mother, father	parent	
sister, brother	sibling	
paternity	parentage	
widow, widower	surviving spouse	
entryman	enterer	
serviceman	servicemember	
midshipman	midshipperson	
longshoremen	stevedores	
postmaster	postoffice director	
plainclothesman	plainclothesperson	
watchman	watchperson	
lineman	line installer, line maintainer	
businessman	businessperson	
duties of seamanship	nautical or seafaring duties	

Sex Bias even demands bad grammar to appease the feminists: "All federal statutes, regulations, and rules shall [use] plural constructions to avoid third person singular pronouns." (pp. 52-53)

2. In another piece of silliness, Sex Bias demands that Congress create a female anti-litter symbol to match "Johnny Horizon."

"A further unwarranted male reference . . . regulates use of the 'Johnny Horizon' anti-litter symbol. . . . This sex stereotype of the outdoorsperson and protector of the environment should be supplemented with a female figure promoting the same values. The two figures should be depicted as persons of equal strength of character, displaying equal familiarity and concern with the terrain of our country." (p. 100)

3. On the other hand, Sex Bias shows its hypocrisy by demanding that the "Women's Bureau" in the U.S. Department of Labor be continued. Although the authors admit that this is "inappropriate" (it is obviously sex discriminatory), they simply demand it anyway. "The Women's Bureau is . . . a necessary and proper office for service during a transition period until the equal rights principle is realized." (p. 221)

4. Sex Bias in the U.S. Code makes a fundamental error in stating: "The Constitution, which provides the framework for the American legal system, was drafted using the generic term 'man'." (p. 2) The word "man" does not appear in the U.S. Constitution (except in a no-longer-operative section of the 14th Amendment, which is not in effect now and was not in effect when the Constitution was "drafted"). The U.S. Constitution is a beautiful sex-neutral document. It exclusively uses sex-neutral words such as person, citizen, resident, inhabitant, President, Vice President, Senator, Representative, elector, Ambassador, and minister, so that women enjoy every constitutional right that men enjoy — and always have.

Sex Bias in the U.S. Code proves that Ruth Bader Ginsburg's "equality principle" would bring about extremist changes in our legal, political, social, and educational structures. The feminists are working hard — with our tax dollars — to bring this

about by constitutional mandate (through the Equal Rights Amendment) or by legislative changes or by judicial activism. Ruth Bader Ginsburg has been their premier lawyer for two decades.

Finally, who but an embittered feminist could have said what Ruth Bader Ginsburg said when she stood beside President Clinton in the Rose Garden the day of her nomination for the Supreme Court: She wished that her mother had "lived in an age when daughters are cherished as much as sons." Where in the world has Ginsburg been living? In China? In India? Her statement was an insult to all American parents who do, indeed, cherish their daughters as much as their sons.

The CHAIRMAN. We are happy to have your testimony. I might add that I know that some of you did not know whether you wanted to testify until late in the process, and I particularly appreciate you coming across the country from California and from Illinois, and I hope, as this has gone, we have tried to accommodate those who asked to testify, even when it has been a little down the line. Mr. Phillips asked early on.

It is nice to see you again, Kay Coles James. The last time we saw you before this committee, you were a nominee. It is nice to see you again.

#### **STATEMENT OF KAY COLES JAMES**

Ms. JAMES. Thank you, Mr. Chairman. I must admit that I prefer this seat in terms of the one I had before.

The CHAIRMAN. Being a witness, rather than a nominee.

Ms. JAMES. Exactly right.

Thank you, Mr. Chairman. I would also like to thank the rest of the committee for this opportunity to contribute to the deliberative process on Judge Ginsburg.

Judge Ginsburg has presented herself as a moderate and as an advocate of judicial moderation. Yet, many of her remarks reveal a philosophy of judicial activism, most notably with regard to abortion, where she clearly revealed views that I believe are radical and activist, and I will even argue wrong.

Judge Ginsburg rightly claimed the privilege of refusing to answer questions that might commit her on issues likely to come before the Court, and she exercised this privilege on a wide range of issues, refusing, for instance, either to endorse or reject the view that sexual orientation is a suspect classification for equal protection purposes, or the view that the capital punishment violates the eighth amendment, even though it is specifically contemplated by the fifth.

But on abortion, Judge Ginsburg not only declined to exercise the privilege, she reached out, in answering a question from Senator Brown that could have been answered much less broadly, and delivered a ringing statement of her pro-abortion position.

Specifically, she said that the abortion right is, in her words, essential to women's equality and dignity. She said, furthermore, that when government controls that decision for a woman, she is being treated as less than a fully adult human responsible for her own choices.

Let me point out first that there is not a shred of law in that statement. Right or wrong, it is pure policy. This is a very strange comment coming from someone who postures as a believer in judicial moderation.

Though, Senator I don't think that she ever really answered your question on how she can reconcile her advocacy of a broad policy driven construction of the equal protection clause with her more recent advocacy of a restrained judiciary, the answer is not hard to find in her speeches and, in fact, in her articles.

She believes the Supreme Court can and should promote radical change, but it should be done slowly, and the slowness is based not on principle, but on expediency. If the Court moves too fast, the electorate reacts in the opposite direction, and this is precisely her

so-called criticism of *Roe v. Wade*. She understands that the electorate in the hands of a liberal, yet cautious judiciary is like a frog in a pot of slowly-heating water. It will never notice the increasing temperature and will get boiled to death, rather than jump out.

But I will leave equal protections of history to one side, because I am not an attorney. What I am is an African-American woman who has put a certain amount of effort into reminding our increasingly self-obsessed society about the right of the most vulnerable category of human beings, the only ones who have been held as a matter of constitutional law to be completely without rights, the human unborn.

Judge Ginsburg believes that laws that command people to respect the rights of the human unborn treat the mother as "less than a fully adult human responsible for her own choices." Mr. Chairman, a similar critique could be leveled at any law whatsoever. All laws direct human conduct in some fashion, and, to that extent, all laws deprive people of absolute autonomy.

Senator Simon is concerned that any Supreme Court nominee he votes for be someone who will increase freedom. But I don't think he means he wants someone who will, say, rule that the 1960 Civil Rights Act is unconstitutional. That act unquestionably limited what some people regard as freedoms, the freedom to decide whom to associate with on the job, the freedom to control the use of one's own property, and so forth. Many employers and restaurant owners argued, in fact, that the act treats them as "less than fully adult humans responsible for their own choices." But it passed, as well it should have, and it continues to command overwhelming support in the electorate, because the limitations it imposed on freedom were necessary to protect the rights of other people whose rights and dignity were being denied, just as the rights and dignity of children in the womb are being denied today.

Judge Ginsburg frames the abortion right with no trace of having confronted the question of whether there might be a party other than the mother with a life-or-death stake in the abortion decision.

One of her formulations of the abortion right is that "women have a right free from unwarranted governmental intrusion whether or not to bear children." That is something I myself could say amen to, were it not for the question of those conceived but not yet born. But asserting a right not to bear a child, regardless of whether or not that child has already come into existence, is like asserting a right to fire a loaded gun, regardless of whether or not there is someone standing in the path of the bullet.

Finally, I would like to say a few words about this notion that the right to take the life of the innocent preborn child as necessary to women's equality and freedom in society. This view, in my belief, is a total capitulation to the old saw about how it is a man's world. Those who adhere to it are, in effect, saying that in order to achieve dignity and standing in the world, women have to have the equivalent of male bodies, but they don't. Women don't need to mutilate their bodies or take the lives of their children in order to be equal to any man. The real feminists are those who say I'm pregnant, I can bear children, and you had better be prepared to deal with it. [Applause.]

The Senate is about to put an advocate of the male assimilation theory of women's rights onto the Supreme Court and to earn plaudits from the feminist establishment for doing so, not to mention plaudits from the media for confirming a moderate.

So it probably won't matter that, for this nominee, moderation is a political tactic, rather than a legal practice. Nor will it matter that the nominee's reasoning on abortion is premised on the notion, to paraphrase the *Dred Scott* decision, that the unborn have no rights that the born are bound to respect. But I think it is a tragedy that we have sunk to the point that this is our idea of a non-controversial nominee.

Mr. Chairman, I do thank you and the committee for the opportunity to come here and say so today.

The CHAIRMAN. Thank you for a reasoned, dispassionate, well-stated statement. As I said, it is nice to have you back before the committee and it is nice to know that you would rather be a witness than a nominee. I guess it is a different role.

Welcome back, Mr. Phillips. One thing for certain, you are non-partisan in your criticism. The last time you were here, if I remember—I mean this to establish your bona fides here—you were not reluctant to oppose a Republican nominee, and you are not reluctant to oppose a Democratic nominee.

Mr. PHILLIPS. I am nonpartisan. I am bipartisan.

The CHAIRMAN. That is a better way of saying it. The floor is yours.

#### STATEMENT OF HOWARD PHILLIPS

Mr. PHILLIPS. Thank you very much, sir, Senator Hatch, Senator Specter.

When we are told that a unanimous vote is in the offing, the American people have the right to ask, in all seriousness, do all Senators share the same standard of judgment. In 1990, when you accorded me the opportunity to testify in opposition to the nomination of David Souter, I asserted that the overarching moral issue in the political life of the United States in the last third of the 20th century is the question of abortion: Is the unborn child a human person entitled to the protections pledged to each of us by the Founders of the Nation?

The first duty of the law and the civil government established to enforce that law is to prevent the shedding of innocent blood. As Notre Dame law professor Charles Rice has pointed out, this is so, because the common law does not permit a person to kill an innocent nonaggressor, even to save his own life.

I have no reason to believe that Mrs. Ginsburg has personally caused human lives to be extinguished, as was clearly the case with David Souter, when President Bush put his name forward. Nor do I in any other way challenge Mrs. Ginsburg's nomination on grounds of personal character. I do, however, urge that Mrs. Ginsburg's nomination be rejected on grounds that the standard of judgment she would bring on the overriding issue of whether the Constitution protects our God-given right to life is a wrong standard.

Instead of defending the humanity and divinely imparted right to life of preborn children, she would simply be another vote for the

proposition that our unborn children are less than human, and that their lives may be snuffed out, without due process of law and with impunity. As a matter of practice and belief, Mrs. Ginsburg has failed to acknowledge or recognize that the first duty of the law is indeed the defense of innocent human life.

If it is Mrs. Ginsburg's position, and it does seem to be her view, that the extinguishment of innocent unborn human lives without due process of law is not only constitutionally permissible, but that those who engage in the practice of destroying unborn lives should enjoy constitutional protection for doing so, she may have a perspective consistent with that held by members of this committee. But it is not one which is consistent with either the plain language of the Constitution or with the revulsion toward abortion which prevailed at the time when our Constitution was drafted and ratified.

While Ms. Ginsburg has disagreed with the reasoning in *Roe v. Wade*, she has at no time expressed dissatisfaction with the millions of legal abortions which were facilitated by that decision, even though she would have argued that discrimination rather than privacy was the core issue. By Ms. Ginsburg's logic, it is unconstitutional discrimination to deny females the opportunity to extinguish any lives which may result from their sexual conduct. Her argument would seem to be with our creator inasmuch as he did not equally assign the same childbearing function to males. Consistent with her warped perspective, Ms. Ginsburg as a litigator argued that pregnancy should be treated as a disability rather than as a gift from God.

The question of personhood and of the humanity of the preborn child is at the very heart of the abortion issue in law, in morals, and in fact. Justice John Paul Stevens expressed his opinion in the 1986 *Thornburgh* case that there is a fundamental and well-recognized difference between a fetus and a human being. He admitted that indeed if there is not such a difference, the permissibility of terminating the life of a fetus could scarcely be left to the will of the State legislatures.

In the *Roe v. Wade* decision, the Supreme Court indicated that if the unborn child is a person, the State could not allow abortion even to save the life of the mother. In fact, the majority opinion deciding *Roe v. Wade*—in that opinion, the Supreme Court said that if the personhood of the unborn child is established, the pro-abortion case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the 14th amendment.

Although my reasoning is different, I agree with Justice Stevens when he argues that if the unborn child is recognized as a human person, there is no constitutional basis to justify Federal protection of abortion anywhere in the United States of America. Indeed, on the contrary, if the preborn child is, in fact, a human person created in God's image, premeditated abortion is unconstitutional in every one of the 50 States.

Ms. Ginsburg should be closely questioned by members of the Judiciary Committee concerning whether she believes the unborn child is a human person created in God's image. This is the core issue. If this is not her understanding—and it does not seem to

be—she should be asked to indicate by what logic she reaches a contrary conclusion.

It has been reported concerning Ms. Ginsburg that several of her writings provide a glimpse into her approach to the Constitution. In an article in *Law and Inequality*, a journal of theory and practice, she wrote that, "a too strict jurisprudence of the Framers' original intent seems to me unworkable." She went on to write that adherence to our 18th century Constitution is dependent on change in society's practices, constitutional amendment, and judicial interpretation.

Furthermore, in the *Washington University Law Quarterly* she remarked that boldly dynamic interpretation, departing radically from the original understanding of the Constitution, is sometimes necessary. And in a speech this March at New York University, Judge Ginsburg advocated using the Supreme Court to enact social change. Without taking giant strides, the Court, through constitutional adjudication, she said, can reinforce or signal a green light for social change.

It is not surprising that different people might reach different conclusions about the intent of the Framers, but it is quite another thing for a prospective Justice of the Supreme Court to presume to substitute his or her own opinion for the plain meaning of the original document, as lawfully amended.

I hope the members of this committee will probe more deeply into Ms. Ginsburg's present view of the opinions she expressed in these briefs, articles, and speeches. If she is unwilling to repudiate them credibly and entirely, then even aside from her apparent failure to recognize the duty of the State to safeguard innocent humanity, she would seem to have disqualified herself from a position in which she is expected to be a guardian of the Constitution. Otherwise, a vote to confirm Ms. Ginsburg becomes a vote to empower a permanent one-woman constitutional convention which never goes out of session.

Indeed, in view of the position taken by Ms. Ginsburg that it is the duty of Supreme Court Justices to disregard the plain words and intentions of the Constitution, it is particularly important that her personal opinions be even more closely scrutinized.

It is the particular obligation of those who might disagree with Ms. Ginsburg's ideology and policy objectives to either oppose her nomination on the basis of such disagreement or to henceforth cease their personal professions of conviction on those particular issues, whether they relate to abortion, to homosexuality, or to some other issue where Ms. Ginsburg's philosophical predilections are a matter of public record.

I see that my time is up, so I will terminate my testimony there, asking that the balance of it be submitted to the record.

The CHAIRMAN. It will be placed in the record.  
[The prepared statement of Mr. Phillips follows:]

*"A vote to confirm Mrs. Ginsburg  
becomes a vote to empower  
a permanent one-woman Constitutional Convention  
which never goes out of session."*

**SUMMARY OF TESTIMONY**  
**IN OPPOSITION TO CONFIRMATION OF RUTH BADER GINSBURG**  
**TO BE A JUSTICE OF THE U.S. SUPREME COURT**

**Excerpts from Testimony of Howard Phillips**

When we are told that a unanimous vote is in the offing, the American people have the right to ask in all seriousness: "Do all Senators share the same standard of judgment?"

By Mrs. Ginsburg's logic, it is unconstitutional discrimination to deny females the opportunity to extinguish any lives which may result from their sexual conduct. Her argument would seem to be with our Creator, inasmuch as he did not equally assign the same childbearing function to males. Consistent with her warped perspective, Mrs. Ginsburg, as a litigator, argued that pregnancy should be treated as a disability rather than as a gift from God.

Indeed, in a 1972 brief, Mrs. Ginsburg argued that "exaltation of woman's unique role in bearing children has, in effect, restrained women from developing their individual talents...and has impelled them to accept a dependent, subordinate status in society."

Moreover in 1984, in a speech at the University of North Carolina, Mrs. Ginsburg went so far as to maintain that the government has a legal "duty" to use taxpayer funds to subsidize abortion.

In an article in *Law and Inequality: A Journal of Theory and Practice*, she wrote that 'a too strict jurisprudence of the framers' original intent seems to me unworkable.' She went on to write that adherence to 'our eighteenth century Constitution' is dependent on 'change in society's practices, constitutional amendment, and judicial interpretation.' Furthermore, in the *Washington University Law Quarterly*, she remarked that 'boldly dynamic interpretation departing radically from the original understanding' of the Constitution is sometimes necessary.'

It is not surprising that different people might reach different conclusions about the intent of the Framers. But it is quite another thing for a prospective Justice of the Supreme Court to presume to substitute his or her own opinion for the plain meaning of the original document as lawfully amended. If she is unwilling to repudiate it credibly and entirely, then, even aside from her apparent failure to recognize the duty of the state to safeguard innocent humanity, she would seem to have disqualified herself from a position in which she is expected to be a guardian of the Constitution. Otherwise, a vote to confirm Mrs. Ginsburg becomes a vote to empower a permanent one woman Constitutional convention which never goes out of session.

Mrs. Ginsburg's views on virtually every subject which might conceivably be addressed by the Supreme Court are relevant to the consideration of this body.

It is the particular obligation of those who might disagree with Mrs. Ginsburg's ideology and policy objectives to either oppose her nomination on the basis of such disagreement, or to henceforth cease their personal professions of conviction on those particular issues---whether they relate to abortion, to homosexuality, or to some other issue where Mrs. Ginsburg's philosophical predilections are a matter of public record.

Mrs. Ginsburg's nomination should be rejected.

**TESTIMONY**  
concerning the nomination of RUTH BADER GINSBURG  
to be a Justice of the U.S. Supreme Court

by

**HOWARD PHILLIPS**  
Chairman  
The Conservative Caucus  
450 Maple Avenue East  
Vienna, Virginia 22180

before the

United States Senate  
Judiciary Committee  
Washington, D.C.

submitted  
Wednesday, July 21, 1993

Mr. Chairman, Members of the Committee, my name is Howard Phillips. Thank you for giving me this opportunity to testify on behalf of The Conservative Caucus with respect to the nomination of Ruth Bader Ginsburg to be a Justice of the Supreme Court of the United States.

On Monday evening, June 14, I saw Senators Orrin Hatch and Patrick Leahy on CNN talking with Larry King about the nomination of Mrs. Ginsburg, whose appointment had been announced earlier that day. Both Senator Hatch and Senator Leahy were effusive in their praise of Mrs. Ginsburg, and Senator Hatch opined that Mrs. Ginsburg would, in all likelihood, be confirmed by a Senate vote of 100 to nothing.

It is particularly interesting to note that Mrs. Ginsburg's nomination seems also to be warmly appreciated by Ross Perot who, according to published reports, has for many years benefited from the professional counsel of Mrs. Ginsburg's husband, Professor Martin Ginsburg. Mr. Perot reportedly thought so highly of Professor Ginsburg that in 1986 he contributed \$1 million in his honor to Georgetown University.

And as Mr. Perot would put it, "isn't it interesting" that Mrs. Ginsburg's nomination occurred only a number of days after Mr. Perot and David Gergen had communed on the island of Bermuda, immediately prior to Mr. Gergen formally joining President Clinton's White House staff?

It is indeed a small world.

Whenever all one hundred Senators, Republican and Democrat alike, agree on something, it's time for ordinary citizens to wonder why. And when Ross Perot is also part of the "amen chorus", it's time to ask "who owns the franchise on happiness pills?".

Are there no issues at controversy which might stir a serious debate? Are there no conflicts in philosophy among the members of the Senate, which is so often characterized "as the world's greatest deliberative body"?

Or is it possible that for various reasons, perhaps even including gender or ethnicity, some nominees are beyond substantive criticism. In such instances, it may even be "politically incorrect" to question the worthiness of a nominee who might otherwise be controversial.

When we are told that a unanimous vote is in the offing, the American people have the right to ask in all seriousness: "Do all Senators share the same standard of judgment?"

Or does it seem politically awkward for some to openly express their privately held concerns by voting against confirmation of a nominee who has benefited from uncritical media coverage.

Presuming that standards of judgment do vary, is it not surprising that a virtually unanimous coincidence of conclusion seems to have emerged with respect to this nomination---as it has on certain prior occasions---but not when Judge Bork and Judge Thomas were under consideration?

Is it not possible that some views are not being adequately represented in what should be a great debate on this important lifetime appointment?

On September 19, 1990, when you accorded me the opportunity to testify in opposition to the nomination of David Souter to be a Justice of the Supreme Court, I asserted that "The overarching moral issue in the political life of the United States in the last third of the 20th Century is, in my opinion, the question of abortion. Is the unborn child a human person, entitled to the protections pledged to each of us by the Founders of our Nation?"

The first duty of the law---and of the civil government established to enforce that law---is to prevent the shedding of innocent blood. As Notre Dame law professor Charles Rice has pointed out, "This is so, because the common law does not permit a person to kill an innocent non-aggressor, even to save his own life."

My objections to Justice Souter were premised not only on his legal philosophy, but on his personal history of having facilitated the liberalization of abortion policies at two hospitals for which he was an overseer.

I presented facts which established without rebuttal that Mr. Souter's posture of neutrality on this great question of life and death was contradicted by his personal complicity in the performance of many hundreds of abortions at Concord Memorial Hospital and Dartmouth Hitchcock Hospital in New Hampshire.

I have no reason to believe that Mrs. Ginsburg has personally caused human lives to be extinguished, as was clearly the case with

David Souter when President Bush put his name forward. Nor do I in any other way challenge Mrs. Ginsburg's nomination on grounds of personal character.

I do, however, urge that Mrs. Ginsburg's nomination be rejected by the Senate on grounds that the standard of judgment she would bring to the Supreme Court on the overriding issue of whether the Constitution protects our God-given right to life, is a wrong standard.

Instead of defending the humanity and divinely imparted right to life of pre-born children, she would simply be another vote for the proposition that our unborn children are less than human and that their lives may be snuffed out without due process of law, and with impunity.

As a matter of practice and belief, Mrs. Ginsburg has failed to acknowledge or recognize that the first duty of the law is indeed the defense of innocent human life.

If it is Mrs. Ginsburg's position---and it does seem to be her view---that the extinguishment of innocent unborn human lives, without due process of law, is not only Constitutionally permissible, but that those who engage in the practice of destroying unborn lives should enjoy Constitutional protection for doing so, she may have a perspective consistent with that held by members of this committee, but it is not one which is consistent with either the plain language of the Constitution or with the revulsion toward abortion which prevailed at the time when our Constitution was drafted and ratified.

While Mrs. Ginsburg has disagreed with the reasoning in *Roe v. Wade*, at no point has she expressed dissatisfaction with the millions of legal abortions which were facilitated by that decision, even though she would have argued that "discrimination" rather than "privacy" was the core issue.

By Mrs. Ginsburg's logic, it is unconstitutional discrimination to deny females the opportunity to extinguish any lives which may result from their sexual conduct. Her argument would seem to be with our Creator, inasmuch as he did not equally assign the same childbearing function to males. Consistent with her warped perspective, Mrs. Ginsburg, as a litigator, argued that pregnancy should be treated as a disability rather than as a gift from God.

Indeed, in a 1972 brief, Mrs. Ginsburg argued that "exaltation of

woman's unique role in bearing children has, in effect, restrained women from developing their individual talents...and has impelled them to accept a dependent, subordinate status in society."<sup>1</sup>

Moreover, in 1984, in a speech at the University of North Carolina, Mrs. Ginsburg went so far as to maintain that the government has a legal "duty" to use taxpayer funds to subsidize abortion.

The question of personhood, and of the humanity of the pre-born child is at the very heart of the abortion issue---in law, in morals, and in fact.

Justice John Paul Stevens expressed his opinion in the 1986 *Thornburgh* case that "there is a fundamental and well-recognized difference between a fetus and a human being". He admitted that "indeed, if there is not such a difference, the permissibility of terminating the life of a fetus could scarcely be left to the will of the state legislatures."<sup>2</sup>

In the *Roe v. Wade* decision, the Supreme Court indicated that if the unborn child is a person, the State could not allow abortion, even to save the life of the mother. In fact, in the majority opinion deciding *Roe v. Wade*, the Supreme Court said that, if the "personhood [of the unborn child] is established, [the pro-abortion] case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment."<sup>3</sup>

Although my reasoning is different, I agree with Justice Stevens when he argues that, if the unborn child is recognized as a human person, there is no Constitutional basis to justify Federal protection of abortion anywhere in the United States of America. Indeed, on the contrary, if the pre-born child is, in fact, a human person created in God's image, premeditated abortion is unconstitutional in every one of the fifty states.

Justice Stevens bases his reasoning on the Fourteenth Amendment. I base mine on Article IV, Section 4 of the Constitution, which stipulates that "The United States shall guarantee to every State in

<sup>1</sup> *Struck v. Secretary of Defense*, 1972 (*The New Republic*, 8/2/93, p. 19)

<sup>2</sup> Supreme Court decision 6/10/86: *Richard Thornburgh v. American College of Obstetricians and Gynecologists*, Justice John Paul Stevens concurring

<sup>3</sup> Supreme Court decision, 1/22/73: *Roe v. Wade*, Justice Harry Blackmun writing the majority opinion

this Union a Republican Form of Government...." What distinguishes a republic from a democracy is the fact that, in our republic, due process protections of our God-given rights to life, liberty, and property cannot properly be snuffed out by legislative whim---whether reflected in the vote of a simple majority, a super majority of two-thirds or three-fourths, or even by unanimous vote.

Mrs. Ginsburg should be closely questioned by members of the Judiciary Committee concerning whether she believes the unborn child is a human person created in God's image.

If this is not her understanding (and it does not seem to be), she should be asked to indicate by what logic she reaches a contrary conclusion.

The Constitution of the United States accords this body the right to provide advice and consent with respect to the judicial nominees of the President. As I read the Constitution, you can confirm a nominee for any reason you choose. Moreover, you can reject a nominee for any reason you choose.

There are two categories of review which, in every case involving a nominee to our highest court, ought to be part of the confirmation process: One, is the nominee a person whose character, judgment, and ability is compatible with the office? A second factor to be considered in the case of Supreme Court nominees is whether the nominee can reasonably be expected to render judgement in a manner which is faithful to the Constitution, taking care to honor its specific words rather than to rely on interpretations of the Constitution which are clearly inconsistent with its plain meaning.

It has been reported<sup>4</sup> concerning Mrs. Ginsburg that "Several of her writings provide a glimpse into her approach to the Constitution. In an article in *Law and Inequality: A Journal of Theory and Practice*, she wrote that 'a too strict jurisprudence of the framers' original intent seems to me unworkable.' She went on to write that adherence to 'our eighteenth century Constitution' is dependent on 'change in society's practices, constitutional amendment, and judicial interpretation.' Furthermore, in the *Washington University Law Quarterly*, she remarked that 'boldly dynamic interpretation departing radically from

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<sup>4</sup> *Legal Times*, 7/12/93, p. 19, "An Activist in Moderate Garb" by Mark R. Levin and Andrew P. Zappia; *Law and Inequality*, Vol. 6, Number 1, pp. 17-25, May 1988

the original understanding' of the Constitution is sometimes necessary."<sup>5</sup>

"In a speech this March at New York University, Judge Ginsburg advocated using the Supreme Court to enact 'social change.'....

"....without taking giant strides...the court, through constitutional adjudication, can reinforce or signal a green light for social change."<sup>6</sup>

It is not surprising that different people might reach different conclusions about the intent of the Framers. But it is quite another thing for a prospective Justice of the Supreme Court to presume to substitute his or her own opinion for the plain meaning of the original document as lawfully amended. I hope the members of the committee will probe more deeply into Mrs. Ginsburg's present view of the opinion she expressed in that article. If she is unwilling to repudiate it credibly and entirely, then, even aside from her apparent failure to recognize the duty of the state to safeguard innocent humanity, she would seem to have disqualified herself from a position in which she is expected to be a guardian of the Constitution. Otherwise, a vote to confirm Mrs. Ginsburg becomes a vote to empower a permanent one-woman Constitutional Convention which never goes out of session.

Indeed, in view of the position taken by Mrs. Ginsburg that it is the duty of Supreme Court justices to disregard the plain words and intentions of the Constitution, it is particularly important that her personal opinions be closely scrutinized.

As you know, it is the practice of judges below the Supreme Court level to indicate deference to the decisions of the Supreme Court, and to avoid the appearance of competing with the Supreme Court in breaking new Constitutional ground.

There are those who argue that Mrs. Ginsburg's performance as a judge of the U.S. Court of Appeals in the District of Columbia stands in clear contrast with her role as advocate when she was in private practice and when she functioned as general counsel of the American Civil Liberties Union. But, it would be a mistake to conclude that

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<sup>5</sup> Legal Times, 7/12/93, "An Activist in Moderate Garb" by Mark R. Levin and Andrew P. Zappia; Washington University Law Quarterly, 1979 Volume, beginning p. 161.

<sup>6</sup> Terry Jeffrey, The Washington Times, 7/20/93, p. F4

Mrs. Ginsburg's performance on the Court of Appeals is evidence that she has abandoned her previous perspective or philosophy.

The clear problem is that, at least at one point, as a mature adult, a law school graduate and a seasoned attorney, Mrs. Ginsburg expressed the view that it was not only the privilege, but the duty, of Supreme Court Justices to become supreme legislators, supplanting the Founding Fathers in determining the scope and meaning of our organic law, the Constitution of the United States.

For this reason, Mrs. Ginsburg's views on virtually every subject which might conceivably be addressed by the Supreme Court are relevant to the consideration of this body.

Of course, it is my view that a Supreme Court nominee who sees her role as that of supreme legislator should, ipso facto, be disqualified. But, I have no doubt that there are many in this body who, presuming that they will agree with Mrs. Ginsburg's policy conclusions, intend to set aside any concerns they might have on that score.

It is, therefore, the particular obligation of those who might disagree with Mrs. Ginsburg's ideology and policy objectives to either oppose her nomination on the basis of such disagreement, or to henceforth cease their personal professions of conviction on those particular issues---whether they relate to abortion, to homosexuality, or to some other issue where Mrs. Ginsburg's philosophical predilections are a matter of public record.

For example, the records of the American Civil Liberties Union disclose that, Mrs. Ginsburg, as a member of the ACLU board, voted to oppose the authority of state governments to preserve laws prohibiting prostitution and homosexuality. She opposed the right of the Federal government to screen out homosexuals from the military, and she even attacked the right of state and local governments to arrest and prosecute adult sex offenders who prey upon the young.<sup>7</sup>

I would argue that those Senators who believe that states and communities have a right of self-defense against the threats to public health and public morals posed by homosexual conduct should act on their professed concerns by voting against the confirmation of Mrs. Ginsburg.

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<sup>7</sup> Human Events, 7/3/93, "Ruth Ginsburg's Role With the ACLU" by Bill Donohue

Similarly, if you sincerely believe that homosexual conduct is incompatible with military service, you cannot, conscientiously or consistently, vote to confirm Mrs. Ginsburg---because as an unelected Supreme Court legislator she could be expected to regularly vote to overturn not only your opinion but that of your constituents.

In the same vein, is it not clear that Mrs. Ginsburg's view of the Fourteenth Amendment would preclude any distinctions being drawn on the basis of gender with respect to the assignment of women to combat?

And whether or not Mrs. Ginsburg has expressed, or even developed, a clearly defined view on other issues of Constitutional import, I would suggest that they are worth raising---not just in terms of her philosophical conformity to prevailing opinion, but in seeking to discern her willingness to accord overriding consideration to the original intentions of the Framers.

This committee has, over the years, asked Supreme Court nominees questions in detail on a variety of subjects ranging from contraception to bilingual ballots, but it has not probed in depth the views of the nominees on other issues of Constitutional significance.

By way of illustration, this year, this Senate is scheduled to conduct hearings on the question of D.C. statehood. What is the opinion of the nominee with respect to Article I, Section 8 of the Constitution, which makes clear that, without Constitutional amendment, the District of Columbia must operate as a Federal city under the jurisdiction of laws approved by the Congress?

What is the opinion of the nominee with respect to the Second Amendment? On what basis does she believe that Congress may be authorized to restrict the right of the people to keep and bear arms? Would she concede that the people have a Constitutional right to effective self-defense by bearing arms---a right reserved to them under the Ninth Amendment as well as the Second?

How does the nominee interpret that provision in Article I, Section 8, which extends to Congress---not to the President, not to the GATT, and not to NAFTA---the authority to "regulate commerce"?

The Constitution gives Congress authority "to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures". Our Federal Reserve system is clearly incon-

sistent with this Constitutional provision. What is the nominee's conclusion concerning this?

The First Amendment says "Congress shall make no law respecting an establishment of religion". Do not subsidies to educational and cultural entities inescapably involve the funding of activities which are religious in character? If so, is it not unconstitutional for the Federal government to subsidize such entities, even those which are purportedly secular?

Is it not in conflict with the First Amendment to require taxpayers to subsidize a National Endowment for the Arts, which underwrites some highly parochial views concerning the nature of God and man?

What is her opinion of the wanton destruction of human life in Waco, Texas and in Ruby Creek, Idaho initiated lawlessly by the Bureau of Alcohol, Tobacco and Firearms and by the United States Department of Justice?

Is the nominee willing to literally apply the Tenth Amendment to the Constitution, which states unequivocally that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people?

Mr. Chairman, members of the committee, Mrs. Ginsburg's nomination should be rejected:

As a Justice, she would not safeguard the God-given right to life. She would further subvert it. Freed of the constraints which tend to bind lower court judges to the decisions of the Supreme Court, we are obliged, on the record, to assume she would act on her belief that it is necessary to offer interpretations which depart radically from the original meaning of the Constitution.

And, rather than protect the Constitutional prerogatives of the Congress to set policy, it seems clear that Mrs. Ginsburg would, at least in some crucial areas, seek to establish herself as a "super-legislator".

I urge you to recall the words of Thomas Jefferson who recognized the danger of allowing members of the judiciary to substitute their own preferences for the clear intention of the Framers of the Constitution. In 1804 he warned that:

"...the opinion which gives to the judges the right to decide what laws are Constitutional and what not, not only for themselves in their own sphere of action, but for the legislature and executive also in their spheres, would make the judiciary a despotic branch."<sup>6</sup>

The members of the Senate in general, and of this committee in particular, have a unique responsibility to preserve not only the prerogatives of the Congress in relation to those of the Judiciary, but of the people with respect to the government.

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<sup>6</sup> *The Real Thomas Jefferson*, National Center for Constitutional Studies, Second Edition 1983, p. 497

The CHAIRMAN. I thank you very much for your testimony, and I have no questions. It seems very clear that your statements are crisp and self-explanatory, as were the previous panels', and I have no questions.

I yield to my friend from Utah.

Senator HATCH. Well, I want to welcome all of you here. I appreciate having your testimony. I have to say that your point, Ms. Cunningham, that through all those Reagan-Bush years both of those Presidents were accused of using the litmus test on abortion for the selection of their Supreme Court nominees—it is pretty apparent that they did not, and having known who did the vetting down there, who used to be a staff member of mine, I know they didn't. Yet, in this particular case there is no question that there was an abortion test.

But then again, this President won the election and, frankly, he has picked a Supreme Court nominee and I have to say that I personally disagree with her on this issue, but she is an excellent person and a fine judicial scholar, and I have said other things as well. But I appreciate having your testimony. I think it takes courage to come in and to express your viewpoints and the viewpoints of millions of people out there with regard to some of the problems surrounding this very important issue, and we appreciate having the testimony.

The CHAIRMAN. Senator Heflin.

Senator HEFLIN. I have no questions.

The CHAIRMAN. Senator Feinstein.

Senator FEINSTEIN. I have no questions other than to say I appreciate your point of view. I managed to hear most of the testimony and appreciate it very much.

The CHAIRMAN. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman. I have no questions. I join my colleagues in thanking you for coming in. I think it is very important that this committee hear your views and consider them. Thank you all very much.

The CHAIRMAN. Let me state one thing, if I may, before I dismiss the panel. It is true that during the nomination, if my recollection serves me correctly, the President did say he would, in fact, look for and appoint someone who holds the view that they are, quote, "pro-choice," I think was the phrase he used.

At the time, I publicly criticized that view because I don't think there should be any test. But with regard to the more narrow issue of whether or not this nominee was, to use the phrase the Senator from Utah used, vetted, which is sort of a term of art used up here—you remember those days, Kay—that question was specifically asked of the nominee and answered.

The question was—and I would ask that this be entered in the record, the whole question. I will read part of it:

Has anyone involved in the process of selecting you as a judicial nominee (including but not limited to a member of the White House staff, the Justice Department, or the Senate or its staff) discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question.

and it goes on from there.

The answer to the question by the nominee is,

I repeated on June 14, 1993, just after the President announced his nomination for the Supreme Court vacancy, that a judge is bound to decide each case fairly, in accord with the relevant facts and the applicable law.

It goes on to say,

No such person discussed with me any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning my position on such case, issue, or question.

During the six months prior to the announcement of my nomination, I had no communication with any member of the White House staff, the Justice Department or the Senate or its staff referring or relating to my views on any case, issue or subject that could come before the United States Supreme Court.

[The question and answer referred to follow:]

*Question.* Has anyone involved in the process of selecting you as a judicial nominee (including but not limited to a member of the White House staff, the Justice Department, or the Senate or its staff) discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, please explain fully. Please identify each communication you had during the 6 months prior to the announcement of your nomination with any member of the White House staff, the Justice Department, or the Senate or its staff referring or relating to your views on any case, issue or subject that could come before the United States Supreme Court, state who was present or participated in such communication, and describe briefly what transpired.

*Answer.* I repeated on June 14, 1993, just after the President announced his nomination for the Supreme Court vacancy, that a judge is bound to decide each case fairly, in accord with the relevant facts and the applicable law. The day a judge is tempted to be guided, instead, by what "the home crowd wants" is the day that judge should resign and pursue other work. It is inappropriate, in my judgment, to seek from any nominee for judicial office assurance on how that individual would rule in a future case. That judgment was shared by those involved in the process of selecting me. No such person discussed with me any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning my position on such case, issue, or question.

During the six months prior to the announcement of my nomination, I had no communication with any member of the White House staff, the Justice Department or the Senate or its staff referring or relating to my views on any case, issue or subject that could come before the United States Supreme Court.

The CHAIRMAN. Now, that may be a distinction in practical effect without a difference, but it is not a distinction without a difference as it relates to whether or not the issue that was before us in the past, and will be before us with every nominee while it is included as far as anyone, when asked and nominated or considered or being vetted, is asked a specific position on a specific issue. That is in the record.

I will ask, since the nominee is still under oath for purposes of questions that are submitted to her in writing—although this is the same effect, but for precision reasons and for strict legal reasons, I will ask this question to be submitted, along with the others that are being submitted on other matters, to the nominee so we have on the record from the nominee under oath whether or not the assertion made by her in this questionnaire is precisely accurate.

I thank you all.

Senator HATCH. Could I just add one other thing? I was interested in the Washington Post's editorial—I believe it was today—on litmus tests. The point that needs to be made is that this Senator rejects the concept that any single litmus test should stop somebody from serving on the Supreme Court because if we start deciding who serves there purely on political grounds, then we will politicize that institution which I think means so much to all of us.

