

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