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1601 Connecticut Avenue, N.W. Suite 600 ■ Washington, D.C. 20009 ■ 202/332-3224

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REPORT
ON THE NOMINATION OF
JUDGE RUTH BADER GINSBURG
TO THE
UNITED STATES SUPREME COURT

As the United States Senate debates Judge Ruth Bader Ginsburg's nomination to the Supreme Court, it is important to reflect upon the profound influence the Court has over our lives. It occupies a central role in society by protecting our most cherished rights, a role that at times puts it at odds with the will of the majority and requires of the Justices a show of great conviction. Although each member of the Court casts just a single vote, their words can set into motion currents that either advance or hinder the ideals underlying our Constitution.

The approaching 40th anniversary of *Brown v. Board of Education* is a reminder that fulfilling the Constitution's promise of equal justice for every person remains largely unfinished. The Court's recently ended term starkly underscored that fact. In the last few weeks alone, the Court issued opinions which shielded bias in the workplace, weakened the wall of separation between church and state, rebuffed refugees fleeing persecution, and closed yet another door to potentially innocent death row prisoners.

The nomination of Judge Ginsburg represents a turning point for the Court. Unlike other sitting Justices, she spent a large part of her career representing the politically powerless of society. As an advocate-law teacher before her appointment to the federal appeals court, Judge Ginsburg constantly questioned the shortcomings of decisions failing to promote fairness and equality. She prodded the Court to reconsider old positions by initiating a dialogue about the changing role of women in society, thereby securing for millions of women greater freedom from disparate treatment. Judge Ginsburg's pathbreaking advocacy for gender equality suggests a person who views the Constitution as a charter for, not a barrier to, individual rights and liberties.

On the appeals court, Judge Ginsburg's record has been generally marked by a restrained judicial approach. However, she has also exhibited an inclusive view of the Constitution and a commitment to the judiciary's preeminent role in its interpretation. This conviction is reinforced by her belief that "without taking giant strides and thereby risking a backlash too forceful to contain, the Court, through Constitutional adjudication, can reinforce or signal a green light for a social change."

Over fifty years ago, Justice Hugo Black wrote that the Supreme Court "stands against any winds that blow, as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement." That is the standard to which other great Justices strove and reached, and that is the standard by which Judge Ginsburg will be measured. As a lower court judge, Ruth Bader Ginsburg has been constrained by the rulings of an increasingly conservative Supreme Court. However, it is the battles she fought prior to her service on the bench that portend a Justice who will broker the promises of the Constitution into reality.

BIOGRAPHICAL INFORMATION

Judge Ruth Bader Ginsburg's lengthy legal career has included public interest advocacy, teaching law and serving on the federal bench. It has been a career indelibly shaped by her own confrontations with discrimination. As a young wife in Fort Sill, Oklahoma, where her husband was in the military, she encountered sex bias firsthand working as a Social Security claims adjuster. After announcing her first pregnancy, she was denied promotions and raises, while a co-worker who did not reveal her pregnancy remained on the promotional track.

Two years later, in 1956 Ginsburg entered Harvard Law School, earning a place on the school's law journal. When her husband found employment in New York, she transferred to Columbia and graduated tied first in her class in 1959. Despite her academic accomplishments, such legendary jurists as Justice Felix Frankfurter and Second Circuit Judge Learned Hand refused to hire her because of her sex, and law firms turned her away. She later said of the firms, "To be a woman, a Jew and a mother to boot -- that combination was a bit too much." Ginsburg eventually obtained a clerkship with a New York federal judge and later worked for several years on a Columbia-sponsored comparative law project.

