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SENATE—*Monday, June 14, 1993*

(Legislative day of Monday, June 10, 1993)

The Senate met at 2:30 p.m., on the expiration of the recess, and was called to order by the Honorable PATTY MURRAY, a Senator from the State of Washington.

PRAYER

The Chaplain, the Reverend Richard C. Halverson, D.D., offered the following prayer:

Let us pray:

Blessed is the nation whose God is the Lord.—Psalm 33:12.

God of our fathers, as a new Senator takes her oath of office, promising to defend the Constitution against all enemies, we are profoundly grateful for a document which merits this commitment from all who hold public office. We thank Thee for the wisdom and vision of our forebears who conceived a political system designed to form a government receiving its authority from the consent of the governed whose purpose was to secure human rights, endowed by God who created all persons equal.

We praise and thank Thee, mighty God, for the faith expressed over and over again in their writings and speeches. Help us gracious God, to take seriously this faith—the foundation upon which our political system rests, lest we lose by default that which we promise to defend.

We pray in His name who is the Light of the world. Amen.

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore [Mr. BYRD].

The legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, DC, June 14, 1993.

To the Senate:

Under the provisions of rule I, section 3, of the Standing Rules of the Senate, I hereby appoint the Honorable PATTY MURRAY, a Senator from the State of Washington, to perform the duties of the Chair.

ROBERT C. BYRD,
President pro tempore.

Mrs. MURRAY thereupon assumed the chair as Acting President pro tempore.

RECOGNITION OF THE MAJORITY LEADER

The ACTING PRESIDENT pro tempore. The Chair recognizes the majority leader.

WELCOME TO MRS. KAY BAILEY HUTCHISON

Mr. MITCHELL. Madam President, the purpose of today's session of the Senate is to welcome and to participate in the swearing-in of the newly elected Senator from Texas, Mrs. KAY BAILEY HUTCHISON.

On behalf of all of the Members of the U.S. Senate, I welcome Mrs. HUTCHISON to our ranks.

A SIGNIFICANT DAY

Mr. MITCHELL. Madam President, this is a significant day in many respects. On the day prior to this swearing-in, a woman was nominated to become the Prime Minister of Canada. Just a few moments ago, the President announced the nomination of a woman to serve on the Supreme Court. And Mrs. HUTCHISON is being sworn in here this afternoon.

I think all of those reflect a positive trend, not only in ours but in other societies, toward the full participation of women in the processes of government.

ORDER OF PROCEDURE

Mr. MITCHELL. Madam President, I have discussed the matter with the distinguished Republican leader. Prior to the swearing in, I have two brief statements to make on subjects which the distinguished Republican leader will himself address. The first deals with Judge Ginsburg.

NOMINATION OF JUDGE RUTH BADER GINSBURG

Mr. MITCHELL. Madam President, I welcome the President's nomination of a distinguished appeals court judge, Judge Ruth Bader Ginsburg, to replace Justice Byron White on the Supreme Court.

Judge Ginsburg's career on and off the bench has been remarkable. A graduate of Columbia Law School in an era where few women aspired to legal studies, she was the first woman appointed a professor of law at Columbia.

As the general counsel of the women's rights project of the American Civil Liberties Union from 1972 to 1980, she played a central role in virtually all of the key cases involving equal rights analysis based on gender.

She was instrumental in persuading the Supreme Court to grant heightened scrutiny to issues of gender discrimination.

Her career on the appellate court has made her one of the most respected judges on the D.C. Circuit Court. She was the lone dissenting appellate judge on the case of Morrison versus Olsen, a judgment that was subsequently vindicated by an 8-to-1 ruling of the Supreme Court.

Judge Ginsburg will bring a distinguished record of legal experience and knowledge to the Court. She will bring, as well, a willingness to recognize the proper role of the judiciary in a democratic society, and in our Government's system of checks and balances.

CONCERN AND PRAYERS FOR SENATOR SPECTER

Mr. MITCHELL. Madam President, I know I speak for all Members of the Senate, also, to express our deep concern and prayers for our colleague, Senator ARLEN SPECTER of Pennsylvania, who this day underwent a major operation. We all hope and pray for Senator SPECTER's swift recovery. We look forward to welcoming him back to the Senate in the near future.

WELCOME AND BEST WISHES FROM SENATORS

Mr. MITCHELL. Finally, Madam President, in welcoming Mrs. HUTCHISON to the Senate, I want to say that we had hoped that there would be more Senators present. This is a day on which the Senate is not in session with votes and, therefore, many Senators are not present. Each of them has asked me to extend to her our welcome and our best wishes.

Madam President, I yield to the distinguished Republican leader at this time.

RECOGNITION OF THE REPUBLICAN LEADER

The ACTING PRESIDENT pro tempore. The Chair recognizes the Republican leader.

NOMINATION OF JUDGE GINSBURG

Mr. DOLE. Madam President, I believe President Clinton made a good choice today with his nomination of Judge Ruth Bader Ginsburg to fill the vacancy on the Supreme Court caused by the expected departure of Justice Byron White.

As pointed out by the distinguished majority leader, she has a distinguished career.

Not surprisingly, she has a long paper trail, having written hundreds of legal opinions and more than 40 articles.

Obviously, these will be reviewed by members of the committee and others.

Having voted for Judge Ginsburg in, I believe, June 1980, almost 13 years ago, to be a member of the circuit court, both in the committee—I was a member of the Judiciary Committee at that time—and also on the floor, I certainly wish her the best. I expect her nomination will be well received.

She is also a neighbor in the same building in which we live, and it is a good bipartisan building.

SENATOR SPECTER'S RECOVERY

Mr. DOLE. Madam President, I also thank the majority leader for his comments about Senator SPECTER.

I spoke with Mrs. Specter at about 12:45 today. The operation, as far as she knows, was a complete success. It took less time than they expected. They will have the pathology tomorrow.

But he was, she said, wiggling his toes and talking—and that seemed to be a very good sign—almost immediately after the operation.

In fact, he did not discover this until this past Friday in an examination at Bethesda.

But he is alert and talking. No question about it, he will be missed. He will be back very soon. We should have more information tomorrow.

PRAYERS FOR GOV. ROBERT CASEY

Mr. DOLE. Madam President, it is also fair to say that our thoughts today are also with the Governor of Pennsylvania, Governor Casey, who is undergoing very serious surgery today. I know our prayers are extended both to the Governor and his family, and to Senator SPECTER and his family.

CREDENTIALS

The VICE PRESIDENT. The Chair lays before the Senate the credentials of Senator-elect KAY BAILEY HUTCHISON of the State of Texas, duly certified by the Governor of said State.

Without objection, the credentials will be placed on file and the certificate of election will be deemed to have been read.

The certificate reads as follows:

STATE OF TEXAS—CERTIFICATE OF ELECTION FOR UNEXPIRED TERM

To the President of the Senate of the United States:

This is to certify that on the fifth day of June, 1993, Kay Bailey Hutchison was duly chosen by the qualified electors of the State of Texas a Senator for the unexpired term ending at noon on the 3rd day of January, 1995, to fill the vacancy in the representation from said State in the Senate of the United States caused by the resignation of Lloyd Bentsen.

Witness: Her excellency Ann W. Richards, our governor, and our seal hereto affixed at Austin this 10th day of June, in the year of our Lord 1993.

ANN W. RICHARDS,
Governor of Texas.

Attest:

JOHN HANNAH, Jr.
Secretary of State.

ADMINISTRATION OF OATH OF OFFICE

The VICE PRESIDENT. If the Senator-elect will present herself to the desk, the Chair will administer the oath of office as required by the Constitution and prescribed by law.

(Mrs. HUTCHISON, escorted by Mr. GRAMM, advanced to the desk of the Vice President; the oath prescribed by law was administered by the Vice President, and Mrs. HUTCHISON subscribed to the oath in the Official Oath Book.)

The VICE PRESIDENT. Congratulations.

[Applause, Senators rising.]

Mr. MITCHELL addressed the Chair.

The ACTING PRESIDENT pro tempore. The Chair recognizes the majority leader.

PRAYERS FOR GOV. ROBERT CASEY

Mr. MITCHELL. Madam President, I would like to join my colleague, the distinguished Republican leader, in expressing the concern of all Senators, and prayers, for the Governor of Pennsylvania, Robert Casey, who, as Senator DOLE indicated, is also about to undergo major surgery.

CONDOLENCES TO SENATOR ALAN SIMPSON

Mr. MITCHELL. Madam President, I would also like to express the condolences of all the Members of the Senate to our good friend and distinguished colleague, Senator ALAN SIMPSON, whose father passed away late last week.

Senator SIMPSON's father was himself a Senator and a Governor of his State. He served with great distinction in those and other public roles. He will be greatly missed, not only by his family, but by all the people of his State of Wyoming.

Madam President, I now yield the floor. I believe the distinguished Republican leader has further comments.

Mr. DOLE addressed the Chair.

The ACTING PRESIDENT pro tempore. The Chair recognizes the minority leader.

WELCOME SENATOR KAY BAILEY HUTCHISON

Mr. DOLE. Madam President, on behalf of all of my colleagues on both sides of the aisle—I guess particularly on this side of the aisle—today I am particularly pleased to welcome Senator KAY BAILEY HUTCHISON to this Chamber.

I want to say how important and significant it was that our former colleague, Senator Bentsen—now Secretary Bentsen—was here. No doubt about it, KAY has big shoes to fill. And I know Secretary Bentsen will be at her beck and call if he can do anything to make her job here a more effective one for the State of Texas.

History will note that Senator HUTCHISON is the 1,815th person, and the 22d woman to serve in the U.S. Senate.

And history will also note Senator HUTCHISON's election is confirmation that 1993 is "the year of the taxpayer"—because of those 1,815 Senators, few have been sent to Washington with more timely or more important instructions from taxpayers than KAY BAILEY HUTCHISON.

And as we welcome Senator HUTCHISON to this Chamber, I also want to welcome the hundreds of Texans who made the trip to Washington to see this historic ceremony.

I have never been to a Texas Longhorn football game—but I suspect the audience there looks a lot like our gallery today.

[Laughter; applause.]

The ACTING PRESIDENT pro tempore. The Senate will be in order.

