

With it all, however, we still know the great Justices had to have something that touched them with fire. Holmes had his Civil War. Frankfurter had his battles as an immigrant coming to this country at age 12, not speaking a word of English, and, as once he said, "belong[ing] to the most vilified and persecuted minority in history." Chief Justice Marshall had his battles to make this country a Nation, and Thurgood Marshall his battles to end racial segregation and all the deleterious effects thereof.

In Ruth Bader Ginsburg, I have confidence that the fire was set by the discrimination Ruth Bader Ginsburg encountered when she first came to the bar and by the challenges she met in developing legal theories which ended some of such discrimination and unfairness. But even more important, that fire rests in her disciplined desire that she excel as a judge, as a legal scholar, as an American, and as a human being.

So I urge this committee to advise and consent favorably for this nomination. I also want to congratulate the country, the legal profession, President Clinton, our great educational and cultural institutions, and the Ginsburg family that in this case the process and system worked, and worked quite well.

I would like to conclude by adding something which may create a slight controversy. That is, on the first day when Judge Ginsburg was introduced, the senior Senator from New York indicated that Justice Frankfurter would not even interview her. I speak as a former Justice Frankfurter law clerk. I would ask that be checked and not be made a part of history. I became his law clerk in 1948. I know that in 1953 when a lady whose last name was Holmes and was the first one to make the Harvard Law Review, that he at that time indicated that, gee, she would be a great law clerk.

In addition, because the statement was made that he would not interview her, the fact is that Justice Frankfurter would interview no one. I was not interviewed by him. His law clerks were selected by Henry Hart, Paul Freund, and, later on, Al Sachs. I say that only to try to keep the record straight. In my heart, I just feel that Felix Frankfurter had the judgment and wisdom that I know Judge Ginsburg has to have the vision that in this country we have the ability to recognize those of great ability.

Thank you.

[The prepared statement of Mr. Coleman follows:]

PREPARED STATEMENT OF WILLIAM T. COLEMAN, JR.

The country is fortunate that the end result of the Presidential selection process to fill the vacancy on the Supreme Court of the United States arising from the retirement of the Honorable Justice Byron Raymond White was the nomination of someone with the talent of Judge Ruth Bader Ginsburg who with her heart, character, determination and background gives promise that she will be a worthy addition to the highest Court.

Among the bar and in the academic community, there is no doubt that Judge Ginsburg ranks among the best jurists who presently sit on the various Courts of Appeals in the United States.¹

¹I have read or caused to be read and explained to me all of the cases that Judge Ginsburg has written that could be classified as civil rights cases, all cases dealing with the standing to raise such issues, including personal constitutional issues, and all cases dealing with constitutional issues involving individuals rights. Attached hereto are three interesting and excellent memoranda that were of great aid in this task.

She brought to the Court of Appeals bench a mind well honed by training at two of the nation's best law schools—Harvard and Columbia—served on the law review of each of these schools and had a magna cum laude performance. Previously there-to she was a stellar student at Cornell University. Thereafter she became a law professor, teaching conflict of laws, civil procedures, both national and international, constitutional law and also acquired learning in the law of Sweden. So as not to be completely cloistered in the life of academia, she got involved in litigation that helped women greatly on their road to equality. All who have been exposed to her recognize that she is bright, able, sincere and apparently (so much of a jurist's and scholar's work is done in solitude) a hard worker. Moreover, she is committed to being an excellent jurist and is a better writer than many of her colleagues. She graces the bench on which she presently serves with style and understanding and the confidence of one with a well trained mind and a sense of herself.

But initiates know that excellent technical skill as a federal Court of Appeals or district court judge or as a judge on any state court, does not necessarily mean that that person will do well on the Supreme Court. For as Justice Flex Frankfurter reminded us:

"... One is entitled to say without qualification that the correlation between prior judicial experience and fitness for the functions of the Supreme Court is zero. The significance of the greatest among the Justices who had such experience, Holmes and Cardozo, derived not from that judicial experience but from the fact that they were Holmes and Cardozo. They were thinkers, and most particularly legal philosophers. The seminal ideas of Holmes, by which to so large an extent he changed the whole atmosphere of legal thinking, are formulated by him before he ever was a judge in Massachusetts. And while the court of appeals gave Cardozo an opportunity to express his ideas in opinions, Cardozo was Cardozo before he became a judge. On the other side, Bradley and Brandeis had the preeminent qualities they had and brought to the Court, without any training that judicial experience could have given them." 105 U. of Penn. L. Rev. 781 (1957).

Thus for me and more particularly for you we must find elsewhere the indicia to predict success on the Supreme Court of the United States. Such search requires some informed judgment as to the possible issues that will come before the Court during the nominee's tenure. For the issues before the Supreme Court are usually difficult, novel and few judges on the courts below have come to grips with them on a regular basis. The great issues other than the few that involve war and peace, international relations, basic business relationships, and the reach of statutes enacted to benefit the general welfare, deal with how to balance the existence of a democratic society based upon majority rule with the fact that minorities, women and other discrete groups have rights and concerns that often are not properly recognized (or indeed sometimes are denigrated) by the majority. This grows in part out of the fact that two groups not present at the Constitutional Convention in 1789 were blacks and women. And the poor in this country, though not small in number, often have no champions in the federal and state legislative chambers despite Mr. Lincoln's statement that God must have loved the poor because he made so many of them.

