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SCHUMER: 'THE MYTH OF THE GINSBURG PRECEDENT'

Schumer Says that the 'Ginsburg Precedent' is Neither Ginsburg nor Precedent – Sitting Justice Answered Many Questions, as Did Other Supreme Court Nominees

Senator Delivers Speech to the American Constitution Society Five Days before Roberts' Confirmation Hearing

U.S. Senator Charles E. Schumer delivered a speech to the American Constitution Society today to talk about the 'Myth of the Ginsburg Precedent.' Schumer, the ranking member of the Judiciary Subcommittee on the Courts, will be highlighting the many questions that Justice Ginsburg and other Supreme Court nominees have answered at past hearings.

The text of the prepared speech follows:

I want to thank the American Constitution Society for hosting this event.

The Senate is only five days away from the first Supreme Court confirmation hearing in 11 years.

Five days away from discharging one of the most solemn duties we have.

Five days away from gaining insight into the judicial views of someone who, if confirmed, will serve for a lifetime and will have the power to affect the life of every single American.

I continue to have an open mind about John Roberts and look forward to the hearings. I believe my fellow Democrats also have an open mind. To my knowledge, no one in the Senate Democratic Caucus has yet stated his or her opposition to Judge Roberts.

This is not a coy or political posture - we simply don't know who Judge Roberts is, judicially speaking.

And yet, while we approach the hearings with open minds, some are seeking to close the door on meaningful questioning that would help Senators and citizens alike learn something about a man who could have so much power over people's lives and livelihoods.

As we approach the hearings, rather than feel confident that we will hear candid answers to critical questions about judicial philosophy, I am concerned that the stage is being set for Judge Roberts to refuse to answer.

At the center of this coordinated stage-setting is a colossally misleading soundbite.

It is repeated like a mantra by the nominee's supporters, featured in new television advertisements, echoed by conservative talking heads, and even intoned by Judge Roberts himself.

It is the so-called "Ginsburg Precedent."

To judge by the self-serving descriptions of certain talking heads and right-wing interest groups, Ruth Bader Ginsburg sat mute at the hearing table, issued the occasional platitude, and refused to answer questions on any issue, while a panel of Senators sat there frustrated and in the dark about Judge Ginsburg's views on important legal and Constitutional questions.

They would have you believe that Judge Ginsburg - who testified for four days - categorically declined to answer any questions about an issue, policy, or decided case.

They would have you believe that Judge Ginsburg - who had written over 300 opinions over 13 years as a federal judge - kept her jurisprudence a secret from Senators and the public.

They would have you believe that Judge Ginsburg - who had authored scores of articles and speeches on substantive legal matters - remained a riddle wrapped inside an enigma at the conclusion of her hearing.

This "Ginsburg Precedent" is, plain and simple, propaganda. It is a ploy. It is a ruse.

The very term "Ginsburg Precedent" is an oxymoron. It is neither Ginsburg nor precedent. It is a myth.

What do I mean by that? First, when people invoke the "Ginsburg Precedent" to suggest that Judge Ginsburg was not forthcoming, they do not accurately reflect what happened at Justice Ginsburg's confirmation hearing in 1993.

Second, it is not precedent. When one thinks of precedent, one imagines a line of cases that judges have regularly followed. Here, there has been only one person to follow Justice Ginsburg - Stephen Breyer - and he answered many, many questions about specific cases, recurring issues, and policy matters.

My greatest worry is that the myth of the "Ginsburg Precedent" is simply a way to provide cover to a nominee because his supporters would prefer that he not discuss his legal views with any specificity.

Without any legal, ethical, or common sense basis for declining to answer standard questions about decided cases and Constitutional questions, these myth purveyors are hoping to rely on a false precedent to excuse Judge Roberts from answering questions that the majority of Americans want him to address.

If Judge Roberts repeatedly resorts to the so-called "Ginsburg Precedent," it will sound less like a principled refusal to answer and more like a variation on the Fifth Amendment:

> "I refuse to answer that question, on the ground that it may incriminate me. Answering may reveal my actual views about Constitutional law and cause me to lose votes."