It is precisely that position that I think rebuts that editorial because we have had Senators on this committee say that they will not vote for somebody who does not support *Roe v. Wade*, and I think that is wrong. I think that no single issue rises to the dignity of foreclosing the right of people to serve on the Supreme Court, as important as all of you believe this to be and as important as I believe it to be.

Mr. PHILLIPS. Senator, may I respectfully say that while you may choose to vote for or against on any other basis, it is in that same spirit clear from the Constitution that every Senator may, for any reason, choose to confirm or any reason choose to reject.

Senator HATCH. Oh, sure.

Mr. PHILLIPS. And I would argue that the question of equal protection of innocent life, the defense of the unborn, is more important than the color of our hair or the neckties we choose to wear, and that the Supreme Court has, in effect, been permitted to become a supreme legislature.

We are kidding ourselves if we believe that the Supreme Court is not a political body. As Charles Evans Hughes said very eloquently in *Riley* at an early point, the Constitution is what the members of the Supreme Court say it is. I don't happen to agree with that, but that is the prevailing situation.

Senator HATCH. I have made some of those same arguments, but my point is that it is one thing to criticize for litmus tests when people hold candidates or nominees liable for them, and it is another thing to criticize for litmus tests when they don't. Frankly, I don't think that there should be a single litmus test.

Sure, the Supreme Court has its political aspects, but it is the least politicized institution in our society, and I would like to keep it that way as much as I can. I think there is a difference, and it is a significant difference, and personally I felt that the editorial was somewhat anti-intellectual.

Mr. PHILLIPS. The American people have manifested growing dissatisfaction with their political system, with the accountability of that system, and that is because very often those whom they elect to office, professing to take a particular position on a certain issue, in office do not vote in a manner consistent with that. That is one of the reasons I am trying to build a new political party called the U.S. Taxpayers Party.

Senator HATCH. I understand that.

Mr. PHILLIPS. There are a number of Senators in the Republican Party, in particular, who profess to take a strong prolife position who, in fact, know that in voting for the confirmation of Ms. Ginsburg they are voting to advance the cause of abortion, and I think that is a tragedy and, frankly, I think it is a violation of the good-faith commitments which were made to the electorate by them.

Senator HATCH. Well, I respectfully disagree with you on that because I think that the place to make the change is in the legislature, not in the Supreme Court. I think that the place to make the change is in the elected representatives of the people. As you and I both well know, the vast majority of Members of Congress are not on our side on this issue and we have been losing regularly, except with regard to Federal funding of abortion.

So don't try and change the Supreme Court in the sense of politicizing it and electing people who will be prolific. I think that we have got to do is elect people who—by the way, I think you could have started with the President of the United States last time. We now have a President who believes this way and he has picked a person who believes this way, and he has a right to do so and that is the point.

Well, we could argue about it all day. All I can say is the place to change it is in the Congress of the United States, not the Court.

The CHAIRMAN. Thank you, Senator, and I want reiterate what Senator Feinstein said. It is important that your viewpoint be represented, and it is important that the American people hear a different perspective on this issue, and we thank you for being here to do that, and you have all delivered your point of view concisely and well. So thank you very much for being here.

Mr. PHILLIPS. Thank you for your courtesy. We appreciate it.

The CHAIRMAN. Now, our last, but certainly not our least panel is comprised of the presidents of three additional bar associations: California Women Lawyers, Hispanic National Bar Association, and the Association of the Bar of the City of New York. We all know New York is an independent, standing nation in and of itself. That is kind of a joke.

At any rate, every time I say this to Mr.—is it pronounced Feerick?

Mr. FEERICK. Yes, Senator.

The CHAIRMAN. Mr. Feerick, I am always reminded of that poster of one of the leading political figures in American politics of the day, and probably the most dynamic—Mr. Wiesenfeld is here, too? Would he come forward, too? He was on the last panel, but would he come forward as well?

I am reminded of that poster that they sell in New York, which is my favorite city in the country, a picture of this very significant American politician, one of the dynamic forces in American politics today, standing on Seventh Avenue and astride Seventh Avenue. It is a map of the United States, and Seventh Avenue is in stark relief and California is minuscule as he looks out over the Nation, which has always sort of been my view of how most New Yorkers view the world and the Nation. There is New York and then there is the rest. The New York City Bar Association is one of the only city bar associations that asks to testify, and I know its members are clear that from their perspective, it is more important than the New York State Bar Association.

Thank you for your good humor. It is getting late in the process, and I apologize for my digression here.

Angela M. Bradstreet is the current president of California Women Lawyers, which probably has more members than the constituents in my entire State.

Ms. BRADSTREET. That is correct, Senator.

The CHAIRMAN. How many members, Angela?

Ms. BRADSTREET. 30,000, Senator.

The CHAIRMAN. No; our State is bigger than that.

It is the largest women's bar association in America. She is also a partner at Carroll, Burdick and McDonough in San Francisco. Is that correct?

**Ms. BRADSTREET.** That is correct, Senator.

The CHAIRMAN. Carlos Ortiz is the national president of the Hispanic National Bar and has been before this committee—the bar has been represented here and is one of the premier organizations in the country, and we are delighted to have you here to testify.

John Feerick is the president of the Association of the Bar of the City of New York. He is also the dean of one of the fine law schools in the country, Fordham Law School.

Also from a previous panel—and we apologize if we have confused you, Mr. Wiesenfeld, as to when we were going to ask you to be here, but thank you for being here. I am looking for your bio here as I go through my—anyway, you were a client of the soon-to-be-Justice.

**Mr. WIESENFELD.** Stephen Wiesenfeld from *Weinberger v. Wiesenfeld*.

The CHAIRMAN. Yes, but we had more information about you as well I was going to read in the record, but if you are satisfied with that description and that introduction we'll let it stand.

Why don't we begin in the order that I have asked you to testify and, Ms. Bradstreet, why don't you begin your testimony. Thank you for coming across the country to be here.

**PANEL CONSISTING OF ANGELA M. BRADSTREET, CALIFORNIA WOMEN LAWYERS, SAN FRANCISCO, CA; CARLOS G. ORTIZ, PRESIDENT, HISPANIC NATIONAL BAR ASSOCIATION; JOHN D. FEERICK, PRESIDENT, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK; AND STEPHEN WIESENFELD, FORT LAUDERDALE, FL**

#### **STATEMENT OF ANGELA M. BRADSTREET**

**Ms. BRADSTREET.** Thank you, Senator. It has been the thrill of a lifetime.

Chairman Biden, distinguished members of this committee, I am deeply honored to be here on behalf of California Women Lawyers to express our strong support of President Clinton's nomination of Judge Ruth Bader Ginsburg as an Associate Justice of the Supreme Court.

California Women Lawyers is, in fact, the largest women's bar association in the Nation, representing the interests of over 30,000 women attorneys in the State of California.

The CHAIRMAN. Excuse me for interrupting. When you say represent the interests, does that mean there are 30,000 women who are dues-paying members of the bar association?

**Ms. BRADSTREET.** We have about 10,000 who are actually dues-paying members of our organization, Senator.

The CHAIRMAN. Thank you very much.

**Ms. BRADSTREET.** By the way, I did get the statistics for your State, if you are interested.

The CHAIRMAN. I am.

**Ms. BRADSTREET.** Well, I got them from the American Bar Association yesterday, and there are 495 women attorneys out of a total of 2,150.

The CHAIRMAN. Well, 25 percent; we are getting there.

**Ms. BRADSTREET.** Yes.

Our mission, Senator, is the advancement of women in the legal profession and the complete eradication of gender bias in our society. We are privileged to currently be assisting Senator Feinstein in her tireless work on issues affecting women, and it is a special honor to be appearing before our first senior woman Senator from California.

After a thorough and formal evaluation process involving a review of her legal opinions, cases argued, writings, and interviews with respected peers which examined her intellectual qualifications, judicial temperament, lack of bias, and analytical skills, California Women Lawyers found Judge Ruth Ginsburg to merit the highest rating possible to serve as an Associate Justice.

Judge Ginsburg's contribution as a pioneer of women's rights cannot be overstated, for, as has been noted, she won five of the most important sex discrimination cases that have ever before been argued before the Supreme Court of the United States. Indeed, the case of *Frontiero* has been hailed as a landmark decision in establishing gender parity as a constitutional mandate in the workplace.

When only 20 years ago she persuaded a majority of Justices that a law which, in essence, denied a working woman equal pay to a working man, Judge Ginsburg forged not only a dynamic reinterpretation of the equal protection clause, but also a fundamental positive change in society's previous stereotypical attitudes toward women in the workplace.

Her explicit recognition that, and I quote:

The shape of the law on gender-based classification indicates and influences the opportunity women will have to participate as men's full partners in the Nation's social, political and economic life.

is cause for great optimism that this nominee's presence on the Supreme Court will make a major difference in the achievement of complete gender equality for all.

Her prolific writings also demonstrate that Judge Ginsburg recognizes and will work earnestly to protect a woman's right to choose. Her approach to choice, suggesting that a constitutionally protected sex-equality perspective should also be adopted, in addition to a due process privacy perspective, is a well-reasoned one, for the notion that we as women should be in control of our own destiny is crucial to our attaining an equal place in society.

It is therefore, Mr. Chairman, particularly apt that the appointment of one who has paved the way for women's equality as the second woman Justice on the Supreme Court should symbolize an historic departure from the tokenism that has traditionally existed in the appointment of women to positions of power.

With still only 14.5 percent of circuit court positions and barely 13 percent of district court positions being filled by women today, Judge Ginsburg's appointment to the highest court in the land will take this Nation a giant step forward in shattering the glass ceiling of our legal profession and indeed in other professions, too.

In conclusion, California Women Lawyers most respectfully urges the distinguished members of this committee to vote in favor of the nomination of this outstanding woman to whom all women today owe a great debt.

Thank you so much.

[The prepared statement of Ms. Bradstreet follows:]

## PREPARED STATEMENT OF ANGELA M. BRADSTREET

Senator Biden and distinguished Senators: I am deeply honored to be here on behalf of California Women Lawyers to express our strong support of President Clinton's nomination of Judge Ruth Bader Ginsburg as an Associate Justice of the United States Supreme Court.

California Women Lawyers is the largest women's bar association in the nation, representing the interests of over 30,000 women attorneys in the State of California. Our mission is the advancement of women in the legal profession and the eradication of all forms of gender bias in our society generally. We are privileged to currently be assisting Senator Dianne Feinstein in her tireless work on issues affecting women.

After a thorough and formal evaluation process involving a review of her legal opinions, cases argued, writings and interviews with respected peers, which examined her intellectual qualifications, judicial temperament, lack of bias and analytical skills, California Women Lawyers found Judge Ruth Bader Ginsburg to merit the highest legal rating possible to serve as an Associate Justice of the Supreme Court, that is, exceptionally well qualified.

Judge Ginsburg's contribution as a pioneer of women's rights cannot be overstated. For she won five of the most important sex discrimination cases that have ever been argued before the Supreme Court of the United States. Indeed, the case of *Frontiero v. Richardson* has been hailed as a landmark decision in establishing gender parity as a constitutional mandate in the workplace. When twenty years ago she persuaded a majority of the Justices that a law automatically allowing married men in the military, but not married women, medical care benefits for a spouse in essence denied a working woman equal pay to a working man, Judge Ginsburg forged not only a dynamic reinterpretation of the equal protection clause, but also a fundamental change in society's previous stereotypical attitudes towards women in the workplace.

Indeed her explicit recognition that "the shape of the law on gender based classification \* \* \* indicates and influences the opportunity women will have to participate as men's full partners in the nation's social, political and economic life" (*Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, R. Ginsburg, 63 N. Carolina L.R., 375) is cause for great optimism that this nominee's presence on the Supreme Court will make a major difference in the achievement of complete gender equality for all.

Her prolific writings also clearly demonstrate that Judge Ginsburg recognizes, and will work earnestly to protect, a woman's right to choose. Her approach to choice, suggesting that a constitutionally protected sex-equality perspective should be adopted, rather than simply a due process privacy perspective, is a well reasoned one. For, the notion that we as women should be in control of our own destiny is crucial to our attaining an equal place in society.

It is, therefore, particularly apt that the appointment of one who has paved the way for women's equality all of her life as the second woman Justice on the Supreme Court of the United States should symbolize an historic departure from the tokenism that has traditionally existed in the appointment of women to positions of power. With still only 14.5 percent of Circuit Court positions and barely 13 percent of District Court positions filled by women today (U.S. Department of Justice), Judge Ginsburg's appointment to the highest court in the land will take this nation a giant step forward in shattering the legal glass ceiling.

In conclusion, California Women Lawyers applauds President Clinton for his outstanding nomination and I respectfully urge the distinguished members of this Committee to vote in favor of this nomination.

Thank you very much.

The CHAIRMAN. Thank you very much for your testimony.  
Mr. President. It has a nice ring to it, doesn't it?

## STATEMENT OF CARLOS G. ORTIZ

Mr. ORTIZ. It sounds OK.

Thank you very much, Chairman Biden and members of the Senate Judiciary Committee. I bring you greetings from the many thousands of Hispanic-American attorneys from around the country, many of whom are your constituents in your respective States.

On behalf of the Hispanic National Bar Association, I want to tell you that we are privileged to once again appear before your

committee. We have testified in four of the last five nominations, I believe, now, and we take it very seriously and consider it very important.

The CHAIRMAN. And we take your views very seriously.

Mr. ORTIZ. Thank you. Based upon the HNBA's investigation, Senator, and review of Judge Ginsburg's record, we support her nomination and we find that she is highly qualified to serve on the U.S. Supreme Court.

The HNBA is the only national organization that represents thousands of Hispanic American attorneys throughout this country. The HNBA has supported and opposed judicial nominees across the political spectrum. Therefore, we do not expect nominees to adhere to any particular ideology. Instead, we review a person's overall record, scholarship and philosophy. In each of these areas, Judge Ginsburg has an exceptional record, particularly in her path-breaking litigation on behalf of women victimized by discriminatory policies and practices.

Many Hispanics, including many thousands of Hispanic women across the Nation, have been the beneficiaries of her legal reform efforts, which are in the finest American legal tradition. Judge Ginsburg enjoys a reputation as an extraordinarily intelligent student of the law. Her academic record is excellent, as you have already heard from numerous witnesses. Judge Ginsburg has a stellar record as a law professor and as a prolific scholar on women's rights, comparative law, and civil procedure, again, as you have heard from many speakers that have preceded us.

As an advocate, Judge Ginsburg played a pivotal role in women's causes. Judge Ginsburg has an exemplary record of advocacy for civil rights and equal protection of women in America, and it is therefore our hope that Judge Ginsburg will be equally committed to equal protection and justice for Hispanic Americans and other minorities who continue to suffer the abuses and indignities of racism and discrimination in America.

The discrimination Hispanic Americans experience is widespread and varied. For example, an anti-immigrant sentiment is growing throughout our Nation. It has been caused in part by the slowdown in the economy and threatens the civil rights of all Hispanics, as well as other minorities residing in this country.

Another example of the injustices suffered by Hispanic Americans is the same sort of employment discrimination suffered by Judge Ginsburg herself merely because of her gender when she attempted to enter the job market upon graduation from law school. Employment discrimination is a daily experience for many Hispanic Americans. The unemployment rate for Hispanic Americans nationally and in many of the States you represent, like Illinois, Arizona, California, Massachusetts, is tragically high, and even those Hispanics who have attained a college education are confronted with a glass ceiling barring their promotion and advancement.

To remedy these and other social ills afflicting Hispanics, the Hispanic community will be increasingly turning to the courts and ultimately to the Supreme Court for relief and for enforcement of our civil and constitutional rights.

As a jurist, Judge Ginsburg has had an equally outstanding career. Having carefully reviewed her opinions, the HNBA finds Judge Ginsburg to be fair and conscientious. Her opinions call for the equal treatment and advancement of all those who live within our country's boundaries. Judge Ginsburg has responded sensitively to the needs of our country's women and minorities. She has been on the side of change—change toward shared participation by all members of our society in our Nation's economic and social life. Her work has been devoted to a broad vision of participatory democracy.

The HNBA knows that Judge Ginsburg will bring to the Supreme Court her unique and sensitive life experiences. We hope that she is able to project her life experiences of gender and religious discrimination to the plight of discrimination against Hispanic-Americans in many forms, including education, employment, housing, voting rights, immigration, health, social services, et cetera, and the list goes on and on.

Other victims of discrimination share our high hopes for Judge Ginsburg as Justice Ginsburg also. They believe that, given her outstanding leadership in fighting gender discrimination, Judge Ginsburg would likely be sensitive to discrimination across-the-board.

On a related and important note, we urge you, the members of this committee, to remember that the Hispanic community today faces the same formidable barriers of neglect and opposition that Judge Ginsburg encountered in her early career. In your own judicial recommendations, nominations and confirmations, we encourage you to draw from among the talented pool of Hispanic-Americans throughout our country's legal communities.

We also ask you to pay particular attention to the pressing need for Hispanic-Americans to sit and serve with distinction on the Nation's Federal courts, especially in such States as Illinois and Massachusetts where significant populations of Hispanic-Americans have never had an Hispanic Federal judge. We hope you will continue to view the HNBA as a resource in helping to make our Nation a better place for all Americans.

Before concluding our statement, we must express our sincere hope that the next nominee to the U.S. Supreme Court who comes before the Senate Judiciary Committee will be an Hispanic-American. Just as we believe the Nation will benefit from the appointment of Judge Ginsburg, we also strongly believe that our Nation needs and would greatly benefit from an Hispanic American—actually, the first ever Hispanic-American Supreme Court Justice.

In closing, the HNBA finds Judge Ginsburg highly qualified to serve on the United States Supreme Court and we look forward to her distinguished service.

Thank you.

[The prepared statement of Mr. Ortiz follows:]

#### PREPARED STATEMENT OF THE HISPANIC NATIONAL BAR ASSOCIATION

Chairman Biden, members of the Senate Judiciary Committee:

The Hispanic National Bar Association (HNBA) is privileged to present testimony to this Committee. Based upon the HNBA's investigation and review of Judge Ruth Bader Ginsburg, we support her nomination and find that she is highly qualified to serve on the United States Supreme Court.

The HNBA is the only national organization that represents thousands of Hispanic American attorneys throughout this country. The HNBA is a nonpartisan organization, and has supported and opposed judicial nominees across the political spectrum. Therefore, we do not expect nominees to adhere to any particular ideology; instead, we review a person's overall record, scholarship, and philosophy. In each of these areas, Judge Ginsburg has an exceptional record, particularly in her pathbreaking litigation on behalf of women victimized by discriminatory policies and practices. Many Hispanics have been the beneficiaries of her legal reform efforts, which are in the finest American legal tradition.

One of Judge Ginsburg's former classmates (now a state Supreme Court Justice in New Jersey) has described her as an extraordinarily intelligent student who was never arrogant about her intelligence. Her academic record is excellent. This is reflected in her graduation with honors from Cornell University and from Harvard and Columbia Law Schools.

Judge Ginsburg has a stellar record as a law professor, and as a prolific scholar in women's rights, comparative law, and civil procedure. She enjoyed a reputation for devotion to her students and to her scholarship. As a professor, Judge Ginsburg was a pioneer, becoming the first woman in the history of Columbia Law School to become a full professor and only the second woman to be hired by Rutgers Law School-Newark. Her publications are significant, reflecting insight and expertise in many areas.

As an advocate, Judge Ginsburg played a pivotal role in women's causes. While serving as counsel to the American Civil Liberties Union, she won five of six gender bias cases argued before the United States Supreme Court. She saw the need for action against gender discrimination and fashioned an incremental strategy to fight it. Judge Ginsburg has an exemplary record of advocacy for the civil rights and equal protection of women in America, and it is therefore our hope that Judge Ginsburg will be equally committed to equal protection and justice for Hispanic Americans, who continue to suffer the abuses and indignities of racism and discrimination in America.

The discrimination Hispanic Americans experience is widespread and varied. For example, an anti-immigrant sentiment is growing throughout our nation. This anti-immigrant sentiment has been caused in part by the slow-down of the economy and threatens the civil rights of all Hispanics as well as other minorities residing in this country. Moreover, Hispanics continue to be disproportionately represented in our jails and prisons for many reasons rooted in discrimination, while largely under-represented in our colleges, universities, and institutions of higher education for those same reasons. This has prompted the suggestion that we have dual systems of justice and of education in America.

Another example of the injustices suffered by Hispanic Americans is the sort of employment discrimination Judge Ginsburg herself faced when she attempted to enter the job market upon graduation from law school. Despite her sterling academic record, Judge Ginsburg was denied a United States Supreme Court clerkship and was turned away from numerous New York law firms because of her gender. Employment Discrimination is a daily experience for many Hispanic Americans. The unemployment rate for Hispanics in America is tragically high and even those Hispanics who have attained a college education are confronted with a "glass ceiling", barring their promotion and advancement. To remedy these and other social ills afflicting Hispanics, we will be turning increasingly to the courts, and ultimately to the Supreme Court, for relief and for enforcement of our civil and constitutional rights.

As a jurist, Judge Ginsburg has had an equally outstanding career. As a D.C. Circuit Court judge, Judge Ginsburg has addressed issues involving federal law on a daily basis. Because of the unique subject matter jurisdiction of the District of Columbia Circuit Court, Judge Ginsburg's current judgeship provides her with an excellent background for dealing with issues that will come before the United States Supreme Court. Judge Ginsburg is described as one who can bring people together and is committed to a collegial attitude. Former colleagues describe Judge Ginsburg as a healer who takes a very thoughtful, measured approach to problems. They have stated that she can bring people together because of her ability to listen and be fair. They believe she will have the ability to build consensus on the High Court.

Having carefully reviewed her options, the HNBA finds Judge Ginsburg to be a fair and conscientious judge. Her opinions call for the equal treatment and advancement of all those who live within our country's boundaries. Judge Ginsburg has responded sensitively to the needs of our country's women and minorities. She has been on the side of change—change toward shared participation by all members of our society in our nation's economic and social life.

Judge Ginsburg lectured on the role of women and the Constitution at the 1987 Eighth Circuit Judicial Conference in Colorado Springs, Colorado. There, she noted that the Constitution, as written in 1787, was a document for white, propertied adult males and she therefore rejected strict interpretation of the Framer's original intent as an unworkable form of Constitutional interpretation. She stated, "We still have, cherish and live under our eighteenth century Constitution because, through a combination of three factors or forces—change in society's practices, constitutional amendment, and judicial interpretation—a broadened system of participatory democracy has evolved, one in which we take just pride." Her life's work has been devoted to a broad vision of participatory democracy.

The HNBA knows that Judge Ginsburg will bring to the Supreme Court her unique life's experiences and sensitivity. We hope that she is able to project her life's experience of gender and religious discrimination to the plights of discrimination against Hispanic Americans in many forms, including education, employment, housing, voting, immigration, health, and social services, etc. Indeed, the HNBA hopes that Judge Ginsburg lives up to the 1987 speech that she gave in Colorado Springs. Specifically, we applaud her perspective that judicial interpretation can broaden the system of participatory democracy to include Hispanics to a greater degree than has occurred in this country's past history.

Other victims of discrimination share our high hopes for Judge Ginsburg as Justice Ginsburg. Anne H. Franke, counsel for the American Association of University Professors said of Judge Ginsburg, "We are very impressed by her dedication to discrimination cases. Having that kind of history of being a leader in the gender-discrimination area means she would likely be sensitive to discrimination across the board." Kenneth S. Tollett, an expert on desegregation law and a professor of higher education at Howard University, predicts that Judge Ginsburg's experience with sex discrimination would make her sensitive to problems facing African American students and historically African American colleges and is optimistic about her judicial perspective.

Judge Ginsburg has often been mentioned as a prospect for the Supreme Court, but that has neither prevented her from publicly addressing politically difficult and complex issues nor from making her views known. This is the type of courage that we expect of a United States Supreme Court Justice. The HNBA believes Justice Ginsburg will be as courageous and insightful as a member of our nation's highest court as she has been as an advocate for women, and as a judge on the Court of Appeals.

On a related and important note, we urge you to remember that the Hispanic community today faces the same combination of neglect and opposition Judge Ginsburg encountered in her early career. In your own judicial nominations, recommendations, and confirmations we encourage you to draw from among the talented pool of Hispanic Americans throughout our country's legal communities. The formal and informal barriers we face are as formidable as those Judge Ginsburg once encountered.

It must be noted that while we are pleased with the nomination of Judge Ginsburg, we are deeply disappointed that a Hispanic American has never been named to the United States Supreme Court. The HNBA persists in urging that a voice be given to the approximately 25 million Hispanic-Americans who now constitute the second largest and the fastest growing minority group in our nation. If our nation's highest court is to adequately reflect our nation's population and avoid the risk of losing its legitimacy, a Hispanic American must be appointed to the Court. Just as we believe the nation will benefit from the appointment of Judge Ginsburg, we also strongly believe that our nation needs—and would greatly benefit from—the appointment of a Hispanic American Supreme Court Justice.

We also ask you to pay particular attention to the pressing need for more Hispanics to sit and to serve with distinction on the lower federal courts. Hispanic-Americans are grossly under-represented in the judiciary in many regions of our nation. Houston, Texas, for example, a city with a significant Hispanic population, has no Hispanic federal judges. The state of Illinois has never had an Hispanic on any of its federal courts. In our nation's capital, the District of Columbia Circuit Court of Appeals, which will have a vacancy when Judge Ginsburg is elevated, has never had an Hispanic appointment. Moreover, there is no active Hispanic American judge today on any of our Circuit Courts of Appeals appointed by a Democratic President. The HNBA stands ready to assist you in locating Hispanic American talent. The HNBA has identified many highly qualified Hispanic American potential nominees.

In closing, the HNBA finds Judge Ginsburg highly qualified to serve on the United States Supreme Court and we look forward to her distinguished service.

Thank you for the opportunity to testify. I am willing to use the rest of my time to respond to any questions or comments the Committee may have of the HNBA.

The CHAIRMAN. Thank you very much.  
Mr. Feerick.

#### STATEMENT OF JOHN D. FEERICK

Mr. FEERICK. Senator Biden and members of the committee, my name is John Feerick and I am the current president of the Association of the Bar of the City of New York. I appreciate very much the opportunity to testify today regarding the nomination of Judge Ginsburg.

I am joined by Helene Barnett, who sits immediately behind me, who chaired the subcommittee of the governing body of our association that conducted the evaluation on behalf of our association.

The CHAIRMAN. Welcome, Ms. Barnett.

Mr. FEERICK. As this committee is aware, the Association of the Bar of the City of New York is one of the oldest bar associations in the country and, since its founding in 1870, has given priority to the evaluations of candidates for judicial office. As far back as 1874, the association has reviewed and commented on the qualifications of candidates for the U.S. Supreme Court. It is a particular honor to participate in this confirmation process for this particular nominee, who is also a member of our association and served on our executive committee from 1974 to 1978.

In May 1987, our association adopted a policy that directs the executive committee, our governing body, to evaluate all candidates for appointment to the U.S. Supreme Court. The executive committee has developed an extensive procedure for evaluating Supreme Court nominees, including a process for conducting research, seeking views of persons with knowledge of the candidate and of our membership of more than 19,000 dues-paying members of the New York and other bars. As well, we evaluate the information received and express a judgment on the qualifications of a person for the U.S. Supreme Court.

Judge Ginsburg is the first nominee to be evaluated under our recently adopted set of guidelines. The association's effort, as I have already noted, was undertaken by a subcommittee of our executive committee and our committee on the judiciary, which joint committee was chaired by Helene Barnett.

In examining the qualifications of Judge Ginsburg, the following materials were reviewed by our association: all of her more than 300 written opinions, concurrences and dissents while sitting on the U.S. Court of Appeals for the District of Columbia; her published articles and lectures; information relating to Judge Ginsburg's 1980 D.C. Circuit nomination and confirmation; comments solicited from association members presented in writing and at a forum held at our association; and news articles, commentaries and other materials with regard to the nomination.

Members of the executive committee also interviewed Judge Ginsburg. In addition, dozens of interviews were conducted with her judicial colleagues, academic colleagues, and former law clerks, and lawyers who litigated with and against or argued before Judge Ginsburg.

Our executive committee, upon evaluating the qualifications of Judge Ginsburg, passed a resolution at its meeting of July 14, 1993, finding her qualified to be a Justice of the U.S. Supreme

Court based on our committee's affirmative finding that she possesses to a substantial degree all of the qualifications enumerated in the association's guidelines for evaluations of nominees to the U.S. Supreme Court—exceptional legal ability, extensive experience and knowledge of the law, outstanding intellectual and analytical talents, maturity of judgment, unquestionable integrity and independence, a temperament reflecting a willingness to search for a fair resolution of each case before the Court, a sympathetic understanding of the Court's role under the Constitution in the protection of the personal rights of individuals, and an appreciation of the historic role of the U.S. Supreme Court as the final arbiter of the meaning of the United States Constitution, including a sensitivity to the respective powers and reciprocal responsibility of the Congress and the Executive.

The association's guidelines do not provide for gradations of ratings, and thus only permit a rating of qualified or unqualified. These guidelines do, however, establish a very high standard, a standard which, in our opinion, Judge Ginsburg clearly meets.

We look forward to a long and exceptional career on the Supreme Court for Judge Ginsburg, and I am once again very grateful to you and this committee for the opportunity to share those views with you.

[The prepared statement of Mr. Feerick follows:]

## PREPARED STATEMENT OF JOHN D. FEERICK

My name is John D. Feerick and I am President of the Association of the Bar of the City of New York. Thank you very much for the opportunity to testify before the Senate Judiciary Committee today regarding the nomination of Judge Ruth Bader Ginsburg to the United States Supreme Court.

The Association of the Bar of the City of New York is one of the oldest bar associations in the country, and since its founding in 1870 has given priority to the evaluation of candidates for judicial office. Our Committee on the Judiciary was one of the four committees formed at the Association's inception. As far back as 1874, the Association has reviewed and commented on the qualifications of candidates for the United States Supreme Court. We have also studied the Senate Confirmation process, and last year submitted to this Committee a report and recommendations with regard to the process. It is thus a particular honor to participate in the confirmation process for this highly distinguished nominee, who is also a member of our Association and served on our Executive Committee from 1974 to 1978.

In May 1987, the Association adopted a policy that directs the Executive Committee, our governing body, to evaluate all candidates for appointment to the United States Supreme Court. The Executive Committee has developed an extensive procedure for evaluating Supreme Court nominees, including a process for conducting research, seeking views of persons with knowledge of the candidate and of our membership, and evaluating the information received. The Committee then applies what it learns about a candidate to a rigorous set of guidelines comprising qualifications we believe are essential in a Supreme Court Justice. Indeed, Judge Ginsburg is the first nominee to be evaluated under this set of guidelines. The Association's effort was largely undertaken by the work of a joint subcommittee of our Executive Committee and our Committee on the Judiciary.

In examining the qualifications of Judge Ginsburg, the following materials were reviewed:

- all of Judge Ginsburg's more than 300 written opinions, concurrences and dissents while sitting on the U.S. Court of Appeals for the D.C. Circuit;

- published articles and lectures by Judge Ginsburg;
- information relating to Judge Ginsburg's 1980 D.C. Circuit nomination and confirmation;
- comments solicited from Association members, presented in writing and at a forum held at the Association; and
- news articles, commentaries and other materials with regard to the nomination.

Members of the Executive Committee also interviewed Judge Ginsburg. In addition, dozens of interviews were conducted with her judicial colleagues, academic colleagues and former law clerks, and lawyers who litigated with and against or argued before Judge Ginsburg.

The Executive Committee, upon evaluating the qualifications of Judge Ginsburg, passed the following resolution at its meeting of July 14, 1993:

The Association of the Bar of the City of New York finds that Judge Ruth Bader Ginsburg is qualified to be a Justice of the United States Supreme Court based on the Executive Committee's affirmative finding that she possesses to a substantial degree all of the qualifications enumerated in the Association's Guidelines for evaluation of nominees to the United States Supreme Court:

- exceptional legal ability
- extensive experience and knowledge of the law
- outstanding intellectual and analytical talents
- maturity of judgment
- unquestionable integrity and independence
- a temperament reflecting a willingness to search for a fair resolution of each case before the Court
- a sympathetic understanding of the Court's role under the Constitution in the protection of the personal rights of individuals
- an appreciation of the historic role of the Supreme Court as the final arbiter of the meaning of the United States Constitution, including a sensitivity to the respective powers and reciprocal responsibility of Congress and the Executive.

The Association's Guidelines do not provide for gradations of ratings, and thus only permit a rating of qualified or unqualified. These guidelines do, however, establish a very high standard, a standard which Judge Ginsburg clearly meets.

We look forward to a long and exceptional career on the Supreme Court for Judge Ginsburg.

I will be pleased to answer your questions.

The CHAIRMAN. Well, we are very grateful that you would take such time and with such thoroughness examine the record of nominees. One of the reasons why we do, in fact, ask your association to be here is because of its over 100-year practice of being involved.

I have often wanted to ask you, and I will reserve it now for maybe over a cup of coffee, what you all did during the Tammany Hall days. I would like to know more about that.

Mr. FEERICK. I have to research that myself.

The CHAIRMAN. I am serious. It would be a fascinating thing to look at. I have often wondered whether or not the origins of the practice of the bar of New York City of looking into judicial nominations was a response to the patronage system and concern about it that existed in the days of the late 19th century. It has just been an historical curiosity on my part. Maybe if the historian of the association knows the answer to that, I would appreciate being dropped a note for my own edification, no other reason.

Mr. FEERICK. You are certainly correct in pointing to corruption in New York as being a precipitating cause of the founding of our bar association, which is exactly right.

The CHAIRMAN. I thank you for your testimony.

Mr. FEERICK. Thank you.

The CHAIRMAN. Now, Mr. Wiesenfeld, it is a pleasure to have you here. You have been immortalized by your being a participant, and a named participant, in one of the most significant Supreme Court cases of the last 20 years, and maybe longer, and it is a pleasure to have you here. The floor is yours for 5 minutes.

#### STATEMENT OF STEPHEN WIESENFELD

Mr. WIESENFELD. Thank you, Chairman Biden. Senators, I would like to thank you for inviting me here, and I would also like to thank my very special friend, Jane DeFalco, sitting behind me, for accompanying me here today.

The CHAIRMAN. Welcome, Ms. DeFalco.

Mr. WIESENFELD. My wife, Paula, and I were married in 1970. Not unlike Martin Ginsburg and his wife, Ruth Bader Ginsburg, we were among the pioneers of alternative family lifestyles. Paula was a high school math teacher at Edison High School in Edison, NJ, and she was completing studies for her Ph.D. She wanted her career in school administration.

I, having already received several graduate degrees, and having already seen big business, decided to be a self-employed consultant. It was our plan that I would take on the primary household chores, including those related to the raising of our son, Jason.

In 1972, my wife, Paula, passed away. She worked right up to the last day. With each paycheck, she made the maximum contribution to the Social Security system. When she died, I approached the Social Security office in New Brunswick, NJ, and applied for the insured benefits for myself and our son, Jason. I was denied widow's benefits.

At that time, the law allowed that both men and women alike would contribute to the Social Security insurance system based upon their earnings. If the male died, his Social Security insurance would then accrue to pay benefits to the family he left behind. If the woman died, even though her contribution was equal to that

of the male, no such insurance benefit would accrue to her surviving spouse.

The contributions that my wife, Paula, had made to be insured under the Social Security system essentially got lost in the system. Women not only earned less money than men for the same work, they were also forced to contribute to a Social Security system that did not insure them with equal protection.

Some months later after reading a story in the New Brunswick Home News about widowed men, I wrote a letter to the editor detailing this inequity. I was then contacted by Phyllis Boring, a professor at Rutgers University, who inquired if I would like to pursue this matter legally. She then introduced me to Ruth Bader Ginsburg.

Ruth Bader Ginsburg, a clear-thinking person endowed with insight and forethought, a person already painfully aware of gender-based discrimination, saw immediately the gains, the consequences, and the long-range effects and the logistics of revising this inequity in the Social Security system. Ruth Bader Ginsburg proceeded to file suit against Casper Weinberger, then Secretary of Health, Education and Welfare.

First, in a three-judge Federal district court in Trenton, NJ, then Columbia law professor Ruth Bader Ginsburg forcefully argued her position on gender-based discrimination in the Social Security system. Using clear, concise arguments, she won a unanimous 3-0 decision allowing that the Social Security laws were in violation of the equal protection clauses of the 5th and 14th amendments.

Casper Weinberger and the Department of Health, Education and Welfare appealed this decision to the U.S. Supreme Court. In January 1975, Ruth Bader Ginsburg appeared before the U.S. Supreme Court expecting a mere minimum decision affirming the three-judge Federal district court's decision.

In *Weinberger v. Wiesenfeld*, Ruth Bader Ginsburg again produced compelling arguments that gender-based discrimination as part of the Social Security laws was a clear violation of the equal protections clauses of the 5th and 14th amendments to the Constitution of the United States of America. On March 19, 1975, the Supreme Court astounded everyone by handing down a unanimous decision upholding the decision of the three-judge Federal district court, proving that the visions of Ruth Bader Ginsburg were clearly correct.

*Weinberger v. Wiesenfeld* was a landmark decision in the quest for equal rights for men and women. It remains still the strongest stand the Supreme Court has ever taken to strike down gender-based discrimination. This is one of the many accomplishments of Judge Ruth Bader Ginsburg. I am proud to appear before this esteemed committee today and to add my voice to the many who stand with and wish to see this committee confirm Judge Ruth Bader Ginsburg to the U.S. Supreme Court.

Thank you.

[The prepared statement of Mr. Wiesenfeld follows:]

PREPARED STATEMENT OF STEPHEN WIESENFELD

My wife Paula and I were married in 1970. Not unlike Martin Ginsburg and his wife Ruth Bader Ginsburg, we were among the pioneers of alternate family life styles. Paula was a high school math teacher at Edison High School in Edison, New

Jersey, and was completing studies for her Ph.D. She wanted her career in school administration. I, having already received several graduate degrees and having already seen big business, decided to be a self-employed consultant. It was our plan that I would take on the primary household choices including those related to the raising of our son, Jason.

In 1972, my wife, Paula, passed away. She worked right up to the day she died. With each pay check, she made the maximum contribution to the Social Security system. When she died, I approached the Social Security office in New Brunswick, New Jersey, and applied for the insured benefits for myself and our son, Jason. I was denied widow's benefits.

At that time, the law allowed that both men and women, alike, would contribute to the Social Security insurance system based upon their earnings. If the male died, his Social Security insurance would then accrue to pay benefits to the family he left behind. If the woman died, even though her contribution was equal to that of a male, no such insurance benefit would accrue to her surviving spouse. The contributions that my wife, Paula, had made to be insured under the Social Security system essentially got lost in the system. Women not only earned less money than men for the same work, they were also forced to contribute to a Social Security system that did not insure with equal protection.

Some months later, after reading a story in the new Brunswick Home News about widowed men, I wrote a letter to the editor detailing this inequity. I was then contacted by Phyllis Boring, a professor at Rutgers University, who inquired if I would like to pursue this matter legally. She then introduced me to Ruth Bader Ginsburg.

