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RUTH BADER GINSBURG: EXAMINING HER PATH TO THE HIGH COURT BENCH AND ITS INTERSECTION WITH THE ACLU

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ABSTRACT

This paper examines Justice Ginsburg's history, her impassioned activism on behalf of the American Civil Liberties Union, her confirmation to the United States Supreme Court, and the partisan politics of 2016, which resulted in the failed nomination of moderate jurist, Chief Judge Merrick Garland.

I. INTRODUCTION

While preparing for her Senate confirmation hearing in 1993, White House staffers interrogated Judge Ginsburg

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regarding her past ACLU work. Judge Ginsburg told the staffers, “there’s nothing you can do to get me to bad mouth the ACLU.”² This paper will introduce readers to Ruth Bader Ginsburg’s early career at the ACLU Women’s Rights Project in the 1970s and the potential impact such an experience might have on her confirmation to the Supreme Court. A quick introduction into Justice Ginsburg’s perspective comes from a segment of the opening statement she gave during her confirmation hearing on July 20, 1993. In her opening statement, she gave thanks to the many individuals who helped her land where she had, remarking she hoped more women would follow her to the Court. Her statement demonstrates the importance of the past and tries to point to the future. This paper will examine whether or not this future is valid given the state of political acrimony in the United States.

Indeed, in my lifetime, I expect to see three, four, perhaps even more women on the Supreme Court bench, women not shaped from the same mold, but of different complexions. Yes, there are miles in front, but what a distance we have traveled from the day President Thomas Jefferson told his Secretary of State: “the appointment of women to [public] office is an innovation for which the public is not prepared.” “Nor,” Jefferson added, “am I.” ... The increasingly full use of the talent of all of this Nation’s people holds large promise for the future, but we could not have come to this point—and I surely would not be in this room today—without the determined efforts of men and women who kept dreams of equal citizenship alive in days when few would listen. People like Susan B. Anthony, Elizabeth Cady Stanton, and Harriet Tubman come to mind. I stand on the shoulders of those brave people.³

² Justice Ruth Bader Ginsburg, Address at Southern Methodist University Dedman School of Law Louise B. Raggio Lecture Series (Aug. 29, 2011).

³ *Nomination of Ruth Bader Ginsburg, To be Associate Justice of the*

In the sections following, Part II discusses the history of the Supreme Court's creation and power, including its historical gender and racial composition. It is important to understand the Supreme Court's history, as the members are responsible for interpreting the laws of the nation. What does it mean for jurisprudence if only men are defining the law? If there is no variance in the gender makeup of members of the Court, what impact does that have on the interpretation of statutes and the Constitution? Where has the Court been on these issues and where should it be going? Part III discusses Ruth Bader Ginsburg's younger years and her leadership regarding strategic opposition for legislation eliminating sex-based differentials. The goal was to educate those in positions of power that statutes intending to benignly favor women actually did the opposite. Part IV discusses the confirmation process of Ruth Bader Ginsburg, which specifically emphasizes how her past ACLU work influenced the process. Part V examines the political climate of 2016 and the failed nomination of Chief Judge Merrick Garland to the Court. Is this a permanent mark on the Supreme Court confirmation process or merely a low point, soon to rebound?

II. AN INTRODUCTION TO THE SUPREME COURT AND ITS STEPS TOWARD DIVERSITY

Article III of the United States Constitution provides the authority of the United States Supreme Court and the Federal courts.⁴ Though the Supreme Court first met in 1790 it was the landmark case of *Marbury v. Madison* in 1803⁵ that established the Supreme Court should determine and resolve conflicts of law in order to uphold its judicial duty as provided by the Constitution. This case was the first time the Court struck down an act of Congress and asserted its judicial power under Article III. Chief Justice John Marshall served as Chief Justice from 1801 to 1835, and some scholars rank him as the greatest justice in the Court's history⁶ because of his single sentence in *Marbury v.*

Supreme Court of the United States Before the S. Comm. on the Judiciary, 103rd Cong. 50 (1993).

⁴ U.S. Const. art. III, § 1.

⁵ *Marbury v. Madison*, 5 U.S. 137 (1803).

⁶ ANDREA SACHS, TIME SUPREME COURT DECISIONS: DECISIONS THAT

Madison: "It is emphatically the province and duty of the judicial department to say what the law is."⁷

Thanks to the doctrine of judicial review, the Court was able to declare its authority equivalent to the other two branches of government relatively early in the nation's history. It was not until 164 years after this landmark ruling that a person of color would sit on the bench, and as such, have the authority to interpret the law. On October 2, 1967, the first African-American male associate justice, Thurgood Marshall, joined the Supreme Court following his appointment by President Lyndon B. Johnson. While this was an important step in ensuring diversity and representativeness on the Court, it would be years later before a woman would join the bench. In fact, women were not permitted to practice before the United States Supreme Court until 1879 and even then, such practice required an act of Congress.

Belva Lockwood was the first woman to gain admission to the Supreme Court Bar and the first woman to participate in an oral argument nearly two years after Congress passed a law stating "any woman" possessing the necessary qualifications shall, on appropriate motion, be admitted to the Bar.⁸ She graduated from National University Law School (today's George Washington University Law School) in September 1873. After completing her curriculum with the male students, the school refused to provide her a diploma. Lockwood wrote President Ulysses S. Grant to demand her diploma. She received her diploma two weeks later.⁹ Lockwood practiced in the District of Columbia for three years and applied for admission to the Supreme Court Bar, however, she was denied. She refused to give up and lobbied Congress for three years until Congress issued its decree in February 1879. On the Bar's membership role, Lockwood's name is the first female name spoken within the Supreme Court. It would be another 178 years before Justice Sandra Day O'Connor sat opposite of female advocates, interpreting the Constitution and various

CHANGED AMERICA 74-75 (2015).

⁷ *Marbury*, 5 U.S. at 137 (emphasis added).

⁸ Justice Ruth Bader Ginsburg, Remarks at Celebration 55: The Women's Leadership Summit (Sept. 20, 2008) (transcript available in 32 HARV. J.L. & GENDER 233 (2008)).

⁹ *Id.*

statutes to define the meaning of the law. Prior to her confirmation, nine men made the decisions regarding what the law was each term based on the authority provided under Article III in the Constitution.

Justice O'Connor and Justice Ginsburg served together from 1993 until Justice O'Connor's retirement in 2005. From 2005, until Associate Justice Sonia Sotomayor was seated on August 8, 2009,¹⁰ the Supreme Court was once again relegated to the voice of eight men and one woman. Justice Ginsburg remarked during this time that she felt lonely on the bench and it was the wrong message for people to "see just a little woman and eight larger men."¹¹ When Sonia Sotomayor was nominated by President Obama in 2009, Justice Ginsburg reflected on the prediction she made during her own 1993 confirmation hearings about having multiple females on the bench. She stated: "I feel great that I don't have to be the lone woman around this place."¹² She likened her experience as the sole female on the Court to her time spent in law school in the 1950s when there were nine women in a class of over 500: "so that meant most sections had just 2 women, and you felt every eye was on you. Every time you went to answer a question, you were answering for your entire sex."¹³ Still in 2009, Justice Ginsburg was concerned about the public's perception when looking at the Supreme Court and seeing only one female at the table. "It matters for women to be there at the conference table to be doing everything that the Court does."¹⁴ Not until 2010, 207 years after the landmark case of *Marbury v. Madison*, would the bench reflect the largest plurality of female voices with the appointments and seating of three female associate justices (Justice Ruth Bader Ginsburg, Justice Sonia Sotomayor, and Justice Elena Kagan) out of the nine seated justices.