Mr. DOLE. Needless to say, there is a lot of proud Texans here today—and most proud of all are Senator HUTCHISON's husband, her mother, and several other family members.

We all extend our welcome to KAY HUTCHISON.

I think I would say to KAY that it is generally good news when there are not many Members on the floor. So do not be disappointed that there were not more here, because if there were more here, we oould do things; with only a few here, we cannot do very much.

So we look forward to working with KAY, starting today and from now on. We extend our congratulations to her, as I said and her family and the people of Texas.

SALUTE TO MILWARD SIMPSON

Mr. DOLE. Madam President, Louis L'Amour, the great storyteller of the American West, once wrote that "what a man is and what he becomes, is in part due to his heritage."

This statement is confirmed by another storyteller of the American West—our friend and colleague, ALAN SIMPSON.

For Senator SIMPSON does credit his heritage for his commitment to public service.

Senator SIMPSON learned this commitment from his father, Milward Simpson, who served 4 years as Gov-

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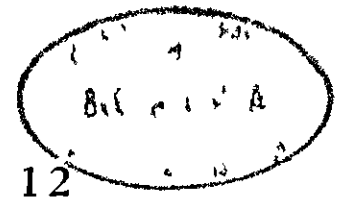
FIRST SESSION



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he is our President, regardless of party—announced legislative proposals on expedited exclusion of illegal aliens and increased penalties for criminal alien smuggling.

I have carefully reviewed those proposals, and I believe they constitute a very good start. Many of the provisions are similar, even identical, to those in two bills I introduced earlier in the Congress to address alien smuggling and asylum abuse.

Many provisions are similar to the work product of Senator FEINSTEIN, who has taken a serious and vivid interest in this, which is very pleasing to me because I intend to work closely with her on these issues.

There are, perhaps, some partisan aspects to immigration reform, refugee matters, asylum. But, by and large, all of us know that the first duty of a sovereign nation is to control its borders. To do that we have to do certain things. I think many of us are ready to do that in a way which does not smack of nativism, or racism, or xenophobia, or all the stuff that is usually out there when you try to do something realistio. But I support very much making entry with fraudulent documents, or no documents—make it a grounds for exclusion with an expedited hearing and then exolusion of those who cannot establish a "credible fear"—those are the words, "oredible fear of persecution in the home country."

I support increased penalties for alien smugglers. I support using our racketeering—our RICO laws—to prosecute organized smuggling gangs. I support those provisions in the administration's proposals but I see some problems with other aspects of the President's bill. They are not unsolvable problems. But a primary purpose of asylum reform is to eliminate some of the many layers of appeal presently available to an alien claiming asylum. This overemphasis on process—it is almost an obsession with process—has created a backlog of hundreds of thousands of these cases. These cases can drag on for many years. Sometimes these people—often—get more due process than does an American citizen under similar, or different, circumstances.

The President's proposal—this is the disturbing one to me —would create a new corps of superasylum review offlcers, outside of the Immigration Service. I think the Attorney General would like to see—I would—bringing that group back within the Department of Justice. But they would review all cases where the alien is found not to have a credible fear of persecution, if he or she were to return "home." Remember, none of them really wants to go home because if you are really an asylee, the minute you reach the country of freedom you are "home"—in quotation marks. At least you are away from the country that is persecuting you. But no, they come to the second country, third country, fourth country—then here. We must stop that.

I support a supervisory review of a screened out case. If it is said of a person, "You do not have a credible fear of persecution," I think there should be indeed a supervisory review. But I am troubled by the administration proposal to create a new group which might be outside the Immigration Service to review every single denied case. I think that is getting right back into the ponderousness of the process.

The purpose of my bill and the administration's proposal is to create a fast, firm, and fair system of dealing with asylum claims by persons who enter this country illegally. I think we can assure fairness with a supervisory review without the cost of delay in review by a member of some superasylum review officer corps.

Another concern with this proposal is adequate resources. We too often have enacted good immigration reform legislation but have failed to provide adequate funding. As a result, we have had legislation which has proven ineffective. A good example is the employer sanctions provisions of the Immigration Reform and Control Act of 1986, legislation that has never been fully and effectively enforced by the Immigration Service due principally to the lack of adequate resources and, of course, the other reason is because the documents presented have all been fraudulent and gimmicked beyond belief. Until we have some form of universal identifier, some form of counterfeit-resistant document, we will not have reform. That can be done in a nonintrusive way.

Because, unless we handle the problems of illegal immigration and gimmickry, we will lose our compassion for legal immigration and bringing in what is now a very generous number, 900,000 people a year—1 million if you want to count it a little differently. Nevertheless we passed that law. We did not provide the funding for the investigators needed to properly enforce it. If we do not provide adequate funding for the doubling of our asylum corps and proper funding for sufficient detention space to hold these aliens who have entered illegally until their claims can be heard, the bill will not be effective. Asylum backlogs will continue to grow and the new procedures will have no deterrent effect. The administration and the Congress must be committed to finding the resources to properly fund asylum and antismuggling legislation, and we cannot simply take the money from other immigration activities. That agency is already underfunded.

So I do appreciate the efforts of the administration to address this growing problem. I suggest several changes in the President's proposal but there is much in the proposal I can support and will. Much of it is essentially in accord with my own activities with immigration reform bills.

It is a good first step, and there is much, much more to do. I thank the chair.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. I ask unanimous consent that I might proceed in morning business for a period not to exceed 15 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

THE NOMINATION OF RUTH BADER GINSBURG

Mr. SPECTER. Mr. President, I am going to use this lull in the proceedings to make my statement on the nomination of Judge Ginsburg, which is scheduled for debate on Monday. But I want to use the time now.

An affirmative vote for Judge Ruth Bader Ginsburg to be Associate Justice of the Supreme Court of the United States is not as easy for me as it is for most, if not all, of my Senate colleagues. While I have no doubt about her being eminently well qualified for the position, I am greatly concerned over the course of the confirmation process that not enough questions have been answered at the confirmation hearings. At her hearings before the Judiciary Committee, Judge Ginsburg declined to answer most of the substantive questions which the members addressed to her.

I believe, and I think many of the other Senators believe, that she should have answered more questions. I am concerned that her confirmation, on the heels of previous confirmations, only leads the Senate further down the road of unwelcome precedent for future nominations.

Until 1925, no nominee had ever appeared before the Senate or any of its committees to testify. Testimony by a nominee did not become routine until Justice Felix Frankfurter was nominated in 1939, and even into the 1940's a nominee to the Supreme Court refused to appear before the committee to testify and was confirmed.

For years, nominees took a consistent position that they would discuss only their records and their background, but they declined to discuss legal philosophy either in the particular or in the abstract. Despite the fact that the Supreme Court became more and more active in decisions which affected all Americans through the 1950's and 1960's, still, nominees to the Court declined to answer questions about judicial philosophy.

My service on the Judiciary Committee began in 1981, and I have been through eight Supreme Court confirmation hearings. As we have proceeded, more and more we began questioning nominees about judicial philosophy. The nominees have had to tread

a fine line as we developed our inquiries to delve more deeply into a nominee's judicial philosophy.

Given the fact that no one wants to appear before a judge who has predetermined the case, it is understandable that nominees have not and should not discuss their views on particular cases which may come before the Court. At the same time, nominees generally have discussed their opinions on certain well-settled issues or on fundamental principles.

A major turning point came during the hearings on Judge Robert Bork. Members of the Judiciary Committee engaged in detailed examination of Judge Bork's judicial philosophy on many issues such as free speech, judicial review, and the proper means of interpreting the Constitution. Judge Bork did not discuss his position in specific cases that might come before the Court, but he gave the committee and the Senate a detailed look at his judicial philosophy.

Among other nominees in the 1980's, there was a wide degree of difference on how far they would go in answering questions. For example, Justice O'Connor expressly endorsed the death penalty as an appropriate sanction. She had previously voted for it as an Arizona legislator. Justice Kennedy refused to give his view on the death penalty.

Judge Souter endorsed the death penalty as constitutional, even though he, like Justice Kennedy, had not expressed a view before the hearings.

Against this background of evolving standards, Judge Ginsburg answered few questions. For example, I asked her about her concurring opinion in a suit by Members of Congress under the War Powers Act. From this point, I took the inquiry to the next level and inquired about Congress' authority to declare war.

When I asked Judge Ginsburg whether the Korean military engagement was a war as contemplated by the constitutional provision giving Congress sole authority to declare war, she responded that she could not answer the question without briefing and oral argument.

Obviously, no case is going to come before the Supreme Court involving the Korean war, and it seemed to me that this question required only a commonsense response regarding a matter which had arisen during her young adulthood. It was an appropriate question for Judge Ginsburg to give us some insight into her approach to an important historical event. She could have answered without prejudging a case which would actually come before the Court.

Judge Ginsburg also refused to answer questions regarding her approach to the propriety of Supreme Court decisions overturning longstanding statutory interpretations that Congress had implicitly accepted. I asked her about her view of the Supreme Court acting as a superlegislature and Supreme Court activism as a revisionist court in changing the law and making new law in two major cases in the late 1980's. One was Wards Cove, a 5–4 decision handed down in 1989 which overruled a unanimous Supreme Court decision in the Griggs case in 1971 interpreting the 1964 Civil Rights Act. Despite the fact that Congress had let the Griggs decision stand for 18 years, the Supreme Court proceeded to change the law in Wards Cove. When I inquired about her view of the propriety of that kind of judicial activism, she declined to answer.

Similarly, she declined to respond to my inquiry involving the decision of the Supreme Court in Rust versus Sullivan which upheld the Department of Health and Human Services' 1988 regulation imposing the gag rule. That rule prohibited counselors from telling clients about the opportunities for abortion where Federal funds were involved under title X of the Family Planning Act of 1970.

For some 18 years, that kind of counseling was permitted, but in the face of 18 years of congressional acceptance of the regulation, the executive changed the regulation and the Supreme Court upheld this change by a 5–4 vote.

My inquiries regarding these two cases related to judicial philosophy on a nominee's deference to Congress when longstanding interpretations of a statute, one by the Supreme Court and the other by the executive branch, which had received longstanding congressional approval, were overturned by the Supreme Court of the United States.

