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

AUGUST 5, 1993 (legislative day, JUNE 30), 1993.—Ordered to be printed

Mr. BIDEN, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany the nomination of Ruth Bader Ginsburg to be an Associate Justice of the U.S. Supreme Court]

The Committee on the Judiciary, to which was referred the nomination of Judge Ruth Bader Ginsburg to be an Associate Justice of the U.S. Supreme Court, having considered the same, reports favorably thereon, a quorum being present, by a vote of 18 yeas and 0 nays, with the recommendation that the nomination be approved.

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INTRODUCTION

The Senate Judiciary Committee unanimously recommends the confirmation of Judge Ruth Bader Ginsburg to be an Associate Justice of the U.S. Supreme Court. This unanimity results from two facts: First, Judge Ginsburg's qualifications and judicial temperament are indisputable. Second, and most important, Judge Ginsburg's extensive judicial record and style mark her as a true consensus candidate

Judge Ginsburg is a nominee who holds a rich vision of what our Constitution's promises of liberty and equality mean, balanced by a measured approach to the job of judging. She accepts the Constitution as an evolving charter of government and liberty—as a limited grant of power *from* the people *to* the government—not a narrow list of enumerated rights. At the same time, she speaks and practices judicial restraint, understanding that a judge must work within our constitutional system—respecting history, precedent, and the respective roles of the other two branches.

The balance that Ruth Bader Ginsburg achieves—between her vision of what our society can and should become, and the limits on a judge's ability to hurry that evolution along—will serve her well on the Supreme Court.

This report canvasses the record of significant issues explored with the nominee during the hearings. Although individual Senators may not agree with the conclusions drawn in every section of this report, each of the issues was relevant to some members of this committee in reaching the recommendation that the Senate consent to this nomination.

The nomination of Judge Ruth Bader Ginsburg is one the committee can enthusiastically recommend for confirmation to the Senate. The committee's recommendation is based on Judge Ginsburg's temperament, character, judicial record, and judicial philosophy. It is made with full confidence.

PART 1: BACKGROUND AND QUALIFICATIONS

I. BACKGROUND

The committee received the President's nomination of Judge Ruth Bader Ginsburg to be an Associate Justice of the U.S. Supreme Court on June 22, 1993. The hearings on Judge Ginsburg's nomination were held on July 20, 21, 22 and 23. The nominee was questioned for nearly 20 hours on 3 days. The nominee was also questioned in a closed session, pursuant to rule 26 of the Standing Rules of the Senate, on July 23, 1993.

The committee heard testimony from a total of 20 witnesses, including William E. Willis, chairman, Standing Committee on Federal Judiciary, American Bar Association; Judah Best, D.C. Circuit Representative, Standing Committee on Federal Judiciary, American Bar Association; William T. Coleman, Jr., O'Melveny & Meyers; Chesterfield Smith, Holland & Knight; Shirley Hufstedler, Hufstedler, Kaus and Ettinger; Ira M. Milstein, Weil, Gotshal and Manges; Gerald Gunther, William Nelson Cromwell professor of law, Stanford University; Herma Hill Kay, dean, Boalt Hall School of Law, University of California at Berkeley; Paige Comstock Cunningham, president, Americans United for Life; Rosa Cumare, Hamilton and Cumare; Nellie J. Gray, president, March for Life Education and Defense Fund; Susan B. Hirschmann, executive director, Eagle Forum; Kay Cole James, Family Research Council; Howard Phillips, U.S. Taxpayers Party and The Conservative Caucus; Edith Roberts; Stephen Wiesenfeld; Kathleen Peratis; Angela M. Bradstreet, California Women Lawyers; Carlos Ortiz, president, Hispanic National Bar Association; John D. Feerick, president, New York City Bar Association.

The committee carefully and thoroughly scrutinized the nominee's qualifications and credentials, including her 13-year record as a circuit judge on the U.S. Court of Appeals, District of Columbia Circuit, her 8-year record as a professor at Columbia Law School, her 9-year record as a professor at Rutgers, the State University School of Law in Newark, N.J., her academic writings and her speeches.

On July 29, 1993, a quorum being present, the committee voted, 18 to 0, to report the nomination with a favorable recommendation.

AYES	NAYS
Mr. Biden	
Mr. Kennedy	
Mr. Metzenbaum	
Mr. DeConcini	
Mr. Leahy	
Mr. Heflin	
Mr. Simon	
Mr. Kohl	
Mrs. Feinstein	
Ms. Moseley-Braun	
Mr. Hatch	
Mr. Thurmond	
Mr. Simpson	
Mr. Grassley	

Mr. Specter
Mr. Brown
Mr. Cohen
Mr. Pressler

II. THE NOMINEE

Judge Ginsburg was born on March 15, 1933, in Brooklyn, NY. She received her bachelor of arts degree from Cornell University in 1954. Judge Ginsburg pursued her legal education, first at Harvard Law School and then at Columbia Law School, receiving her juris doctor in 1959.

From 1959 to 1961, the nominee served as law clerk to Judge Edmund L. Palmieri, U.S. district court judge for the Southern District of New York.

From 1961 to 1962, the nominee was a research associate for the Project on International Procedure at Columbia Law School, and from 1962 to 1963, she served as the associate director of that program.

From 1963 to 1966, the nominee was an assistant professor at Rutgers, the State University School of Law. From 1966 to 1969 she was an associate professor and from 1969 to 1972, the nominee was a full professor at Rutgers.

From 1972 to 1980, the nominee was a professor at Columbia University School of Law.

From 1973 to 1974, she was a consultant to the U.S. Commission on Civil Rights.

From 1972 to 1973, Judge Ginsburg was the director of the Women's Rights Project at the American City Liberties Union; from 1973 to 1980, she served as a general counsel.

From 1977 to 1978, the nominee was a fellow at the Center for Advanced Study in Behavioral Sciences in Stanford, CA.

In 1980, President Carter nominated Judge Ginsburg to the U.S. Court of Appeals for the District of Columbia. She has served on that court from 1980 to the present. President Clinton nominated her to the Supreme Court on June 14, 1993.

III. THE AMERICAN BAR ASSOCIATION'S EVALUATION

A. The Standing Committee unanimously gave Judge Ginsburg its highest rating of "Well Qualified"

The American Bar Association's (ABA) Standing Committee on the Federal Judiciary, chaired by William E. Willis, Esq., unanimously found Judge Ginsburg to be "Well Qualified," its highest rating. (Letter from William E. Willis to Chairman Biden at 1 (July 15, 1993) (on file with the Senate Committee on the Judiciary).) Based on its investigation, the Standing Committee determined that Judge Ginsburg "has earned and enjoys an excellent general reputation for her integrity and her character." (Letter from William E. Willis to Chairman Biden at 4 (July 19, 1993) (on file with the Senate Committee on the Judiciary).) Out of the hundreds of people questioned regarding Judge Ginsburg's integrity, no one interviewed expressed doubt on this issue. The committee also found that Judge Ginsburg possesses the highest level of judicial temperament and meets the highest standard of professional com-

petence required for a seat on the Supreme Court. An example of her professional competence was given by a member of one of the Reading Groups who said:

> 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. (Id. at 8.)

The Standing Committee concluded that Judge Ginsburg 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 [D.C. Circuit] Court of Appeals, Judge Ginsburg meets the highest standards of professional competence required for a seat on the Supreme Court." *Transcript of Proceedings, Nomination of Ruth Bader Ginsburg to be Associate Justice of the Supreme Court of the United States: Hearings before the Senate Committee on the Judiciary,* 103d Cong., 1st sess., July 23, at 12 [hereinafter cited as "Transcript"].

B. The Standing Committee conducted an extensive investigation

The Standing Committee conducted an extensive investigation of Judge Ginsburg, including interviews with members of the Supreme Court and with many of her colleagues on the D.C. Circuit. Of the more than 625 persons interviewed by the committee, over 400 are Federal or State judges. The remaining 225 consist of practicing attorneys, former law clerks, and lawyers who have appeared before Judge Ginsburg. Committee members also 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. (Letter from William E. Willis to Chairman Biden at 2 (July 19, 1993) (on file with the Senate Committee on the Judiciary).) Members of the Standing Committee also personally interviewed Judge Ginsburg. (Id.)

Judge Ginsburg's opinions were reviewed by: (1) a Reading Group of lawyers chaired by Rex E. Lee, former Solicitor General of the United States and presently president of Brigham Young University, who 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. The three Reading Groups reported to the committee their independent analyses of Judge Ginsburg's opinions. (Id. at 3–4.) The comprehensive reports uniformly praised Judge Ginsburg's scholarship and writing ability. One group characterized her opinions as "lawyerly," "thoughtful," "careful," "measured, clear, precise and judicious," while another group commented on her "concern with the institutional needs of the court and the necessity for maintaining collegiality." (Id. at 7–8).

IV. COMMITTEE RECOMMENDATION

A motion to report with favorable recommendation the nomination of Judge Ruth Bader Ginsburg to be an Associate Justice of the U.S. Supreme Court passed by a vote of 18 to 0.

PART 2: JUDGE GINSBURG'S JUDICIAL PHILOSOPHY AND CONSTITUTIONAL METHODOLOGY

I. JUDGE GINSBURG BELIEVES THE CONSTITUTION IS AN EVOLVING DOCUMENT

Judge Ginsburg's written record and testimony before the committee amply demonstrate that she believes the Constitution is a living document that adjusts to modern notions of ordered society to retain its vitality. She rejects any formulation of original intent that would freeze the Constitution in time, limiting its broad clauses to situations specifically contemplated by the framers. For example, in a speech given to the Eighth Circuit Judicial Conference, she said:

> [A] too strict "jurisprudence of the framers' original intent" seems to me unworkable, and not what Madison or Hamilton would espouse were they with us today. It cannot be, for example, that although the founding fathers never dreamed of the likes of Dolly Madison or even the redoubtable Abigail Adams ever serving on a jury, we would today say it is therefore necessary or proper to keep women off juries.
>
> 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. (Ruth Bader Ginsburg, Remarks on Women Becoming Part of the Constitution, Address Before the Eighth Circuit Judicial Conference (July 17, 1987), in 6 Law & Ineq. J. 17, 17 (1988) [hereinafter cited as "Remarks"]).

Judge Ginsburg recognizes that our Constitution has grown from a document with a cramped view of "We, the People" to one increasingly inclusive of traditionally excluded social groups, including women and racial minorities. In her view, this evolution toward a more inclusive understanding of our Constitution's meaning is consistent with the broad intent of the framers. She believes that judges do their jobs properly when they act in accordance with the framers' "original understanding," but she does not find that "understanding" confining.

The nominee believes the framers understood that the Constitution would not remain static, constrained by the specific notions of the framers themselves. She believes they intended the Constitution to be subject to a careful process of extension—either through amendment, interpretation, or social practice. (Ginsburg, The James Madison Lecture on Constitutional Law, Speaking in a Judicial Voice, Address Before the New York University School of Law (March 9, 1993) in N.Y.U. L. Rev. (forthcoming 1993) (manuscript

on file with the Senate Commission on the Judiciary) [hereinafter cited as "Madison Lecture"].) Supporting her view is her recitation of the history of our Nation. That history is one in which the framers contemplated continued slavery, refused women the franchise, and imposed property qualifications on men seeking to vote. Through the process of extension she describes, however, the Constitution grew—ultimately abolishing slavery and giving women the right to vote through amendment, recognizing women's equality through interpretation, and eliminating most voting qualifications other than age and citizenship through a combination of amendment, legislation, and social convention.

The nominee further articulated her view of the framers' original understanding in testimony before the committee. Judge Ginsburg testified in response to a question from the Chairman:

> [T]he 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 when, during the series of Bicentennials when songs of praise of the Constitution were sung, he 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 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.
>
> So 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. (Transcript, July 20, at 112.)

When Senator Hatch asked the nominee whether she agreed with the 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," the nominee replied:

> I think all people could agree with that, but as I tried to say in response to the Chairman * * *, trying to divine what the Framers long did, intended, at least I have to look at that two ways. One is what they might have intended immediately for their day, and one is their larger expectation that the Constitution was meant to govern, not for the passing hour, but for the expanding future. And I know no better illustration of that than to take the great man who wrote the Declaration of Independence, who also said, for our state, a pure democracy, there would still be excluded from our deliberations women who, to prevent depravation of morals or ambiguity of issues, should not mix promiscuously in gatherings of men.
>
> Now I do believe that Thomas Jefferson, were he alive today, would say that women are equal citizens. * * * But what was his understanding of all men are created equal for his day and 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 a larger aspiration, our society improves. I think the Framers were intending to create a more perfect union that would become ever more perfect over time. (Transcript, July 20, at 131–32).

In short, Judge Ginsburg believes that the effort to divine the framers' specific original intent is an appropriate starting point in constitutional review, but she rejects the notion that the inquiry ends where it begins.

