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of Justice Ruth Bader Ginsburg:
Answering Questions
While Maintaining Judicial Impartiality**

**By Kristina Silja Bennard
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The Confirmation Hearings of Justice Ruth Bader Ginsburg: Answering Questions While Maintaining Judicial Impartiality

Kristina Silja Bennard*

In light of the upcoming confirmation hearings on the President’s nominee for the position of Associate Justice of the U.S. Supreme Court, it is instructive to look to prior confirmation hearings of recent vintage for guidance on the proper scope of questions directed to a judicial nominee – and on the appropriateness of nominees answering particular questions.¹ While senators fulfill their constitutional obligation under Article II, Section 2 of the Constitution to provide “advice and consent” to the President by asking judicial nominees penetrating questions and expecting straightforward answers, there is a consensus that certain areas of inquiry should be off limits. The Code of Conduct for United States Judges mandates that a judge retain his or her impartiality – and the appearance of impartiality – at all times. Accordingly, a judicial nominee should not make any commitments or offer forecasts as to how he or she would decide a case involving an issue that is likely to come before the Court. By the same token, however, recent practice clearly shows that the Code of Conduct is not an all-encompassing shield that a nominee may invoke to deflect questions that deserve thoughtful answers; a nominee may not properly rely on the Code to avoid questions that concern judicial philosophy or that simply touch on controversial issues.

The confirmation hearings for Justice Ruth Bader Ginsburg in 1993 provide a good example of how a judicial nominee appropriately balances her obligation of impartiality with the need to shed light on her fundamental views. During the course of her hearings, senators from both parties thought it appropriate to ask probing questions meant to further their understanding of the nominee’s judicial philosophy and methodology. These questions addressed then-current – and controversial – legal issues, Justice Ginsburg’s philosophy of judging, the role of federal courts, and even a range of substantive areas of the law to which she’d had little exposure.

As Senator Biden (D-Del.), then-Chairman of the Senate Judiciary Committee, told Justice Ginsburg at her hearings: “Once confirmed as a Justice, you generally will

* Kristina Silja Bennard is an associate in the Washington, D.C. office of Mayer, Brown, Rowe & Maw LLP. Any views expressed herein are her own – not those of her employer. Daniel J. Englander, a paralegal at Mayer Brown, provided valuable assistance in preparing this article.

¹ The nature of confirmation hearings has changed over the years. In the first half of the twentieth century, Supreme Court nominees often did not testify before the Senate. But appearances by nominees have been routine for the last 50 years, beginning with testimony in 1955 by John Marshall Harlan, and questioning has become progressively more probing as the Court has assumed a more prominent and controversial place in the national government. As articulated by the late Senator Strom Thurmond (R-S.C.) almost 40 years ago, “the Supreme Court has assumed such a powerful role as a policymaker in the Government that the Senate must necessarily be concerned with the views of the prospective Justices or Chief Justices as they relate to broad issues confronting the American people, and the role of the Court in dealing with those issues.” *Nominations of Abe Fortas and Homer Thornberry to be a Chief Justice and an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 90th Cong., 2d Sess. 180 (1968).*

not appear before the public to answer questions or to discuss your judicial philosophy, and this hearing provides the only opportunity for a public forum to hear the individuals who will make our critical constitutional decisions.”² Democratic members of the Judiciary Committee accordingly did not expect less candor from Justice Ginsburg than they did of previous judicial nominees of Republican Presidents. In fact, after the first round of questioning, Senator Biden opened the day’s hearings by remarking that Justice Ginsburg on some occasions had, “at least from my perspective, appeared to be reticent to answer some of our questions.”³ He indicated that this “concerns me, and I believe the forum offered by these hearings, I think, is very important.”⁴ While Senator Biden acknowledged the forthright answers Justice Ginsburg had given so far, he advised that he would “return to several subjects” including equal protection, freedom of speech, and constitutional methodology “to see if we can engage just a little bit more.”⁵

This article looks to the Ginsburg hearings to identify examples of the kinds of questions that a nominee – regardless of his or her political stripes – rightly should be expected to answer. These illustrations show that senators asked penetrating questions on a variety of issues, both fact-based and theoretical, and that Justice Ginsburg answered substantively and with specificity.⁶ In fact, senators from *both* parties praised Justice Ginsburg for her forthrightness in responding to their questions.⁷

I. Justice Ginsburg Answered Questions Relating To Current And Controversial Legal Issues With Candor.

While judicial nominees should not (and Justice Ginsburg did not) express views on unresolved legal issues that might come before the Court, that does not mean that inquiries into controversial issues are precluded. Justice Ginsburg provided frank answers to questions relating to a broad range of current and controversial legal issues without sacrificing her impartiality or independence. These answers provided significant insight into her fundamental constitutional values.

