

The CHAIRMAN. Thank you very much, Mr. Secretary. Nice comment. I thank you all.

Senator HATCH. Thank you.

The CHAIRMAN. Our third panel is comprised of two very prominent members of the legal academic community. I might add that we could have had 150 members of the legal academic community who were willing and anxious to come and testify. But there was such unanimity that we responded to two in particular. The first is Prof. Gerald Gunther, the William Nelson Cromwell Professor of Law at Stanford Law School. Professor Gunther served as a law clerk for Chief Justice Earl Warren, and prior to his appointment at Stanford was a member of the faculty at Columbia University School of Law. Welcome, Professor. It is nice to have you back. And thank you, I might add parenthetically, for always being available to this committee for any information we ask and any input we have asked of you.

Next we have Herma Hill Kay, who is a dean of the University of California at Berkeley, Boalt Hall, School of Law. It is nice to see you again, Dean. Again, I thank you, every time I have asked for your input, you have provided it. She is a coauthor with the nominee of a casebook on sex-based discrimination and was among the first full-time women law professors in this country.

I welcome you both, and I will yield to you in the order you have been recognized.

**PANEL CONSISTING OF GERALD GUNTHER, WILLIAM NELSON CROMWELL PROFESSOR OF LAW, STANFORD UNIVERSITY, STANFORD, CA; AND HERMA HILL KAY, DEAN, SCHOOL OF LAW, UNIVERSITY OF CALIFORNIA, BERKELEY, CA**

#### **STATEMENT OF GERALD GUNTHER**

Mr. GUNTHER. Thank you, Mr. Chairman, members of the committee; that is, Senator Feinstein, my own Senator, a Stanford alumna, our last, most recent commencement speaker. I am really personally overjoyed and proud as well as professionally heartened that this committee is considering the nomination of Ruth Bader Ginsburg for a seat on the Supreme Court.

I speak as a teacher of constitutional law for more than 35 years, and as someone who has known Ruth Ginsburg well for almost as long a time. I am entirely confident that she possesses all of the qualities you should cherish in a Supreme Court Justice.

Ruth Ginsburg was my student at Columbia Law School. She was a brilliant student. She demonstrated extraordinary intellectual capacities, as she has in everything she has undertaken all her life. In the 1950's, I set up a program at Columbia to place our graduates as judicial law clerks, and I assisted her selection by a fine, originally recalcitrant, Federal judge.

I have followed her work closely in the years since. I admired her scholarly capacity as a faculty member at Rutgers and then at Columbia, and especially her historic work on behalf of women's rights, as a brief-writer and oral advocate before the Supreme Court.

In 1980, Ruth was named, as you know, to the Court of Appeals for the District of Columbia Circuit. I was asked then to speak at

her investiture ceremony and to speak about the task of judges. I had just begun work on a biography of one of our greatest Federal judges, Judge Learned Hand. In my address before the District of Columbia Circuit, I understandably spoke about Hand and compared Ruth Ginsburg's potential talents to his.

Although I do not claim a great track record in predicting anything—football, soccer, elections, you name it—I have taken special delight in the fact that my expectations about Ruth were entirely, and to me not surprisingly, fulfilled. I said then that I knew Ruth to be modest, thoughtful, penetrating, fair and open-minded, and I suggested that those qualities equipped her ideally for the bench.

I also said that she has the character and temperament, the persistence, the sense of responsibility, the modesty as well as the courage and strength reflected in Learned Hand's words and deeds. I read her opinions on the court of appeals for the last 13 years with great interest as they were handed down, and she disclosed precisely those qualities.

Ruth Ginsburg, I am convinced, possesses the ingredients, the moral qualities Hand thought essential for greatness. And I am confident she will confirm that greatness on the Supreme Court. She clearly possesses the requisite intellect, temperament, and character. Her opinions reflect an obvious belief in and fidelity to the law, careful attention to the records before her, and an appropriate respect for the force of precedent. She has demonstrated integrity and analytical skills. She is also characteristically sympathetic to the fact that the disputes before her involved human beings and that a court's rulings have an impact on those human beings. One would expect no less in a person who is herself a splendid human being, who has managed to integrate with great skill her roles as lawyer and teacher and judge as well as wife and mother, and who overcame the many obstacles that confronted her and other women who were entering the profession in the 1950's.