The myth of the "Ginsburg Precedent" is best debunked by looking at the transcript of her hearing. Although there were places where she said she did not want to answer, she nevertheless gave lengthy and poignant answers to scores of questions about Constitutional law and decided cases.

She spoke about dozens of Supreme Court cases and often gave her unvarnished impressions, suggesting that some were problematic in their reasoning while others were eloquent in their vindication of important Constitutional principles.

Furthermore, she answered hypothetical questions about a variety of subjects and gave her personal views on a number of issues.

In fact, Senator Hatch - who has joined the chorus of people now invoking the so-called "Ginsburg Precedent" and who applauded Judge Roberts for doing so in 2003 - while pressing her to be more specific in answering a question about the death penalty, said:

> "[Y]ou were very specific in talking about abortion, equal rights, and a number of other issues." [Hearing, 263]

Senator Hatch's comment shows that not only did Ginsburg answer questions forthrightly, but that Senator Hatch - and many others - firmly believed that nominees ought to answer questions with specificity.

PRIVACY. Indeed, nominee Ginsburg answered candidly and at length questions about specific cases and issues involving personal autonomy and the right to privacy.

Senator Hatch, for example, asked Judge Ginsburg about the line of cases involving the right of privacy. She answered by making reference to a Supreme Court case:

> "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)."

Judge Ginsburg went on to talk about another decided case, in which Justice Powell wrote the majority opinion, *Moore v. City of East Cleveland* (1977), involving a grandmother who wanted to live with her grandson. She candidly recognized that the opinion "has difficulties" but that it was an eloquent expression of the right to be left alone.

Further, when pressed to distinguish the Supreme Court's line of privacy cases from the much-discredited decisions in *Dred Scott* and *Lochner*, she responded with characteristic eloquence and specificity:

> "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."

ABORTION. Judge Ginsburg spoke directly about another case - *Struck v. Secretary of Defense (1972)* - which involved a woman's decision to choose birth rather than abortion while serving in the military. In answering, she gave a clear answer stating where she stood on the issue of personal autonomy:

> "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." [Hearing, 206-07]

Most notably, when talking about *Roe v. Wade* itself, Judge Ginsburg did not retreat behind a platitude about settled law. She actually leveled some criticism at the scope of the case, though she agreed with the result:

> "My view is that if *Roe* had been less sweeping, people would have accepted it more readily, would have expressed themselves in the political arena in an enduring way on this question." [Hearing, 149]

In fact, the Judiciary Committee's report on the Ginsburg nomination concluded that "the committee knows far more about Judge Ginsburg's views on reproductive rights than it has known about any previous nominee's."

We hear very little about these answers about specific cases and issues when people spread the myth of the "Ginsburg Precedent."

CHURCH AND STATE. On the leading case setting forth the standard under which the Court reviews Government intrusion into religion - laid out in *Lemon v. Kurtzman* B Judge Ginsburg was asked by Senator Simon, "You have no difficulty with the *Lemon* test now?"

Judge Ginsburg responded, "I think that is an accurate description. It is also accurate to say I appreciate the United States is a country of many religions."

FREE SPEECH. Judge Ginsburg also answered pointed questions about speech and Government funding.

For example, she was pressed by Senator Hatch about a hypothetical - could the Government fund anti-smoking campaigns under the Constitution? Again, Judge Ginsburg answered forthrightly:

> "I may get myself into difficulty with the Senators from tobacco States, and I am a reformed sinner in that respect myself. . . . 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. . . ." [Hearing, 268]

RACIAL DISCRIMINATION. Judge Ginsburg also did not hesitate to explain her personal feelings about certain legal issues. For example, she spoke poignantly about how growing up during World War II in a Jewish family had made her "alert to discrimination." [Hearing, 139]

WOMEN'S RIGHTS. Judge Ginsburg candidly admitted that she still supported an Equal Rights Amendment to the Constitution. And she was forthright in saying that the Supreme Court in *Hoyt v. Florida* (1961) "wrongly decided the women's jury service issue."