I was not asking Judge Ginsburg about how she would vote in any particular case, but more broadly about her approach to judicial respect for congressional intent in such cases where Congress, in effect, acts intentionally by not acting at all. She declined to answer those questions.

These are only a few examples of Judge Ginsburg's refusal to discuss her judicial philosophy. While she was more forthcoming than recent nominees about her support for the right of a woman to make reproductive choices, she declined to answer many questions on a wide variety of subjects.

Mr. President, there is no doubt about Judge Ginsburg's overall competency. She has an outstanding law school record, having attended Harvard and Columbia, being a member of the Law Review at both schools. She has a superb record as a practicing lawyer, having argued cases before the Supreme Court of the United States and won many landmark decisions. Her work as a jurist over 13 years has been similarly outstanding.

One of her strong traits has been to write brief opinions, which is rather unusual for a judge or a Justice. As she articulates it, she likes to keep it tight and right. Some of her opinions resemble Justice Oliver Wendell Holmes', a Supreme Court Justice noted for brevity in opinions, in clarity and brevity. In fact, it takes a long time to write a short opinion.

So her record is outstanding, and for the reason of her record and her prospects as a Supreme Court nominee, I support her nomination for the Supreme Court of the United States. But in voicing that support, I articulate a reservation and a concern about the limited number of questions which she answered. In fact, I believe the Senate and the Judiciary Committee are responsible for setting the stage with so much approval in advance that her nomination was realistically assured.

We have seen, as a matter of practice, that the nominees to the Supreme Court of the United States answer about as many questions as they really have to answer. When Chief Justice Rehnquist was up for confirmation for the Chief Justice's position, for which he was ultimately confirmed on a vote of 65 to 33, and there was a realistio question about his confirmation to that position, he answered very significant questions saying that the Congress of the United States did not have the authority to take away the jurisdiction of the Supreme Court on first amendment issues. That, to me, Mr. President, is a very important subject. If we do not establish the supremacy of the Court to interpret constitutional issues, then our entire constitutional structure is in doubt.

Judge Ginsburg did answer the question that she supported Marbury versus Madison, which established the supremacy of the Court on constitutional issues, but she would not answer the question as to whether the Congress could take away the jurisdiction of the Supreme Court to hear cases under the equal protection clause of the 14th amendment. The equal protection olause of the 14th amendment is vital for individual rights. Judge Ginsburg, as a lawyer, established her reputation on cases involving equal protection of the law. That has been a principal source of her interest in advocacy and the issue which she has pushed: women's rights.

But if the Congress has the authority to take away the jurisdiction of the Supreme Court, the Court could not pass on those issues. And, in fact, we would not have constitutional protections. That is why I pressed for an answer from Judge Ginsburg. I did not get the answer.

It is my concern that we have slid back from the scope of questions to which we have received answers from Judge Bork who answered a great many, as I think realistically he had to, to have a chance for confirmation, although he was not oonfirmed.

My reading of the record shows Judge Ginsburg answered fewer questions

than Justice David Souter, than Justice Anthony Kennedy, than Justice Sandra Day O'Connor. Only Justice Antonin Scalia answered fewer questions than Judge Ginsburg.

Judge Ginsburg did conoede that the opinion of the Senate and the voice of the Senate in confirmation stands on an equal footing to the opinion of the President in making the nomination. But the Senate cannot discharge that constitutional authority unless it has latitude to receive answers to its questions.

My judgment, Mr. President, on a nominee depends on a balancing of his or her record before the hearings—academio, professional record—and the nominee's willingness to be responsive and the substance of those responses. Despite my substantial reservations on the responsiveness of Judge Ginsburg, I am voting for her because of her outstanding educational, professional and judicial qualifications.

I hope that it will not be necessary to reject nominees in the future because of lack of responsiveness to Senators' questions, but I do express the reservation, the caveat, that it may become necessary as the only way to establish the appropriate balance to enable the Senate to perform its constitutional duty on advise and consent.

Mr. President, I wish to acknowledge the outstanding assistance given to me in preparation of the hearings themselves by my former law partner, Mark Klugheit, of the Dechert, Price & Rhoads firm in Philadelphia, and my Judiciary Committee chief counsel, Richard Hertling.

Mr. Klugheit came to Washington to serve as counsel for the Impeachment Committee on Judge Alcee Hastings and then returned as an unpaid volunteer for the preparation of hearings on Judge Ginsburg. Mr. Klugheit assembled a team of summer associates from Dechert, Price & Rhoads. And I thank Jennifer Arbittier, Scott Rose, Silvestre Fontes, Rachel Nosowsky for their research assistance, and also, in my Judiciary Committee office, Alison Serxner who assisted Mr. Hertling. It was a voluminous task to read more than 300 published opinions, a large number of unpublished opinions, and some 75 articles which Judge Ginsburg had written to prepare for the questioning and evaluation of the nominee, and I thank those individuals for their assistance.

Mr. President, I ask unanimous consent that the appendix to my written statement to which I earlier referred to be printed in the RECORD.

There being no objection, the appendix was ordered to be printed in the RECORD, as follows:

APPENDIX—EXAMPLES OF JUDGE RUTH BADER GINSBURG'S REFUSALS TO ANSWER OR NONRESPONSES TO QUESTIONS ASKED BY MEMBERS OF THE JUDICIARY COMMITTEE DURING HER CONFIRMATION HEARINGS, JULY 20–JULY 22, 1993

The CHAIRMAN. So what did you mean when you said, Judge, in the Madison lecture that it ended race discrimination in our country, perhaps a generation before State legislators in our southern States would have budged on the issue? Are you saying that the Nation itself may have been in sync with Brown and the Court not that far ahead of the Nation, and it was only that part of the country?

Judge GINSBURG. Well, the massive resistance was concentrated in some parts of the country, that there was discrimination throughout the country I think is undoubtedly the case. But there was certainly a positive reaction in Congress, not immediately, but first the voting rights legislation started in the fifties, and then the great civil rights legislation of 1964. The country was moving together.

The CHAIRMAN. It was a decade later. My time is up, Judge. You have been very instructive about how things have moved, but you still haven't—and I will come back to it—squared for me the issue of whether or not the Court can or should move ahead of society a decade, even admittedly in the Brown case, it was at least a decade ahead of society. The Congress did not, in fact, react in any meaningful way until 10 years later, and so it moved ahead.

One of the things that has been raised, the only question that I am aware of that has been raised, not about you personally, but about your judicial philosophy in the popular press and among those who follow this, is how does this distinguished jurist distinguish between what she thinks the Court is entitled to do under the Constitution and what she thinks it is wise for it to do. What is permitted is not always wise.

So I am trying to get—and I will fish for it again when I come back—I am trying to get a clear distinction of whether or not you think, like in the oase of Brown, where it clearly did step out ahead of where the Nation's legislators were, whether that was appropriate. If it was, what do you mean by it should not get too far out ahead of society, when you talked about that in the Madison leotures?

But I will give it another try. I think you not only make a great Justice, you are good enough to be confirmed as Secretary of State, because State Department people never answer the questions fully directly, either.

Senator KENNEDY. Well, we have overturned those decisions now in the Civil Rights Act of 1991. I am asking you whether you are willing to express an opinion about those cases that were overturned since it won't come back up to you and since now we have legislated in those particularly cases.

Judge GINSBURG. I don't want to write a Law Review commentary on the Supreme Court's performance in different cases. I think the record of what went on in the lower courts, in some of those instances the Supreme Court's position was contrary to the position that had been taken in the lower Federal courts, and in the *Ward's Cove* case, in the *Patterson* oase. And it is always helpful when Congress respond to a question of statutory interpretation, as it did in this case, to set the record right.

Now, sometimes I spoke of the Pregnanoy Discrimination Act and Title VII. I think that Congress was less clear than it could have been the first time around. Maybe that wasn't apparent until the case came up. Congress reacted rather swiftly and said, yes, discrimination on the ground of pregnancy is discrimination on the ground of sex, and Title VII henoeforth is to be interpreted that way.

So I think it is a very healthy thing. It is part of what I called the dialogue, particularly on questions of statutory interpretation; that if the Court is not in tune with the will of Congress, that Congress doesn't let it sit and makes the necessary correction, that can be even on a constitutional matter—and I referred to the *Simka Goldman* case yesterday when Congress fulfilled the Frse Exercise Clause more generously than the Court had.

Senator METZENBAUM. My question to you is: How would you view an antitrust case where the facts indicated that there had been anti-competitive conduct but the defendant attempted to justify it based on an economic theory such as business efficiency?

Judge GINSBURG. I am not going to be any more satisfying to you, I am afraid, than I was to Senator Specter. I can answer antitrust questions as they emerge in a case. I said to you yesterday that I think the only case where I addressed an antitrust question fully on the merits was in the Detroit newspaper case where I think I faithfully—or at least I attempted to faithfully interpret the Newspaper Preservation Act and what Congress meant in allowing that exemption from the antitrust laws.

Senator METZENBAUM. Indeed you did.

Judge GINSBURG. Antitrust, I will confess, is not my strong suit. I have had, as you pointed out, some half a dozen—not many more—cases on this court. I think I understand the oonsumer protector, the entrepreneur, individual deoisionmaking, protective trust of those laws, but I can't give you an answer to your abstract question any more than I could—I can't be any more satisfying on the question you are asking me than I was to Senator Specter on the question that he was asking.

If you talk about my particular case—and it was a dissent. There was a division in the court on how to interpret that statute. I think I tried to indicate what my approach—I think that case indicates what my approach is in attempting to determine what Congress meant. But I can't, other than saying I understand——

Senator DECONCINI. Let me put it this way, Judge: Do you think there is any merit to a process within the judicial branch of government, which would permit the removal of a judge?

In other words, what if a constitutional amendment set up or gave authority to the judicial branch to set up procedures where complaints could be heard? A judge would have an opportunity to respond and to have a hearing and to appeal the hearing, and what have you, and that the Supreme Court or somebody within the judicial branch could, in fact, dismiss the judge. Have you given that any thought?

Judge GINSBURG. I understand that the Kastenmeier Commission that has been looking into the discipline and tenure of judges, has come out with a preliminary draft of its report that takes a careful—that commission has been operating for some time and it is supposed to have a very broad charter to take a careful look at all these areas.