The Court of 2018, with Chief Justice John Roberts at the

¹⁰ LAURENCE TRIBE, *PORTRAIT OF A DIVIDED COURT* 18, 22 (2015).

¹¹ Justice Ruth Bader Ginsburg, Remarks at 10th Cir. Bench & Bar Conference at the University of Colorado in Boulder (Nov. 26, 2012).

¹² Emily Bazelon, *The Place of Women on the Court*, THE N.Y. TIMES MAGAZINE (July 7, 2009), <https://www.nytimes.com/2009/07/12/magazine/12ginsburg-t.html>.

¹³ *Id.*

¹⁴ *Id.*

helm, consists of nine and is the most diverse to date. The Supreme Court includes three women, three members of the Jewish faith,¹⁵ and both an African-American associate justice and the first Latina associate justice. Regarding race and gender, the Court is much more a reflection of the American citizenry than ever before. Justice Ginsburg feels the perception of the Court is a much stronger one because of gender, stating it is “distinctly different...I like the idea that we’re all over the bench. It says women are here to stay.”¹⁶

Currently, each Justice attended an Ivy League school with three current associate justices of the Court holding Juris Doctor degrees from Yale Law, five members of the Court, including the Chief Justice, holding degrees from Harvard Law, and Justice Ginsburg holding a Columbia Law degree (though she spent her first two years at Harvard Law.) Additionally, the Court has three members of the Jewish faith¹⁷ and four identified Catholic members. Associate Justice Neil Gorsuch, the Court’s newest member, has not self-identified his religion publicly. He was raised Catholic, however, it is reported he attends an Episcopalian church. If he identifies as a Protestant, he would be the sole Protestant on the Court and the first since the retirement of Justice John Paul Stevens in 2010.¹⁸ Regionally, the Court is disproportionately from the Northeast section of the country with Justice Sotomayor hailing from the Bronx, Justice Ginsburg from Brooklyn, Justice Kagen from Manhattan, Chief Justice Roberts from Buffalo, New York, and Justice Alito from Trenton, New Jersey.¹⁹

Justice Sotomayor has recently advocated for increased

¹⁵ KELLY KNAUER, WHAT IF WOMEN HAD ALWAYS SERVED ON THE COURT? 45 (2015).

¹⁶ Joan Biskupic, *Justice Ginsburg reflects on term, leadership role*, USA TODAY (June 30, 2011), http://usatoday30.usatoday.com/news/washington/judicial/2011-07-01-supreme-court-ginsburg_n.htm#.

¹⁷ Justice Sonia Sotomayor, Remarks at Brooklyn Law School (Apr. 8, 2016).

¹⁸ Alison Durkee, *What Religion Is Neil Gorsuch?*, MIC (Apr. 7, 2017), <https://mic.com/articles/173527/what-religion-is-neil-gorsuch#.6WmZxYPVZ>.

¹⁹ *This article was drafted prior to the confirmation of Supreme Court Associate Justice Brett Kavanaugh on October 6, 2018. The demographic information illustrated here does not include Justice Kavanaugh.*

diversity on the bench, stating that varied and diverse backgrounds bring different perspectives that can help the justices better understand the arguments before them and help them articulate their positions in a better way.²⁰ This clarion call for diversity from the first Latina justice to be appointed to the Supreme Court has been centuries in the making. As such, it shares a direct correlation with the topic of this paper. Within the context of confirmation today, what type of personality could the United States Senate confirm? Could it be a member of the ACLU or an ardent feminist, like the person who laid out the blueprint of the women's rights movement? Justice Ginsburg herself says no. If that is the case, then who fits the call Justice Sotomayor is seeking regarding diversity on the bench? From the time of the *Marbury v. Madison* opinion in 1803, through Belva Lockwood's hard fought battle for equality within the Supreme Court Bar in 1879, to the first female to sit on the Supreme Court in 1981, there continues to be a lack of diversity on the bench.

III. THE PREPARATION OF RUTH BADER GINSBURG FOR THE ACLU AND THE BENCH

Ruth Bader Ginsburg was born on March 15, 1933 in Brooklyn, New York.²¹ She attended Cornell on a full scholarship. It was at Cornell during freshman year that Ruth met Martin (Marty) D. Ginsburg, a year ahead of her in school.²² Early in Marty's senior year at Cornell, they began discussing what they should study as they wanted to work in the same discipline.²³ The business school at Harvard, which is where

²⁰ *Id.*

²¹ Neil A. Lewis, *The Supreme Court: Woman in the News; Rejected as a Clerk, Chosen as a Justice: Ruth Joan Bader Ginsburg*, THE N.Y. TIMES (June 13, 1993),

<http://www.nytimes.com/1993/06/15/us/supreme-court-woman-rejected-clerk-chosen-justice-ruth-joan-bader-ginsburg.html>.

²² Beth Saulnier, *Justice Prevails: A Conversation with Ruth Bader Ginsburg '54*, CORNELL ALUMNI MAGAZINE (November/December 2013).

²³ Jay Mathews, *The Spouse of Ruth*, THE WASHINGTON POST (June 19, 1993),

<https://www.washingtonpost.com/archive/lifestyle/1993/06/19/the-spouse-of-ruth/a57e6536-3e1b-4c30-8bab-1f2c629cf172>.

Marty wanted to attend graduate school, was not admitting women, so law school was chosen.²⁴ Marty said the following about their decision regarding the study of law: "I have thought deep in my heart that Ruth always intended that to be the case."²⁵ Ruth graduated from Cornell in 1954, and they were married on Long Island at Marty's parents' house on June 23, 1954. Marty had just completed his first year at Harvard Law School. Following the wedding, the newlyweds had to report to Fort Sill, Oklahoma for Marty to complete his two-year military assignment.²⁶ It was in Oklahoma when Ruth first experienced gender discrimination in employment. While employed at the Social Security office as a claims adjuster, she became pregnant with their first child, Jane, who was born in 1955. Once her employer discovered her pregnancy, Ruth was informed she would receive no more promotions or raises.²⁷

When the two-year assignment in Oklahoma was complete, Ruth had to apply for readmission to Harvard Law. At Harvard, Ruth was one of two women to make Law Review. It is of note that when Law Review had its banquet, she was not permitted to invite her mother-in-law because the Law Review dinner was for men only. Further gender exclusion occurred when Ruth needed to check a citation for Law Review in Lamont Library. When she arrived at the periodical room, she was not permitted access because of her gender.²⁸ These indignities began to open her eyes to a lack of equal access for women.