You have an opportunity to recommend the confirmation of an individual who will be a great Justice, a person who will contribute immensely to the collegiality, the intellectual quality, and the wisdom of the Supreme Court of the United States.

Now, I fully expect to criticize Justice Ginsburg's opinions on the Court. After all, that is my professional task. I am confident, however, I will never have reason to doubt her integrity, her judicial temperament, and her analytical abilities. I know that I, like most of my fellow academics, look forward to evaluating the work of a Supreme Court with Ruth Ginsburg on it.

I have tried to summarize my remarks. I have submitted a longer statement for the record.

The CHAIRMAN. Without objection, your entire written remarks will be placed in the record. It is hard to see how they could improve upon what you have said.

Mr. GUNTHER. Well, I did actually include a copy, as a matter of ultimate egomania, of the speech I delivered before the D.C. Circuit, because I well remember, Senator, the reaction at the reception afterwards when everyone I talked to winked at me when I tried to compare Ruth Ginsburg to the qualities of Learned Hand, and they said, "Nice job. But, of course, she is not going to turn

out that." I have never been happier about being right on something in my life.

[The prepared statement of Mr. Gunther follows:]

PREPARED STATEMENT OF GERALD GUNTHER

I am personally overjoyed and proud as well as professionally heartened that this committee is considering the confirmation of Ruth Bader Ginsburg for a seat on the Supreme Court.

I speak as a teacher of constitutional law for more than thirty-five years, and as someone who has known Ruth Ginsburg well for almost as long a time. I am confident that she possesses all of the qualities you should cherish in a Justice.

Ruth Ginsburg was my student at Columbia Law School. She was a brilliant student; she demonstrated extraordinary intellectual capacities, as she has in everything she has undertaken throughout her life. In the 1950's, I set up Columbia's program for placing graduates as judicial law clerks, and I assisted her selection by a fine federal trial judge. I have followed her work closely in the years since; I admired her scholarly capacity as a faculty member at Rutgers and then at Columbia, and especially her work on behalf of women's rights, as a brief-writer and oral advocate before the Supreme Court.

As a teacher of constitutional law and the author of a casebook in my field, I am very familiar with her central, indeed historic, role in shaping the modern law of gender discrimination. To this day, I—and, I suspect, most teachers in my field—speak admiringly of her singular contribution.

In 1980, Ruth Ginsburg was named to the U.S. Court of Appeals for the District of Columbia Circuit. I was asked to speak at her investiture ceremony. I had just begun work on a biography of one of our greatest federal judges, Learned Hand (a biography that will be published in a few months). In my address before the D.C. Circuit, I understandably spoke about Hand and compared Ruth Ginsburg's potential talents with those of my subject. (I am taking the liberty of attaching my 1980 address as an appendix to this statement.) Although I do not claim a great track record in predictions, I have taken special delight in the fact that my expectations about Ruth Ginsburg were fulfilled. I said then that I knew Ruth to be "modest, thoughtful, penetrating, fair and open-minded," and I suggested that these qualities equipped her ideally for the bench. I also said that "she has the character and temperament, the persistence, \* \* \* the sense of responsibility, the modesty as well as the courage and strength reflected in Learned Hand's words and deeds." Hand's greatness, in my view, stems from a special combination of character and temperament and intellect that, in combination, produces the capacity to be a "modest but creative judge" who "is heedful of limitations stemming from the judge's own competence and [from] the presuppositions of our constitutional system." I read her opinions on the Court of Appeals for the last thirteen years with great interest as they were handed down, and she disclosed precisely those qualities.

In my close attention to Ruth's career over the years, especially her judicial career, some of Hand's words often come to mind as aptly describing Ruth Bader Ginsburg. Hand once said that the prime condition of great judging is a "capacity for detachment." He went on to say: "There are those who insist that detachment is an illusion; that our conclusions, when their bases are sifted, always reveal a passionate foundation. Even so; though they be throughout the creatures of past emotional experience, it does not follow that that experience can never predispose us to impartiality. A bias against bias may be as likely a result of some buried crisis, as any other bias." A great judge, he also said, acts "with patience, courage, insight, self-effacement, understanding, imagination and learning."