CRIMINAL LAW. Judge Ginsburg also spoke in a straightforward way about her views on the *Miranda* warning, required for the first time in *Miranda v. Arizona*. In response to questions from Senator DeConcini, she gave her opinion on that still-controversial Supreme Court decision:

> "This practical approach, the *Miranda* warnings, has become familiar to all, thanks to television. I think it has worked. . . . [T]hese are salutary rules that have safeguarded the constitutional right. Frankly, from my point of view, it makes the system run better. . . ."

In addition, she expressed her suspicion about the wisdom of mandatory minimum sentences in criminal cases. [Hearing, 315-16]

So, the truth is that Judge Ginsburg -- while a nominee -- discussed, parsed, and commented on numerous cases.

In addition to the cases I've already mentioned, she also criticized *Korematsu* as a "tragic decision" [Hearing, 210] and stated that *Dred Scott* was "an entirely wrong decision when it was rendered." [Hearing, 270].

Meanwhile:

- She applauded *Marbury v. Madison* [Hearing, 289];

- Agreed that *Brandenburg v. Ohio* (1969) was one of "the great milestones in the Court's history" [Hearing, 313];

- Praised Justice Learned Hand's First Amendment decision in *Masses* (1917) [Hearing, 313];

- Said that, on the issue of overturning precedent, "I associate myself with what was said in *Casey* about settled expectations." [Hearing, 317]

- Testified that she had "no question about the authority of Congress to override the Supreme Court decision in *Duro v. Reina* (1990)," a case involving criminal jurisdiction over American Indians. [Hearing, 333].

The bottom line is that, as a nominee to the High Court, Judge Ginsburg talked about specific cases; she addressed hypotheticals; she discussed public policy; and she revealed her own views about issues like individual autonomy, discrimination, and gender equality.

Did she speak more about some issues than others? Of course. She spoke at greater length on issues with which she had greater familiarity.

Could she have been even more forthcoming in certain areas? Perhaps.

But it is a rank distortion for people to claim that she did not answer questions meaningfully. More importantly, it misses two vitally important distinctions.

1. Justice Ginsburg had spent 13 years on the D.C. Court of Appeals, written 305 opinions, and penned at least 65 substantive articles. These were enough to provide any Senator with patience and a pair of reading glass ample evidence of her legal thinking. Because she had a long record, it was somewhat less critical for her to answer every question.

In Judge Roberts' case, on the other hand, he has only spent two years on the bench and authored a small fraction as many opinions as Justice Ginsburg had at the time of her nomination.

2. And of course, Justice Ginsburg was a consensus nominee, whom President Clinton vetted with then Ranking Member Senator Orrin Hatch. Most Senators knew they were going to vote for her, and so the questioning was naturally a bit lighter and more forgiving.

That is why the first part of the so-called "Ginsburg Precedent" is misleading. It just doesn't accurately describe what Ginsburg said and what Senators knew about her.

The second part of the term is equally misleading - the "precedent" part.

As I said earlier, Judge Ginsburg's testimony does not constitute a binding case or a legal precedent. Moreover, the conservative ad campaign and talking heads completely and conveniently ignore three things.

They blithely ignore (1) the examples set by countless other nominees to the High Court; (2) an intervening Supreme Court precedent; and (3) Judge Roberts's own precedent.

First, and most astonishingly, they ignore the examples of other nominees to the High Court.

Last time I checked, Justice Ginsburg was not the only nominee ever to have come before the Senate Judiciary Committee for a confirmation hearing. What of these other precedents, conveniently overlooked?

To pick selected refusals from a single nominee and enshrine that into a stonewalling soundbite is the height of disingenuousness.