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Ruth Bader Ginsburg proceeded to file suit against Casper Weinberger, then Secretary of Health, Education and Welfare.

First, in a three judge federal district court in Trenton, New Jersey, then Columbia University law professor Ruth Bader Ginsburg, forcefully argued her position on gender-based discrimination and the Social Security system. Using clear, concise arguments, she won a unanimous 3 to nothing decision allowing that the Social Security laws were in violation of the equal protection clause(s) of the fifth and fourteenth amendments.

Casper Weinberger and the Department of Health, Education and Welfare appealed this decision to the United States Supreme Court. In January of 1975, Ruth Bader Ginsburg appeared before the United States Supreme Court expecting a mere minimum decision affirming the three judge federal district court's decision.

In Weinberger vs. Wiesenfeld, Ruth Bader Ginsburg again produced compelling arguments that gender-based discrimination as part of the Social Security Laws was a clear violation of the equal protection clauses of the fifth and fourteenth amendments to the Constitution of the United States of America.

On March 19, 1975, the United States Supreme Court astounded everyone by handing down a unanimous decision of the three judge federal district court, proving that the visions of Ruth Bader Ginsburg were clearly correct.

Weinberger vs. Wiesenfeld was a landmark decision in the quest for equal rights for men and women. It remains, still, the strongest stand the Supreme Court has ever taken to strike down gender-based discrimination.

This is one of the many accomplishments of Judge Ruth Bader Ginsburg. I am proud to appear before this esteemed committee today and to add my voice to the many who stand with, and wish to see, this committee confirm Judge Ruth Bader Ginsburg to the United States Supreme Court.

The CHAIRMAN. Well, I thank you very much for your testimony. A little known fact—as we say, a point of personal privilege—is that I shared a similar fate that you did in 1972 and raised two children with a professional wife who had passed away, and it is amazing how much has changed.

I thank you all for taking the time and the effort, and I must say again that I have been impressed with how concise and thoughtful and how full in their support and opposition to Judge Ruth Bader Ginsburg the panels have been. Each of the six panels has served their position well, and each has served us by being here. I thank you very, very much.

Mr. Ortiz, I don't think we are going to have to wait much longer. At least, that is my hope and my expectation.

Senator do you have any comments?

Senator HATCH. Well, we are happy to have all of you here, and I have to say that, Mr. Ortiz, it was very close this time.

Mr. ORTIZ. Very close.

Senator HATCH. And I want to tell you that there are very few opportunities to fill these positions, and I want to commend the President for making an excellent choice here. We really appreciate the testimony of each of you, as we have all of the witnesses, including those who have testified in opposition. Everybody has been respectful and, I think, very considerate in their testimony, and you, in particular, have been.

Mr. Wiesenfeld, I have to tell you that your name, of course, goes down in history and has gone down in history as a very, very important name in the field of civil rights and human rights, and we appreciate you being here and taking the time to come after all these years.

Mr. WIESENFELD. A pleasure; I really enjoyed myself.

Senator HATCH. Well, thank you. Thanks, Mr. Chairman.

The CHAIRMAN. Speaking of being gracious and concise, running the risk that it could hurt him politically, I want to thank my friend from Utah. He has been, as the saying goes in this circumstance, a gentleman and a scholar. He has been extremely thoughtful and considerate, and the way in which my Republican colleagues have approached this nomination, I think, is a standard that I hope everyone will remember if and when the perilous day comes that a Republican is once again naming Supreme Court nominees.

I thank you, Senator, for the way in which you have not only cooperated, but the way in which you have led this committee.

Senator HATCH. Well, thank you, Mr. Chairman. I appreciate it.

#### CLOSING STATEMENT

The CHAIRMAN. There is nothing more, God willing, to come before this committee and this hearing, and I know the press will ask this question, so I will state it at the outset. It is my hope and expectation that next Thursday, which is in the normal course of proceeding within this committee, we will have before us in an executive session, which merely means with no business before us in terms of witnesses, but considering the nominations of individuals—it is my hope, with the permission of my Republican friends, to convene in executive session at 10:30 on Thursday morning next in order to consider the nomination of Ruth Bader Ginsburg to the Supreme Court, and for this committee to fulfill its internal Senate responsibilities of making a recommendation to the Senate as a whole as to whether or not she should be confirmed.

I want to end where I began. This committee and this hearing is and should only be one part of the process of examining whether or not someone should sit on the Supreme Court of the United States. Our job is to, as thoroughly as we can, look into the background and qualifications of a nominee, and then make a recommendation to the Senate as a whole.

The Constitution does not mention the Judiciary Committee; it mentions the U.S. Senate. We are operating at the request and at the will of the Senate as a whole, and next Thursday hopefully we will be able to make that recommendation to the U.S. Senate for the Senate's debate and consideration.

I thank you all. I thank everyone for their cooperation, all of my colleagues, and this hearing is adjourned.

[Whereupon, at 2:43 p.m., the committee was adjourned.]



## APPENDIX

### QUESTIONS AND ANSWERS

JOSEPH R. BIDEN Jr., DELAWARE, CHAIRMAN  
EDWARD M. KENNEDY, MASSACHUSETTS  
HOWARD N. METZENBAUM, OHIO  
DENNIS DECONCINI, ARIZONA  
PATRICK J. LEAHY, VERMONT  
HOWARD H. SMITH, ALABAMA  
PAUL SIMON, ILLINOIS  
HERBERT KOHL, WISCONSIN  
DIANNE FEINSTEIN, CALIFORNIA  
CAROL MOSELEY-BRAUN, ILLINOIS  
ORRM G. HATCH, UTAH  
STROM THURMOND, SOUTH CAROLINA  
ALAN K. SIMPSON, WYOMING  
CHARLES E. GRASSLEY, IOWA  
ANDREW P. DAVIS, WEST VIRGINIA  
MARK BROWN, COLORADO  
WILLIAM S. COHEN, MAINE  
LARRY PRESSLER, SOUTH DAKOTA  
CATHERINE C. HOGAN, CHIEF COUNSEL  
CATHERINE M. RUSSELL, STAFF DIRECTOR  
MARK A. DIESLER, MINORITY STAFF DIRECTOR  
SHARON FROST, MINORITY CHIEF COUNSEL

### United States Senate

COMMITTEE ON THE JUDICIARY  
WASHINGTON, DC 20510-6275

July 27, 1993

The Honorable Ruth Bader Ginsburg  
United States Court of Appeals for  
the District of Columbia Circuit  
333 Constitution Avenue, N.W.  
Washington, D.C. 20001

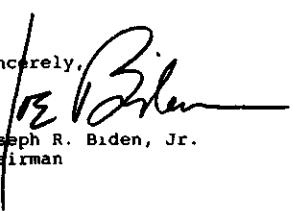
Dear Judge Ginsburg:

Following your testimony before the Judiciary Committee from July 20, 1993, to July 23, 1993, I respectfully request that you respond in writing to the attached additional questions that I have submitted as well as those of Senators Thurmond, Kohl, and Pressler. Your responses will be included in the hearing record as part of your sworn testimony.

Please direct your responses to the attention of Cathy Russell, Staff Director of the Committee. Your timely response is appreciated. Should you have any questions, please contact her at 224-5706.

Thank you for your assistance.

Sincerely,

  
Joseph R. Biden, Jr.  
Chairman

Enclosures

(567)

WRITTEN QUESTIONS FOR RUTH BADER GINSBURG  
FROM JOSEPH R. BIDEN, JR.  
July 27, 1993

1. At the hearings, you discussed the *Chevron* doctrine of statutory interpretation. See *Chevron USA v. NRDC*, 467 U.S. 837 (1984). Following the Supreme Court's decision, some courts have applied the "Chevron rule" to require deference to the agency's reasonable policy view unless Congress has resolved the precise matter at issue in a contrary way. Ready deference to the administrative agency whenever a statute is ambiguous or silent on a specific point stands in tension with a court's duty to reason from broad congressional statements of purpose to the particular issue before the court.

How should *Chevron* be applied in light of this tension? What are the limits on this doctrine, and what sort of factors would you take into account in determining the proper deference owed to agency interpretation?

2. In your written response to the Committee's questionnaire, you stated that:

It is inappropriate, in my judgment, to seek from any nominee for judicial office assurance on how that individual would rule in a future case. That judgment was shared by those involved in the process of selecting me. No such person discussed with me any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning my position on such case, issue, or question.

During the six months prior to the announcement of my nomination, I had no communication with any member of the White House staff, the Justice Department, or the Senate or its staff referring or relating to my views on any case, issue or subject that could come before the United States Supreme Court.

For the record, was any attempt made by anyone associated with the Administration to obtain a commitment concerning, or to determine, how you would decide any issue or case?

UNITED STATES COURT OF APPEALS  
DISTRICT OF COLUMBIA CIRCUIT  
WASHINGTON, DC 20001

RUTH BADER GINSBURG  
UNITED STATES CIRCUIT JUDGE

July 27, 1993

Senator Joseph R. Biden  
Senate Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Dear Senator Biden:

Enclosed, please find my responses to the written questions you forwarded to me today.

With appreciation for your interest.

sincerely,



Ruth Bader Ginsburg

Enclosures

Responses by Ruth Bader Ginsburg to Written Questions  
by Senator Joseph R. Biden, Jr., received July 27, 1993

1. The doctrine of deference to agency constructions of statutes applies when "Congress, through express delegation or the introduction of an interpretive gap in the statutory structure, has delegated policy-making authority to an administrative agency." *Pauley v. Benthenergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991). The first step in deciding whether deference is due, therefore, is to determine if the statute itself answers the question, leaving no gap for the agency to fill. This step requires the courts to "employ[] traditional tools of statutory construction." *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 n.9 (1984). The courts must examine "the language and structure of the Act as a whole" (*Dole v. United Steelworkers of America*, 494 U.S. 26, 41 (1990)) and any other pertinent evidence of the statute's proper meaning, including its legislative history (*id.* at 41-42) and "its object and policy" (*id.* at 35 (internal quotation marks omitted)).

In short, the task of statutory construction for the courts is neither mechanical nor narrow. Statutory language that might seem ambiguous in isolation, presenting a "gap" for the agency to fill, can take on a clear meaning in the light of full judicial consideration of congressional intent. Only if the reviewing court concludes that more than one answer is consistent with the congressional will expressed in the statute, having fully considered the relevant materials, is the agency charged with administering the statute owed deference.

Even then, deference is limited, because the reviewing court must determine whether the particular construction advanced by the agency is a "reasonable interpretation." *Chevron*, 467 U.S. at 844. Lack of a single congressionally determined meaning does not give the agency license to adopt any view it pleases. The agency view must itself be consistent with statutory language and congressional policy. *Chevron*, 467 U.S. at 843-45; *Pauley*, 111 S. Ct. 2534-35. Beyond that, the agency position must -- whether treated as a matter of statutory interpretation or as a matter of administrative policymaking subject to normal APA-review standards -- be internally reasonable. It must reflect reasoned decisionmaking, judged in light of such factors as the thoroughness of the agency's consideration of evidence and policies, the need for expertise on the question, and the consistency of the agency position with earlier views or the presence of articulated reasons for changing such views. *Id.* In this respect as in the initial task of statutory construction, the judicial role is anything but mechanical.

In the end, the courts' task is to ensure rational administration consistent with governing law, giving full weight to authoritative guidance from Congress. The "tensions" you describe are always present in determining where congressional constraint leaves off and agency discretion begins. The process demands sometimes-difficult judgment calls about when Congress has spoken with sufficient clarity. Greater legislative clarity, of course, reduces the difficulty of these judgments.

2. This is to confirm the response I gave to the committee's questionnaire: No attempt was made by anyone associated with the Administration to obtain a commitment concerning, or to determine, how I would decide any issue or case.

WRITTEN QUESTIONS FOR RUTH BADER GINSBURG  
FROM SENATOR STROM THURMOND

I want to ask you a few questions about the 10th Amendment to the United States Constitution.

As we all know, and as discussed here, the Constitution was submitted to the states by resolution of the Constitutional Convention on September 17, 1787. South Carolina was the eighth state to ratify on May 23, 1788.

The Bill of Rights, the first ten amendments to the Constitution, was proposed by Congress on September 25, 1789, and declared ratified on December 15, 1791.

After the Constitution was submitted and before it was ratified, assurances were made to Legislatures of the several states that the 10th Amendment as part of the Bill of Rights would become a part of the United States Constitution. These assurances assured the ratification of the Constitution.

What is your view of two levels of sovereignty guaranteed by the Constitution--State sovereignty and federal sovereignty?

What is your view of the separation of powers doctrine as enunciated by the founding fathers and guaranteed by the 10th Amendment?

What weight will you give to the 10th Amendment when considering laws enacted by Congress that pre-empt state authority and sovereignty?

In your judgment, does the 10th Amendment have meaning and worth today and in the future?

UNITED STATES COURT OF APPEALS  
DISTRICT OF COLUMBIA CIRCUIT  
WASHINGTON, DC 20001

RUTH BADER GINSBURG  
UNITED STATES CIRCUIT JUDGE

July 27, 1993

The Honorable Strom Thurmond  
Senate Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Dear Senator Thurmond:

Your questions about the Tenth Amendment were forwarded to me yesterday. I enclose a response, which I hope you will find satisfactory.

With appreciation for your interest.

sincerely,



Ruth Bader Ginsburg

Enclosure

**Response by Ruth Bader Ginsburg to Written Questions  
of Senator Strom Thurmond, received July 26, 1993**

In response to the four questions you asked about the Tenth Amendment, I have several overlapping thoughts and therefore hope you will find this composite answer satisfactory. The plan for dual sovereignty, confirmed in, and reinforced by the Tenth Amendment, is a core part of our Nation's history and an important reason for our Nation's success. Justice Black, in *Younger v. Harris*, 401 U.S. 37 (1971), spoke eloquently on this subject when he referred to the essential character of "Our Federalism." Many other Justices have expressed similar views over the years. "Our Federalism" has inspired foreign systems, notably, the European Economic Community members, and the motivating spirit of the Tenth Amendment should continue to contribute to the greatness of the United States.

As you note, the Tenth Amendment is vital to the Constitution's separation of powers scheme. The separation for which the Founders provided is indicated both by the tripartite structure established in the first three Articles of the Constitution, and by the Tenth Amendment. Further recognition of the sovereignty of the states is contained in the Guarantee Clause of Article IV, section 4.

Today, as in earlier years, the Tenth Amendment serves as a basic reminder -- first to Congress and then to the courts in interpreting congressional actions -- that the national government is one of limited powers and that the sovereignty of the states is a cornerstone in our constitutional structure. In specific application, the Amendment requires Congress to be clear and careful when it considers displacement of state authority with federal programs; and it requires the courts to insist on such clarity in cases involving claims that Congress has pre-empted state legislative, regulatory, or judicial authority.

**WRITTEN QUESTIONS FOR RUTH BADER GINSBURG  
FROM SENATOR HERB KOHL**

1. My home state of Wisconsin has taken a lead in allowing televised court proceedings. So I was especially pleased with your support for allowing cameras in the courts when you discussed this matter with Judge Heflin yesterday and with Senator Hatch today. But I'm not sure precisely where you stand with respect to televising Supreme Court oral arguments.

Almost two years ago, Justice Thomas told this Committee that "it would be good for the American public to see what's going on there" -- meaning the Supreme Court.

**QUESTIONS: Do you agree with Justice Thomas? Do you personally support televising Supreme Court oral arguments?**

UNITED STATES COURT OF APPEALS  
DISTRICT OF COLUMBIA CIRCUIT  
WASHINGTON, DC 20001

RUTH BADER GINSBURG  
UNITED STATES CIRCUIT JUDGE

July 27, 1993

The Honorable Herbert Kohl  
Senate Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Dear Senator Kohl:

Your written question, dated July 22, 1993, was forwarded to me yesterday. I enclose a response, which I hope you will find satisfactory.

With appreciation for your interest.

Sincerely,

*Ruth Bader Ginsburg*  
Ruth Bader Ginsburg

Enclosure

**Response by Ruth Bader Ginsburg to Written Question  
of Senator Herbert Kohl, dated July 22, 1993**

As I suggested at the Hearings, televised appellate proceedings can convey at once a picture not easily drawn in words spoken outside the courtroom. One can also view televised proceedings as an extension of the U.S. tradition of open proceedings.

I am sensitive, however, to concerns about distortion, and consider essential court control of any editing. Furthermore, I appreciate the need for good will among colleagues, and would not push my own preference without first hearing the views of others on this subject.

Just now an experiment with televised proceedings is ongoing in the federal courts, with several district courts and courts of appeals as participants. A report based on experience will be made to the U.S. Judicial Conference and the Conference may thereafter adopt a resolution on cameras in courts. It would be judicious to await the Conference report so that Supreme Court practice can be developed in light of the Conference discussion and recommendations.

LARRY PRESSLER  
SOUTH DAKOTA

United States Senate  
WASHINGTON, DC 20510-4101

COMMITTEES  
FOREIGN RELATIONS  
COMMERCE SCIENCE AND  
TRANSPORTATION  
SELECT COMMITTEE  
ON AGING  
SMALL BUSINESS  
JUDICIARY

July 23, 1993

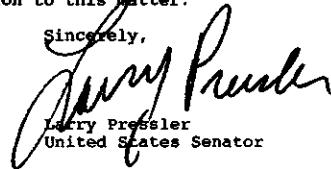
The Honorable Ruth Bader Ginsburg  
U.S. Supreme Court Nominee  
c/o Senate Judiciary Committee  
Dirksen Senate Office Building, Room 246  
Washington, D.C. 20510

Dear Judge Ginsburg:

As I mentioned in my questioning last Wednesday, I would appreciate your answering for the record the enclosed questions regarding issues of interest to the small business community.

Thank you for your attention to this matter.

Sincerely,



Larry Pressler  
United States Senator

LP/gwg  
Enclosures

SMALL BUSINESS

I would like to ask a couple of questions relating to business issues. While Ranking Member on the Small Business Committee, I intend to devote considerable attention during this Congress to improving the business climate for the small businesses of my state and throughout the nation.

## MINORITY SET-ASIDE PROGRAMS

In City of Richmond v. Croson, 488 U.S. 469 (1989), the Supreme Court overturned a minority set-aside program that had been implemented by the City of Richmond, Virginia. In doing so, the Court outlined a two-part test that must be met if state and local governments are to implement constitutional set-aside programs for minority contractors.

As I understand the test, it requires that local public sector entities must base remedial minority set-aside programs on their own past discriminatory practices -- not on more general societal wrongs that precipitated past discrimination against minority groups, even if ample historical evidence supports such a finding. Once a strong factual predicate is established, state and local governments must develop a set-aside program narrowly tailored to a specific goal.

You had occasion to apply the Croson standard in O'Donnell Construction Company v. District of Columbia, 963 F.2d 420 (1992). In that case, you wrote a concurrence in which you held with the majority that the District of Columbia Minority Contracting Act violated a local non-minority contractor's Fifth Amendment right to equal protection. You agreed that under the Croson test, where "race classification is resorted to for remedial purposes, measures must be narrowly focused and supported by a strong factual predicate". You also agreed that the District's Minority Contracting Act "falls short on both counts."

However, you go on to state that you concur "with the understanding, made clear by Croson, that minority preference programs are not per se offensive to equal protection principles, nor need they be confined solely to the redress of state-sponsored discrimination."

- 1) First, do you believe I have stated the holding in Croson correctly -- that (1) a state or locality must demonstrate a compelling governmental interest by relying on prior discrimination by the state or local government itself; and (2) a resulting set-aside program must be narrowly tailored to accomplish a remedial purpose?
- 2) Could you elaborate on what you meant in your O'Donnell concurrence when you state that it is your "understanding" that minority preference programs need not "be confined solely to the redress of state-sponsored discrimination."

Over 75 percent of the states and more than 190 U.S. localities have implemented some form of set-aside programs for minority contractors. In many of these instances -- such as in Richmond and the District of Columbia -- these programs were developed using the guidance of Fullilove v. Klutznick, 448 U.S. 448 (1980). However, cases such as Croson and Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) hold that Fullilove does not provide an appropriate standard for state and local governments since it applied to actions of the U.S. Congress taken under its specific constitutional mandate to enforce the dictates of the Fourteenth Amendment.

- 3) Do Croson, Wygant and their progeny provide state and local governments with a standard clear enough that they can revise their Fullilove based minority set-aside programs in such a manner as to make them constitutional? My basis for this question once again is your statement in O'Donnell that these programs need not "be confined solely to the redress of state-sponsored discrimination" and your additional statement that "remedy for past wrong is not the exclusive basis upon which racial classification may be justified."
- 4) Do the caveats you expounded in O'Donnell demonstrate your belief that communities and states can develop constitutional minority set-aside programs based on standards other than those established by Croson? If so, doesn't this leave the future of Croson somewhat unclear and the job of state and local officials trying to develop a constitutional program much more difficult?

## EMPLOYER V. UNION RIGHTS

In Microimage Display Division of Xidex Corporation v. National Labor Relations Board, 924 F.2d 245 (1991), you voted in the majority in a case involving a series of actions taken by Xidex Corporation following its purchase of a new plant that had been a union shop. The union alleged many of these actions constituted unfair labor practices. An administrative law judge and the NLRB agreed with the union on several points and you enforced their orders against Xidex.

- 1) In Xidex, the Circuit Court relied on the holding in NLRB v. Brown, 380 U.S. 278, 287-88 ((1965)) that "antiunion motivation will convert an otherwise ordinary business act into an unfair labor practice." Please elaborate on what you understand this standard to mean.
- 2) The Circuit Court in Xidex also makes the point that in conducting its review of NLRB actions, it would extend deference to the Board's findings of fact. Indeed, the court's opinion cites 29 U.S.C. 160(e) and explains its decision is governed by the statutory language that "the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."
  - a) Please explain your understanding of the phrase "substantial evidence on the record considered as a whole."
  - b) Do you find the use of the word "substantial" particularly instructive in making a fact-based determination that the National Labor Relations Act has been violated?
- 3) At another point in the opinion, the Circuit Court notes that "although a showing of antiunion animus does not automatically establish a violation of [the Act], it places on the employer the burden to prove that it would have undertaken the action alleged to be an unfair labor practice even in the absence of the antiunion sentiment." The Court goes on to find that "[h]ere, the employer failed to carry its burden; the Board was therefore justified in finding a violation" of the Act.

- a) What evidentiary standard must a union meet in order to demonstrate "antiunion animus" sufficient to shift the burden of proof to the company?
- b) What evidentiary standard is applied to employers once the burden of proof has shifted to them in these cases?

#### INCOME TAX DEDUCTION FOR HOME OFFICE EXPENSES

Earlier this year, the Supreme Court, in Commissioner v. Soliman, 113 S. Ct. 701 (1993), limited the availability of the home office income tax deduction for many taxpayers. While I know you did not have occasion to write an income tax opinion during your years on the Circuit Court, as the ranking member of the Small Business Committee, I would like to explore this issue. I am troubled by the decision in Soliman and what it could mean for small business men and women and other self-employed individuals.

As you may know, the issues in Soliman, revolved around an anesthesiologist who practiced in three local hospitals--none of which provided him an office. He used a room in his home for administrative office functions such as records keeping and billing. While the District and Circuit courts allowed his deduction of expenses associated with his home office, the Supreme Court reversed and created new factors to be considered in the determination of whether home office expenses are deductible.

In essence, it seems to me the decision wrote two new conditions into law--conditions that appear nowhere in the tax statutes written by Congress. The Court held that in deciding whether to allow a deduction for home office expenses, the IRS and the courts should take into account: (1) the relative importance of the activities performed at each business location; and (2) the time spent in each place.

The reason I am troubled by the decision is that it creates new standards based upon what the justices think Congress meant to say. While such an exercise certainly is part of the statutory interpretation responsibilities of the Court, it seems to me that in this case, the Justices read the statute very expansively--and did so

in favor of the IRS position at the expense of individual taxpayers' interests.

- 1) What is your philosophy concerning the Court's role in statutory interpretation? In answering, I would like to hear your views with regard to tax cases, but anything you would wish to add in a general vein on the subject also would be appreciated.
- 2) If you are familiar with Soliman, I also would appreciate any comments you might have concerning the Court's reasoning and decision in that case.

UNITED STATES COURT OF APPEALS  
DISTRICT OF COLUMBIA CIRCUIT  
WASHINGTON, DC 20001

RUTH BADER GINSBURG  
UNITED STATES CIRCUIT JUDGE

July 28, 1993

Senator Larry Pressler  
Senate Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Dear Senator Pressler:

The questions attached to your July 23, 1993 letter were forwarded to me yesterday. I enclose responses which I hope you will find satisfactory. If you wish me to supply, in writing, the answers I gave to the questions you asked on the second day of the Hearings, please tell me, and I will be glad to do so.

With appreciation for your interest.

Sincerely,

*Ruth Bader Ginsburg*  
Ruth Bader Ginsburg

Enclosures

**Responses by Ruth Bader Ginsburg to Written Questions  
by Senator Larry Pressler on Employer v. Union Rights  
received July 26, 1993**

In *Microimage Display Division of Xidex Corp. v. NLRB*, 924 F.2d 245 (D.C. Cir. 1991), a unanimous panel (Judges Henderson, Wald and R.B. Ginsburg), in an opinion by Judge Henderson, agreed to enforce an NLRB order in full in the face of cross-petitions for review by the employer and the union. The opinion is highly fact-specific and turns on the panel's statutorily-guided deference to the Board's decision.

The NLRB determined that the employer's threat to transfer work from its union to its non-union facility (which would have entailed laying off over twenty workers at the union plant) contravened section 8(a)(1) of the NLRA. That section declares it an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise of the rights guaranteed under [the NLRA] to engage in concerted activity for purpose of collective bargaining or other mutual aid or protection."

Evidence in the record indicated that prior to the threatened transfer, a company manager had declared his intent to develop a strategy to rid the company of the union. Following the threat, employees, with some employer encouragement, circulated a union decertification petition. The record indicated that after circulation of the decertification petition, the company reversed its plan to move work away from the union facility. Just over a month later, the employer terminated recognition of the union, and actually transferred in work from its other, non-union plant.

Based on a full review of the record, the panel accepted the Board's finding that the employer's threat was motivated by antiunion animus. Given that adequately-supported finding, it was incumbent on the employer to demonstrate that it would have planned the work change even absent antiunion sentiment. Again, the panel deferred to the NLRB's finding that the employer had not made the necessary showing, i.e., had not carried the proof burden cast on it. Accordingly, the court enforced the Board's order regarding the 8(a)(1) violation.

Your first question concerns my understanding of *NLRB v. Brown*, 380 U.S. 278 (1965). In that case, the Supreme Court indicated that the NLRB need not inquire into employer motivation to support an unfair labor practice finding where the employer's conduct is inherently destructive of employees' rights and is not justified as serving significantly a legitimate business end. The Court's opinion in *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), is illustrative. There, the employer offered twenty years of superseniority to any striking worker who crossed the picket line and returned to work. Blatant conduct of that order is "inherently discriminatory or destructive," *Erie Resistor*, 373 U.S. at 228, and obviates the need for independent evidence of antiunion animus.

But where the conduct is not so blatant and is designed on its face to achieve legitimate business ends, then, according to *Brown*, the Board can find antiunion motivation only when independent evidence so demonstrates. In the *Xidex* case, as Judge Henderson's opinion explained, the Board pointed to independent evidence sufficient to support a finding that antiunion animus motivated the employer's threat to transfer work

to its nonunion plant. In sum, after reviewing the record, we were satisfied that the Board's unfair labor practice finding had the requisite evidentiary support.

Your second question concerns the standard courts use to review decisions of the NLRB. The NLRA directs the court to defer to NLRB findings of fact and sets out the standard for such deference. Section 10(e) provides that the "findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." The word "substantial" was added to section 10(e) of the NLRA by the Taft-Hartley Act of 1947. This standard for review of agency fact-finding is consistent with the standard generally applicable under the Administrative Procedure Act.

In his opinion for the Court in 1951 in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), Justice Frankfurter discussed the meaning of the word "substantial." Quoting from earlier Supreme Court decisions, Justice Frankfurter noted that "substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept to support a conclusion." In the *Xider* case, the panel adhered to the statutory instruction and the long-held precedent in this area. The decision is consistent with the views I expressed in the Hearings that a court considering an agency's decision should respect that decision but not to the point of abdicating the reviewing court's responsibility to canvass the record carefully.

You next ask about evidentiary standards and antiunion animus. I note first that the union bears no evidentiary standard in these cases because the General Counsel of the NLRB, not the union, presents the cases on behalf of workers. The evidentiary standard NLRB's General Counsel must meet to show "antiunion animus" was set out by Justice White in his opinion for a unanimous Supreme Court in 1983 in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). In that decision, Justice White indicated that the General Counsel must persuade the Board that antiunion animus has contributed to the employer's adverse action. He noted that, consistent with the statutory requirement in section 10(c) of the NLRA, the Board must rest its unfair labor practice determination on a "preponderance of the testimony."

If the General Counsel has demonstrated antiunion animus motivating the employer's action, the employer may show, as an affirmative defense to the unfair labor charge, that the conduct in question would have occurred in any event. *Transportation Management Corp.*, 462 U.S. at 395. Applying this rule in the *Xider* case, it was incumbent on the employer to show that the plan to transfer work, and lay off employees, would have occurred regardless of the divergent union status of each facility. As Judge Henderson's opinion developed after carefully reviewing the record, we deferred to the Board's reasonable determination that the employer did not make the requisite showing.

**Responses by Ruth Bader Ginsburg to Written Questions  
by Senator Larry Pressler on Minority Set-Aside Programs,  
received July 26, 1993**

You asked several related questions about the Supreme Court's decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Joining a unanimous panel and briefly concurring, I applied the teachings of *Croson* in *O'Donnell Construction Co. v. District of Columbia*, 963 F.2d 420 (D.C. Cir. 1992). I hope you will find in the following discussion adequate answers to your inquiries.

As you state, *Croson* dealt with "remedial minority set-aside programs" for the award of government construction contracts -- i.e., with a local government's adoption of a program for the purpose of remedying past discrimination. In that context, *Croson* made clear, the past discrimination to be remedied need not be the local government's own discrimination; it may be private discrimination (by the construction industry) in which the government had "become a 'passive participant'" through financial support, 488 U.S. at 491-92, thus "exacerbating [the private discrimination] pattern," 488 U.S. at 504. That is what I meant in *O'Donnell* when I wrote "minority preference programs" need not "be confined solely to the redress of state-sponsored discrimination." 963 F.2d at 429.

*Croson* also made clear that a local government, in establishing the basis for its remedial program, cannot rely on a "generalized assertion" of nationwide discrimination in an industry as a whole, 488 U.S. at 498, but "must identify [the] discrimination, public or private, with some specificity." 488 U.S. at 504. Furthermore, the program must be "narrowly tailored to remedy [the] prior discrimination." 488 U.S. at 507.

With respect to its essential, practical meaning, *Croson* explicitly stated: "Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction." 488 U.S. at 509. The Court thus contemplated that its "specificity" and "narrow tailoring" standards were not impossibly restrictive, but could be met by proper showings and proper programs. My concurrence in *O'Donnell* cited an instance in which a court of appeals found, on the particular facts, that the *Croson* standards likely would be met. 963 F.2d at 429 (citing *Associated General Contractors v. Coalition for Economic Equity*, 950 F.2d 1401 (9th Cir. 1991), cert. denied, 112 S. Ct. 1670 (1992)).

Finally, because *Croson* involved a city program designed as a remedy for past discrimination, the holding of the case did not address whether a race-based classification, in other contexts, can be justified on a non-remedial ground. In *O'Donnell*, I commented that "remedy for past wrong is not the exclusive basis upon which racial classification may be justified." 963 F.2d at 429. I cited as support for the comment Justice Stevens' concurrence in *Croson*. Although Justice Stevens ruled out any non-remedial justification for Richmond's race-based restriction on contractors' access to the construction market, 488 U.S. at 512-13, he added that he would not "totally discount the legitimacy of race-based decisions that may produce tangible and fully justified future benefits" in, for example, an education setting. 488 U.S. at 511 n.1, 512 & n.2. Justice Powell's opinion in *University of California Regents v. Bakke*, 438 U.S. 265, 311-19 (1978), elaborated on such a non-remedial justification in a school setting. Future cases, as you know, could well present questions about the kinds of "narrow tailoring" or other requirements one might appropriately apply to a justification of the kind Justice Powell described, and it would not be appropriate for me to address -- without a record, briefs, and arguments -- what those uses might be.

Responses by Ruth Bader Ginsburg to Written Questions  
by Senator Larry Pressler on the Supreme Court's Decision  
in *Commissioner v. Soliman*, 113 S. Ct. 701 (1993),  
received July 26, 1993

Federal courts should interpret statutes, first and foremost, by examining the statute's text. If the text is clear -- and as I have said, it is always the hope of federal judges that enactments will clearly reveal what the legislature meant -- the text itself should resolve the matter. When the legislature's meaning is not apparent from the statute's language, it is appropriate to take into account traditional aides to interpretation, notably, the overall statutory and historical contexts of the provision at issue, including similar and prior statutes, and the legislative history. While these additional materials should be relied on cautiously, they sometimes prove helpful guides.

In addition, applicable regulations authorized by the statute should be accorded reasonable deference by courts. This is particularly important in tax cases because the IRS has adopted a comprehensive (often interrelated) set of regulations that Congress and the country depend upon to foster evenhanded administration of our complex tax laws.

Regarding the *Soliman* case in particular, it would not be appropriate for me to comment on the Court's holding, especially without the benefit of briefing and argument. I might note, however, that the Court's endeavor in that case was to interpret the provision of the Internal Revenue Code, 26 U.S.C. § 280A(c)(1)(A), that allowed a deduction for a home office when the office was used as "the principal place of business for any trade or business of the taxpayer." All the Justices agreed that the case turned on the meaning of this phrase.

## ADDITIONAL SUBMISSIONS FOR THE RECORD

**JUDICIAL SELECTION MONITORING PROJECT***A project of the Free Congress Foundation's Center for Law & Democracy***• 717 SECOND STREET, N.E. • WASHINGTON D.C. 20002 • PHONE: (202) 546-3000 • FAX (202) 543-8425**

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 New Yorkers for Constitutional Freedoms  
 Pennsylvania Parents Commission  
 Pioneer Institute of Oklahoma  
 Students for America  
 Traditional Values Coalition  
 U.S. Business and Industrial Council

**A STEP IN THE LEFT DIRECTION**

An analysis of  
 President Bill Clinton's nomination of

**RUTH BADER GINSBURG****to be an Associate Justice of the U.S. Supreme Court**

by  
**Thomas L. Jipping, M.A.,J.D.**

June 24, 1993

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**EXECUTIVE SUMMARY**  
(excerpted from section V, Conclusion)

Judicial philosophy and judicial style are two very different facets of a judicial nominee. Judicial philosophy encompasses a nominee's fundamental views about the role of courts and the difference between law and politics, between judges and policymakers. Judge Ginsburg has an activist judicial philosophy.

- \* She believes that the Supreme Court can, and sometimes should, change its interpretation of the Constitution because of social changes.<sup>1</sup>
- \* She believes that the Supreme Court can, and sometimes should, creatively interpret constitutional provisions in order to accommodate a modern vision of society.<sup>2</sup>
- \* She believes in the need for "interventionist" judicial decisions when legislatures do not or will not act.<sup>3</sup>
- \* She believes that "boldly dynamic interpretation" that departs "radically from the original understanding" is sometimes necessary to reach certain results.<sup>4</sup>
- \* She believes the Constitution can survive only if supported by judicial interpretations that are neither too "mushy" or too "rigid."<sup>5</sup> She believes that a jurisprudence of original understanding is too rigid.<sup>6</sup>

Judicial style is a combination of practical factors that describe the functioning, rather than the role, of a judge. Judge Ginsburg has a moderate judicial style. It is only in this sense that she can be called a "moderate," the label that so many are so quick to place on her.

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<sup>1</sup> See *infra* section II.B.

<sup>2</sup> See *infra* section II.C.

<sup>3</sup> See *infra* section II.D.

<sup>4</sup> See *infra* section II.F.

<sup>5</sup> See *id.*

<sup>6</sup> See *id.*

- \* She opposes frequently writing separate opinions.<sup>7</sup>
- \* She believes that judges should write no more than necessary to decide a particular case and should "take the low ground, and resist personal commentary" when writing for the court.<sup>8</sup>

Judge Ginsburg's views on abortion and *Roe v. Wade* are driven by her politics. Consistent with her activist judicial philosophy, she believes the Supreme Court quite properly involved itself in the abortion controversy, and should have done so by striking down the restrictive law at issue in *Roe* on equal protection, rather than on due process, grounds. This way, the Court could have encouraged a liberalizing political trend that, in Judge Ginsburg's view, recognizes the independence of women in our society.

Consistent with her moderate judicial style, Judge Ginsburg has criticized the Supreme Court for going beyond invalidating the Texas law and announcing a set of complicated rules that effectively struck down all other abortion restrictions--tough as well as lenient--existing in 1973, and most of those enacted since.

Judge Ginsburg's preferred equal protection theory, however, has serious conceptual problems. Most important, men and women cannot be similarly situated with respect to either pregnancy or its termination and, as such, it is impossible to discuss whether women are being treated "equally" because of their gender. Since women are the sole focus of this view, applying an equal protection theory to abortion rights necessarily means defining any restriction on abortion--a course of action that only women can take--as impermissible sex discrimination. As such, this theory would go beyond the policy established by *Roe v. Wade*. Judge Ginsburg objects to the Supreme Court's decisions that the state is not constitutionally required to pay for abortions, even though the Court applied her preferred equal protection theory in those cases.

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<sup>7</sup> See *infra* section III.C.

<sup>8</sup> See *infra* section II.B.

## A STEP IN THE LEFT DIRECTION

by  
Thomas L. Jipping, M.A.J.D.<sup>1</sup>

On June 14, 1993, President Bill Clinton exercised his power under Article II, Section 2 of the United States Constitution<sup>2</sup> and nominated U.S. Circuit Judge Ruth Bader Ginsburg to be an Associate Justice of the U.S. Supreme Court. This analysis is provided by the Judicial Selection Monitoring Project<sup>3</sup> to assist the U.S. Senate in fulfilling its constitutional role of "advice and consent" and in considering Judge Ginsburg's nomination.

Ruth Bader Ginsburg was born on March 15, 1933, in Brooklyn, New York. She received a B.A. with high honors in government and distinction in all subjects from Cornell University in 1954, graduating Phi Beta Kappa. She attended Harvard Law School from 1956 to 1958, serving on the *Harvard Law Review*, and received her LL.B. and J.D. degrees in 1959 from Columbia Law School, where she served on the *Columbia Law Review* and was named a Kent Scholar. After serving as a law clerk to U.S. District Judge Edmund Palmieri, she joined the faculty at Rutgers University School of Law and, from 1972 to 1980, was a professor of law at Columbia. During her tenure there, she served as general counsel to the American Civil Liberties Union and founded its Women's Rights Project. As counsel to the Women's Rights Project, she successfully litigated several landmark sex discrimination cases in the Supreme Court. She was appointed to the U.S. Court of Appeals for the District of Columbia Circuit by President Jimmy Carter on June 18, 1980.