Passed over for a position at Columbia, New York University and Fordham law schools, Ginsburg joined the faculty at Rutgers in 1963, primarily teaching courses in civil procedure and the federal courts. In the late 1960s, at the urging of several women students, she taught a class on the legal status of women. Her research for the course opened her eyes to the widespread nature of legalized gender bias. At the same time, she volunteered at the New Jersey chapter of the American Civil Liberties Union and was referred cases of women complaining of sex discrimination. Later Ginsburg said, "It was that combination -- research in the lawbooks and confrontation with the genuine grievances of women who had been denied jobs or other opportunities -- that combination engaged my interest both as an attorney and as a woman." In one case, she successfully challenged school board regulations forcing pregnant teachers to leave without the right to return to their jobs.

Leaving Rutgers to become the first female law professor at Columbia, Ginsburg was well on her way to establishing herself as an expert in gender discrimination law. The ACLU set up the Women's Rights Project, and Ginsburg became its first director. The Project was soon recognized as the premier women's rights advocate before the Supreme Court. Between 1969 and 1980, Ginsburg argued six landmark sex discrimination cases before the Court and won five. In 1980, President Jimmy Carter appointed her to the U.S. Court of Appeals for the District of Columbia Circuit. Senator Strom Thurmond was the only Senator to oppose her.

As an Advocate

As an advocate and teacher, Ruth Bader Ginsburg was one of the premier authorities on gender equality under the Constitution and virtually steered the Supreme Court to its current jurisprudence on the subject. Although the 14th Amendment guarantees that the government shall not "deny to any person within its jurisdiction the equal protection of its laws," the Court historically had interpreted the clause not to apply to women and consistently upheld gender-based classifications. A woman could be barred from the legal profession (1873); had no right to vote (1875); could not work as a bartender (1948); and could be barred from serving on a jury (1961). According to Ginsburg, for women seeking justice before the Court during this period, the Constitution was "an empty cupboard." "Sexual Equality under the Fourteenth and Equal Rights Amendment," 1979 *Washington University Law Quarterly* 164.

By the late 1960s, however, the phenomenal changes in women's participation in society and in the labor force demanded a reassessment of stereotypical notions about women's roles and a closer examination of gender-based laws. Sensing that the Supreme Court was open to hearing fresh arguments, Ginsburg pursued a legal strategy to both inform the Court of these new facts and to persuade it to extend the umbrella of equal protection guarantees to women. Part of that strategy was to select cases in which the inequities fell on men as well. By the end of the 1970s, the ACLU had participated in more than half of the 63 gender bias cases before the Court, and Ginsburg had been the principal author of most of the briefs.

In her first brief to the Supreme Court, Ginsburg launched a full-scale attack on a gender discriminatory law in *Reed v. Reed*, 404 U.S. 71 (1971), which involved an Idaho statute giving men preference over women for appointment as estate administrators. According to the Court's equal protection jurisprudence at the time, gender-based classifications were routinely upheld if they were rationally related to a legitimate governmental objective. Under this approach known as the "rational basis" test, little scrutiny was involved.

Ginsburg argued in *Reed*, however, that the law should be viewed as inherently suspect, similar to way the Court analyzed race-based classifications. Under this approach, a law treating people differently had to have a compelling purpose, and the classification had to be necessary to accomplish that purpose if the law was to survive the Court's "strict scrutiny." The Court was unwilling to designate gender as a suspect category, but it did agree that the law was based on overgeneralized and outdated notions of women's abilities. It unanimously invalidated the statute using the rational basis standard, but added that the law was "subject to scrutiny." *Reed* marked the Court's first decision ever striking down a gender-based law as unconstitutional.

In subsequent cases, Ginsburg continued to press the argument that gender was a suspect classification and that *Reed* stood for the proposition that administrative convenience alone could not justify gender classification. Her position found four votes on the Court in *Frontiero v. Richardson*, 411 U.S. 677 (1973), but fell short of the majority necessary for establishing a precedent. Nonetheless, eight Justices held that married women in the armed services were entitled to the same fringe benefits as married men. Justice Byron White was part of the "gender as suspect" plurality, while Justice William Rehnquist was the lone dissenter.