II. JUDGE GINSBURG ADVOCATES JUDICIAL RESTRAINT

One theme that emerged from the committee's extensive review of Judge Ginsburg's written record, as well as her testimony, is her belief in a judicial branch that moves incrementally. A careful adherent to a case-by-case method of gradual evolution in the law, Judge Ginsburg believes the Court should move in "measured motions." This view is exemplified by the following testimony from her opening statement:

> My approach [to judging], 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. 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." (Transcript, July 20 at 91–92.)

Judge Ginsburg has written extensively about how the judicial branch should take incremental steps, allowing legislatures and society to address and respond to court-ordered changes. In her Madison Lecture, she articulated a view about how judges should go about interpreting our evolving Constitution to accommodate modern circumstances. There is one overarching theme: the Court should generally lay markers along the road to doctrinal change, allowing public debate and legislative acceptance to occur, rather than making abrupt changes that lack secure foundations. She wrote, "[W]ithout 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." (Madison Lecture at 36–37.)

As an example of this process at work, the nominee cited the gender equality cases of the 1970's, from *Reed* v. *Reed,* 404 U.S. 71 (1971), through *Craig* v. *Boren,* 429 U.S. 190 (1976). Prior to *Reed,*

the Supreme Court had never found gender discrimination unconstitutional under the 14th amendment. In this line of cases, however, the Court developed a new theory of gender equality under the Constitution—ultimately concluding in *Craig* that gender classifications would be subjected to an intermediate standard of equal protection scrutiny. Each of these cases, beginning with *Reed* and culminating in *Craig*, was, in her view, a "pathmarker" toward the constitutional principle of gender equality. The nominee wrote of this development:

> For the most part, the Court was neither out in front of, nor did it hold back, social change. Instead, what occurred was what engineers might call a "positive feedback" process, with the Court functioning as an amplifier—sensitively responding to, and perhaps moderately accelerating, the pace of change, change toward share participation by members of both sexes in our nation's economic and social life. (Remarks at 24.)

She stated further:

> The ball, one might say, was tossed by the Justices back into the legislators' court, where the political forces of the day could operate. The Supreme Court wrote modestly, it put forward no grand philosophy; but by requiring legislative reexamination of once customary sex-based classifications, the Court helped to ensure that laws and regulations would "catch up with a changed world." (Madison Lecture at 31–32 (footnotes omitted).)

Judge Ginsburg echoed this view in her testimony before the committee. Under questioning by Senator DeConcini, the nominee testified that the Court did not lead society in the gender equality cases, stating, "From my viewpoint, [these cases] were reflecting social changes and putting the imprimatur of the law on the direction of change that was ongoing in society." (Transcript, July 21, at 10.)

At least in part, Judge Ginsburg's prescription for cautious judicial advances reflects a recognition of the limitations under which the Court operates. The judiciary lacks a "sword" with which to enforce its pronouncements. She has written:

> With prestige to persuade, but not physical power to enforce, with a will for self-preservation and the knowledge that they are not "a bevy of Platonic Guardians," the Justices generally follow, they do not lead, changes taking place elsewhere in society. 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. (Madison Lecture, at 36–37 (footnotes omitted).)

III. JUDGE GINSBURG ACKNOWLEDGES THAT COURTS MUST ACT BOLDLY WHERE THE POLITICAL PROCESS WILL NOT ADMIT CONSTITUTIONALLY NECESSARY CHANGE

In her Madison Lecture, Judge Ginsburg wrote:

> I do not suggest that the Court should never step ahead of the political branches in pursuit of a constitutional precept. *Brown* v. *Board of Education* [347 U.S. 483], the 1954 decision declaring racial segregation in public schools offensive to the equal protection principle, is the case that best fits the bill. Past the midpoint of the twentieth century, apartheid remained the law enforcement system in several states, shielded by a constitutional interpretation the Court itself advanced at the turn of the century—the "separate but equal" doctrine. (Madison Lecture at 33–34 (footnotes omitted).)

She wrote that "prospects in 1954 for dismantling racially segregated schools were bleak." (Madison Lecture at 34.) To paraphrase her argument: political actors were unlikely to be moved to desegregate the schools because a national consensus to support such bold legislative initiatives were lacking.

The nominee's generally cautious approach to judging stands in balance with her belief that our understanding of the Constitution's meaning evolves over time. Judge Ginsburg suggests that judges walk a fine line. In the context of discussing her litigation attacking laws that discriminated based on gender, she wrote, "Challenges to [gender-based] laws put the courts in the sticky marshland between constitutional *interpretation* in our system, a proper judicial task, and constitutional *amendment*, a job reserved to the people's elected representatives." (Ginsburg, The Meaning and Purpose of the Equal Rights Amendment, Address Before the Colloquim on Legislation for Women's Rights, Oosterbeek, Netherlands 10 (September 27, 1979) [hereinafter, Meaning and Purpose].)

On the one hand, the nominee believes the Constitution to be an evolving document—a belief she ascribes to the framers as well. On the other hand, she believes judges can go too far, actually amending the Constitution when their job is to interpret only. She summarized this tension in her writings: "[T]he genius of our eighteenth century Constitution is its supple capacity to serve through changing times if supported by judicial interpretations that are neither 'mushy' nor too 'rigid.'" (Ginsburg, The Ben J. Altheimer Lecture, On Amending the Constitution: A Plea for Patience, Address Before the University of Arkansas at Little Rock School of Law (February 7, 1990) in 12 U. Ark. Little Rock L.J. 677, 693 (1989–90) (footnote omitted).)

In part because the nominee herself acknowledged a tension between the notion of an evolving Constitution and the principle of judicial restraint, several members of the committee sought to determine the nominee's view on the proper methodology for recognizing previously acknowledged rights.

During the hearing, the chairman asked the nominee to reconcile her position that courts must move incrementally with her support for a case like *Brown* where the Court took a bold step. In response, the nominee first reconciled her approval of *Brown* with her view of judicial restraint by pointing out that *Brown* "wasn't born in a day," even though it produced change "perhaps a generation before state legislators in our southern states would have

budged on the issue." (Meaning and Purpose at 2.) Judge Ginsburg testified:

> Thurgood Marshall came to the Court showing it wasn't equal, in case after case, in four cases, at least, before he wanted to put that before the Court, *Sweatt* v. *Painter,* [339 U.S. 629 (1950)], *McLaurin* [v. *Oklahoma State Regents,* 339 U.S. 639 (1950)], *Gaines* [v. *Canada,* 305 U.S. 337 (1938)]. He set the building blocks, until it was obvious to everyone that separate couldn't be equal.
>
> * * * * * * *
>
> But *Brown* itself * * * didn't say, and racial segregation which society has come to recognize, in some parts was coming to recognize, is going to be ended [root and] branch by one decision. *Brown* was in 1954, and it wasn't until *Loving* v. *Virginia* [388 U.S. 1] in 1967 that the job was over, even at the Supreme Court level, even at the declaration level. (Transcript, July 20, at 123–124.).

But Judge Ginsburg then did acknowledge that there are some cases in which the Court appropriately may lead society in bold new directions—even where there are no "pathmarkers" to show the way, and no "dialogue" with the political branches. She mentioned as examples *Worcester* v. *Georgia,* 31 U.S. 515 (1932), and *Dred Scott* v. *Sandford,* 60 U.S. 393 (1857).

Senator DeConcini pursued this issue in an effort to discern the methodology she would employ to recognize a case in which it is appropriate for the Court to lead society. The nominee stated, "[W]hen political avenues become dead-end streets judicial intervention in the politics of the people may be essential in order to have effective politics." (Transcript, July 21, at 13.) She gave as an example the legislative reapportionment case of *Baker* v. *Carr,* 369 U.S. 186 (1962), in which the Court established the principle of one person, one vote. In further response to this line of questioning by Senator DeConcini, the nominee indicated that courts should move with restraint, but that, where legislatures fail to resolve important questions, courts must step in to supply a remedy if a case demanding a remedy is before them. (*Transcript,* July 21, at 17–18.)

IV. JUDGE GINSBURG'S THEORY OF *STARE DECISIS*

The committee is satisfied that Judge Ginsburg holds an appropriate respect for the principle of *stare decisis* and abiding understanding of the value of precedent. At the same time, she recognizes the importance of achieving the correct result in matters of constitutional interpretation, where the Court is the final arbiter. She distinguishes the somewhat diminished importance of *stare decisis* in the constitutional context from statutory interpretation, when stability becomes more important and errors by courts can be corrected by legislatures. In response to a question from Senator Heflin, the nominee associated herself with the views of Justice Brandeis, as expressed in *Burnet* v. *Coronado Oil & Gas,* 285 U.S. 393, 405 (1935) (Brandeis, J., dissenting). She testified:

> Justice Brandeis said some things are better settled, and especially when the legislature sits. So if we are talking

about a precedent that has to do with the construction of a statute, *stare decisis* is more than just the soundness of the reasoning. Reliance interests are important; the stability, certainty, predictability of the law, people know what the law is, they can make their decisions, set their course in accordance with that law. So that the importance of letting the matter stay decided has to do with more than just if the Court decides next year, well, maybe it would have been better to have decided the other way. That is not enough.

If it is a decision that has to do with the Constitution, * * * then the Court's view is the legislature can't come to the rescue if we got it wrong, if we are saying this is what the Constitution requires. So that is for us to correct. But even there, *stare decisis* is one of the restraints against a judge infusing his or her own values into the interpretation of the Constitution. (Transcript, July 21, at 82–83; see also Transcript, July 22, at 131–32, Questioning by Senator Leahy.)

Judge Ginsburg rejects the view of some theorists that the doctrine of *stare decisis* is of less importance in areas such as criminal law. These theorists believe *stare decisis* applies with the most force with respect to contract or property rights, where, according to the theory, stability is more important because of the public's reliance on settled law. She stated:

> I don't think that reliance is absent from the criminal law field either in the way courts—one thing is that the precedent is set for the way the courts will behave, the way the police will behave, the way prosecutors will behave. And so I don't think that one can say in that area reliance doesn't count. (Transcript, July 21, at 85.)

Judge Ginsburg's testimony in other contexts exemplified her respect for precedent and inclination to adhere to the principle of *stare decisis.* She agreed with Senator Hatch's assertion that the abortion funding cases of *Maher* v. *Roe,* 432 U.S. 464 (1997), and *Harris* v. *McRae,* 448 U.S. 297 (1980), were the Supreme Court's precedent. She stated that she had no "agenda to displace them." (Transcript, July 22, at 28.) Likewise, in response to Senator Grassley, she expressed the view that the Supreme Court's decision in *Planned Parenthood* v. *Casey,* 112 S. Ct. 2791 (1992), reflected the importance of precedent. She said the case, which reaffirmed the basic right of a woman to choose whether or not to terminate her pregnancy, "stresses the reliance interest that has been built up around a precedent about the generation of women who have grown up thinking that *Roe* v. *Wade,* [410 U.S. 113 (1973)], was the law of the land." (Transcript, July 22, at 112.)

V. CONCLUSION

The sum of her testimony, as well as written record, demonstrates that Judge Ginsburg enjoys an appropriate respect for the principle of judicial restraint. She understands the role and place of the judicial branch within our constitutional system, a system that envisions that activism should arise primarily in the polit-

ical branches. At the same time, she understands that there are circumstances in which the political branches and popular majorities fail to protect fully the great ideals of our Constitution. In those circumstances, the Court must step forward to fill the void.

The committee is satisfied that Judge Ginsburg's understanding of constitutional principles such as liberty and equality, as well as her historical perspective, informs her approach to constitutional decisionmaking and results in a method of judging that is not unduly restrictive. Her record suggests that she will be a voice on the Court for deliberate and reasoned constitutional evolution.

PART 3: JUDGE GINSBURG'S VIEWS ON UNENUMERATED RIGHTS, PRIVACY, AND REPRODUCTIVE FREEDOM

Judge Ginsburg's testimony and writings on unenumerated rights, the right of privacy, and reproductive freedom set her apart from all other recent nominees to the Supreme Count. Judge Ginsburg enthusiastically embraced the concept of unenumerated rights and the right of privacy. She also forthrightly supported a woman's right to reproductive freedom, under either a privacy or an equal protection analysis.

I. JUDGE GINSBURG EMBRACED THE CONCEPT OF UNENUMERATED RIGHTS, INCLUDING A RIGHT OF PRIVACY

A. Judge Ginsburg supports the concept of unenumerated rights

In clear and unequivocal terms, Judge Ginsburg expressed support for and appreciation of the concept of unenumerated rights—the view that each American citizen has rights independent of and apart from those specifically listed in the Constitution. She stated, in response to the very first question of the hearings, by Chairman Biden:

> 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 inalienable 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 catalogue. * * *
>
> 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.
>
> * * * And then * * * the Framers were fearful that this limited catalogue might be understood, even though it is written as a restriction on Government rather than a conferring of rights of people, that it might be understood as skimpy, as not stating everything that is. And so we do have the Ninth Amendment stating that the Constitution shall not be construed to deny or disparage other rights.