Each of us can pick the issues that will likely come before the Court that we hope a resilient, acute and understanding mind can resolve correctly. Abortion is and will be with us for a long time. Church and state, free speech, and privacy are always recurring issues; the important issues of the rights of a criminal defendant in a civilized society, including the recurring issues of habeas corpus and search and seizure and the right to adequate counsel. Questions surrounding sexual orientation and complicated voting rights issues have an increasing call on the Court docket. And though we have become one nation, federalism for many of us is thought to be a strength and calls upon the Court to revisit the issues of state sovereignty every so often. If we would ask civil rights lawyers to describe some of the challenges before the Court they would include:

(1) how to overrule *Croson* or distinguish it so that state and local set aside programs are still valid; (2) how to preserve the provisions of the Voting Rights Acts of 1965 and 1982 designed to ensure election of more representatives who are responsive to minority voters (in other words, to overrule or limit greatly the effect of Justice O'Connor's decision in *Shaw v. Reno*, 61 U.S.L.W. 4818 (June 28, 1993) (5-4 decision)); (3) how to make effective the provisions of the 1991 Civil Rights Act concerning burdens of proof in employment discrimination cases (including to limit or overrule *St. Mary's Honor Center v. Hicks*, 61 U.S.L.W. 4782 (June 25, 1993) (5-5 decision); and (4) how to overrule or minimize the effect of *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (5-4 decision), which refused to upset a Texas school finance system which permitted poor, mostly minority, children living

in poor school districts to study in much lower quality schools than children living in affluent, mostly white school districts.

And, if the political process with respect to eliminating poverty continues to fail the society as it did on race and sexual issues until 1960, the Court may be asked to take bold steps to address that problem.

What is there in Judge Ginsburg's record and background that would give you confidence that, if given the opportunity, she will approach each of the difficult issues properly, even though you may or may not agree with the result? For so much of the confidence and acceptance of Court decisions in difficult social and political issues depend upon the integrity of the opinions written and the character of the Court's members. For in the end, particularly in constitutional matters, the only check on a Justice's exercise of power is his or her own sense of self-restraint. First is what she has been exposed to and done with herself over the last 60 years—a great education, a superior mind, great intellect and intelligence, her seizing and taking advantage of opportunities in both the academic and professional worlds and mixing with great success her professional life and responsibilities as a mother and a wife. Second, she has acquitted herself extremely well as a jurist recognized by the bar and greatly appreciated by her colleagues. Third, her reading and experiences are far beyond the law. She is as familiar with Locke, Rousseau, Keynes, Nietzsche, Santayana, Voltaire, Longfellow, Montesquieu and de Tocqueville, to name a few of her reading companions, as she is with Holmes' Common Law, Cardozo's *The Nature of the Judicial Process* and Blackstone. (A visit to her well used library at home would be a treat and a challenge to us all.) You will often see her at the opera, the theater, the symphony, the ballet, art museums, the Council on Foreign Relations. Next she has a wide range of friends and will discuss just about any subject. She has written books and law review articles, given talks in many diverse fields and traveled extensively.

With it all, however, we still know that the great justices had something that "touched them with fire." Holmes had his Civil War battles, Frankfurter had his battles as an immigrant coming to this country at 12, not speaking a word of English and, as he once said, "belong[ing] to the most vilified and persecuted minority in history."² Chief Justice Marshall his battles to make this country a nation and Thurgood Marshall his battles to end racial segregation and all the deleterious effects thereof.

In Judge Ruth Bader Ginsburg I have confidence that that fire was set by the discrimination Ruth Bader Ginsburg encountered when she first came to the bar and by the challenges she met in developing legal theories which ended some of such discrimination and unfairness. That fire also rests in her disciplined desire that she excel as a judge, as a legal scholar, as an American, and as a human being.

I thus urge that your Committee recommend that the Senate favorably advise and consents to the President's nomination of Judge Ruth Bader Ginsburg as an Associate Justice of the Supreme Court of the United States. And I congratulate the country, the legal profession, President Clinton, our great educational and cultural institutions, and the Ginsburg family that in this case the process and system worked and worked quite well.

The CHAIRMAN. Thank you very much.

Mr. Chesterfield Smith, former president, but once a president, always a president. Mr. President.

STATEMENT OF CHESTERFIELD SMITH

Mr. SMITH. Forever.

The greatest interest of my life as a trial lawyer has been the justice system, the quality of justices and judges. I have worked at it. I have cared about it. I have been right and wrong in my positions. I have changed and modified. But in an unyielding and unceasing way, I have been devoted to it.

Without reservation, Circuit Judge Ruth Bader Ginsburg in my opinion will, if confirmed, be an absolutely magnificent Supreme Court Justice. As both a lawyer and a person, I know her quite well, perhaps extremely well. I believe that she possesses the temperament, the character, and the professional skills and abilities

² *Board of Education v. Barnette*, 319 U.S. 624, 646 (1943).