Two cases brought by other advocates interrupted the chain of precedents sought by Ginsburg and eliminated any hope of obtaining a majority on the Court for treating gender as a suspect classification. *Kahn v. Shevin*, 416 U.S. 351 (1974), brought by the Florida ACLU chapter but argued by Ginsburg before the Court, upheld a state real-property tax exemption for widows and blind and disabled persons, but not widowers. Rejecting a widower's challenge, the Court observed that the tax scheme was benign and intended to assist surviving wives facing unplanned economic difficulties. The Court upheld a similarly "benign" system in *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (no equal protection violation to give female naval officer longer time period before mandatory discharge for lack of promotion). To Ginsburg, *Kahn* and *Ballard* reflected the outmoded thinking underlying earlier decisions that women were in need of a "boost . . . because they cannot make it on their own." "Remarks on Women Becoming Part of the Constitution," 6 *Law and Inequality: A Journal of Theory and Practice* 25 (1988).

After the *Kahn* and *Ballard* setbacks, Ginsburg adjusted her constitutional arguments in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), urging the Court to adopt an intermediate level of scrutiny. In *Wiesenfeld*, a widower claimed discrimination because of a Social Security provision that denied him "mother's insurance benefits," which would have allowed him to remain at home to take care of his infant son; his wife had died during childbirth. The statute allowed widows with dependent children to receive such benefits. Ginsburg argued that the statute actually discriminated against each member of the family. It denied benefits to widowers which a similarly situated widow would have received. The law also provided less protection for female wage earners by treating them equally with men for purposes of Social Security taxation, but unequally in a determination of family benefits. In addition, the law denied the motherless child the same opportunity for parental care afforded to a fatherless child. Brief for Appellee at 10-12, *Weinberger v. Wiesenfeld*. Seven Justices agreed, stating that a purportedly benign classification was still subject to judicial scrutiny. Without saying so, the Court looked closer at the provision than a rational basis test would have required.

In *Craig v. Boren*, 429 U.S. 190 (1976), the Court finally adopted the standard of review pushed by Ginsburg. Ironically, the case was not brought by the ACLU or Ginsburg, but by a private attorney who opposed the Equal Rights Amendment. However, Ginsburg authored an amicus brief and advised the attorney on legal arguments. She specifically called his attention to the uselessness of urging strict scrutiny and counseled him to argue instead for an intermediate level of scrutiny. The Court, 7-2 (with Justice Rehnquist in dissent), declared that any gender-based law, to withstand challenge, must serve important governmental objectives and must be substantially related to achievement of those objectives. The law at issue allowed 18-year-old girls to purchase 3.2 percent alcoholic beer, whereas boys had to wait until age 21. The Court stated that the law did little to cope with the problem of drunk driving by young people.

The same day as *Craig* was heard, Ginsburg argued *Goldfarb v. Califano*, 430 U.S. 199 (1977). In *Goldfarb*, five Justices voted to strike down a Social Security provision authorizing survivor's benefits to widowers only if the wife's contributions to family expenses had been three times that of the husband's, whereas no such formula was tied to a widow's eligibility. Ginsburg argued that although the law appeared to harm only men, as the law in *Craig* seemed to harm only boys, it actually hurt women by using gender as a short-hand method for drawing lines, which only reinforced stereotypes.

Looking back on the gender equality cases of the 1970s, Ginsburg wrote that they illustrated "the kind of interplay among the people, the political branches, and the courts that has kept the 'more perfect Union,' ordained by the Constitution alive and vibrant over these 200 years." 6 *Law and Inequality* at 25. In a more recent speech, she added that by forcing legislatures to reexamine gender-based laws, "the Court helped to ensure that laws and regulations would 'catch up with a changed world.'" "Speaking in a Judicial Voice," Madison Lecture, New York University School of Law (March 9, 1993), 3rd line draft at 58 [hereinafter Madison Lecture]. As an advocate, Ginsburg was a critical participant in the Court's dialogue about the role of women in society and their status in the law, and awakened the Court's conscience about the meaning of equality.