Judge Ginsburg is the author of numerous law journal articles and has continued writing articles and delivering speeches since joining the federal judiciary. She has received honorary academic degrees from nearly one dozen universities, as well as awards including

<sup>1</sup> Director, Judicial Selection Monitoring Project, Center for Law & Democracy, Free Congress Foundation. B.A. with honors, Calvin College (1983); J.D. cum laude, State University of New York at Buffalo (1987); M.A., SUNY-Buffalo (1989). Law clerk, U.S. Court of Appeals, Third Circuit (1988-89). Many thanks to Marianne E. Lombardi, Esq., Deputy Director of the Judicial Selection Monitoring Project, and to Joseph R. Cincotta, Gregory A. Gold, Jennifer M. Barnes, and Michael W. Fanning, Research Associates with the Free Congress Foundation.

<sup>2</sup> Article II, Section 2 states in part that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint...Judges of the supreme Court."

<sup>3</sup> A project of the Free Congress Foundation's Center for Law & Democracy, the Judicial Selection Monitoring Project is supported by more than 50 national and state organizations. It was launched in August 1992 to expand the Foundation's ability to participate in the debate over nominations to judicial and Department of Justice posts.

the Society of American Law Teachers Outstanding Teacher Award in 1979 and the Woman of Achievement Award from Barnard College in 1980. Examples of her service to the legal profession, drawn from the 1993 *Judicial Staff Directory*, include:

- \* American Bar Association
  - Standing Committee on Federal Judicial Improvements, 1992-present
  - Amicus Curiae Committee, 1979-80
  - Individual Rights and Responsibilities Section Council, 1975-80
  - American Bar Association Journal*, Board of Editors, 1972-78
  - International Law Section
    - Committee on Comparative Procedure and Practice, 1970-73
    - European Law Committee, 1967-72
- \* American Bar Foundation
  - Executive Committee and Board of Directors, 1979-89
- \* Association of the Bar of the City of New York
  - Executive Committee, 1974-78
  - Civil Rights Committee, 1979-80
  - Sex and Law Committee, 1978-79
  - Post Admission Legal Education Committee, 1970-74
  - Foreign Law Committee, 1966-69
- \* American Law Institute Council
  - Adviser, *Restatement (2d) of Judgments*, 1972-82
  - Adviser, Project on Complex Litigation, 1987-present
- \* Federal Bar Council
  - Vice President, 1978-80
- \* American Foreign Law Association
  - Vice President, 1973-76
  - Director, 1970-77
- \* Association of American Law Schools
  - Executive Committee, 1972
  - Nominating Committee, 1979
- \* Society of American Law Teachers
  - Vice President 1978-80
  - Board of Governors, Executive Committee, 1975-77
- \* Judicial Conference of the Second Circuit
  - Planning and Program Committee, 1976-80
  - Advisory Committee on Planning for District Courts, 1979-80

Judge Ginsburg has served on the editorial board of various publications including the *Guide to American Law* and *American Journal of Comparative Law*. Her service on advisory boards includes Columbia University's Center for the Study of Human Rights and Center for the Study of Social Change, and the Women's Equity Action League. She served as a director of the Women's Law Fund from 1972 to 1980. She is a member of the Council on Foreign Relations and a Fellow of the American Academy of Arts and Sciences.

## I. INTRODUCTION

### **A. The Rush to Judgment**

President Clinton withdrew his nomination of University of Pennsylvania law professor Lani Guinier to be Assistant Attorney General for Civil Rights after admitting he had read none of her writings. Attorney General Janet Reno lauded Guinier as a "superb" nominee without having read any of her writings. This embarrassing experience should have made plain the need for thoroughly examining a nominee's record before making judgments or attaching labels such as "superb" or "moderate."

Several additional factors point to the same conclusion, whether or not taking the time required impacts on a convenient legislative schedule. First, Judge Ginsburg's 30-year "paper trail," which includes hundreds of judicial opinions and dozens of legal briefs and scholarly articles, is far longer than any Supreme Court nominee in recent memory.

Second, even after thinking about it for more than 12 weeks, President Clinton nominated someone he met for the first time just 24 hours before. Especially after the Guinier episode, this unusual set of events puts a greater premium on post-nomination evaluation.

Third, the initial and critical evaluation, screening, and "vetting" of candidates was conducted by a team of anonymous private lawyers.<sup>4</sup> Their identities, hidden agendas, conflicts of interest, and personal stakes remain completely unknown to the public. This administration has a habit of allowing such anonymous and unaccountable people to make significant personnel and policy decisions. For which judicial positions will this team of lawyers screen candidates? Do any of these lawyers practice before the Supreme Court or any other court for which they will recommend nominees? Who are these lawyers and what are their credentials for serving this critical gate-keeping and screening function? Many people concerned about the integrity of the Clinton administration have raised new doubts based on this mysterious group having such enormous influence.<sup>5</sup>

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<sup>4</sup> See, e.g., Devroy & Marcus, "After 87 Days, Tortuous Selection Process Came Down to Karma," *Washington Post*, June 15, 1993, at A1; Murray, "Despite Writings, President Insists Ginsburg is Pro-Choice," *Washington Times*, June 16, 1993, at A3.

<sup>5</sup> See Klaibman, "Who Are Clinton's Vetters, and Why the Big Secret?," *Legal Times*, June 21, 1993, at 1.

Fourth, Republican Senate leaders apparently have agreed to a July 20 hearing date, just five weeks after the nomination was announced. This "unusual expedited process"<sup>6</sup> will take less than the minimum of six weeks that Judiciary Committee Chairman Joseph Biden (D-DE) once said would be necessary, much less than the average over the last 13 years of nine weeks between nomination and hearing, and less than half the time President Clinton took to think about his choice. There is talk that an expedited process is being granted in return for President Clinton's choice of a less-than-radical nominee, meaning that the timetable is being dictated by who was not chosen rather than by who was. Focusing instead on this nominee and the length of her paper trail counsels for more time.

#### B. What's in a Label?

Analysts, reporters, and politicians rushed to label Judge Ginsburg within minutes of her nomination. President Clinton, who had met her for the first time just a day earlier, said when he announced her nomination that she "cannot be called a liberal or a conservative."<sup>7</sup> One reporter called her "a self-described centrist" and a "cautious" judge.<sup>8</sup> The *Wall Street Journal*,<sup>9</sup> *Washington Post*,<sup>10</sup> and *Washington Times*<sup>11</sup> all immediately labeled her a "moderate," while the *New York Times* labeled her "moderate to liberal."<sup>12</sup> One columnist said she "represents an extreme of moderation."<sup>13</sup> Senator Charles Grassley (R-IA) called her "a Democrat nominee that even conservatives can like and respect."<sup>14</sup>

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<sup>6</sup> Biskupic, "Quick Confirmation of Ginsburg Sought," *Washington Post*, June 16, 1993, at A1.

<sup>7</sup> Quoted in Murray, "D.C. Appeals Judge Beats Out Two Men," *Washington Times*, June 15, 1993, at A1.

<sup>8</sup> Roman, "Process May Lead to Court in Center," *Washington Times*, June 16, 1993, at A3.

<sup>9</sup> Barrett & Birnbaum, "Clinton Picks Ginsburg for the Supreme Court After Tortuous Search," *Wall Street Journal*, June 15, 1993, at A1.

<sup>10</sup> Biskupic, "Quick Confirmation of Ginsburg Sought," *Washington Post*, June 16, 1993, at A16.

<sup>11</sup> Roman, "Analyst Links Nomination to a Weak White House," *Washington Times*, June 20, 1993, at A6.

<sup>12</sup> Editorial, "Mr. Clinton Picks a Justice," *New York Times*, June 15, 1993, at A26.

<sup>13</sup> Greenberg, "The Unveiling of a New Justice," *Washington Times*, June 17, 1993, at G4.

<sup>14</sup> Quoted in Seper, "Ginsburg Nomination Prompts General Praise," *Washington Times*, June 15, 1993, at A7.

In 1991, one commentator offered a list of what he called "first-rate centrists" which included Judge Ginsburg. His evaluation of Judge Ginsburg is as follows:

[Judge Ginsburg is] the least liberal of four Carter appointees to U.S. Court of Appeals for D.C. Circuit...stellar record as law professor, pioneering and prolific scholar on women's rights and civil procedure...was general counsel of the American Civil Liberties Union and its Women's Rights Project...was leading litigator for women's rights...pro-choice on abortion but with nuanced views on the constitutional issue posed by *Roe v. Wade*...a political liberal who would be anathema to far-right screamers but is widely respected by conservative and liberal experts and litigators alike as a highly intelligent, careful judge not given to crusading activism.<sup>15</sup>

Advocates of judicial restraint—something quite different from conservative activism, albeit a distinction lost to many liberal interest groups and members of the media establishment—resist evaluating judges or judicial nominees on the basis of winners and losers. Merely observing, for example, how often a judge has ruled for the prosecution in criminal cases or for plaintiffs in civil rights cases says absolutely nothing about that judge or about his or her judicial philosophy. Nevertheless, the media inevitably tabulates winners and losers and publishes articles about whether a judge is "pro" this interest or "anti" that one, rules for this or that group how often, or sides with "conservatives" or "liberals" on a particular court. By itself, without providing anything more meaningful to give such statistical observations context, this is a fundamentally misleading approach to evaluating a judicial nominee such as Judge Ginsburg.

For example, Judge Ginsburg has joined in numerous rulings in favor of labor unions.<sup>16</sup> Yet one news report stated that "union lawyers have expressed concern about two labor rulings in which Ginsburg voted against unions."<sup>17</sup> One reporter thinks that

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<sup>15</sup> Taylor, "What's Really Wrong With the Way We Choose Supreme Court Justices," *The American Lawyer*, November 1991, at 76.

<sup>16</sup> See, e.g., *North Bay Development Disabilities Services, Inc. v. NLRB*, 905 F.2d 476 (D.C.Cir. 1990), *cert. denied*, 111 S.Ct. 952 (1991); *LeBoutillier v. Air Line Pilots*, 778 F.2d 883 (D.C.Cir. 1985); *Kolinske v. Lubbers*, 712 F.2d 471 (D.C.Cir. 1983).

<sup>17</sup> Marcus, "Clinton's Unexpected Choice is Women's Rights Pioneer," *Washington Post*, June 15, 1993, at A14.

"Judge Ginsburg...would have dissented"<sup>18</sup> in *Roe v. Wade*,<sup>19</sup> the Supreme Court decision creating the right to choose abortion, while analyst Bruce Fein writes that she would have "concurred in the *Roe* result."<sup>20</sup> These result-oriented assessments are rarely either accurate or revealing of anything meaningful.

Judges, unlike lawyers, do not advocate for clients. Judges, unlike politicians, do not represent constituents. As such, it is troubling to hear President Clinton emphasize that Judge Ginsburg "has repeatedly stood for the individual, the person less well-off, the outsider in society" when discussing her particular fitness to serve on the Supreme Court.<sup>21</sup> Unless Judge Ginsburg is able successfully to put this advocacy role behind her, she will be neither moderate nor centrist, but a judicial activist who ought not sit on the highest court in the land. As a judge, she must stand for the law and its equal application to all, regardless of race, gender, or social class.

### C. Marks of a Meaningful Evaluation

Any meaningful evaluation of this nomination, then, must do two things. First, it must fairly review and report on the substance of Judge Ginsburg's record. During the 1980s, opponents of Supreme Court nominees intentionally and seriously misrepresented the substance of those nominees' records. Judge Ginsburg herself has, for example, criticized a particularly "egregious" example of the Planned Parenthood Federation's attacks on Judge Robert Bork, nominated to the Supreme Court in 1987.<sup>22</sup> She condemned such attacks as "emotionally charged, badly distorted, calculated to alarm."<sup>23</sup>

This approach is an attempt to manipulate and commandeer, rather than assist and inform, the judicial selection process. There can no doubt exist differences of opinion about, and alternative conclusions drawn from, an accurately presented body of information. No useful result can, however, flow from the kind of distortion that often masqueraded as "analysis" by liberal interest groups against Supreme Court nominees in the last decade.

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<sup>18</sup> Murray, *supra* note 4.

<sup>19</sup> 410 U.S. 113 (1973).

<sup>20</sup> Fein, "Status Quo Selection," *Washington Times*, June 16, 1993, at G1.

<sup>21</sup> Marcus, *supra* note 17, at A1.

<sup>22</sup> Ginsburg, "Confirming Supreme Court Justices: Thoughts on the Second Opinion Rendered by the Senate," 1988 *University of Illinois Law Review* 101,115.

<sup>23</sup> *Id.* at 116.

Second, a meaningful evaluation must put information about Judge Ginsburg's record in some perspective for present purposes, that is, her nomination to the Supreme Court. While her objective credentials form only part of the material needed to evaluate her nomination, the remaining pieces of the puzzle must be chosen and explained with care.

Judge Ginsburg has, after all, not been nominated to head an executive branch department or regulatory agency. As such, her policy views--her political ideology--are not important for their own sake. Neither has she been nominated to serve on the U.S. Court of Appeals. As such, her views, for example, about adherence to the rulings of higher or collateral courts may be less relevant. Ruth Bader Ginsburg has been nominated to serve on the Supreme Court of the United States, the very court that once served as a restraint and supplied much of the applicable law for her on the U.S. Court of Appeals.

In 1990, Democratic members of the Senate Judiciary Committee, including Chairman Joseph R. Biden and Edward M. Kennedy, told then-Court of Appeals nominee Clarence Thomas that while they might support him for his appellate position, they said, it would be a very different ball game should he ever be nominated to the highest court in the land. And indeed it was. Similarly, the Senate would shirk its duty simply if it simply rubber-stamped Judge Ginsburg's nomination merely by observing that she has spoken or acted with relative restraint while a U.S. Circuit Judge. The more important inquiry is whether she is fundamentally committed to judicial restraint or exercised restraint merely because she occupied the middle tier of the federal judiciary.

A meaningful evaluation requires more than noting Judge Ginsburg's statement at the press conference announcing her nomination that "a judge is bound to decide each case fairly in a court with the relevant facts and the applicable law even when the decision is not, as [Chief Justice William Rehnquist] put it, what the home crowd wants."<sup>24</sup> This may have been the maxim she remembered while on the U.S. Court of Appeals; it begs the question of what her maxim will be while on the U.S. Supreme Court. It is the duty of the Senate, in fulfilling its constitutional "advice and consent" function, to find out.

A meaningful evaluation also requires more than the insistence by worshipful former clerks that her opinions "are scrupulously free of ideology" or that she "has faithfully reconciled personal conviction with a judge's duty to apply the law."<sup>25</sup> On the Court of Appeals, she may have had little choice. On the Supreme Court, she will have a choice.

This report will examine Judge Ginsburg's scholarly record and will strive to organize the pieces of that record into some coherent fashion. It will provide clues about Judge Ginsburg's judicial philosophy and her judicial style--two fundamentally different factors--and

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<sup>24</sup> Quoted in "Ginsburg 'Has Stood for the Individual,'" *Washington Times*, June 15, 1993, at A4.

<sup>25</sup> Huber & Taranto, "Ruth Bader Ginsburg, a Judge's Judge," *Wall Street Journal*, June 15, 1993, at A18.

determine whether she is, in fact, a "moderate." This report will also examine Judge Ginsburg's views on abortion and *Roe v. Wade*. Finally, this report throughout will suggest questions that Senators should ask as they seek to evaluate this nomination and fulfill their constitutional role of advice and consent.

## II. JUDICIAL PHILOSOPHY

During the 1980s, liberal interest groups and some Democratic Senators sought to change the constitutional balance of power in the judicial selection process in order to frustrate the appointment of judicially restrained judges to the federal courts. In doing so, they sought to collapse "political ideology" into "judicial philosophy" and claim that nominees were against all the relevant politically correct results. Using the attacks on Supreme Court nominee Robert Bork as an example, Judge Ginsburg observed that "[t]he distinction between judicial philosophy and votes in particular cases, however, blurred."<sup>26</sup>

This tactic, to be sure, made for useful sound-bites, direct-mail fundraising appeals, and hysterical sloganeering. Judge Ginsburg described the tactic as "campaigns against judges that spread misinformation, turn complex issues into slogans, and play on our fears."<sup>27</sup> As it perverted the judicial selection process and harmed good people, however, this tactic also blurred the necessary distinction between law and politics and between the judicial and political branches of government. It is no wonder that leaders of this attack on judicial independence, such as Nan Aron of the Alliance for Justice, already have said that they want "a political justice" to fill the next vacancy on the Supreme Court.<sup>28</sup>

"Judicial philosophy" encompasses an individual's views about the proper place of courts in our system of co-equal branches of government, as well as the proper role of an unelected judge. Should the courts involve themselves in social or political developments, whether by prompting them or responding to them with changing interpretations of the Constitution? Does the Constitution necessarily speak to every social problem or division and is, therefore, a judge some mix of national physician, counselor, philosopher/king, and handyperson? Must a judge necessarily do what other co-equal branches do not, or cannot? Is it the judge's job to "do justice" in the abstract or to settle legal disputes?

How should a judge approach the task of construing a statute or interpreting the Constitution? This is a fundamentally different question from asking what an individual's particular construction or interpretation might be. Confusing the two is precisely what

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<sup>26</sup> Ginsburg, *supra* note 22, at 114.

<sup>27</sup> *Id.* at 117.

<sup>28</sup> Quoted in Roman, *supra* note 8.

liberal interest groups and their Democratic Senate allies introduced into the mix during the 1980s. As liberals collapsed the judicial into the political, they treated judges like politicians and judicial nominees like congressional candidates. They were only interested in how a nominee would rule on issues they cared about. Rather, a proper inquiry into a nominee's judicial philosophy asks about the goal of interpretation and the tools that a judge should employ in that task.

The terms "activism" and "restraint" remain useful when properly defined. An activist judge believes his or her job is generally to "do justice" in the abstract. An activist believes that the actual meaning of legal documents themselves (particularly statutes and the Constitution) changes over time. An activist believes that judges and courts exist to heal the divisions and address the problems of society. An activist believes that courts can, and sometimes should, be involved in social change or prompt political developments and that they should pinch-hit for legislatures that do not do the right thing.

A restrained judge believes his or her job is to settle legal disputes properly brought before the court. A restrained judge believes that the actual meaning of legal documents does not change—that meaning remains what the document's framers (Congress, the Founding Fathers, etc.) intended it to mean—but, instead, must be applied to changing circumstances. A restrained judge has a more modest view of the judiciary's role, believing that many other institutions (governmental and private) exist to handle divisions and tensions in society and that they should be left alone to do their part when the courts have done theirs. As a judicial colleague of Judge Ginsburg's once put it, "[j]udicial restraint" is shorthand for the philosophy that courts ought not to invade the domain the Constitution marks out for democratic rather than judicial governance.<sup>29</sup>

Judge Ginsburg has provided some clues, including a particular formulation which she has repeated over the years, about her judicial philosophy, at least while on a mid-level appellate court. At the hearing on her nomination to the U.S. Court of Appeals, she said:

And I believe that a judge is bound to decide fairly--based solely on the relevant facts—the record made in the case the and applicable law; a judge is bound to do that even then the decision is, as Justice Rehnquist recently put it, not the one the home crowd wants.<sup>30</sup>

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<sup>29</sup> *Dronenburg v. Zech*, 746 F.2d 1579, 1583 (D.C. Cir. 1984) (statement by Judge Bork).

<sup>30</sup> *Selection and Confirmation of Federal Judges*, Hearings Before the Committee on the Judiciary, United States Senate, 96th Cong., Second Sess., Serial No. 96-21, Part 7 (1981), at 350.

A. Nudging Social Trends

One facet of a nominee's judicial philosophy is whether the courts should be involved in social or political developments. Court cases, of course, result from such developments

and court decisions can contribute to them, and the view that judges should resist such involvement in no way argues with this fact. But the important point here is whether a judicial nominee is self-consciously committed to resisting this involvement, to deciding cases on the basis of what the law requires rather than on the winds of political or social change.

Judge Ginsburg has criticized the Supreme Court's decision in *Roe v. Wade*, which created the right to choose abortion. The nature and implications of this criticism for her judicial philosophy are explored in another section of this report, and it is enough here to note that she has criticized the Court for stepping "boldly in front of the political process."<sup>31</sup> One reporter observed that Judge Ginsburg feels "the court should merely nudge social trends."<sup>32</sup>

Judge Ginsburg clearly approves of judicial involvement in social or political change; she merely believes such involvement should be gradual rather than sudden. She did not criticize the Court for "stepping in front of the political process" but for "stepping boldly." Judge Ginsburg believes in "nudging" social trends rather than shoving them. This clearly identifies her as a judicial activist.

Judge Ginsburg is not fundamentally committed to judicial restraint, a principled and self-conscious attitude that, all other things being equal, will guide her away from acting politically rather than judicially. Her many statements cautioning against "venturing too far" or shaping doctrinal limbs "too swiftly," to be sure, suggest that her activism has limits, but she is nevertheless an activist. Judges acting politically have an activist judicial philosophy; judges acting politically slowly or carefully may have a moderate judicial style. Only in this latter sense can Judge Ginsburg be called a moderate. As Roger Pilon concludes: "Thus she establishes herself as a 'judicial activist,' although one limited to 'interstitial' activism."<sup>33</sup> Stuart Taylor, quoted above, concluded that she was not given to "crusading" activism.

In one article, commenting on "the role the Supreme Court plays in the process of social change,"<sup>34</sup> Judge Ginsburg stated that, at least with respect to gender equality, "the

<sup>31</sup> Verbatim, "Ginsburg Laments *Roe*'s Lack of Restraint," *Legal Times*, April 5, 1993, at 11.

<sup>32</sup> Murray, *supra* note 4.

<sup>33</sup> Pilon, "Ginsburg's Troubling Constitution," *Wall Street Journal*, June 17, 1993, at A10.

<sup>34</sup> Ginsburg, "Remarks on Women Becoming Part of the Constitution," 6 *Law & Inequality* 17,24 (1988).

Court was neither in front of, nor did it hold back, social change.<sup>35</sup> Rather, its involvement was to foster "interplay among the people, the political branches, and the courts."<sup>36</sup> In this view, courts and judges are not the bulwarks of our liberties but the facilitators of progressive social development. Roger Pilon again puts it well when he says that "the image is closer to 'good government' than to the separation of powers."<sup>37</sup>

In one article, Judge Ginsburg cited comments by law professor Gerald Gunther, spoken at her investiture as a judge, which she considers "a model" of "the good judge":

[The good judge] is genuinely open-minded and detached,...heedful of limitations stemming from the judge's own competence and, above all, from the pre-suppositions of our constitutional scheme; th[at] judge...recognizes that a felt need to act only interstitially does not mean relegation of judges to a trivial or mechanical role, but rather affords the most responsible room for creative, important judicial contributions.<sup>38</sup>

The Judiciary Committee should explore Judge Ginsburg's views about these "creative, important judicial contributions."

### B. Responding to Social Trends

Elsewhere, Judge Ginsburg has written approvingly of changes in constitutional interpretation brought about by "a growing comprehension by jurists of a pervasive change in society at large."<sup>39</sup> She made this observation particularly to describe how the Supreme Court came to apply the Fourteenth Amendment's equal protection clause to women and thereby to scrutinize sex-based legislative classifications. She described how the Court turned "in a new direction" after understanding how legislation "apparently designed to benefit or protect women could often, perversely, have the opposite effect."<sup>40</sup> Elsewhere

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 25.

<sup>37</sup> Pilon, *supra* note 33.

<sup>38</sup> Ginsburg, "The Obligation to Reason Why," 37 *University of Florida Law Review* 205,224 (1985).

<sup>39</sup> Ginsburg, *supra* note 34, at 20.

<sup>40</sup> *Id.*

she noted how "[p]ervasive social changes" undermined the reasoning in previous undesirable Supreme Court decisions in the area of gender equality.<sup>41</sup>

#### C. Should Judges Implement Their Vision for Society?

An important facet of a nominee's judicial philosophy is whether the courts are empowered to implement their particular vision of what society needs. Judge Ginsburg's writings suggest that she believes the courts should be such fully-engaged players. She has argued that an equal rights amendment is necessary to provide an explicit constitutional guarantee of equal protection for women. Nevertheless, she has written that the Fourteenth Amendment's equal protection clause is "growth-susceptible"<sup>42</sup> and elsewhere stated that it is "phrased broadly enough" to cover women.<sup>43</sup> In the absence of an equal rights amendment, she writes, the Supreme Court "has creatively interpreted clauses of the Constitution...to accommodate a modern vision of sexual equality....Such interpretation has limits, but sensibly approached, it is consistent with the grand design of the Constitution-makers to write a charter that would endure as the nation's fundamental instrument of government."<sup>44</sup> Anyone who believes that the Constitution can only endure if the Supreme Court creatively interprets its clauses to accommodate modern social visions has a fundamentally activist judicial philosophy.

#### D. Should Courts Fill In for Legislatures?

Another facet of a nominee's judicial philosophy is whether courts should serve as a societal pinch-hitter, filling in the gaps or stepping up to the plate when legislatures do not or will not address particular issues or problems. In a 1981 article on judicial activism, Judge Ginsburg discussed "legislative activism" in the aid of judicial restraint and stated that "the need for interventionist [judicial] decisions...would be reduced significantly if elected officials shouldered their full responsibility for activist decisionmaking."<sup>45</sup> This is a

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<sup>41</sup> Ginsburg, "Sex Discrimination," in L. Levy, K. Karst & D. Mahoney (eds.), *Encyclopedia of the American Constitution* (1986), at 1667.

<sup>42</sup> Ginsburg, *supra* note 34, at 18.

<sup>43</sup> *Selection and Confirmation of Federal Judges*, *supra* note 30, at 348.

<sup>44</sup> Ginsburg, *supra* note 41, at 1673.

<sup>45</sup> Ginsburg, "Inviting Judicial Activism: A 'Liberal' or 'Conservative' Technique?," 15 *Georgia Law Review* 539,550 (1981).

scholarly way of saying that someone has to do it and the judiciary will fill in if the legislature fails. This is also a clear example of an activist judicial philosophy.

Judge Ginsburg, to be sure, has expressed a preference for "activist decisionmaking" by legislatures rather than by courts. This may suggest a moderate judicial style, but it is an activist judicial philosophy nonetheless. In another article, she stressed that legislatures ought to "install a system of legislative review and revision under which Congress would take a second look at a law once a court opinion or two highlighted the measure's infirmities."<sup>46</sup> Yet she clearly believes that courts should do the job if legislatures fail.

#### E. Judicial Dialogue

##### 1. Between judges on the same court

Judge Ginsburg has discussed three different forms of dialogue in which judges participate. The first, and narrowest, occurs among the judges on a single court. This report, in its discussion of Judge Ginsburg's judicial style below, describes her emphasis on writing narrowly and not separately. Nonetheless, she acknowledges that separate opinions constitute a kind of dialogue among judges on a collegial court that "may provoke clarifications, refinements, modifications in the court's opinion."<sup>47</sup>

##### 2. Between different courts

A second, and broader, dialogue occurs between judges at different levels in the federal court system. Both separate opinions and opinions of the court participate in this dialogue. "Separate opinions in intermediate appellate courts serve an alert function. If appeal from the court's judgment is a matter of right, the separate opinion may assist the court of next resort by charting alternative grounds of decision. If further review is discretionary, as in the U.S. Supreme Court, a separate opinion may signal to the Court that the case is troubling and perhaps worthy of a place on its calendar."<sup>48</sup>

In addition to separate opinions, the majority opinions of one court may participate in a dialogue with superior courts. Judge Ginsburg voted against the full U.S. Court of Appeals re-hearing a panel decision upholding the Navy's discharge of a sailor for engaging

<sup>46</sup> Ginsburg, "A Plea for Legislative Review," *Southern California Law Review* 995,996 (1987).

<sup>47</sup> Ginsburg, "Remarks on Writing Separately," 65 *Washington Law Review* 133,143 (1990).

<sup>48</sup> *Id.* at 143-44.

in homosexual activity.<sup>49</sup> She supported the narrower grounds for the panel's decision and considered its broader constitutional discussion to be the individual viewpoint of Judge Robert Bork, the opinion writer, rather than the views of the court.<sup>50</sup> The judges arguing for re-hearing criticized the panel opinion for ignoring judicial restraint and questioning the coherence, if not the substance, of Supreme Court decisions. Judge Ginsburg responded:

The dissenting opinion bends 'judicial restraint' out of shape in suggesting that it is improper for lower federal courts ever to propose 'spring cleaning' in the Supreme Court. In my view, lower court judges are not obliged to cede to the law reviews exclusive responsibility for indicating a need for, and proposing the direction of, further enlightenment from Higher Authority....It is a view on which I have several times acted.<sup>51</sup>

In a panel discussion at Rutgers University School of Law the next year, she nonetheless defended that panel's broader discussion of constitutional issues against strong criticism by law professor Ronald Dworkin. She said: "If Judge Bork showed a lack of judicial restraint or respect in questioning High Court precedent he regarded as doubtful, then I suppose I did so also many times."<sup>52</sup> She clearly sees the utility of a dialogue between individual judges and courts occupying different tiers of the federal judiciary.

### 3. Between different branches of government

Judge Ginsburg has suggested that she does not view courts as the solver of all societal problems, but one of many players. She said during a 1985 roundtable discussion at Rutgers University Law School:

But it is not sensible, for example, for civil rights advocates to press today in federal court litigation for lowered standing barriers, or broader views of state action, constitutionally-guarded privacy, or the range of expressive conduct protected by the first amendment. Instead, concentration should be on state legislatures, administrative agencies--both federal and

<sup>49</sup> *Dronenberg v. Zech*, 741 F.2d 1388 (D.C.Cir. 1984).

<sup>50</sup> *Dronenberg v. Zech*, 746 F.2d 1579, 1581-82 (D.C.Cir. 1984) (statement of Judge Ginsburg).

<sup>51</sup> *Id.* at 1581 n.1.

<sup>52</sup> Ginsburg, "Second Decennial Conference on the Civil Rights Act of 1964," *37 Rutgers Law Review* (1985), at 1108.

state--and, most of all, public education, as election returns and shifting student attitudes on many undergraduate campuses indicate. The effort will require more patience, planning, and persistence than campaigns aimed at sweeping victories in court, but success, to the extent it is achieved, may be more secure.<sup>53</sup>

What is unclear is whether this reflects her understanding about the role of the courts generally or a recommendation for proceeding "today," that is, during a time of domination by Republican-appointed judges committed to judicial restraint.

Dialogue among judges on the same court or between judges on different tiers of the federal judiciary is unobjectionable. Dialogue between the judicial and political branches of government, however, can either be judicial activism--if the judges decide to do the legislature's job--or judicial restraint--if the judges let the legislature do its own job. Judge Ginsburg's writings place her in the activist camp.

Judge Ginsburg is not opposed to judicial activism per se. Writing in the *Georgia Law Review*, she stated that "the need for interventionist [judicial] decisions...would be reduced significantly if elected officials shouldered their full responsibility for activist decisionmaking."<sup>54</sup> Judge Ginsburg does not oppose what she calls "interventionist" judicial decisions. Rather, she apparently believes that it is preferable for legislatures to make such decisions. She identifies "legislative activism" as an "aid of judicial restraint."<sup>55</sup> The other side of this coin, however, is the belief that judicial activism is appropriate in the face of legislative restraint. Judges can, in her view, act where "Congress is too busy or too divided politically to speak with precision."<sup>56</sup> Thus she appears to roughly equate the judicial and legislative branches as interchangeable players; someone has to do it, and the courts should if the legislature does not. This is clearly the mark of a judicial activist.

#### E. What Does "Interpretation" Mean?

Judge Ginsburg has argued that the Fourteenth Amendment's equal protection clause was not intended to cover women. She has stressed this view when arguing in favor of adding an equal rights amendment to the Constitution. At the same time, however, Judge Ginsburg has led a long-term litigation campaign to successfully urge the Supreme Court to

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<sup>53</sup> *Id.*

<sup>54</sup> Ginsburg, *supra* note 45, at 550.

<sup>55</sup> *Id.* at 547.

<sup>56</sup> *Id.* at 548.

more strictly scrutinize legislative classifications based on sex, with the goal being invalidation of such classifications under the equal protection clause.

For purposes of politics, Judge Ginsburg argues that the Fourteenth Amendment does not protect women. For purposes of litigation, she argues that it does. What are her true views? Her apologists might argue that, as a lawyer, she must employ any legitimate argument in the service of her client. Perhaps. This pattern nonetheless suggests that she has often placed constitutional interpretation in the service of present political purposes.

This pattern also suggests that she has little, if any, firm foundation in a coherent constitutional or interpretive philosophy. This discussion has already noted the observations by some that she is more a technician than an interpretive philosopher. Harvard law professor Alan Dershowitz says that she emphasizes the "fine print" rather than the "big picture."<sup>57</sup> Her selective references and manipulative use of originalism supports this view.

Judge Ginsburg insists that respecting what she insists is the intent of the Fourteenth Amendment's framers would constitute "a too strict 'jurisprudence of the framers' original intent."<sup>58</sup> Rather, she writes approvingly of "[b]oldly dynamic interpretation, departing radically from the original understanding...to tie to the fourteenth amendment's equal protection clause a command that government treat men and women as individuals equal in rights, responsibilities, and opportunities."<sup>59</sup> She also writes that the Constitution can "serve through changing times if supported by judicial interpretations that are neither 'mushy' nor too 'rigid'.<sup>60</sup> And, as already noted, she approves of "creatively interpreted clauses" as a way of making the Constitution accommodate modern social visions.

The Senate Judiciary Committee should explore with Judge Ginsburg just what she means by "interpretation" in these contexts. Only an activist could urge "boldly dynamic interpretation," "creative interpreted clauses," and the "creative, important judicial contributions" of which Professor Gunther spoke. She criticizes the Supreme Court for "stepping boldly in front of the political process" in *Roe v. Wade* yet encourages the Court to interpret boldly in sex discrimination cases. She wants the Court to interpret boldly, dynamically, and creatively in that area, but insists that the Constitution will endure only if the Court's interpretations are neither mushy nor rigid. These pieces do not suggest any coherent judicial or interpretive philosophy.

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<sup>57</sup> Dershowitz, "Nomination by Default," *Washington Times*, June 16, 1993, at G1.

<sup>58</sup> Ginsburg, *supra* note 34, at 17.

<sup>59</sup> Ginsburg, "Sexual Equality Under the Fourteenth and Equal Rights Amendments," 1979 *Washington University Law Quarterly* 161,161.

<sup>60</sup> Ginsburg, "On Amending the Constitution: A Plea for Patience," 12 *University of Arkansas at Little Rock Law Journal* 677,692-93 (1989-90).

Judge Ginsburg has suggested that on a court like the U.S. Court of Appeals, and "[u]nlike the Supreme Court,"<sup>61</sup> which faces few "grand constitutional questions," various factors combine to "tug judges strongly toward the middle, toward moderation and away from startlingly creative or excessively rigid positions."<sup>62</sup> Will she be free of the tug once she joins the Supreme Court and begins facing grand constitutional questions or favor the "[b]oldly dynamic interpretation"<sup>63</sup> of the Constitution she has called for in the past?

### III. JUDICIAL STYLE

"Judicial style" is different from judicial philosophy. It includes commitment to prudential rules of institutional restraint rather than broader, more substantive, views about interpretation or the overall role of the courts. While judicial philosophy involves one's view of the proper role of a judge, judicial style involves one's view of the proper functioning of a judge. One can have an activist judicial philosophy but a moderate judicial style.

#### A. Compromise, Consensus, and Collegiality

When President Clinton nominated Judge Ginsburg, he outlined three reasons for choosing her. One was that she would be "a force for consensus-building on the Court." Judge Ginsburg is self-conscious about this role. She put it this way during a roundtable discussion in 1985:

I don't see myself in the role of a great dissenter and I would much rather carry another mind even if it entails certain compromises. Of course there is a question of bedrock principle where I won't compromise but I have a very low dissent record on my court and I have learned a lot about other minds paying attention to people's personalities in this job. I take that into account much more than just the ideas that I was dealing with in what I did before I came to the bench.<sup>64</sup>

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<sup>61</sup> Ginsburg, "Styles of Collegial Judging: One Judge's Perspective," *Federal Bar News and Journal*, March/April 1992, at 200.

<sup>62</sup> *Id.*

<sup>63</sup> Ginsburg, *supra* note 59, at 161.

<sup>64</sup> *Judicature*, October-November 1985, at 145.

**B. Writing No More Than Necessary**

Judge Ginsburg later, in her roundtable discussion at Rutgers University, said that "a judge who speaks for a court with a wide range of views, rather than in a concurring or dissenting opinion, should take the low ground, and resist personal commentary."<sup>65</sup> This was in direct reference to criticism of Judge Robert Bork's decision in *Dronenberg v. Zech*,<sup>66</sup> in which the court upheld the Navy's policy of discharging sailors who engaged in homosexual conduct.

Judge Ginsburg was not a member of the panel but did express her views when addressing a motion for the entire court to review the panel decision. She voted not to rehear the case.<sup>67</sup> She agreed with the panel's first conclusion, that the Supreme Court's summary affirmation in *Doe v. Commonwealth's Attorney*<sup>68</sup> was binding but felt that in its remaining discussion, "the panel opinion airs a good deal more than disposition of the appeal required."<sup>69</sup> She considered those "extended remarks on constitutional interpretation as a commentarial exposition of the opinion writer's viewpoint, a personal statement that does not carry or purport to carry the approbation of 'the court'.<sup>70</sup> Her clear preference, in her statement in *Dronenberg* as well as in her remarks at Rutgers University a year later, is for the judge writing for the court to avoid addressing matters not directly necessary to the case before the court.

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<sup>65</sup> Ginsburg, *supra* note 52, at 1108.

<sup>66</sup> 741 F.2d 1388 (D.C.Cir. 1984).

<sup>67</sup> Unfortunately, the media routinely misreported Judge Ginsburg's action. One report stated that "she voted to dismiss a sailor's challenge to his dismissal for homosexual conduct." Marcus, "Clinton's Unexpected Choice is Women's Rights Pioneer," *Washington Post*, June 15, 1993, at A14. Another reporter for the same newspaper stated that "she voted to dismiss a case involving a sailor discharged from the military for engaging in homosexual activity." Blakupic, "Nominee's Philosophy Seen Strengthening the Center," *Washington Post*, June 15, 1993, at A12. Another reporter stated that "she ruled against homosexual sailor who challenged his discharge from the Navy." Roman, "Ginsburg Seen Joining Court's 'Muddy Middle,'" *Washington Times*, June 15, 1993, at A7. She did none of these things.

<sup>68</sup> 425 U.S. 901 (1976), *summarily aff'd* 403 F.Supp. 1199 (E.D.Va. 1975).

<sup>69</sup> *Dronenberg v. Zech*, 746 F.2d 11579, 1581 (D.C.Cir., 1984) (statement of Judge Ginsburg).