During law school, Marty became ill with cancer. Ruth continued her studies, took notes for Marty, and continued to parent their daughter. He was able to recuperate and upon graduation found a job in New York City. Ruth asked the Dean if she could finish her third year at Columbia Law in New York but still obtain a Harvard degree, as many male students had done when exigent circumstances had arisen. The Dean said no. Ruth transferred to Columbia where she tied for first in her

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Nomination of Ruth Bader Ginsburg, To be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary, 103rd Cong. 134 (1993).*

class.²⁹

Though Ruth finished first in her class from Columbia Law and was on Law Review at both Harvard and Columbia, she was rejected by each potential employer.³⁰ Some employers would only interview men at the time, but Ruth sat for 12 interviews and had two follow up interviews. Both firms rejected her. She felt her liabilities were that she was both a female and a mother.³¹ Dean Sacks proposed Ruth to Justice Felix Frankfurter of the Supreme Court as a law clerk, but Justice Frankfurter was not ready to hire a woman.³² Ruth was surprised he would not hire her because he was the first Supreme Court justice to hire an African-American law clerk.³³ More than being a Supreme Court law clerk, Ruth hoped to clerk for Judge Learned Hand on the Second Circuit Court of Appeals. However, he refused to hire her as well. Finally, with the help of her mentors, she was able to find employment with a Federal district court judge, Edmund Palmieri.³⁴

After clerking for Judge Palmieri, she was recruited to participate in an international civil procedure project about Sweden through Columbia Law School.³⁵ It was in Sweden where Ruth began to further see the inequality in women's rights that existed in the United States. In Sweden in 1962 and 1963, women were about 25% of the law student population, while in the U.S., women only made up about 3%. Additionally, in Sweden, it was already accepted that families would have dual incomes.³⁶ In contrast, in the U.S., women were still expected to stay home and were generally not welcome, or equal, members of the workforce. In 1963, Ruth began teaching

²⁹ Saulnier, *supra* note 21.

³⁰ Suzanne Reynolds, *An Interview with Justice Ruth Bader Ginsburg*, 48 No. 3 JUDGEJ. 6, 7 (2009).

³¹ *Id.*

³² *Id.*

³³ *Interview with Ruth Bader Ginsburg*, ACADEMY OF ACHIEVEMENT (Aug. 17, 2010), <http://www.achievement.org/achiever/ruth-bader-ginsburg/>.

³⁴ LINDA HIRSHMAN, SISTERS IN LAW 21 (2015).

³⁵ Reynolds, *supra* note 29, at 6, 8.

³⁶ Abbe R. Gluck & Gillian Metzger, *A Conversation with Justice Ruth Bader Ginsburg*, YALE LAW SCHOOL LEGAL SCHOLARSHIP REPOSITORY 8 (2013).

at Rutgers Law School.³⁷ When she began at Rutgers, her Dean informed her she would have to take a pay cut from what Columbia had been paying her for the Sweden project where she had co-authored a book. When she asked what a male faculty member close to her age and years out of law school was paid, the response from the Dean was swift: "Ruth, he has a wife and two children to support. You have a husband with a well-paid job at a New York law firm."³⁸

At this time in history, women around the country were turning to the ACLU to report discriminatory practices in the workplace. The ACLU needed help in handling the cases, therefore, the ACLU reached out to Ruth. She began helping the ACLU draft briefs in gender discrimination cases.³⁹ Ruth was the author of a brief in *Reed v. Reed*, a landmark Supreme Court decision where the Court ruled a statute in Idaho unconstitutional because it discriminated solely based on gender. In *Reed v. Reed*, a mother of her deceased son was trying to be the administrator of the estate and had filed to do so. The father filed after the mother, and the court appointed him as administrator because the statute said that men were preferred. The *Reed* brief contained Idaho's statute for the domicile rule, an example of another sex-based differential statute in Idaho, which was typical at the time. It read: "*The husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto.*"⁴⁰ The Court unanimously held the statutory language to be in violation of the Equal Protection Clause of the Fourteenth Amendment.⁴¹ It was a landmark and historic ruling that changed the face of constitutional law.

³⁷ Hirshman, *supra* note 33, at 22.

³⁸ Elaine Bucklo, *From Women's Rights Advocate to Supreme Court Justice: Ruth Bader Ginsburg Speaks*, 37 No. 2 LITIGATION 8, 10 (Winter 2011).

³⁹ Roya Rafei, *Ruth Bader Ginsburg: The Former Rutgers Law Professor Led the Legal Campaign for Gender Equality*, RUTGERS TODAY (Feb. 29, 2016) <http://news.rutgers.edu/feature/ruth-bader-ginsburg-former-rutgers-law-professor-led-legal-campaign-gender-equality/20160228#.V2G69KLzPrw>.

⁴⁰ Justice Ruth Bader Ginsburg, Remarks for the Celebration of 75 Years of Women's Enrollment at Columbia Law School (Oct. 19, 2002) (transcript available in 102 Colum. L. Rev. 1441 (2002)).

⁴¹ *Reed v. Reed*, 404 U.S. 71, 77 (1971).

Before *Reed v. Reed*, the Court had turned away any female seeking relief based on an argument of an Equal Protection violation by a state or federal law.⁴² This was the first time the Supreme Court used the Fourteenth Amendment's Equal Protection clause to apply to women. After this ruling, the ACLU Women's Rights Project was founded and Ruth was asked to serve as the director.⁴³

In 1972, Ruth left Rutgers and became the first tenured female professor at Columbia Law School.⁴⁴ In her role with the ACLU during the 1970s, she brought six cases involving gender discrimination before the United States Supreme Court, winning five of the six.⁴⁵ Her strategy was to target state and federal statutes with sex-based differentials while advancing public understanding, legislative change, and change in judicial doctrine.⁴⁶ She worked a long-range plan trying to convey to decision makers "that something was wrong with their perception of the world."⁴⁷ She received help from the government with this plan in 1973 when Ruth and her husband, a leading tax attorney, teamed up on a case for a client, Charles E. Moritz, against the IRS. The IRS allowed a deduction for single women, but not single men, when caring for elderly dependents. Charles wanted to claim the deduction for caring for his elderly mother. After they brought the suit, Congress modified the law to change the sex-based differential in the midst of the suit, making the issue moot. The government continued to seek relief from the Supreme Court because the Court of Appeals, in ruling on behalf of Charles, "casts a cloud of unconstitutionality upon the many federal statutes listed in Appendix E." The government was worried about the precedent set by the holding, and had set out in Appendix E a list of statutes with sex-based differentials. This was a road map

⁴² See Ruth Bader Ginsburg, *Advocating the Elimination of Gender-Based Discrimination*-Feb. 10, 2006, IOWA STATE UNIVERSITY ARCHIVES OF WOMEN'S POLITICAL COMMUNICATION (Feb. 10, 2006), <https://awpc.cattcenter.iastate.edu/2017/03/09/advocating-the-elimination-of-gender-based-discrimination-feb-10-2006>.

⁴³ Hirshman, *supra* note 33, at 58.

⁴⁴ Bazelon, *supra* note 12.

⁴⁵ Ginsburg, *supra* note 8.