> So the Constitution * * * the whole thrust of it is people have rights, and Government must be kept from trampling on them. (Transcript, July 20, at 110–11.)

Judge Ginsburg here compared the American Constitution to the French Declaration of the Rights of Man, which confers rights, rather than restricting government, and thus (unlike the Constitution) presupposes a world in which citizens have no rights other than those specifically given. (Transcript, July 20, at 111.)

Elaborating further on this view, Judge Ginsburg testified that "the Ninth Amendment is part of the ideal that people have rights, the Bill of Rights keeps the government from intruding on those rights. We don't necessarily have a complete enumeration here." (Transcript, July 21, at 112.)

B. Judge Ginsburg subscribes to the views of Justice Harlan and Justice Powell with respect to when the Court should recognize an unenumerated right

Judge Ginsburg testified that in determining whether an asserted unenumerated right is protected by the Constitution—in particular, by the broadly worded Due Process Clause of the 14th amendment—she would follow the approach articulated by Justice Harlan in *Poe* v. *Ullman,* 367 U.S. 497 (1961), and by Justice Powell in *Moore* v. *City of East Cleveland,* 431 U.S. 494 (1977).

Justice Harlan wrote in *Poe,* in arguing for a flexible conception of due process, not limited by the specific rights granted elsewhere in the Constitution:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon the postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it has certainly not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint. (367 U.S. at 542 (Harlan, J., dissenting).)

Judge Ginsburg testified that "I associate myself with *Poe* v. *Ullman* and the method that is revealed most completely by Justice Harlan in that opinion." (Transcript, July 22, at 62.)

Similarly, Judge Ginsburg read from Justice Powell 's opinion in *Moore* in response to Senator Hatch's characterization of the dangers of substantive process. In *Moore,* Powell wrote:

> There *are* risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint. But it does not counsel abandonment.
>
> * * * * * * *
>
> Appropriate limits on due process come not from drawing arbitrary lines but rather from careful "respect for the teachings of history [and] solid recognition of the basic values that underlie our society." (431 U.S. at 502–03.)

Judge Ginsburg described this passage as the "most eloquent statement" of her own position after *Poe.* (Transcript, July 22, at 33.)

Significantly, Judge Ginsburg rejected the method adopted by Justice Scalia to identify interests protected by the Due Process Clause. In what Judge Ginsburg termed in her testimony "the famous Footnote Six" of *Michael H.* v. *Gerald D.,* 491 U.S. 110, 127, n.6 (1989), Justice Scalia proposed limiting the scope of the due process clause to those interests which, most specifically defined, received the historic protection of the Government. Justices O'Connor and Kennedy, who joined most of Justice Scalia's opinion, declined to join this footnote, explaining that under the proposed method "many a decision would have reached a different result." Id. at 132. In response to a question from Chairman Biden, Judge Ginsburg associated herself with the views of Justice O'Connor and Kennedy on this subject, as opposed to those of Justice Scalia:

> I have stated in response to Senator Hatch that I associate myself with *Poe* v. *Ullman.* * * * 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 *Poe* v. *Ullman* as her methodology. (Transcript, July 22, at 62–63.)

In adopting Justice Harlan's approach, and rejecting Justice Scalia's, Judge Ginsburg has selected a method for identifying unenumerated rights in keeping with the Constitution's majestic and capacious language. As Justices O'Connor and Justice Kennedy recognized in *Michael H.,* "requiring specific approval from history before protecting anything in the name of liberty" effectively "squashes * * * freedom." 491 U.S. at 132. It is Justice Harlan's approach—an approach of measured change and rooted evolution—that comports with both the intent and the draftsmanship of the Constitution. Judge Ginsburg's embrace of this approach provides excellent reason to support her.

C. Judge Ginsburg recognizes a right to privacy

Judge Ginsburg's testimony left no dobut that she supports the Supreme Court's recognition of a general, unenumerated right to privacy. Her views were evident in an exchange with Senator Leahy:

> Senator LEAHY. Is there a constitutional right to privacy?
>
> Judge GINSBURG. There is a constitutional right to privacy which consists I think of at least two distinguishable parts. One is the privacy expressed most vividly in the Fourth Amendment, that is 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, uninhibited, uncontrolled by my government, the decisions that affect my life's course. Yes, I think that whether it has been lumped under the label, privacy is a constitutional right, and it has those two elements, the right to be let alone and the right to make basic decisions about one's life course. (Transcript, July 21, at 54–55.)

In a subsequent colloquy with Senator Hatch, Judge Ginsburg elaborated on her view of the right to privacy as protecting personal autonomy, including personal control over matters of marriage and family. Judge Ginsburg said:

> It starts in the 19th century. The right of the individual, the Court then said no right is held more sacred or is more carefully guarded by the common law. It grows from our tradition, and the right of every individual to the possession and control of his person. It goes on through *Skinner* v. *Oklahoma* [316 U.S. 535 (1942)], which was the right to have offspring recognized as a basic human right.
>
> I have said to this committee that the finest expression of that idea of individual autonomy and personhood and the State leaving people alone to make basic decisions about their personal life is *Poe* v. *Ullman,* Justice Harlan's position in that. (Transcript, July 22, at 32–33.)

Judge Ginsburg added that in this line of cases, the Court was "affirming the right of the individual to be free." (Transcript, July 22, at 34.)

Although Judge Ginsburg never explicitly referred to the right to privacy as a "fundamental right"—a term the Court commonly has used—she made clear that the Government must meet a very high burden before interfering with the right. In response to a question of the chairman, Judge Ginsburg stated:

> 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 that the State has to have to interfere with that is very considerable. (Transcript, July 22, at 53.)

Judge Ginsburg thus indicated that the right to privacy protected by the Constitution is a right of real meaning and consequence.

Judge Ginsburg's willing acknowledgment of the right to privacy, her characterization of the strength of that right, and most of all, her understanding of the values underlying that right—all of these set Judge Ginsburg apart from most recent nominees to the Supreme Court. Her testimony shows that she appreciates the impor-

tance of preventing government from controlling or burdening an individual's most central and personal decisions. Her testimony shows that she believes this restraint on government to be a central aspect of freedom.

II. JUDGE GINSBURG SUPPORTS THE RIGHT OF WOMEN TO REPRODUCTIVE FREEDOM

Prior to her nomination, Judge Ginsburg discussed her views on reproductive rights in two speeches, reprinted as articles; the most recent of these, presented in March 1993, is generally known as the Madison Lecture. (Madison Lecture; *see also* Ginsburg, William T. Joyner Lecture on Constitutional Law, Some Thoughts on Autonomy and Equality in Relation to *Roe* v. *Wade,* Address before the University of North Carolina School of Law (April 6, 1984) *in* 63 N.C. L. Rev. 375 (1985).) During her hearings, Judge Ginsburg clarified and expanded on her thoughts on this subject.

The premise of the Madison Lecture is that the Constitution protects in some measure the right of women to choose for themselves whether or not to terminate a pregnancy. Judge Ginsburg thus wrote that the Court should have struck down the extreme anti-abortion law under review in *Roe* v. *Wade*—a law she characterized as "intolerably shackl[ing] a woman's autonomy." (Madison Lecture at 23.)

Similarly, in her testimony, Judge Ginsburg left no doubt of her conviction that the Constitution protects the right to choose. In her most strikingly articulated of many statements on the issue, judge Ginsburg told Senator Brown:

> This is something central to a woman's life, to her dignity. It is a decision that she must make for herself. And when government controls that decision for her, she is being treated as less than a fully adult human responsible for her own choices. (Transcript, July 21, at 106.)

In response to another question of Senator Brown, exploring whether fathers may have rights relating to the decision to terminate a pregnancy, Judge Ginsburg added that "in the end it's [a woman's] body, her life. * * * [I]t is essential * * * that she be the decisionmaker, that her choice be controlling." (Transcript, July 21, at 108.)

In the Madison Lecture, Judge Ginsburg seemed to argue that the right to terminate a pregnancy arose from the equal protection guarantee, rather than from the right to privacy. There, Judge Ginsburg stated that the *Roe* Court should have "homed in more precisely on the women's equality dimension of the issue," arguing that "disadvantageous treatment of a woman because of her pregnancy and reproductive choice is a paradigm case of discrimination on the basis of sex." (Madison Lecture at 24, 28.) Similarly, in an earlier speech and article, Ginsburg contended that abortion regulations affect "a woman's autonomous charge of her full life's course—* * * her ability to stand in relation to man, society, and the state as an independent, self-sustaining equal citizen." (Ginsburg, William T. Joyner Lecture on Constitutional Law, Some Thoughts on Autonomy and Equality in Relation to *Roe* v. *Wade,* Address before the University of North Carolina School of Law

(April 6, 1984) *in* 63 N.C. L. Rev. 375, 383 (1985) (footnote omitted).)

In her testimony, Judge Ginsburg repeatedly stated that her emphasis on the equality aspect of reproductive freedoms was meant to supplement, rather than supplant, the traditional privacy rationale for the right to terminate a pregnancy. This point emerges clearly in the following exchange between Judge Ginsburg and Senator Feinstein:

> Senator FEINSTEIN. If I understand what you are saying—correct me if I am wrong—you are saying that *Roe* could have been decided on equal protection grounds rather than the fundamental right to privacy. * * *
>
> Judge GINSBURG. Yes, Senator, except in one respect. I never made it either/or. * * * 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 question of equal protection or personal autonomy, it was a question of both.
>
> * * * * * * *
>
> So I would have added another underpinning, one that I thought was at least as strong, perhaps stronger. But it was never equal protection rather than personal autonomy. It was both. (Transcript, July 21, at 193–94.)

Similarly, Judge Ginsburg replied to a question by Senator Brown by noting that "the State controlling the woman is *both* denying her full autonomy and full equality with men * * *" (Transcript, July 21, at 108.)

Judge Ginsburg's effort to highlight the equality dimension of reproductive freedoms thus serves to enhance, rather than diminish, these important rights. Judge Ginsburg's analysis focuses on an aspect of reproductive rights the Court recently hinted at in *Casey* v. *Planned Parenthood,* 112 S. Ct. 2791 (1992)—the effect of these rights on the status of women in our society. In Judge Ginsburg's view, this analysis need not result in a weaker level of constitutional scrutiny than that demanded by the Court in *Roe*. It is true that gender discrimination currently receives only intermediate scrutiny, whereas the recognition of a fundamental right of privacy, as occurred in *Roe,* provokes strict scrutiny. But Judge Ginsburg made clear that equality is but one aspect of reproductive freedom; and she further noted on several occasions that the Court may yet hold sex distinctions to demand strict scrutiny.

In another aspect of her Madison Lecture, as well as in an earlier article, Judge Ginsburg suggested that the Court in *Roe* went too far too fast—that it should have struck down only the extreme anti-abortion law before it, leaving for another day the question of the constitutionality of other, more moderate abortion restrictions. Such an approach, Judge Ginsburg posited in the Madison Lecture, "might have served to reduce, rather than to fuel controversy." (Madison Lecture at 23.) According to Ginsburg, quoting *Roe* itself, "there was a marked trend in state legislatures 'toward liberalization of abortion statutes.'" (*Id.* at 32 (footnote omitted).) If *Roe* had limited its ruling—if it had, in Judge Ginsburg's words, "invited * * * dialogue with legislators"—that trend might well have con-

tinued. (Id.) By issuing its decision in *Roe*, Ginsburg argued, the Court halted this process, provoked popular backlash, and "prolonged divisiveness." (Id. at 37.)

Senator Metzenbaum and Judge Ginsburg engaged in an exchange on this subject:

> 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. 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.
>
> * * * * * * *
>
> There was the one thing that one can say for sure: There was a massive attack on *Roe* v. *Wade*. It was a single target to hit at. I think two things happened. One is that a movement that had been very vigorous became relaxed, * * *.
>
> So one side seemed to relax its energy, while the other side had a single target around which to rally, but that is my "what if," and I could be wrong about that. My view was that the people would have accepted, would have expressed themselves in an enduring way on this question. And as I said this is a matter of speculation, this is my view of what if. Other people can have a different view. (Transcript, July 20, at 183–84.)

Judge Ginsburg's testimony on this matter—as well as the two articles it is based on—reflect her broad judicial philosophy: most notably, her commitment to gradual change and her respect for the political process. But Judge Ginsburg's testimony and articles do not call into question her fundamental commitment to reproductive rights. The committee understands her articles as presenting a view of how such rights can best be achieved and maintained—of how *any* rights can best be achieved and maintained—in a democratic society, rather than as expressing doubts about the rightful place of these rights in the constitutional order.

