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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

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Judiciary Committee
Washington, D.C.

submitted
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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 some 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."[1]

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."[2]

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."[3]

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

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[1] *Struck v. Secretary of Defense*, 1972 (*The New Republic*, 8/2/93, p. 19)

[2] Supreme Court decision 6/10/86: *Richard Thornburgh v. American College of Obstetricians and Gynecologists*, Justice John Paul Stevens concurring

[3] 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[4] 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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[4] *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."[5]

"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."[6]

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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[5] *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.

[6] 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.[7]

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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[7] *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 sbustitute 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."[6]

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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[6] *The Real Thomas Jefferson*, National Center for Constitutional Studies, Second Edition 1983, p. 497