² *Nomination of Ruth Bader Ginsburg to be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103rd Cong., 1st Sess. 258 (1993) (hereinafter “Ginsburg Hearings”).

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 259.

⁶ This is not to say that there were no questions that Justice Ginsburg declined to answer. For example, Justice Ginsburg did not answer a question regarding the constitutionality of school voucher systems because the Court was likely to face the issue in the future. Ginsburg Hearings, at 140-141. Indeed, Justice Ginsburg was correct – the issue did come before the Court in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). She also declined to answer questions regarding the status of sexual orientation under the Equal Protection Clause for the same reason (Ginsburg Hearings, at 146, 322-323, 341, 359), which was the central question three years later in *Romer v. Evans*, 517 U.S. 620 (1996).

⁷ *E.g.*, Ginsburg Hearings, at 264 (Senator Hatch: “[y]ou were very forthright in talking about [abortion]”), 363 (Senator Hatch: “you have been asked a wide variety of questions by both sides of the aisle, you have answered an awful lot of questions here, and I have great respect for your legal acumen”), 367 (Senator Biden: “I concur with the assessment of my friend from Utah [Senator Hatch]. You have been an extremely good witness.”).

Substantive Due Process Rights/Fundamental Rights. Perhaps one of the most contentious sources of debate in the realm of constitutional adjudication concerns the fundamental rights that often are addressed under the rubric of the right to privacy or autonomy. Senators of both parties asked Justice Ginsburg extensive questions as to the source and creation of such rights.

Senator Hatch [R-Utah]: [H]ow do you distinguish as a matter of principle between the substantive due process right of privacy that the Supreme Court has developed in recent decades from the rights the Supreme Court developed on its own accord in *Dred Scott v. Sanford* and the *Lochner v. New York* case?

Judge Ginsburg: I don't think, Senator Hatch, that it is a recent development. I think it started decades ago. * * * It started in the 19th century. The Court then said no right is held more sacred or is more carefully guarded by the common law. It grew from our tradition, and the right of every individual to the control of his person. The line of decisions continued through *Skinner v. Oklahoma* (1942), which recognized the right to have offspring as a basic human right.

I have said to this committee that the finest expression of that idea of individual autonomy and personhood, and of the obligation of the State to leave people alone to make basic decisions about their personal life [is] Justice Harlan's dissenting opinion in *Poe v. Ullman* (1961). * * *

Senator Hatch: [B]ut in my view it is impossible, as a matter of principle, to distinguish *Dred Scott v. Sanford* and the *Lochner* cases from the Court's substantive due process/privacy cases like *Roe v. Wade*. The methodology is the same; the difference is only in the results, which hinge on the personal subjective values of the judge deciding the case.

Judge Ginsburg: In one case the Court was affirming the right of one man to hold another man in bondage. In the other line of cases, the Court is affirming the right of the individual to be free. So I do see a sharp distinction between the two lines.⁸

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Senator Leahy [D-Vt.]: Senator Metzenbaum had asked you whether the right to choose is a fundamental right. Is there a constitutional right to privacy?

⁸ *Id.* at 270-271. See also *id.* at 282 (responding to Chairman Biden's question as to how to determine whether a right to privacy exists under the 14th amendment).

Judge Ginsburg: There is a constitutional right to privacy composed of at least two distinguishable parts. One is the privacy expressed most vividly in the fourth amendment: The Government shall not break into my home or my office without a warrant, based on probable cause; the Government shall leave me alone.

The other is the notion of personal autonomy. The Government shall not make my decisions for me. I shall make, as an individual, uncontrolled by my Government, basic decisions that affect my life's course. Yes, I think that what has been placed under the label privacy is a constitutional right that has those two elements, the right to be let alone and the right to make decisions about one's life course.

Senator Leahy: And absent a very compelling reason, the Government cannot interfere with that right? * * *

Judge Ginsburg: The Government must have a good reason, if it is going to intrude on one's privacy or autonomy. The fourth amendment expresses it well with respect to the privacy of one's home. The Government should respect the autonomy of the individual, unless there is reason tied to the community's health or safety. We live in communities and I must respect the health and well-being of others. So if I am going to accord that respect on my own, the Government appropriately requires me to recognize that I live in a community with others and can't push my own decision-making to the point where it would intrude on the autonomy of others.⁹

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Chairman Biden [D-Del.]: [D]o you agree that the right of privacy is fundamental, meaning that it is so important – I am not asking about any specific right of privacy – meaning that it is so important, that the Government may interfere with it only for compelling reasons, when it finds such a right exists, the right of privacy?