Questions remain open as to the approach Judge Ginsburg would follow, if confirmed, in cases soon to come before the Court involving abortion regulations. Judge Ginsburg, in responding to questions posed by Senator Metzenbaum, would not comment on whether the right to choose remains a fundamental right after *Casey;* neither would she comment on the level of scrutiny that should be applied to abortion regulations or on the permissibility of any particular regulations. (Transcript, July 20, at 184–85; July 21 at 196.) These questions are of obvious importance with respect to the future scope of reproductive freedoms.

But the committee knows far more about Judge Ginsburg's views on reproductive rights than it has known about any previous nomi-

nee's. Judge Ginsburg's record and testimony suggest both a broad commitment to reproductive freedoms and a deep appreciation of the equality and autonomy values underlying them.

PART 4: JUDGE GINSBURG'S VIEWS ON EQUAL PROTECTION AND CIVIL RIGHTS

Judge Ginsburg came to the committee with a long and impressive record in equal protection and civil rights law. As a lawyer, she led the effort to bring women within the coverage of the equal rights clause of the 14th amendment. Her continued work in the field, as a scholar and a judge, and her testimony before the committee evidences Judge Ginsburg's deep and principled commitment to the ideal of equal protection of the laws.

I. JUDGE GINSBURG'S CAREER MARKS HER AS A LEADING SCHOLAR AND ADVOCATE IN THE AREA OF EQUAL PROTECTION

A. Judge Ginsburg's record as an advocate

Before her appointment to the circuit court, Judge Ginsburg worked as an advocate to provide women with equal protection of the laws. Her work is justly renowned. As much as any other advocate, Judge Ginsburg is responsible for the celebrated Supreme Court decisions of the 1970's guaranteeing women's rights—decisions which still comprise the mass of governing constitutional law in this area. (*See* Markowitz, *In Pursuit Of Equality: One Woman's Work To Change The Law,* 11 Women's Rts. L. Rep. 73 (1989); Cole, *Strategies Of Difference: Litigating For Women's Rights In A Man's World,* 2 Law & Ineq. J. 33, 53–92 (1984); Cowan, *Women's Rights Through Litigation: An Examination Of The American Civil Liberties Union Women's Rights Project, 1971–1976,* 8 Colum, Hum. Rts. L. Rev. 373, 384–98 (1976).)

The committee examined scholars' published accounts of Judge Ginsburg's litigation strategies, methods, and theories. The committee likewise reviewed the briefs that Judge Ginsburg filed in these cases, together with the Supreme Court's decisions from the United States Reports. All of this evidence establishes Judge Ginsburg as a Supreme Court advocate of extraordinary stature.

B. Sex discrimination

Judge Ginsburg has written dozens of law review articles on the topic of equal rights for women. She also wrote, with two co-authors, the leading law school casebook in this area: K. Davidson, R. Ginsburg, and H. Kay, *Sex-Based Discrimination* (1st ed. 1974). Just as Judge Ginsubrg's advocacy and scholarship helped to create this new field, so too did her pedagogy help to transmit her learning to most of those who work in the field today.

In all of this material, Judge Ginsburg has made the case for treating women as full and equal citizens under the laws and Constitution. She describes the injury to *both* sexes from unequal treatment based on gender stereotypes. As an advocate, Judge Ginsburg often selected cases in which the gender differential most obviously penalized men, as a way of awakening an all-male bench to the reality of harm. Tradition portrayed these sex-based classifications as shelters for women, but Judge Ginsburg insisted that this portrayal

was flawed. She explained how stereotypical thinking tends to become self-fulfilling, as when a law offers women fewer employment opportunities in the name of protection, but in reality serves to bar women from economic equality and independence.

In a closely related vein, some of Judge Ginsburg's writing set forth the case of an equal rights amendment to the Constitution. In her testimony, she explained that she continued to support an equal rights amendment:

> I remain an advocate of the Equal Rights Amendment, I will tell you, for this reason: because I have a daughter and a granddaughter, and I know what the history was, and I would like the legislature of this country and of all the States to stand up and say we know what that history was in the 19th century and we want to make a clarion call that women and men are equal before the law, just as every modern human rights document in the world does since 1970. (Transcript, July 21, at 65.)

Judge Ginsburg's view is that passage of the ERA would have clarified the meaning of the 14th amendment without the need for what she has described as the Burger Court's "bold and dynamic" interpretation in the gender cases. Given that the ERA would have served in her view only to clarify the meaning of the 14th amendment, Judge Ginsburg stated she does not view defeat of the ERA as incompatible with the 14th amendment's extension of equal rights to women. (Transcript, July 21, at 65, 72–75, 75–76, and 143–44.)

A recent criticism of Judge Ginsburg's approach asserts that formal equality under the laws will not serve to achieve real equality for women. This criticism contends that Judge Ginsburg and others of her generation have not appreciated that sex-based laws can benefit women, whose different situation—both biological and social—demands not identical but different treatment.

Senator Specter spelled out this scholarly criticism and asked Judge Ginsburg for her reaction to it. Judge Ginsburg said that "[w]hat you discuss, Senator Specter, I think reflects a large generation[al] of difference." (Transcript, July 21, at 70.) She stated that she continues to bring "a certain skepticism" to supposed legislative protection of women. Judge Ginsburg observed, for example, that in the hearing room "most of the faces that I see are not women's faces." (Id.) Judge Ginsburg explained that she would moderate her skepticism about special legislative protection for women "if the legislature were just filled with women and maybe one or two men. * * * (Id. at 70–71.)

In her testimony, Judge Ginsburg repeatedly mentioned the possibility of applying a "strict scrutiny" standard of review to gender-based distinctions, rather than the current intermediate standard. Use of a strict scrutiny standard would represent a significant doctrinal shift, making almost all sex-based distinctions unlawful. Whereas under current law, sex-based distinctions are upheld if they substantially further a significant government interest, under a strict scrutiny standard, they would be upheld only if narrowly tailored to further a compelling government interest. Judge Gins-

burg did not specifically advocate this change. But her remarks suggest her openness to its consideration.

Judge Ginsburg told the committee that the Court had not settled the question of whether a strict scrutiny issue should apply to gender-based distinctions:

> [H]eightened scrutiny, as I said before, for sex classifications is not necessarily the stopping point, as O'Connor made clear in the *Mississippi University For Women* case. [*Mississippi University For Women* v. *Hogan,* 458 U.S. 718 (1982).] Sex as a suspect classification remains open. It wasn't necessary for the Court to go that far in that case. * * * It is just that the Court has left that question open, and it may get there. (Transcript, July 21, at 195; see also Transcript, July 20, at 123; Transcript, July 22, at 185–91.)

Here Judge Ginsburg refers to a suggestive footnote in *Mississippi University For Women* (1982), in which the Court concluded: "we need not decide whether classifications based upon gender are inherently suspect." 458 U.S. at 724 n.9.

Most observers have not taken this footnote as proof that the question of strict scrutiny remains an open one. Most have instead accepted the view that the Supreme Court in the 1976 case of *Craig* v. *Boren* decided that a middle-tier standard is appropriate for gender cases. *See* 429 U.S. at 190. This conclusion seems particularly valid in light of the Supreme Court's reiteration of the *Craig* standard in *Heckler* v. *Mathews,* 465 U.S. 728 (1984)—2 years *after* its 1982 footnote in *Mississippi University For Women.* 458 U.S. at 724 n.9. The Supreme Court then described the middle tier standard as "firmly established." It entirely ignored the 1982 footnote to which Judge Ginsburg referred. 465 U.S. at 744.

Judge Ginsburg's testimony, highlighting the *Mississippi University for Women* footnote, thus seems to indicate her openness to continue doctrinal change—in particular, heightening the scrutiny for gender-based distinctions. This stance would comport with her historic support for the equal rights amendment—a link that she herself twice drew to Senator DeConcini. (Transcript, July 21, at 6–7.) Still, Judge Ginsburg declined to commit herself definitively when Senator DeConcini pressed her about whether "strict scrutiny should be the beginning point on any gender issue brought before the Court." (Id).

C. Race discrimination and affirmative action

Judge Ginsburg's record and testimony demonstrate an awareness of the lingering effects of our national history of racism and racial discrimination. She also accepts the continued need to remedy the effects of racial discrimination in appropriate cases. She offered no hints of how she would rule in specific cases, but her testimony expressed support for continued efforts to root out discrimination. Her record as a judge suggests she will take a generous approach to possible remedies.

In the case of *O'Donnell* v. *District of Columbia,* 963 F.2d 420, 429 (D.C. Cir. 1992), Judge Ginsburg concurred in a decision of the U.S. Court of Appeals for the District of Columbia Circuit striking

down the District of Columbia minority set-aside program in construction. The court made clear in *O'Donnell* that this result was compelled by the Supreme Court's 1989 decision in *City of Richmond* v. *Croson,* 488 U.S. 469 (1989), in which the Court declared that even benign State and local racial classifications would be subjected to strict constitutional scrutiny under the Equal Protection Clause of the 14th amendment. Under this test, even a remedial affirmative action plan must be justified by a compelling governmental interest. One such interest is that of remedying past discrimination; a jurisdiction offering such a rationale is compelled to document with specificity its history of discrimination.

Concurring in the decision in *O'Donnell,* Judge Ginsburg expressed her view that a history of discrimination was not the only interest that a governmental entity might assert to justify the use of remedial affirmative action plans. In her view, other interests, such as a desire to achieve diversity, might also suffice.

Under questioning by Senator Simon during the confirmation hearing, Judge Ginsburg explained her view in *O'Donnell.* She cited approvingly Justice Powell's opinion in the landmark case of *University of California Bd. of Regents* v. *Bakke,* 488 U.S. 265 (1978),[1] in which the Court affirmed the right of governmental entities to take race into account for certain purposes in a way consistent with the equal protection clause. Citing Justice Powell, she stated that a governmental actor might well offer a sufficient rationale for an affirmative action program even if the rationale is not specifically tied to past discrimination. Asked by Senator Simon whether she had any philosophical objection to the use of set-asides, the nominee stated:

> [I]n many of these cases, there really is underlying discrimination, but it's not easy to prove, and 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, that the kind of settlement that is encouraged in these plans is a better, healthier thing for society than to make everything fiercely adversary, so that it becomes very costly and bitter.
>
> In many of these plans, there is a suspicion that there was underlying discrimination. * * * But rather than make it a knock-down-drag-out fight, it would be better for there to be this voluntary action, always taking into account that there is an interest, as there was in the *O'Donnell* case, of the people who say but why me, why should I be the one made to pay, I didn't engage in past discrimination, and that's why these things must be approached with understanding and care. (Transcript, July 21, at 133–34.)

Under questioning by Senator Feinstein, the nominee expressed a preference for goals and timetables, rather than rigid quotas. She discussed this preference in the context of sex discrimination, describing some practices that operate to exclude women. She stated:

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[1] As an advocate, the nominee submitted a brief *amicus curiae* in *Bakke,* supporting the university's admissions program.

> So many of these job classifications that were done one way without thinking of including women, and that is part of I think the kind of positive affirmative action plan that is not put in terms of rigid quotas, but estimates of what you would expect the workforce to look like, if there had not been discrimination operating to close out certain groups. (Transcript, July 21, at 202.)

Her record and testimony document Judge Ginsburg's recognition of the continued reality of race and sex discrimination, both overt and subtle. She has demonstrated an open-minded approach to finding solutions for this ongoing national problem.

D. Discrimination based on sexual orientation

The nominee did not indicate in any way how she might rule on the assertion that discrimination based on sexual orientation violates the Constitution. She refused to comment on the issue in response to Senators Thurmond, Brown, and Cohen on the grounds that the question would undoubtedly come before the Court. (See Transcript, July 20, at 177; Transcript, July 22, at 191–92; Transcript, July 22, at 146.)

In her testimony, the nominee spoke broadly about our country's abhorrence of discrimination of any sort, including discrimination based on sexual orientation. In response to a question by Senator Kennedy, she said, "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 based on—this country is great because of its accommodation of diversity." (Transcript, July 22, at 10–11; see also id. at 146 (questioning by Senator Cohen).)

II. JUDGE GINSBURG TAKES A GENEROUS APPROACH TO INTERPRETING AND APPLYING CIVIL RIGHTS STATUTES

A. Construction and application generally

Under questioning by Senator Kennedy, the nominee expressed the view that judges must construe civil rights laws broadly to give full meaning to congressional intent. She engaged in the following exchange with Senator Kennedy:

> Senator KENNEDY. What is your view of the approach to construing civil rights laws * * *?
>
> 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 in the civil rights area but the antitrust area, are meant to be broad charters—the Sherman Act. 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 in the antitrust laws, and the courts construe statutes in accord with the essential meaning that Congress had for passing them. (Transcript, July 22, at 7–8.)