Ruth Bader Ginsburg, I am convinced, possesses the ingredients, the "moral" qualities, Hand thought essential for greatness. I am confident that she will confirm that greatness on the Supreme Court. She clearly possesses the requisite intellect, temperament, and character. Her opinions reflect an obvious belief in and fidelity to the law, careful attention to the records before her, and an appropriate respect for the force of precedent. She has demonstrated integrity and analytical skills. She is also characteristically sympathetic to the fact that the disputes before her involve human beings and that a court's rulings have an impact upon those human beings. One would expect no less in a person who is herself a splendid human being, who has managed to integrate with great skill her roles as lawyer and teacher and judge as well as wife and mother, and who overcame the many obstacles that confronted women when she entered the profession.

You have an opportunity to confirm an individual who will be a great Justice, a person who will contribute immensely to the collegiality, intellectual quality, and wisdom of the Court.

I fully expect to criticize Justice Ginsburg's opinions on the Court—after all, that is my professional task. I am confident, however, I will never have reason to doubt her integrity, her judicial temperament, and her analytical abilities. I know that I, like many of my fellow academics, look forward to evaluating the work of a court with Ruth Bader Ginsburg on it.

The CHAIRMAN. Dean Kay.

#### STATEMENT OF HERMA HILL KAY

Ms. KAY. Thank you, Chairman Biden. I want to say before I start that I do not yield to my colleague, Professor Gunther, in his admiration for our Senator from California, Senator Feinstein. It is a pleasure to see her here today on this committee.

It gives me great pleasure to be here and to participate in your deliberations as you prepare to recommend to the Senate the advice it should give to President Clinton on his nomination of Judge Ruth Bader Ginsburg to the U.S. Supreme Court.

President Clinton's choice of Judge Ginsburg is wise and inspired, sound and practical. In Judge Ginsburg, President Clinton has found a constitutional scholar who knows from her own experience what it means to be excluded despite outstanding credentials solely because of sex. In the early 1970's, she brought that experience—and her flawless logic—to the bar of the U.S. Supreme Court, where she will soon take her seat. In case after case, she hammered home the point that for the law to assign preexisting roles to men and women is limiting to both sexes and is forbidden by the equal protection clause.

It is a point that, 20 years later, many regard as self-evident. But the High Court seemed unable to grasp that point prior to Judge Ginsburg's advocacy, instead taking as its starting position the belief that a legislative distinction drawn on the basis of sex was a rational classification that passed constitutional muster.

Ruth Bader Ginsburg's strategy of written and oral advocacy to help the nine men then sitting on the Supreme Court understand the irrationality of sex-based classification was one of patient instruction. She chose cases, as Judge Hufstедler said, in which the law's unequal treatment of men and women was evident and the consequent need for a broader interpretation of the equal protection clause could be clearly established and readily accepted. The result is that her cases are now constitutional classics: *Reed v. Reed*, 1971: A mother can administer a deceased child's estate as capably as a father. *Frontiero v. Richardson*, 1973: A service-woman's Air Force pay earns the same fringe benefits for her dependent spouse that a serviceman's pay provides for his. *Weinberger v. Wiesenfeld*, 1975: A widowed father is entitled to the same insurance benefits available to a widowed mother to help him care for his infant son after his wife's death. *Califano v. Goldfarb*, 1977: A deceased wife's earned income provides the same survivor's benefits to her widowed husband that a deceased husband's widow would receive.

These are some of the legal propositions that Judge Ginsburg established as an advocate, and she used them to help the Court forge a new understanding of the equal protection of the laws. It

was Ruth Bader Ginsburg's voice, raised in oral argument before the U.S. Supreme Court, that opened new opportunities for the women of this country. She was in the forefront of the creation of the legal precedents that advocates who have followed her have used, time and time again, to build a strong edifice against discrimination that now protects many groups. She left her enduring mark on the Constitution even before taking her place on the Supreme Court.

I speak today not only as an academic observer of Judge Ginsburg's works, but also as her co-author and friend. I have had the privilege of working with her on our casebook on "Sex-Based Discrimination," published in 1974. She and I are both among the first 20 full-time women law professors in the country. We continue to serve together on the Council of the American Law Institute. From those vantage points, I can say that hers is a courageous intellect, and that she is as steadfast and loyal a colleague and friend as anyone could wish. Her standards are exacting. She produces the best and most precise work, and she expects the same from others.

