

FILE: GINSBURG 6487  
July 12, 1993

MEMORANDUM FOR HOWARD PASTER

FROM: RON KLAIN

SUBJECT: LIKELY AREAS OF COMMITTEE QUESTIONING

Here are the likely areas of Judiciary Committee questioning, based on information obtained in her courtesy calls, our subsequent contacts with staff and Senators, and prior Judiciary hearings.

Below I list close to 100 areas of questioning planned by the Senators, covering about 50 different topics.

Chairman Biden

- (1) **Interpretative Theory:** General questions on method, based largely on the Madison Lectures. (Difference between approach to gender, race cases as articulated there.) Views on Scalia's footnote six in Michael H.
- (2) **Unenumerated Rights/Right to Privacy:** From Harlan in Poe to Roe; constitutional basis for the right to privacy; how RBG interprets the liberty clause of the 14th Amendment.
- (3) **Right to Die:** Possible questioning on this application of privacy cases; how would RBG approach this issue?
- (4) **Separation of Powers:** RBG's view on this; her dissent in In re Sealed Case; her views on Chevron deference.
- (5) **Freedom of Speech:** Basic doctrinal issues; RBG cases; views on major precedents: e.g., NYT v. Sullivan, Brandenberg.
- (6) **Free Exercise:** Smith and progeny; RBG views on Smith (akin to Souter).

### Senator Hatch

- (1) **Judicial Activism vs. Restraint:** Is Ginsburg a moderate in substance, or just style? Is her reputation for restraint undeserved, as a product of her place on a court bound by precedent? Is she a closet activist?
- (2) **Specific Cases:** Two are being studied -- Horhi, as evidence of RBG's "activism;" and Ross, a "soft-on-crime" and "activist" case.
- (3) **Crime and Criminal Procedure:** Constitutionality of the death penalty; habeas corpus reform; constitutional status of Miranda and the Exclusionary Rule.
- (4) **Religious Freedom:** Hatch is critical of Smith; will seek answers similar to Souter's on this topic.
- (5) **Vetters:** RBG's experience with outside vetters; confirmation helpers; conflicts of interest and recusals.
- (6) **Affirmative Action:** Do "benign" classifications get strict scrutiny? Does RBG stand by her Bakke brief? What are the "other justifications" (beyond remedial) that RBG was referring to in O'Donnell to justify set asides?

### Senator Kennedy

- (1) **Civil Rights:** RBG's views on remedies and affirmative action; equal protection and race; Croson and progeny.
- (2) **Voting Rights:** Recent Shaw decision -- under what circumstances can race be used in districting? Views on Presley may also come up.
- (3) **Abortion Rights:** General questions; also, views on Bray and abortion-clinic protection legislation.
- (4) **Section Five:** RBG's views of Congress' power under Section Five of the Fourteenth Amendment; extent to power to remedy discrimination (cf. Croson, Metro Broadcasting); extent of power to enact legislation like FOCA.

### Senator Thurmond

- (1) **Death Penalty:** Is it constitutional? Constitutionality of non-homicidal death penalty; racial discrimination and the use of statistics to challenge this penalty.
- (2) **Habeas Corpus Reform/Finality:** Agreement with Teague, Butler; general problem of a lack of finality in capital cases; views on legislative reforms.
- (3) **Gay Rights:** Bowers; gays in the military; equal protection for gays; affirmative action for gays.
- (4) **ACLU Generally:** Attack on controversial ACLU policies and any RBG connections to them.
- (5) **Second Amendment:** Does RBG support it? To what extent does it guarantee rights for individual gun owners? (May attack ACLU policy?)
- (6) **Tenth Amendment:** General support for states' rights; How does RBG interpret the Tenth Amendment?
- (7) **Obscenity:** General doctrinal issues and the power of Congress to regulate indecent speech.

### Senator Metzenbaum

- (1) **Abortion Rights:** RBG's views generally; The Madison Lectures and RBG's editorial modifications; access issues; Casey; public funding.
- (2) **Antitrust:** Overall approach; controversial RBG decisions on Court of Appeals; views on resale price maintenance; role of economics in antitrust.
- (3) **Labor Issues:** RBG decisions that have been criticized by labor groups; RBG's views on union cases generally.
- (4) **Access to the Courts:** RBG standing cases; RBG private-right of action cases; RBG's response to charge that she uses "technical" barriers to keep persons from court.
- (5) **Equal Protection - Gender:** Did RBG back away from strict scrutiny for women in the Madison Lectures?