I will read the final report when it comes out with great interest, but I don't feel equipped to address that subject.

Senator DECONCINI. Let me ask you this: Is it offensive to you, if the judiciary had authority to discipline judges and that discipline could also include dismissal?

Judge GINSBURG. We already have an in-house complaint procedure, as you know.

Senator DECONCINI. Yes, I do.

Judge GINSBURG. And I think that has worked rather well. It has never come to the point in all my 13 years there has been an instance calling for removal.

Senator DECONCINI. My problem, Judge, is what do you do with a convicted judge? Wouldn't it be appropriate for the judiciary to have a process that they could expel that judge? I mean I am giving you the worst of all examples. I am not talking about the litigant who is unsatisfied, doesn't like the ruling of the judge and, thereby, files a complaint as to moral turpitude of the judge, and then you have a hearing on that. I am talking about something that is so dramatic as a felony conviction of a judge.

Judge GINSBURG. Senator, I appreciate the concern that you are bringing up, and it isn't hypothetical, because there are judges who are in that situation. They are rare, one or two in close to a thousand.

Senator DECONCINI. I think there are two.

Judge GINSBURG. So I appreciate the problem. When I was asked before about cameras in the court room, I was careful to qualify my own view, saying I would, of course, give great deference to the views of my colleagues on this subject, and there is an experiment going on now in the Federal courts on that subject.

Here I don't even feel comfortable in expressing my own view, without the view of the U.S. Judicial Conference on this subject. I know that the judges are going to study the Kastenmeier report, and they are going to react to it. I can just say that I appreciate it is a very grave problem.

Senator LEAHY. Doee that mean that the Free Exercise Clause and the Establishment Clause are equal, or is one subordinaue to the other?

Judge GINSBURG. I prefer not to address a question like that; again, to talk in grand terms about principles that have to be applied in concrete cases. I like to reason from the specific case and not——

Senator LEAHY. Let me ask you this: In your view of the Supreme Court today—or do you have a view whether the Supreme Court has put one in a subordinate position to the other?

Judge GINSBURG. The two clauses are on the same line in the Constitution. I don't see that it is a question of subordinating one to the other. They both have to be given effect. They are both——

Senator LEAHY. But there are instances where both cannot be upheld.

Judge GINSBURG. Senator, I would prefer to await a particular case and——

Senator LEAHY. I understand. Just trying, Judge. Just trying.

Senator SIMON. If I could get you to be a little more specific here, if I can ask, not in commenting on the substance of the Alvarez case—incidentally, he was tried in the United States and not found guilty—but wers you at all startled, when you heard about the results of the Alvarez case?

Judge GINSBURG. If I may, Senator, I would not like to comment on my personal reactions to that case. I think I told you what my view is on how U.S. officials should behave, and I would like to leave it at that. This was a decision of the United States Suprsme Court that you have cited, and I have religiously tried to refrain from commenting on a number of Court decisions that have been raised in these last couple of days.

Senator FEINSTEIN. Thank you, Mr. Chairman.

Just to try to pursue that a little bit further, Judge Ginsburg, could you talk at all about the methodology you might apply, what factors you might look at in discussing Second Amendment cases should Congress, say, pass a ban on assault weapons?

Judge GINSBURG. I wish I could, Senator, but all I can tell you is that this is an amendment that has not been looked at by the Supreme Court since 1939. And apart from the specific context, I really can't expound on it. It is on area in which my court has had no business, and one I had no acquaintance as a law teacher. So I really feel that I am not equipped beyond what I already told you, that it isn't an incorporated amendment. The Supreme Court has not dealt with it since 1939, and I would proceed with the care that I give to any serious constitutional question.

Senator MOSELEY-BRAUN. So I have two questions. The first is, in a situation like this, if the property owners challenge the government action as a taking of their property, what principles should the Supreme Court look to in evaluating that claim?

Judge GINSBURG. Senator, the question has some kinship to the one that Senator Pressler raised about the wetlands. It is just evolving. There is a clear recognition that at some point a regulation does become a taking. When that point is reached is something to be settled for the future.

We do know that, as I said in the Lucas case, when the value of that property is totally destroyed as a result of the regulation, that is indeed a taking and there must be compensation for it. Reliance is certainly one of the factors that goes into the picture.

As I say, this is just a developing area and it is still evolving and I can't say any more about it than is reflected in the most recent precedents in the Nolan case and in the recent Lucas case of the Court. But there certainly is sensitivity to the concerns. One, the regulations for the benefit of the community, which you mentioned, and the other is the expectation, the reliance of the private person, and those two will have to be balanced in the future cases coming up. But this is an area that is very much evolving now, and I can't say anything more than I have said about it so far.

Senator HATCH. But in the International Funding case, you cited Harris v. McRae favorably in support of a distinction you drew between funding restrictions that are permissible and those that are not. Irrespective of your views on the policy of abortion funding, do you agree that Mayer and Harris, those two cases, were decided correctly?

Judge GINSBURG. I agree that those cases are the Supreme Court's precedent. I have no agenda to displace them, and that is about what I could say. I did express my views on the policy that is represented. That is not something that anybody has elected me to vote on.

Senator THURMOND. One vocal critic of this decision said that the Supreme Court has now created an entirely new constitutional right for white people. Judge Ginsburg, do you believe this to be an accurate assessment of the Shaw decision? And if confirmed, how will you approach challenges to reapportionment plans under the Equal Protection Clause?

Judge GINSBURG. Senator Thurmond, the Shaw case to which you referred was returned to a lower court. The chance that it will return again to a higher court is hardly remote. It is hardly remote for that very case. It is almost certain for other cases like it. These are very taxing questions. I think that the Supreme Court has redistricting cases already on its docket for next year, so this is the very kind of question that would be injudicious for me to address.

Senator GRASSLEY. Well, there wouldn't be any question about separation of powers protecting Members of Congress from applicability of criminal laws against this. What principal distinction can there be made of having employment laws or civil rights laws applied to Congress?

Judge GINSBURG. I think if you ask the counsel to the Senate, who argued very effectively in a number of Speech or Debate Clause cases before us, for a brief on that subject, that office would be best qualified to address it.

Senator GRASSLEY. Well, I believe before long you will be addressing it sometime. Obviously that would keep you from responding to specific question, but——

Judge GINSBURG. If and when, I would have the benefit of the wonderful brief, I hope; the briefs on both sides. But that is the difficulty that I confront in this milieu. I am so accustomed—and as a judge, it is the only way I can operate, on a full record, with briefs, and not making general statements apart from a concrete case for which I am fully prepared with the arguments that parties make on both sides.

Senator BROWN. I wanted to cover one last area, and it may be an area you would prefer not to explore. If you do, I would certainly understand.

I believe earlier on Senator Cohen and others had brought up a question with regard to homosexual rights. I would not expect you to rule on something or advise on something that may well involve a case. But there is a question I thought you might clear up for us that I think has some relevance here.

The Equal Protection Clause, as we have explored it this afternoon, deals, in effect, requiring sex-blind standards with regard to Government action or legislation, or may well deal in that area. That relates to classes of people; in this case, males and females. Obviously there are other classes.

In the event we are dealing with forms of behavior—and I appreciate that is not a foregone conclusion with regard to homosexuals. That is open to debate whether or not it is a class of people or forms of behavior. But in the event we are dealing with forms of behavior, would they come under the provisions of the Equal Protection Clause?

Judge GINSBURG. Senator Brown, I am so glad you prefaced this by saying you would understand if I resisted a response, because this is an area where I sense that anything I say could be taken as a hint or a forecast on how I would treat a classification that is going to be in question before a court, and ultimately the Supreme Court. So I think it is best that I not do anything that could be seen, be used as a prediction of how I might vote with regard to that classification.

Senator COHEN. What about sexual orientation?

Judge GINSBURG. Senator, you know that that is a burning question that at this very moment is going to be before the Court based on an action that has been taken. I cannot say one word on that subject that would not violate what I said had to be my rule about no hints, no forecasts, no prsviews.

Senator PRESSLER. Are you uncomfortable that the Constitution's Bill of Rights does not extend to Native Americans?

Judge GINSBURG. I can't express my personal view on that subject. I know that there are many people who care deeply about the concept of tribal sovereignty. I am not a member of one of those communities and, as a judge, I will do my best to apply faithfully and fairly the policy that Congress sets with respect to tribal governance.

Mr. SPECTER. I thank the Chair and yield the floor.

Mr. JEFFORDS. Mr. President, I ask unanimous consent that I may be able to proceed for a period of time not to exceed for 5 minutes to introduce a bill.

The PRESIDING OFFICER. Without objection, it is so ordered. The Chair recognizes the Senator from Vermont for 5 minutes.

(The remarks of Mr. JEFFORDS pertaining to the introduction of S. 1327 are located in today's RECORD under "Statements on Introduced Bills and Joint Resolutions.")

Mr. JEFFORDS. Mr. President, I thank the Chair and I yield the floor.

The PRESIDING OFFICER. The Chair recognizes the Senator from Montana.

Mr. BURNS. Mr. President, I ask unanimous consent that I may proceed for 5 minutes as if in morning business to introduoe a bill.

The PRESIDING OFFICER (Mr. FEINGOLD). Without objection, it is so ordered.

The Senator is recognized for up to 5 minutes.

(The remarks of Mr. BURNS pertaining to the introduction of S. 1328 are located in today's RECORD under "Statements on Introduced Bills and Joint Resolutions.")

Mr. BURNS. I thank the Chair and yield the floor.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. GRASSLEY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. GRASSLEY. Mr. President, I ask unanimous consent to speak as in morning business for 10 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

REINVENTING GOVERNMENT

Mr. GRASSLEY. Mr. President, I rise early this afternoon to present the first of several statements that I am going to make over the next few weeks on an issue that is really foremost in the minds of many: Reinventing government. It has also been foremost in the miuds of famous authors, David Osborne and Ted Gaebler in their now-celebrated book entitled "Reinventing Government." The term reflects a necessity—brought on by taxpayer animosity—for the Government to become more responsive and more effective in its delivery of Federal services. Taxpayer hostility is a result of not just poor service delivery under our present system, but also deals very much with the bottom line cost—maybe even more so.

