

Senator GRASSLEY. The rule against accepting gifts and favors, I believe, is designed to ensure the impartiality of judges. In fact, the canon that covers gifts states that judges are prohibited from accepting gifts or favors where the donor is a party to a case or other persons who has come or is likely to come or whose interests have come or likely to come before a judge.

Did you give any consideration, in accepting the waiver of the initiation fee, to the possibility of other Woodmont members or their interests would come before you, as a judge, and did you have a recusal policy with respect to the country club?

Judge GINSBURG. I did not think that the membership in that golf club would present a conflict. But, of course, if any affair involving the Woodmont Country Club had come before my court, I would have recused myself. I was hardly the first member of my court to be a special member of that club. A long-time Chief Judge of my court, Judge Bazelon, had been a member, and a few of the district judges, I believe, had been members. But at the time of my membership, the only other Federal judge in the club was Judge Edwards. He took up golfing and came, particularly with my husband, to play at Woodmont; he liked it, and therefore joined the club. At the time of my resignation, only Judge Edwards and I were members of Woodmont, but earlier Judge Bazelon and a couple of district judges held memberships.

Senator GRASSLEY. You may not even be in a position to answer this, I recognize that, and I wouldn't have thought of it, except for the statement you just made. Because of colleagues' membership in the same club, do you know of any recusal by any member because of potential conflict?

Judge GINSBURG. I don't recall any matter having to do with Woodmont Country Club during my tenure on the court having come before the court.

Senator GRASSLEY. Judge, I am satisfied with your answer. From my perspective, this oversight is not necessarily a disqualifier. As I said when the media one time asked me about Clarence Thomas trying marijuana, my answer was that we weren't confirming him for sainthood, we were confirming him for the Supreme Court. We are all human and all fallible, and I am satisfied that we have had an opportunity to discuss this.

I thank you and I yield the floor.

Senator MOSELEY-BRAUN. At this time, I have questions as a member of the committee, but I don't know if it is appropriate. Senator Specter had indicated that he wanted to—

Senator HATCH. It is entirely appropriate for you to go ahead, and then we will go to Senator Specter after. How is that?

Senator MOSELEY-BRAUN. I didn't know whether or not you had a reason for wanting to leave now.

Senator SPECTER. I would be glad to wait my turn, Madam Chairman.

Senator MOSELEY-BRAUN. Fine. Thank you very much, Senator Specter. That is very nice of you.

Judge I would like to talk about the first amendment a little bit, particularly in the area of violence or having to do with violence. Obscene expression is considered by the Court to be unprotected speech, that is longstanding law, and it may, therefore, be prohib-

ited. Expression which is sexually explicit may be indecent, but not obscene, and, therefore, under the rule in *FCC v. Pacifica Foundation* and other cases, that speech may be regulated, but not prohibited.

Indeed, you wrote an opinion in the case of *Action for Children's Television v. FCC*, which involved an attempt by the FCC to regulate material which was indecent, but not obscene, and which was having to do with the protection, the notion being that the children should be protected in terms of the hours that such material might be viewed.

There are many, including this Senator, who believe that violence in our media, in the television and the movies, has had a profound effect on our society, and particularly on our young people. Indeed, in a hearing here regarding Senator Simon's initiative in this area, one of the witnesses testified that it is no longer debatable, but that the depiction of violence does have the effect of increasing young people's proclivity to violence.

In your decision in *Action for Children's Television v. FCC*, you have upheld, in part, the FCC's attempt to regulate obscene material, and so my question to you is: One, do you think that violence may be categorized as indecent material in the first instance? And what standards do you think ought to be applied to violence as speech? The threshold question is do you see violence as an expression which would rise to the level of being speech? Then, second, do you think that it, therefore, can be categorized as indecent, if not in extreme cases obscene speech, and then, if so, what standards do you think ought to be applied to violence as speech in the media?

Judge GINSBURG. Senator, I can begin with that question. You referred to *Action for Children's Television* (1988), which is still in the courts. My opinion at a prior stage of the litigation differentiates between regulating in the interest of children, which my court said was entirely lawful, and overregulating to the extent that adults have no access.