### Senator Simpson

- (1) **Abuse of Asylum:** What limits does Due Process place on government's ability to end abusive claims of asylum? Does Constitution require us to let undocumented aliens "run free" in the U.S.?
- (2) **Confirmation Process:** RBG's views of the process? Her Illinois law review article? RBG's criticisms of the attacks on Judge Bork?
- (3) **Selection Process/Litmus Tests:** What questions was RBG asked by vetters, White House, or the President? Were litmus tests applied?
- (4) **Gay Rights:** Are the analogies between the gay rights movement and the civil rights movement fitting? Should blacks be upset about use, by gays, of their rhetoric?
- (5) **RBG Role on Court as a Woman:** How does RBG see her role on the Court, as a woman? (Comparison to Justice Marshall's special role on race issues.)
- (6) **Race v. Gender:** What are differences in equal protection analysis in these two areas? What gender distinctions would be invalid, that would be invalid if based on race?
- (7) **Freedom of Speech:** RBG's views generally; RBG's vote with judge Bork in Evans v. Ollman.

### Senator DeConcini

- (1) **Gender and Equal Protection:** RBG's approach in general; levels of scrutiny; RBG's view of Stevens' approach; practical applications of strict scrutiny for gender. [This will dominate DeConcini's questioning.]
- (2) **ERA:** Does RBG believe an ERA is still needed? How does she reconcile her political view that ERA is needed, with her legal view that strict scrutiny is the rule under the Equal Protection Clause?
- (3) **Asset Forfeiture:** What is RBG's view of recent Supreme Court cases in this area? Does she agree that the Eighth Amendment applies to this civil sanction?
- (4) **Race and Equal Protection:** DeConcini is likely to ask some questions of concern to Hispanics -- i.e., Do RBG's views on race, which seem largely to concern the historical problems faced by blacks, encompass an understanding of the plight of Hispanics?

### Senator Grassley

- (1) **Property Rights:** When do environmental laws (e.g., wetlands regulation) go to far? Is the rule complete deprivation of value, or something short of that?
- (2) **Victims' Rights:** What is RBG's view on "victims rights"? What about victim impact statements (Booth)?
- (3) **Judicial Activism:** Is RBG an activist? Does she accept the idea of "original intent?" What is her view on stare decisis?
- (4) **Statutory Interpretation/Legislative History:** Does RBG accept Scalia's view on legislative history (Grassley does not)? What is her approach?
- (5) **Ninth Amendment:** What is the meaning of the "forgotten Ninth Amendment"?
- (6) **Tenth Amendment:** Does it have any teeth in insuring federalism? What about "states' rights"?

### Senator Leahy

- (1) **Freedom of Speech:** Basic doctrinal issues; RBG cases (Evans, CCNV).
- (2) **Free Exercise:** RBG views on Smith; will RBG criticize it as Souter did?.
- (3) **Establishment Clause:** RBG's views on the Lemon test? Does she agree with the Jeffersonian "wall" metaphor?
- (4) **Abortion Rights:** RBG's views generally; her awareness of the special problems of women in rural areas.
- (5) **Freedom of Information:** RBG's views on FOIA; Leahy is a strong FOIA booster and will press on any "anti-FOIA" decisions by RBG.
- (6) **New Technology and Freedom:** Leahy may also ask some general questions about how the Constitution "grows" to deal with new issues raised by new technology (e.g., digital telephony).

### Senator Specter

- (1) **War Powers:** Is the War Powers Act constitutional? Was the Korean War a constitutional war? If not, should the Court have declared it as such? What is RBG's view of the allocation of powers in this area between the President and the Congress?
- (2) **Free Speech:** May seek RBG's views on Brandenberg, or other speech cases. Will ask some questions seeking to ascertain her general approach to the doctrine.
- (3) **Establishment Clause:** How RBG views the Lemon test? How to make sense of the subtle lines in the Court's jurisprudence?
- (4) **Affirmative Action:** When are race-conscious remedies permissible? What did RBG mean in her concurrence in O'Donnell?
- (5) **Jewish Seat:** How does RBG feel to be taking the "Jewish seat"? Does she see herself as having a special role or responsibility in this regard?

### Senator Heflin

- (1) **Abortion - Madison Lectures:** What are RBG's views generally on abortion? What is her view of Roe? What was she trying to say in the Madison Lectures?
- (2) **Wright v. Regan:** What was the basis of RBG's opinion in this case? Why was she reversed by the Supreme Court? What are her views on standing generally?
- (3) **Dronenberg:** What was the basis for RBG's separate opinion? Was she expressing a view on the underlying constitutional question? Why did she criticized Bork's opinion in the case, but later defend it in a speech?
- (4) **Relations between Courts and Congress:** RBG's views on what Congress can do to improve relations? RBG's views on reform proposals, such as Federal Courts Study Commission (Heflin was a member)?
- (5) **Statutory Interpretation:** RBG's approach; her application of Chevron deference; her use of legislative history?