As this confirmation process has shown the Nation, she thinks deeply and chooses her words with care. But I can tell you that her compassion is as deep as her mind is brilliant. In Ruth Bader Ginsburg, the President has offered the country a Justice worthy of the title. I urge this committee to recommend that the Senate give its enthusiastic consent to her appointment to the U.S. Supreme Court.

Thank you, Mr. Chairman.

[The prepared statement of Ms. Kay follows:]

#### PREPARED STATEMENT OF HERMA HILL KAY

Senator Biden, Members of the Judiciary Committee, it gives me great pleasure to be here and participate in your deliberations as you prepare to recommend to the Senate the advice it should give President Clinton on his nomination of Judge Ruth Bader Ginsburg to the United States Supreme Court.

President Clinton's choice of Judge Ginsburg is wise and inspired, sound and practical. In Judge Ginsburg, the President has found a constitutional scholar who knows from her own experience what it means to be excluded despite outstanding credentials solely because of sex. In the early 1970s, she brought that experience—and her flawless logic—to the bar of the United States Supreme Court, where she will soon take her seat. In case after case, she hammered home the point that for the law to assign pre-existing roles to women and men is limiting to both sexes and forbidden by the equal protection clause. It is a point that—at present, twenty years later—many regard as self-evident. But the High Court seemed unable to grasp that point before Ginsburg's advocacy, instead taking as its starting position the belief that a legislative distinction drawn on the basis of sex was a rational classification that passed constitutional muster.

Ruth Bader Ginsburg's strategy of written and oral advocacy to help the nine men then sitting on the Supreme Court understand the irrationality of sex-based distinctions was one of patient instruction. She chose cases in which the law's unequal treatment of men and women was evident and the consequent need for a broader interpretation of the equal protection clause clearly established and readily accepted. The result is that her cases are now constitutional classics: *Reed v. Reed*, 1971: A mother can administer a deceased child's estate as capably as a father. *Frontiero v. Richardson*, 1973: A servicewoman's Air Force pay earns the same fringe benefits for her "dependent" spouse that a serviceman's pay provides for his "dependent" spouse. *Weinberger v. Wiesenfeld*, 1975: A widowed father is entitled to the same insurance benefits available to a widowed mother to help him care for his infant son after his wife's death. *Califano v. Goldfarb*, 1977: A deceased wife's earned income provides the same survivor's benefits to her widowed husband that a deceased husband's widow would receive.

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The CHAIRMAN. Thank you, Dean.

I have been in the Senate 20 years, and I have sat through a lot of nomination hearings for the court generally, and the Supreme Court in particular. I must say I have never heard higher praise for a nominee than I have heard from those who have testified today. I thank you for adding your insight to these deliberations. And your reputations individually precede you, and it means a great deal that you think so highly of this nominee, and it reinforces in my mind, and the minds of the committee as a whole, that our initial judgment about Judge Ginsburg was correct, and that the wisdom of the President was demonstrated in his choice. But I thank you both. I have no questions.

I will yield to my friend from Utah.

Senator HATCH. Well, we are happy to welcome both of you here, and we appreciate the excellent testimony you have given. I had to listen to a degree while I was meeting with some people in the back room here, but I don't know that Judge Ginsburg could have had two better law professors come in and speak for her and on her behalf.

Don't you forget, Professor Gunther, when that book on the judge comes out, *Learned Hand*—

Mr. GUNTHER. Will you make clear, Senator, that we don't have an agreement? That gives me the opening to say it will be published in February 1994 by Knopf.

Senator HATCH. He is going to publish a wonderful book on *Learned Hand*. February of 1994, you say?

Mr. GUNTHER. Yes.

Senator HATCH. Knopf. I expect an autographed copy, is all I can say.

Mr. GUNTHER. It is yours.

Senator HATCH. I appreciate it, and we are happy to have both of you here. Thank you for coming.

The CHAIRMAN. Senator Feinstein?

Senator FEINSTEIN. Nothing other than to say, Mr. Chairman, you have before you, as you well know, two of—

The CHAIRMAN. I beg your pardon.