We know that regulations permissible for the broadcast media are impermissible for the print media. The question of violence is one that may well come up, and I don't want to deal in the speech area with a category that the FCC, under Congress' direction or on its own initiative, may decide to regulate. Then it will come before the Court, just as the indecent speech question came before the Court, so I don't want to be seen as prejudging it.

Senator MOSELEY-BRAUN. Without looking at just regulatory action in this area, if challenged on constitutional grounds as obscene or indecent, would you be inclined to see extreme violence, gratuitous violence as unprotected speech, or as speech which might be amenable to regulation?

Judge GINSBURG. Speech that is obscene is outside the first amendment. Speech that is indecent is inside, but subject to regulation. Where this would fit has not come up yet, where this category of speech would belong I can't say at this time.

I can say to you, as a parent, that I am as concerned, perhaps more concerned about the exposure of children to violence, and I have had some experience with a controlled system, as my daughter will confirm. When she was with me in Sweden, violent films

were off-limits to children. Children were not permitted to attend such films, and it was the first time it had occurred to me that a State reasonably might regulate in that area. But I can tell you that this has not yet occurred. It may very well occur. It would certainly be subject to challenge on first amendment grounds, and so I don't want to express any legal opinion on it.

But if I may, after we had our conversation yesterday, I was uncomfortable with an answer I gave you. When I went back to the courthouse, I read the *Presley v. Etowah County Commission* (1992) case, and can tell you a little more than I did earlier. The Court's opinion focused solely on section 5. But the Court said nothing in the opinion that implies the conduct at issue in these cases is not actionable under a different remedial scheme. The *Etowah County* case, as I understand it, is back in the lower court for consideration of other claims made. These include title VI of the Civil Rights Act and the constitutional claim of deliberate discrimination in removing the functions of individual commissioners when the first black commissioner was elected.

So the case is still alive in Court. It is still possible that there may be a further ruling. But what the Court said under section 5 is not the end of the road for that particular case.

Senator MOSELEY-BRAUN. I appreciate that followup. I guess my concern in *Presley* really was a matter of your view of the language of the statute, the specific language of section 5 of the Voting Rights Act, and, given the facts of that case, whether or not the Court gave too narrow an interpretation of the language in such a way that essentially frustrated the meaning of the statute as a whole.

Judge GINSBURG. I avoided commenting on Supreme Court decisions when other Senators raised that question, so I must adhere to that position.

Senator MOSELEY-BRAUN. Then another softball in the first amendment area. The Senate has been dealing fairly extensively, in fact, just recently passed legislation in the area of campaign finance regulation. As you are aware, in *Buckley v. Valeo*, the Court considered the constitutionality of the act of 1971 and upheld contribution limits, disclosure and reporting provisions of the public financing scheme, but invalidated the limitation of expenditures. In short, the Court took the view that contributions could be limited, because contributions are only a means of expressing one's views, but that expenditures could not be limited, because to limit expenditures would effectively limit the total quantity of an individual or a candidate's speech.

In an important passage, the Court declared in *Buckley* that "it is wholly foreign to the first amendment for government to restrict the speech of some elements of our society, in order to enhance the relative voice of others." In other words, although the Government can attempt to improve the marketplace of ideas in a variety of ways, including contribution limitations, it cannot constitutionally attempt to improve public debate by silencing those who already have too much speech.

Implementing that proposition, the Court, in *First National Bank of Boston v. Bellotte*, invalidated a Massachusetts statute prohibiting corporations from making contributions.

Following the decision in that case, Justice White wrote a scathing dissent, in which he said it is critical to obviate or dispel the impression that Federal elections are purely and simply a function of money, that Federal officers are bought and sold, or that political races are reserved for those who have the facility or the stomach for doing whatever it takes to bring together those interest groups and individuals that can raise or contribute large fortunes, in order to prevail at the polls.

My question to you, Judge Ginsburg is, Do you believe with Justice White that the Supreme Court's decision in the *Buckley* case was an example of judicial activism into an area that Congress itself should have ruled on?

