

APPENDIX

JUDGE RUTH BADER GINSBURG'S D.C. CIRCUIT COURT DECISIONS
REVIEWED BY THE U.S. SUPREME COURT

Washington Post Co. v. U.S. Dep't of State, 647 F.2d 197 (D.C. Cir. 1981) (per curiam). The court held that a Freedom of Information Act exemption which prevents disclosure of "personnel and medical files and similar files . . . which would constitute a clearly unwarranted invasion of personal privacy" did not apply to a newspaper's request for records to determine whether two individuals residing in Iran were U.S. citizens or held U.S. passports. The court reasoned that citizenship information did not involve intimate details similar to personnel and medical data. The Supreme Court reversed in *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595 (1982), holding that the exemption was intended to protect the confidentiality of personal matters and that "[i]t strains the normal meaning of the word to say that [passport] files are not 'similar' to personnel and medical files." Justice White voted with the majority.

United States v. Ross, 655 F.2d 1159 (D.C. Cir. 1981) (en banc). Judge Ginsburg ruled that a legal, warrantless search of an automobile does not necessarily extend to closed containers found in the car. The Fourth Amendment requires that a warrant be obtained before a search of such containers may take place. The Supreme Court reversed in *United States v. Ross*, 456 U.S. 798 (1982). In a dissenting opinion, Justice White would have affirmed Judge Ginsburg.

Wright v. Regan, 656 F.2d 820 (D.C. Cir. 1981). Judge Ginsburg wrote for the court that parents of black children in public schools could sue the IRS for providing tax exemptions to private schools discriminating on the basis of race. The Supreme Court reversed in *Allen v. Wright*, 468 U.S. 737 (1984), holding that plaintiffs had suffered no injury because they did not wish to attend the discriminatory schools. Justice White voted with the majority.

International Ass'n of Machinists and Aerospace Workers v. Federal Election Commission, 678 F.2d 1092 (D.C. Cir. 1982) (en banc) (per curiam). The court rejected a union's First Amendment challenge to various provisions of the Federal Election Campaign Act which allowed corporate political action committees to solicit their career employees and to use general corporate assets to finance their operating and administrative costs. The union claimed that the Act violated the Constitution by creating an imbalance of political speech rights between corporations and unions, prevented career employees from abstaining from political expression, and, by using corporate assets, violated the speech rights of dissenting shareholders. The Supreme Court affirmed without opinion in *International Ass'n of Machinists & Aerospace Workers v. Federal Election Commission*, 459 U.S. 983 (1982). Justice White's position was not stated.

American Electric Power Service Corp. v. Federal Energy Regulatory Commission, 675 F.2d 1226 (D.C. 1982) (denial of rehearing en banc) (per curiam memorandum). The court invalidated two agency rules issued under the Public Utility Regulatory Policies Act that were designed to encourage the development of private, small electrical cogenerators and reduce

demand for fossil fuels. The court held that FERC had failed to explain and justify its rule setting prices for utilities to purchase excess power from the cogenerators and had overstepped its authority in mandating that utilities establish interconnecting cables with cogenerators. In a per curiam memorandum denying hearing before the full court, Judge Ginsburg chastised FERC for "read[ing] into the opinion much more than the court put there." The Supreme Court reversed in *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402 (1983). Justice White voted with the majority.

Natural Resources Defense Council v. Gorsuch, 685 F.2d 718 (D.C. Cir. 1982). Judge Ginsburg held that the Environmental Protection Agency was barred from interpreting pollution "source" under the Clean Air Act as more than a single originator of pollution. She ruled that the redefinition of pollution source, which weakened environmental standards, subverted Congress' intent to improve air quality. The Court reversed in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Justice White voted with the majority.

Community for Creative Non-Violence v. Watt, 703 F.2d 586 (D.C. Cir. 1983) (en banc). The court held that homeless demonstrators given permission by the National Park Service to erect tents as part of an around-the-clock demonstration on the Mall and in Lafayette Park had a First Amendment right to sleep in those tents. Concurring, Judge Ginsburg emphasized that sleep, like other non-verbal activities, could have both expressive and non-expressive aspects, and she criticized then-Judge Scalia's dissent narrowly interpreting protected speech to include only actual words. Judge Ginsburg also asserted that sleeping in this case facilitated actual speech by allowing the demonstrators to carry on a 24-hour protest. Justice White wrote the majority opinion to reverse in *Clark v. CCNV*, 468 U.S. 288 (1984), finding that the ban on sleeping was a legitimate restriction.