<sup>70</sup> *Id.* at 1582.

C. Writing Separately Only When Necessary

Judge Ginsburg, as quoted above, has pointed out that she has "a very low dissent record" on the U.S. Court of Appeals.<sup>71</sup> Delivering the Jurisprudential Lecture at the University of Washington School of Law in May 1989, Judge Ginsburg discussed "the competing tugs of collegiality and individuality" and said that "[w]hen to acquiesce and when to go it alone is a question our system allows each judge to resolve for herself."<sup>72</sup> Clearly opting for the former over the latter, Judge Ginsburg cited time constraints, the "danger of crying wolf," and "[c]oncern for the well-being of the court on which one serves, for the authority and respect its pronouncements command" as deterrents to writing separately.<sup>73</sup>

While, as noted above, Judge Ginsburg sees some utility in writing separately, her general view is that "[o]verindulgence in individualist judging...is counterproductive....Most vitally, the 'rule of law' virtues are slighted when a court fails to function as a collegial body. Those virtues are consistency, predictability, clarity, and stability."<sup>74</sup>

There appears to be some agreement that Judge Ginsburg is, in the words of one analyst, more "a legal technician" than "an interpretive philosopher."<sup>75</sup> Another report concluded that she has "a sometimes pedantic concern about details and procedure" and "her opinions reveal no broad constitutional philosophy."<sup>76</sup> Professor Dershowitz says more critically that her opinions as a judge "have been characterized by a rigid proceduralism."<sup>77</sup> One former clerk described her approach as "restrained, taking small steps instead of big steps--adhering closely to the precedents and not pushing the envelope."<sup>78</sup> One reporter concluded that Judge Ginsburg is one of those "cautious judges who are reluctant to overturn precedent."<sup>79</sup>

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<sup>71</sup> *Judicature*, *supra* note 64, at 145.

<sup>72</sup> *Ginsburg*, *supra* note 47, at 141.

<sup>73</sup> *Id.* at 142.

<sup>74</sup> *Ginsburg*, *supra* note 61, at 200.

<sup>75</sup> *Fein*, *supra* note 20.

<sup>76</sup> *Barrett & Birnbaum*, *supra* note 9, at A1.

<sup>77</sup> *Dershowitz*, *supra* note 57.

<sup>78</sup> Quoted in Associated Press, "Law Clerks Paint Picture of a Painstaking Jurist," *Washington Times*, June 20, 1993, at A6.

<sup>79</sup> *Roman*, *supra* note 8.

Even as they rush to confirm Judge Ginsburg before their August legislative recess, Senators should explore whether this attention to procedural and jurisdictional concerns is part of Judge Ginsburg's fundamental commitment to a moderate-to-conservative judicial style or whether it is merely a function of her serving on a mid-level appellate court. That is, once the restraint of Supreme Court precedent is removed, what principles will guide Justice Ginsburg and are those the same that once guided Judge Ginsburg?

This discussion of Judge Ginsburg's judicial style can conclude with two of her own expressions. At the 1980 hearing on her nomination to the U.S. Court of Appeals, she said:

And I believe that a judge is bound to decide fairly--based solely on the relevant facts--the record made in the case and the applicable law; a judge is bound to do that even when the decision is, as Justice Rehnquist recently put it, not the one the home crowd wants.<sup>80</sup>

Concluding an article on judicial activism, Judge Ginsburg wrote that the greatest members of the federal judiciary "have been independent-thinking individuals with open but not empty minds, individuals willing to listen and to learn. They have been skeptical of party lines and they have exhibited a readiness to reexamine their own premises, liberal or conservative, as thoroughly as those of others."<sup>81</sup>

The *Washington Post* expressed its editorial view this way:

She herself has expressed a reference for 'measured motions' by the judiciary, warning that 'doctrinal limbs too swiftly shaped...may prove unstable.' She reaffirmed yesterday her determination to view each case on the facts and the law presented, no matter what her own personal views and the urging of 'the home crowd' might suggest. To do anything less, to go to the high court with a political agenda or a mind closed to the unorthodox or the challenging, would be a betrayal of judicial responsibility.<sup>82</sup>

Judge Ginsburg has moderate practical instincts as a judge. She has a moderate judicial style. She is an interstitial activist. Yet her activist judicial philosophy is of far greater concern to those who seek to protect an independent judiciary. A philosophy of

<sup>80</sup> *Selection and Confirmation of Federal Judges*, *supra* note 30, at 350.

<sup>81</sup> *Ginsburg*, *supra* note 45, at 558.

<sup>82</sup> Editorial, "Judge Ginsburg's Nomination," *Washington Post*, June 15, 1993, at A20.

judicial restraint can keep judicial style in check. Practical instincts, a moderate judicial style, are no match for an activist judicial philosophy, especially when the shackles of institutional constraint are removed by appointment to the highest court in the land.

#### IV. ABORTION AND *ROE v. WADE*

Judge Ginsburg founded the ACLU's Women's Rights Project and served as the ACLU's general counsel from 1974 to 1980. Anyone who thinks she does not support constitutional protection for the right to choose abortion does not know what those four letters represent. Noting her criticism of *Roe v. Wade*,<sup>63</sup> the Supreme Court's decision creating the right to abortion, one analyst concluded that her objection did not extend to "the ultimate goal of a right to abortion fully anchored in the Constitution and secure against political undermining."<sup>64</sup>

President Clinton, however, promised during the presidential campaign to choose someone as his first Supreme Court appointee who is a "strong supporter of *Roe v. Wade*." At least since the late 1970s, Judge Ginsburg has criticized the constitutional basis and practical political impact of that decision. This slight departure from the politically correct text immediately raised questions about whether Bill Clinton correctly applied his abortion litmus test. Indeed, even he has backed off, insisting now only that Judge Ginsburg "is clearly pro-choice" on abortion.<sup>65</sup> Kathleen Quinn brands Judge Ginsburg's views "alarming" and "stunning."<sup>66</sup>

##### A. Constitutional Foundation

###### 1. The Supreme Court's decision

Judge Ginsburg has devoted nearly all of her professional life to crafting and implementing a unified approach to issues of concern to women based on the Constitution's requirement of "equal protection of the laws." During the 1970s, she argued and won

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<sup>63</sup> 410 U.S. 113 (1973).

<sup>64</sup> Greenhouse, "On Privacy and Equality," *New York Times*, June 16, 1993, at A1.

<sup>65</sup> Murray, *supra* note 4.

<sup>66</sup> Quinn, "Treat Judge Ginsburg Like a Man," *New York Times*, June 20, 1993, at 17.

landmark cases in the Supreme Court requiring courts to constitutionally scrutinize laws that treat men and women differently. The nature of her criticism of *Roe's* constitutional foundation, then, may not seem surprising.

On January 22, 1973, by a 7-2 vote, the Supreme Court handed down its decision in *Roe v. Wade* striking down a century-old Texas statute that prohibited all abortions except those necessary to save the life of the mother. The Court decided, for the first time, that the Fourteenth Amendment's due process clause<sup>87</sup> protects a woman's decision whether to terminate her pregnancy by abortion. The Court went past striking down that law—the most restrictive in the nation—and crafted a scheme of rules for balancing the woman's right and the state's interests in maternal health and fetal life during different stages of pregnancy.

#### 2. Judge Ginsburg's views

Judge Ginsburg has criticized the decision for basing the right to choose abortion on the due process clause rather than the equal protection clause.<sup>88</sup> For example, while still a law professor, she wrote in a review of the Supreme Court's 1976-77 Term:

Significantly, the opinions in *Roe v. Wade* and *Doe v. Bolton* barely mention "women's rights." They are not tied to any equal protection or equal rights theory. Rather, the Court anchored stringent review of abortion prohibitions to concepts of bodily integrity, personal privacy or autonomy, derived from the due process guarantee.<sup>89</sup>

When Professor Ginsburg became Judge Ginsburg, she continued raising the same question. Delivering the Joyner Lecture on Constitutional Law at the University of North

<sup>87</sup> The Fourteenth Amendment's due process clause reads: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

<sup>88</sup> The Fourteenth Amendment's equal protection clause reads: "[nor shall any State...] deny to any person within its jurisdiction the equal protection of the laws." While the Fifth Amendment, which applies to the federal government, does not contain a similar clause, the Supreme Court has decided that its due process clause has an equal protection component and has thereby imposed the same restrictions on the federal government that the Fourteenth Amendment imposes on state governments. See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *Bolling v. Sharpe*, 347 U.S. 497 (1954). Ruth Bader Ginsburg successfully *Weinberger* before the Supreme Court.

<sup>89</sup> Ginsburg, "Gender in the Supreme Court: The 1976 Term," in B. Justice & R. Pore (eds.), *Constitutional Government in America* (1980), at 223.

Carolina School of Law in April 1984, she observed: "The High Court has analyzed classification by gender under an equal protection/sex discrimination rubric; it has treated reproductive autonomy under a substantive due process/personal autonomy headline not expressly linked to discrimination against women."<sup>90</sup>

Judge Ginsburg repeated the same observation in a 1992 article: "But the Supreme Court did not rest its *Roe v. Wade* decision on an equal stature for women or sex discrimination rationale. Instead, the Court ruled on a personal privacy or autonomy analysis that had few precedents."<sup>91</sup>

Unfortunately, Judge Ginsburg has never described just how, based on the equal protection clause, an opinion striking down the restrictive Texas statute might have been written. In fact, she has never explicitly stated that *Roe v. Wade* was itself wrongly decided or that it should be overruled. She has simply observed that the Court based its opinion on the due process clause rather than on the equal protection clause. Most of her writings on this subject are descriptive rather than analytical.

### 3. Analysis

Judge Ginsburg is not alone in asserting that laws prohibiting or restricting abortion constitute sex discrimination in violation of the equal protection clause. In *Webster v. Reproductive Health Services*,<sup>92</sup> for example, the parties challenging abortion restrictions asked that, should the Court abandon *Roe*'s due process theory for abortion rights, the Court "remand th[e] case for consideration of what other Constitutional principles can support the right recognized in *Roe*." They offered an equal protection theory as an alternative.

Harvard law professor Laurence Tribe has observed that "[t]he plaintiffs in *Roe v. Wade* and *Doe v. Bolton* did not challenge the abortion restrictions as a form of sex discrimination....The national ACLU's Reproductive Freedom Project has long pursued a policy of discouraging sex discrimination claims in abortion cases."<sup>93</sup> This may be the result of fundamental conceptual problems with the theory itself.

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<sup>90</sup> Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*," 63 *North Carolina Law Review* 373,373-74 (1985).

<sup>91</sup> Ginsburg, "A Moderate View on Roe," *Constitution*, Spring-Summer 1992, at 17.

<sup>92</sup> 492 U.S. 490 (1989).

<sup>93</sup> L. Tribe, *American Constitutional Law* (2nd ed. 1988), at 1353 n.109.

Judge Ginsburg refers to an "equal protection or equal rights theory"<sup>84</sup> or an "equal protection/sex discrimination rubric"<sup>85</sup> as a better way of approaching cases challenging abortion restrictions. The equal protection clause ensures that similarly situated individuals are treated similarly.<sup>86</sup> Applying this concept to the question of abortion rights creates some difficulty. If women and men could both become pregnant, a law prohibiting only women from obtaining abortions would violate the equal protection clause. This law would treat women differently because of their sex.

Men, of course, cannot become pregnant and, therefore, women and men cannot be similarly situated with respect to either pregnancy or its termination. Denying to women a course of action that only they can take--in this case, a particular method of pregnancy termination--cannot be said to discriminate against them because of their gender; all persons able to take that course of action are of the same gender.

Perhaps the best way to make this point is to use examples from the very sex discrimination cases that Ruth Bader Ginsburg participated in litigating on behalf of the American Civil Liberties Union's Women's Rights Project. Each of these cases involved women being treated differently than similarly situated men because of their gender.

- \* *Reed v. Reed*<sup>87</sup> challenged an Idaho law requiring that men be preferred over equally qualified women to be estate administrators.
- \* *Frontiero v. Richardson*<sup>88</sup> challenged two statutes providing military servicemen with automatic dependency benefits for housing or medical care for their spouses but providing such benefits for military servicewomen only if her spouse depended on her for more than half his support.
- \* *Kahn v. Shevin*<sup>89</sup> challenged a tax break for widows that was unavailable for widowers.

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<sup>84</sup> Ginsburg, *supra* note 89, at 223.

<sup>85</sup> Ginsburg, *supra* note 90, at 373.

<sup>86</sup> See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439-40 (1985).

<sup>87</sup> 404 U.S. 71 (1971).

<sup>88</sup> 411 U.S. 677 (1973).

<sup>89</sup> 416 U.S. 351 (1974).

- \* *Weinberger v. Wiesenfeld*<sup>100</sup> and *Califano v. Goldfarb*<sup>101</sup> challenged Social Security benefits available to women but not to men.
- \* *Craig v. Boren*<sup>102</sup> challenged an Oklahoma law setting the age for purchasing beer at 18 for women and 21 for men.

One of her former clerks summarized Judge Ginsburg's views on this point: "The disadvantageous treatment of a woman because of pregnancy or reproductive choice, Judge Ginsburg has written, is a paradigm case of discrimination on the basis of sex."<sup>103</sup> Roger Pilon counters:

Disadvantageous treatment of a woman because of her pregnancy is treatment based, as the proposition states, on her pregnancy, not her sex. Otherwise every woman would be so treated, which not even Judge Ginsburg asserts. It is true, of course, that only women become pregnant. But from that fact it no more follows that pregnancy discrimination is sex discrimination than that punishment for having committed a crime is punishment for being a person--it being a fact also that only people commit crimes.<sup>104</sup>

Exclusive focus on women, therefore, necessarily negates the equal protection argument because individuals in the resulting class share the same gender. Yet an exclusive focus on women is exactly what Judge Ginsburg advocates. *Roe*, she writes, would be less subject to criticism "had the Court placed the woman alone...at the center of its attention."<sup>105</sup> Doing so, however, cannot be accomplished through the equal protection clause since determining whether a woman has been treated "equally" with respect to her gender requires reference to the treatment of similarly situated individuals of a different gender, namely, men.

Remember how her former clerk put it: "The disadvantageous treatment of a woman because of her pregnancy or reproductive choice...is a paradigm case of discrimination on

<sup>100</sup> 420 U.S. 636 (1975).

<sup>101</sup> 430 U.S. 199 (1977).

<sup>102</sup> 429 U.S. 190 (1976).

<sup>103</sup> Huber & Taranto, *supra* note 25.

<sup>104</sup> Pilon, *supra* note 33.

<sup>105</sup> Ginsburg, *supra* note 90, at 382.

the basis of sex." Only women can become pregnant and, therefore, only women can obtain abortions. Therefore, any abortion restriction is a "disadvantageous treatment of a woman because of her pregnancy or reproductive choice" because no abortion restriction, no matter how slight, can be applied against a man. To apply an equal protection theory to abortion rights, then, requires arguing that any abortion restriction violates the equal protection clause by definition.

The Supreme Court has already rejected this idea. In *Geduldig v. Aiello*,<sup>106</sup> the Court upheld against an equal protection challenge a state program that excluded from insurance coverage disabilities accompanying pregnancy. The Court held:

The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition--pregnancy--from the list of compensable disabilities. While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification.<sup>107</sup>

Judge Ginsburg believes that "[t]he disadvantageous treatment of a woman because of pregnancy...is a paradigm case of discrimination on the basis of sex." The Supreme Court has rejected the notion that "every legislative classification concerning pregnancy is a sex-based classification." No wonder the ACLU's Reproductive Freedom Project counsels against making sex discrimination claims in abortion cases.

### B. Practical Political Impact

#### 1. The Supreme Court's decision

During the 19th century, every state passed laws prohibiting all abortions except those necessary to save the life of the mother.<sup>108</sup> Between 1965 and 1972, every state considered

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<sup>106</sup> 417 U.S. 484 (1974).

<sup>107</sup> *Id.* at 496 n.29.

<sup>108</sup> See Quay, "Justifiable Abortion--Medical and Legal Foundations," 49 *Georgetown Law Journal* 395,447-520 (1961).

proposals to liberalize these statutes and many chose to do so.<sup>109</sup> A study by the Planned Parenthood Federation found that approximately half the states adopted proposals to reform or repeal their abortion statutes.<sup>110</sup>

In 1973, when the Supreme Court decided *Roe*, three types of statutes existed. Thirty-one states retained the traditional restrictive statute.<sup>111</sup> Another 15 states had adopted statutes permitting abortions in specific circumstances.<sup>112</sup> The final four states allowed abortions for any reason but only during early pregnancy.<sup>113</sup>

The Texas statute reviewed in *Roe* was of the first type and *Roe* obviously rendered it unconstitutional. In a case decided the same day as *Roe*, the Court made clear that its decision also rendered the second, more liberal, type of statute invalid.<sup>114</sup> There is almost universal agreement among scholars, analysts, and commentators that *Roe* effectively struck down all existing abortion laws.<sup>115</sup> None was liberal enough to survive the new scheme of rules constructed by the Court in *Roe*. Its rigid framework has been applied since 1973 to invalidate nearly every abortion restriction including, for example, parental and spousal consent,<sup>116</sup> standard of care in post-viability abortions,<sup>117</sup> second physician requirement

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<sup>109</sup> See Comment, "A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems," 1972 *University of Illinois Law Forum* 177.

<sup>110</sup> "Abortion in the U.S.: Two Centuries of Experience," in *Constitutional Amendments Relating to Abortion: Hearings Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 97th Cong., 1st Sess. 357 (1981).

<sup>111</sup> See *Roe*, 410 U.S. at 118 n.2.

<sup>112</sup> *Id.* at 140 n.37. These circumstances typically included a threat to the mother's life or health, likely fetal deformity, rape, or incest. This type of statute was modeled on the American Law Institute's Model Penal Code section on abortion.

<sup>113</sup> *Id.*

<sup>114</sup> *Doe v. Bolton*, 410 U.S. 179 (1973).

<sup>115</sup> See, e.g., Sarvis & Rodman, *The Abortion Controversy* (New York: Columbia University Press, 1973), at 57 (Court's decision in *Roe* "renders all original and reform laws unconstitutional").

<sup>116</sup> See, e.g., *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

<sup>117</sup> See, e.g., *Colautti v. Franklin*, 439 U.S. 379 (1979).

for post-viability abortions,<sup>118</sup> informed consent requirements,<sup>119</sup> or two-parent notification.<sup>120</sup>

## 2. Judge Ginsburg's views

Judge Ginsburg clearly views this sudden and universal trumping of the legislative process, and the wiping out of all existing abortion laws—restrictive and lenient—in a negative light.

On March 9, 1993, Judge Ginsburg delivered the Madison Lecture at New York University School of Law and observed that *Roe v. Wade* "halted a political process that was moving in a reform direction and thereby, I believe, prolonged divisiveness and deferred stable settlement of the issue."<sup>121</sup> She noted that the Court "seemed entirely to remove the ball from the legislators' court."<sup>122</sup>

Judge Ginsburg had previously observed in 1992 that "[t]he *Roe* decision, by stopping a political process that was moving in a reform direction, may have prolonged divisiveness and deferred stable settlement of the abortion controversy."<sup>123</sup>

Judge Ginsburg wrote in a 1990 article: "There was at the time [of *Roe*], as Justice Blackmun noted in his opinion, a distinct trend in the states 'toward liberalization of abortion statutes.' Had the Court written smaller and shorter, the legislative trend might have continued in the direction in which it was clearly headed in the early 1970s."<sup>124</sup>

She wrote in 1985 that, in *Roe*, the Court "called into question the criminal abortion statutes of every state, even those with the least restrictive provisions."<sup>125</sup> In doing so, the

<sup>118</sup> See, e.g., *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

<sup>119</sup> See, e.g., *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983).

<sup>120</sup> See, e.g., *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

<sup>121</sup> *Verbatim*, *supra* note 31, at 11.

<sup>122</sup> *Id.*

<sup>123</sup> *Ginsburg*, *supra* note 91.

<sup>124</sup> *Ginsburg*, "On Muteness, Confidence, and Collegiality: A Response to Professor Nagel," 61 *University of Colorado Law Review* 715, 718-19 (1990).

<sup>125</sup> *Ginsburg*, *supra* note 90, at 381.

decision "ventured too far in the change it ordered."<sup>126</sup> Judge Ginsburg agreed with the assessment of Professor Paul Freund, namely, that the Court "properly invalidated the Texas proscription" but should have "left off at that point" so that "the legislative trend might have continued in the direction in which it was headed in the early 1970s."<sup>127</sup> Professor Freund had written in 1983 that the detailed trimester framework in *Roe* "illustrated a troublesome tendency of the modern Supreme Court...to specify by a kind of legislative code the one alternative pattern that will satisfy the Constitution".<sup>128</sup>

### 3. Analysis

Not everyone agrees with Judge Ginsburg's reading of history. The *New York Times* editorialized that she "was too hard on Roe and probably misread history."<sup>129</sup> Author David Garrow writes that her criticisms of *Roe* "manifest a surprising ignorance of abortion law developments in the five years preceding the January 1973 decision."<sup>130</sup>

When Judge Ginsburg, on the one hand, argues that the Court in *Roe* "ventured too far"<sup>131</sup> and should have "written smaller and shorter"<sup>132</sup> and, on the other hand, challenges *Roe*'s doctrinal foundation, she suggests that her preferred equal protection theory would be less expansive than the due process theory the Court adopted. In fact, however, her recommended alternative has no limitation whatsoever.

Judge Ginsburg has offered no reason, and none is apparent, why a law prohibiting abortion for a particular reason--even sex selection--or during a particular stage of pregnancy--even the ninth month--would not amount to sex discrimination just as readily as would a law prohibiting all abortions. If restricting a course of action that only women can take is prohibited sex discrimination, then it is so throughout pregnancy. Restriction on sex selection abortions or on late-term abortions only affect women.

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 382.

<sup>128</sup> *Id.*, quoting Freund, "Storms Over the Supreme Court" 69 A.B.A. Journal 1474,1480 (1980)

<sup>129</sup> Editorial, *New York Times*, June 15, 1993, at A26.

<sup>130</sup> Garrow, "History Lesson for the Judge," *Washington Post*, June 20, 1993, at C3.

<sup>131</sup> *Id.* at 381.

<sup>132</sup> Ginsburg, *supra* note 124, at 719.

Judge Ginsburg has, on the one hand, criticized the Supreme Court's *Roe v. Wade* decision for going too far in striking down an abortion restriction while, on the other hand, criticizing the Supreme Court for going too far in upholding restrictions on public funding of abortions. The Court has consistently held that the Constitution does not require the state to pay for abortions under any circumstances. Judge Ginsburg has criticized these decisions as "incongruous"<sup>133</sup> and the "[m]ost unsettling of the losses" for women's rights.<sup>134</sup> She wrote in 1985: "If the Court had acknowledged a woman's equality aspect, not simply a patient-physician autonomy constitutional dimension to the abortion issue, a majority perhaps might have" ruled differently.<sup>135</sup>

One would think from Judge Ginsburg's criticism of both the due process theory of abortion rights and the Court's abortion funding cases that the Court had decided the funding cases on a due process rationale. Not so. It applied the equal protection clause.

- \* In *Maher v. Roe*,<sup>136</sup> the Court held that the equal protection clause does not require a state to pay expenses for elective abortions when it chooses to pay expenses for childbirth.
- \* In *Poelker v. Doe*,<sup>137</sup> the Court held that the equal protection clause does not require a city to provide publicly financed hospital facilities for abortions when it provides such facilities for childbirth.
- \* In *Harris v. McRae*,<sup>138</sup> the Court held that the so-called Hyde Amendment, which restricts the use of funds in the federal Medicaid program to pay for abortions, does not violate the equal protection clause.
- \* In *Williams v. Zbaraz*,<sup>139</sup> the Court held that a funding restriction similar to the Hyde Amendment in a state statute does not violate the equal protection component of the Fifth Amendment.

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<sup>133</sup> Ginsburg, *supra* note 90, at 386.

<sup>134</sup> Ginsburg, *supra* note 89, at 224.

<sup>135</sup> Ginsburg, *supra* note 90, at 385.

<sup>136</sup> 432 U.S. 464 (1977).

<sup>137</sup> 432 U.S. 519 (1977).

<sup>138</sup> 448 U.S. 297 (1980).

<sup>139</sup> 448 U.S. 358 (1980).

- \* In *Webster v. Reproductive Health Services*,<sup>140</sup> the Court held that a statutory restriction on the use of public employees or facilities for abortions does not violate the equal protection clause.

One can only conclude that Judge Ginsburg simply thinks that the government is obligated to pay for abortions, regardless of how the equal protection clause applies. It appears, at least in this area, that Judge Ginsburg is willing to have "the Supreme Court step boldly in front of the political process,"<sup>141</sup> exactly what she criticized the Court for doing in *Roe*.

On the one hand, Judge Ginsburg writes that "the legislative trend"<sup>142</sup> of the 1960s and early 1970s should have been allowed to continue "in the reform direction."<sup>143</sup> On the other hand, she writes: "Nor can the political process be relied upon to respond to the plight of the indigent woman."<sup>144</sup> It appears she only opts for allowing the legislative process to operate in the abortion area as long as it is heading in a "reform direction" toward results she approves.

Is Judge Ginsburg's preferred theory--equal protection--more modest or more expansive than the Supreme Court's preferred theory--due process--has been? Does Judge Ginsburg think that the legislative process should be allowed to move toward a "stable settlement of the abortion controversy"<sup>145</sup> or doesn't she? She apparently equates "stable settlement" with widely available legal abortion.

Judge Ginsburg writes that "the *Roe v. Wade* decision is not fairly described as 'moderate'"<sup>146</sup> and elsewhere described that decision as "no measured motion."<sup>147</sup> Yet it is not at all clear that her preferred theory makes any more sense or is any more moderate. Judge Ginsburg has made it clear that her theory could be used to require public financing of abortions and a cursory look suggests that her theory could be used to eliminate restrictions that *Roe v. Wade* would allow.

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<sup>140</sup> 492 U.S. 490 (1989).

<sup>141</sup> Ginsburg, *supra* note 31, at 11.

<sup>142</sup> Ginsburg, *supra* note 124, at 719.

<sup>143</sup> Ginsburg, *supra* note 91.

<sup>144</sup> Ginsburg, *supra* note 89, at 224.

<sup>145</sup> Ginsburg, *supra* note 91.

<sup>146</sup> *Id.*

<sup>147</sup> Ginsburg, *supra* note 31, at 11.

#### V. CONCLUSION

Judicial philosophy and judicial style are two very different facets of a judicial nominee. Judicial philosophy encompasses a nominee's fundamental views about the role of courts and the difference between law and politics, between judges and policy makers. Judge Ginsburg has an activist judicial philosophy.

- \* She believes that the Supreme Court can, and sometimes should, change its interpretation of the Constitution because of social changes.<sup>148</sup>
- \* She believes that the Supreme Court can, and sometimes should, creatively interpret constitutional provisions in order to accommodate a modern vision of society.<sup>149</sup>
- \* She believes in the need for "interventionist" judicial decisions when legislatures do not or will not act.<sup>150</sup>
- \* She believes that "boldly dynamic interpretation" that departs "radically from the original understanding" is sometimes necessary to reach certain results.<sup>151</sup>
- \* She believes the Constitution can survive only if supported by judicial interpretations that are neither too "mushy" or too "rigid."<sup>152</sup> She believes that a jurisprudence of original understanding is too rigid.<sup>153</sup>

Judicial style is a combination of practical factors that describe the functioning, rather than the role, of a judge. Judge Ginsburg has a moderate judicial style. It is only in this sense that she can be called a "moderate," the label that so many are so quick to place on her.

- \* She opposes frequently writing separate opinions.<sup>154</sup>

<sup>148</sup> See *supra* notes 39-41 and accompanying text.

<sup>149</sup> See *supra* notes 42-44 and accompanying text.

<sup>150</sup> See *supra* notes 45-46 and accompanying text.

<sup>151</sup> See *supra* note 59 and accompanying text.

<sup>152</sup> See *supra* note 60 and accompanying text.

<sup>153</sup> See *supra* note 58 and accompanying text.

<sup>154</sup> See *supra* note 74 and accompanying text.

- \* She believes that judges should write no more than necessary to decide a particular case and should "take the low ground, and resist personal commentary" when writing for the court.<sup>155</sup>

Judge Ginsburg's views on abortion and *Roe v. Wade* are driven by her politics. Consistent with her activist judicial philosophy, she believes the Supreme Court quite properly involved itself in the abortion controversy, and should have done so by striking down the restrictive law at issue in *Roe* on equal protection, rather than on due process, grounds. This way, the Court could have encouraged a liberalizing political trend that, in Judge Ginsburg's view, recognizes the independence of women in our society.

Consistent with her moderate judicial style, Judge Ginsburg has criticized the Supreme Court for going beyond invalidating the Texas law and announcing a set of complicated rules that effectively struck down all other abortion restrictions--tough as well as lenient--existing in 1973, and most of those enacted since.

Judge Ginsburg's preferred equal protection theory, however, has serious conceptual problems. Most important, men and women cannot be similarly situated with respect to either pregnancy or its termination and, as such, it is impossible to discuss whether women are being treated "equally" because of their gender. Since women are the sole focus of this view, applying an equal protection theory to abortion rights necessarily means defining any restriction on abortion--a course of action that only women can take--as impermissible sex discrimination. As such, this theory would go beyond the policy established by *Roe v. Wade*. Judge Ginsburg objects to the Supreme Court's decisions that the state is not constitutionally required to pay for abortions, even though the Court applied her preferred equal protection theory in those cases.

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<sup>155</sup> See *supra* note 65 and accompanying text.

## JUDICIAL SELECTION MONITORING PROJECT

*A project of the Free Congress Foundation's Center for Law & Democracy*

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### THE CONTINUING SEARCH FOR MODERATION

An analysis of  
President Bill Clinton's nomination of

### RUTH BADER GINSBURG

to be an Associate Justice of the U.S. Supreme Court

by  
Thomas L. Jipping, M.A., J.D.

July 13, 1993

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**EXECUTIVE SUMMARY**

Pundits and politicians rushed to label Ruth Bader Ginsburg a "moderate" without knowing virtually anything about her record. This reaction had more to do with who she is not—Bruce Babbitt, Jon Newman, Mario Cuomo, Laurence Tribe—than who she is.

The record shows that Judge Ginsburg is no moderate. The Judicial Selection Monitoring Project's first report, *A Step in the Left Direction*, documented how her scholarly writings reveal a strikingly activist judicial philosophy and an arguably moderate judicial style. On issues that really matter, however, her record belies any moderation at all. Her politics drive her jurisprudence.

This second report, *The Continuing Search for Moderation*, summarizes these findings and goes on to examine Judge Ginsburg's record on the U.S. Court of Appeals, with an eye toward whether she tempers her judicial activism in practice. The "moderate" label so quickly and confidently placed on Judge Ginsburg would predict such a pattern. In addition, mid-level appellate courts have built-in factors that can temper judicial activism—Supreme Court precedent, circuit precedent, etc. Judge Ginsburg herself has written about such factors that "tug" judges on those courts toward moderation.

The jurisdiction of the judicial circuit on which Judge Ginsburg serves makes the task of assessing her judicial philosophy particularly difficult. This circuit's docket includes a heavy dose of administrative law and includes, for example, only a narrow range of criminal cases. Even so, Judge Ginsburg's record provides many examples of how she breaks her own rules of moderation by writing separately about issues not before the court and giving dissertations on the law outside of the case at hand. In key areas—e.g., separation of powers, standing, civil rights—her opinions reveal a pattern of picking and choosing approaches and selective application of doctrines to create a striking parallel with the liberal political agenda. *A Step in the Left Direction* showed how, in her scholarly writings, Judge Ginsburg's politics drive her jurisprudence. Likewise, *The Continuing Search for Moderation* reveals how this same activism is apparent in her judicial record.

Judge Ginsburg believes that courts and legislatures are interchangeable players in the search for sound public policy; that courts should be restrained only when legislatures are activist; that courts should change interpretation of the Constitution in light of social and political developments; that courts can move beyond reviewing legislation to actually "repairing" it. She has shown that even the inherent constraints of a mid-level appellate court have not seriously tempered this activism. She has written that the factors tugging judges toward moderation on such a court do not exist on the court to which she has been nominated.

The record belies the pundits. Judge Ginsburg is no moderate. She has a strikingly activist judicial philosophy and has shown her willingness to abandon even her nominally moderate judicial style in the service of politically correct results.

## THE CONTINUING SEARCH FOR MODERATION

by  
Thomas L. Jipping, M.A.,J.D.<sup>1</sup>

On June 14, 1993, after more than 12 weeks of consideration, President Bill Clinton nominated U.S. Circuit Judge Ruth Bader Ginsburg to replace retiring U.S. Supreme Court Associate Justice Byron White. The Judicial Selection Monitoring Project published its first report on the Ginsburg nomination, *A Step in the Left Direction*, on June 24. That report focused on Judge Ginsburg's scholarly writings. This second report includes discussion of her judicial opinions and assembles more clues about Judge Ginsburg's judicial philosophy. Both reports are intended to provide information as the Senate seeks to fulfill its constitutional role of advice and consent and in considering the Ginsburg nomination.

I. INTRODUCTION

Analysts, reporters, and politicians quickly rushed to label Judge Ginsburg a "moderate" within minutes of her nomination. None of them, of course, even attempted to define that term. Determining how a former general counsel of the American Civil Liberties Union and a pioneering women's rights activist could be labeled "moderate" led to publication of *A Step in the Left Direction*. Defining, and distinguishing between, judicial philosophy and judicial style, the report concluded that the "moderate" label applies only to the latter and only for the moment.

More serious study of Judge Ginsburg's record has produced doubts about this "moderate" label. For example, noting that Ruth Bader Ginsburg prompted the ACLU to adopt a radical position on the issue of sex between adults and children while she was its general counsel, *Human Events* asked: "How 'Moderate' Is Ruth Ginsburg?"<sup>2</sup> Writing in the *New Republic*, Mickey Kaus described thinking that the label "moderate" sounded legitimate until he read her writings. "Now," he writes, "I'm not so sure."<sup>3</sup>

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<sup>2</sup> "How 'Moderate' Is Ruth Ginsburg?", *Human Events*, June 26, 1993, at 1.

<sup>3</sup> Kaus, "Moderate Threat," *The New Republic*, June 12, 1993, at 6.

When evaluating Republican nominees, Senate Democrats and their allies in the academy and interest groups strongly argued for the relevance of extra-judicial writings, the focus of *A Step in the Left Direction*. Testifying in 1987 against the Supreme Court nomination of U.S. Circuit Judge Robert Bork, law professor Paul Gewirtz countered those who argued against considering the nominee's academic writings by stating that "virtually all academics write to express what they believe to be the truth. We may try out ideas that we later conclude are wrong, but...law professors try to say what they really believe. Thus, what we write is always revealing."<sup>4</sup> Senator Howard Metzenbaum (D-OH), a member of the Judiciary Committee, declared at the hearing on Judge Ginsburg's former judicial colleague Clarence Thomas' nomination to the Supreme Court that "[t]he pre-judicial record and positions of a nominee are usually a good indicator of what kind of judge that nominee will be."<sup>5</sup>

Significantly, these liberal activists demanded consideration of Republican nominees' academic writings that entirely pre-dated any service in the judiciary and never attempted to explain their relevance to a nominee's judicial philosophy. Rather, they simply highlighted political results. Most of Ruth Bader Ginsburg's scholarship, on the other hand, was published after she joined the U.S. Court of Appeals, making it even more relevant than even the Democratic standard suggests. The reports on the Ginsburg nomination from the Judicial Selection Monitoring Project are careful to focus attention on the nominee's judicial philosophy rather than political results.

*A Step in the Left Direction* distinguished between Judge Ginsburg's activist judicial philosophy and her moderate judicial style and suggested that the latter might just give way should she join the Supreme Court. Mickey Kaus' analysis followed a strikingly similar line. He wrote: "When it comes to judging, there are many species of moderation. One variety reflects a disciplined interpretation of the Constitution. Another reflects mere caution."<sup>6</sup> He concluded that "Ginsburg's cautious, case-by-case approach...appears less like congenital 'moderation' than the option-preserving tactics of a shrewd litigator....By being 'moderate' today, she frees herself to be immoderate tomorrow."<sup>7</sup>

Summarizing the findings from *A Step in the Left Direction* provides a useful backdrop for this analysis of Judge Ginsburg's judicial decisions.

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<sup>4</sup> *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States*, Hearings Before the Committee on the Judiciary, United States Senate, 100th Cong., First Sess., Serial No.J-100-64, Part 2 (1987), at 2561.

<sup>5</sup> Transcript of Proceedings, United States Senate, Committee on the Judiciary, *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court*, Sept. 16, 1991 (Part 1), at 31.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

#### A. Activist Judicial Philosophy

Judge Ginsburg has a clearly activist judicial philosophy. She blurs the line between the judicial and political branches of government, between judges and policymakers, and between law and politics. Her writings evidence this activist philosophy in several ways.

First, Judge Ginsburg believes that the Supreme Court can, and sometimes should, change its interpretation of the Constitution based on "a growing comprehension by jurists of a pervasive change in society at large."<sup>8</sup> She has written approvingly of how "[p]ervasive social changes" undermine the reasoning of undesirable Supreme Court precedents.<sup>9</sup>

Second, she approves of the Supreme Court "creatively interpret[ing]" constitutional provisions to implement "a modern vision" of society.<sup>10</sup> She supports "[b]oldly dynamic interpretation, departing radically from the original understanding" to achieve desirable political results.<sup>11</sup>

Third, Judge Ginsburg believes that courts and legislatures are interchangeable players in the effort to achieve good public policy. She writes that courts should achieve desirable political results when legislatures do not "shoulder[] their full responsibility for activist decisionmaking."<sup>12</sup> Judicial restraint is only appropriate when legislatures are activist.

Fourth, Judge Ginsburg's politics drive her jurisprudence. Some examples:

- \* When campaigning for adoption of the so-called equal right amendment to the U.S. Constitution, she says the equal protection clause of the Fourteenth Amendment does not protect women.<sup>13</sup>

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<sup>8</sup> Ginsburg, "Remarks on Women Becoming Part of the Constitution," 6 *Law & Inequality* 17,20 (1988).

<sup>9</sup> Ginsburg, "Sex Discrimination," in L. Levy, K. Karst & D. Mahoney (eds.), *Encyclopedia of the American Constitution* (1986), at 1667.

<sup>10</sup> *Id.* at 1673.

<sup>11</sup> Ginsburg, "Sexual Equality Under the Fourteenth and Equal Rights Amendments," 1979 *Washington University Law Quarterly* 161,161.

<sup>12</sup> Ginsburg, "Inviting Judicial Activism: AA 'Liberal' or 'Conservative' Technique?," 15 *Georgia Law Review* 539,550 (1981).

<sup>13</sup> See Ginsburg, "Sexual Equality Under the Fourteenth and Equal Rights Amendments," 1979 *Washington University Law Quarterly* 161.