⁴⁶ *Id.*

⁴⁷ Ginsburg, *supra* note 39.

for Ruth and the ACLU to advocate for legislative change.⁴⁸

As Ruth brought cases before the Court, she kept in mind her audience: men. Her plan was to convince the Court and legislators that statutes with sex-based differentials disadvantaged women, like their wives, daughters, and granddaughters. She also used male victims of sex-based differentials to change the way the Court and Congress thought about gender. By using male examples to demonstrate situations where men and boys could be disadvantaged by the traditional view of gender, she was successful. A case very close to Ruth's heart was *Weinberger v. Wiesenfeld*, argued in 1975 before the Court. She continues to maintain a relationship with this family today. In *Weinberger v. Wiesenfeld*, Stephen Wiesenfeld's wife passed away during childbirth. Stephen wanted to stay home with their child until he reached school age, but because he was a widowed father, and not a widowed mother, he was excluded from receiving Social Security benefits. The government argued for the sex-based differential to remain in place because women, as a class, were more in need of financial assistance. The Court disagreed and in a unanimous decision said the gender-based distinction in Social Security benefits violated the Due Process clause of the Fifth Amendment. The Court stated benefits were intended to care for the child, regardless of the gender of the surviving parent.⁴⁹ She again had a male client in *Craig v. Boren* in 1976 where she successfully convinced the Court to apply the elevated standard of "heightened scrutiny" when reviewing overt gender-based classifications – a first in American history.⁵⁰ In *Craig v. Boren*, Oklahoma passed a statute where women could purchase 3.2 percent beer at age 18, but men could not purchase the beverage until age 21. In a 7-2 decision, the Court held the statute violated the Fourteenth Amendment's Equal Protection Clause by establishing different drinking ages based on gender.⁵¹

The last case Ruth brought before the Supreme Court was *Duren v. Missouri*, which involved a practice allowing women to be excluded from jury service. A criminal defendant, convicted by an all-male jury, appealed his conviction based on

⁴⁸ *Id.*

⁴⁹ *Weinberger v. Wiesenfeld*, 420 U.S. 636, 649 (1975).

⁵⁰ Ginsburg, *supra* note 39.

⁵¹ *Craig v. Boren*, 429 U.S. 190, 214 (1976).

violations of the Sixth and Fourteenth Amendments of the Constitution, alleging he had not received a fairly constituted jury pool of his peers. The Court agreed in an 8-1 majority opinion stating that the exclusion of women did not serve any significant state interest. Justice William Rehnquist dissented, arguing the majority was incorrectly applying the Due Process clause and Equal Protection Clause.⁵² This is the transcript of the last question she received as an advocate before the Court:

Ruth Bader Ginsburg: To conclude, the unconstitutionality of Missouri's excuse for any woman as it operates to distort Jackson County jury panels is plainly established. Any sensible reading of this record juxtaposed with this Court's eight to one judgment in Taylor leads ineluctably to that conclusion.

William H. Rehnquist: You won't settle for putting Susan B. Anthony on the new dollar, right?

(Laughter)

Warren E. Burger: I think you have no jurisdiction to make that concession, Mrs. Ginsburg. Thank you.

She later recalled she wished she had replied to Justice Rehnquist with the following: "We won't settle for tokens." Instead, she said nothing.⁵³ Perhaps that moment of silence was strategic as Justice Rehnquist would become Ruth's Chief Justice on the Supreme Court. In her years as an attorney practicing before the Court, Justice Rehnquist dissented in all of the cases in which she was successful except for *Weinberger v. Wiesenfeld*. However, later in his time on the Court, Chief Justice Rehnquist joined in Justice Ginsburg's landmark VMI

⁵² *Duren v. Missouri*, 439 U.S. 357, 370 (1979).

⁵³ David Von Drehle, *Redefining Fair with a Simple Careful Assault*, THE WASHINGTON POST (July 19, 1993),

http://www.washingtonpost.com/wp-dyn/content/article/2007/08/23/AR2007082300903_pf.html.

judgment, *United States v. Virginia*,⁵⁴ whereby the Court held that VMI's male-only admissions policy was unconstitutional pursuant to the Fourteenth Amendment's Equal Protection Clause. He later wrote the opinion upholding the constitutionality of the Family and Medical Leave Act in *Nevada Department of Human Resources v. Hobbs*. Justice Rehnquist in his opinion stated: "The Act aims to protect the right to be free from gender-based discrimination in the workplace."⁵⁵ When Justice Ginsburg brought the opinion home for her husband, Marty, to read, he asked, "Did you write it?"⁵⁶ The transformation from someone who would joke from the highest bench in the United States Court system about putting a female on American currency to defending the Family Medical Leave Act in the face of gender discrimination is the type of success the ACLU Women's Rights Project envisioned when it started in 1972. Because of Ruth's success at the ACLU, President Jimmy Carter took notice and appointed her to serve as Judge for the District of Columbia Circuit Court of Appeals in 1980.⁵⁷

IV. JUDGE GINSBURG: PROGRESSIVE, PIONEER, AND A FORCE FOR CONSENSUS

President Clinton, a Democrat, served as President from 1993-2001.⁵⁸ In his first year it was announced Justice Byron White would be retiring. President Clinton and his administration realized he needed to be careful with his nomination as he had irritated Senate Democrats during his presidential campaign. The Chairman of the Judiciary Committee, Democratic Senator Joseph R. Biden, Jr., was ready for a battle based on his comments to appoint someone in favor of abortion rights, saying: "It was very inappropriate for Bill Clinton to indicate on the record during the campaign that he would impose a litmus test on the abortion issue because that

⁵⁴ *United States v. Virginia*, 518 U.S. 515, 566 (1996).

⁵⁵ *Nev. Dep't of Human Res. v. Hobbs*, 538 U.S. 721, 740 (2003).

⁵⁶ Bucklo, *supra* note 37, at 14.

⁵⁷ Ginsburg, *supra* note 8.

⁵⁸ HISTORY.COM, BILL CLINTON,

<https://www.history.com/topics/us-presidents/bill-clinton> (last visited Jan. 11, 2019).

will polarize opinion in the Senate.”⁵⁹ Republican Senator Orrin Hatch, the ranking Republican on the Judiciary Committee, sent a warning to the President to select someone who would “neutrally and objectively interpret and apply the laws, not judges who will impose their own policy preferences.”⁶⁰ In order to avoid embarrassment, President Clinton needed to select someone capable of gaining bipartisan support. The last justice to be confirmed had been Judge Clarence Thomas in 1991.⁶¹ His nomination by President Bush concluded a 107 day fight with a 52-48 vote after three days of hearings with law professor Anita Hill making allegations of sexual harassment, which Judge Thomas denied.⁶²

President Clinton was trying to decide whom to nominate to the Supreme Court for his first nomination and asked Justice Scalia, “If you were stranded on a desert island with your new Court colleague, who would you prefer, Larry Tribe or Mario Cuomo?” Justice Scalia answered: “Ruth Bader Ginsburg.”⁶³ President Clinton took his advice and the rest is Supreme Court history. After an exhaustive selection process of over 40 potential nominees lasting three months, President Clinton announced his nomination of Judge Ruth Bader Ginsburg in the Rose Garden at the White House on June 14,

⁵⁹ Thomas L. Friedman, *The Supreme Court; Clinton Expected to Pick Moderate for High Court*, N.Y. TIMES (Mar. 20, 1993), <http://www.nytimes.com/1993/03/20/us/the-supreme-court-clinton-expected-to-pick-moderate-for-high-court.html?pagewanted=print>.

⁶⁰ *Id.*

⁶¹ HISTORY.COM, THOMAS CONFIRMED TO THE SUPREME COURT, <https://www.history.com/this-day-in-history/thomas-confirmed-to-the-supreme-court> (last visited Jan. 11, 2019).

⁶² R.W. Apple, Jr., *The Thomas Confirmation; Senate Confirms Thomas, 52-48, Ending Week of Bitter Battle; ‘Time for Healing,’ Judge Says*, N.Y. TIMES (Oct. 16, 1991),

<http://www.nytimes.com/1991/10/16/us/thomas-confirmation-senate-confirms-thomas-52-48-ending-week-bitter-battle-time.html>.