Judge Ginsburg: The line of cases you just outlined, the right to marry, the right to procreate or not, the right to raise one's children, the degree of justification the State must have to interfere with those rights is large.¹⁰

⁹ *Id.* at 185.

¹⁰ *Id.* at 278.

Abortion. The issue of abortion has been at the forefront of debate since 1973, when the Court handed down *Roe v. Wade*. As the following examples demonstrate, Justice Ginsburg did not shy away from expressing her views on existing case law and a woman’s right to make decisions relating to procreation.

Senator Feinstein [D-Calif.]: My question is: Did the Court in *Casey* explicitly erode the protections previously afforded women under *Thornburgh v. American College of Obstetricians*?

Judge Ginsburg: I have two responses. One is, as I said before, that heightened scrutiny for sex classifications remains an open question. Justice O’Connor made that clear in the *Mississippi University for Women* (1982) case. Sex as a suspect classification remains open. It wasn’t necessary for the Court to go that far in that case. The Court struck down the gender-based classification. So it is not settled that sex classifications will be subject to a lower degree of scrutiny than limitations on fundamental rights. It is just that the Court has left the question open, and it may some day say more.

If you are inquiring about the specific rulings in *Thornburgh* (1986) as against the rulings in *Casey* (1992), yes, I think there are respects in which *Casey* is in tension with *Thornburgh*. Restrictions rejected in *Thornburgh* were accepted in *Casey*. So I must say yes, the two decisions are in tension, and I expect that the tension is going to be resolved sooner or later. Similar issues are likely to come before the Court again, so I can’t say more than yes, the two decisions are in tension; that is where we are at the moment.¹¹

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Senator Metzenbaum [D-Ohio]: After the *Casey* decision, some have questioned whether the right to choose is still a fundamental constitutional right. In your view, does the *Casey* decision stand for the proposition that the right to choose is a fundamental constitutional right?

Judge Ginsburg: The Court itself has said after *Casey* (1992) – I don’t want to misrepresent the Supreme Court, so I will read its own words. This is the statement of a majority of the Supreme Court, including the dissenters in *Casey*: “The right to abortion is one element of a more general right of privacy . . . or of the Fourteenth Amendment liberty.” That is the Court’s most recent statement. It includes a citation to *Roe v. Wade*. The Court

¹¹ *Id.* at 243-244.

has once again said that abortion is part of the concept of privacy or liberty under the 14th amendment.

What regulations will be permitted is certainly a matter likely to be before the Court. Answers depend, in part, Senator, on the kind of record presented to the Court. It would not be appropriate for me to go beyond the Court's recent reaffirmation that abortion is a woman's right guaranteed by the 14th amendment; it is part of the liberty guaranteed by the 14th amendment.

Perhaps I can say one more thing. It concerns an adjustment we have seen moving from *Roe* to *Casey*. That *Roe* decision is a highly medically oriented decision, not just in the three-trimester division. *Roe* features, along with the right of the woman, the right of the doctor to freely exercise his profession. The woman appears together with her consulting physician, and the pairing comes up two or three times in the opinion, the woman, together with her consulting physician.

The *Casey* decision, at least the opinion of three of the Justices in that case, makes it very clear that the woman is central to this. She is now standing alone. This is her right. It is not her right in combination with her consulting physician. The cases essentially pose the question: Who decides; is it the State or the individual? In *Roe*, the answer comes out: the individual, in consultation with her physician. We see in the physician something of a big brother figure next to the woman. The most recent decision, whatever else might be said about it, acknowledges that the woman decides.¹²

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Judge Ginsburg: [Y]ou asked me about my thinking on equal protection versus individual autonomy. My answer is that both are implicated. The decision whether or not to bear a child is central to a woman's life, to her well-being and dignity. It is a decision she must make for herself. When Government controls that decision for her, she is being treated as less than a fully adult human responsible for her own choices.

Senator Brown [R-Colo.]: With regard to the equal protection argument, though, since this may well confer a right to choose on the woman, or could, would it also follow that the father

¹² *Id.* at 149-150.

would be entitled to a right to choose in this regard or some rights in this regard?