- What about the Breyer Precedent?
  - Nominee Stephen Breyer came before the Committee more recently than Justice Ginsburg, but we hear much less about the "Breyer Precedent." He was very forthcoming about all manner of issues and cases.
  - Senator Specter was so pleased by how forthcoming Stephen Breyer was at his confirmation hearing that he coined a phrase:

    "It has been my conclusion that nominees answer about as many questions as they think they have to. . . . We may have the 'Breyer rule' coming out of these proceedings, that more questions are being answered than a nominee would have to answer. . . . I think we may have the 'Breyer rule' coming out of this proceeding, which would be very good."

- What about the Thomas Precedent?
  - Judge Thomas, too, answered many questions about decided cases and specific issues. What about that precedent?
  - When asked whether he agreed with the decision in *Bolling v. Sharpe*, nominee Clarence Thomas told Senator DeConcini, "I have no quarrels" with it.
  - Senator Grassley also asked Judge Thomas if he "had any objections to" the test established in *Bowers v. Hardwick* "as a method of determining the extent of protectable private interests. Judge Thomas said that the methodology was one "certainly f[ou]nd agreeable."

- Despite a clear expression of his views on this case, Justice Thomas wrote a strongly worded dissent in defense of *Bowers* when it was overruled by the Supreme Court in 2003. No one asked Justice Thomas to recuse himself based on his prior testimony.
- Senator Leahy asked Judge Thomas if the standard for libel established in *New York Times v. Sullivan* "provide[s] sufficient protection for public figures in your mind?" and if Judge Thomas saw "any need to change that standard?" Judge Thomas also answered that question.
- So why aren't we talking about the Thomas Precedent?

- What about the Powell Precedent?
  - In 1971, Senator Mathias asked nominee Lewis Powell about two cases - *Miranda* and *Escobido* - and asked, "I am wondering if . . . you think these cases should be overruled?" Powell responded by giving his candid view: "I just happened to have the view that the minority opinion was the sounder one [in *Miranda*]."

- What about the Souter precedent?
  - Even David Souter, who has been derided by some as a stealth nominee to the Supreme Court, gave his views on specific cases and was prepared to go farther than Roberts's supporters NOW say is appropriate.

  - In response to a question from Senator Grassley about whether *Miranda* "improperly created rights," for example, Judge Souter said:

    "I personally have looked at Miranda as a pragmatic decision intended to protect a right, and the only sense in which I think probably you can say there was an extension of a right was" Justice Harlan's comment that *Miranda* merely extended the fifth amendment from the courtroom to the police station.

Other examples abound. But not only have Supreme Court nominees answered questions at their confirmation hearings, but once confirmed, they have continued to speak and write candidly about Constitutional questions and cases.

Of course, every sitting Justice of the Supreme Court has DISSENTED numerous times in cases.

If a statement critical of a majority opinion in a case were by itself cause for disqualification from future cases on a similar issue, our system would collapse.

Justice Blackmun famously wrote in dissent in *Callins v. Collins* that "From this day forward, I no longer shall tinker with the machinery of death." Death penalty litigants appearing before Justices Blackmun, Brennan, and Marshall knew quite a bit about how these Justices thought about the issue.

Similarly, on cases involving not only the death penalty, but also affirmative action, reproductive rights, and other issues, litigants appearing before Justices Scalia, Thomas, and Rehnquist are unlikely to be surprised, based on their vigorous dissents in a number of cases.

Justices also have a tradition of giving their legal opinions about matters in books, articles, and speeches. None of this disqualifies them from hearing future cases.

Second, in addition to Judge Roberts's own precedent, the propagators of the myth of the "Ginsburg Precedent" also overlook a very real legal precedent, which came into being in 2002, nine years after Judge Ginsburg testified. That is the case of *Minnesota Republican Party v. White*.

In *White*, the Supreme Court to which Judge Roberts aspires made clear that when judicial candidates state their views on legal matters and decided cases, their impartiality in future cases is not undermined.

Listen to Justice Scalia in 2002 quoting Justice Rehnquist in 1972:

> "Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."