⁶³ Justice Ruth Bader Ginsburg, Remarks for the Second Circuit Judicial Conference (May 26, 2016) (transcript available via <https://www.supremecourt.gov/publicinfo/speeches/Remarks%20for%20the%20Second%20Circuit%20Judicial%20Conference%20May%2025%202016.pdf>).

1993.⁶⁴ In his speech, he cited Judge Ginsburg's advocacy work on behalf of the women's rights cases in the 1970s (though he never mentioned the ACLU by name), comparing her to the former Supreme Court Justice Thurgood Marshall. He remarked about her past 13 years as one of the nation's leading centrist judges on the United States Court of Appeals for the District of Columbia. He said he nominated her because of her progressive outlook, balanced and fair opinions, pioneering work on behalf of women, and she would be a force of consensus building on the Supreme Court.⁶⁵ In her remarks in the Rose Garden, Judge Ginsburg made sure to pay reverence to the women's rights movement:

The announcement the President just made is significant, I believe, because it contributes to the end of the days when women, at least half the talent pool in our society, appear in high places only as one-at-a-time performers. Recall that when President Carter took office in 1976, no woman ever served on the Supreme Court, and only one woman, Shirley Hufstедler of California, then served at the next Federal Court level, the United States Courts of Appeals. Today, Justice Sandra Day O'Connor graces the Supreme Court bench, and close to 25 women serve at the Federal Court of Appeals level, two as Chief Judges. I am confident that more will soon join them. That seems to me inevitable, given the change in law school enrollment. My law school class in the late 1950's numbered over 500. That class included less than 10 women. As the President said, not a law firm in the entire city of New York bid for my employment as a lawyer when I earned my degree. Today few law

⁶⁴ Justice Ruth Bader Ginsburg, Address Accepting the Nomination for Associate Supreme Court Justice (Jun. 15, 1993) (transcript available in the N.Y. Times news archive, available at <https://www.nytimes.com/1993/06/15/us/supreme-court-transcript-president-s-announcement-judge-ginsburg-s-remarks.html>).

⁶⁵ *Id.*

schools have female enrollment under 40 percent, and several have reached or passed the 50 percent mark. And thanks to Title VII, no entry doors are barred...I am indebted to so many for this extraordinary chance and challenge: to a revived women's movement in the 1970's that opened doors for people like me, to the civil rights movement of the 1960's from which the women's movement drew inspiration...[I] have a last thank you. It is to my mother, Celia Amster Bader, the bravest and strongest person I have known, who was taken from me much too soon. I pray that I may be all that she would have been had she lived in an age when women could aspire and achieve and daughters are cherished as much as sons.⁶⁶

Within a day, both Senator Biden and Senator Hatch were making statements to the press expressing bipartisan support for the confirmation of Judge Ginsburg. Senator Hatch went so far to say that Judge Ginsburg "will have a relatively easy time" getting confirmed.⁶⁷ The confirmation hearing was set to begin July 20, 1993, with hopes of her being confirmed in time for the October session.⁶⁸

Judge Ginsburg spent the week leading up to her confirmation hearing at the Old Executive Office in Washington, D.C., working with lawyers in mock interviews to

⁶⁶ Justice Ruth Bader Ginsburg, Address Accepting the Nomination for Associate Supreme Court Justice (Jun. 14, 1993) (transcript available in

<http://www.americanrhetoric.com/speeches/ruthbaderginsburguscnominationspeech.htm>).

⁶⁷ Stephen Labaton, *Senators See Easy Approval for Nominee*, N.Y. TIMES (1993), available at

<http://www.nytimes.com/1993/06/16/us/senators-see-easy-approval-for-nominee.html?pagewanted=print>.

⁶⁸ Richard Berke, *Ruth Bader Ginsburg; Clinton Picks a 'Healer' With Few Detractors for the Supreme Court*, N.Y. TIMES (1993), available at <http://www.nytimes.com/1993/06/20/weekinreview/june-13-19-ruth-bader-ginsburg-clinton-picks-healer-with-few-detractors-for.html?pagewanted=print>.

prepare for the questioning.⁶⁹ This involved combing through all of her past writings, decisions, and speeches. The hope was that there would be no question a senator would ask that they had not gone over in the practice sessions.⁷⁰ She was anticipating the ACLU questions from the committee. An associate of Judge Ginsburg said she would “not disavow anything she has written.”⁷¹ Judge Ginsburg’s confirmation hearing began as scheduled on July 20, 1993.⁷² There were eighteen senators on the Senate Judiciary Committee. Two of them were women.⁷³ The first day started with each senator giving a prepared opening statement. Senator Howell Heflin from Alabama commented on the change in the confirmation atmosphere:

I have during past hearings seen the organized distortions of interest groups, heard the roars of extreme party loyalists, and witnessed the divisiveness of politics. I have in a sense seen blood shed during past confirmation hearings. This time I believe we will see a process remarkably free of acrimony and partisan bickering. Already there is a noticeable difference. What a change of atmosphere from that of recent past: Congeniality prevails over confrontation; back-slapping has replaced backstabbing; inquiry is the motivation rather than injury. While it remains to be seen whether this climate of goodwill will last, at least for now we are scaling the heights of bipartisan cooperation.

Two hours later, following the opening statements,

⁶⁹ Neil A. Lewis, *Ginsburg Gets Set for Her Most Public Law Exam*, N.Y. Times (1993), available at <http://www.nytimes.com/1993/07/15/us/ginsburg-gets-set-for-her-most-public-law-exam.html?pagewanted=print>.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Nomination of Ruth Bader Ginsburg, To be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 103rd Cong. 134 (1993).

⁷³ *Id.* at 2.

Judge Ginsburg was able to speak.⁷⁴ Judge Ginsburg set a ground rule at the beginning of the confirmation hearing, dubbed the “Ginsburg Rule” in the press, that she would not answer any questions about how she would cast a vote on questions that would come before the Supreme Court, as that would show “disdain for the entire judicial process” to offer forecasts on how she might rule on a future controversy.⁷⁵ Besides her oral testimony, and the oral testimony and prepared testimony of other witnesses at the hearing, the Committee was given hundreds of pages about Judge Ginsburg and thousands of pages written by her, including her writings as a professor; a decade of Courtroom briefs; various speeches and articles; over 700 opinions made during her thirteen years on the U.S. Court of Appeals for the District of Columbia Circuit; and several comments on the roles of judges and lawyers in the legal system.⁷⁶

During her questioning, she was asked about the cases she worked on extensively while director of the ACLU Women’s Rights Project but never asked one question directly about the ACLU. She described her time during the 1970’s as part advocate and part teacher. When she would discuss gender differentials, she found people were confused about what she was saying because men thought women were treated so much better than they were.

I was talking to an audience of men who thought immediately that what I was saying was somehow critical about the way they treated their wives, the way they treated their daughters. Their notion was, far from treating women in an odious, evil, discriminatory way, women were kept on a pedestal. Women were spared the messy, dirty real world; they were

⁷⁴ Linda Greenhouse, *The Supreme Court: Reporter’s Notebook; Hearing Without Strife Brings Joy to Senators*, N.Y. TIMES (1993), available at <http://www.nytimes.com/1993/07/21/us/supreme-court-reporter-s-notebook-hearing-without-strife-brings-joy-senators.html?pagewanted=print>.

⁷⁵ *Nomination of Ruth Bader Ginsburg, To be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 103rd Cong. 55 (1993).