Judge Ginsburg: That was an issue left open in *Roe v. Wade* (1973). But if I recall correctly, it was put to rest in *Casey* (1992). In that recent decision, the Court dealt with a series of regulations. It upheld most of them, but it struck down one requiring notice to the husband. * * * The *Casey* majority understood that marriage and family life is not always all we might wish them to be. There are women whose physical safety, even their lives, would be endangered, if the law required them to notify their partner. And *Casey*, which in other respects has been greeted in some quarters with great distress, answered a significant question, one left open in *Roe*; *Casey* held a State could not require notification to the husband.

Senator Brown: I was concerned that if the equal protection argument were relied on to ensure a right to choose, that looking for a sex-blind standard in this regard might also then convey rights in the father to this decision. Do you see that as following logically from the rights that can be conferred on the mother?

Judge Ginsburg: I will rest my answer on the *Casey* decision, which recognizes that it is her body, her life, and men, to that extent, are not similarly situated. They don't bear the child.

Senator Brown: So the rights are not equal in this regard, because the interests are not equal?

Judge Ginsburg: It is essential to the woman's equality with man that she be the decisionmaker, that her choice be controlling. If you impose restraints that impede her choice, you are disadvantaging her because of her sex.¹³

Free Speech. Members of the Judiciary Committee also asked Justice Ginsburg many questions about speech rights protected by the first amendment, particularly with respect to government speech and the distinction between speech and conduct.

Senator Simpson [R-Wyo.]: What is the reasoning you might use in considering a case involving a constitutional right to Federal funding of the arts or something else that might be highly controversial of a similar nature?

¹³ *Id.* at 207.

Judge Ginsburg: Senator Simpson, the initial concern of the first amendment is with the Government as censor. I don't think the first amendment says that the Government can't choose Shakespeare over modern theater, David Mamet, for example in deciding what programs it wants to support, say for public performances. It can't shut down speech, but it can purchase according to its preference, within limits.

So although the first amendment keeps the Government from squelching speech on the basis of its content, I don't think anyone has taken the first amendment or the equal protection principle to the length of saying Government must fund equally anything that anyone considers art. I think the Government as a consumer doesn't have to buy all art equally.¹⁴

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Senator Hatch: Let's assume that the Government decides that not smoking is better than smoking and that it subsidizes an antismoking campaign through a grant program. May the Government give grants only to those who adhere to the antismoking campaign or viewpoint, or does the Constitution compel the Government to also subsidize prosmoking campaigns by cigarette manufacturers?

Judge Ginsburg: I may get myself into difficulty with the Senators from tobacco States, and I am a reformed sinner in that respect myself. But this is a question of safety and health. I think the Government can fund antismoking campaigns and is not required equally to fund people who want to put their health and the health of others at risk. So my answer to that question is "yes," the Government can fund stop smoking campaigns and it doesn't have to fund smoking is intoxicating and fun campaigns. Yes, the Government can fund programs for the safety and health of the community.¹⁵

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Regarding then-Judge Ginsburg's dissent in a case involving protestors' First Amendment rights to sleep in a public park as part of their protest, she had the following exchange:

Senator Cohen [R-Me.]: The question I have is whether you would give first amendment protection to any noncommunicative component of the mix in a case that involves a

¹⁴ *Id.* at 160. See also *id.* at 184-185 (following up on issue in response to Sen. Leahy's questioning).

¹⁵ *Id.* at 268.

facilitation of expression. In other words, is that a test that we can apply in future cases that involve conduct that is in some way related to speech that would be protected, or is this the same situation where you are going to say don't take my words beyond the individual case?

Judge Ginsburg: The facilitative aspect of it is not entitled to the same protection as the expressive aspect of it. My comment in relation to my colleague's opinion is that one cannot draw a line between words and expression as he did, and say neatly, when you speak, that is speech, and otherwise it is conduct. I gave, as an example, this illustration: It is said that during World War II the King of Denmark stepped out on the street in Copenhagen wearing a yellow armband. If so, that gesture expressed the idea more forcefully than words could.¹⁶

II. Justice Ginsburg Answered Questions Probing Her Philosophy On Judging, Including Stare Decisis And Approaches To Constitutional And Statutory Interpretation.

How a nominee approaches the task of judging – particularly his or her views on stare decisis and constitutional and statutory interpretation – is of key import. Justice Ginsburg demonstrated during her hearings that a nominee may respond to such questions in detail without running afoul of his or her obligation of impartiality.

Constitutional and Statutory Interpretation.

