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001. memo	For the President from Bernie Nussbaum, et al., re: Court of Appeals Vacancies - Decision Memo (13 pages)	08/31/1993	b(6)
002. memo	To Judicial Selection Group from William Marshall re: Status of District Court Candidates (2 pages)	07/29/1993	b(6)
003. list	U.S. District Judge Tracking Sheet (6 pages)	07/29/1993	b(6)
004. list	District Court Candidates - Pending (16 pages)	07/28/1993	b(6)
005. list	Courts of Appeals - Current Status (7 pages)	07/30/1993	b(6)
006. note	To Melanne from Ron re: materials (1 page)	n.d.	b(6)
007. list	Courts of Appeals - Status Summary Sheet (1 page)	n.d.	b(6)
008. memo	For the President from Bernie Nussbaum, et al., re: Court of Appeals Vacancies - Decision Memo (5 pages)	09/20/1993	b(6)
009. list	District Court Candidates - Pending (19 pages)	09/14/1993	b(6)
010. list	District Court Candidates - Pending (19 pages)	09/21/1993	b(6)
011. questionnaire	Re: Robert J. Timlin (partial) (1 page)	n.d.	b(6)

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P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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PEOPLE FOR THE AMERICAN WAY ACTION FUND

Defending Constitutional Liberties

July 14, 1993

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PEOPLE FOR REPORT FINDS JUDGE GINSBURG "FAVORABLE" ON CIVIL RIGHTS AND LIBERTIES; URGES "CLOSE QUESTIONING" ON UNCLEAR AREAS OF JUDICIAL PHILOSOPHY

Washington, DC --

The People For the American Way Action Fund today issued a report analyzing the views of Supreme Court nominee Judge Ruth Bader Ginsburg, whose confirmation hearings begin July 20. The People For report, based on a review of hundreds of Ginsburg's opinions, writings, and speeches, found her views to be "favorable" on issues ranging from freedom of expression and religion to sex discrimination and civil rights. The report also called on the Senate Judiciary Committee to question Judge Ginsburg closely on areas where her judicial philosophy is less clear, such as privacy rights and church-state law.

"Judge Ginsburg follows a moderate, cautious course that is usually favorable to civil rights and liberties," said People For Action Fund Legal Director Elliot Minberg. "Her record is particularly strong in such areas as free speech and equal protection. Where her judicial philosophy is unclear, however -- such as on privacy rights and church-state issues -- we urge the Judiciary Committee to engage in close questioning."

These are among the highlights of the People For report's findings:

o **A measured judicial philosophy.** The People For report characterizes Judge Ginsburg's performance on the bench as "careful, measured and thorough." She is a strong supporter of consensus decision-making, the separation of powers and the doctrine of stare decisis, or respect for precedent. She is generally critical of court decisions that force rapid or precipitous change.

o **Fairly consistent support for freedom of expression and association.** In nine out of eleven federal court opinions Ginsburg has authored on these issues, she clearly ruled in favor of protection of First Amendment interests.

-- more --

o Leadership on gender discrimination. Judge Ginsburg has played a pioneering role in promoting sexual equality. Her legal work in a series of landmark court cases during the 1970s and her writings both reflect this priority, though she is skeptical of some affirmative action remedies designed to benefit women.

o Overall sensitivity to civil rights. Judge Ginsburg has been generally, but not uniformly, favorable to civil rights plaintiffs. While her opinions have been framed in narrow terms, she has indicated a willingness to support affirmative action remedies where justified. She nonetheless has been critical of numerical racial quotas in employment.

o Unclear views on privacy rights. Ginsburg's record leaves open questions about her views on privacy. She has been ambivalent about the landmark Griswold v. Connecticut decision that provided a significant part of the rationale for Roe v. Wade, and has criticized Roe itself. While she has ruled in several cases on issues relating to sexual orientation, she has never ruled directly on whether the right to privacy encompasses those issues. Her record is also unclear on such general questions as the constitutional basis for the right to privacy.

o A sparse record on church-state issues. In this key area which has recently come before the Court several times each term, Ginsburg's views are largely unknown. While she has authored several decisions supportive of free exercise of religion, she has not addressed the Lemon test -- the current legal standard for judging church-state cases, which is under attack by the conservative wing of the Court.

o A favorable but mixed record on access to the courts. In most of the opinions Judge Ginsburg has written on this subject, she ruled that plaintiffs were entitled to access to the courts. In some cases, however, she disagreed with judges like Patricia Wald and Abner Mikva and ruled against access for civil rights or civil liberties plaintiffs.

"There is clearly much to recommend Judge Ginsburg as a Supreme Court nominee. Yet Ginsburg's voluminous public record still leaves many questions unanswered," said People For Action Fund Legal Director Elliot Minberg. "As with Justices Souter and Thomas, the Judiciary Committee can properly probe unknown areas of her judicial philosophy without asking about specific cases. Their responsibility to do this is no less because this has not been a controversial nomination."