⁷⁶ *Id.*

kept in clean, bright homes. I was trying to educate the judges that there was something wrong with the notion, “Sugar and spice and everything nice, that’s what little girls are made of” – for that very notion was limiting the opportunities, the aspirations of our daughters. One doesn’t learn that lesson in a day. Generally, change in our society is incremental, I think. Real change, enduring change, happens one step at a time.⁷⁷

Though she was not directly asked about her ACLU involvement, she was asked about her comments regarding the *Roe v. Wade* decision, as she had written on the topic in the past, making her the first nominee in more than a decade to discuss abortion. The former two Republican administrations, George Bush and Ronald Reagan, refused to knowingly nominate anybody who would uphold *Roe v. Wade*. However, Democratic senators would not confirm anyone committed to overturning *Roe v. Wade*.

An examination of the history of Supreme Court cases in which nominees claim privilege from the years 1939-2010 shows *Roe v. Wade* at the top of the list with 37 nominees claiming privilege.⁷⁸ Further examination of the civil rights issue shows 24% of nominees from the same time period invoked privilege during the confirmation process regarding abortion.⁷⁹ Justice Sandra Day O’Connor, Justice David Souter, Justice Clarence Thomas, and Chief Justice John Roberts all claimed privilege on the topic of abortion rights during their confirmation hearings.⁸⁰

Judge Ginsburg explained her comments regarding *Roe v. Wade* were “what if” speculation.⁸¹ She speculated that if the decision had been less sweeping, it would not have given one side of the movement a target for which to aim, and would have

⁷⁷ *Id.* at 122.

⁷⁸ Paul M. Collins, Jr. & Lori A. Ringhand, *Supreme Court Confirmation Hearings and Constitutional Change* 249 (2013).

⁷⁹ *Id.* at 235.

⁸⁰ *Id.* at 246.

⁸¹ *Nomination of Ruth Bader Ginsburg, To be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary, 103rd Cong.* 149 (1993).

allowed the citizenry to express themselves in the political arena so to make gradual change in each state.⁸² During the questioning on abortion, Judge Ginsburg was able to discuss a case she had wanted to argue before the Supreme Court in 1972. Captain Susan Struck had become pregnant while serving in the Air Force in Vietnam.⁸³ The Air Force gave her the choice to have an abortion at the base hospital or leave the service. She was a Catholic and could not reconcile having an abortion with her faith. She also did not want to lose her job as she loved being in the Air Force. She went home to America and had the baby, surrendering it for adoption. Judge Ginsburg, through the ACLU's Women's Rights Project, argued the Air Force regulations violated the Equal Protection clause of the Fourteenth Amendment, that making Captain Struck choose whether to bear or not bear a child was violating her Due Process freedoms, and that the Air Force was infringing on her religious beliefs.⁸⁴ This case did not make it to the Supreme Court. The Air Force, recognizing theirs was a losing argument, changed its regulations and waived Captain Struck's discharge allowing her to remain in the service. This case marked the first time Judge Ginsburg "thought long and hard about this question" of a woman's choice for birth.⁸⁵ To her, the abortion issue is not an either/or matter. It involves both equal protection and choice. Pregnancy is the one thing that differentiates women from men as only women can become pregnant. If a woman is being treated differently based on the fact of her pregnancy, then she is being denied her Equal Protection rights under the law. In the *Struck* case, it was her choice to carry the child. The Air Force, as the arm of the government, was interfering in that choice by telling her to either abort the child or lose her job.

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

⁸² *Id.*

⁸³ *Id.* at 205.

⁸⁴ *Struck v. Sec'y of Def.*, 409 U.S. 1071 (1972).

⁸⁵ *Nomination of Ruth Bader Ginsburg, To be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 103rd Cong. 206 (1993).

herself. When Government controls that decision for her, she is being treated as less than a fully adult human responsible for her own choices...It is essential to woman's equality with man that she be the decision maker, that her choice be controlling. If you impose restraints that impede her choice, you are disadvantaging her because of her sex.⁸⁶...Abortion prohibition by the State, however, controls women and denies them full autonomy and full equality with men . . . The two strands—equality and autonomy—both figure in the full portrayal. Recall that *Roe* was decided in early days. *Roe* was not preceded by a string of women's rights cases. Only *Reed v. Reed* (1971) had been decided at the time of *Roe*. Understanding increased over the years. What seemed initially, as much a doctor's right to freely exercise his profession as a woman's right, has come to be understood more as a matter in which the woman is central.⁸⁷

When asked how the American people should think of her, Judge Ginsburg responded: "I would like to be thought of as someone who cares about people and does the best she can with the talent she has to make a contribution to a better world."⁸⁸ After several long days of questioning, the hearing adjourned on July 23, 1993 at 2:43 p.m.⁸⁹ On August 2, 1993, speeches were given on the Senate floor. Senator Orrin Hatch expressed his disagreement with Judge Ginsburg on her views regarding abortion, however, he stated she is "unlikely to be a liberal judicial activist."⁹⁰ Senator Jesse Helms, a Republican from North Carolina, chastised the Committee members for being too soft on Judge Ginsburg regarding her position on abortion and warned she would be "likely to uphold the

⁸⁶ *Id.* at 207.

⁸⁷ *Id.* at 208.

⁸⁸ *Id.* at 232.

⁸⁹ *Id.* at 565.

⁹⁰ 139 Cong. Rec. S10083-01 (daily ed. Aug. 2, 1993) (statement of Sen. Hatch).

homosexual agenda.”⁹¹ The vote to confirm Judge Ginsburg was taken in the U.S. Senate on August 3, 1993. The vote was 96 YEAs, 3 NEAs, and 1 not voting.⁹² Senators Helms (R-NC), Nickles (R-OK), and Smith (R-NH) voted NEA while Senator Riegle (D-MI) was not present to vote, attending a funeral in his home state. A total of 55 Democrat senators and 41 Republican senators voted in support of the women’s rights pioneer.⁹³ Justice Ruth Bader Ginsburg was sworn in on August 10, 1993,⁹⁴ becoming the 107th Justice of the Supreme Court of the United States⁹⁵ and the second woman to sit on the Supreme Court. Though she received bipartisan support in 1993, today Justice Ginsburg believes she would not be confirmed. Justice Ginsburg stated specifically of Republican Senator Orrin Hatch: “I think today he wouldn’t touch me with a 10-foot pole.”⁹⁶

V. THE POLITICAL DIVIDE OF 2016

Eight is not a good number for a multimember Court⁹⁷ when there are to be nine members. This was the number the Court was left with following the passing of Justice Antonin Scalia. The news of his passing broke in the morning hours of Saturday, February 13, 2016. By 5:24 p.m. that afternoon, the Associated Press reported Republican Senate Majority Leader Mitch McConnell said the Supreme Court vacancy should not be filled until there was a new President.⁹⁸ President Barack

⁹¹ 139 Cong. Rec. S10076-01 (daily ed. Aug. 2, 1993) (statement of Sen. Helms).

⁹² 139 Cong. Rec. S10163 (Aug. 3, 1993) (Senate votes to confirm Ruth Bader Ginsburg as an Associate Supreme Court Justice).

⁹³ *Id.*

⁹⁴ RUTH BADER GINSBURG, OYEZ, https://www.oyez.org/justices/ruth_bader_ginsburg (last visited Jan. 21, 2019).

⁹⁵ *Nomination of Ruth Bader Ginsburg, To be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 103rd Cong. 10 (1993).