AS A JUDGE

THE ROLE OF AN APPEALS COURT JUDGE

Courtwatchers predict that Judge Ginsburg will be as "moderate" on the Supreme Court as she has been on the D.C. Circuit. But such predictions are at best premature. Her judicial record and extrajudicial writings, taken together, indicate that she may view the role of a Supreme Court Justice quite differently from that of an appellate court judge. Frequently, Judge Ginsburg has noted the limitations circuit judges face. They "generally have, if not marching instructions, then at least some pathmarkers from the appeals courts on which they sit, sister courts, or the Supreme Court, and they do not have the last judicial word on the turbulent constitutional questions of the day." "Confirming Supreme Court Justices: Thoughts on the Second Opinion Rendered by the Senate," 1988 *University of Illinois Law Review* 111.

In a 1985 speech, Judge Ginsburg summed up the role of federal courts of appeals judges with the statement "[o]ur modus operandi gravitates toward the middle." "The Obligation to Reason Why," 37 *University of Florida Law Review* 212 (Spring 1985). It is a statement as true of herself as of any circuit judge. For nearly thirteen years on the bench, Judge Ginsburg has employed a "middle of the road" approach to decisionmaking that has earned her the reputation of "centrist" on a court known for its conservative and liberal jurists.

Judge Ginsburg's judicial approach on the D.C. Circuit appears to stem from her strong commitment to the institutional integrity of the federal courts and the unique role of an appeals court judge. She believes strongly that one of the judiciary's primary roles is to promote predictability and consistency within the law. She has written frequently of the distinction between individualist and institutionally-minded styles of judging, exhibiting a pronounced preference for the latter. Judge Ginsburg argues that collegiality through unanimity of opinion is critical to promoting and enhancing the rule of law. While writing separately is sometimes productive, even necessary, she argues that "overindulgence in individualistic judging" can diminish the force of judicial opinions and undermine legal authority. "Styles of Collegial Judging: One Judge's Perspective," 39 *Federal Bar News & Journal* 200 (March/April 1992).

Judge Ginsburg's appellate decisions are also marked by an overriding fidelity to the proper role of the appeals courts as the middle tier of the federal court system. She has written:

> "One reality [about the courts of appeals] cannot be over-emphasized: the character of the cases combines with the modus operandi to tug judges strongly toward the middle, toward moderation and away from startlingly creative or excessively rigid positions. . . . Unlike the Supreme Court, courts of appeals deal far less frequently with grand constitutional questions than with questions of statutory interpretation or the rationality of agency or district court decisions. In most matters of that variety, as Justice Brandeis repeatedly cautions: '[I]t is more important that the applicable rule of law be settled than that it be settled right . . . .'"
>
> ". . . . In contrast to district judges, who are the real power holders in the federal court system, no single court of appeals judge can carry the day in any case. To attract a second vote and establish durable law for the Circuit, a judge may find it necessary to moderate his or her own position, sometimes to be less bold, other times to be less clear."

39 *Federal Bar News & Journal* at 200.

A Complex Record

Judge Ginsburg's strong respect for the courts' institutional integrity, and particularly the distinct role of appellate judges, pervades her judicial opinions, which exhibit a strict adherence to legal precedent and a cautious, often formalistic approach to deciding cases. Her opinions are generally as narrowly tailored to the specific facts of a case as possible, reflecting her sense that intermediate appellate judges should refrain from expansive decisions that produce sweeping changes in the law. On a court considered second in importance only to the Supreme Court because of its many high-profile and contentious decisions on the scope of federal power, Judge Ginsburg has often declined to subscribe to the bold positions of some of her colleagues.