As 12 leading legal ethicists wrote in a letter to me in July, the *White* case makes absolutely clear that there is no ethical concern for a nominee to talk about decided cases and judicial philosophy at a confirmation hearing:

> "It is hardly possible that a person could achieve nomination for appointment to the United States Supreme Court and yet have no opinions about the significant constitutional issues and cases of our day. And the fact that the nominee does have such opinions and voices them will not undermine impartiality or the appearance of impartiality."

So, the purveyors of the myth of the "Ginsburg Precedent" not only ignore Judge Roberts's own precedent in talking about legal issues, they sidestep an actual Supreme Court precedent, written by one of the Court's most conservative members.

Finally, there is Judge Roberts's own precedent. On multiple occasions - as a White House advisor, as a political appointee in the Solicitor General's office, as a legal commentator, and even as a judge - Judge Roberts has himself addressed legal issues, criticized court cases, and called for decisions to be overturned.

Judge Roberts appropriately advanced his views on specific cases and issues in virtually every capacity B government lawyer, private attorney, and judge. In doing so, he has certainly opened the door to such questioning:

- In 1981, for example, Roberts drafted a speech in which he quoted approvingly from the dissent in *Griswold v. Connecticut*, the 1965 case holding that it was unconstitutional to criminalize the sale of birth control to married couples.

- In 1985, Roberts wrote a memo addressing *Wallace v. Jaffree*, which involved issues relating to the separation of church and state. He not only wrote approvingly of Rehnquist's attempt to "revolutionize" a well-settled area of law, he also took a shot at the opinion of Lewis Powell in the same case, criticizing it as a "lame concurring opinion focusing on *stare decisis*."

- In 1990, Judge Roberts signed a brief in *Rust v. Sullivan* called for the overturning of settled law: "We continue to believe that *Roe* was wrongly decided and should be overruled."

- In 1993, as a private lawyer, Judge Roberts authored a law review article in which he endorsed the Supreme Court's standing decision in *Lujan v. Defenders of Wildlife* (1992), as a "sound

and straightforward decision applying the Article III injury requirement."

- In 1999, while a guest on National Public Radio, Judge Roberts described three recently decided federalism cases that dramatically limited citizens' ability to sue the states for violating their rights as a "healthy reminder that we're in a country that was formed by the states."

- Most recently, as an appeals judge, Judge Roberts has several times criticized the majority opinions in cases on issues ranging from the scope of the Commerce Clause to the discretionary authority of the Secretary of Labor.

Does anyone believes that these expressions of opinion about decided cases mean he must disqualify himself, if confirmed, from considering cases involving similar issues? Of course not.

Did they show a prejudgment about future cases? Of course not.

But I worry that Judge Roberts - with frequent resort to the myth of the "Ginsburg Precedent" - may flatly refuse to address, critique, or meaningfully discuss his views even of decided Supreme Court cases.

Does it make any sense that as soon as he becomes a nominee to the highest court in the land, as soon as his views are more relevant than they have ever been, as soon as 280 million Americans need to trust him to protect their rights under the Constitution. . . he should suddenly be gagged?

Judge Roberts has sought to reassure us about his judicial philosophy by repeatedly saying that he holds dear the values of judicial modesty and stability.

Those are perfectly nice sentiments, but how are we to learn what that means in practice? How are we to learn whether those are meaningful checks on an activist judicial agenda, rather than hollow words, unless he answers specific questions?

If Judge Roberts answers important questions forthrightly and convinces me that he is a jurist in the broad mainstream, most Democrats will be able to vote for him.

If, on the other hand, he chooses evasion over candor, if he uses the mythical "Ginsburg Precedent" as some kind of game-show lifeline, I will find it very, very hard to vote for him.

The key is for Judge Roberts to answer questions forthrightly and fully and to avoid relying on any false precedent to avoid informing the American people of his views, as he seeks to ascend to the most important court in the land.

I sincerely hope that Judge Roberts decides to share his views with - rather than hide them from - the American people.

We are only five days away from finding out if he will.

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