In that spirit, Judge Ginsburg expressed her understanding of the rationale for both the use of statistical evidence to prove unlawful discrimination under the civil rights laws and the adoption of appropriate measures to remedy unlawful discrimination and historic underrepresentation of women and minorities. Senator Hatch asked the nominee whether a showing of statistical disparity should constitute proof of unlawful discrimination; in addition, he asked whether such a showing could justify either voluntary or court-ordered race- or gender-conscious preferences in employment. Judge Ginsburg responded by reciting the facts of the Supreme Court's decision in *Johnson* v. *Santa Clara Transportation Agency,* 480 U.S. 616 (1987), in which an affirmative action plan was upheld where it was shown that of 238 positions, no woman had ever been hired. She then recounted her own experience:

> I had to think back to the days when I was in law school and I did find on the pen and paper tests I had good grades, and then I had interviews and 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 that *[Johnson]* case was no kind of preference at all, but a safeguard, a check against unconscious bias * * * that—I think may even be conscious way back in the fifties, but in a department that has 238 positions and none of them are women, whether the slight plus—one must always recognize that there is another interest at stake in this case, Paul Johnson—whether the employer wasn't in fact engaged unconsciously in denying full and equal opportunity to the women. (Transcript, July 20, at 139–40.)

This testimony reveals a recognition that both overt and subtle forms of discrimination occur in our society. Consistent with the Court's precedent in *Griggs* v. *Duke Power Co.,* 401 U.S. 424, (1971), as codified by the Civil Rights Act of 1991, the testimony suggests the nominee's understanding that statistical evidence may prove a statutory violation. Moreover, her discussion of *Johnson* indicates that she might sanction well-reasoned remedial efforts that balance the interests of the victims of discrimination and those of parties who are not guilty of discrimination.

B. Voting rights

As a judge on the Court of Appeals for the District of Columbia Circuit, the nominee has had no occasion to construe the Voting Rights Act. When asked about the act during her testimony, she refused to answer because the questions might come before her on the Court; specifically, she would not discuss the Supreme Court's recent decision in *Shaw* v. *Reno,* 61 U.S.L.W. 4818 (1993), in which the Court held that white voters could challenge bizarrely shaped majority minority voting districts when the districts were so odd as to leave no possible inference but that they were gerrymandered based on race (see Transcript, July 20, at 172; Transcript, July 21, at 215–16). Thus, the committee has no indication of how Judge

Ginsburg views the very current issues concerning race-conscious electoral districts.

The nominee did express her concern about the history of discrimination against African Americans in voting. In response to questioning by Senator Moseley-Braun, Judge Ginsburg noted how recent it was that parts of the country employed devices such as literacy tests to disenfranchise black voters. (Transcript, July 21, at 216.) Moreover, she stated with reference to the *Shaw* case, "[A] judge should not tear down without having a better building to replace what is in place, and that is a general rule that I think most judges would subscribe to." (Transcript, July 21, at 220.)

Under questioning by Senator Kennedy, Judge Ginsburg testified about her belief in the importance of the Voting Rights Act. She stated:

> We live in a democracy that has, through the years, been opened to more and more people. Perhaps the most vital part of the civil rights legislation in the middle 1960's was the voting rights legislation. That has been the history of our country, ever widening the participation in our democracy. And I think I expressed on the very first day of these hearings my discomfort with the notion that judges should pre-empt that process so that the people, 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. (Transcript, July 22, at 9–10.)

This testimony indicates that Judge Ginsburg appreciates the continued need for voting rights protection. Moreover, her views on the construction of civil rights laws indicate a strong deference to congressional intent to apply the law broadly, as exhibited in the adoption of the act in 1965, as well as the 1982 amending legislation.

PART 5: JUDGE GINSBURG'S VIEWS ON RELIGIOUS FREEDOM

Few areas of constitutional law are in such ferment as that involving the first amendment's two guarantees of religious freedom—the free exercise clause and the establishment clause. In the free exercise area, the Court recently approved by a 5–4 vote a major doctrinal shift giving government greater leeway to apply laws interfering with religious practice. *Employment Division* v. *Smith,* 494 U.S. 872 (1990). Although the Court by now has lost two of the original dissenting Justices, its most recent free exercise decision suggests continued dissatisfaction and division over the new free exercise standard. *Church of the Lukumi Babalu Aye* v. *City of Hialeah,* 113 S. Ct. 2217 (1993). In addition, several Justices have expressed disagreement with the test traditionally used to review establishment clause claims; although a majority has not voted to depart from this approach, it sometimes appears to be hanging by a thread. See e.g., *Lamb's Chapel* v. *Center Moriches Union Free School District,* 113 S. Ct. 2141 (1993).

Judge Ginsburg's vote in each of these areas might well prove crucial in marking the future direction of the Court. Although she has authored opinions only on the free exercise clause, and al-

though her testimony with respect to each clause left important questions unanswered, here written record and congressional testimony in conjunction give reason to believe that Judge Ginsburg will respect both aspects of the first amendment's guarantee of religious freedom: tolerance of religious practice and separation of church and state.

I. THE FREE EXERCISE CLAUSE

The most critical issue today concerning the free exercise clause is the vitality of the Court's decision in *Employment Division* v. *Smith,* which permits the Government, without any substantial justification, to enforce a generally applicable law that interferes, no matter how greatly, with religious practice. Prior to *Smith,* the Court invalidated government actions that substantially burdened religious practice unless such actions were supported by a compelling justification. *Smith,* in Justice O'Connor's words, "dramatically depart[ed] from [this] well-settled First Amendment jurisprudence" by abandoning the use of the strict scrutiny test, which requires a compelling justification, when a law is generally applicable—that is, when it does not specifically target religious practice. 494 U.S. at 891 (O'Connor, J., concurring). In these circumstances, a mere rational basis for the Government action will suffice, even if the action has the effect of interfering with practices central to a person's religion.

Judge Ginsburg did not specifically state in her testimony that she disapproved the *Smith* analysis; indeed, she refused to say in so many words whether strict scrutiny should apply, as it did prior to *Smith,* to claims brought under the free exercise clause. (Transcript, July 22, at 217.) But in other testimony, Judge Ginsburg hinted at an approach more generous than the *Smith* test toward accommodating religious practice.

Most important, a colloquy with Senator Leahy went as follows:

> 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 with assuming there has to be accommodations to * * * the right of religion?
>
> Judge GINSBURG. Yes, I think that is quite right, that our tradition has been many religions and one of tolerance and mutual respect. (Transcript, July 21, at 47–48.)

The significance of this dialogue arises not only from Judge Ginsburg's understanding of the values of religious pluralism and tolerance, but also, and more critically, from her approval of the idea that government must accommodate religious practice in the absence of "special circumstances"—an idea directly in conflict with the *Smith* analysis.

Judge Ginsburg also hinted at a generous approach toward free exercise claims when she referred to congressional legislation requiring the military to accommodate the wearing of a yarmulke, enacted after a panel of the D.C. Circuit and the Supreme Court

had refused to mandate such accommodation. In response to a question from Chairman Biden, Judge Ginsburg stated: "I think Congress realized the free exercise right *more fully* than the courts did in that instance. * * * (Transcript, July 21, at 122 (emphasis added).) Here again, Judge Ginsburg indicated, contrary to *Smith,* that the free exercise clause, properly read, may require special accommodations to religious persons and their practice.

Judge Ginsburg's opinions, although written prior to *Smith* and therefore not suggesting any view of that decision, similarly reflect appreciation of the importance of religious practice and the need for government to accommodate it. In *Leahy* v. *District of Columbia,* 833 F. 2d 1046 (D.C. Cir. 1987), for example, Judge Ginsburg demanded that the Government show the strongest possible justification for requiring an applicant for a driver's license to produce his social security number when doing so violated his religious beliefs.

Even more revealing, in *Goldman* v. *Secretary of Defense,* 739 F.2d 657 (D.C. Cir. 1984)—the case eventually resulting in the congressional action referred to above—Judge Ginsburg called for the full D.C. Circuit to reconsider a panel decision allowing the military to apply a regulation against wearing headgear indoors to an Orthodox Jew wearing a yarmulke. There, Judge Ginsburg wrote that the military 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 [for our people].'" *Id.* at 660 (brackets in original). In so stating, Judge Ginsburg demonstrated a sensitivity to the demands of religous conviction and a willingness to order the Government—even the military, to whom special deference is usually paid—to accommodate these demands of conscience.

There is no knowing for certain whether Judge Ginsburg will disapprove the *Smith* analysis of free exercise claims if she is confirmed. She, like prior nominees, refrained from commenting on the specific case. But Judge Ginsburg's approach, reflected in her testimony and her judicial record, shows sensitivity to the problem at the core of *Smith* and of modern free exercise clause doctrine—the problem of adjusting government action on religious practice in a pluralistic society.

II. THE ESTABLISHMENT CLAUSE

Judge Ginsburg's views on the establishment clause are somewhat difficult to gauge, in part because she has written no opinions on this subject, in part because her testimony on this matter bordered on the elliptic. Most of what she did say in testimony, however, suggests that she would follow the core tenets and traditional standards of modern establishment clause jurisprudence.

The most troubling portion of Judge Ginsburg's testimony on the establishment clause occurred late in the hearings, when she and Senator Specter engaged in the following exchange:

> Senator SPECTER. On the establishment clause, the dictum of Jefferson has been quoted repeatedly and * * * 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, I think that the first amendment prohibits the establishment of religion and protects the free exercise thereof. How that line between those two is drawn in particular cases is going to depend upon the facts of the specific case. I am not going to expound at large and answer an abstract question. I think I have said what I feel comfortable saying on that subject. (Transcript, July 22, at 217–18.)

An understanding of the establishment clause as erecting "a wall of separation" between church and state has provided the foundation of establishment clause jurisprudence of many decades. See, e.g., *Everson* v. *Board of Education,* 330 U.S. 1 (1947). If we believed that Judge Ginsburg rejected—or even questioned—this most general interpretation of the meaning and purpose of the establishment clause, we would have some real concern about her appointment.

But in light of Judge Ginsburg's answers to other questions concerning the establishment clause, including those detailed below, we do not read Judge Ginsburg's answer in this manner. Rather, we take Judge Ginsburg to be saying only that a too-rigid wall of separation would prevent government from accommodating religious practice, as the free exercise clause at times requires. This observation falls well within mainstream thinking on the meaning of the establishment clause; it does not cast doubt on Judge Ginsburg's commitment to that clause's underlying principles.

Several Senators asked Judge Ginsburg about the reigning test for determining establishment clause violations, established in *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971). Under this test, used to implement the more general notion that the establishment clause erects a wall of separation between church and state, government action violates the establishment clause if it has a religious purpose, its principal or primary effect is to advance or inhibit religion, or it fosters an excessive government entanglement with religion. In recent years, a number of Justices have criticized this test on a wide variety of grounds.

Judge Ginsburg's testimony indicates that she has no current intention to join the group of Justices clamoring for *Lemon*'s reversal. She stated that notwithstanding recent attacks on *Lemon,* the three-part test of that opinion remains prevailing law—"and my approach is the law stays the law unless and until there is a reason to displace it." (Transcript, July 21, at 117.) She responded to the recent criticism of the *Lemon* test by asking: "What is the alternative? It is very easy to tear down, to say that—to deconstruct. It is not so easy to construct." (Transcript, July 20, at 197.) In later explanation of this testimony, she responded to a question of Senator Simon as follows:

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. (Transcript, July 21, at 118.)

Judge Ginsburg thus seems likely to accept and work within the prevailing principles and standards for determining when government action violates the establishment clause of the first amendment.

PART 6: JUDGE GINSBURG'S VIEWS ON FREEDOM OF SPEECH

Judge Ginsburg's testimony before the committee and her judicial record indicate a strong dedication to free speech values.

When asked by Senator Leahy to name some of the Supreme Court cases "that mean the most to you," Judge Ginsburg mentioned the great separate opinions of Holmes and Brandeis in *Abrams* v. *United States,* 250 U.S. 616 (1919), *Gitlow* v. *New York,* 268 U.S. 652 (1925), and *Whitney* v. *California,* 274 U.S. 357 (1927), as well as the Court's later opinion in *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969).

The Holmes and Brandeis opinions first articulated the view that government may prohibit speech on public issues—including speech that advocates law-breaking, sedition, or violence—only on a showing of "clear and present danger." 268 U.S. at 672–673. The Court in the 1950's began to treat these minority opinions as governing law, and in *Brandenburg,* a unanimous Court adopted a similar but even more stringent test, under which government may proscribe speech advocating violence or law-breaking only if such speech calls for, and probably would produce, "imminent lawless action." Together, these opinions state the most central principle of first amendment law.