### Senator Brown

- (1) **Property Rights:** Does RBG regard them as fundamental? How do they compare to "personal" rights, such as abortion and contraception? What about a case like Moore, where the two are bound together? When is a regulation a taking?
- (2) **RBG's Speech at 8th Circuit Conference:** RBG's views on "originalism"? What is her judicial philosophy, at a general level? What limits her "activism," if not fidelity to original intent?
- (3) **Freedom of Speech/Obscenity:** What restrictions, if any, are permissible on speech in the field of obscene speech? RBG's views on the Pornography Victims Compensation Act?
- (4) **ACLU Activities:** What was RBG's role in the organization? What is RBG's views of its more controversial policies?
- (5) **Strict Scrutiny - Gender:** What distinctions between men and women would RBG uphold? What, if any, are legitimate? And how does this view square with use of strict scrutiny in race area?
- (6) **Apply Laws to Congress:** May ask RBG about her comment about the applicability of general laws to Congress (e.g., Title VII); Brown is a critic of Congress' self-exemption.

### Senator Simon

- (1) **Sensitivity:** Is RBG sensitive to the problems of those who have lived different lives from hers? Ever visited an Indian reservation? Does she care about "little people"?
- (2) **Stare Decisis:** What is RBG's approach? When does she defer to precedent; when will she reject them?
- (3) **RBG and Bork:** Why did she agree with him so often? What is her response to 1987 Legal Times analysis on rate of agreement?
- (4) **Civil Rights:** Does RBG care about civil rights? What are her views about race relations?

### Senator Pressler

- (1) **Indian Jurisdiction:** Tribal jurisdiction over non-Indians; Duro; quality of tribal courts; when can Indians go into federal court? Criminal jurisdiction on Indian lands (can whites be tried in Indian courts)?
- (2) **Non-Indian Rights:** Rights of non-Indians on Indian lands (e.g., hunting and fishing rights)? Rights of whites to be tried in non-Indian courts?
- (3) **Water Rights:** How can RBG, as Easterner, understand West's complex water rights cases? (These were Justice White's specialty).
- (4) **Regulatory Takings:** When does mining regulation effectuate a taking? Is the rule complete deprivation of value, or something short of that?
- (5) **Agricultural Antitrust:** What about the agricultural antitrust exemption?
- (6) **Victims' Rights:** What is RBG's view on "victims rights"? What can be done to limit "criminals' rights"?
- (7) **States' Rights:** What is the scope of state power to regulate abortion, under Planned Parenthood? What is RBG's view? What about under the Freedom of Choice Act?

### Senator Kohl

- (1) **Personal Questions:** Why does RBG want the job? What does she bring to it? Does she have a "big heart"?
- (2) **Preparation:** What was the role of DoJ, the White House, and outsiders in her preparation? What conflicts of interest are created? What recusals will result?
- (3) **Consensus Builder:** Is RBG a consensus builder? How does she do it as a quiet person? Response to Dershowitz's attacks on RBG?
- (4) **Overall Philosophy:** How does RBG describe herself? As a "centrist"? As a "pragmatist"?

### Senator Cohen

- (1) **Independent Counsel:** RBG's dissent in In Re Sealed Case; Cohen is Senate sponsor of Independent Counsel law.
- (2) **Goldman Case:** RBG's views on religious freedom in the military; views on Free Exercise generally.
- (3) **Right to Privacy:** Where does RBG find it? What are its roots? What are its full implications?
- (4) **Race Relations:** What is the role of law in promoting racial healing? RBG's views on the state of race relations in the U.S. today?

### Senator Feinstein

- (1) **Gay Rights:** Feinstein supports gay rights; may question Ginsburg on Dronenberg or general constitutional issue.
- (2) **Death Penalty:** Feinstein supports death penalty; concerned about Ginsburg's opposition (or even neutrality) to it; other "ACLU-crime" questions.
- (3) **Abortion Rights:** Feinstein supports abortion rights; concerned about Ginsburg's criticisms of Roe.
- (4) **ACLU Ties:** Feinstein is concerned about these; wants Ginsburg to distance herself.

### Senator Mosely-Braun

- (1) **Civil Rights:** Is RBG committed? Review of discussion of Brown and Loving in Madison Lectures? Affirmative action and permissible use of set-asides? [Failure to hire black law clerks?]
- (2) **Free Speech:** RBG's views on "cutting edge" issues and cases; hate crimes and speech codes; other "new" issues in free speech jurisprudence.
- (3) **Abortion Rights:** Wouldn't RBG's "gradualist" approach to Roe have hurt poor women? RBG's views on restrictions (e.g., waiting periods) that hurt rural and poor women.
- (4) **Court as Leader:** What does RBG's criticism of the Court as being "too far ahead" of the country mean in the Madison Lecture?

(07/12/93 -- 10:10)