The challenge to advocates of reinventing government is to reform the Federal bureaucracy so that it performs better, is less wasteful, and allows the decisionmaking, or ownership of Government, to occur closer to the citizenry. In theory, at least, everything, save the Constitution, should be on the table, and it would not hurt if we were on the table either in the respect of always reviewing, to a considerable degree, whatever we do.

The macro benefits to the country would be enormous: More effective service delivery, less Government spending, a need for fewer taxes, and a build-down of the national debt.

All that stands between these worthy objectives and the present system is a reinvention of Dunkirk. Somehow, an enormous, countervailing political will must build. This, alone, can turn back the dynamic of growing government caused by special interests feeding off of the present, failing structure. The people want such change. It is up to us to deliver.

As I prooeed with my floor statements between now and the August recess, together with others of my colleagues, I intend to advance such an agenda, beginning with the principles and standards for an effective reinvention. I intend to draw on the insights in Osborne and Gaebler's book, on my own experiences attempting to reinvent the Defense and Justice Departments during the 1980's, on such management legends as W. Edwards Deming and Peter Drucker, and on many others.

In essence, this agenda would be an extension of my defense reform efforts of the 1980's, only this time applied to all of Government.

I would especially like to commend the work and leadership of Senator ROTH of Delaware, Mr. President. Senator ROTH has advanced the cause of reinventing Government in the Senate, and in a bipartisan way, for many years, even before this administration committed itself to reinvention. The administration's stated commitment gives us the foundation for true bipartisan cooperation. Many of us on this side of the aisle have long advocated fundamental reform of the Federal Government. We look forward to the opportunity to form a bipartisan coalition for constructive change.

The centerpiece of Senator ROTH's efforts has been two reinvention bills, each of which I have cosponsored.

One of the bills has passed the Congress already—the Government Performance and Results Aot. This act is a model for setting performance goals for Federal programs so that effectiveness can be measured and monitored.

A second bill, the Reinventing Government Act, would establish an entity similar to the Base Closure Commission that would tackle the tough issues of which programs and agencies to reform and how.

In my view, this approach has worked effectively. It has worked on perhaps the thorniest issue of all facing a representative institution such as ours: the closing of military bases in our States and districts.

If Government indeed is to be reinvented, and democracy revitalized, this law would give us the best chance of succeeding, in my view. Again, that is something that we need to commend the Senator from Delaware [Mr. ROTH] for his leadership in this area.

I should also commend the efforts of the President and the Vice President. Under their leadership, the seed has been planted for real Government reform at the highest levels of our Government. In my view, if it took Nixon to go to China, it will take Democrats to reform the welfare state. I have lived and practiced under this adage: It took a CHUCK GRASSLEY and other Republicans to reform the Defense Department and to lead the way to the freeze of the Defense budget in the 1980's. I believe in this principle, and I can testify to its effectiveness.

Mr. President, I would like to help define what it means when we use the term reinventing government. Consistent with any organizational reform or turnaround, we must begin with fundamental questions: What is it that we do now, and what is it that we should continue to do?

In the case of reforming Government, this means asking and, of course, answering the following three questions about those things the Federal Government now does:

First of all, what funotions should the Federal Government continue to do as it does now; that is, rowing? That is what I call rowing, like rowing a boat.

Second, what functions should the Federal Government no longer do, but rather maintain a guiding hand in; that is, steering? That is what I call steering, like steering an automobile.

Third, what functions should the Federal Government turn over to State or local governments, to communities, to foundations, or to private industry; that is, drydocking, I call it, to coin a phrase.

Answering these three questious will create three categories for Federal programs and functions. I would like to look at them separately.

First, there is rowing. These are programs that the Federal Government must do. One example would be administering to the national defense. This is a function that the Government must do itself to provide for the collective defense of the Nation.

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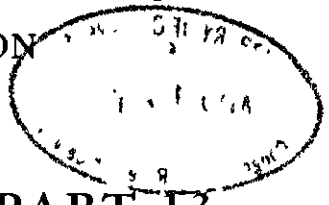
FIRST SESSION



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now going to have to defend in a fair way. With what he himself identifies as more direct control over decisionmaking, that could result in the National Endowment for the Humanities sharply veering off course.

Dr. Hackney, you have your work cut out for you, and I am quite concerned at this moment of who this good, intelligent, scholarly figurehead will be. Will he be the person who arbitrarily restricted free speech and then made a change? Or will he be the stalwart who directs in a fair and balanced way the moneys of this great institution?

Those are the questions at hand, and in the coming weeks and months, I am sure we will know because I expect the doctor to be confirmed. But I will tell you that he is not a strong and decisive captain. He is a man who has allowed his ship to be blown off course by the winds of change and not to remain a stalwart defender of constitutional and basic American principles and rights.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. DOLE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. KERREY). Without objection, it is so ordered.

Mr. DOLE. I ask unanimous consent to proceed as if in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

SALUTE TO EWING KAUFFMAN

Mr. DOLE. Mr. President, a rags-to-riches success story; baseball; a devotion to the philosophy of neighbor helping neighbor; what do these have in common? All three are a unique part of the American culture. And all three were also part of the uniquely American life of Ewing Kauffman, who passed away Saturday in Kansas City, MO.

In 1950, Ewing Kauffman started a pharmaceutical business in the garage of his home. And over the years, Marion Laboratories grew from a one-man operation to a $1 billion corporation.

Mr. Kauffman said the reason behind his business success could be found in his motto—"Those who produce, share." Mr. Kauffman never used the word "employee," referring to everyone—from vice presidents, to secretaries, to janitors as "associates."

In 1969, Mr. Kauffman earned the affection of the people of Missouri and Kansas, when he purchased a new major league baseball franchise and brought it to Kansas City. And for the past 24 years, the Kansas City Royals have been one of the most successful franchises in baseball.

Under Mr. Kauffman's ownership, the Royals won six American League Western Division titles and made two trips to the World Series, winning the World Championship in 1985.

The Royals were also winners off the field, as well. Mr. Kauffman knew that his team really didn't belong to him; it belonged to the people of the Kansas City area—in fact, for that matter, all the Midwest. And his leadership ensured that the Royals were also available to make appearances on behalf of worthy causes and to reach out to young people.

Young people were also the focus of many of Mr. Kauffman's philanthropic efforts. His Kauffman Foundation financed countless projects, including a program to teach children how to resist peer pressure at the age when they are most vulnerable to involvement with drugs.

Mr. Kauffman also made a life-changing promise to over 1,000 high school freshmen in Kansas City, KS, and in his hometown of Westport, MO—a promise that he would pay the entire cost of their college or vocational training if they steered clear of drugs, alcohol, teenage parenthood, and received their high school diploma.

Mr. President, when Mr. Kauffman was diagnosed with bone cancer, he typically did not think of himself; he thought of others; and he established a trust which would keep the Royals in Kansas City after his death.

Ewing Kauffman is survived by his wife, Muriel, three children, nine grandchildren, and three great grandchildren. He is also survived by countless men, women, and children whose lives are better because of the leadership and generosity of this remarkable American.

SALUTE TO CONGRESSMAN PAUL HENRY

Mr. DOLE. Mr. President, I know that all Members of the Senate join me in extending our sympathies to the family, friends, colleagues, and constituents of Congressman PAUL HENRY of Michigan.

Congressman HENRY passed away Saturday after a courageous fight against brain cancer.

Regarded by many as one of the rising stars of the Republican Party, PAUL HENRY made a career of making a difference in the lives of others.

As a Peace Corps volunteer, he made a difference in the lives of the people of Ethiopia and Liberia.

As a political science professor, he made a difference in the lives of his students.

And as a 5-year member of the Michigan State Legislature and a five-term Member of Congress, PAUL HENRY made a difference for Michigan and America.

Mr. President, I was proud to call Congressman HENRY my friend, and know that I am just one of many in this Chamber who will miss this truly outstanding public servant.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. HELMS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

NOMINATION OF RUTH BADER GINSBURG

Mr. HELMS. Mr. President, it had been my tentative inclination prior to this past weekend to vote to confirm Ruth Bader Ginsburg to serve on the U.S. Supreme Court despite disagreement with some of her declarations about constitutional matters and other matters. I have a small habit which I have not been able to break, I am not inclined to break, and I have not tried to break, that is, on each major nomination to come before the Senate I assemble all available information about the nominee including testimony before the committee hearing of his or her nomination.

I did that this past weekend. I spent a part of the weekend reviewing various documents regarding Mrs. Ginsburg, and never have I been more disappointed in a nominee. This lady, whom I have regarded as a pleasant, intellectual liberal is, in fact, a woman whose beliefs are 180 degrees in opposition to some fundamental principles that are important not only to me but, I believe, to the majority of other Americans as well.

Therefore, it would be hypocritical of me to keep silent about Mrs. Ginsburg's beliefs, let alone her nomination to be quietly confirmed by the Senate, like a ship passing in the night.

I confess great disappointment that the Senate Judiciary Committee in conducting the hearing on Mrs. Ginsburg's nomination did not press her on a number of matters—for example, her outrageously simplistic and callous position on abortion. The lady used a great deal of doubletalk and, sad to say, the Judiciary Committee let her get by with it.

Mr. President, I did not find one syllable of challenge by any member of the Judiciary Committee to this outrageous oversimplification by a nominee whose demeanor appeared to be one of amused tolerance of Senators too timid to ask questions that needed to be asked. Why, Mr. President, in the name of God did someone not ask, "But, Mrs. Ginsburg, what about that unborn innocent and helpless child's right to be left alone, that child who is about to be destroyed because of specious reasoning by people like Ruth Bader Ginsburg?"

Mrs. Ginsburg also made such unchallenged declarations as that the Hyde amendment is unconstitutional;

that the implication—that went unchallenged—was that, as a member of the Supreme Court, she is likely to uphold the homosexual agenda; and, three, the States should be required to pay for abortions.

There were other such remarkable assertions. But the able Senator from Pennsylvania, Mr. SPECTER, did put it aptly when he said:

I'm not suggesting that Judge Ginsburg will be defeated, or that she should be, but I am suggesting that her coronation in advance is irresponsible.

And that is putting it mildly, Mr. President.