In speaking of these cases with Senator Leahy, Judge Ginsburg expressed appreciation of their significance and greatness:

> People think that free speech was always free in this country. It really wasn't. It is a development of our current century in those great cases that are now I think just so well accepted, but they were originally stated as dissenting positions. * * *
>
> * * * * * * *
>
> The idea was always there. The great 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, with the line of cases ending in *Brandenburg* v. *Ohio,* 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.
>
> * * * * * * *
>
> I think we have been a model for the world in that regard. The words of the song, "The right to speak my mind out, that's America to me." It is one of the greatest things about our country. (Transcript, July 22, at 121–22, 122–23, 124.)

Consistent with this apparently expansive understanding of the free speech guarantee, Judge Ginsburg indicated her support for the range of Supreme Court decisions granting first amendment protection to acts variously labeled "symbolic expression" or "expressive conduct." She reiterated in her testimony the position she took in *CCNV* v. *Watt,* 703 F.2d 586, 604–08 (D.C. Cir. 1983), that even nonverbal acts can express ideas and therefore can merit the protection of the first amendment. Referring to then-Judge Scalia's opinion in *CCNV,* which stated that only words are entitled to first amendment protection, Judge Ginsburg said in response to a question of Senator Cohen:

> My comment in relation to my colleague's opinion is that you 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. And I think I gave the example that shows that, at least for me, more than any other case. It is when the King of Denmark stepped out on the street in Copenhagen wearing a yellow armband, there were no words that could express that idea more forcefully than that action. That action was expression. (Transcript, July 21, at 153–54.)

Judge Ginsburg thus couples a capacious view of the expression protected by the first amendment with her embrace of the doctrinal rules that narrowly limit the circumstances in which government may restrict protected expression.

Equally important in our time, Judge Ginsburg understands the first amendment as limiting the power of government not only to restrict speech directly, but also to distort public discourse through use of its taxing and spending powers. In a concurring opinion in *FEC* v. *International Funding Institute, Inc.,* 969 F.2d 1110 (D.C. Cir. 1992), Judge Ginsburg wrote:

> [D]ecisionmakers 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. Id. at 1118 (emphasis in original).

This truth informed Judge Ginsburg's dissenting opinion in *DKT Memorial Fund* v. *Agency for International Development,* 887 F.2d 275, 299 (D.C. Cir. 1989), in which she argued that the Government's "Mexico City Policy" of refusing funds to any foreign organization engaged in abortion counseling violated the first amendment by depriving domestic organizations of the ability to associate with foreign organizations in overseas abortion counseling programs. In *DKT,* Judge Ginsburg perceived the constitutional invalidity of the Government's attempt to "pick[ ] off or buy[ ] up the audience or associates abroad" of a domestic organization engaged in speech activities:

> [The domestic organization's] right to inform and counsel on lawful access to abortion is surely diminished, and the employment of the organization's own resources is surely

> restrained, when our government denies benefits to, or withdraws benefits from, foreign organizations that find [its] speech persuasive and therefore would join [it] in informing and counseling women in need about abortion [were it not for the condition on funding]. Id. at 300, 303.

Judge Ginsburg thus demonstrated her understanding of the ways in which government at times attempts to use its powers of the purse to curtail first amendment freedoms.

Judge Ginsburg's testimony, when taken as a whole, similarly shows a deep appreciation of this problem. In responding to an initial question about the ability of government to fund some speech, while refusing to fund other, more "offensive" speech, Judge Ginsburg appeared to say, in direct contradiction of her prior opinions, that the Government could exercise its spending powers as it wished, without fear of violating the first amendment:

> [T]he concern with the First Amendment is with the government censoring. I don't think the First Amendment says that the government can't choose Shakespeare over David Mamet, for example, in deciding what programs it wants to support, say, for public performances. It can't shut down speech, but like any consumer, it can purchase according to its preference. (Transcript, July 20, at 210.)

At the very next opportunity however, Judge Ginsburg clarified her response and stated the view that selective funding of speech might well violate the first amendment. She and Senator Leahy conversed as follows:

> Senator LEAHY. Well, 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.
>
> * * * * * * *
>
> 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 came up yesterday at a point where I was, to be frank, just very tired and I gave a glib answer that I should not have given, and certainly the answer was inconsistent with what I said in the *DKT* case, when I said, yes, 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,* * *
>
> Senator LEAHY. 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. Well, we know that the most dangerous thing that the government can do is to try to censor speech on the basis of the viewpoint that is being ex-

> pressed. We are uncomfortable with content regulation, generally, but particularly uncomfortable with [regulation based on a] particular point of view.
>
> If I can mention the military base case, the *Spock* [*Greer* v. *Spock,* 424 U.S. 828 (1976)] case, the Court said that 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. (Transcript, July 21, at 51–52, 53–54.)

Judge Ginsburg thus indicated that government funding decisions raise the most severe first amendment difficulties when the funding is based on the viewpoint of the speaker. This principle will not itself suffice to resolve the many and varied first amendment questions arising from the Government's use of its spending and taxing powers. For example, the question whether a decision *is* viewpoint-based is not always obvious; nor is the question whether a particular viewpoint-based decision may nonetheless be justified; nor, finally, is the question whether a particular nonviewpoint-based funding decision also should provoke suspicion. But the general principle that Judge Ginsburg would apply to this area is probably the best that can be found. It is a principle that allows the Government substantial latitude in the use of its spending and taxing powers, while ensuring that those powers are not employed to distort discussion and debate of important matters.

Judge Ginsburg made clear, in all her testimony, her commitment to the principles of free speech that this Nation cherishes. She may not rule in every case for the most speech-protective of all positions. To her credit, Judge Ginsburg also recognized the strength of competing values: values involved, for example, in limiting the "exposure of children to violence" and in preventing the harassment of students in educational environments. (Transcript, July 22, at 202, 212–13.) We are convinced, however, that in resolving these and other conflicts, Judge Ginsburg will keep always in the front of her mind her own admonition "that we are a society that has given, beyond any other, maximum tolerance for the speech that we hate." (Transcript, July 22, at 213.) With respect to free speech issues, no one can demand anything more of a nominee to the Supreme Court.

PART 7: JUDGE GINSBURG'S VIEWS ON SEPARATION OF POWERS

Judge Ginsburg has a moderate and pragmatic view of the constitutional separation of powers. Recognizing that ours is "a system of separate branches of government," Judge Ginsburg also acknowledges the needed and complementary principle that "each branch is given by the Constitution a little space in the other's territory." (Transcript, July 20, at 166.) As Judge Ginsburg described the fundamental nature of our system of government, "the Constitution has divided government, but it also has checks and balances, and it makes each [branch] a little dependent on the other." (Transcript, July 20, at 166.) This understanding of our constitutional

order—as opposed to a rigid and formalistic notion of complete separation between branches—allows for some needed flexibility in our processes of government.

Judge Ginsburg's opinion in what is commonly known as the independent counsel case comports with the broad views she stated to the committee on separation of powers principles—and also illustrates the importance of those views. *In re Sealed Case,* 838 F.2d 476, 518 (D.C. Cir. 1988) (Ginsburg, J., dissenting). The case involved a constitutional challenge to the Ethics in Government Act, which provided for the appointment of an independent counsel in cases of alleged misbehavior by members of the executive branch. Judge Ginsburg argued in dissent that the statute accorded with the Constitution even though it effectively transferred part of the prosecutorial function outside the executive branch. She reasoned that the statute combatted Watergate-style "abuses of executive power, abuses which themselves threatened the balance among the three branches of government." Id. at 527. Judge Ginsburg's position ultimately was adopted by the Supreme Court in *Morrison* v. *Olsen,* 487 U.S. 654 (1988), over a long dissent by Justice Scalia.

In commenting on the case during the hearings, Judge Ginsburg stated:

> The independent counsel law was attacked on the ground that it was an improper derogation from the full authority of the executive branch * * * [M]y position in that case is we have two grand themes. One is separation of powers, three branches of government, but the other is checks and balances.
>
> * * * * * * *
>
> [M]y view of that case was it was an essential piece of legislation on the checking side * * *.
>
> * * * * * * *
>
> [N]o person should be judge of his or her own cause, and that principle was at stake in the independent counsel law, because this was a law providing a prosecutor for the highest executive officer[s]. (Transcript, July 21, at 80–81.)

Judge Ginsburg continued, however, that the case would have been different if Congress had assigned the prosecutorial function to itself, rather than give it to a person appointed by the courts. In that event, Judge Ginsburg testified, there would have been great danger of "legislative encroachment." (Transcript, July 21, at 81.)

Judge Ginsburg's opinion in the independent counsel case, as well as her other writings and her testimony at the hearings, marks her as having a balanced view of separation of powers principles. She has acknowledged the importance of "divisions of responsibility, and the closely kept balance of powers that results from them." *Abourezek* v. *Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986). But she also has recognized that by the very nature of American democracy, our institutions of government should be viewed "not as rigidly compartmentalized but as interdependent." (Ginsburg, Cleveland-Marshall Fund Visiting Scholar Lecture, Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation (November 9, 1979), in 28 Clev. St. L. Rev. 301, 324

(1978.) Her views on separation of powers reflects the balance of those two—both critical—principles.

PART 8: JUDGE GINSBURG'S VIEWS ON STATUTORY INTERPRETATION

As Senator DeConcini observed during the hearings that more than half of the Supreme Court's cases now involve questions on statutory interpretation. In recent years, Justice Scalia has taken the controversial position that such questions should be resolved without reference to a statute's legislative history. Because of the topic's importance and because of the controversy provoked by Justice Scalia's position, many Senators questioned Judge Ginsburg about her approach to statutory interpretation. Judge Ginsburg offered sound and conventional views on this subject.

Judge Ginsburg noted that the easiest cases of statutory interpretation involve laws whose language is "free from ambiguity;" in such cases, courts must uphold the law's clear textual meaning. Judge Ginsburg noted, however, that in the usual case, the court's task is harder: there, the statutory language is ambiguous and courts "must look elsewhere to clues of legislators' intent." (Transcript, July 22, at 155). In such circumstances, Judge Ginsburg counseled the use of traditional canons of construction, as well as the use of legislative history. (Transcript, July 22, at 154–155.) In response to a question from Senator Kohl, she distinguished her approach to legislative history from that of Justice Scalia. (Transcript, July 21, at 156.)

In explaining her approach, Judge Ginsburg stated:

> [A] judge has to try to find out what the legislature meant, and to find that out, you have to consult * * * all of the sources that bear on the question, what does the statute mean.
>
> * * * * * * *
>
> In order to answer this question, what did the legislature mean, if it is not clear from the text, we need help, and [legislative history] is certainly one source of help that should be considered. (Transcript, July 22, at 155–156.)

Judge Ginsburg continued that legislative history is not always clear or reliable; her attitude toward it, she said, is therefore one of "hopeful skepticism." (Transcript, July 22, at 155.) Judge Ginsburg noted former Judge Leventhal's jest that sometimes "visiting legislative history is like going to a cocktail party and looking through the crowd for your friends." (Transcript, July 21, at 148–149.) Yet, according to Judge Ginsburg, "[T]here are some parts of legislative history that are more reliable than others"—for example, a unanimous committee report as compared to a single member's statement after voting—and courts should use legislative history that is reliable as an aid in statutory construction. (Transcript, July 22, at 155.)

Judge Ginsburg also stated her view that Congress intends some statutes to be interpreted differently from others. For example, she stated that statutes creating exceptions to the antitrust laws are to be strictly construed. (Transcript, July 22, at 154.) By contrast, some legislation—such as the Civil Rights Act [of 1964]—is to be

interpreted as a broad charter of principle. The critical principle in statutory construction, Judge Ginsburg testified, is that courts should "construe statutes in accord with the essential meaning that Congress had for passing them." (Transcript, July 22, at 8.)

Judge Ginsburg also provided both written and oral testimony on the "Chevron doctrine"—the rule that courts defer to reasonable agency interpretations of ambiguous statutes. Judge Ginsburg pointed out that such deference is not appropriate where the statute is clear—and that "[s]tatutory language that might seem ambiguous in isolation * * * can take on a clear meaning in the light of full judicial consideration of Congressional intent." (Letter from Ginsburg to Chairman Biden (July 27, 1993) (on file with the Senate Committee on the Judiciary).) In addition, she noted that even when the statute leaves a gap, the agency interpretation must be "reasonable:" "Lack of a single Congressionally determined meaning does not give the agency license to adopt any view it pleases." (Transcript, July 22, at 8.)

All of Judge Ginsburg's testimony indicates that, if confirmed, she will make every effort to construe statutes in accordance with Congress' intent in enacting them. Instead of adopting Justice Scalia's approach of using artificial rules of statutory construction in order to influence legislative behavior, she will use sound and varied methods of construction in order to divine legislative purpose.