Goldman v. Secretary of Defense, 739 F.2d 657 (D.C. Cir. 1984) (denial of reh'g en banc). The court rejected a Jewish officer's First Amendment challenge to a military regulation banning the wearing of "headgear . . . indoors," including a yarmulke. Judge Ginsburg dissented from the decision not to have the full court rehear the case. The Court, 5 to 4, affirmed in *Goldman v. Weinberger*, 475 U.S. 503 (1986). Justice White voted with the majority.

Schor v. Commodity Futures Trading Commission, 740 F.2d 1262 (1984). Writing for the court, Judge Ginsburg held that under the Commodity Exchange Act, the Commission did not have jurisdiction over state law counterclaims arising out of a commodity dispute. She wrote that Congress did not clearly express an intention to authorize such jurisdiction. The Supreme Court vacated the decision in *Commodity Futures Trading Commission v. Schor*, 473 U.S. 922-23 (1985), and remanded for further consideration in light of an intervening High Court decision. Justice White's position was not stated. On remand, the appeals court in a per curiam opinion with Judge Ginsburg participating, reinstated its original decision. The Supreme Court reversed in *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986). Justice White voted with the majority.

Shaw v. Library of Congress, 747 F.2d 1469 (D.C. Cir. 1984). The court upheld an attorneys fees award that took into account inflation due to a delay in payment. Dissenting, Judge Ginsburg rejected the majority's view that the United States had waived its immunity from

interest awards. She would have remanded to the district court, however, for determination of whether an increase was justified as a permissible "delay" factor rather than as interest. In *Library of Congress v. Shaw*, 478 U.S. 310 (1985), the Supreme Court reversed, agreeing with Judge Ginsburg that the United States had not waived its interest immunity, but rejecting the distinction between interest and a "delay" factor, claiming that they are both "designed to compensate for the belated receipt of money." Justice White voted with the majority.

Alaska Airlines v. Donovan, 766 F.2d 1550 (D.C. Cir. 1985). Judge Ginsburg concurred with the court's judgment that the Airline Deregulation Act's unconstitutional legislative veto provision was severable from the rest of the employee protection provisions of the statute. The Court affirmed in *Alaska Airlines v. Brock*, 480 U.S. 678 (1987). Justice White voted to affirm in the unanimous opinion.

Abourezk v. Reagan, 785 F.2d 1043 (D.C. Cir. 1986). Judge Ginsburg held that the State Department may deny visas to individuals only when they enter the country "to engage in activities . . . prejudicial" to U.S. interests and that individuals may not be barred solely because of their membership in a Communist or anarchist organization. Dissenting, Judge Bork argued that excluding aliens is an essential act of sovereignty for which the executive branch should be given wide discretion. An equally divided Supreme Court affirmed without opinion in *Reagan v. Abourezk*, 484 U.S. 1 (1987). Justice White's position was not stated.

In re American Federation of Government Employees, 790 F.2d 116 (D.C. Cir. 1986). A government employees association petitioned for a court order to force the Federal Labor Relations Authority to process a number of long-standing labor complaints pending before the agency. Writing for the court, Judge Ginsburg noted that the "FLRA's past record of delay, as documented by AFGE, was indeed intolerable." However, she noted that because FLRA's counsel at oral argument produced evidence that the agency was making progress, denial of the request for a court order was appropriate. Judge Ginsburg left open the option that if the agency "fail[s] to act with due diligence" on its case docket, the association could renew its petition. The Supreme Court affirmed without opinion in *Bowsher v. American Federation of Government Employees*, 479 U.S. 801 (1986). Justice White's position was not stated.

McKelvey v. Turnage, 792 F.2d 194 (D.C. Cir. 1986). The appeals court rejected a claim that a Veterans Administration regulation violated the Rehabilitation Act by deeming all alcoholism, except when secondary to an "acquired psychiatric disorder," to be caused by "willful misconduct." Under VA rules, a determination of willful misconduct precluded a veteran from receiving extended educational benefits. Dissenting, Judge Ginsburg argued that an irrebuttable presumption that alcoholism was always the result of willful misconduct violated the Rehabilitation Act's proscription against discrimination based solely on handicap. Justice White wrote for the Court to uphold the VA rule in *Traynor v. Turnage*, 485 U.S. 535 (1988).

Hohri v. United States, 793 F.2d 313 (D.C. Cir. 1986) (denial of rehearing en banc). Japanese-Americans who were interned by the federal government during World War II sued the United States for damages and other relief under the Federal Tort Claims Act and the Little Tucker Act. The Little Tucker Act limits jurisdiction in district courts over nontort claims to no more than \$10,000; any case over \$10,000 must be filed in the Claims Court and is appealable

to the Federal Circuit Court of Appeals. Upon dismissal by the district court, the appeals court reversed, holding that the Little Tucker claims fell within the D.C. Circuit jurisdiction, not the Federal Circuit's, and that the FTCA claims were not time-barred. On a request for a rehearing before the full court, Judges Skelly Wright and Ginsburg defended the panel decision interpreting the jurisdictional issue. The Supreme Court reversed in *United States v. Hohri*, 482 U.S. 64 (1987), holding that the Federal Circuit had exclusive jurisdiction. Justice White joined the unanimous opinion.