Senator Hatch: I would like to ask you whether you agree with the following statements about the role of a judge, including a Supreme Court Justice. The first statement is this: The judge's authority derives entirely from the fact that he or she is applying the law, not his or her personal values. Do you agree or disagree with that?

Judge Ginsburg: No judge is appointed to apply his or her personal values, but a judge will apply the values that come from the Constitution, its history, its structure, the history of our country, the traditions of our people.

Senator Hatch: I agree. Then you agree with that basic statement then, you shouldn't be applying your own personal values?

Judge Ginsburg: I made a statement quoting Holmes to that effect in my opening remarks.

¹⁶ *Id.* at 226.

Senator Hatch: You did. What about this statement: The only legitimate way for a judge to go about defining the law is by attempting to discern what those who made the law intended.

Judge Ginsburg: I think all people could agree with that. But as I tried to say in response to the chairman's question, trying to divine what the Framers intended, I must look at that matter two ways. One is what they might have intended immediately for their day, and the other is their larger expectation that the Constitution would govern, as Cardozo said, not for the passing hour, but for the expanding future. And I know no better illustration of that than to take the words of the great man who wrote the Declaration of Independence. Thomas Jefferson said: "Were our state a pure democracy, there would still be excluded from our deliberations women who, to prevent depravation of morals and ambiguity of issues, should not mix promiscuously in gatherings of men." Nonetheless, I do believe that Thomas Jefferson, were he alive today, would say that women are equal citizens. * * * So I see an immediate intent about how an ideal is going to be recognized at a given time and place, but also a larger aspiration as our society improves. I think the Framers were intending to create a more perfect union that would become ever more perfect with time.

Senator Hatch: I think that is a good way of putting it.¹⁷

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Senator Hatch: If a judge abandons the intention of the lawmakers as his or her guide, there is no law available to the judge and the judge begins to legislate a social agenda for the American people. That goes well beyond his or her legitimate power.

Judge Ginsburg: The judge has a law – whether it is a statute that Congress passed or our highest law, the Constitution – to construe, to interpret, and must try to be faithful to the provision. But it is no secret that some of these provisions are not self-defining. Some of the laws that you write are not self-defining. There is nothing a judge would like better than to be able to look at a text and say this text is clear and certain. * * * But often that is not the case, and then a judge must do more than just read the specific words. The judge will read on to see what else is in the law and read back to see what was there earlier. The judge will

¹⁷ *Id.* at 127.

look at precedent, to see how the words in this provision or in similar provisions have been construed. The effort is always to relate to the intent of the lawgiver or the lawmaker, but sometimes that intent is obscure.

Senator Hatch: I like your statement that the judge has an obligation to be faithful to the provisions of the law, and you have explained that I think very well.¹⁸

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Later in the hearing, in response to a question regarding the use of legislative history in interpreting statutes, Justice Ginsburg testified that

very often, my colleagues will look at a text, and one reasonable mind will say it means *x* while another reasonable mind will say it means *y*. We must then look someplace else.

In such cases, I turn to the legislative history. I do so with an attitude I can best describe as hopeful skepticism. Hopeful because I really hope I will find something genuinely helpful there and that everything will be on line, the committee report and any other statements made.¹⁹

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Senator Pressler [R-S.D.]: I guess the most commonly asked question by attorneys in my State is – and you have addressed this to some extent, but to boil it down – does the nominee wish to interpret the Constitution as a static document, or does she wish the Court to initiate creative changes or creative new approaches?

Judge Ginsburg: I have said that I associate myself with Justice Cardozo, who said our Constitution was made not for the passing hour but for the expanding future. I believe that is what the Founding Fathers intended.²⁰

Stare Decisis.

Senator Heflin [D-Ala.]: Let me ask you about stare decisis. * * * Two terms ago, the Court reversed a 5-year-old

¹⁸ *Id.* at 127-128.

¹⁹ *Id.* at 224.

²⁰ *Id.* at 239.

precedent in *Payne v. Tennessee*, and in its opinion, the majority reasoned that stare decisis is less vital in cases that don't involve property or contract rights because litigants have not built up reliance on the current state of the law.

In your judgment, is this a sound theory of stare decisis? Would you prefer some other version such as the test that may have been hinted at in [*United States*] v. *Dixon*, which would inquire into the soundness of the reasoning in a prior opinion without regard to the substantive area of the law?