Let me emphasize, in conclusion, Mr. President, that I hold no personal animus for Mrs. Ginsburg. But based on what she has said, and what she clearly meant, I cannot support her nomination. She will be confirmed, yes. And I may be the only Senator opposing her. But I pray that as a sitting Justice of the Supreme Court, she will rethink some of her positions.

Mr. President, I ask unanimous consent that two items be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

COALITIONS FOR AMERICA,
Washington, DC, July 23, 1993.

To: Interested parties.

From: Thomas L. Jipping, J.D., Legal Affairs Analyst.

Judge Ruth Bader Ginsburg told the Senate Judiciary Committee on July 20 that her nomination should be evaluated on the basis of her 34-year written record. That record provides a solid, and perhaps even compelling, basis for Senators to vote against her nomination. First, she believes courts should make policy and implement judges' own social vision. Second, her social vision is very liberal. Third, her supporters believe she will work to implement that vision on the Supreme Court.

I. JUDGE GINSBURG BELIEVES THAT COURTS SHOULD MAKE POLICY AND IMPLEMENT JUDGES' OWN SOCIAL VISION

She approves of courts changing their interpretation of the Constitution because of "a growing comprehension by jurists of a pervasive change in society at large."[1]

She approves of instances where "[p]ervasive social changes" undermined previous Supreme Court decisions she felt impeded women's right.[2]

She approves of cases where the Supreme Court "has creatively interpreted clauses of the Constitution * * * to accommodate a modern vision" of society.[3]

She approves of "[b]oldly dynamic interpretation, departing radically from the original understanding" to achieve certain results.[4]

She believes courts should be restrained only when legislatures are activist.[5]

She believes courts should "repair" or "rewrite" unconstitutional legislation to reach desirable results rather than striking it down and letting legislatures do the legislating.[6]

She testified at her hearing that courts should sometimes act as "interim legislatures."

She believes factors that "tug judges toward the middle" on appellate courts are not present on the Supreme Court, which faces "grand constitutional questions."[7]

II. JUDGE GINSBURG'S SOCIAL VISION IS EXTREMELY LIBERAL

Judge Ginsburg served on the national board of the ACLU when it adopted positions opposing any restrictions on pornography (including child pornography), opposing any restrictions on prostitution, and opposing the criminalization of adult/child sex.

Judge Ginsburg testified during her hearing that she opposes discrimination on the basis of sexual preference.

Judge Ginsburg has written that the Supreme Court's decisions that the Constitution does not require the public funding of abortion are "incongruous"[8] and represent the "[m]ost unsettling of the losses" for women's rights.[9]

Judge Ginsburg co-authored a report for the U.S. Commission on Civil Rights purporting to identify "Federal laws which allow implicit or explicit sex-based discrimination" and offering recommendations.[10] Her social vision, as outlined in this report, includes:

Drafting women,[11] and sending them into combat.[12]

Legalizing prostitution, which she believes is protected by the Constitution.[13]

Lowering the age of consent for sexual acts to 12 years.[14]

Terminating all public financial support of 4-H Boys and Girls Clubs,[15] Boy Scouts, Girl Scouts, Boys' Clubs of America, Big Brothers of America, and other organizations until they open their membership to both sexes, change their name by using only sex-neutral language, and purging any activities and purposes that "perpetuate sex-role stereotypes."[16]

Single-sex prisons.[17]

Replacing fraternities and sororities at colleges and universities with single-sex "social societies."[18]

Constitutional protection of bigamy.[19]

Judge Ginsburg even included the statute establishing Mother's Day and Father's Day as separate holidays as one that allows "implicit or explicit sex-based discrimination" though did not offer a specific recommendation for correcting this problem.[20]

III. JUDGE GINSBURG'S ALLIES AND FRIENDS BELIEVE SHE WILL IMPLEMENT HER SOCIAL VISION ON THE SUPREME COURT

On July 22, the woman who replaced Judge Ginsburg as director of the ACLU's Women's Rights Project told PBS that Judge Ginsburg has a definite social vision and will have no restraints on implementing that vision when she gets on the Supreme Court.

On July 20, Eleanor Homes Norton, the District of Columbia's congressional delegate, introduced Judge Ginsburg to the Judiciary Committee and stated that Judge Ginsburg would make great strides for women's rights on the Supreme Court just as she had while an advocate and scholar.

The left-wing Alliance for Justice asserts that any prediction that Judge Ginsburg will be a moderate member of the Supreme Court is "at best premature."[21] Indeed, the Alliance believes that "it is the battles she fought prior to her service on the bench that portend" the kind of Supreme Court Justice she will be.[22]

IV. CONCLUSION

Judge Ginsburg said her nomination should be evaluated on the written record, supplemented by her testimony before the Judiciary Committee. By that standard, there is ample ground for opposing the appointment of this judicial activist to the Supreme Court. She takes a fundamental political approach to the law, believing that courts can and should work to implement judges' social vision. Her own social vision—the one she will enforce on the Supreme Court—is extremely liberal. Her allies and supporters believe that she will in fact work, in the unconstrained environment on the Supreme Court, to implement that vision in much the same fashion that she pursued her agenda as an advocate.

Any Senator claiming the label "conservative" or even "moderate" will find it difficult to explain voting for someone with such a clearly activist record. Judge Ginsburg's record is more hostile to conservatives than Judge David Souter's record was to liberals. The vote on Souter's 1990 nomination was 90–9.

FOOTNOTES

[1] Ginsburg, "Remarks on Women Becoming Part of the Constitution," 6 Law & Inequality 17,20 (1988).

[2] Ginsburg, "Sex Discrimination," in L. Levy, K. Karst & D. Mahoney (eds.), Encyclopedia of the American Constitution (1986), at 1667.

[3] Id. at 1673.

[4] Ginsburg, "Sexual Equality Under the Fourteenth and Equal Rights Amendments," 1979 Washington University Law Quarterly 161,161.

[5] Ginsburg, "Inviting Judicial Activism: A 'Liberal' or 'Conservative' Technique?" 15 Georgia Law Review 539,550 (1981).

[6] Ginsburg, "Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation," 28 Cleveland State Law Review 301 (1979).

[7] Ginsburg, "Styles of Collegial Judging: One Judge's Perspective," Federal Bar News and Journal, March/April 1992, at 200.

[8] Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade," 63 North Carolina Law Review 373,386 (1985).

[9] Ginsburg, supra note 2, at 224.

[10] U.S. Commission on Civil Rights, Sex Bias in the U.S. Code (April 1977). The report states that "the initial research and draft of this report was developed by contractors, Ruth Bader Gineburg and Brenda Feigen Fasteau." Id. at iii. Fasteau is a former director of the American Civil Liberties Union's Women's Rights Project.

[11] Id. at 218.

[12] Id. at 26.

[13] Id. at 97.

[14] Id. at 102.

[15] Id. at 138.

[16] Id. at 148.

[17] Id. at 101.

[18] Id. at 169.

[19] Id. at 195–96.

[20] Id. at 146.

[21] Alliance for Justice, Report on the Nomination of Judge Ruth Bader Ginsburg to the United States Supreme Court, at 5.

[22] Id. at 2.

[From the Family Research Council, Washington, DC]

JUDGE RUTH BADER GINSBURG: GROUNDS FOR QUESTIONS

(By David M. Wagner, Director of Legal Policy)

In choosing Appeals Court Judge Ruth Bader Ginsburg for the U.S. Supreme Court, President Clinton has achieved a triple goal: An easy confirmation process; political credit for selecting a "moderate"; and a probably reliable liberal vote on key social issues, with the legal acumen to make her opinions influential.

In deciding whether to oppose Judge Ginsburg's confirmation, conservative and pro-family groups have to weigh how much worse Clinton's selection could have been, against how much damage can be done by a careful liberal jurist with a non-negotiable commitment to far-reaching, if slow-paced, social change.

Footnotes appear at end of article.

This paper will set forth some areas of Judge Ginsburg's record that should provide material for questioning when she appears before the Senate Judiciary Committee, or for the casting of an informed vote by members of the Senate.

GINSBURG ON ABORTION

It is being said that Judge Ginsburg has "criticized Roe v. Wade." Technically this is true; in fact, her most recent "criticism" of Roe came in a speech delivered just last March, shortly before Justice Byron White announced his intention to resign. That speech may well account for the absence of Judge Ginsburg's name from most observers' lists of possible nominees throughout April and May.

However, in these "critiques" of Roe there is actually less than meets the eye. Judge Ginsburg's criticisms of Roe are basically two:

1. By laying down a framework for all subsequent abortion law, the Court in Roe forced a more rapid reform than most state legislatures were willing to allow, thereby strengthening the right-to-life movement. Had the Court been content merely to strike down the Texas statute that was at issue in Roe, without announcing the rigid "trimester" system, the pro-abortion drift of the state legislatures would have continued without interruption. In other words, Judge Ginsburg criticizes Roe for being a less effective vehicle for abortion rights than it could have been.

In her recent speech she noted that Roe "halted a political process that was moving in a reform direction and thereby, I believe, prolonged divisiveness and deferred stable settlement of the issue."[1] And she wrote in a 1990 article: "There was at the time [of Roe], as Justice Blackmun noted in his opinion, a trend 'toward liberalization of the abortion statutes.' Had the Court written smaller and shorter, the legislative trend might have continued in the direction in which it was clearly headed in the early 1970s."[2]

Furthermore, as she noted in a 1985 article based on a 1984 speech: "The sweep and detail of the opinion stimulated the mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures."[3]

2. Roe grounded the abortion right on personal privacy and autonomy, rather than on sex discrimination. In contrast, Judge Ginsburg believes the Court should have grounded the abortion right on the theory that, since only women become pregnant, all restrictions on abortion discriminate on the basis of sex, and therefore violate the Equal Protection Clause of the Fourteenth Amendment. Closely allied to this legal argument is the overtly political argument that abortion is necessary to the civic and professional equality of women.[4]

Displaying her penchant for announcing her own views by quoting approvingly from others, Judge Ginsburg wrote in 1985:

"Professor Paul Freund explained where he thought the Court went astray in Roe, and I agree with his statement. The Court properly invalidated the Texas proscription, he indicated, because '[a] law that absolutely made criminal all kinds and forms of abortion could not stand up; it is not a reasonable accommodation of interests.'* * *

"I commented at the outset that I believe the Court presented an incomplete justification for its action. Academic criticism of Roe, charging the Court with reading its own values into the due process clause, might have been less pointed had the Court placed the woman alone, rather than the woman tied to her physician, at the center of its attention. Professor Karst's commentary is indicative of the perspective not developed in the High Court's opinion: he solidly linked abortion prohibitions with discrimination against women. The issue in Roe, he wrote, deeply touched and concerned 'women's position in society in relation to men.'[5]"

It should be particularly noted that, while some abortion regulations survive scrutiny under the Roe test as modified by Planned Parenthood v. Casey,[6] Judge Ginsburg's equal protection analysis would strike down any and all abortion regulations (though a ban on sex-selection abortion might present an arguable question for her), on the theory that any and all abortion regulations create unequal burdens on women and men.