The People For the American Way Action Fund is a 300,000-member nonpartisan constitutional liberties organization.



**PEOPLE FOR
THE AMERICAN WAY
ACTION FUND**

Defending Constitutional Liberties

Report of
People For The American Way Action Fund
on the
Nomination of Judge Ruth Bader Ginsburg
to the U.S. Supreme Court

July 14, 1993

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Introduction

On June 14, 1993, President Clinton selected Judge Ruth Bader Ginsburg as his first nominee to the Supreme Court. Prior to his election, the President stated that in selecting nominees to the federal bench, he would appoint "only men and women of unquestioned intellect, judicial temperament, broad experience and a demonstrated concern for, and commitment to, the individual rights protected by our Constitution, including the right to privacy."¹ These criteria provide a useful and important benchmark for evaluating the nomination of Judge Ginsburg, as well as President Clinton's future lower court judicial nominations.

Measured against these standards, there is much to recommend Judge Ginsburg. She has had a broad and distinguished career as a law professor, an advocate, and a judge. Her intellect is indeed unquestioned, and her judicial temperament is recognized. She has shown a clear concern for and commitment to individual rights, both on the bench and particularly in her pioneering work to combat sex discrimination in the 1970s.

It is no criticism of Judge Ginsburg to suggest, however, that the Senate should undertake detailed analysis of her record and questioning of her as a nominee. The Senate has long recognized the importance of its independent advice and consent role with respect to federal court nominees, particularly nominees to the Supreme Court. That role remains important no matter who is President and no matter which party controls Congress. Indeed, Judge Ginsburg herself has recognized the Senate's co-equal role in the judicial nomination process and the appropriateness of questioning nominees on their judicial philosophy.²

In this context, the People For the American Way Action Fund has prepared this report on Judge Ginsburg's nomination. The report examines her overall judicial philosophy, as well as her record on specific civil rights and civil liberties issues, including freedom of expression, freedom of religion, discrimination, abortion and privacy, access to the courts, and criminal law. It is based on a comprehensive review of the judicial opinions and articles she has written and speeches she has delivered in these areas, along with an analysis of cases she has litigated and secondary sources about her record. We

¹Nat. L. J., Nov. 2, 1992, at 15.

²Ruth Bader Ginsburg, Confirming Supreme Court Justices: Thoughts on the Second Opinion Rendered By the Senate, 1988 U. Ill. L. Rev. 101.

generally did not review opinions she has joined but did not author, except where necessary to provide overall context.

The report concludes that Judge Ginsburg's record is favorable in these areas, and that she has demonstrated clear judicial competence and a genuine concern for and commitment to civil and constitutional rights and liberties. Her record is particularly good in such areas as gender discrimination, free expression and separation of powers. The report also indicates that in a number of areas, due primarily to the particular mix of cases in which she has been involved, relatively little is known about her judicial philosophy, so that questioning by the Senate Judiciary Committee is warranted. These areas include overall constitutional interpretation, the right to privacy, and separation of church and state. We urge the Committee to undertake that process at its hearings beginning on July 20.

I. Judge Ginsburg's Overall Judicial Philosophy

Judge Ginsburg's many opinions and articles reveal much about her judicial philosophy. She has written that her own models as judges are jurists like Learned Hand who are neither liberals nor conservatives, but "independent-thinking individuals with open, but not drafty, minds" who are "willing to listen," to learn, and to "reexamine their own premises."³ As she stated at her confirmation hearings in 1980, and repeated when President Clinton nominated her to the Court, she strongly believes that it is the role of a judge to "decide fairly" based on the facts and the law "even when the home crowd will not be happy with the result."⁴

Judge Ginsburg is thus seldom classified as "liberal" or "conservative." Instead, she is usually regarded as a moderate centrist, or a "swing vote" on the D.C. Circuit.⁵ One study of decisions in 1987 showed that she agreed most often in non-unanimous cases with Judge Silberman and then-Judge Starr, both Republican appointees. Id. Judge Ginsburg's own analysis demonstrated that over a ten-year period, she "disagreed most often with four judges: two...were Republican appointees [and] two were Carter appointees."⁶

In particular, Judge Ginsburg's opinions and writings indicate that five aspects of her overall judicial philosophy are most important in evaluating her nomination to the Court: her views on opinion-writing and the judicial process, on precedent and stare decisis, on statutory interpretation, on the separation of powers, and on constitutional interpretation by the courts.

A. Judicial Opinion-Writing and the Judicial Process

Judge Ginsburg is well known for her careful, measured, and thorough opinions. She has stressed the obligation of judges to explain the reasons for their decisions, noting that a

³Ruth Bader Ginsburg, Interpretations of the Equal Protection Clause, 9 Harv. J. L. Pub. Pol. 41, 45 (1986).

