

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 that 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. BORK, JR., DELAWARE CHAIRMAN

EDWARD M. KENNEDY, MASSACHUSETTS	ORRIN G. MATCH, UTAH
HOWARD M. METZENBAUM, OHIO	SYRON THURMOND, SOUTH CAROLINA
FRANK McCONNIE, ARIZONA	ALAN K. SAMPSON, WYOMING
ESTHER J. LEAHY, VERMONT	CHARLES E. GRASSLEY, IOWA
DAVIDE L. BENTON, ALABAMA	ARLEN SPECTER, PENNSYLVANIA
PAUL SIMON, ILLINOIS	HANK BROWN, COLORADO
DAVID D. KEIR, WISCONSIN	WILLIAM S. COHEN, MAINE
MARK L. FEINSTEIN, CALIFORNIA	LARRY PRESSLER, SOUTH DAKOTA
MARK ANSFLEY, BRAUN, RHODE ISLAND	

THOMAS J. BRIDGES, CHIEF CLERK
 CATHERINE M. BRISKILL, STAFF DIRECTOR
 MARGO S. DODER, SENIORITY CLERK
 SHARON PRUITT, SENIORITY CLERK

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

JOSEPH R BIDEN Jr. DELAWARE CHAIRMAN

EDWARD M. KENNEDY MASSACHUSETTS	ORRIN G. HATCH UTAH
EDWARD M. METZENBAUM OHIO	STROM THURMOND SOUTH CAROLINA
ROBERT D. INGRAM ARIZONA	ALAN S. SAMPSON WYOMING
FRANK R. LEEHEY VERMONT	CHARLES E. GRASSLEY IOWA
DAVID D. DUREN ALABAMA	ARLEN SPECTER PENNSYLVANIA
PAUL SIMON ILLINOIS	HANK BROWN COLORADO
HERBERT KOHL WISCONSIN	WILLIAM S. COHEN MAINE
MARK R. DEKLEBEN CALIFORNIA	LARRY PRESSLER SOUTH DAKOTA
CHARLES M. SCHLES ILLINOIS	

CYRILIA C. HOGAN CHIEF COUNSEL
 CATHERINE M. RUSSELL STAFF DIRECTOR
 MARK R. DESLER MINORITY STAFF DIRECTOR
 SHARON PROBT MINORITY CHIEF COUNSEL

United States Senate

COMMITTEE ON THE JUDICIARY
 WASHINGTON, DC 20510-8275

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.