Although routinely labeled a centrist, Judge Ginsburg has actually built a judicial record that defies precise characterization. Studies show that she votes more often with her colleagues appointed by Reagan and Bush than her fellow Carter appointees, and she is reputed to be on the "conservative" side on business law issues. According to one study, her decisions in antitrust law "have been as consistently conservative as any Carter, Bush, or Reagan judge on the D.C. Circuit." William Kovacic, "Reagan's Judicial Appointees and Antitrust in the 1990s," 60 *Fordham Law Review* 122 (1991). In a 1989 case, however, she dissented from the court's approval of a joint operating agreement between two major newspapers, which operated to exempt the arrangement from antitrust laws, and joined her Carter-appointed colleagues in calling for a rehearing before the full court. *Michigan Citizens for an Independent Press v. Thornburgh*, 868 F.2d 1285 (D.C. Cir. 1989), *reh'g en banc denied*, 868 F.2d 1300 (1989). Moreover, her opinions in the critical areas of standing and constitutional law, while generally exhibiting her characteristically cautious, methodical approach to decisionmaking, suggest an appreciation for the Constitution's unique role in protecting individual rights.

Access to the Courts

On issues relating to access to the courts -- often viewed as a barometer of whether a jurist possesses a restrictive or expansive judicial philosophy -- Judge Ginsburg displays a broad legal vision. For example, in *Wright v. Regan*, 656 F.2d 820 (D.C. Cir. 1981), she held that parents of black children attending public schools had standing to challenge the Internal Revenue Service's failure to deny, as legally required, tax exempt status to private schools that discriminated on the basis of race. The Supreme Court later overturned the decision in *Allen v. Wright*, 468 U.S. 737 (1983) in an opinion reflective of its increasing antipathy to the doctrine of standing. The Court concluded that the harm alleged was not fairly traceable to the IRS's supposed inaction.

In another prominent case, *Women's Equity Action League v. Cavazos*, 879 F.2d 880 (D.C. Cir. 1989), Judge Ginsburg held that students had standing to sue for enforcement of federal laws prohibiting federal funding of discriminatory educational institutions. She distinguished *Allen v. Wright*, holding that the plaintiffs in the present case (students rather than parents) suffered a direct injury and that federal funding of racially discriminatory institutions "is in part causative of the perpetuation of such discrimination." But Judge Ginsburg dismissed the case on other grounds in a later decision, 906 F.2d 742 (D.C. Cir. 1990), holding that Congress did not create a right, under the civil right statutes, for the plaintiffs to maintain such a broad and continuing action for compliance -- the scale of which she repeatedly emphasized -- in light of several precedents that had been handed down since the litigation began in 1970.

Generally, Judge Ginsburg's opinions on standing exhibit a receptiveness to arguments of how an injury is traceable to or caused by government action or inaction -- a requirement for standing -- especially when the claim is distinctly outlined and arises under a law passed by Congress. In *Dellums v. Nuclear Regulatory Commission*, 863 F.2d 968 (D.C. Cir. 1988), an anti-apartheid organization and its director-activist contended that a license allowing the importation of uranium from South Africa violated the Anti-Apartheid Act's trade embargo against the country. Judge Laurence Silberman held that the petitioners' injury -- their inability to travel to South Africa -- was not caused by the license nor could it be redressed by revoking it. In dissent, Judge Ginsburg argued that the license could conceivably contribute to the preservation of apartheid, the cause of the petitioners' injuries. Urging the court to defer to Congress' judgment that sanctions against South Africa were an effective means to end apartheid, she criticized the majority's approach as placing "judges beyond the pale of their general competence and draw[ing] the bench into the unseemly business of second-guessing Congress."

The same openness to organizational standing and deference to Congressional findings was evident in *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 30 (D.C. Cir. 1990) (fair housing organization had standing to challenge discriminatory newspaper advertisements under federal law and plaintiffs sought to vindicate values "endorsed by Congress . . . the enforcement of which Congress specifically left in the hands of private attorneys general like plaintiffs") and *United Transportation Union v. Interstate Commerce Commission*, 891 F.2d 908, 921 (D.C. Cir. 1989) (Ginsburg, J., concurring) (union did not have standing to contest agency rule but "Congressional economic and social judgments bearing on standing merit . . . respect").