PART 9: JUDGE GINSBURG'S VIEWS ON STANDING

An important issue often before the Federal courts concerns access to the courts themselves—and particularly standing to sue. A judge's approach to this issue may be as important as any of the judge's views on substantive law. The question of standing determines whether the court will rule on the merits of a claim—and thus whether the claimant has any possibility of obtaining relief.

Judge Ginsburg understands the importance of access to courts and has an excellent record in this area. She has authored a number of important decisions allowing plaintiffs to bring civil rights, civil liberties, and other claims to court. In so doing, she has proved properly receptive to assertions of injury, as well as to arguments of how an injury is traceable to or caused by government action, both of which must be accepted for standing to exist.

An especially telling opinion, which Judge Ginsburg discussed during the hearings, is *Dellums* v. *NRC,* 863 F.2d 968 (D.C. Cir. 1988). In that case, the director of an anti-apartheid organization, in exile from his home country of South Africa, contended that a license allowing the importation of uranium from South Africa violated the Anti-Apartheid Act's trade embargo against the country. A majority of the D.C. Circuit panel assigned to hear the case held that the plaintiff did not have standing because his injury—the inability to return to his home country—was not caused by the license and could not be redressed by revoking the license. Judge Ginsburg dissented, for reasons she described in her testimony:

> Our Congress, you, had enacted an embargo on certain commodities from South Africa. In doing so, you said that you thought that putting this kind of pressure on the

> South African government would hasten the time when apartheid would end. When apartheid would end, that man—or when it began to break down, that man could go back to his native country. * * *
>
> This man was claiming an injury, and I was relying on your fact-finding that the measure that you took could hasten the day when his injury would end. * * *
>
> [T]he reason you were putting this embargo on South Africa was not because it was an idle or an arbitrary thing, but that the very purpose of it was just what you said it was: to hasten the day when apartheid in that country would end and this man would no longer be an exile in his native land. (Transcript, July 22, at 115–16.)

The opinion—and Judge Ginsburg's testimony about it—reveals a pragmatic, nonformalistic approach to standing requirements, as well as an appropriate willingness to defer to Congress' own fact-finding when determining whether a person has standing to bring suit under a statute.

Similarly, in *Spann* v. *Colonial Village, Inc.,* 899 F.2d 24 (D.C. Cir. 1990), Judge Ginsburg held that a fair housing organization had standing to sue developers under the Fair Housing Act for using racially discriminatory advertisements. Judge Ginsburg determined that the organization had suffered the injury requisite for standing because the advertisements compelled the organization to expend more resources in its effort to combat racial discrimination. *Id.* at 27–29. She also noted that "[t]o the extent that plaintiffs seek to vindicate values, those values were endorsed by Congress in the Fair Housing Act, the enforcement of which Congress specifically left in the hands of private attorneys general like plaintiffs." *Id.* at 30.

In another important civil rights case, *Wright* v. *Regan,* 656 F.2d 820 (D.C. Cir. 1981), Judge Ginsburg ruled that black parents of children attending public schools had standing to challenge the Internal Revenue Service's failure to deny tax-exempt status to private schools with racially discriminatory policies. Judge Ginsburg concluded that the "denigration [the plaintiffs] 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" was sufficient injury to confer standing on the plaintiffs. Id. at 827. The Supreme Court later overturned this decision in *Allen* v. *Wright,* 468 U.S. 737 (1983)—on the ground that the injury alleged was not fairly traceable to the IRS's policies—in an opinion reflective of the Supreme Court's increasingly formalistic approach to the standing inquiry and its increasing antipathy to providing access to courts.

Judge Ginsburg, of course, frequently has found—and, in most cases, properly so—that plaintiffs lack standing to bring a suit. In these opinions, she has showed a respect for the limits of judicial authority, as well as for the binding force of precedent. See, e.g., *Capital Legal Foundation* v. *Commodity Credit Corp.,* 711 F.2d 253 (D.C. Cir. 1983); *California Ass'n of Physically Handicapped, Inc.* v. *FCC,* 778 F.2d 823 (D.C. Cir. 1985); *Cooper & Brass Fabricators, Inc.* v. *Department of the Treasury,* 679 F.2d 951 (D.C. Cir. 1982). But always Judge Ginsburg has recognized the importance of shap-

ing standing doctrine to ensure that injured citizens will have access to the courts to challenge unlawful government policies. Her record in this area merits support.

PART 10: JUDGE GINSBURG'S VIEWS ON CRIMINAL LAW AND PROCEDURE

Judge Ginsburg's record and testimony in the area of criminal law is reasonable and balanced, combining recognition of the need for effective law enforcement with concern for the constitutional rights of criminal defendants.

In testimony, Judge Ginsburg expressed support for the Supreme Court's decision in *Miranda* v. *Arizona,* 384 U.S. 436 (1966), on grounds both of fairness to criminal defendants and effective administration of the law enforcement system. She testified, in response to a question about *Miranda* by Senator DeConcini:

> [T]he idea of the Miranda warnings, the idea is to make certain that a defendant's rights are known to the defendant, so the defendant can exercise them.
>
> * * * * * * *
>
> 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 much more smoothly, because then you don't have to go case-by-case and say, well, did this defendant know that he had a right to counsel, did he intelligently waive that right. (Transcript, July 22, at 156–57.)

She added that the Miranda rule is "an assurance of the even-handed administration of justice." (Transcript, July 22, at 158.)

Judge Ginsburg's concern for balancing effective law enforcement with the rights of individuals is also evident in opinions she has authored on warrantless searches, where she provided law enforcement officials with room to operate, while at the same time treating with respect an individual's right to privacy. For example, in *United States* v. *Russell,* 655 F. 2d 1261 (1981), Judge Ginsburg ruled that police officers who find packets containing what appears to be drugs in plain view in a car are not required to "field test" the material before proceeding with a further search of the car. But Judge Ginsburg also ruled in a later opinion in the same case, 670 F. 2d 323 (1982), subsequently withdrawn based on intervening Supreme Court precedent, that it was inappropriate for the police to search a closed container in the car in the absence of a warrant.

Judge Ginsburg's approach to criminal sentencing is balanced as well. Her most prominent opinion in this area was in *United States* v. *Harrington,* 947 F. 2d 956 (1991), which involved the question whether a trial court could reduce a defendant's sentence for post-offense rehabilitative efforts. Judge Ginsburg surveyed the law comprehensively and ruled that rehabilitative efforts did not justify a departure from the Federal sentencing guidelines, as the trial court had held. Judge Ginsburg found, however, that under the guidelines themselves, such efforts can support a more cir-

cumscribed sentence reduction, as a reflection of "affirmative acceptance of personal responsibility for * * * criminal conduct." Id. at 957.

Judge Ginsburg has never ruled on death penalty questions and, like Justice Kennedy before her, declined to take a firm position on these questions during the hearing. (See Hearings on nomination of Anthony Kennedy, Tr. 12/15/87, at 208, where then Judge Kennedy refused to discuss the constitutionality of the death penalty on the ground that the issue involved a "constitutional debate of ongoing dimension.") Judge Ginsburg stated in response to questioning by Senator Hatch:

> At least since 1976, and possibly if you date it from *Furman* and 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 there is no judge on the Court that takes the position that the death penalty is unconstitutional under any and all circumstances. * * *
>
> There are many questions left unresolved. They are coming constantly before that Court. * * *
>
> I can tell you that I do not have a closed mind on this subject. I don't want to commit—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. (Transcript, July 22, at 16.)

The committee believes that Judge Ginsburg's approach to issues of criminal law and procedure is reasoned and balanced. Her opinions and her testimony reflect a respect both for the practical realities of law enforcement and the constitutional rights of the accused.

CONCLUSION

This report summarizes the extensive record before the Judiciary Committee and the Senate as it prepares to exercise its constitutional duty to consent to the President's choice of a Supreme Court nominee. The record amply demonstrates that Ruth Bader Ginsburg merits the support of the committee and the entire Senate.

Some members of the committee have expressed concern that Judge Ginsburg answered fewer questions during the hearings than they would have liked. But a careful comparison of Judge Ginsburg's answers with those of other recent nominees reveals that Judge Ginsburg supplies as much—or more—information about her views as anyone who has appeared before the committee in the last 5 years. During the course of her testimony, Judge Ginsburg in fact told the committee a great deal—most particularly about her approach to constitutional and statutory interpretation and her views on unenumerated rights, the right to privacy, and reproductive freedoms.

Judge Ginsburg's refusal to answer all the committee's questions also should be viewed in light of her substantial judicial record. In this respect, Judge Ginsburg's nomination might be contrasted to that of David Souter. Almost nothing was known about Justice

Souter's constitutional philosophy or his approach to judging at the time of his nomination. By contrast, each member of the committee had ample means, prior to Judge Ginsburg's hearing, to discover much pertinent information—indeed, the most pertinent information—about Judge Ginsburg's judicial approach and method. In more than 300 signed appellate opinions, and more than three score articles, Judge Ginsburg told the Senate and the American people an enormous amount about herself even before the hearings opened.

None of this is to say that the committee is fully satisfied with the responsiveness of Judge Ginsburg's answers. But we have not been fully satisfied for many years, and perhaps will not be for as many longer. Given Judge Ginsburg's extensive written record and her willingness to answer questions at least as fully as other recent nominees, the committee sees no reason for this issue to bar her appointment.

Judge Ginsburg is open-minded, nondoctrinaire, fair, and independent. She respects and loves the law. She honors the concept of individual rights. She brings to constitutional interpretation an understanding that the Constitution is an evolving document, together with an appreciation that the most secure evolution is also the most rooted. She will be a fine Associate Justice of the United States Supreme Court.

JOSEPH R. BIDEN, Jr.
EDWARD M. KENNEDY.
HOWARD M. METZENBAUM.
DENNIS DECONCINI.
PATRICK J. LEAHY.
HOWELL HEFLIN.
PAUL SIMON.
HERBERT KOHL.
DIANNE FEINSTEIN.
CAROL MOSELEY-BRAUN.

ADDITIONAL VIEWS OF SENATOR KOHL

Although I share many of the views expressed by my colleagues, I write separately to explain my reasons for voting to confirm Judge Ginsburg.

In brief, I do have some reservations about the extent to which Judge Ginsburg answered our questions. Nevertheless, I believe she will make an excellent Supreme Court Justice and that she will help move the Court back toward firmer middle ground. Let me explain.

First, Judge Ginsburg has demonstrated the necessary character, competence and integrity to sit on our Nation's highest court. As a law student, she achieved honors at a time when few women were even permitted to attend law school. As an advocate, she led the fight to ensure gender equality for women. As an appellate judge, she served with distinction. And at the hearing, she confirmed that she possesses the exceptional intellect required of a Supreme Court Justice.

In all of these categories, she presented a record that is simply beyond reproach. And it is largely on the basis of her long established career, not her brief appearance before this committee, that I decided to vote for her.

Second, both on the bench and before this committee, Judge Ginsburg displayed an understanding of and respect for the values which form the core of our constitutional system of government. She rejected the doctrine of original intent, which could undermine many of the Court's most important achievements. She accepted an approach to statutory interpretation that relies on legislative history as an anchor for understanding. She spoke forcefully in support of the right to privacy and in opposition to all forms of discrimination. In her 13 years on the bench, she demonstrated a uncommon fidelity to applying precedent, to judicial restraint and to the Rule of Law.

Most importantly, Judge Ginsburg seemed committed to protecting the civil rights and civil liberties of all Americans. As she told this committee, "the whole thrust of [the Constitution] is people have rights and government must be kept from trampling on them." I could not agree more.

Despite my admiration for Judge Ginsburg, I was disappointed by her "don't ask, don't tell, don't pursue" strategy of responding to questions. Of course, she did not need to disclose how she would vote on cases that might come before her. But she should have revealed more about how she would approach these cases, what reasoning and methodology she would apply to them, and which factors and materials she would find relevant. As the chairman points out elsewhere in this report, Judge Ginsburg was hardly a stealth candidate. Nevertheless, she was at times a stealth witness.

Future Supreme Court nominees—especially ones with less comprehensive paper trails—would be wise not to adopt a similar approach. After all, as Judge Ginsburg herself noted, "In an appointment to the United States Supreme Court, the Senate comes second, but is not secondary." I hope that the next nominee will take this model more to heart.

Still, as I reflected on the confirmation hearing, I kept returning to how Judge Ginsburg told me she wanted to be remembered, "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."

I believe Judge Ginsburg can be such a Justice, and that is why she ought to be confirmed.

ADDITIONAL VIEWS OF SENATORS HATCH AND THURMOND

We will vote for the confirmation of Judge Ruth Bader Ginsburg to be an Associate Justice of the Supreme Court of the United States. Let us briefly outline the reasons why.