⁹⁶ Justice Ruth Bader Ginsburg, Address at Rathbun Lecture on a Meaningful Life at Stanford Memorial Church (Feb. 6, 2017).

⁹⁷ Supreme Court, *supra* note 62.

⁹⁸ Senator Mitch McConnell, Statement on the Passing of Justice Antonin Scalia (Feb. 13, 2016).

Obama's second presidential term expired January 20, 2017.⁹⁹

The President of the United States has the authority to appoint justices to the Supreme Court through Article II, Section 2, of the United States Constitution. The United States Senate then has the authority through "Advice and Consent" to confirm or deny these appointments.¹⁰⁰ On March 16, 2016, President Obama nominated Chief Judge Merrick Garland of the United States Court of Appeals for the District of Columbia Circuit to fill the Supreme Court vacancy. Following a nomination, the Senate Judiciary Committee conducts a hearing on the nominee. After the hearing, a vote is held in committee to send the nomination to the Senate floor with a favorable, unfavorable, or no recommendation status. Next, the vote goes to the Senate floor, with procedures in place for potential filibustering.¹⁰¹ However, Chief Judge Garland's nomination did not move forward. Senate Majority Leader McConnell stated: "The American people should have a voice in the selection of their next Supreme Court Justice ... [t]herefore, this vacancy should not be filled until we have a new president."¹⁰²

Chief Judge Garland's record indicates he is a moderate jurist. This was more than likely why he was nominated by President Obama as an effort to force Senate Majority Leader McConnell to back away from his initial comments. However, the move did not work. When Chief Judge Garland's nomination is compared with three appointees from three former administrations, it is clear his trajectory in the process is unusual. Justice Kennedy, a Ronald Reagan appointee (Republican president with a Senate controlled by Democrats), was appointed and confirmed within 65 days. Chief Justice John Roberts, a George W. Bush appointee (Republican president with a Senate controlled by Republicans), was appointed and confirmed within 62 days. Justice Elena Kagan, a Barack Obama appointee (Democrat president with a Senate controlled by Democrats), was appointed and confirmed within 87 days. Since 1900, six Justices have been appointed in a

⁹⁹ THE WHITE HOUSE, PRESIDENT BARACK OBAMA, <https://obamawhitehouse.archives.gov/administration/president-obama> (last visited Jan. 21, 2019).

¹⁰⁰ U.S. CONST. art. II, § 2.

¹⁰¹ THE WHITE HOUSE, *supra* note 97.

¹⁰² Stack, *supra* note 96.

presidential election year.¹⁰³ Justice Anthony Kennedy is the most recent example of a Supreme Court justice being confirmed in an election year. He was appointed by Republican President Ronald Reagan and confirmed in February of 1988 by a vote of 97-0, despite the Senate being controlled by Democrats.¹⁰⁴ Yet no hearing, much less a vote, was held in the Senate for Chief Judge Garland. After waiting 294 days, the 114th Congress concluded on January 3, 2017, ending Chief Judge Garland's hopes for nomination.¹⁰⁵

Chief Judge Garland's failure to obtain a hearing has less to do with him than with the current state of politics. He is not the only person to receive a nomination that Congress subsequently made efforts to block. In 2010, Senator Jeff Sessions (R-AL) complained that President Obama was only nominating individuals to the Federal bench who possessed "ACLU DNA". He stated:

I'm sure that less than one percent of the lawyers in America are members of the ACLU. It seems if you have the ACLU DNA, you get a pretty good leg up to being nominated by this president...I do believe the administration needs to understand that this is going to be a more contentious matter if we keep seeing the ACLU chromosome as part of this process.¹⁰⁶

A number of other Supreme Court Justices have also had this "ACLU DNA" such as Thurgood Marshall, Felix Frankfurter, and Arthur Goldberg.¹⁰⁷ The ACLU is an organization dedicated to defending and preserving the rights contained within the United States Constitution. On the

¹⁰³ *Id.*

¹⁰⁴ Steve Benen, *Justice Kennedy's Confirmation Debunks Key GOP Talking Point*, MSNBC (Feb. 15, 2016) <http://www.msnbc.com/rachel-maddow-show/justice-kennedy-confirmation-debunks-key-gop-talking-point>.

¹⁰⁵ Amy Howe, *Garland Nomination Officially Expires*, SCOTUSBLOG (Jan. 3, 2017) <http://www.scotusblog.com/2017/01/garland-nomination-officially-expires/>.

¹⁰⁶ 156 Cong. Rec. S10852-02, S10870 (daily ed. Dec. 21, 2010) (statement of Sen. Sessions).

¹⁰⁷ *Id.*

opposite side of the spectrum in law is the Federalist Society, an organization that many Bush appointees were members of during his administration. In fact, Justice Antonin Scalia was a supporter of the Federalist Society.¹⁰⁸ This is an organization favoring right-wing interests and the ideal that the Constitution should not encroach upon the rights enumerated to the states. This “ACLU DNA” comment in 2010 would not be the only time Senator Sessions would bring up his concern with attorneys who practice in the civil rights arena. In 2015, during a Senate Judiciary Committee Hearing with Paula Xinis, a former federal public defender and civil rights lawyer nominated for the United States District Court for the District of Maryland, Senator Sessions asked her: “Can you assure police officers in Baltimore and all over Maryland that might be brought before your court that they’ll get a fair day in court, and that your history would not impact your decision-making?”¹⁰⁹ He went on to ask if she would bring an agenda to the bench. Xinis was nominated by President Obama on March 26, 2015 and was confirmed more than one year later on May 16, 2016 by a 53-34 vote in the Senate.¹¹⁰

It appears Chief Judge Garland neither possessed the ACLU chromosome nor the Federalist gene. He was confirmed to the D.C. Circuit Court with votes from a majority of Democrats and a majority of Republicans, after serving as a Federal prosecutor in President George H.W. Bush’s administration. As President Obama was nominating Chief Judge Garland, he gave the following admonition to the Senate:

At a time when our politics are so polarized, at a time when norms and customs of political rhetoric and courtesy and comity are so often treated like they are disposable, this is precisely the time when we should play it straight and treat the process of appointing a Supreme Court

¹⁰⁸ Amy Bach, *Movin’ On Up with the Federalist Society*, THE NATION (Sept. 13, 2001), <https://www.thenation.com/article/movin-federalist-society/>.

¹⁰⁹ *Nomination of Paula Xinis for United States District Court Judge Before the S. Comm. of the Judiciary*, 114 Cong. (2015) (statement of Sen. Sessions).

¹¹⁰ 162 Cong. Rec. S2832-07 (May 16, 2016).

justice with the seriousness and care it deserves because our Supreme Court really is unique. It's supposed to be above politics. It has to be. And it should stay that way. To suggest that someone as qualified and respected as Merrick Garland doesn't even deserve a hearing, let alone an up or down vote, to join an institution as important as our Supreme Court, when two-thirds of Americans believe otherwise, that would be unprecedented. To suggest that someone who has served his country with honor and dignity, with a distinguished track record of delivering justice for the American people might be treated, as one Republican leader stated, as a political piñata. That can't be right.¹¹¹

Senate Republicans were not persuaded by the President's remarks. Many Republican senators refused to meet with Chief Judge Garland. The Judicial Crisis Network launched a five-figure digital campaign "exposing Merrick Garland's record as a liberal."¹¹² It appeared the civility of 1993 was replaced with a strategy of obstructing President Obama's Federal judicial appointments, not just in the Supreme Court but also in the lower courts. After Republicans took over the Senate in 2015, year seven of President Obama's presidency, the Senate had only confirmed five judges by the beginning of August, compared to confirming 26 at that point in President George W. Bush's presidency.¹¹³

¹¹¹ President Barack Obama, Address Nominating Judge Merrick Garland for Supreme Court Justice (Mar. 16, 2016) (transcript available at <http://time.com/4260979/supreme-court-nominee-merrick-garland-speech-transcript>).