Judge Ginsburg also found standing in *National Coal Association v. Lujan*, 979 F.2d 1548 (D.C. Cir. 1992), in which several coal associations challenged civil penalty regulations promulgated under the Surface Mining Control and Reclamation Act. She rejected the argument that the regulations applied only to individuals and thus not to the association members, which were coal companies. In addition, she held that a union had standing to sue the Federal Deposit Insurance Corporation, a receiver for a failed bank, in order to enforce the compensation rights of employees arising from a bargaining agreement between the union and the bank. She noted that although the union itself did not have a claim against the bank, it generally had authority to sue on behalf of its members and nothing in the controlling federal law, the Financial Institutions Reform, Recovery and Enforcement Act, warranted a different conclusion. *Office & Professional Employees International Union v. FDIC*, 962 F.2d 63 (D.C. Cir. 1992).

Civil Rights and Civil Liberties

Judge Ginsburg appears to take a fairly broad view of the scope of civil rights protections. In *Goodrich v. International Brotherhood of Electrical Workers*, 712 F.2d 1488 (D.C. Cir. 1983), she allowed a trial to go forward on the issue of whether the union violated the Equal Pay Act when it paid the female plaintiff less than it paid its male employees. In *O'Donnell Construction Company v. District of Columbia*, 963 F.2d 420 (D.C. Cir. 1992), Judge Ginsburg concurred in striking down the District's minority business contractor set-aside program, relying on a recent Supreme Court decision, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), which held that such a program must rest on a strong body of evidence showing racial discrimination in the past and be narrowly tailored to remedy such bias. However, Judge Ginsburg emphasized the limits of *Croson*, stating that "minority preference programs are not *per se* offensive to equal protection principles, nor need they be confined solely to the redress of state-sponsored discrimination," and that they are not exclusively remedies for past wrongs. 963 F.2d at 429.

Her approach in the area of civil liberties is less consistent. When the government treads heavily on a firmly established right, such as the free exercise of religion or speech, Judge Ginsburg shows no reluctance to criticize the action. In *Goldman v. Secretary of Defense*, 739 F.2d 657 (D.C. Cir. 1984), she dissented from the court's decision not to rehear a case involving a Jewish military officer's right under the First Amendment to wear a yarmulke while on duty. She wrote:

> "The plaintiff . . . has long served his country as an Air Force officer with honor and devotion. A military commander has now declared intolerable the yarmulke Dr. Goldman has worn without incident throughout his several years of military service. At the least, the declaration suggests 'callous indifference' to Dr. Goldman's religious faith, and it runs counter to 'the best of our traditions' to accommodate[] the public service to the[] spiritual needs [of our people.]"

739 F.2d at 660 (citations omitted). Similarly, Judge Ginsburg argued in dissent in *DKT Memorial Fund v. Agency for International Development*, 887 F.2d 275 (D.C. Cir. 1989) that a

government agency violated the First Amendment free speech and association rights of domestic family planning organizations by conditioning funding to foreign groups on their not accepting private, abortion-related funds from domestic organizations.

Judge Ginsburg has also shown an openness to certain judicial remedies to correct government malfeasance when civil liberties are at stake. In an Eighth Amendment "cruel and unusual punishment" case, a two-judge majority lifted a court-imposed population cap at an overcrowded prison, stating that "courts are not in the business of running prisons." *Inmates of Occoquan v. Barry,* 844 F.2d 828, 841 (D.C. Cir. 1988). The dissenting judge noted, however, that even the government's own experts had described the prison conditions as "both deplorable and explosive." 844 F.2d at 846. On suggestion for rehearing en banc, Judge Ginsburg joined a minority of her colleagues in seeking to review the case and wrote separately to underscore the appropriateness of a population cap as a possible remedy. 850 F.2d 796, 800 (D.C. Cir. 1988) (dissent from denial of rehearing en banc).