Judge Ginsburg: The soundness of the reasoning is certainly a consideration. But we shouldn't abandon a precedent just because we think a different solution more rational. Justice Brandeis said some things are better settled than settled right, especially when the legislature sits. So if a precedent settles the construction of a statute, stare decisis means more than attachment to the soundness of the reasoning. Reliance interests are important; the stability, certainty, predictability of the law is important. If people know what the law is, they can make their decisions, set their course in accordance with that law. So the importance of letting the matter stay decided means judges should not discard precedent simply because they later conclude it would have been better to have decided the case the other way. That is not enough.

If it is a decision that concerns the Constitution, * * * then the Court knows the legislature, in many cases, can't come to the rescue. If the judges got it wrong, it may be that they must provide the correction. But even in constitutional adjudication, stare decisis is one of the restraints against a judge infusing his or her own values into the interpretation of the Constitution.²¹

Philosophy of Judging.

Senator Grassley [R-Iowa]: Should [judges] be drafting political compromises?

Judge Ginsburg: A judge is not a politician. A judge rules in accord with what the judge determines to be right. That means in the context of the particular case, based on the arguments the parties present, in accord with the applicable law and precedent. A judge must do that no matter what the home crowd wants, no matter how unpopular that decision is likely to be. If it is legally right, it is the decision that the judge should render.

²¹ *Id.* at 196-197.

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Senator Heflin: Would you tell us how you feel or what are the parameters that you feel should be followed relative to trying to reach a consensus as opposed to a feeling that you should dissent or you should disagree, even in concurring opinions? * * *

Judge Ginsburg: This is an area where style and substance tend to meet. It helps in building collegiality if you don't take zealous positions, if you don't write in a[n] overwrought way, if you state your position logically and without undue passion for whatever is the position you are developing.²² * * * Willingness to entertain the position of the other person, readiness to rethink one's own views, are important attitudes on a collegial court. If your colleagues, who are intelligent people and deserve respect, have a different view, perhaps you should then pause and rethink, Am I right? Is there a way that we can come together? Is this a case where it really doesn't matter so much which way the law goes as long as it is clear?

And I also said what a judge should take account of is not the weather of the day, but the climate of an era. The climate of the age, yes, but not the weather of the day, not what the newspaper is reporting.²³

III. Justice Ginsburg Answered Questions Regarding Her Personal Reactions And Views On Contentious Issues.

While judges are expected to remain impartial, that does not mean that they do not have personal reactions and views on debated issues. Along those lines, Justice Ginsburg candidly offered a window into her thinking on affirmative action and women's rights, and on how her judicial approach was shaped by her personal background:

Judge Ginsburg: Senator Hatch, we have many employment discrimination cases in the court. They come to us with a large record of facts developed in the trial court, and they come also with lengthy briefs on both sides * * * . So I am always suspicious, on guard, when given a one, two, three series in a hypothetical * * * . But I can say this. I was thinking in relation to your question, about a particular case, one that, in fact, went to the Supreme Court. It was a Santa Clara (California) Highway Department case that involved an affirmative action program.

Senator Hatch: That was the *Johnson* (1987) case.

²² *Id.* at 200-201.

²³ *Id.* at 303.

Judge Ginsburg: Right. Paul Johnson was the plaintiff and he complained that Diane Joyce had gotten a job he should have gotten, and it was the result of an affirmative action plan. That was a case that was much discussed.

I will tell you a nonlegal reaction I had to it. The case involved a department that had 238 positions, and not one before Diane Joyce was ever held by a woman. After an initial screening, 12 people qualified for the job. That number was further reduced until there were 7 considered well qualified for the job. Then the final selection was made.

On the point score, Paul Johnson came out slightly higher than Diane Joyce, but a big part of the composite score was determined by a subjective test, an interview, if I recall correctly, and they were scored on the basis of the interview.

I thought back to the days when I was in law school. I did fine on the pen and paper tests. I had good grades. And then I had interviews. I didn't score as high as the men on the interviews. I was screened out on the basis of the interview.

So I wonder whether the kind of program that was involved in the *Johnson* (1987) case was no preference at all, but a safeguard, a check against unconscious bias, bias that may even have been conscious way back in the fifties. In a department that has 238 positions and none of them are filled by women, perhaps the slight plus – one must always recognize that there is another interest at stake in the cases, Paul Johnson's – checks against the prospect that the employer was in fact engaged unconsciously in denying full and equal opportunity to women.

These are very difficult cases and each one has to be studied in its own particular context. But in that case, at least, I related back to my own experience. Whenever a subjective test is involved, there is that concern. If you are a member of the group that has up until now been left out, you wonder whether the person conducting the interview finds you unfamiliar, finds himself slightly uncomfortable, thinking about you being part of a workplace that up until then has been, say, all-white or all-male.²⁴

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²⁴ *Id.* at 130-131.