- \* When championing the feminist cause in court, she argues quite successfully that the equal protection clause of the Fourteenth Amendment does indeed protect women.<sup>14</sup>
- \* When promoting the equal rights amendment, she calls the claim that the measure would support abortion rights "an inflammatory, but not an accurate charge."<sup>15</sup>
- \* When criticizing the Supreme Court's abortion doctrine, she insists that an equal protection theory, rather than a due process theory, should provide the basis for abortion rights.<sup>16</sup>

Anyone who confuses the political and judicial branches of government as much as Judge Ginsburg does has a fundamentally activist judicial philosophy. The term "moderate" does not fairly describe these views. Then why have so many given Judge Ginsburg this label?

#### B. Moderate Judicial Style

While judicial philosophy refers to one's views of the role of a judge, "judicial style" refers to practical considerations guiding the functioning of a judge. Only with respect to these prudential factors can Judge Ginsburg be called a moderate.

First, Judge Ginsburg has discouraged what she calls "individualist judging,"<sup>17</sup> the practice of frequently writing separate opinions. Judge Ginsburg opts "to acquiesce" rather than "to go it alone."<sup>18</sup> She wrote in 1985: "I don't see myself in the role of a great dissenter and I would much rather carry another mind even if it entails certain compromises."<sup>19</sup>

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<sup>14</sup> See, e.g., *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Craig v. Boren*, 429 U.S. 190 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Kahn v. Shevin*, 416 U.S. 351 (1974); *Fronstiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971).

<sup>15</sup> Ginsburg, "Ratification of the Equal Rights Amendment: A Question of Time," 57 *Texas Law Review* 919,937 (1979).

<sup>16</sup> See *infra* notes 39-40 and accompanying text; *A Step in the Left Direction* at 22-23.

<sup>17</sup> Ginsburg, "Styles of Collegial Judging: One Judge's Perspective," *Federal Bar News and Journal*, March/April 1992, at 200.

<sup>18</sup> Ginsburg, "Remarks on Writing Separately," 65 *Washington Law Review* 133,141 (1990).

<sup>19</sup> *Judicature*, October-November 1985, at 145.

Second, Judge Ginsburg has written that, when a judge does write for a court's majority rather than separately, he or she "should take the low ground, and resist personal commentary."<sup>20</sup>

Third, Judge Ginsburg has criticized the Supreme Court's decision in *Roe v. Wade*,<sup>21</sup> which not only struck down the very restrictive Texas statute before the Court but announced a complicated set of rules that effectively rendered all other abortion laws invalid, as having "ventured too far in the change it ordered."<sup>22</sup> She believes the Court should have "written smaller and shorter."<sup>23</sup>

In 1991, commentator Stuart Taylor called Judge Ginsburg a "careful judge not given to crusading activism."<sup>24</sup> Roger Pilon wrote that she "establishes herself as a 'judicial activist,' although one limited to 'interstitial' activism."<sup>25</sup> One reporter concluded that Judge Ginsburg feels "the court should merely nudge social trends."<sup>26</sup> She is an activist; Taylor says she is not a "crusading" one and Pilon says she is merely an "interstitial" one. She believes courts should move social trends; some say she would merely "nudge" them.

Judge Ginsburg is even arguably "moderate" only with respect to this practical measure of judicial style although, as the next section of this report will demonstrate, she violates in practice the very rules of moderation she has expressed in scholarship. Even this moderate judicial style may be merely a product of Judge Ginsburg's service on a mid-level appellate court, restrained by her own court's precedents and the decisions of the Supreme Court. Judge Ginsburg has written that on such a court, "[u]nlike the Supreme Court" which

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<sup>20</sup> Ginsburg, "Second Decennial Conference on the Civil Rights Act of 1964," 37 *Rutgers Law Review* (1985), at 1108.

<sup>21</sup> 410 U.S. 113 (1973).

<sup>22</sup> Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*," 63 *North Carolina Law Review* 373,381 (1985).

<sup>23</sup> Ginsburg, "On Muteness, Confidence, and Collegiality: A Response to Professor Nagel," 61 *University of Colorado Law Review* 715,719 (1990).

<sup>24</sup> Taylor, "What's Really Wrong With the Way We Choose Supreme Court Justices," *The American Lawyer*, November 1991, at 76.

<sup>25</sup> Pilon, "Ginsburg's Troubling Constitution," *Wall Street Journal*, June 17, 1993, at A10.

<sup>26</sup> Murray, "Despite Writings, President Insists Ginsburg is Pro-Choice," *Washington Times*, June 16, 1993, at A3.

faces "grand constitutional questions," various factors combine to "tug judges strongly toward the middle, toward moderation and away from startlingly creative or excessively rigid positions."<sup>27</sup> If confirmed, Judge Ginsburg will no longer serve on such a court and will be free of that tug toward moderation.

#### C. Turning Judicial Review Into Judicial Repair

Judge Ginsburg believes that courts should go beyond invalidating statutes they find to violate the Constitution and should actually "repair" them. In *Weinberger v. Wiesenfeld*,<sup>28</sup> for example, the Supreme Court reviewed a provision of the Social Security Act that awarded benefits to the surviving widow of a deceased male wage earner but not to the surviving widower of a deceased female wage earner. The Court determined that this gender-based classification violated the Fifth Amendment, but then went beyond invalidating the provision. The Court actually ordered Social Security payments to widowers in the absence of any legislative provision to accomplish that result. As Judge Ginsburg put it, "the Court wrote into the statute [those] Congress had left out."<sup>29</sup>

Such "judicial extension of underinclusive statutes"<sup>30</sup> or "judicial repair work"<sup>31</sup> is appropriate, Judge Ginsburg writes, when "the class benefited by the judicial repair...[is] limited, and the legislative will [is] minimally touched."<sup>32</sup> She writes approvingly of courts acting to "repair" an invalidated statute based on "[t]he probable will of the legislature."<sup>33</sup>

This is a shockingly activist view of the proper role of unelected courts in a system of representative government with co-equal branches. Judge Ginsburg has no problem with courts explicitly legislating—literally writing statutes that did not otherwise exist—so long as they do so modestly. She writes quite plainly that "appreciating that the court is legislating

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<sup>27</sup> Ginsburg, "Styles of Collegial Judging: One Judge's Perspective," *Federal Bar News and Journal*, March/April 1992, at 200.

<sup>28</sup> 420 U.S. 636 (1975).

<sup>29</sup> Ginsburg, "Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation," 28 *Cleveland State Law Review* 301,302 (1979).

<sup>30</sup> *Id.* at 304.

<sup>31</sup> *Id.* at 305.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 316.

seems to me the key to proper analysis of the issue.<sup>34</sup> Determining the actual will of the legislature is often a daunting task; courts inventing the probable will of the legislature is license for independent legislation by the judicial branch. And even then, whether acting on the basis of the actual or probable will of the legislature, courts have no authority to do anything but invalidate a legislative enactment that violates the Constitution. Courts do not have authority to write new legislation.

Just as Judge Ginsburg thinks courts and legislatures are interchangeable players in developing desirable public policy, so she also equates judicial review with judicial repair. Judge Ginsburg writes that, without the power of "judicial repair," unconstitutional statutes would be "immunize[d] from judicial review"<sup>35</sup> and legislating would be left "to the political branches without judicial oversight."<sup>36</sup> This is patently absurd. Legislatures have the power to legislate. Courts have the power to review that legislation and determine whether it contravenes the Constitution. When it does, such legislation is void. This dramatic power literally to invalidate the actions of the elected branches is the essence, not the absence, of judicial review. Indeed, "judicial oversight" is perhaps too modest a label for this power.

#### D. A "Moderate" Theory of Abortion Rights?

In *Roe v. Wade*, the Supreme Court found that the "liberty" protected by the due process clause of the Fourteenth Amendment<sup>37</sup> includes "a woman's decision whether or not to terminate her pregnancy."<sup>38</sup> That theory has been applied in the years since 1973 to strike down virtually any restriction on abortion.

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<sup>34</sup> *Id.* at 324.

<sup>35</sup> *Id.* at 303.

<sup>36</sup> *Id.* at 317.

<sup>37</sup> The Fourteenth Amendment's due process clause reads: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

<sup>38</sup> *Roe v. Wade*, 410 U.S. 113,153 (1973).

Judge Ginsburg has criticized the Court for basing its abortion doctrine on the due process clause rather than the equal protection clause.<sup>39</sup> In a 1992 article, Judge Ginsburg wrote that "the Supreme Court did not rest its *Roe v. Wade* decision on an equal statute for women or sex discrimination rationale. Instead, the Court ruled on a personal privacy or autonomy analysis that had few precedents."<sup>40</sup>

### 1. an immoderate theory

The combination of Judge Ginsburg's criticism of *Roe* as "venturing too far" and her criticism of the decision's doctrinal foundation suggests that her preferred equal protection theory for abortion rights would be more moderate. At least two aspects of this theory, however, demonstrate otherwise.

First, applying the equal protection theory to abortion rights really means ignoring any discussion of "equality" as between similarly situated men and women and focusing instead solely on women. This, in turn, results in defining any abortion restriction as impermissible sex discrimination.

The Constitution requires that [government] treat similarly situated persons similarly.<sup>41</sup> Yet men and women cannot be similarly situated with respect to either pregnancy or its termination. Claiming that abortion restrictions constitute discrimination against women on the basis of gender requires reference to the treatment of similarly situated persons of a different gender, namely, men. Anyone can see the conceptual difficulty this immediately creates. James Bopp concludes: "Logically, if pregnant women are not similarly situated with respect to nonpregnant persons, a law prohibiting abortion would not be a denial of equal protection to all women as a class and, therefore, not gender discrimination."<sup>42</sup>

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<sup>39</sup> The Fourteenth Amendment's equal protection clause reads: "[n]or shall any State... deny to any person within its jurisdiction the equal protection of the laws." While the Fifth Amendment, which applies to the federal government, does not contain a similar clause, the Supreme Court has decided that its due process clause has an equal protection component and has thereby imposed the same restrictions on the federal government that the Fourteenth Amendment imposes on state governments. See *Weinberger v. Wiesenfeld*, 420 U.S. 636,638 n.2 (1975); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

<sup>40</sup> Ginsburg, "A Moderate View on Roe," *Constitution*, Spring-Summer 1992, at 17.

<sup>41</sup> *Rosker v. Goldberg*, 453 U.S. 57,79 (1981). See also *Cleburne v. Cleburne Living Center*, 473 U.S. 432,439-40 (1985).

<sup>42</sup> Bopp, "Is Equal Protection a Shelter for the Right to Abortion?", in J. Butler & D. Walbert (eds.), *Abortion, Medicine, and the Law* (4th ed. 1992), at 167.

Since men cannot become pregnant and, therefore, cannot be situated similarly with women regarding pregnancy or its termination, the argument must necessarily take a different form and focus exclusively on women. Doing so actually requires ignoring the "equal" protection clause which, again, guarantees that similarly situated individuals be treated similarly. Even though an exclusive focus on women necessarily negates the entire equal protection argument, Judge Ginsburg wants just such a focus. She has written that *Roe* would be less subject to criticism "had the Court placed the woman alone...at the center of its attention."<sup>43</sup>

Focusing exclusively on women, as Judge Ginsburg insists, not only requires ignoring the very constitutional provision on which her theory supposedly rests, but it further complicates the argument. Restricting abortion means restricting a course of action that only women can pursue. As such, the theory must contend, restricting abortion is sex discrimination and a denial of equal protection by definition. One of Judge Ginsburg's former law clerks summarized this view: "The disadvantageous treatment of a woman because of pregnancy or reproductive choice, Judge Ginsburg has written, is a paradigm case of discrimination on the basis of sex."<sup>44</sup> Roger Pilon counters:

Disadvantageous treatment of a woman because of her pregnancy is treatment based, as the proposition states, on her pregnancy, nor her sex. Otherwise every woman would be so treated, which not even Judge Ginsburg asserts. It is true, of course, that only women become pregnant. But from that fact it no more follows that pregnancy discrimination is sex discrimination than that punishment for having committed a crime is punishment for being a person—it being a fact also that only people commit crimes.<sup>45</sup>

It is hardly a moderate position to assert that restricting a course of action that only women can pursue is, by definition, discrimination on the basis of sex. While Judge Ginsburg apparently feels that the Court did too much at one time in *Roe v. Wade*, over the long term her theory would mandate more radical results than the theory announced in *Roe*.

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<sup>43</sup> Ginsburg, *supra* note 22, at 382.

<sup>44</sup> Huber & Taranto, "Ruth Bader Ginsburg, a Judge's Judge," *Wall Street Journal*, June 15, 1993, at A18 (emphasis added).

<sup>45</sup> Pilon, *supra* note 25.

Judge Ginsburg's preferred theory for abortion rights is far from moderate for a second reason. She has insisted that the case for constitutional protection of abortion rights is less about "state versus private control of a woman's body for a span of nine months"<sup>46</sup> than it is about "a woman's autonomous charge of her full life's course [or] her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen."<sup>47</sup> For this reason she has recently suggested support<sup>48</sup> for the Supreme Court's decision in *Planned Parenthood v. Casey*,<sup>49</sup> which also stated that the "ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."<sup>50</sup>

This is a concrete example of one facet of Judge Ginsburg's activist judicial philosophy. She believes that judges can, and sometimes should, drive social trends, as well as respond to favorable social and political developments, through "creative" or "dynamic" changes in constitutional interpretation. In the context of abortion rights, Judge Ginsburg believes that federal courts have the authority simply to choose a particular social or political development of which they approve, or a preferred social theory, and then to change interpretation of the Constitution itself in order to accommodate those developments or theories.

This is truly a radical theory. Whatever a judge feels would help women "participate in the economic and social life of the Nation" could be constitutionally mandated through the equal protection clause. Mickey Kaus writes:

It could be used to argue that abortion must be *subsidized* by the state as well as permitted....It could justify affirmative discrimination designed to compensate women for the extra burden of childrearing. It could even be used to strike down laws that are non-discriminatory on their face but that don't make allowances for women's reproductive disadvantage. (Is the forty-hour week unconstitutional?)<sup>51</sup>

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<sup>46</sup> Ginsburg, *supra* note 22, at 383.

<sup>47</sup> *Id.*

<sup>48</sup> See Verbatim, "Ginsburg Laments Roe's Lack of Restraint," *Legal Times*, April 5, 1993, at 11.

<sup>49</sup> 112 S.Ct. 2791 (1992).

<sup>50</sup> *Id.* at 2809.

<sup>51</sup> Kaus, *supra* note 3.

In *Roe v. Wade*, the Supreme Court held that elected representatives of the people may not choose one theory of life, namely, that it begins at conception, on which to base its regulation of abortion.<sup>52</sup> Yet Judge Ginsburg apparently believes that unelected federal judges are perfectly free to choose one theory of social and political relations on which to base their interpretation of the Constitution. By thus putting the Constitution in the service of politics, Judge Ginsburg provides a clear example of a shockingly activist judicial philosophy.

## 2. immoderate results

Judge Ginsburg's criticism of the due process basis for the Supreme Court's abortion doctrine is merely a function of political expediency. As noted above, she stressed the due process theory when trying to blunt criticism of the equal rights amendment. When she says that the decision in *Roe* "ventured too far in the change it ordered,"<sup>53</sup> "seemed entirely to remove the ball from the legislators' court,"<sup>54</sup> and "called into question the criminal abortion statutes in every state, even those with the least restrictive provisions,"<sup>55</sup> she is not criticizing the Court's failure to properly settle the constitutional issue. Rather, she is criticizing the Court's interruption of what she saw as progress toward a "stable settlement"<sup>56</sup> of the political issue. As she criticizes the Court for supposedly overreaching, in the same scholarly breath Judge Ginsburg laments that *Roe* "halted a political process that was moving in a reform direction."<sup>57</sup> She wants the job of broadening access to abortion accomplished and thinks that legislative liberalization rather than judicial fiat might be the best method at the moment.

Any suggestion that Judge Ginsburg, by simultaneously criticizing *Roe*'s doctrinal foundation and seemingly excessive political impact, would achieve more modest political results with her preferred equal protection theory is belied by her own writings. The Supreme Court has, in fact, applied the equal protection theory to abortion restrictions. In doing so, it has consistently held that the government is not constitutionally required to pay

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<sup>52</sup> *Roe*, 410 U.S. at 162.

<sup>53</sup> Ginsburg, *supra* note 22, at 381.

<sup>54</sup> Verbatim, *supra* note 48, at 11.

<sup>55</sup> Ginsburg, *supra* note 22, at 381.

<sup>56</sup> Verbatim, *supra* note 48.

<sup>57</sup> *Id.* See also Ginsburg, *supra* note 23, 718-19; Ginsburg, *supra* note 22, at 382; Ginsburg, *supra* note 40.

for abortions under any circumstances.<sup>58</sup> Judge Ginsburg has criticized these decisions as "incongruous"<sup>59</sup> and the "[m]ost unsettling of the losses" for woman's rights.<sup>60</sup> This is just one example of how Judge Ginsburg's application of the equal protection theory would invalidate restrictions that the Supreme Court has upheld under *Roe*. Mickey Kaus writes that "Ginsburg strongly implies that she *would* require government funding of abortions--hardly the 'moderate' position."<sup>61</sup>

The bottom line is that Judge Ginsburg supports widely available legal abortion and chooses her social, political, and constitutional theories--as well as offers her praise and criticism--accordingly. Her politics drive her jurisprudence. It would be difficult to find a clearer example of judicial activism.

## II. FROM ONE SIDE OF THE BENCH TO THE OTHER

Many analysts and activists continue to evaluate judges on the basis of the winners and losers in legal cases. In a recent column, for example, law professor David Cole described what he believes is Judge Ginsburg's "vision of justice" by a checklist of those with whom Judge Ginsburg "has sided" in her judicial decisions.<sup>62</sup> She has, he claims, "sided with conservatives"<sup>63</sup> on issues such as gay rights, racial discrimination, and criminal law. On the other hand, Cole observes, "she has authored opinions favorable to" liberal interests in other categories of cases.<sup>64</sup> He hopes she will be "a justice who is sympathetic to the claims of the politically weak."<sup>65</sup> In other words, she will be a good justice if she produces politically correct results.

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<sup>58</sup> See, e.g., *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989); *Williams v. Zbaraz*, 448 U.S. 358 (1980); *Harris v. McRae*, 448 U.S. 297 (1980); *Poelker v. Doe*, 432 U.S. 519 (1977); *Maher v. Roe*, 432 U.S. 464 (1977).

<sup>59</sup> Ginsburg, *supra* note 22, at 386.

<sup>60</sup> Ginsburg, "Gender in the Supreme Court: The 1976 Term," in B. Justice & R. Port (eds.), *Constitutional Government in America* (1980), at 224.

<sup>61</sup> Kaus, *supra* note 3.

<sup>62</sup> Cole, "A Justice of Passion? We'll See," *National Law Journal*, July 5, 1993, at 15.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 16.

<sup>65</sup> *Id.*

This is the wrong way to evaluate judges and Judge Ginsburg herself has suggested that she may not subscribe to this blatantly political approach to justice, criticizing those who blast the judiciary when their own "ox is being gored" rather than on a more principled basis.<sup>66</sup> This analysis, too, will attempt to evaluate Judge Ginsburg's record while on the U.S. Court of Appeals by what it reveals of her judicial philosophy rather than merely by a tally of winners and losers. It highlights 37 cases out of the hundreds in which Judge Ginsburg wrote majority or separate opinions.

#### A. A Judicial Record in Perspective

With the analysis of Judge Ginsburg's scholarly writings offered in *A Step in the Left Direction* and summarized above as a backdrop, this report moves on to survey the nominee's judicial record on the U.S. Court of Appeals for the District of Columbia Circuit to discover more clues about her judicial philosophy. For several reasons, this record is less reflective than it might be. First, the jurisdiction of the D.C. Circuit is dominated by regulatory and administrative law issues. These cases require the court merely to decide whether an agency adequately evaluated the basis for and alternatives to action it seeks to take.<sup>67</sup> At the same time, the court's docket is light on cases involving substantive constitutional issues or other elements that are more reflective of an individual's judicial philosophy.

Second, the Supreme Court is a fundamentally different court than the U.S. Court of Appeals. Judge Ginsburg herself has distinguished the two, writing that on mid-level appellate courts, "[u]nlike the Supreme Court," which do not face "grand constitutional questions," certain factors serve to "tug judges strongly toward the middle, toward moderation."<sup>68</sup> If confirmed, she will no longer be on a court where those factors tug judges toward moderation, but will be on the Supreme Court, facing grand constitutional questions, where judges' own predilections have freer rein.

Significantly, those riding on Judge Ginsburg's welcome wagon seem to forget the dogged insistence by Senate Democrats and liberal activists about this very point, albeit directed at Republican nominees. Law professor Laurence Tribe, testifying against the

<sup>66</sup> Ginsburg, "Interpretations of the Equal Protection Clause," 9 *Harvard Journal of Law & Public Policy* 41,44 (1986).

<sup>67</sup> See, e.g., *Tongass Conservation Society v. Cheney*, 924 F.2d 1137 (D.C.Cir. 1991) (Judge Ginsburg concluded for the court—joined by Judges Patricia Wald and Clarence Thomas—that the Navy had adequately evaluated alternatives to its planned submarine testing range in Alaska and adequately evaluated its impact on the local tourist industry).

<sup>68</sup> Ginsburg, *supra* note 17, at 200.

Supreme Court nomination of Robert Bork in 1987, described the "fundamental difference between being on a court of appeals where one is operating within the bounds of precedent and being on the Supreme Court where one is making precedent."<sup>69</sup> He stressed the need to examine a nominee's extra-judicial writings and speeches "as a guide to what [a nominee] might do upon [the Supreme] Court."<sup>70</sup>

Similarly, law professor Paul Gewirtz testified at the same hearing:

A Court of Appeals judge is obliged by his position in the judicial hierarchy to carry out Supreme Court precedent, and knows that if that obligation is ignored there is a higher court to reverse him. A Supreme Court Justice has much greater power because of the importance of the cases that come to the Court and because a Justice has the leeway to overrule prior Court decisions. In exercising the more extensive leeway that typically exists in cases before the Supreme Court, a Justice is likely to draw more extensively upon his or her deep-seated convictions about what the Constitution means and what a Justice's role is.<sup>71</sup>

Third, not only is a mid-level appellate judge bound by the Supreme Court, she is also bound by her own circuit's precedents. Changing the law is significantly easier on the Supreme Court than on the U.S. Court of Appeals. Three-judge appellate panels cannot change the law of a circuit by overruling another panel's decision on a particular point of law. There must be a motion for the entire circuit to re-hear a panel's decision and only the entire circuit can change the law of that circuit, something it is very reluctant to do. The entire Supreme Court, in contrast, considers each case and can change its own precedents without any similar intervening step.

#### B. Breaking Her Own Rules of Moderation

Judge Ginsburg's scholarly writings, as presented in *A Step in the Left Direction* and summarized above, demonstrate a strikingly activist judicial philosophy. The next question is whether she has similarly demonstrated her activism while on the bench. Those who have rushed to label Judge Ginsburg a moderate seem to assume that she has not. Again, analysis of the actual record belies the quick assertions of the pundits.

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<sup>69</sup> *Nomination of Robert H. Bork*, *supra* note 4, Part 2, at 1314.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 2561.

1. straying from the issues at hand

Judge Ginsburg has criticized "individualist judging."<sup>72</sup> the practice of writing separate opinions, as well as judges who address issues not necessary for deciding the case in front of them. Yet in *Federal Election Commission v. International Funding Institute*,<sup>73</sup> she violated both of her own rules. In that case, the court, sitting en banc, upheld a Federal Election Commission rule forbidding the use of campaign fundraising lists by other political organizations. Judge Ginsburg wrote a separate statement to give a dissertation on how "taxing and spending decisions...can seriously interfere with the exercise of constitutional freedoms."<sup>74</sup> She specifically cited one of the Supreme Court's abortion funding decisions to assert that a "substantial constitutional question" would arise if the government withheld all Medicaid funding from women seeking abortions.<sup>75</sup>

This gratuitous statement not only had nothing to do with the case before the court, belying a moderate judicial style, but it was a wrong statement of the law. Judge Ginsburg cited the 1980 decision in *Haris v. McRae*,<sup>76</sup> yet failed to cite several other funding cases, including the 1989 decision in *Webster v. Reproductive Health Services*.<sup>77</sup> The Court has never held that denial of Medicaid benefits for abortion by either the state or federal government violates the Constitution under any circumstances. Judge Ginsburg has long insisted that these cases were wrongly decided, but they are the law nonetheless. Her gratuitous misstatement of the law in such an area that she cares particularly about raises doubts about her "moderation" and adherence to precedent when freed from any constraints on the Supreme Court.

In *Dronenberg v. Zech*,<sup>78</sup> Judge Ginsburg had criticized Judge Robert Bork for including in his opinion "a commentarial exposition of the opinion writer's viewpoint."<sup>79</sup> Yet that is exactly what Judge Ginsburg offered about a topic—abortion funding—that she

<sup>72</sup> Ginsburg, *supra* note 17, at 200.

<sup>73</sup> 969 F.2d 1110 (D.C.Cir. 1992).

<sup>74</sup> *Id.* at 1118 (emphasis in original).

<sup>75</sup> *Id.* at 1119.

<sup>76</sup> 448 U.S. 297 (1980).

<sup>77</sup> 492 U.S. 490 (1989).

<sup>78</sup> 746 F.2d 1579 (D.C.Cir. 1984).

<sup>79</sup> *Id.* at 1582.

has written extensively about in the past. The relevance of abortion funding to a case involving Federal Election Commission regulations is not self-evident. She apparently breaks her own rules when it suits her.

## 2. straying from the law at hand

As noted above, mid-level appellate courts are bound by both their own precedents and the decisions of the Supreme Court. In her own opinions, Judge Ginsburg often emphasizes this fact, repeatedly claiming--whether accurately or not<sup>80</sup>--that Supreme Court decisions compel her conclusions. Judge Ginsburg has, however, again broken her own rules about writing separately to gratuitously address policy issues.

In *Federal Labor Relations Authority v. U.S. Department of the Treasury*,<sup>81</sup> for example, the court ruled that an FLRA order requiring disclosure by federal agencies of their employees' names to a federal employees' union violated the Privacy Act. Judge Ginsburg wrote separately to state that she "reluctantly"<sup>82</sup> agreed with the result because the Supreme Court's interpretation of the relevant statutes required it. She wrote that the Supreme Court should reconsider the issue and expressed her clear preference for the "public interest in the [collective] bargaining representative's ready access to unit employees" over the employees' "modest privacy interests."<sup>83</sup>

In *Government Employees Local 1843 v. Federal Labor Relations Authority*,<sup>84</sup> the court upheld as reasonable a decision by the FLRA that an agency had not committed an unfair labor practice by failing to withhold union dues from a reinstated employee's back pay award. Judge Ginsburg wrote separately to state that, if she were a member of the FLRA, she would have ruled otherwise,<sup>85</sup> a statement hardly necessary to decide the case before the court.

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<sup>80</sup> See the discussion of abortion funding cases, *supra* notes 76-77 and accompanying text.

<sup>81</sup> 884 F.2d 1446 (D.C.Cir. 1989).

<sup>82</sup> *Id.* at 1457.

<sup>83</sup> *Id.* at 1457-58.

<sup>84</sup> 843 F.2d 550 (D.C.Cir. 1988).

<sup>85</sup> *Id.* at 556 (Ginsburg, J., concurring).

C. Constitutional Interpretation

1. equal protection cases

Judges cannot pick their subject matter the way professors can. While the bulk of Judge Ginsburg's academic scholarship addressed the equal protection clause and gender discrimination, she has rarely addressed these issues as a judge.

In *Quiban v. Veterans Administration*,<sup>86</sup> Philippine World War II veterans and a deceased veteran's surviving spouse challenged federal statutes that excluded them from eligibility for veterans' benefit programs. They claimed this exclusion violated the Fifth Amendment's guarantee of equal protection. The court of appeals reversed the district court's grant of summary judgment for the plaintiffs.

This case raised two basic questions: the proper standard of review, and the result when applying that standard of review. Judge Ginsburg was careful to base her answer to both questions explicitly on Supreme Court precedent. She first concluded that, "[u]nder binding Supreme Court precedent,"<sup>87</sup> the lenient "rational basis test" rather than the "strict scrutiny test" should apply. She then found that "[t]he classifications in question, controlling authority instructs, have the requisite rationality."<sup>88</sup> She stressed this point again at the close of her opinion: "This case is controlled by [Supreme Court precedent], both as to the standard of review and as to the merits of the constitutional challenge. Under the lenient [Supreme Court] standard, we must conclude that section 107--while hardly generous to veterans of the Philippine Army and the New Philippine Scouts--is constitutional."<sup>89</sup>

Judge Ginsburg's response to one argument is noteworthy, albeit also based squarely on Supreme Court precedent. Counsel for an *amicus* argued that the plaintiffs were being discriminated against "based on an 'immutable' condition, a status they cannot change, i.e., their status as World War II veterans of the Philippine armed forces."<sup>90</sup> Judge Ginsburg

<sup>86</sup> 928 F.2d 1154 (D.C. Cir. 1991). Judges Douglas H. Ginsburg and Karen LeCraft Henderson joined Judge Ginsburg's opinion.

<sup>87</sup> *Id.* at 1156.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 1163.

<sup>90</sup> *Id.* at 1160 n.13.

responded that "the 'immutable characteristic' notion, as it appears in Supreme Court decisions, is tightly-cabined. It does not mean, broadly, something done that cannot be undone. Instead, it is a trait 'determined solely by accident of birth.'"<sup>91</sup>

This decision might be consistent with a restrained judicial philosophy, one not given to creating new rights or turning wants into entitlements. Yet it begs the question whether Judge Ginsburg herself holds these views, or would have decided these issues the same way in the absence of controlling Supreme Court precedent.

## 2. first amendment religion cases

### a. free exercise clause

The First Amendment guarantees that "Congress shall make no law...prohibiting the free exercise [of religion]."<sup>92</sup> In *Goldman v. Secretary of Defense*,<sup>93</sup> a Jewish physician who had served in the military for 14 years faced court-martial for insisting on wearing a yarmulke in addition to his military uniform. A panel of the U.S. Court of Appeals upheld the action against Goldman, who made a motion for the entire court to re-hear the case. Judge Ginsburg, joined by then-Judge Antonin Scalia, dissented from the majority's decision not to re-hear the case. She stated her belief that the military's action 'suggests 'callous indifference' to Dr. Goldman's religious faith, and it runs counter to 'the best of our traditions' to 'accommodate[] the public service to the[] spiritual needs [of our people]'."<sup>94</sup>

Judge Ginsburg expressed agreement with the opinion of Judge Kenneth Starr, also dissenting from the denial of re-hearing, who likewise cited "the spirit of accommodation which the Constitution, as interpreted by the Supreme Court, requires."<sup>95</sup>

This short statement by Judge Ginsburg is frequently mentioned in the media, though only with reference to the outcome it urges--upholding an individual's right to exercise his religion. Yet it reveals little by itself about Judge Ginsburg's own agreement or disagreement with the Supreme Court's emphasis on accommodation or the principles she

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<sup>91</sup> *Id.* (citations omitted).

<sup>92</sup> The Supreme Court has applied the free exercise clause to the states as well. See *Canwell v. Connecticut*, 310 U.S. 296 (1940).

<sup>93</sup> 739 F.2d 657 (D.C.Cir. 1984).

<sup>94</sup> *Id.* at 660 (citations omitted).

<sup>95</sup> *Id.* at 659.

feels are important in interpreting constitutional provisions such as the free exercise clause. Does she believe that some kind of subjective "callous indifference" standard should be applied? Would she look to the meaning of "free exercise" intended by those who framed that constitutional language? Her brief statement in *Goldman* certainly does not answer these questions, though their answer would seem essential to a proper evaluation of Judge Ginsburg's nomination to the Supreme Court, which has the power to shape free exercise jurisprudence.

In *Leahy v. District of Columbia*,<sup>96</sup> an individual raised a religious objection against the District of Columbia's regulation that each applicant for a driver's license provide his Social Security number. The district court denied the plaintiff's motion for summary judgment and dismissed the case. Judge Ginsburg, for the court of appeals,<sup>97</sup> concluded that the district court had misread a relevant Supreme Court precedent and applied a test that only a minority of the Court had approved. Judge Ginsburg stated the correct test and applied it to conclude that the government had not met its burden. She then remanded the case to the district court to determine the sincerity of the plaintiff's religious belief.

In *Olsen v. Drug Enforcement Administration*,<sup>98</sup> an individual claimed to be a priest in the Ethiopian Zion Coptic Church. Claiming that the church's sacrament was marijuana, he sought a religious-use exemption from federal law prohibiting use of the drug. Acknowledging that the government has a compelling interest in preventing marijuana use, Judge Ginsburg concluded that the pivotal issue "is whether marijuana usage by [members of the church] can be accommodated without undue interference with the government's interest in controlling the drug."<sup>99</sup> Following the lead of the U.S. Courts of Appeals for the First, Eighth, and Eleventh Circuits, she decided that "[w]e have no reason to doubt that these courts have accurately gauged the Highest Court's pathmarks in this area"<sup>100</sup> and affirmed the district court's denial of an exemption.

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<sup>96</sup> 833 F.2d 1046 (D.C.Cir. 1987).

<sup>97</sup> U.S. Circuit Judge Kenneth Starr and U.S. District Judge Gerhard Gesell, sitting by designation, joined in the opinion.

<sup>98</sup> 878 F.2d 1458 (D.C.Cir. 1989). Judge Laurence Silberman joined Judge Ginsburg's opinion. Judge James Buckley filed a dissenting opinion.

<sup>99</sup> *Id.* at 1462.

<sup>100</sup> *Id.*

b. establishment clause

In *Murray v. Buchanan*,<sup>101</sup> taxpayers challenged payment of salaries and expenses for chaplains serving the U.S. House of Representatives and the U.S. Senate. The district court dismissed the complaint. The court of appeals held that, under Supreme Court precedent,<sup>102</sup> payment of such salaries and expenses did not violate the establishment clause of the First Amendment.<sup>103</sup> Judge Ginsburg, joined by Senior Judge David Bazelon, concurred in a separate statement. She declined to give her own discussion of the constitutional issue, resting instead on the "unambiguous[]"<sup>104</sup> instruction from the Supreme Court on how the case should be decided on the merits.

3. first amendment free speech cases

In *American Postal Workers Union v. United States Postal Service*,<sup>105</sup> a postal employee was fired for claiming, in an article promoting universal unionization in his union newsletter, to have read the mail he had been handling. He challenged his discharge as violating the First Amendment's guarantee of free speech. The district court ruled for the employee. The court of appeals, in an opinion by Chief Judge Patricia Wald joined by Judge Ginsburg, affirmed. The employee, however, was not discharged for having written an article or for expressing a particular opinion about unionization. Rather, the employee was discharged for having read the mail he was handling, albeit a fact revealed in a newsletter article. This distinction can easily be demonstrated by observing that he could have expressed his views about unionization without admitting to the unlawful behavior. Unable to distinguish between a subject of public concern (unionization) and an admission of unlawful behavior, the court held that the first effectively sanctified the second. It appears that a subjective appraisal of the results in this case prevented the court from observing this necessary distinction.

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<sup>101</sup> 720 F.2d 689 (D.C.Cir. 1983).

<sup>102</sup> See *Marsh v. Chambers*, 463 U.S. 783 (1983).

<sup>103</sup> The establishment clause of the First Amendment reads: "Congress shall make no law respecting an establishment of religion."

<sup>104</sup> *Murray*, 720 F.2d at 699 (statement of Ginsburg, J.).

<sup>105</sup> 830 F.2d 294 (D.C.Cir. 1987). Judge Robert Bork dissented.

*Community for Creative Non-Violence v. Watt*<sup>106</sup> provides an example of Judge Ginsburg's politics driving her jurisprudence. In this case, the National Park Service issued a permit to the Community for Creative Non-Violence (CCNV) to conduct a round-the-clock demonstration on the Mall and in Lafayette Park to draw attention to the plight of the homeless but denied the participants a permit to sleep in those locations because sleeping would violate the Park Service's anti-camping regulations. Claiming that sleeping is an exercise of free speech, CCNV brought suit to invalidate the permit's limitation on sleeping. The district court ruled for the Park Service. The court of appeals, sitting en banc, reversed. Judge Ginsburg agreed with the result, though she found the case "close and difficult."<sup>107</sup> She rejected then-Judge Antonin Scalia's position that the First Amendment only protected spoken and written thought as an "arbitrary, less-than-fully baked" theory.<sup>108</sup> She also hesitated to accept the more liberal position that "the on-site sleep of a round-the-clock demonstrator" is indistinguishable from leaflet distribution, speeches, or flag displays.<sup>109</sup>

Instead, Judge Ginsburg insisted 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 a demonstrator is physically present to sustain the round-the-clock demonstration.<sup>110</sup> This "linkage...suffices to require a genuine effort to balance the demonstrators' interests against [the government's] concern."<sup>111</sup> She insists that "the non-communicative component of the mix reflected in CCNV's request for permission to sleep...facilitates expression."<sup>112</sup> It remains a mystery, one that Judge Ginsburg made no attempt to solve, why her division of sleeping into communicative and non-communicative components is any less arbitrary or any more baked than Judge Scalia's theory.

What are the limits of Judge Ginsburg's theory? Would she give formal First Amendment protection to any "non-communicative component of the mix" in a particular case that "facilitates expression"? If so, then her theory would sweep far beyond even the liberal position taken by the majority in this case—a position she would not join. Where would she look for guidance about how to answer these questions? Is this a case in which she would apply an emphasis from her scholarly writings, namely, that courts should change

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<sup>106</sup> 703 F.2d 586 (D.C.Cir. 1983).

<sup>107</sup> *Id.* at 605 (Ginsburg, J., concurring in the judgment).

<sup>108</sup> *Id.* at 605.

<sup>109</sup> *Id.* at 606.

<sup>110</sup> *Id.* at 607.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 608.

their interpretation of the Constitution to accommodate a desirable vision of a just and equitable society? Again, the answers to these questions are critical to a proper evaluation of Judge Ginsburg's nomination to the Supreme Court.

*In Action for Children's Television v. Federal Communications Commission*,<sup>113</sup> the court reviewed an FCC regulation limiting broadcast of indecent programming to the period from midnight to 6:00 a.m. Judge Ginsburg held that the Supreme Court's decision in *FCC v. Pacifica Foundation*<sup>114</sup> shielded the FCC's definition of "indecent" programming from challenge but decided that the FCC had not adequately justified the time restriction for such programming. She emphasized that the FCC's role was to assist parents rather than to replace parents in making viewing decisions for children.<sup>115</sup>

#### 4. fifth amendment takings cases

Judge Ginsburg has demonstrated serious effort to keep her opinions involving the Fifth Amendment's takings clause<sup>116</sup> limited. In *Hohri v. United States*,<sup>117</sup> the plaintiffs sought money damages and a declaratory judgment stemming from the internment of Japanese-Americans during World War II. The district court dismissed all claims. The court of appeals affirmed, except with respect to the claim that the internment constituted an uncompensated taking of their property in violation of the Fifth Amendment. Judge Ginsburg joined a statement accompanying denial by the full court of appeals to re-hear the panel decision. That statement criticized Judge Robert Bork's dissent from the denial of re-hearing as full of "rhetorical excess"<sup>118</sup> and evidence that he had "succumbed to the

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<sup>113</sup> 852 F.2d 1332 (D.C.Cir. 1988). Judges Spottswood Robinson and David Sentelle joined her opinion.