Judge Ginsburg also points out that her theory would even require striking down the Hyde Amendment—i.e., it would require the federal government to fund abortions. She wrote: "If the Court had acknowledged a woman's equality aspect, not simply a patient-physician autonomy dimension to the abortion issue, a majority might perhaps have seen the public assistance cases as instances in which, borrowing a phrase from Justice Stevens, the sovereign had violated its 'duty to govern impartially.'"[7]

Thus, just at the time the Clinton administration is fine-tuning its health care plan and proposing to include abortion coverage in it, the court is getting a new Justice who believes the Constitution requires the federal government to fund abortion.

GINSBURG ON JUDICIAL METHOD

Another claim made about Judge Ginsburg is that she is a believer in, and a practitioner of, judicial restraint. But as Thomas Jipping of the Free Congress Foundation points out, one must distinguish between judicial restraint as a principle and judicial restraint as a style.

Judge Ginsburg's record includes many praiseworthy instances of judicial restraint. For instance, in a case involving a homosexual serviceman who argued that the military's policy on homosexuals violated his constitutional right to privacy, Judge Ginsburg concurred with her D.C. Circuit colleagues in turning down the plaintiff's petition for en banc review of the panel opinion rejecting his claim.[8] At that time, the Supreme Court had not yet definitively ruled on whether homosexual acts were covered by the constitutional right of privacy,[9] so in theory, Judge Ginsburg could have voted in favor of making some new law in this area. She did not do so. Judicial restraint is clearly part of her judicial style.

However, her career as the chief activist-litigator for the ACLU's Women's Rights Project was dedicated to persuading the courts that the language of the 14th Amendment requires a social revolution beyond anything that those who wrote and ratified the 14th Amendment dreamed of. This is the essence of judicial activism—the theory that the words of the Constitution are blank check to be filled in by judges, in light of whatever understanding they have of what contemporary thinking demands or what contemporary society needs. This form of judging necessarily entails the substitution of the values of federal judgee—which for demographic reasons tend to be the values of the "knowledge class"—for the values of the rank and file of the American people.

In a brief paper given as part of a Federalist Society conference,[10] Judge Ginsburg defended the Supreme Court's sex equality decisions of the 1970s primarily by pointing out how overwhelmingly the Burger Court adopted the view of the Equal Protection Clause that Ginsburg, as advocate, had promoted, and by suggesting how unjust would be the predicament of women today had those decisions not come down the way they did. Apparently her view is that judicial activism (at least where sex equality is concerned) is justified by its high degree of support on the Court, and by its good results.

In her 1981 Georgia Law Review article,[11] Judge Ginsburg seeks to debunk the view that judicial activism is exclusively a tool of political liberals, by pointing out instances in which conservatives have repaired to the courtroom to seek to reverse a legislative or executive outcome, e.g. over the Panama Canal issue, and over President Carter's termination of the mutual defense treaty with Taiwan.[12]

The article concludes with a solemn warning against "attempts to politicize the judiciary,"[13] in which Judge Ginsburg's prime exhibit is the testimony given by a conservative organization, United Families of America, in opposition to her own confirmation for her present seat on the Court of Appeals for the D.C. Circuit.[14]

UFA had suggested to the Judiciary Committee a list of questions for judicial nominees. Some of these questions were such that, in our view, a responsible nominee would have to decline to answer them, because to answer would be to make a premature commitment to a given outcome on an issue likely to come before the court.[15] The view that demanding outcome commitments from a judicial nominee amounts to an unacceptable politicization of the judiciary is bedrock conservative legal doctrine—a point that Judge Ginsburg hammers home by backing up her critique of the UFA questions with a quote from then-Justice Rehnquist.[16]

But before we give Judge Ginsburg a standing ovation and a leatherbound copy of The Federalist Papers, one might ask: did the politicization of the judiciary start with UFA's little list? From the vantage point of 1981, after two decades in which American society was significantly remade by judicial decisions reading the liberal agenda into the Fourteenth Amendment, is it not a touch disingenuous to imply that the threat of a politicized judiciary comes primarily from the conservatives? Especially when one happens to have been the legal architect of a portion of the judicial revolution? Does not this sort of argument suggest the presence of an unconfessed but powerful commitment to the liberal agenda?

The evidence suggests that judicial restraint is part of Judge Ginsburg's judicial style, but not part of her judicial philosophy; that she is cautious in her rulings, but does not believe that the judiciary has any overarching obligation to refrain from reading liberalism into the Constitution.

GINSBURG, THE ACLU, AND STATUTORY RAPE

According to a transcript obtained and quoted by the conservative weekly Human Events, the ACLU, honing down its position on homosexual rights at a board meeting in December 1975, adopted the view that the state has a legitimate interest in "protecting children from sexual abuse, an interest underlying some laws concerned with sexual conduct between adults and minors."[17]

This was substitute language. The first draft had articulated the state's interest in somewhat stronger terms: "[t]he state has a legitimate interest in controlling sexual behavior between adults and minors by criminal sanctions."[18]

Footnotes appear at end of article.

The change is explained in the transcript as follows:

"In the second paragraph of the policy statement, dealing with relations between adults and minors, Ruth Bader Ginsburg made a motion to eliminate the sentence reading: 'The state has a legitimate interest in controlling sexual behavior between adults and minors by criminal sanctions.' She argued that this implied approval of statutory rape laws, which are of questionable constitutionality.[19]"

Assuming that the scribe faithfully recorded then-Prof. Ginsburg's objection to the stronger anti-pederastly language, the transcript still does not tell us what her constitutional argument against statutory rape laws was or is. But given the predominance of the theme of sex-equality in her constitutional writings, it is not fanciful to assume that she objects to the different ages of consent for girls and for boys that are typically found in such statutes. But surely such "discrimination" reflects a judgment by the legislatures that young women are more in need of protection against what we would now call sexual harassment than young men are. Is this an unconstitutional policy judgment, requiring that our statutory rape laws be overthrown?

By no stretch can then-Prof. Ginsburg's intervention here be read as supportive of pedophilia. As noted, she was concerned with an appearance of endorsement for statutory rape laws that she considered unconstitutional.

Nonetheless, the Judiciary Committee should ask her to clarify the views reflected in this transcript.

GINSBURG AS FEMINIST BLUE-PENCILLER

Attention has already been called to Judge Ginsburg's preference for adopting the statements of others, rather than announcing her views in her own words. Yet, despite the debt that she implicitly acknowledges to tbose whom she approvingly quotes, she nonetheless feels that their choice of words is in need ot updating, in light of the rules laid down by "political corrections."

Thus, in her article in the Georgia Law Review,[20] she quotes from Judge Carl McGowan on the subject of legislatore becoming plaintiffs. Judge McGowan describes this sort of plaintiff as "a legislator who has failed to persuade his colleagues."[21] In Judge Ginsburg's quotation of this line, however, the words "or her" have been added in brackets between the word "his" and the word "colleague."[22]

Likewise, she quotes Judge Irving L. Goldberg defending judicial activism in some circumstances. As quoted by Judge Ginsburg, Judge Goldberg said that "the [judicial] fire[fighters] must respond to all calls."[23] Judge Ginsburg has added the word "judicial" in brackets, just to clarify that Judge Goldberg was invoking a metaphor for judging rather than defining the duties of fire departments.

Thus, in order to steal a glance at the original phrase as written by Judge Goldberg, the eye is inclined to suppress the word "judicial". Continuing with this procedure, the eye then also suppresses the word "fighters," since this is also in brackets. We therefore seem to have Judge Goldberg saying "the fire must respond to all calls," which makes very little sense. But then, one realizes shrewdly that Judge Ginsburg is not adding the word "fighters," but changing "firemen" to "firefighters."

A few pages further on, faced with a politically incorrect usage by such an exalted figure as Supreme Court Justice Felix Frankfurter, the blue pencil hesitates. The result is that we find Justice Frankfurter quoted as saying: "There is a good deal of shallow talk that the judicial robe does not change the man [and today we would add, or woman] within it * * *"[24]

Perhaps it is the appeals court judge's deeply engrained respect for "Higher Authority"[25] that keeps Judge Ginsburg from simply dropping "[or woman]" straight into the text, without the patronizing apology for the benighted era in which Justice Frankfurter lived and which he wae evidently unable to transcend. (Further on in the passage, Judge Ginsburg does in fact drop in an unadorned "[or women]", when Frankfurter discussed how "men are loyal to the obligation with which they are entrusted."[26]

Only once in this article does Judge Ginsburg forgo an opportunity to correct a politically incorrect usage. This lapse of vigilance occurs when she quotes from Gilbert and Sullivan's opera Iolanthe; specifically, from Private Willis' observation that the brainlessness of most modern members of Parliament may be a good thing after all, because:

"* * * [the prospect of] a lot of dull MPs
In close proximity,
All thinking for themselves, is what
No man can bear with equanimity.[27]"

The judge's decision to withhold her legislative hand at this point is probably due less to reverence for fellow-lawyer W. S. Gilbert's text than to a commendable regard for scansion.

There are many possible views on the propriety of enforcing gender-neutral language. Our only point here is that it takes a high degree of partisan zeal to deny to a peer the right to choose his own words, and to insist instead that everyone's usage be made to conform to a given ideological imperative, however noble. A conservative jurist exhibiting similar zeal for his own cause would be subjected, both in the media and by the Senate Judiciary Committee, to a searching inquiry as to his judicial temperament.