¹¹² Judicial Crisis Network, *Judicial Crisis Network Launches Digital Ad Campaign Exposing Merrick Garland's Record as a Liberal*, JUDICIAL NETWORK (Mar. 23, 2016), <http://judicialnetwork.com/judicial-crisis-network-launches-digital-ad-campaign-exposing-merrick-garlands-record-as-a-liberal>.

¹¹³ Russell Wheeler, *Confirming Federal Judges During the Final Two Years of the Obama Administration; Vacancies Up, Nominees Down*, BROOKINGS (Aug. 18, 2015), <http://www.brookings.edu/blogs/fixgov/posts/2015/08/18-obama-federal-judges-confirmation-wheeler>.

Justice Ginsburg turned 85 years old in March 2018. For years, several voices were clamoring for her to step down while President Obama was in office so he could replace her with someone likeminded. When asked if she would resign in 2014, she responded that if she resigned President Obama would not be able to appoint anyone like her. She was aware the Senate Republicans “took off the filibuster for lower Federal court appointments, but it remains for this court.” She advised anyone was wrong if they thought President Obama could appoint someone like her if she stepped down, and that she would do the job as long as she could without any loss of production in her work.¹¹⁴ When asked why her confirmation hearing differed from others, she responded:

In part, the Judiciary Committee was determined to have a process different from the one the country had experienced during Justice Thomas’ confirmation. The committee was embarrassed and didn’t want the nomination process to come off so badly again. For example, not one Senator raised any question about my work as a general counsel to the American Civil Liberties Union and cofounder of the ACLU’s Women’s Rights Project. I can’t imagine that happening in a hearing today. I hope someday soon we will get back to the spirit that prevailed in 1993 and 1994. The goal of the process should be to determine whether the nominee is a good lawyer, a reasoned thinker, and one who cares about the society law exists to serve.¹¹⁵

Typically, Supreme Court justices avoid political topics. However, Justice Ginsburg has gone on the record with her displeasure regarding the Senate’s refusal to act on President Obama’s nominee. She said it is the Senate’s job to act on the nomination and “there’s nothing in the Constitution that says the president stops being president in his last year.”¹¹⁶ Justice

¹¹⁴ Jessica Weisberg, *Reigning Supreme*, ELLE, October 2014, 362.

¹¹⁵ Reynolds, *supra* note 29, at 9.

¹¹⁶ Adam Liptak, *Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Last Term*, N.Y. TIMES (July 10, 2016), <http://www.nytimes.com/2016/07/11/us/politics/ruth-bader->

Ginsburg asserts due to the advanced age of some of the sitting justices,¹¹⁷ at some point the Senate will need to act on nominations. On January 31, 2017, President Donald Trump nominated Judge Neil Gorsuch to fill Justice Antonin Scalia's seat.¹¹⁸ Judge Gorsuch was confirmed by a Senate vote of 54-45. He was sworn in as an associate justice on April 10, 2017.¹¹⁹ The process from start to finish took 70 days.

VI. CONCLUSION

"Today, my ACLU connection would probably disqualify me,"¹²⁰ Justice Ruth Bader Ginsburg stated to a room of 2,000 people at Southern Methodist University's Dedman School of Law in 2011. She was there as part of a lecture series and spoke of her confirmation process to the United States Supreme Court. Perhaps Justice Ginsburg was lucky her confirmation hearing fell after Justice Thomas' debacle, leaving the Senate Judiciary Committee with a need to rehabilitate the process for the television cameras. Perhaps her appointment was good timing with a Democratic President looking for a female to appoint, knowing he had a Democratic-controlled Senate to help support his choice in the confirmation process. It seems, however, there is more to Justice Ginsburg's life than mere coincidence and luck. In a lively speech by Senator Elizabeth Warren to the American Constitution Society on June 9, 2016 imploring the Senate to do their jobs and give the Federal Judges who are waiting for their hearings their votes, Senator Warren ended with these words:

We are not a nation that disqualifies lawyers and judges from public service because of race—or religion—or gender—or because they haven't spent their entire careers representing the wealthy and the powerful. We are the nation of

[ginsburg-no-fan-of-donald-trump-critiques-latest-term.html](#).

¹¹⁷ *Id.*

¹¹⁸ President Donald Trump, Address Nominating Judge Neil Gorsuch for Supreme Court Justice (Jan. 31, 2017).

¹¹⁹ *Biographies of the Justices*, SCOTUSBLOG, <http://www.scotusblog.com/reference/educational-resources/biographies-of-the-justices/>.

¹²⁰ Stengle, *supra* note 2.

John Adams—a lawyer who defended the British soldiers after the Boston Massacre, and went on to serve as President of the United States. We are the nation of Abraham Lincoln—a lawyer who defended accused killers, and went on to serve as President of the United States. We are the nation of Thurgood Marshall—a lawyer who fought for racial equality, and went on to serve on the Supreme Court of these United States. We are the nation of Ruth Bader Ginsburg—a lawyer who fought for gender equality, and went on to serve on the Supreme Court of these United States.¹²¹

It is Justice Ginsburg's hope that the United States returns to the political climate of the day when she was confirmed, and it is her opinion the fault lies on both sides of the aisle. She hopes Congress will return to "working for the good of the country and not just along party lines."¹²²

Justice Ginsburg's opinion is she could not be confirmed today. Some may agree with this contention, citing the current political climate in the United States and the failure of moderate jurist, Chief Judge Merrick Garland, to obtain a hearing before the Senate. Others may disagree, citing the bulk of her years of activism with the ACLU to defeat sex-based differentials which ultimately led to constitutional change in the area of gender discrimination, thus diminishing her time with the ACLU as a lightning rod. What is not in dispute is the trajectory of change Ruth Bader Ginsburg brought in her private practice, as well as her years on the Supreme Court, to the area of equal protection for all citizens. Since 1993 she has been one of nine voices that "say what the law is" as established in *Marbury v. Madison*.¹²³ Her voice is one that, over a carefully calculated period of time, has shifted the law in the United States toward more progressive notions of equality. The ACLU was a large part of

¹²¹ Elizabeth Warren, *Equal Justice Under Law*, MEDIUM (June 9, 2016), <https://medium.com/@SenWarren/equal-justice-under-law-4346ea773b6c>.

¹²² Justice Ruth Bader Ginsburg, Address at Rathbun Lecture on a Meaningful Life at Stanford Memorial Church (Feb. 6, 2017).

¹²³ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

this progression and one in which Justice Ginsburg appears to strongly embrace.

In her 1993 Senate confirmation hearing, Justice Ginsburg stated she hoped to see three or four women on the Supreme Court in her lifetime. This vision has come to fruition. It has been a road long traveled, from the days where women could not obtain a law license, to the present, where women make up a third of the Supreme Court. This advancement has been bolstered by the dedication of Justice Ginsburg and others, including the ACLU, in their diligent efforts to educate lawmakers and create lasting constitutional change.