<sup>114</sup> 438 U.S. 726 (1978).

<sup>115</sup> *Id.* at 1334 ("the Commission's avowed objective is not to establish itself as censor but to assist parents in controlling the material young children will hear") (emphasis in original); *id.* at 1343-44 ("the government does not propose to act *in loco parentis* to deny children's access *contrary to parents' wishes....[T]he government's role is to facilitate parental supervision of children's listening*") (emphasis in original).

<sup>116</sup> The Fifth Amendment states that "nor shall private property be taken for public use without just compensation."

<sup>117</sup> 793 F.2d 304 (D.C.Cir. 1986).

<sup>118</sup> *Id.* at 314.

temptation to overstate and overwrite.<sup>119</sup> She claimed the panel opinion—which she joined—turned “on what we find to be the situation-specific holding” of relevant Supreme Court precedents.<sup>120</sup>

In *Boston and Maine Corp. v. Interstate Commerce Commission*,<sup>121</sup> the court reviewed an ICC decision approving a request by Amtrak to condemn miles of railroad track and convey them to another railroad. Judge Ginsburg agreed with granting the petition for review and remanding the case to the ICC, but stressed that “I rely on the inadequacy of the Commission’s assessment *in this case*, not on the precedent-setting construction of the statute decreed by the majority opinion.”<sup>122</sup>

#### 5. fifth amendment due process cases

In *Robinson v. Palmer*,<sup>123</sup> prison officials suspended visits by an inmate’s wife for one year after she was found smuggling marijuana to him. The Department of Corrections subsequently changed its policy to require permanent suspension of visiting privileges for anyone attempting to bring in contraband. The inmate’s wife challenged application of the new policy to her and the district court held that her suspension could not be permanently extended without notice and an opportunity for her to be heard. Judge Ginsburg, for the court of appeals, reversed and held, under existing Supreme Court precedent, that a felon’s expectation of privacy is too insubstantial to invoke the full procedural protections of the due process clause.<sup>124</sup>

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<sup>119</sup> *Id.* at 315.

<sup>120</sup> *Id.* at 313 (statement of Judges Wright and Ginsburg).

<sup>121</sup> 911 F.2d 743 (D.C.Cir. 1990). Judge James Buckley wrote the opinion for the court.

<sup>122</sup> *Id.* at 753 (Ginsburg, J., concurring) (emphasis in original).

<sup>123</sup> 841 F.2d 1151 (D.C.Cir. 1988). Judge James Buckley and Senior Judge Thomas Fairchild, sitting by designation, joined the opinion.

<sup>124</sup> *Id.* at 1155.

#### D. Separation of Powers

Judge Ginsburg has criticized the judicial practice of writing separate opinions<sup>125</sup> and has emphasized that, on mid-level appellate courts, factors operate to tug judges toward moderation.<sup>126</sup> This may be true in cases devoid of significant issues of constitutional import. In cases raising such issues, however, Judge Ginsburg does indeed write separately and indicates what she might do on a court where factors tugging judges toward moderation no longer exist.

In *In re Sealed Case*,<sup>127</sup> former government officials challenged the authority of independent counsels appointed under the Ethics in Government Act to issue subpoenas compelling their testimony before a grand jury. The district court ruled against them. The court of appeals reversed. Writing in dissent, Judge Ginsburg provided another example of how her politics drive her jurisprudence<sup>128</sup> in a case involving a "grand constitutional controversy."<sup>129</sup>

In her scholarship, Judge Ginsburg has approved of the courts changing their interpretation of the Constitution in light of social and political developments.<sup>130</sup> In this case, we see that this kind of overt activism similarly infects her judicial writings. The asserted policy goal of the Ethics in Government Act—curbing "abuses of executive branch power"<sup>131</sup>—justifies for Judge Ginsburg turning the structural imperative of separated powers mandated by the Constitution into a subjective test barring only what judges feel is "undue displacement of executive branch prerogatives."<sup>132</sup> When the Supreme Court eventually reversed the court of appeals, Justice Antonin Scalia characterized Judge Ginsburg's position, which the majority had adopted, this way: "The Court has...replaced the clear constitutional prescription that the executive power belongs to the President with a

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<sup>125</sup> See *supra* notes 17-19 and accompanying text.

<sup>126</sup> See *supra* note 27 and accompanying text.

<sup>127</sup> 838 F.2d 476 (D.C.Cir. 1984). Judge Laurence Silberman, joined by Judge Stephen Williams, wrote the opinion for the court.

<sup>128</sup> See *supra* notes 13-16 and accompanying text.

<sup>129</sup> *In re Sealed Cases*, 838 F.2d at 531 (Ginsburg, J., dissenting).

<sup>130</sup> See *supra* notes 8-11 and accompanying text.

<sup>131</sup> *In re Sealed Cases*, 838 F.2d at 518 (Ginsburg, J., dissenting).

<sup>132</sup> *Id.* at 518 (emphasis added).

'balancing test'...Evidently, the governing standard is to be what might be called the unfettered wisdom of a majority of this Court, revealed to an obedient people on a case-by-case basis."<sup>133</sup>

Quite in contrast to Judge Ginsburg's subjective, functional approach to the separation of powers in *In re Sealed Case*, in *National Federation of Federal Employees v. Brown*,<sup>134</sup> she took a decidedly more rigid approach. In this case, unions challenged imposition by the executive branch of a cap on pay increases under a statute authorizing adjustment of pay rates consistent with the public interest. Emphasizing the "structure of government—the separation of powers—established by the Constitution,"<sup>135</sup> Judge Ginsburg held in this 2-1 decision that the President may not cap pay increases without relying on congressionally established standards.

In *Walker v. Jones*,<sup>136</sup> a former congressional employee claimed she had been discharged because of her gender. The district court dismissed the action and the court of appeals, Judge Ginsburg writing, reversed. The Constitution gives each house of Congress authority to determine its own rules of internal governance. As Judge MacKinnon pointed out in dissent, "subject only to clear constitutional limitations, that power is 'absolute and beyond the challenge of any other body or tribunal.' What this means is that the House has virtually unquestionable authority to decide what activities constitute internal legislative matters, and to regulate, manage, or oversee those matters as it sees fit."<sup>137</sup> Even so, Judge Ginsburg, in what the dissent called a "sharp departure from existing law,"<sup>138</sup> created her own categories of activities over which Congress had unfettered control and those which the courts could regulate.

In *Doe v. Casey*,<sup>139</sup> a former CIA employee claimed he was improperly dismissed because he had revealed his homosexuality. The National Security Act allows the CIA director "in his discretion" to "terminate the employment of any employee...whenever he shall deem such termination necessary or advisable in the interest of the United States." Judge Ginsburg joined the decision for the plaintiff. The majority created a rule that, quite

<sup>133</sup> *Morrison v. Olson*, 487 U.S. 654,711-12 (1988) (Scalia, J., dissenting).

<sup>134</sup> 645 F.2d 1017 (1981). Judge Harry Edwards joined the opinion.

<sup>135</sup> *Id.* at 1024.

<sup>136</sup> 733 F.2d 923 (D.C.Cir. 1984). Judge Malcolm Wilkey joined the opinion.

<sup>137</sup> *Id.* at 939 (MacKinnon, J., dissenting in part), quoting *United States v. Ballin*, 144 U.S. 1,5 (1892).

<sup>138</sup> *Id.* at 938.

<sup>139</sup> 796 F.2d 1508 (D.C.Cir. 1986). Judge Harry Edwards wrote the opinion for the court. Judge James Buckley dissented.

contrary to the plain language of the National Security Act, any dismissal must actually be in the national interest—as measured by the judiciary, of course—rather than that the CIA director's exercise of discretion be reasonable. As Judge James Buckley pointed out in dissent: "The majority[] misreads [the National Security Act] to require that the discharge...actually be in the national interest. All that the statute prescribes is that the Director deem it to be. The majority fails to draw the necessary distinction between judicial confirmation of the Director's purpose...and that determination's correctness. While a court may satisfy itself of the former, it may not inquire into the latter."<sup>140</sup>

Judge Ginsburg invoked a rigid concept of structural separation of power to rule in favor of a labor union, adopted a subjective concept of undue displacement to rule in favor of investigating the executive branch, delved into matters of internal legislative administration to preserve a claim of gender discrimination, and misread a federal statute to keep alive a claim of discrimination on the basis of sexual orientation. It appears she changes jurisprudential stripes in the pursuit of politically correct results.

#### E. Standing

In *Wright v. Regan*,<sup>141</sup> parents of black children attending public schools in Memphis, Tennessee, claimed the Internal Revenue Service failed "on a nationwide basis"<sup>142</sup> to confine tax exempt status to private schools that do not discriminate.<sup>143</sup> The district court dismissed the action because the plaintiffs lacked standing to bring the lawsuit. Plaintiffs are required to demonstrate a real injury upon their own legal rights in order to

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<sup>140</sup> *Id.* at 1528 (Buckley, J., dissenting) (emphasis in original).

<sup>141</sup> 656 F.2d 829 (D.C.Cir. 1981). Judge J. Skelly Wright joined the opinion. Judge Tamm dissented.

<sup>142</sup> *Id.* at 825.

<sup>143</sup> Under 501(c)(3) of the Internal Revenue Code, schools are exempt from federal income, Social Security, and unemployment taxes. Contributions to such organizations are tax-deductible. In *Green v. Connally*, 330 F.Supp. 1150 (D.D.C. 1971), a three-judge district court held that the Internal Revenue Code requires "denial and elimination of Federal tax exemption for racially discriminatory private schools and of Federal income tax deductions for contributions to such schools." *Id.* at 1156. The Supreme Court summarily affirmed this decision. *Coit v. Green*, 404 U.S. 997 (1971). The IRS subsequently adopted guidelines to determine whether schools nationwide requesting or holding tax exempt status are discriminatory.

properly invoke a court's jurisdiction. In an opinion by Judge Ginsburg, and over a dissent describing her opinion as "boldly creating new law on the jurisdiction of federal courts"<sup>144</sup> and an opinion "to be deplored as a statement of jurisprudential principle,"<sup>145</sup> reversed.

The plaintiffs in this case challenged the granting of tax exempt status to private schools, yet did not and had no intention of sending their own children to private schools. As Judge Ginsburg described their position: "The sole injury they claim is the denigration they suffer as black parents and schoolchildren when their government graces with tax-exempt status educational institutions in their communities that treat members of their race as persons of lesser worth....The very act by the IRS of according tax exemption to a school that discriminates in their vicinity causes immediate injury to them, plaintiffs maintain, and that is the only injury for which they seek redress."<sup>146</sup> That is, they challenged government policy and action in the abstract, absent an application of that action or policy to them or any deprivation of any legal rights.

Judge Ginsburg claimed that "as an intermediate court of review, we select from two divergent lines of Supreme Court decision the one we believe best fits the case before us."<sup>147</sup> When the Supreme Court voted 6-2 to reverse Judge Ginsburg,<sup>148</sup> it became clear that she made the wrong choice. The Supreme Court held that a general claim to have the government act according to the law is not an injury in fact to the cognizable legal rights of the plaintiffs. Similarly, the Court held that a general claim of stigmatizing injury because of the presence somewhere of discriminatory government action, without proof that individuals had been personally discriminated against, is clearly insufficient to establish standing and, therefore, the court's jurisdiction.

As the Supreme Court explained, the doctrine of standing is an essential element of "the idea of separation of powers on which the Federal Government is founded."<sup>149</sup> As with the separation of powers cases summarized above, this is another example of how Judge Ginsburg makes her jurisprudence fit her politics.

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<sup>144</sup> *Id.* at 838 (Tamm, J., dissenting).

<sup>145</sup> *Id.* at 839 n.1.

<sup>146</sup> *Id.* at 827.

<sup>147</sup> *Id.* at 828.

<sup>148</sup> *Allen v. Wright*, 468 U.S. 737 (1984). Justice Thurgood Marshall did not participate.

<sup>149</sup> *Id.* at 750.

In *Women's Equity Action League v. Cavazos*,<sup>150</sup> Judge Ginsburg found that the Women's Equity Action league had standing to sue the Department of Education for failing to properly enforce Title VI of the 1964 Civil Rights Act, which conditions receipt of federal education funds on the absence of race discrimination. The court of appeals previously remanded this matter to the district court to decide the standing question in light of the Supreme Court's decision in *Allen v. Wright* which reversed Judge Ginsburg's decision in *Wright v. Regan*, discussed above. The plaintiffs in *Wright* had no connection with an educational institution allegedly engaged in prohibited discrimination; they merely had an interest in the problem. "The fact that the *Allen* plaintiffs neither attended nor sought to attend the private schools in question proved fatal to their claim."<sup>151</sup> In contrast, the plaintiffs in *Women's Equity Action League*, or those they represented, were actually enrolled or employed in the educational institutions allegedly engaged in prohibited discrimination.

In *Kurtz v. Baker*,<sup>152</sup> an atheist philosophy professor requested permission to offer remarks during the period at the opening of each daily session of Congress reserved for prayer. The chaplains of the House and Senate denied the request and Dr. Kurtz brought suit. The district court ruled that he had standing to sue, and the court of appeals reversed. The court found that Kurtz had established sufficient "injury in fact" by alleging that he had "been prevented from addressing each house of Congress."<sup>153</sup> But the court next decided that this injury could not be said to have been caused by the chaplains' rejection of Kurtz's requests because there was no allegation, or any proof, that the chaplains had the authority to grant those requests. There is, therefore, no "substantial probability"<sup>154</sup> that Kurtz would be allowed to speak but for the chaplains' denial of his request.

Judge Ginsburg dissented on this point, but went out of her way to avoid the conclusion that Dr. Kurtz lacked standing to raise his claim. She twisted Kurtz's claim into something that helped her reach her own conclusion, but also into something that his complaint did not allege. She insisted that "Kurtz's claim...is inevitably an attack on Congress' customary, opening-with-prayer observance."<sup>155</sup> She thus confused the underlying issue of whether a chaplain-led prayer is constitutional with the real issue of standing, that is, whether Dr. Kurtz could properly raise the issue. Since the Supreme Court

<sup>150</sup> 879 F.2d 890 (D.C.Cir. 1989). Judge David Sentelle and Chief Judge Edward Re of the Court of International Trade, sitting by designation, joined in the opinion.

<sup>151</sup> *Id.* at 885.

<sup>152</sup> 829 F.2d 1133 (D.C.Cir. 1987). Judge James Buckley, joined by Judge Douglas Ginsburg, wrote the opinion for the court.

<sup>153</sup> *Id.* at 1142.

<sup>154</sup> *Id.*, quoting *Warth v. Seidin*, 422 U.S. 490,504 (1975).

<sup>155</sup> *Id.* at 1147.

has held that the practice does not violate the Constitution,<sup>156</sup> she wrote that "I would so hold directly and would not avoid the question by a circuitous determination that Kurtz lacks standing to seek its settlement."<sup>157</sup>

To the extent that Judge Ginsburg hereby shows a preference for deciding cases on the merits rather than for first addressing questions—like standing—affecting the court's jurisdiction, she herself completely refutes any claim of moderation made for her by her apologists and shows a more aggressive activism than those apologists are willing to admit. To the extent that she confuses the issues of merits and jurisdictions, she evidences an disturbing lack of ability.

Another example of how Judge Ginsburg stretches the limits of the standing doctrine to accommodate a political interest with which she has sympathy is *Spann v. Colonial Village, Inc.*<sup>158</sup> Individual and organizational plaintiffs brought suit against the manager of a condominium development which, they claimed, ran discriminatory advertisements in the *Washington Post* in violation of the Fair Housing Act. The plaintiffs claimed that advertisements utilizing white models "indicate a preference based race" prohibited by the Fair Housing Act that "impelled the [plaintiffs] to devote resources to checking or neutralizing the ads' adverse impact."<sup>159</sup> Such "concrete drains on their time and resources"<sup>160</sup> constitute an injury sufficient, they said, to confer standing to sue.

In this case, an organization made a subjective judgment about the message being sent by an advertisement. That organization made another subjective judgment about the need for it to respond to the message it deemed was sent by the advertisement. The organization made yet another subjective judgment about the form its response should take. It is by no means clear that the conclusion reached through such a series of judgments constitutes the kind of "actual or threatened injury in fact that is fairly traceable to the

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<sup>156</sup> See *Marsh v. Chambers*, 463 U.S. 783 (1983).

<sup>157</sup> *Kurtz*, 829 F.2d at 1147-48.

<sup>158</sup> 899 F.2d 24 (D.C.Cir. 1990).

<sup>159</sup> *Id.* at 27.

<sup>160</sup> *Id.* at 29.

alleged illegal action<sup>161</sup> required by the Supreme Court for standing to exist. It seems closer to the "abstract concern with a subject"<sup>162</sup> or an "organization's abstract social interests"<sup>163</sup> that remains insufficient to confer standing.

Similarly, in *Action Alliance of Senior Citizens v. Heckler*,<sup>164</sup> several organizations seeking to improve the lives of the elderly through information, counseling, and service referral brought suit challenging implementation of the Age Discrimination Act by the Department of Health and Human Services. These organizations challenged the content of specific regulations and the Department's supposed failure to act on regulations proposed by other agencies. A federal magistrate concluded that the organizations thereby lacked standing to bring suit. The court of appeals reversed on this point. Judge Ginsburg wrote that there were "concrete organizational interests detrimentally affected"<sup>165</sup> that justified standing in this case. Because two of the challenged regulations—which reduced the level of compliance reports and eliminated the need for certain types of evaluations—restricted the flow of information available to organizations that, like the plaintiffs in this case, work to counsel individuals and otherwise refer them for provision of services, these organizations' "programmatic concerns" rather than "ideological interests" were affected.<sup>166</sup>

The plaintiff organizations were not the subject of the regulations. The regulations did not operate to affect these organizations in any direct way whatsoever. Rather, regulations that decrease the amount of bureaucratic activity necessary for service delivery are said to "inhibit[...] daily operations"<sup>167</sup> of organizations that simply deal in information about the bureaucracy. This creates a completely unwarranted incentive to constantly expand government bureaucracy through initiation of lawsuits by organizations which, while not subject to government regulations, nevertheless deal in information about those government regulations.

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<sup>161</sup> *Valley Forge Christian College v. American United for Separation of Church and State*, 454 U.S. 464,472 (1982).

<sup>162</sup> *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26,40 (1976).

<sup>163</sup> *Havens Realty Corp. v. Coleman*, 455 U.S. 363,379 (1982).

<sup>164</sup> 789 F.2d 931 (D.C.Cir. 1986). Judge Harry Edwards and Senior Judge Thomas Fairchild of the U.S. Court of Appeals for the Seventh Circuit, sitting by designation, joined the opinion.

<sup>165</sup> *Id.* at 937.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

In *Public Citizen v. National Highway Traffic Safety Administration*,<sup>168</sup> environmental and consumer organizations challenged a rule issued by the NHTSA setting mandatory fuel economy standards for automobiles. They claimed that their members wished to purchase more fuel-efficient automobiles and the NHTSA standards were too low. That is, organizations claimed that the agency should have done something more to their liking and the court granted them standing on this ground. This is a striking expansion of the standing doctrine which opens up the floodgates to litigation by persons whose only interests that are injured are their policy preferences.

It does not require more examples to establish the point. In case after case where public interest organizations bring lawsuits, Judge Ginsburg massages and stretches the standing doctrine to advance politically correct claims—e.g., discrimination and environmental—to go forward. Perhaps it is merely coincidence that the causes championed by these groups parallel the liberal political agenda. On the other hand, perhaps Judge Ginsburg's politics drives her jurisprudence.

#### F. Civil Rights Cases

Judge Ginsburg's application of the standing doctrine produces results in curiously close parallel to the liberal political agenda. Several decisions addressing jurisdictional issues in civil rights cases produce the same parallel—denying a race discrimination claim to whites, while allowing another employment discrimination claim as well as environmental interests to proceed with their suits.

In *Dougherty v. Barry*,<sup>169</sup> eight white firefighters claimed race discrimination in the promotion of black firefighters to the position of deputy fire chief. The district court ruled for the plaintiffs and ordered back pay and retirement benefits as if each of the eight plaintiffs had been promoted. The court of appeals vacated that decision, ordering the complaint dismissed because it was filed more than 90 days after the plaintiffs received the requisite letter from the Equal Employment Opportunity Commission notifying them of their right to sue. It made no difference that the EEOC later issued a second right to sue letter that the plaintiffs thought brought with it another 90-day period in which to sue.

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<sup>168</sup> 848 F.2d 256 (D.C.Cir. 1988). Judge Abner Mikva joined the opinion. Judge Laurence Silberman dissented.

<sup>169</sup> 869 F.2d 605 (D.C.Cir. 1989). Judges Kenneth Starr and David Souter were on the panel although Judge Starr, who had been nominated to be Solicitor General, did not participate in the decision.

While construing this time limit rigidly, Judge Ginsburg took a more flexible approach in *Bayer v. U.S. Department of the Treasury*,<sup>170</sup> in which the plaintiff alleged discrimination based on religion. The plaintiff failed to contact the Equal Employment Opportunity Commission within 30 days of the alleged discrimination as required by federal regulations. The district court dismissed the complaint. The court of appeals reversed, this time holding that the plaintiff may have been unaware of the 30-day time limit, thus making summary judgment for the government inappropriate.

In *Center for Nuclear Responsibility v. U.S. Nuclear Regulatory Commission*,<sup>171</sup> A public interest organization challenged a ruling of the Nuclear Regulatory Commission that proposed amendments to a nuclear power plant's operating license presented no significant hazards and could be immediately effective without a pre-determination hearing. The district court dismissed the complaint. The plaintiff organization waited more than three months to file an appeal, outside the 60 days required by the Federal Rules of Appellate Procedure. The court of appeals affirmed. Judge Ginsburg dissented, claiming that the plaintiff was confused about the proper appellate forum. She rejected the majority's application of the time limit as a "mechanical analysis" that should not prevent the plaintiff's "long-sought day in court."<sup>172</sup>

*Masie v. Barry*<sup>173</sup> gave Judge Ginsburg the opportunity to apply Supreme Court precedent with which she clearly disagreed. In this case, a police officer claimed that his lateral transfer and public criticism of his performance by supervisors deprived him of a liberty interest and entitled him to additional procedural protections that had not been afforded him. The district court ruled for the government. The court of appeals affirmed because the loss suffered by the plaintiff did not rise to the level required by the Supreme Court in *Paul v. Davis*.<sup>174</sup> Judge Ginsburg concurred, but wrote separately to harshly criticize the Supreme Court's decision in *Paul*. She wrote: "Until the Court revisits the question whether a person's good name is a liberty interest, protected by the Constitution against arbitrary government deprivation, we are obliged to follow *Paul v. Davis*, and its

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<sup>170</sup> 956 F.2d 330 (D.C.Cir. 1992). Chief Judge Abner Mikva and Judge Ray Randolph joined the opinion.

<sup>171</sup> 781 F.2d 935 (D.C.Cir. 1986). Judge J. Skelly Wright, joined by Judge Patricia Wald, wrote the opinion for the court.

<sup>172</sup> *Id.* at 946 (Ginsburg, J., dissenting).

<sup>173</sup> 718 F.2d 1151 (D.C.Cir. 1983). Judge Robert Bork, joined by Chief Judge Spottswood Robinson, wrote the opinion for the court.

<sup>174</sup> 424 U.S. 693 (1976).

strained reading of earlier decisions. Based on the accurate rendition of *Paul v. Davis'* reasoning in Judge Bork's opinion, but emphasizing penetrating criticism of the High Court's opinion, I concur.<sup>175</sup>

In *Mosie*, Judge Ginsburg wrote an opinion separate from Judge Robert Bork's majority to offer her own critical commentary about a Supreme Court decision. Just one year later, Judge Ginsburg wrote an opinion separate from Judge Bork's majority to criticize him for offering "a commentarial exposition of the opinion writer's viewpoint"<sup>176</sup> about certain Supreme Court decisions. Judge Ginsburg apparently departs from her own rules about moderation when it suits her political fancy.

#### G. Criminal Cases

Liberal activists and most in the media establishment focus on a tally of winners and losers and conclude that a judge who rules for the government is bad while a judge who rules for criminal defendants is good. Under this standard, Judge Ginsburg has a decidedly mixed record.

In *United States v. Eccleston*,<sup>177</sup> a jury convicted Trevor Eccleston of narcotics and firearms offenses. The court of appeals reversed, holding that the circumstantial evidence in the case was "just barely sufficient to sustain the verdict."<sup>178</sup> She was convinced that improper admission of hearsay testimony by a police officer prejudiced that testimony and the district court should have ordered a mistrial.

In *United States v. Russell*,<sup>179</sup> Charles Russell was convicted of narcotics and firearms charges. The court of appeals affirmed, upholding warrantless searches where plain view or the shape or feel of objects justified it and disapproving of a warrantless search of a grocery bag where no such factors were present.

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<sup>175</sup> *Mosie*, 718 F.2d at 1163 (Ginsburg, J., concurring).

<sup>176</sup> *Dronenberg v. Zech*, 746 F.2d 1579 (D.C.Cir. 1984).

<sup>177</sup> 961 F.2d 955 (D.C.Cir. 1992). Judges James Buckley and Douglas Ginsberg joined the opinion.

<sup>178</sup> *Id.* at 955.

<sup>179</sup> 655 F.2d 1261 (D.C.Cir. 1981). Judges Spottswood Robinson and Malcolm Wilkey joined the opinion.

In *United States v. Harrington*,<sup>180</sup> the judge sentencing Kelvin Harrington for narcotics offenses departed from the federal sentencing guidelines, giving him a more lenient sentence because Harrington's potential for rehabilitation was a mitigating factor inadequately considered in the guidelines. The court of appeals vacated the decision and remanded the case for resentencing, disagreeing with the district court's analysis but finding a niche in the existing guidelines--acceptance of personal responsibility for one's criminal conduct--for what the court deemed to be Harrington's post-offense rehabilitative conduct. As the dissenting judge observed: "A defendant's participation in a drug treatment program does not evince his acceptance of responsibility for the crime he committed, even where--as here--that crime was distributing illegal drugs. Rather, it demonstrates only the defendant's desire to improve himself...and perhaps to obtain a lighter sentence."<sup>181</sup>

In *United States v. Chin*,<sup>182</sup> a jury convicted Andrew Chin of narcotics charges and of using a juvenile to avoid detection for a drug offense. The court of appeals affirmed, holding that the police officer had probable cause to arrest Chin and upholding admission of expert drug testimony. Observing that the federal statute prohibiting the use of juveniles to avoid detection "is not a model of meticulous drafting,"<sup>183</sup> Judge Ginsburg followed the lead of three other courts of appeals to conclude that actual knowledge of the juvenile's age is not an element of the crime.

In *United States v. Gibson*,<sup>184</sup> a jury convicted Bernard Gibson of narcotics charges. The court of appeals affirmed the conviction, upholding the search of a purse found in a car and into which a police officer had observed money and a packet of white substance being placed under both the automobile exception to the warrant requirement and the plain view doctrine.

In *United States v. Watley*,<sup>185</sup> a jury convicted Andre Watley of using a firearm during a drug offense and other narcotics charges. The district court denied a pre-sentence motion to withdraw the guilty plea. The court of appeals vacated the district court's decision and remanded, holding that erroneous information about the possible sentence the defendant would face made his guilty plea involuntary.

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<sup>180</sup> 947 F.2d 956 (D.C.Cir. 1991). Judge Harry Edwards filed a concurring opinion and Judge Laurence Silberman filed a dissenting opinion.

<sup>181</sup> *Id.* at 970-71.

<sup>182</sup> 981 F.2d 1275 (D.C.Cir. 1992). Judges Harry Edwards and Stephen Williams joined the opinion.

<sup>183</sup> *Id.* at 1279.

<sup>184</sup> 636 F.2d 761 (D.C.Cir. 1981). Judges Spottswood Robinson and Malcolm Wilkey joined the opinion.

<sup>185</sup> 987 F.2d 841 (D.C.Cir. 1993). Judges Patricia Wald and Laurence Silberman joined the opinion.

In *United States v. Foster*,<sup>186</sup> a jury convicted Cornell Foster of narcotics charges. The court of appeals reversed, holding that the trial court erred in limiting defense counsel's cross-examination of a police officer about the fact that Foster carried, at the time of his arrest, significantly less cash than would be expected of someone selling drugs. The court also held it was improper for the prosecutor to insinuate he had knowledge of prior instances of drug dealing by Foster absent evidence in the record to support the insinuation.

The reasons discussed above<sup>187</sup> why Judge Ginsburg's judicial record is less revealing than it might be are apparent in this criminal context. The criminal jurisdiction of the D.C. Circuit is decidedly limited. As the examples above demonstrate, the criminal docket is dominated by cases involving violation of federal drug laws. Few, if any, of these cases raise significant issues.

### III. CONCLUSION

Judge Ruth Bader Ginsburg has a strikingly activist judicial philosophy. While her scholarly writings and the inherent constraints imposed on a mid-level appellate court may suggest a more moderate judicial style, her record while on the U.S. Court of Appeals demonstrates that she abandons even this moderation when it suits her political agenda. In key categories of cases—e.g., cases involving the separation of powers, abortion, standing, or discrimination—her politics drives her jurisprudence.

Considering her own acknowledgement that the factors present on other courts that tug judges toward moderation are not present on the Supreme Court, this comprehensive review of Judge Ginsburg's record completely refutes the "moderate" label that so many journalists, politicians, and activists have rushed to place on her. Her liberal politics and judicial activism may well dominate her tenure on the Supreme Court to a degree that no one anticipates, or is willing to admit publicly, today.

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<sup>186</sup> 982 F.2d 551 (D.C.Cir. 1993). Judges Laurence Silberman and Stephen Williams joined the opinion.

<sup>187</sup> See *supra* section II.A.

# Alliance for Justice

A National Association of Organizations Working for Equal Justice

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**REPORT  
ON THE NOMINATION OF  
JUDGE RUTH BADER GINSBURG  
TO THE  
UNITED STATES SUPREME COURT**

As the United States Senate debates Judge Ruth Bader Ginsburg's nomination to the Supreme Court, it is important to reflect upon the profound influence the Court has over our lives. It occupies a central role in society by protecting our most cherished rights, a role that at times puts it at odds with the will of the majority and requires of the Justices a show of great conviction. Although each member of the Court casts just a single vote, their words can set into motion currents that either advance or hinder the ideals underlying our Constitution.

The approaching 40th anniversary of *Brown v. Board of Education* is a reminder that fulfilling the Constitution's promise of equal justice for every person remains largely unfinished. The Court's recently ended term starkly underscored that fact. In the last few weeks alone, the Court issued opinions which shielded bias in the workplace, weakened the wall of separation between church and state, rebuffed refugees fleeing persecution, and closed yet another door to potentially innocent death row prisoners.

The nomination of Judge Ginsburg represents a turning point for the Court. Unlike other sitting Justices, she spent a large part of her career representing the politically powerless of society. As an advocate-law teacher before her appointment to the federal appeals court, Judge Ginsburg constantly questioned the shortcomings of decisions failing to promote fairness and equality. She prodded the Court to reconsider old positions by initiating a dialogue about the changing role of women in society, thereby securing for millions of women greater freedom from disparate treatment. Judge Ginsburg's pathbreaking advocacy for gender equality suggests a person who views the Constitution as a charter for, not a barrier to, individual rights and liberties.

On the appeals court, Judge Ginsburg's record has been generally marked by a restrained judicial approach. However, she has also exhibited an inclusive view of the Constitution and a commitment to the judiciary's preeminent role in its interpretation. This conviction is reinforced by her belief that "without taking giant strides and thereby risking a backlash too forceful to contain, the Court, through Constitutional adjudication, can reinforce or signal a green light for a social change."

Over fifty years ago, Justice Hugo Black wrote that the Supreme Court "stands against any winds that blow, as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement." That is the standard to which other great Justices strove and reached, and that is the standard by which Judge Ginsburg will be measured. As a lower court judge, Ruth Bader Ginsburg has been constrained by the rulings of an increasingly conservative Supreme Court. However, it is the battles she fought prior to her service on the bench that portend a Justice who will broker the promises of the Constitution into reality.

#### BIOGRAPHICAL INFORMATION

Judge Ruth Bader Ginsburg's lengthy legal career has included public interest advocacy, teaching law and serving on the federal bench. It has been a career indelibly shaped by her own confrontations with discrimination. As a young wife in Fort Sill, Oklahoma, where her husband was in the military, she encountered sex bias firsthand working as a Social Security claims adjuster. After announcing her first pregnancy, she was denied promotions and raises, while a co-worker who did not reveal her pregnancy remained on the promotional track.

Two years later, in 1956 Ginsburg entered Harvard Law School, earning a place on the school's law journal. When her husband found employment in New York, she transferred to Columbia and graduated tied first in her class in 1959. Despite her academic accomplishments, such legendary jurists as Justice Felix Frankfurter and Second Circuit Judge Learned Hand refused to hire her because of her sex, and law firms turned her away. She later said of the firms, "To be a woman, a Jew and a mother to boot -- that combination was a bit too much." Ginsburg eventually obtained a clerkship with a New York federal judge and later worked for several years on a Columbia-sponsored comparative law project.

Passed over for a position at Columbia, New York University and Fordham law schools, Ginsburg joined the faculty at Rutgers in 1963, primarily teaching courses in civil procedure and the federal courts. In the late 1960s, at the urging of several women students, she taught a class on the legal status of women. Her research for the course opened her eyes to the widespread nature of legalized gender bias. At the same time, she volunteered at the New Jersey chapter of the American Civil Liberties Union and was referred cases of women complaining of sex discrimination. Later Ginsburg said, "It was that combination -- research in the lawbooks and confrontation with the genuine grievances of women who had been denied jobs or other opportunities -- that combination engaged my interest both as an attorney and as a woman." In one case, she successfully challenged school board regulations forcing pregnant teachers to leave without the right to return to their jobs.

Leaving Rutgers to become the first female law professor at Columbia, Ginsburg was well on her way to establishing herself as an expert in gender discrimination law. The ACLU set up the Women's Rights Project, and Ginsburg became its first director. The Project was soon recognized as the premier women's rights advocate before the Supreme Court. Between 1969 and 1980, Ginsburg argued six landmark sex discrimination cases before the Court and won five. In 1980, President Jimmy Carter appointed her to the U.S. Court of Appeals for the District of Columbia Circuit. Senator Strom Thurmond was the only Senator to oppose her.

**As an Advocate**

As an advocate and teacher, Ruth Bader Ginsburg was one of the premier authorities on gender equality under the Constitution and virtually steered the Supreme Court to its current jurisprudence on the subject. Although the 14th Amendment guarantees that the government shall not "deny to any person within its jurisdiction the equal protection of its laws," the Court historically had interpreted the clause not to apply to women and consistently upheld gender-based classifications. A woman could be barred from the legal profession (1873); had no right to vote (1875); could not work as a bartender (1948); and could be barred from serving on a jury (1961). According to Ginsburg, for women seeking justice before the Court during this period, the Constitution was "an empty cupboard." "Sexual Equality under the Fourteenth and Equal Rights Amendment," 1979 *Washington University Law Quarterly* 164.

By the late 1960s, however, the phenomenal changes in women's participation in society and in the labor force demanded a reassessment of stereotypical notions about women's roles and a closer examination of gender-based laws. Sensing that the Supreme Court was open to hearing fresh arguments, Ginsburg pursued a legal strategy to both inform the Court of these new facts and to persuade it to extend the umbrella of equal protection guarantees to women. Part of that strategy was to select cases in which the inequities fell on men as well. By the end of the 1970s, the ACLU had participated in more than half of the 63 gender bias cases before the Court, and Ginsburg had been the principal author of most of the briefs.

In her first brief to the Supreme Court, Ginsburg launched a full-scale attack on a gender discriminatory law in *Reed v. Reed*, 404 U.S. 71 (1971), which involved an Idaho statute giving men preference over women for appointment as estate administrators. According to the Court's equal protection jurisprudence at the time, gender-based classifications were routinely upheld if they were rationally related to a legitimate governmental objective. Under this approach known as the "rational basis" test, little scrutiny was involved.

Ginsburg argued in *Reed*, however, that the law should be viewed as inherently suspect, similar to way the Court analyzed race-based classifications. Under this approach, a law treating people differently had to have a compelling purpose, and the classification had to be necessary to accomplish that purpose if the law was to survive the Court's "strict scrutiny." The Court was unwilling to designate gender as a suspect category, but it did agree that the law was based on overgeneralized and outdated notions of women's abilities. It unanimously invalidated the statute using the rational basis standard, but added that the law was "subject to scrutiny." *Reed* marked the Court's first decision ever striking down a gender-based law as unconstitutional.

In subsequent cases, Ginsburg continued to press the argument that gender was a suspect classification and that *Reed* stood for the proposition that administrative convenience alone could not justify gender classification. Her position found four votes on the Court in *Frontiero v. Richardson*, 411 U.S. 677 (1973), but fell short of the majority necessary for establishing a precedent. Nonetheless, eight Justices held that married women in the armed services were entitled to the same fringe benefits as married men. Justice Byron White was part of the "gender as suspect" plurality, while Justice William Rehnquist was the lone dissenter.

Two cases brought by other advocates interrupted the chain of precedents sought by Ginsburg and eliminated any hope of obtaining a majority on the Court for treating gender as a suspect classification. *Kahn v. Shevin*, 416 U.S. 351 (1974), brought by the Florida ACLU chapter but argued by Ginsburg before the Court, upheld a state real-property tax exemption for widows and blind and disabled persons, but not widowers. Rejecting a widower's challenge, the Court observed that the tax scheme was benign and intended to assist surviving wives facing unplanned economic difficulties. The Court upheld a similarly "benign" system in *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (no equal protection violation to give female naval officer longer time period before mandatory discharge for lack of promotion). To Ginsburg, *Kahn* and *Ballard* reflected the outmoded thinking underlying earlier decisions that women were in need of a "boost . . . because they cannot make it on their own." "Remarks on Women Becoming Part of the Constitution," 6 *Law and Inequality: A Journal of Theory and Practice* 25 (1988).

After the *Kahn* and *Ballard* setbacks, Ginsburg adjusted her constitutional arguments in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), urging the Court to adopt an intermediate level of scrutiny. In *Wiesenfeld*, a widower claimed discrimination because of a Social Security provision that denied him "mother's insurance benefits," which would have allowed him to remain at home to take care of his infant son; his wife had died during childbirth. The statute allowed widows with dependent children to receive such benefits. Ginsburg argued that the statute actually discriminated against each member of the family. It denied benefits to widowers which a similarly situated widow would have received. The law also provided less protection for female wage earners by treating them equally with men for purposes of Social Security taxation, but unequally in a determination of family benefits. In addition, the law denied the motherless child the same opportunity for parental care afforded to a fatherless child. Brief for Appellee at 10-12, *Weinberger v. Wiesenfeld*. Seven Justices agreed, stating that a purportedly benign classification was still subject to judicial scrutiny. Without saying so, the Court looked closer at the provision than a rational basis test would have required.