CONCLUSION

Let us return to the passage by Justice Frankfurter, quoted by Judge Ginsburg in her Georgia Law Review article. It reads (without Judge Ginsburg's edits):

"There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted.[28]"

To the extent that Judge Ginsburg is here engaging in her well-tested practice of stating her own views through quotation of others, we take heart. Even the most activist of attorneys is capable of making the transition to the very different mindset of the judge, and Judge Ginsburg's own career is an example of the transition.

Nonetheless, it would be an abdication of a grave responsibility if Senators, especially those of the opposition party, fail to ask her questions about, inter alia:

What regulations of abortion, if any, would survive a consistent application of the test she outlined in her North Carolina Law Review article (note: she could answer this without committing herself to using that test as a Supreme Court Justice);

What the original intent behind the Fourteenth Amendment was, and how, if at all, this intent should influence constitutional judging today;

What the principles that undergird judicial restraint are, and how she has or has not lived up to those principles.

Far from a fire-breathing ideologue of the left, but a committed liberal nonetheless—that is our impression of Judge Ginsburg, based on her writings, and that is how we expect she will appear after questioning by the Judiciary Committee. The President who appointed her, and the Senators who will probably vote to confirm her, should receive both full credit and full blame for what they are presently rushing to do.

FOOTNOTES

[1] *Ginsburg Lament Roe's Lack of Restraint*, LEGAL TIMES, April 5, 1993, at 11.

[2] Ginsburg, *On Muteness, Confidence, and Collegiality: A Response to Professor Nagel*, 61 U. OF COLO. L.REV. 715, 718–719 (1990).

[3] Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 NORTH CAROLINA LAW REVIEW 375, 381 (1985).

[4] A majority of the present Court has already endorsed this view; *see* Planned Parenthood v. Casey, 11 S.Ct. 2791, 2809 (1992).

[5] Ginsburg, *supra* n.3, at 381, citing Freund, *Storms over the Supreme Court*, 69 A.B.A. J. 1474, 1480 (1983) (adapted from inaugural Harold Leventhal Lecture at Columbia Law School), and Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV.L.REV. 1, 53–59 (1977), at 58.

[6] *Casey*, *supra* n.4.

[7] Ginsburg, *supra* n.3, at 385 (citing *Harris v. McRae*, 448 U.S. at 357 [Stevens, J., dissenting]).

[8] Dronenburg v. Zech, 746 F.2d 1579 (1984) (order on appellant's suggestion for rehearing *en banc*).

[9] *See* Doe v. Commonwealth's Attorney, 425 U.S. 901, 96 S.Ct. 1489 (1976), *aff'g mem.* 403 F. Supp. 1199 (E.D. Va. 1975). Bowers v. Hardwick, 478 U.S. 186, 106 S.Ct. 2841 (1986), had not yet been decided at the time of the *Dronenburg* litigation.

[10] Ginsburg, *Interpretations of the Equal Protection Clause*, 9 HARV.J.L.&PUB.POL. 43 (1986). The Federalist Society is a nationwide organization of conservative and libertarian lawyers, law students, and law professors. Greatly to her credit, Judge Ginsburg has been a frequent participant in conferences sponsored by the Federalist Society and other conservative groups.

[11] Ginsburg, *Inviting Judicial Activism: a "Liberal" or "Conservative" Technique?*, 15 GEORGIA L.REV. 539 (1981).

[12] *Id.* at 542.

[13] *Id.* 553.

[14] *Id.* at 553–4, citing: Hearing before the Senate Committee on the Judiciary on the Nomination of Ruth Bader Ginsburg for United States Circuit Judge, Statement of Sandy MacDonald on behalf of United Families of America (June 4, 1980) (typescript copy).

[15] Id. Examples of overly-specific questions on the UFA list were questions on busing, parental consent for abortion, and rescission of ERA ratification. On the other hand, at least one UFA question cited by Judge Ginsburg—"What principles ought federal judges to follow in deciding social policy cases?"—can and should be answered fully by even the most scrupulous nominee.

[16] Id. at 554–5, citing Rehnquist, Act Well Your Part: Therein all Honor Lies, 7 PEPPERDINE LAW REVIEW 227, 229–30 (1980).

[17] How "Moderate" is Ruth Ginsburg?, HUMAN EVENTS, June 26, 1993, at 1.

[18] Id.

[19] Id. at 17.

[20] Ginsburg, supra n. 11.

[21] Id. at 542, citing McGowan, Congressmen in Court: The New Plaintiffs, id. at 241.

[22] Id. at 542.

[23] Id. at 547, citing Reynolds v. Allstate Insurance Co., 629 F.2d 1111, 1112 (5th Cir. 1980).

[24] Id. at 555, citing Public Utils. Comm'n v. Pollak, 343 U.S. 451, 466 (1952).

[25] See Dronenburg v. Zech, 746 F.2d. 1579, 1581, n. 1 (D.C. Cir., denial of request for rehearing en banc, 1984) (Ginsburg, J., concurring).

[26] Supra n. 15.

[27] Id. at 557 (cited in prose, beneath indented passage). See GILBERT & SULLIVAN, IOLANTHE, Act II (1882) (Aria: "When All Night Long").

[28] Supra n. 15.

SENATE—*Tuesday, August 3, 1993*

(Legislative day of Wednesday, June 30, 1993)

The Senate met at 9:40 a.m., on the expiration of the recess, and was called to order by the Honorable BARBARA BOXER, a Senator from the State of California.

PRAYER

The Chaplain, the Reverend Richard C. Halverson, D.D., offered the following prayer:

Let us pray:

He answered and said unto them, "When it is evening, ye say, It will be fair weather: for the sky is red. And in the morning, It will be foul weather to-day: for the sky is red and lowering. O ye hypocrites, ye can discern the face of the sky; but can ye not discern the signs of the times?" —Matthew 16:2, 3.

Eternal God, our hearts are overwhelmed with the desolation the flood have brought, and continues to bring, in the Midwest. In our helplessness, we pray for the people who have been devastated, for the many who have lost loved ones, who have lost homes and lands and businesses, for the frustration many feel as they work hard to fight the flood and are still overwhelmed by it. We who have been spared this tragedy feel guilty that we have not suffered.

Mighty God, are You trying to say something to us? Are these signs, reminding us of judgment? Are these a warning that we must get our house in order, nationally?

Gracious God, we pray for a visitation upon us as a people, that we may turn to Thee in our hour of desperation.

In Jesus' name. Amen.

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore [Mr. BYRD].

The legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, DC, August 3, 1993.

To the Senate:

Under the provisions of rule I, section 3, of the Standing Rules of the Senate, I hereby appoint the Honorable BARBARA BOXER, a Senator from the State of California, to perform the duties of the Chair.

ROBERT C. BYRD,
President pro tempore.

Mrs. BOXER thereupon assumed the chair as Acting President pro tempore.

RECOGNITION OF THE MAJORITY LEADER

The ACTING PRESIDENT pro tempore. The majority leader is recognized.

VOTES ON S. 919 AND GINSBURG NOMINATION

Mr. MITCHELL. Madam President, the Senate will now proceed to the national service bill with a vote on final passage of that bill to occur at 10 a.m. this morning. Immediately following that, there will be a vote on the nomination of Judge Ginsburg to the Supreme Court. I wish to repeat my request to Senators that in accordance with past practice and tradition, Senators take their seats and remain at their desks during the vote on the Ginsburg nomination.

Madam President, I would like to just make a brief comment on that nomination now, and then I will discuss the schedule for the remainder of the week.

NOMINATION OF RUTH BADER GINSBURG

Mr. MITCHELL. The vote by which the Senate will this morning confirm the nomination of Judge Ruth Bader Ginsburg as an Associate Justice of the United States Supreme Court will reflect the very high level of admiration and respect she has earned in this body.

Judge Ginsburg's appearance before the Senate Judiciary Committee last month confirmed for all of us that her reputation as a brilliant legal scholar committed to the fundamental constitutional freedoms is well deserved.

Judge Ginsburg revealed at the hearings what her career has previously demonstrated, a complete and secure grasp of the law and of the role of the judiciary in a representative democracy like ours.

With the vote this morning, Judge Ginsburg will be ready to be sworn in and take her seat as Justice Ginsburg when the Supreme Court's fall term begins in October. It will be a pleasure to congratulate her and to look forward to her tenure on the Court.

SCHEDULE

Mr. MITCHELL. Madam President, the Senate is scheduled to commence the August recess by the close of business on Friday. If we are to make that schedule, there will have to be cooperation and many votes and much consideration of various measures by the Senate during this week. And so I will be meeting with the distinguished Republican leader, with Senator KENNEDY, Senator NUNN, and others involving legislation we are trying to take up and consider.

But I merely want to alert and caution Senators to the fact that there will be votes at any time throughout the day, evening, perhaps into the night during this week. Senators should be prepared for lengthy sessions. No requests for periods of time in which votes do not occur will be entertained or considered. Senators must be prepared to be here within 20 minutes to cast votes when necessary.

With respect to the votes this morning, the last two votes will be 10 minutes each. There will be four votes in succession. The first two will be under the usual time procedures. The last two votes will be for 10 minutes each. So I encourage my colleagues to cooperate, to be present, not to make requests for no votes for this evening or for that morning or for that afternoon. This is the final week, and if we are to complete our action and begin the recess, it will be necessary to have cooperation.

Of course, as I have said many times, the principal action we will take is on the reconciliation bill. I expect that to be enacted later this week. If for any reason it is not, there will be no recess. I have said this publicly on many occasions, and I wish to repeat it now so there cannot possibly be any misunderstanding whatsoever on the part of any Senator.

If for any reason I do not expect this to occur, but if for any reason reconciliation does not pass, the recess is automatically canceled and the Senate will remain in session throughout the month of August. But I hope and expect that that will not occur and we will be able to complete that and other measures during the week.

Madam President, I thank my colleagues for their patience and cooperation, and I now yield the floor.

RESERVATION OF LEADERSHIP TIME

The ACTING PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

NATIONAL AND COMMUNITY SERVICE TRUST ACT OF 1993

The ACTING PRESIDENT pro tempore. Under the previous order, the