Doe v. Casey, 796 F.2d 1508 (D.C. Cir. 1986). A majority of the court held that a decision to fire a gay CIA employee is not totally within the director's discretion; judicial review of such a termination is available under the Administrative Procedure Act (APA), and the court can review claims raising constitutional issues. Concurring, Judge Ginsburg responded to the dissent by emphasizing that if the CIA director is required to act within statutory bounds, then surely the director must comply with the Constitution, the "nation's highest law." The Supreme Court reversed on the APA issue, but affirmed on the latter in *Webster v. Doe*, 486 U.S. 592 (1988). Justice White voted with the majority.

In re Korean Air Lines Disaster, 829 F.2d 1171 (D.C. Cir. 1987). Following the downing of a Korean airliner by Soviets over the Sea of Japan, several wrongful death lawsuits were filed in various districts and then transferred and consolidated for pretrial proceedings in District of Columbia federal court. Judge Ginsburg held that failure of the airline to give required notice of liability limitations under the Warsaw Convention and Montreal Agreement did not deprive the airline of the \$75,000-per-passenger limitation on damages. The Supreme Court affirmed in *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989). Justice White voted with the majority.

In re Sealed Case, 838 F.2d 476 (D.C. Cir. 1988). A majority of the court held the independent counsel law unconstitutional under the doctrine of separation of powers. Dissenting, Judge Ginsburg argued that Congress has broad power under the Constitution to grant the power to appoint "inferior officers" as it sees fit. The Supreme Court reversed in *Morrison v. Olson*, 487 U.S. 654 (1988), on essentially similar grounds as Judge Ginsburg's opinion. Justice White voted with the majority.

Community for Creative Non-Violence v. Reid, 846 F.2d 1485 (D.C. Cir. 1988). Judge Ginsburg held that a sculptor who created a statue for display by a nonprofit association was not an employee of the association but an independent contractor and could apply for copyright ownership. However, she also ruled that the association might qualify as a joint author and thus as co-copyright owner of the sculpture. The Supreme Court affirmed in *CCNV v. Reid*, 490 U.S. 730 (1989). Justice White joined the unanimous opinion.

Michigan Citizens for an Independent Press v. Thornburgh, 868 F.2d 1285 (D.C. Cir. 1989). A majority of the court upheld the Attorney General's approval, under the Newspaper Preservation Act, of a joint operating agreement between two major newspapers. The approval essentially exempted the arrangement from antitrust laws. Judge Ginsburg dissented on the grounds that the Attorney General had interpreted the exemption too broadly and failed to adequately explain his decision to override two administrative decisions below rejecting the agreement. On an unsuccessful request for rehearing en banc, she joined her Carter-appointed

colleagues. An evenly divided Supreme Court affirmed the panel decision in *Michigan Citizens for an Independent Press v. Thornburgh*, 493 U.S. 38 (1989). Justice White did not participate in the case.

American Postal Workers Union v. U.S. Postal Service, 891 F.2d 304 (D.C. Cir. 1989). The majority held that the union had standing to challenge the Postal Service's decision to suspend its monopoly over international mail because union members' jobs would be affected. Concurring, Judge Ginsburg emphasized that the Postal Services' rulemaking proceedings did not adequately address critical comments. The Supreme Court reversed in *Air Courier Conference v. American Postal Workers Union*, 498 U.S. 517 (1991), holding that the union did not have standing. Justice White voted with the majority.

Boston & Maine Corp. v. Interstate Commerce Commission, 911 F.2d 743 (D.C. Cir. 1990). The court held that the ICC could not invoke condemnation power under the Rail Passenger Service Act to take possession of 50 miles of track held by B & M to give to Amtrak, which immediately transferred it to a third railroad line. In a concurring opinion, Judge Ginsburg agreed that the ICC's assessment was inadequate in this case, but she stopped short of the majority's ruling that the agency could not exercise its full eminent domain power when Amtrak's only aim was to secure use, but not possession, of tracks. The Supreme Court reversed in *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 112 S. Ct. 1394 (1992). The Court stated that the ICC's interpretation of the Act and its exercise of authority were reasonable. Dissenting, Justice White wrote that the ICC's findings justifying the taking were inadequate.

Consumers Union, National Wildlife Federation and Natural Resources Defense Council
do not take positions on judicial nominations