In *Craig v. Boren*, 429 U.S. 190 (1976), the Court finally adopted the standard of review pushed by Ginsburg. Ironically, the case was not brought by the ACLU or Ginsburg, but by a private attorney who opposed the Equal Rights Amendment. However, Ginsburg authored an amicus brief and advised the attorney on legal arguments. She specifically called his attention to the uselessness of urging strict scrutiny and counseled him to argue instead for an intermediate level of scrutiny. The Court, 7-2 (with Justice Rehnquist in dissent), declared that any gender-based law, to withstand challenge, must serve important governmental objectives and must be substantially related to achievement of those objectives. The law at issue allowed 18-year-old girls to purchase 3.2 percent alcoholic beer, whereas boys had to wait until age 21. The Court stated that the law did little to cope with the problem of drunk driving by young people.

The same day as *Craig* was heard, Ginsburg argued *Goldfarb v. Califano*, 430 U.S. 199 (1977). In *Goldfarb*, five Justices voted to strike down a Social Security provision authorizing survivor's benefits to widowers only if the wife's contributions to family expenses had been three times that of the husband's, whereas no such formula was tied to a widow's eligibility. Ginsburg argued that although the law appeared to harm only men, as the law in *Craig* seemed to harm only boys, it actually hurt women by using gender as a short-hand method for drawing lines, which only reinforced stereotypes.

Looking back on the gender equality cases of the 1970s, Ginsburg wrote that they illustrated "the kind of interplay among the people, the political branches, and the courts that has kept the 'more perfect Union,' ordained by the Constitution alive and vibrant over these 200 years." 6 *Law and Inequality* at 25. In a more recent speech, she added that by forcing legislatures to reexamine gender-based laws, "the Court helped to ensure that laws and regulations would 'catch up with a changed world.'" "Speaking in a Judicial Voice," Madison Lecture, New York University School of Law (March 9, 1993), 3rd line draft at 58 [hereinafter Madison Lecture]. As an advocate, Ginsburg was a critical participant in the Court's dialogue about the role of women in society and their status in the law, and awakened the Court's conscience about the meaning of equality.

#### AS A JUDGE

##### *THE ROLE OF AN APPEALS COURT JUDGE*

Courtwatchers predict that Judge Ginsburg will be as "moderate" on the Supreme Court as she has been on the D.C. Circuit. But such predictions are at best premature. Her judicial record and extrajudicial writings, taken together, indicate that she may view the role of a Supreme Court Justice quite differently from that of an appellate court judge. Frequently, Judge Ginsburg has noted the limitations circuit judges face. They "generally have, if not marching instructions, then at least some pathmarkers from the appeals courts on which they sit, sister courts, or the Supreme Court, and they do not have the last judicial word on the turbulent constitutional questions of the day." "Confirming Supreme Court Justices: Thoughts on the Second Opinion Rendered by the Senate," 1988 *University of Illinois Law Review* 111.

In a 1985 speech, Judge Ginsburg summed up the role of federal courts of appeals judges with the statement "[o]ur modus operandi gravitates toward the middle." "The Obligation to Reason Why," 37 *University of Florida Law Review* 212 (Spring 1985). It is a statement as true of herself as of any circuit judge. For nearly thirteen years on the bench, Judge Ginsburg has employed a "middle of the road" approach to decisionmaking that has earned her the reputation of "centrist" on a court known for its conservative and liberal jurists.

Judge Ginsburg's judicial approach on the D.C. Circuit appears to stem from her strong commitment to the institutional integrity of the federal courts and the unique role of an appeals court judge. She believes strongly that one of the judiciary's primary roles is to promote predictability and consistency within the law. She has written frequently of the distinction between individualist and institutionally-minded styles of judging, exhibiting a pronounced preference for the latter. Judge Ginsburg argues that collegiality through unanimity of opinion is critical to promoting and enhancing the rule of law. While writing separately is sometimes productive, even necessary, she argues that "overindulgence in individualistic judging" can diminish the force of judicial opinions and undermine legal authority. "Styles of Collegial Judging: One Judge's Perspective," 39 *Federal Bar News & Journal* 200 (March/April 1992).

Judge Ginsburg's appellate decisions are also marked by an overriding fidelity to the proper role of the appeals courts as the middle tier of the federal court system. She has written:

"One reality [about the courts of appeals] cannot be over-emphasized: the character of the cases combines with the modus operandi to tug judges strongly toward the middle, toward moderation and away from startlingly creative or excessively rigid positions. . . . Unlike the Supreme Court, courts of appeals deal far less frequently with grand constitutional questions than with questions of statutory interpretation or the rationality of agency or district court decisions. In most matters of that variety, as Justice Brandeis repeatedly cautions: '[I]t is more important that the applicable rule of law be settled than that it be settled right . . . .'"

". . . . In contrast to district judges, who are the real power holders in the federal court system, no single court of appeals judge can carry the day in any case. To attract a second vote and establish durable law for the Circuit, a judge may find it necessary to moderate his or her own position, sometimes to be less bold, other times to be less clear."

*39 Federal Bar News & Journal* at 200.

#### *A COMPLEX RECORD*

Judge Ginsburg's strong respect for the courts' institutional integrity, and particularly the distinct role of appellate judges, pervades her judicial opinions, which exhibit a strict adherence to legal precedent and a cautious, often formalistic approach to deciding cases. Her opinions are generally as narrowly tailored to the specific facts of a case as possible, reflecting her sense that intermediate appellate judges should refrain from expansive decisions that produce sweeping changes in the law. On a court considered second in importance only to the Supreme Court because of its many high-profile and contentious decisions on the scope of federal power, Judge Ginsburg has often declined to subscribe to the bold positions of some of her colleagues.

Although routinely labeled a centrist, Judge Ginsburg has actually built a judicial record that defies precise characterization. Studies show that she votes more often with her colleagues appointed by Reagan and Bush than her fellow Carter appointees, and she is reputed to be on the "conservative" side on business law issues. According to one study, her decisions in antitrust law "have been as consistently conservative as any Carter, Bush, or Reagan judge on the D.C. Circuit." William Kovacic, "Reagan's Judicial Appointees and Antitrust in the 1990s," 60 *Fordham Law Review* 122 (1991). In a 1989 case, however, she dissented from the court's approval of a joint operating agreement between two major newspapers, which operated to exempt the arrangement from antitrust laws, and joined her Carter-appointed colleagues in calling for a rehearing before the full court. *Michigan Citizens for an Independent Press v. Thornburgh*, 868 F.2d 1285 (D.C. Cir. 1989), *reh'g en banc denied*, 868 F.2d 1300 (1989). Moreover, her opinions in the critical areas of standing and constitutional law, while generally exhibiting her characteristically cautious, methodical approach to decisionmaking, suggest an appreciation for the Constitution's unique role in protecting individual rights.

#### *Access to the Courts*

On issues relating to access to the courts -- often viewed as a barometer of whether a jurist possesses a restrictive or expansive judicial philosophy -- Judge Ginsburg displays a broad legal vision. For example, in *Wright v. Regan*, 656 F.2d 820 (D.C. Cir. 1981), she held that parents of black children attending public schools had standing to challenge the Internal Revenue Service's failure to deny, as legally required, tax exempt status to private schools that discriminated on the basis of race. The Supreme Court later overturned the decision in *Allen v. Wright*, 468 U.S. 737 (1983) in an opinion reflective of its increasing antipathy to the doctrine of standing. The Court concluded that the harm alleged was not fairly traceable to the IRS's supposed inaction.

In another prominent case, *Women's Equity Action League v. Cavazos*, 879 F.2d 880 (D.C. Cir. 1989), Judge Ginsburg held that students had standing to sue for enforcement of federal laws prohibiting federal funding of discriminatory educational institutions. She distinguished *Allen v. Wright*, holding that the plaintiffs in the present case (students rather than parents) suffered a direct injury and that federal funding of racially discriminatory institutions "is in part causative of the perpetuation of such discrimination." But Judge Ginsburg dismissed the case on other grounds in a later decision, 906 F.2d 742 (D.C. Cir. 1990), holding that Congress did not create a right, under the civil right statutes, for the plaintiffs to maintain such a broad and continuing action for compliance -- the scale of which she repeatedly emphasized -- in light of several precedents that had been handed down since the litigation began in 1970.

Generally, Judge Ginsburg's opinions on standing exhibit a receptiveness to arguments of how an injury is traceable to or caused by government action or inaction -- a requirement for standing -- especially when the claim is distinctly outlined and arises under a law passed by Congress. In *Dellums v. Nuclear Regulatory Commission*, 863 F.2d 968 (D.C. Cir. 1988), an anti-apartheid organization and its director-activist contended that a license allowing the importation of uranium from South Africa violated the Anti-Apartheid Act's trade embargo against the country. Judge Laurence Silberman held that the petitioners' injury -- their inability to travel to South Africa -- was not caused by the license nor could it be redressed by revoking it. In dissent, Judge Ginsburg argued that the license could conceivably contribute to the preservation of apartheid, the cause of the petitioners' injuries. Urging the court to defer to Congress' judgment that sanctions against South Africa were an effective means to end apartheid, she criticized the majority's approach as placing "judges beyond the pale of their general competence and draw[ing] the bench into the unseemly business of second-guessing Congress."

The same openness to organizational standing and deference to Congressional findings was evident in *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 30 (D.C. Cir. 1990) (fair housing organization had standing to challenge discriminatory newspaper advertisements under federal law and plaintiffs sought to vindicate values "endorsed by Congress . . . the enforcement of which Congress specifically left in the hands of private attorneys general like plaintiffs") and *United Transportation Union v. Interstate Commerce Commission*, 891 F.2d 908, 921 (D.C. Cir. 1989) (Ginsburg, J., concurring) (union did not have standing to contest agency rule but "Congressional economic and social judgments bearing on standing merit . . . respect").

Judge Ginsburg also found standing in *National Coal Association v. Lujan*, 979 F.2d 1548 (D.C. Cir. 1992), in which several coal associations challenged civil penalty regulations promulgated under the Surface Mining Control and Reclamation Act. She rejected the argument that the regulations applied only to individuals and thus not to the association members, which were coal companies. In addition, she held that a union had standing to sue the Federal Deposit Insurance Corporation, a receiver for a failed bank, in order to enforce the compensation rights of employees arising from a bargaining agreement between the union and the bank. She noted that although the union itself did not have a claim against the bank, it generally had authority to sue on behalf of its members and nothing in the controlling federal law, the Financial Institutions Reform, Recovery and Enforcement Act, warranted a different conclusion. *Office & Professional Employees International Union v. FDIC*, 962 F.2d 63 (D.C. Cir. 1992).

#### *Civil Rights and Civil Liberties*

Judge Ginsburg appears to take a fairly broad view of the scope of civil rights protections. In *Goodrich v. International Brotherhood of Electrical Workers*, 712 F.2d 1488 (D.C. Cir. 1983), she allowed a trial to go forward on the issue of whether the union violated the Equal Pay Act when it paid the female plaintiff less than it paid its male employees. In *O'Donnell Construction Company v. District of Columbia*, 963 F.2d 420 (D.C. Cir. 1992), Judge Ginsburg concurred in striking down the District's minority business contractor set-aside program, relying on a recent Supreme Court decision, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), which held that such a program must rest on a strong body of evidence showing racial discrimination in the past and be narrowly tailored to remedy such bias. However, Judge Ginsburg emphasized the limits of *Croson*, stating that "minority preference programs are not *per se* offensive to equal protection principles, nor need they be confined solely to the redress of state-sponsored discrimination," and that they are not exclusively remedies for past wrongs. 963 F.2d at 429.

Her approach in the area of civil liberties is less consistent. When the government treads heavily on a firmly established right, such as the free exercise of religion or speech, Judge Ginsburg shows no reluctance to criticize the action. In *Goldman v. Secretary of Defense*, 739 F.2d 657 (D.C. Cir. 1984), she dissented from the court's decision not to rehear a case involving a Jewish military officer's right under the First Amendment to wear a yarmulke while on duty. She wrote:

"The plaintiff . . . has long served his country as an Air Force officer with honor and devotion. A military commander has now declared intolerable the yarmulke Dr. Goldman has worn without incident throughout his several years of military service. At the least, the declaration suggests 'callous indifference' to Dr. Goldman's religious faith, and it runs counter to 'the best of our traditions' to accommodate[] the public service to the[] spiritual needs [of our people]."

739 F.2d at 660 (citations omitted). Similarly, Judge Ginsburg argued in dissent in *DKT Memorial Fund v. Agency for International Development*, 887 F.2d 275 (D.C. Cir. 1989) that a

government agency violated the First Amendment free speech and association rights of domestic family planning organizations by conditioning funding to foreign groups on their not accepting private, abortion-related funds from domestic organizations.

Judge Ginsburg has also shown an openness to certain judicial remedies to correct government malfeasance when civil liberties are at stake. In an Eighth Amendment "cruel and unusual punishment" case, a two-judge majority lifted a court-imposed population cap at an overcrowded prison, stating that "courts are not in the business of running prisons." *Inmates of Occoquan v. Barry*, 844 F.2d 828, 841 (D.C. Cir. 1988). The dissenting judge noted, however, that even the government's own experts had described the prison conditions as "both deplorable and explosive." 844 F.2d at 846. On suggestion for rehearing en banc, Judge Ginsburg joined a minority of her colleagues in seeking to review the case and wrote separately to underscore the appropriateness of a population cap as a possible remedy. 850 F.2d 796, 800 (D.C. Cir. 1988) (dissent from denial of rehearing en banc).

But Judge Ginsburg has also criticized the remedial effects of *Roe v. Wade* as too sweeping. In her Madison lecture, she argued that by relying on the right to privacy to recognize a woman's right to abortion, the Court effectively struck down every state abortion law and exacerbated the national debate over the issue. Although an abortion rights supporter, Judge Ginsburg stated that the Court could have found a firmer Constitutional ground, such as the equal protection clause, on which to rest its decision. Instead of constructing the trimester analytical framework, she asserted that the Court should have simply invalidated the law at issue and allowed states to gradually test the limits of the abortion right. Several commentators have disagreed with her historical rendition of the facts surrounding the pro-choice movement at the time *Roe* was decided and have pointed out the real-life implications for women who could not wait for the courts to delineate the scope of the abortion right.

In another civil liberties case, Judge Ginsburg was reluctant to look closer at a Supreme Court precedent that displayed an unusual harshness towards gays and lesbians. In *Dronenburg v. Zech*, 746 F.2d 1579 (D.C. Cir. 1984), a three-judge panel, comprised of Judges Robert Bork, Antonin Scalia, and a district judge sitting by designation, rejected a sailor's claim that the Navy's policy of discharging individuals who engage in homosexual conduct violated the constitutional right to privacy. Judge Bork's opinion was sweeping in its criticism of the right to privacy. Four members of the full court voted to rehear the case, arguing that the panel's expansive decision inappropriately "conduct[ed] a general spring cleaning of constitutional law" in finding no right to privacy.

Although Judge Ginsburg rejected Judge Bork's discussion as primarily non-binding dicta, she voted not to rehear the case, arguing that a 1976 Supreme Court case squarely controlled the instant one. In that case, the High Court affirmed without opinion a district court judgment upholding a statute barring homosexual conduct between consenting adults. Her reliance on that lone, summarily-decided case to reject an important and novel constitutional question led the four judges voting to rehear the case to lament her "well-intentioned" but unconvincing "attempt to justify the panel decision." 746 F.2d at 1580-81. They asserted that the Court had "not definitively answered the difficult question." 746 F.2d at 1580 (quoting from *New York v. Uplinger*, 104 S.Ct. 2332 (1984)).

In criminal law cases, Judge Ginsburg has written few opinions herself but has joined in at least three decisions that restricted the rights of the criminally accused. In *United States v. Jones*, No. 91-3025, slip op. (D.C. Cir. July 2, 1993), Judge Ginsburg joined an en banc opinion holding that a defendant could receive a longer sentence under the sentencing guidelines if he or she, rather than pleading guilty, chooses to go to trial and is subsequently convicted. The dissenters, Judges Abner Mikva, Patricia Wald, Harry Edwards and David Sentelle, argued that the majority was penalizing the defendant for exercising his Fifth Amendment right to trial.

In a Fourth Amendment case, *United States v. Rodney*, 956 F.2d 295 (D.C. Cir. 1992), Judge Ginsburg joined then-Circuit Judge Clarence Thomas's opinion allowing a consensual body search to include the individual's crotch area. Although recognizing that a consensual search cannot exceed the scope of the consent, Judge Thomas nonetheless held that the search at issue, which was conducted on a public street and on less than articulable suspicion of wrongdoing, "reasonably" included the person's genitals. Dissenting, Judge Wald argued that a citizen on a public thoroughfare who consents to a body search certainly does not expect the search to include his or her most private body parts.

In another troubling consensual-search case, Judge Ginsburg joined an opinion by Judge Douglas H. Ginsburg upholding a search of a train passenger's baggage after the person withdrew his consent to the search. In *United States v. Carter*, 985 F.2d 1095 (D.C. Cir. 1993), a plainclothes officer approached a nervous-looking train passenger and received permission to search his bag. When the officer pulled out a separate paper bag, however, the passenger snatched it back, replying that there was food in it and that he would get it out himself. He then put his hand into the bag, retrieved nothing but refused to allow the officer to look inside. The officer then seized the bag, which was ultimately found to contain drugs. Judge D.H. Ginsburg held that the "totality of the circumstances," including the manner in which the passenger withdrew his consent, justified the seizure.

In dissent, Judge Wald essentially argued that the way the defendant exercised his Constitutional right to be free from unreasonable searches was used to justify exactly the kind of intrusion the Fourth Amendment was seeking to prevent. She explained, "The reality is that so-called consensual encounters with the police are bound to be unnerving, and that most citizens -- innocent or guilty -- will feel the need to explain or excuse themselves when refusing to comply with a police request to search their luggage . . . and, in so doing, create the very suspicion that will be used to justify the previously unauthorized detention. . . . Permitting the police to rely on the atmospherics of the refusal . . . strips the legal right of withdrawal of all practical value." 985 F.2d at 1100.

#### *SUPREME COURT REVIEW OF GINSBURG'S OPINIONS*

Judge Ginsburg's opinions in cases reaching the Supreme Court offer several clues about the kind of Supreme Court Justice she will be. The Court has considered twenty-two D.C. Circuit court decisions in which Judge Ginsburg wrote either a majority or separate opinion. Her reversal-affirmance ratio is roughly even -- thirteen to nine -- with a rash of reversals occurring during her early years. Overall, the Court disagreed with her positions most often in cases involving standing and constitutional issues, with Judge Ginsburg often taking a more

expansive view. Additionally, in administrative law cases, a staple of the D.C. Circuit, Judge Ginsburg has been less deferential to agencies than the Court and more willing to overturn their actions on the grounds that are contrary to the intent of Congress or based on inadequate facts.

Contrasting Judge Ginsburg's voting record on the same cases with that of Justice White also provides a glimpse into how the Supreme Court may change with her appointment. The two jurists voted similarly in eight cases and differently in ten (four Court decisions did not list the Justices' votes or Justice White did not participate). In six cases on which they disagreed, the Supreme Court and Justice White took a more deferential view of agency decisions. In two others, Justice White voted to deny standing to plaintiffs, indicating a more limited view than Judge Ginsburg on access issues. Finally, in a First Amendment free speech case, Justice White allowed greater restrictions on expressive conduct. See Appendix for a chronological summary of Judge Ginsburg's decisions reviewed by the Court.

#### **CONCLUSION: AS A JUSTICE**

The appointment of every Justice is an event charged with far-reaching consequences. In the next century, the Court will be called upon to decide novel issues testing our nation's character and commitment to its founding principles. It will, for example, be asked to define "equality" in a culture increasingly fractured along racial and ethnic lines. It will be pressed to explain the phrase "freedom of expression" in a world in which technological advances occur almost daily. And it will be asked to articulate what "liberty" and "justice" mean at a time when currently popular groups and ideas demand conformity and obedience. The nation needs a judicial visionary who can apply the basic principles of the Constitution to the complex and unforeseen challenges of the future.

Throughout Ruth Bader Ginsburg's advocacy, writings, speeches and opinions, what comes through is her desire to calibrate the dynamic nature of the law and to search for responses that inch the law forward. To her, this self-described "measured" approach is essential to maintain collegiality within the judiciary and an open, productive dialogue with the other branches of government. However, there will be times when much more is required on the Supreme Court, often the last refuge for those seeking a safe harbor from prejudice and injustice. Indeed, Justices must display unyielding fidelity to the Constitution at precisely those moments when the easiest and least controversial action is to acquiesce to the will of the majority. The true measure of Judge Ginsburg's words will be whether she uses her authority to shield the disenfranchised and those most in need of the Court's protection.

## APPENDIX

**JUDGE RUTH BADER GINSBURG'S D.C. CIRCUIT COURT DECISIONS  
REVIEWED BY THE U.S. SUPREME COURT**

*Washington Post Co. v. U.S. Dep't of State*, 647 F.2d 197 (D.C. Cir. 1981) (per curiam). The court held that a Freedom of Information Act exemption which prevents disclosure of "personnel and medical files and similar files . . . which would constitute a clearly unwarranted invasion of personal privacy" did not apply to a newspaper's request for records to determine whether two individuals residing in Iran were U.S. citizens or held U.S. passports. The court reasoned that citizenship information did not involve intimate details similar to personnel and medical data. The Supreme Court reversed in *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595 (1982), holding that the exemption was intended to protect the confidentiality of personal matters and that "[i]t strains the normal meaning of the word to say that [passport] files are not 'similar' to personnel and medical files." Justice White voted with the majority.

*United States v. Ross*, 655 F.2d 1159 (D.C. Cir. 1981) (*en banc*). Judge Ginsburg ruled that a legal, warrantless search of an automobile does not necessarily extend to closed containers found in the car. The Fourth Amendment requires that a warrant be obtained before a search of such containers may take place. The Supreme Court reversed in *United States v. Ross*, 456 U.S. 798 (1982). In a dissenting opinion, Justice White would have affirmed Judge Ginsburg.

*Wright v. Regan*, 656 F.2d 820 (D.C. Cir. 1981). Judge Ginsburg wrote for the court that parents of black children in public schools could sue the IRS for providing tax exemptions to private schools discriminating on the basis of race. The Supreme Court reversed in *Allen v. Wright*, 468 U.S. 737 (1984), holding that plaintiffs had suffered no injury because they did not wish to attend the discriminatory schools. Justice White voted with the majority.

*International Ass'n of Machinists and Aerospace Workers v. Federal Election Commission*, 678 F.2d 1092 (D.C. Cir. 1982) (*en banc*) (per curiam). The court rejected a union's First Amendment challenge to various provisions of the Federal Election Campaign Act which allowed corporate political action committees to solicit their career employees and to use general corporate assets to finance their operating and administrative costs. The union claimed that the Act violated the Constitution by creating an imbalance of political speech rights between corporations and unions, prevented career employees from abstaining from political expression, and, by using corporate assets, violated the speech rights of dissenting shareholders. The Supreme Court affirmed without opinion in *International Ass'n of Machinists & Aerospace Workers v. Federal Election Commission*, 459 U.S. 983 (1982). Justice White's position was not stated.

*American Electric Power Service Corp. v. Federal Energy Regulatory Commission*, 675 F.2d 1226 (D.C. 1982) (denial of rehearing *en banc*) (per curiam memorandum). The court invalidated two agency rules issued under the Public Utility Regulatory Policies Act that were designed to encourage the development of private, small electrical cogenerators and reduce

demand for fossil fuels. The court held that FERC had failed to explain and justify its rule setting prices for utilities to purchase excess power from the cogenerators and had overstepped its authority in mandating that utilities establish interconnecting cables with cogenerators. In a per curiam memorandum denying hearing before the full court, Judge Ginsburg chastised FERC for "read[ing] into the opinion much more than the court put there." The Supreme Court reversed in *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402 (1983). Justice White voted with the majority.

*Natural Resources Defense Council v. Gorsuch*, 685 F.2d 718 (D.C. Cir. 1982). Judge Ginsburg held that the Environmental Protection Agency was barred from interpreting pollution "source" under the Clean Air Act as more than a single originator of pollution. She ruled that the redefinition of pollution source, which weakened environmental standards, subverted Congress' intent to improve air quality. The Court reversed in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Justice White voted with the majority.

*Community for Creative Non-Violence v. Watt*, 703 F.2d 586 (D.C. Cir. 1983) (en banc). The court held that homeless demonstrators given permission by the National Park Service to erect tents as part of an around-the-clock demonstration on the Mall and in Lafayette Park had a First Amendment right to sleep in those tents. Concurring, Judge Ginsburg emphasized that sleep, like other non-verbal activities, could have both expressive and non-expressive aspects, and she criticized then-Judge Scalia's dissent narrowly interpreting protected speech to include only actual words. Judge Ginsburg also asserted that sleeping in this case facilitated actual speech by allowing the demonstrators to carry on a 24-hour protest. Justice White wrote the majority opinion to reverse in *Clark v. CCNV*, 468 U.S. 288 (1984), finding that the ban on sleeping was a legitimate restriction.

*Goldman v. Secretary of Defense*, 739 F.2d 657 (D.C. Cir. 1984) (denial of reh'g en banc). The court rejected a Jewish officer's First Amendment challenge to a military regulation banning the wearing of "headgear . . . indoors," including a yarmulke. Judge Ginsburg dissented from the decision not to have the full court rehear the case. The Court, 5 to 4, affirmed in *Goldman v. Weinberger*, 475 U.S. 503 (1986). Justice White voted with the majority.

*Schor v. Commodity Futures Trading Commission*, 740 F.2d 1262 (1984). Writing for the court, Judge Ginsburg held that under the Commodity Exchange Act, the Commission did not have jurisdiction over state law counterclaims arising out of a commodity dispute. She wrote that Congress did not clearly express an intention to authorize such jurisdiction. The Supreme Court vacated the decision in *Commodity Futures Trading Commission v. Schor*, 473 U.S. 922-23 (1985), and remanded for further consideration in light of an intervening High Court decision. Justice White's position was not stated. On remand, the appeals court in a per curiam opinion with Judge Ginsburg participating, reinstated its original decision. The Supreme Court reversed in *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986). Justice White voted with the majority.

*Shaw v. Library of Congress*, 747 F.2d 1469 (D.C. Cir. 1984). The court upheld an attorneys fees award that took into account inflation due to a delay in payment. Dissenting, Judge Ginsburg rejected the majority's view that the United States had waived its immunity from

interest awards. She would have remanded to the district court, however, for determination of whether an increase was justified as a permissible "delay" factor rather than as interest. In *Library of Congress v. Shaw*, 478 U.S. 310 (1985), the Supreme Court reversed, agreeing with Judge Ginsburg that the United States had not waived its interest immunity, but rejecting the distinction between interest and a "delay" factor, claiming that they are both "designed to compensate for the belated receipt of money." Justice White voted with the majority.

*Alaska Airlines v. Donovan*, 766 F.2d 1550 (D.C. Cir. 1985). Judge Ginsburg concurred with the court's judgment that the Airline Deregulation Act's unconstitutional legislative veto provision was severable from the rest of the employee protection provisions of the statute. The Court affirmed in *Alaska Airlines v. Brock*, 480 U.S. 678 (1987). Justice White voted to affirm in the unanimous opinion.

*Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986). Judge Ginsburg held that the State Department may deny visas to individuals only when they enter the country "to engage in activities . . . prejudicial" to U.S. interests and that individuals may not be barred solely because of their membership in a Communist or anarchist organization. Dissenting, Judge Bork argued that excluding aliens is an essential act of sovereignty for which the executive branch should be given wide discretion. An equally divided Supreme Court affirmed without opinion in *Reagan v. Abourezk*, 484 U.S. 1 (1987). Justice White's position was not stated.

*In re American Federation of Government Employees*, 790 F.2d 116 (D.C. Cir. 1986). A government employees association petitioned for a court order to force the Federal Labor Relations Authority to process a number of long-standing labor complaints pending before the agency. Writing for the court, Judge Ginsburg noted that the "FLRA's past record of delay, as documented by AFGE, was indeed intolerable." However, she noted that because FLRA's counsel at oral argument produced evidence that the agency was making progress, denial of the request for a court order was appropriate. Judge Ginsburg left open the option that if the agency "fail[s] to act with due diligence" on its case docket, the association could renew its petition. The Supreme Court affirmed without opinion in *Bowsher v. American Federation of Government Employees*, 479 U.S. 801 (1986). Justice White's position was not stated.

*McKelvey v. Turnage*, 792 F.2d 194 (D.C. Cir. 1986). The appeals court rejected a claim that a Veterans Administration regulation violated the Rehabilitation Act by deeming all alcoholism, except when secondary to an "acquired psychiatric disorder," to be caused by "willful misconduct." Under VA rules, a determination of willful misconduct precluded a veteran from receiving extended educational benefits. Dissenting, Judge Ginsburg argued that an irrebuttable presumption that alcoholism was always the result of willful misconduct violated the Rehabilitation Act's proscription against discrimination based solely on handicap. Justice White wrote for the Court to uphold the VA rule in *Traynor v. Turnage*, 485 U.S. 535 (1988).

*Hohri v. United States*, 793 F.2d 313 (D.C. Cir. 1986) (denial of rehearing en banc). Japanese-Americans who were interned by the federal government during World War II sued the United States for damages and other relief under the Federal Tort Claims Act and the Little Tucker Act. The Little Tucker Act limits jurisdiction in district courts over nontort claims to no more than \$10,000; any case over \$10,000 must be filed in the Claims Court and is appealable

to the Federal Circuit Court of Appeals. Upon dismissal by the district court, the appeals court reversed, holding that the Little Tucker claims fell within the D.C. Circuit jurisdiction, not the Federal Circuit's, and that the FTCA claims were not time-barred. On a request for a rehearing before the full court, Judges Skelly Wright and Ginsburg defended the panel decision interpreting the jurisdictional issue. The Supreme Court reversed in *United States v. Hohri*, 482 U.S. 64 (1987), holding that the Federal Circuit had exclusive jurisdiction. Justice White joined the unanimous opinion.

*Doe v. Casey*, 796 F.2d 1508 (D.C. Cir. 1986). A majority of the court held that a decision to fire a gay CIA employee is not totally within the director's discretion; judicial review of such a termination is available under the Administrative Procedure Act (APA), and the court can review claims raising constitutional issues. Concurring, Judge Ginsburg responded to the dissent by emphasizing that if the CIA director is required to act within statutory bounds, then surely the director must comply with the Constitution, the "nation's highest law." The Supreme Court reversed on the APA issue, but affirmed on the latter in *Webster v. Doe*, 486 U.S. 592 (1988). Justice White voted with the majority.

*In re Korean Air Lines Disaster*, 829 F.2d 1171 (D.C. Cir. 1987). Following the downing of a Korean airliner by Soviets over the Sea of Japan, several wrongful death lawsuits were filed in various districts and then transferred and consolidated for pretrial proceedings in District of Columbia federal court. Judge Ginsburg held that failure of the airline to give required notice of liability limitations under the Warsaw Convention and Montreal Agreement did not deprive the airline of the \$75,000-per-passenger limitation on damages. The Supreme Court affirmed in *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989). Justice White voted with the majority.

*In re Sealed Case*, 838 F.2d 476 (D.C. Cir. 1988). A majority of the court held the independent counsel law unconstitutional under the doctrine of separation of powers. Dissenting, Judge Ginsburg argued that Congress has broad power under the Constitution to grant the power to appoint "inferior officers" as it sees fit. The Supreme Court reversed in *Morrison v. Olson*, 487 U.S. 654 (1988), on essentially similar grounds as Judge Ginsburg's opinion. Justice White voted with the majority.

*Community for Creative Non-Violence v. Reid*, 846 F.2d 1485 (D.C. Cir. 1988). Judge Ginsburg held that a sculptor who created a statue for display by a nonprofit association was not an employee of the association but an independent contractor and could apply for copyright ownership. However, she also ruled that the association might qualify as a joint author and thus as co-copyright owner of the sculpture. The Supreme Court affirmed in *CCNV v. Reid*, 490 U.S. 730 (1989). Justice White joined the unanimous opinion.

*Michigan Citizens for an Independent Press v. Thornburgh*, 868 F.2d 1285 (D.C. Cir. 1989). A majority of the court upheld the Attorney General's approval, under the Newspaper Preservation Act, of a joint operating agreement between two major newspapers. The approval essentially exempted the arrangement from antitrust laws. Judge Ginsburg dissented on the grounds that the Attorney General had interpreted the exemption too broadly and failed to adequately explain his decision to override two administrative decisions below rejecting the agreement. On an unsuccessful request for rehearing en banc, she joined her Carter-appointed

colleagues. An evenly divided Supreme Court affirmed the panel decision in *Michigan Citizens for an Independent Press v. Thornburgh*, 493 U.S. 38 (1989). Justice White did not participate in the case.

*American Postal Workers Union v. U.S. Postal Service*, 891 F.2d 304 (D.C. Cir. 1989). The majority held that the union had standing to challenge the Postal Service's decision to suspend its monopoly over international mail because union members' jobs would be affected. Concurring, Judge Ginsburg emphasized that the Postal Services' rulemaking proceedings did not adequately address critical comments. The Supreme Court reversed in *Air Courier Conference v. American Postal Workers Union*, 498 U.S. 517 (1991), holding that the union did not have standing. Justice White voted with the majority.

*Boston & Maine Corp. v. Interstate Commerce Commission*, 911 F.2d 743 (D.C. Cir. 1990). The court held that the ICC could not invoke condemnation power under the Rail Passenger Service Act to take possession of 50 miles of track held by B & M to give to Amtrak, which immediately transferred it to a third railroad line. In a concurring opinion, Judge Ginsburg agreed that the ICC's assessment was inadequate in this case, but she stopped short of the majority's ruling that the agency could not exercise its full eminent domain power when Amtrak's only aim was to secure use, but not possession, of tracks. The Supreme Court reversed in *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 112 S. Ct. 1394 (1992). The Court stated that the ICC's interpretation of the Act and its exercise of authority were reasonable. Dissenting, Justice White wrote that the ICC's findings justifying the taking were inadequate.

Consumers Union, National Wildlife Federation and Natural Resources Defense Council  
do not take positions on judicial nominations

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July 23, 1993

**The Honorable Joseph R. Biden, Jr.**  
**Chairman**  
**Committee on the Judiciary**  
**U.S. Senate**  
 224 Dirksen Senate Office Building  
 Washington, D.C. 20510-6275

**Re: Nomination of Judge Ruth Bader Ginsburg**

**Dear Mr. Chairman:**

The National Asian Pacific American Bar Association (NAPABA) supports the nomination of the Honorable Ruth Bader Ginsburg to the Supreme Court of the United States, and recommends that the Senate Judiciary Committee confirm her appointment.

NAPABA is a national, non-profit, non-partisan professional organization whose membership includes approximately three dozen local Asian Pacific American bar associations and over 3,000 Asian Pacific American attorneys, law professors, judges, and other legal professionals throughout the United States. NAPABA not only serves the professional needs of its members, but also provides leadership as an advocate for the legal needs and interests of the Asian Pacific American community. NAPABA has been privileged to testify before this Committee in the past, and is pleased to offer its views concerning the nomination of Judge Ruth Bader Ginsburg.

As a preliminary matter, NAPABA notes that Judge Ginsburg has an impressive record as an attorney, law professor and judge. She has earned the highest possible rating of the American Bar Association, having been found unanimously by the ABA panel to be "well qualified" to serve on the highest court in the nation. Moreover, she has been a forceful and committed advocate for the rights of women.

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It is particularly important to NAPABA that Judge Ginsburg's overall record also suggests that she is sensitive to issues that significantly affect minority communities. For example, her opinion for the court in Spann v. Colonial Village, Inc., 899 F.2d 24 (D.C. Cir. 1990), indicates that she understands the importance under the civil rights laws of ensuring meaningful access to the courts to combat discrimination. In Spann, the court upheld the use of "testers" by fair housing organizations seeking to challenge discriminatory housing practices.

Judge Ginsburg has also demonstrated support for actions designed to remedy the adverse consequences of discrimination. In O'Donnell Construction Co. v. District of Columbia, 963 F.2d 420 (D.C. Cir. 1992), in which the court struck down the D.C. minority set-aside program, Judge Ginsburg concurred in the decision as mandated by City of Richmond v. Croson, 488 U.S. 469 (1989), but emphasized that Croson did not hold minority preference programs to be unconstitutional *per se* or to be limited to redress of state sponsored discrimination. 963 F.2d at 429. She pointed out that "remedy for past wrong is not the exclusive basis upon which racial classification may be justified." *Id.* (citing Croson, 488 U.S. at 511 (Stevens, J., concurring)).

Furthermore, Judge Ginsburg has shown an understanding of the concerns and experiences of Asian Pacific Americans in at least two cases before her. In Hohri v. United States, 782 F.2d 227 (D.C. Cir. 1986), vacated and remanded, 482 U.S. 64 (1987), Judge Ginsburg joined in a panel decision which allowed Japanese American victims of the disgraceful World War II internment camps to bring an action under the Takings Clause of the Constitution, challenging the confiscation of their property. The panel decision found that the statute of limitations had been tolled by reason of the government's misrepresentations to the Supreme Court in the Hirabayashi and Korematsu cases. The court later denied a rehearing of the decision *en banc*, in which Judge Bork, dissenting at length, criticized the panel opinion as one in which "compassion displaces law." 793 F.2d 313 (Bork, J., dissenting). Judge Ginsburg and Judge J. Skelly Wright, in a joint statement, responded to each legal point raised and noted that the panel opinion dealt "particularly and precisely with the special facts of an extraordinary episode of injustice."

In Jacobs v. Barr, 959 F.2d 313 (D.C. Cir. 1992), Judge Ginsburg joined in a panel decision rejecting a challenge brought against the Civil Liberties Act of 1988 by

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a German American who had been interned with his father during World War II. The Act was passed to compensate Japanese Americans who had been victims of the government's decision during World War II to send them to internment camps solely because of their race, and to apologize for the "grave injustice" they had suffered. The plaintiff argued that the Act violated the Equal Protection Clause because it did not compensate German Americans who had been interned. The court noted, however, that Congress considered "extensive evidence" that Japanese Americans were interned solely for reasons of racial prejudice, while German Americans (who received individual hearings) were not. *Id.* at 321.

In summary, NAPABA believes that Judge Ginsburg is well qualified to serve on the Supreme Court of the United States not only with respect to her technical skills and judicial temperament, but also with respect to her sensitivity to the concerns of racial and ethnic minorities. NAPABA recommends that the Committee confirm her appointment.

Sincerely yours,

*William C. Hou*

William C. Hou  
President

cc: Members of the Senate Judiciary Committee

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