Judge GINSBURG. That falls in the same category as the prior question. You are inviting comment on Supreme Court opinions, or separate opinions, in an area live with business. We get Federal election campaign business regularly in the District of Columbia Circuit. The Supreme Court gets some of that business. So this is a vibrant area for challenge.

Senator MOSELEY-BRAUN. All right. Well, to move along, if I understand you to say you can't answer that question. You might say that I couldn't possibly comment, as they might say.

In *Red Lion v. FCC*, the Court, as you know, rejected an attack by a Pennsylvania radio station on the fairness doctrine—And I don't know. Have these questions been asked already? I was on the floor a little while this afternoon. OK. Thank you—which required radio broadcasters to permit people attacked on the air the opportunity to reply.

The station was resisting an FCC order to give free time to an author who had been accused of Communist activities on the air. NBC and CBS joined the station, arguing, as Justice White put it, that the first amendment secured the station's right to "broadcast whatever they chose and to exclude whomever they chose."

Justice White, in writing for a unanimous Court, said, "There is no sanctuary in the first amendment for unlimited private censorship operating in a medium not open to all." It was not simply that Government had granted the radio station its FCC license. The point was that the first amendment protected the public's right to have a dialog, not the corporation's right to censor that dialog.

Again, to quote Justice White,

The right of free speech of a broadcaster, the use of a sound truck, or any other individual does not embrace the right to snuff out the free speech of others.

And so I guess my question in this area goes to the extent to which you see a role for the Court in the absence of—we have developed standards in regards to obscenity. We have developed standards with regard to sexually explicit speech on the one hand. But in areas going to other forms, other important forms of speech, such as violence, such as campaign expenditures and the use of the media, the air waves to communicate in this area, the Court has been less clear.

Just as a broad, general question, do you see a need for the development of standards that will give us some guidelines as to an approach to those issues going to speech which are, frankly, non-traditional? When the early first amendment cases came down, we didn't have to worry about satellite transmission of campaign com-

mercials, but now we do. And we have the specter of violence again that we have never had before. And so I suppose my question to you, Judge Ginsburg, is: Do you see a need for some clarity there? Because, after all, that is supposed to be the role, to have some certainty, some clarity in the areas of conduct that is permissible under our Constitution? Do you see some need for clarity in those areas?

Judge GINSBURG. You brought up the *Red Lion* (1969) case, which indicates one line that has been drawn. There is no right to reply to a newspaper comment. There is no fairness doctrine applicable there. *Tornillo* (1974) is the rule. The different regime for the broadcast media was once explained on the basis of the scarcity of the spectrum. That is a less tenable ground for distinction today. The fairness doctrine is up for consideration again. The must carry rules are alive and are in litigation. Again, I can refer to the distinction drawn between the print media and the broadcast media. But beyond that, I can't comment on the fairness doctrine or the "must carry" rules, the differential regulation of the broadcast media. You said it so well, and in a lot fewer words that I have been using. I can't go further at this point.

Senator MOSELEY-BRAUN. Judge Ginsburg, thank you very much. I would have loved to have taken a class with you.

Judge GINSBURG. You are so kind, and I know it has been a very busy, important day for you.

Senator MOSELEY-BRAUN. Thank you very much.

Senator Specter.

Senator SPECTER. Thank you very much, Madam Chairwoman.

I will try to be relatively brief, Judge Ginsburg. It has been a long day. But there are a number of other subjects that I would like to touch on with you.

At the conclusion of our last round, you made reference to an exchange of correspondence that you and I had had when I wrote to you about a comment in your article on confirming Supreme Court Justices, thoughts on a second opinion rendered by the Senate. And referring to Judge Bork, you had stated, "The distinction between judicial philosophy and votes in particular cases having blurred as the questions wore on." And I then asked you to provide me with examples of such questions to Judge Bork in order to help us in the course of your hearing. And I just wanted to make for the record my letter to you dated July 15 and your reply to me dated July 16 and my reply to that dated July 19 a part of the record.

[The letters follow:]