But Judge Ginsburg has also criticized the remedial effects of *Roe v. Wade* as too sweeping. In her Madison lecture, she argued that by relying on the right to privacy to recognize a woman's right to abortion, the Court effectively struck down every state abortion law and exacerbated the national debate over the issue. Although an abortion rights supporter, Judge Ginsburg stated that the Court could have found a firmer Constitutional ground, such as the equal protection clause, on which to rest its decision. Instead of constructing the trimester analytical framework, she asserted that the Court should have simply invalidated the law at issue and allowed states to gradually test the limits of the abortion right. Several commentators have disagreed with her historical rendition of the facts surrounding the pro-choice movement at the time *Roe* was decided and have pointed out the real-life implications for women who could not wait for the courts to delineate the scope of the abortion right.

In another civil liberties case, Judge Ginsburg was reluctant to look closer at a Supreme Court precedent that displayed an unusual harshness towards gays and lesbians. In *Dronenburg v. Zech,* 746 F.2d 1579 (D.C. Cir. 1984), a three-judge panel, comprised of Judges Robert Bork, Antonin Scalia, and a district judge sitting by designation, rejected a sailor's claim that the Navy's policy of discharging individuals who engage in homosexual conduct violated the constitutional right to privacy. Judge Bork's opinion was sweeping in its criticism of the right to privacy. Four members of the full court voted to rehear the case, arguing that the panel's expansive decision inappropriately "conduct[ed] a general spring cleaning of constitutional law" in finding no right to privacy.

Although Judge Ginsburg rejected Judge Bork's discussion as primarily non-binding dicta, she voted not to rehear the case, arguing that a 1976 Supreme Court case squarely controlled the instant one. In that case, the High Court affirmed without opinion a district court judgment upholding a statute barring homosexual conduct between consenting adults. Her reliance on that lone, summarily-decided case to reject an important and novel constitutional question led the four judges voting to rehear the case to lament her "well-intentioned" but unconvincing "attempt to justify the panel decision." 746 F.2d at 1580-81. They asserted that the Court had "not definitively answered the difficult question." 746 F.2d at 1580 (quoting from *New York v. Uplinger,* 104 S.Ct. 2332 (1984)).

In criminal law cases, Judge Ginsburg has written few opinions herself but has joined in at least three decisions that restricted the rights of the criminally accused. In *United States v. Jones*, No. 91-3025, slip op. (D.C. Cir. July 2, 1993), Judge Ginsburg joined an en banc opinion holding that a defendant could receive a longer sentence under the sentencing guidelines if he or she, rather than pleading guilty, chooses to go to trial and is subsequently convicted. The dissenters, Judges Abner Mikva, Patricia Wald, Harry Edwards and David Sentelle, argued that the majority was penalizing the defendant for exercising his Fifth Amendment right to trial.

In a Fourth Amendment case, *United States v. Rodney*, 956 F.2d 295 (D.C. Cir. 1992), Judge Ginsburg joined then-Circuit Judge Clarence Thomas's opinion allowing a consensual body search to include the individual's crotch area. Although recognizing that a consensual search cannot exceed the scope of the consent, Judge Thomas nonetheless held that the search at issue, which was conducted on a public street and on less than articulable suspicion of wrong-doing, "reasonably" included the person's genitals. Dissenting, Judge Wald argued that a citizen on a public thoroughfare who consents to a body search certainly does not expect the search to include his or her most private body parts.