Senator Simon [D-Ill.]: Do you have a philosophical disagreement with the idea of [minority] set-asides?

Judge Ginsburg: I tried to express my view yesterday that, in many of these cases, there really is underlying discrimination. But it's not so easy to prove. Sometimes it would be better for society if we didn't push people to the wall and make them say, yes, I was a discriminator. The kind of settlement reflected in many affirmative action plans seems a better, healthier course for society than one that turns every case into a fierce, adversary contest that becomes costly and bitter.

In many of these plans, there is a suspicion that underlying discrimination existed on the part of the employer and, sometimes, on the part of the unions involved. But, in place of a knock-down-drag-out fight, it might be better to pursue voluntary action * * *. Members of the once preferred class understandably ask, "why me," why should I be the one made to pay? I didn't engage in past discrimination. That's why these cases must be approached with understanding and with care.²⁵

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Senator Specter (R-Pa.) asked Justice Ginsburg to explain an earlier writing on gender equality and her remarks from a Second Circuit judicial conference on the equal rights amendment in which she asserted that "[t]he Supreme Court, by dynamic interpretation of the equal protection principle, could have done everything we asked today." She responded:

Judge Ginsburg: The position was that, yes, it took bold and dynamic interpretation in view of what the framers of the 14th amendment intended. The framers of the 14th amendment meant no change, they intended no change at all in the status of women before the law. But in 1920, when women achieved the vote, they became full citizens, and you have to read the Constitution as a whole, changed, as Thurgood Marshall said, over the years by amendment and by judicial construction. So it was certainly a bold change from the middle of the 19th century until the 1970's when women's equal citizenship was recognized before the law.

I remain an advocate of the Equal Rights Amendment for this reason. I have a daughter and a granddaughter. I know what the history was. I would like the legislators of this country and all of the States to stand up and say we know what the history was in the 19th century; we want to make a clarion announcement that

²⁵ *Id.* at 218.

women and men are equal before the law, just as every modern human rights document in the world does, at least since 1970. I would like to see that statement made just that way in the U.S. Constitution. But that women are equal citizens and have been ever since the 19th amendment was passed, I think that is the case. And that is what [my] article was about.²⁶

IV. Justice Ginsburg Expressed Her Personal Views On The Considerations That Went Into The Resolution Of Important Questions Of Criminal Law.

Justice Ginsburg did not shy away from expressing views that gave insight into how she would approach important questions of criminal law:

Senator Leahy: Now, you must have had discussions of this issue both in your own court and at judicial conferences. How do you feel about the mandatory penalties? Are they putting too much discretion over sentencing in the hands of prosecutors, and not in the hands of judges?

Judge Ginsburg: Senator Leahy, there was recently published a very intelligent comment by Judge Weinstein of the Eastern District of New York concerning mandatory sentences. He recommended appointment of a commission to do a careful study of how they are working out in practice.

The perception is very strong among many judges – I know this from conversations we have had at meetings of judges – that it is deceptive to think discretion has been removed. It has indeed been removed from the sentencing judges, because mandatory minimums don't give judges any choice. If there is an indictment for x amount of drug y and a conviction for that, then the sentence will be 10 years mandatory or 5 years mandatory, based solely on the character of the drug and the weight that the defendant was charged with distributing.

So the judges' sense is that the discretion has been transferred from them to the prosecutor, who can choose to indict for a lesser weight than the weight actually found at the time the defendant was arrested. There is much concern that these mandatory minimum sentences are transferring discretion from the judge to the prosecutor and that they may be deceptive in other respects, because the likelihood of apprehension – not the sentence length – may be the strongest deterrent. If someone is aware that the chance of being caught is very high and the sentence is sure,

²⁶ *Id.* at 188-190. See also *id.* at 165 (Judge Ginsburg: "I was an advocate of the equal rights amendment. I still am.").

even if it is shorter, that awareness probably would be the greatest deterrent you could have.²⁷

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Senator DeConcini [D-Ariz.]: You think it is a proper area for the Court to be involved in, certainly in the *Miranda* case, I suspect you do, but just in general of putting forth pragmatic rules?

Judge Ginsburg: In a situation like this, where the object is to ensure that a defendant knows about the right to counsel, knows that the defendant is not obliged to incriminate herself or himself, these are salutary rules that have safeguarded the constitutional right. Frankly, from my point of view, it makes the system run better because then one need not ask case-by-case: Did this defendant know that he had a right to counsel? Did he intelligently waive that right?