We are unlikely ever to agree with President Clinton on the ideal nominee to be a Supreme Court Justice. Indeed, there have been many prominently mentioned potential nominees whom we would in all likelihood vigorously oppose. But we do believe that a President is entitled to some deference in the selection of a Supreme Court Justice. If a nominee is experienced in the law, highly intelligent, of good character and temperament, and—most importantly—gives clear and convincing evidence that he or she understands and respects the proper role of the judiciary in our system of government, the mere fact that we might have selected a different nominee will not lead us to oppose the President's nominee.

In the case of Judge Ginsburg, her long and distinguished record as a judge on the U.S. Court of Appeals for the District of Columbia Circuit is the critical factor that leads us to support her. Her judicial record demonstrates that she is willing and able to issue rulings called for by the Constitution and the Federal statutes, even though Judge Ginsburg, were she a legislator, might personally have preferred different results as a matter of policy. Several examples may illustrate this point:

In *Women's Equity Action League* v. *Cavazos,* 906 F.2d 742 (D.C. Cir. 1990), Judge Ginsburg 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, the courts had no authority to create such a cause of action for these civil rights groups. Judge Ginsburg declined an opportunity to legislate from the bench, even though from her background as a women's rights lawyer she might have been thought to be sympathetic to the plaintiffs.

In *Coker* v. *Sullivan,* 902 F.2d 84 (D.C. Cir. 1990), Judge Ginsburg 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 Judge Ginsburg did not allow that consideration to sway her from applying the relevant law, which was that Congress had not given them the right to sue that they claimed.

In *Randall* v. *Meese,* 854 F.2d 472 (D.C. Cir. 1988), Judge Ginsburg wrote an opinion that was joined by Judge Silberman, a Reagan appointee, and from which Judge Mikva, a

Carter appointee, dissented. In that opinion, she 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. This is an elementary principle of administrative law that, when properly adhered to as Judge Ginsburg did in this case, reduces litigation and permits adjudication, if it must finally occur, to be based on a fully developed record.

In *Dronenburg* v. *Zech,* 746 F.2d 1579 (D.C. Cir. 1984), Judge Ginsburg, alone of the Carter appointees on the D.C. 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 a district court decision upholding a Virginia statute criminalizing homosexual conduct. Her liberal colleagues on the court wanted to extend the right of privacy announced in other cases to this situation, but she properly, in our view, concluded that the Supreme Court's summary affirmance was controlling, and whatever her own views on the right to privacy, there was no latitude to apply it there.

In *Conair Corp.* v. *NLRB,* 721 F.2d 1355 (D.C. Cir. 1983), in a significant loss for labor unions, Judge Ginsburg wrote an opinion that was joined by then-Judge Scalia over the dissent of Judge Wald. There, it had been found that 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. The union, however, had not shown that it ever had majority support among the employees. Judge Ginsburg ruled that the NLRB therefore could not impose a bargaining order on the employer. She 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, she disagreed with Warren Court dictum.

Judge Ginsburg has been anything but a lockstep liberal. As one article noted,

> According to a computerized study of the appeals court's 1987 voting patterns published in Legal Times, Judge Ginsburg voted more consistently with her Republican-appointed colleagues than with her fellow Democratic-appointed colleagues. For example, in 1987 cases that produced a division on the court, *she voted with Judge Bork 85 percent of the time* and with Judge Patricia M. Wald 38 percent of the time. New York Times, 6/27/93, at 20.

Similarly, according to a study by Judge Harry Edwards of the D.C. Circuit, in the 1983–84 year, Judge Ginsburg voted with Judge Bork 100 percent of the time, and with then-Judge Scalia 95 percent of the time. Edwards, *Public Misperceptions Concerning The "Politics" Of Judging,* 56 Colo. L. Rev. 619, 644 (1985). The high regard in which Judge Ginsburg is held by her conservative

judicial colleagues provides further assurance that she is unlikely to be a liberal judicial activist.

We also take comfort from some of Judge Ginsburg's testimony before the committee. As she explained, "No judge is appointed to apply his or her personal values." Instead,

> [T]he spirit of liberty must lie in the hearts of the women and men of this country. It would be really easy, wouldn't it, to appoint platonic guardians who would rule wisely for all of us, but then we wouldn't have a democracy, would we? * * * Judges must be mindful of what their place is in this system and must always remember that we live in a democracy that can be destroyed if judges take it upon themselves to rule as platonic guardians.

Likewise, in testimony that has not received the attention that it deserves, Judge Ginsburg exploded the judicial activist notion that the ninth amendment is somehow a font of unenumerated rights for judges to elaborate. In her words, the ninth amendment is "peculiarly directed to Congress to guard" and is an "instruction[ ] first and foremost to Congress itself," not to the courts.

Let us add that there were other aspects of Judge Ginsburg's testimony that we found disturbing. For example, her view that a right to abortion could be based on the equal protection clause is, we believe, ultimately untenable. We are also concerned that some of her jurisprudential musing give insufficient attention to the legitimacy or illegitimacy of certain courses of judicial action. In addition, we disagree very much with some of Judge Ginsburg's academic and advocacy writings. We believe, however, that Judge Ginsburg recognizes the distinction between her role as an academic and advocate and her role as a judge.

We do not expect to agree with any nominee, especially one chosen by a President of the other party, on every issue that may come before the judicial branch. Because we are opposed to the politicization of the judiciary, we believe that it is improper to apply any single-issue litmus test to Supreme Court nominees. A cumulation of unsound positions, by contrast, might warrant the conclusion that a nominee does not understand and respect the proper role of the Supreme Court and is therefore unsuited to serve on that institution, irrespective of his or her other qualifications. Here, Judge Ginsburg's long record of, on balance, restrained and responsible judging is sufficient to outweigh the genuine concerns that have arisen. We will therefore vote to confirm her nomination.

ADDITIONAL VIEWS OF SENATOR PRESSLER

This was the first confirmation hearing of a Supreme Court nominee in which I participated. Because of this fact, I have considered carefully my vote on Judge Ginsburg's confirmation. Our vote today is a recommendation to the rest of our colleagues in the Senate whether or not they should confirm Judge Ginsburg. Prior to joining the committee, I always placed great weight on the committee's recommendations. I believe other Senators do also.

On one basic point, there is no argument: Judge Ginsburg is exceptionally well-qualified to be an Associate Justice of the U.S. Supreme Court. Her background is impressive. She has authored volumes of law review articles published throughout the world and in several languages. She was one of the first 20 female law professors in this country. She won five of the six cases she personally argued before the Supreme Court, including several landmark cases. For the past 13 years, she has served with distinction as a Federal appellate court judge on the D.C. Circuit. Her legal career clearly deserves our admiration and respect.

However, having said all this, I must express my disappointment with the nominee's responses to my questions during the hearings. Almost exclusively, I used my questioning periods to explore her understanding of Indian Country issues, which routinely come before the Court. My purpose in doing so was not to elicit a promise or commitment from her, or even an idea of how she would decide these issues so crucial to people in my part of the country. Rather, I had hoped to be satisfied that Judge Ginsburg had a good understanding and solid grasp of this complex and murky area of the law. Unfortunately, I was not satisfied.

While not as glamorous as other issues, Indian cases do frequently come before the Court. In the last decade, the Court has accepted approximately 40 cases dealing with the sovereignty, civil rights, law enforcement, or jurisdiction of American Indians and their tribes. I understand such cases never come before the D.C. Circuit Court of Appeals. Therefore, I did not expect Judge Ginsburg to be an expert on Indian law prior to her nomination. In an attempt to impress upon her the importance of these issues, I told Judge Ginsburg of my intent to inquire into her understanding of Indian Country law when she visited my office the day after her nomination. Additionally, I sent her references to several key Indian law cases a few weeks ago as well as a copy of the questions I intended to ask during the hearings.

Therefore, I was disappointed with Judge Ginsburg's answers to my questions. I felt they were largely nonresponsive and somewhat simplistic. She failed to demonstrate a basic or general philosophy toward, or even an interest in, Indian Country issues. To her credit, she did promise to approach these cases in the same thorough, meticulous way she prepares for all cases. I commend her for that.

But I disagree with her if she believes a Supreme Court Justice really does not need to possess knowledge of Indian Country issues and the problems of the West prior to taking the bench. It is exactly that lack of an overall philosophy that has led to the patchwork of court decisions which characterizes Indian law today.

As I have stated before, Congress certainly shares equally in the blame for this situation. All too often, this body has failed to act in a responsible and sensible manner regarding the concerns of citizens in Indian Country. But in the absence of congressional action or clear intent, the Supreme Court must make the law that Congress is unwilling or unable to make. Through its decisions, the Supreme Court has the responsibility of providing guidance for lower courts on Indian Country matters. It is therefore easy to see the importance of selecting nominees who have a basic understanding of the complex history of the American Indians and their unique relationship with the U.S. Government.

Though I am not yet convinced that Judge Ginsburg has this understanding, I am voting for her confirmation. But I also want to put future Supreme Court nominees on notice that I will insist they have an interest and understanding of Indian Country law. After today, I will not vote for a nominee unless I am satisfied that they have demonstrated this concern.

But I am not here to make threats. I do wish Judge Ginsburg all the best. I hope she has a long and productive career on the highest Court in the land.

ADDITIONAL VIEWS OF SENATOR COHEN

Members of this committee have expressed the hope that soon-to-be Justice Ginsburg will exercise restraint on the Court. Other members pray that her past activism as an advocate will be revived on the Court. Both groups are likely to be disappointed. Nothing that has been said during the committee's deliberations and nothing that will be said on the Senate floor during the debate on the nomination will have a scintilla of influence upon her performance as a Justice on the Supreme Court. She is going to follow her own inner guides without regard to any of our importuning.

Judge Ginsburg indicated during the course of the hearings that she is a student and great admirer of Justice Holmes. He reminded us that the "history of the law is not logic but experience and that a page of experience is worth more than a volume of logic." Judge Ginsburg has demonstrated that she will bring not only a formidable intellect but also a great deal of experience to the Court, and this experience will serve the Court and the country well.

As the committee's unanimous vote on the nomination indicated, we all believe Judge Ginsburg meets the highest standards of professional competence and integrity, that she has a highly disciplined mind and a distinguished record as a jurist and an advocate, and should be confirmed overwhelmingly.

The hearings on the Ginsburg nomination, however, have highlighted concerns about the role of the Judiciary Committee in the "advice and consent" process and the expectations of the public about that role. Editorial writers in major newspapers characterized the committee as a band of Lilliputians who tried vainly to tie up a legal giant with trivial and petty pursuits. Others have suggested that Judge Ginsburg is "a methodical, passionless technician," and that what is really required on the Court is a "radical maverick" to cancel the radicalism of conservative justices.

Whatever one's characterization of Judge Ginsburg, only a single view of the committee emerged from the hearings and it was not a complimentary one. Members were accused of asking the wrong questions, failing to ask tough questions, or crossing the line between exploring judicial philosophy and that of social and legal policy.

Judge Ginsburg declared in her opening statement that she was setting the guidelines for the scope of her testimony. She indicated that any subject on which a nominee had written, lectured or taught was, in her view, open to inquiry but that other areas were not, particularly if they involved issues that might come before the Court at some future (however remote) time.

To allow a nominee to decide what he or she will testify to during the course of a hearing puts the members of the committee in the position of either having to accept the nominee's terms as dictated or vote against the nomination. I believe it is incumbent upon the

committee to work on a bipartisan basis to establish responsible guidelines for what will be expected of future nominees. Nominees can, of course, decide whether they will abide by those rules and the committee members can then decide what action to take in response.

Finally, I want to commend the chairman for instituting reforms in committee procedures on Supreme Court nominations and, specifically, for his decision to hold a closed hearing on every nominee to review any allegations of a personal nature, even if no negative statements have been made. During my tenure in both the House and Senate, I have seen too many people have their lives destroyed by allegations, rumors, and outright lies before the appropriate congressional committee has had an opportunity to scrutinize such allegations for their veracity.

Part of the problem is the result of a great deal of misapprehension about what is commonly referred to as FBI reports. The FBI does not make reports. The FBI simply releases files which contain the questions that were put to certain witnesses and their responses. Those witnesses may remain anonymous. Their statements are not taken under oath. Their statements are not subject to scrutiny by the FBI. The statements are simply included in the file and those files are turned over to the committee.

When information is leaked from the FBI files, we have witnessed how easy it is to destroy a totally innocent individual. Such a situation casts great disrepute upon this committee or any other committee that allows character assassination to take place.

As a committee, we have a responsibility to a nominee to scrutinize any allegation of impropriety made against that individual and to test its validity. Such allegations should not be made public unless and until it is determined they have some foundation and, even then, only after we have confronted the nominee with them and given the individual a chance to either rebut them or to remove his or her name from consideration. It is important in my view, even though there were no allegations whatsoever against Judge Ginsburg, that we adopt the same process for all future nominees.

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