In another troubling consensual-search case, Judge Ginsburg joined an opinion by Judge Douglas H. Ginsburg upholding a search of a train passenger's baggage after the person withdrew his consent to the search. In *United States v. Carter*, 985 F.2d 1095 (D.C. Cir. 1993), a plainclothes officer approached a nervous-looking train passenger and received permission to search his bag. When the officer pulled out a separate paper bag, however, the passenger snatched it back, replying that there was food in it and that he would get it out himself. He then put his hand into the bag, retrieved nothing but refused to allow the officer to look inside. The officer then seized the bag, which was ultimately found to contain drugs. Judge D.H. Ginsburg held that the "totality of the circumstances," including *the manner* in which the passenger withdrew his consent, justified the seizure.

In dissent, Judge Wald essentially argued that the way the defendant exercised his Constitutional right to be free from unreasonable searches was used to justify exactly the kind of intrusion the Fourth Amendment was seeking to prevent. She explained, "The reality is that so-called consensual encounters with the police are bound to be unnerving, and that most citizens -- innocent or guilty -- will feel the need to explain or excuse themselves when refusing to comply with a police request to search their luggage . . . and, in so doing, create the very suspicion that will be used to justify the previously unauthorized detention. . . .Permitting the police to rely on the atmospherics of the refusal . . . strips the legal right of withdrawal of all practical value." 985 F.2d at 1100.

Supreme Court Review of Ginsburg's Opinions

Judge Ginsburg's opinions in cases reaching the Supreme Court offer several clues about the kind of Supreme Court Justice she will be. The Court has considered twenty-two D.C. Circuit court decisions in which Judge Ginsburg wrote either a majority or separate opinion. Her reversal-affirmance ratio is roughly even -- thirteen to nine -- with a rash of reversals occurring during her early years. Overall, the Court disagreed with her positions most often in cases involving standing and constitutional issues, with Judge Ginsburg often taking a more

expansive view. Additionally, in administrative law cases, a staple of the D.C. Circuit, Judge Ginsburg has been less deferential to agencies than the Court and more willing to overturn their actions on the grounds that are contrary to the intent of Congress or based on inadequate facts.

Contrasting Judge Ginsburg's voting record on the same cases with that of Justice White also provides a glimpse into how the Supreme Court may change with her appointment. The two jurists voted similarly in eight cases and differently in ten (four Court decisions did not list the Justices' votes or Justice White did not participate). In six cases on which they disagreed, the Supreme Court and Justice White took a more deferential view of agency decisions. In two others, Justice White voted to deny standing to plaintiffs, indicating a more limited view than Judge Ginsburg on access issues. Finally, in a First Amendment free speech case, Justice White allowed greater restrictions on expressive conduct. See Appendix for a chronological summary of Judge Ginsburg's decisions reviewed by the Court.

CONCLUSION: AS A JUSTICE

The appointment of every Justice is an event charged with far-reaching consequences. In the next century, the Court will be called upon to decide novel issues testing our nation's character and commitment to its founding principles. It will, for example, be asked to define "equality" in a culture increasingly fractured along racial and ethnic lines. It will be pressed to explain the phrase "freedom of expression" in a world in which technological advances occur almost daily. And it will be asked to articulate what "liberty" and "justice" mean at a time when currently popular groups and ideas demand conformity and obedience. The nation needs a judicial visionary who can apply the basic principles of the Constitution to the complex and unforeseen challenges of the future.

Throughout Ruth Bader Ginsburg's advocacy, writings, speeches and opinions, what comes through is her desire to calibrate the dynamic nature of the law and to search for responses that inch the law forward. To her, this self-described "measured" approach is essential to maintain collegiality within the judiciary and an open, productive dialogue with the other branches of government. However, there will be times when much more is required on the Supreme Court, often the last refuge for those seeking a safe harbor from prejudice and injustice. Indeed, Justices must display unyielding fidelity to the Constitution at precisely those moments when the easiest and least controversial action is to acquiesce to the will of the majority. The true measure of Judge Ginsburg's words will be whether she uses her authority to shield the disenfranchised and those most in need of the Court's protection.