It avoids controversies. It is an assurance that people know their rights. It is an assurance that the law is going to be administered even-handedly, because, as I said, sophisticated defendants who have counsel ordinarily will know about their rights, so it is an assurance of the even-handed administration of justice.²⁸

V. Justice Ginsburg Answered Questions Regarding Many Areas Of The Law.

While no one expects a nominee to have extensive knowledge in all areas of the law, Justice Ginsburg did not use lack of expertise as a global excuse for avoiding questions in those areas.

Indian Law. In the face of extensive questioning in area with which Justice Ginsburg professed minimal familiarity,²⁹ she nevertheless fully engaged in a dialogue on the subject.

Senator Pressler: [D]o you take an expansive or restrictive view of tribal sovereignty?

Judge Ginsburg: I take whatever view Congress has instructed. Senator, Congress has full power over Indian affairs under the Constitution, and the Supreme Court has so confirmed, most recently in *Morton v. Mancari* (1974). Judges are bound to accord the tribes whatever sovereignty Congress has given them or left them and as a judge, I would be bound to apply whatever

²⁷ *Id.* at 315-16.

²⁸ *Id.* at 327.

²⁹ See *id.* at 332-33.

policy Congress has set in this very difficult area. Control is in the hands of Congress, and the courts are obliged to faithfully execute such laws as Congress has chosen to enact. * * *

Senator Pressler: What weight would you give to each of the following when deciding cases involving disputes with the Indian tribes in view of what the Constitution says? Treaties between the tribes and the Federal Government that have been written over the years. We have a trust relationship between the Federal Government and the federally recognized Indian tribes. And, finally, the power of Congress to legislate matters relating to Indians and Indian Tribes.

Judge Ginsburg: As far as treaties are concerned, Congress can abrogate treaties with Indian tribes, and to the extent Congress has not done so, the treaties would be binding on the Executive. And your next inquiry concerned?

Senator Pressler: There are treaties and there is the trust relationship. I believe the Secretary of the Interior is the trustee for the American Indians, and there is a special relationship between the Federal Government and federally recognized Indian tribes.

Judge Ginsburg: The Court made clear in the *Cherokee Nation* (1831) case that when Congress indicates in a treaty or a statute that the Government is to assume a trust relationship with a recognized tribe, the Court will then apply that policy. And with respect to the power of Congress to legislate, the Supreme Court has consistently recognized that Congress has full power over Indian affairs. So my answer is that this is peculiarly an area where the courts will do what Congress instructs, recognizing that these are very difficult questions for the legislature to confront and resolve.³⁰

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Antitrust. In a similar vein, Justice Ginsburg answered questions regarding antitrust to the best of her ability despite professing minimal expertise in the area:³¹

Senator Metzenbaum: Do you think that anticompetitive conduct can ever be justified on the basis that you have to have it in order to achieve business efficiency? I am really not asking you

³⁰ *Id.* at 233.

³¹ *Id.* at 291-292.

how you would vote on a case. I am just sort of asking you generally.

Judge Ginsburg: As you know, there is a key decision by Justice Brandeis, *Chicago Board of Trade*, which teaches that restraints of trade which are not per se illegal can be justified if their effects are more procompetitive than anticompetitive. And that is the analysis one would have to undertake.

You asked me if the only purpose of the antitrust law is efficiency. The cases indicate that the antitrust laws are focused on the interests of the consumer. There is also an interest in preserving the independence of entrepreneurs. I don't think the antitrust laws call into play only one particular theory. The Supreme Court made that clear in the *Kodak* (1992) case. But out of the context of a specific case, I can't say much more. No, I don't think efficiency is the sole drive.³²

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Of course, it is impossible for necessarily brief excerpts to provide a full account of the wide range of questions asked and answers given at a lengthy confirmation hearing. But the selections set out above are typical, and indicate that Justice Ginsburg commented candidly and at length on a variety of issues and subjects; she was willing to engage the Judiciary Committee on her personal and judicial views regarding controversial or undecided subjects, while avoiding statements that would undermine her impartiality or independence. Her exchanges with the senators were characterized by specific questions and substantive answers. This is an appropriate yardstick by which we should measure and conduct future judicial confirmation hearings.

³² *Id.* at 292. See also *id.* 150-152 (responding to Senator Metzenbaum's questions regarding two antitrust cases Judge Ginsburg heard while sitting on the D.C. Circuit).