⁴Hearings Before the Senate Judiciary Committee on Selection and Confirmation of Federal Judges, 96th Cong., 2d Sess. 350 (1980).

⁵Bork or No Bork, GOP Bloc a Force on D.C. Circuit, Legal Times (Jan. 18, 1988).

⁶Panel Discussion: Effectiveness of Judicial Review in Agency Cases, 134 F.R.D. 440, 447 (1990).

"peremptory judgment without any stated reason bears an uncomfortably close relationship to simple rejection of a case as unworthy of review."⁷ At the same time, however, she has recognized the importance of avoiding delay in opinion writing and the desirability of "clearer, shorter, more definitive opinions."⁸ She has criticized deciding cases without adequate facts, and has warned both judicial colleagues and advocates against "personal commentary",⁹ and "slinging mud" or "beating up on the trial judge" in advocating on appeal.¹⁰

With respect to the process of judging and opinion-writing on appellate courts and the Supreme Court, Judge Ginsburg has written about the tension between the independence of individual judges and the collective process of judicial decision-making. Individual opinions are important, she has recognized, because they may help produce improvements in the majority's opinion and greater pressure to "get it right" in the face of a possible dissent.¹¹ They also serve to alert higher courts or courts that may review the issue in the future of fundamental problems in the majority's opinion which may lead to future correction, as exemplified by Justice Harlan's famous dissent in Plessy v. Ferguson and the subsequent overruling of Plessy in Brown v. Board of Education. Id. at 143-44.

On the other hand, Judge Ginsburg has acknowledged the importance of compromise and collective decision-making for appellate courts. To attract additional votes necessary for a majority decision and to "establish durable law," she has written, "a judge may find it necessary to moderate her position" or be "less bold" or "less clear." Ruth Bader Ginsburg, The Obligation to Reason Why, 37 U. Fla. L. Rev. 205, 212 (1985).

⁷Ruth Bader Ginsburg, The Obligation to Reason Why, 37 U. Fla. L. Rev. 205, 222 (1985).

⁸Ruth Bader Ginsburg, Reflections on the Independence, Good Behavior and Workload of Federal Judges, 55 Col. L. Rev. 1, 19 (1983); Conair Corp. v. NLRB, 721 F.2d 1355, 1402 (D.C. Cir. 1983) (Ginsburg, J., concurring).

⁹Where Do We Go From Here?, 37 Rutgers L. Rev. 1093, 1108 (1985).

¹⁰Appellate Advocacy Today: What Wins & What Loses 140 F.R.D. 566, 584 (1992). See also Warren v. United States Parole Comm., 659 F.2d 183, 197-99 (D.C. Cir. 1981) (Ginsburg, J., dissenting).

¹¹Ruth Bader Ginsburg, Remarks on Writing Separately, 65 Wash. L. Rev. 133, 139, 143 (1990).

"Dissent is diminished - sapped of its power to attract our attention - through too frequent use," she has suggested.¹² In addition, she has stated, important virtues such as consistency, predictability, stability, and clarity are "slighted when a court fails to function as a collegial body." Id. Indeed, Judge Ginsburg has criticized the "proliferation of separate opinions with no single opinion commanding a clear majority" which has characterized a number of Supreme Court decisions over the past several years. Ruth Bader Ginsburg, Remarks on Writing Separately, 65 Wash. L. Rev. 133, 148 (1990).

Judge Ginsburg's own judicial opinions reflect these conflicting pressures. She is known as an independent thinker, and has written her share of concurring and dissenting opinions. She has also written or joined many unanimous opinions, however, and some of her concurring opinions themselves appear to be efforts to help bridge the gaps between judges on the court by suggesting that common ground does exist or that differing opinions are not as extreme as they are portrayed to be. See, e.g., Jersey Cent. Power & Light Co. v. FERC, 768 F.2d 1500, 1505 (D.C. Cir. 1985) (Ginsburg, J., concurring). While it is impossible to predict precisely how she would function on the Supreme Court, her very thoughtful recognition of the importance of both judicial independence and collegiality should help prepare her for a role on the high Court.

B. Precedent and Stare Decisis

Throughout her career, Judge Ginsburg has acknowledged the importance of past precedent and the principle of stare decisis (the principle that judges should generally follow prior case law). Even before becoming a judge, she wrote an article on the importance of following the most recent judicial decision when two judgments are in conflict as a matter of res judicata.¹³ Since joining the D.C. Circuit, she has repeatedly expressed the view that she is bound to follow controlling Supreme Court or D.C. Circuit precedent unless overruled, even where she clearly disagrees with the precedent. For example, in Save Our Cumberland Mountains v. Hodel, 826 F.2d 43, 54-55 (D.C. Cir. 1987) (Ginsburg J., concurring), she reluctantly concurred in a decision applying a restrictive Circuit precedent on attorneys' fees, declining to join in what she termed an "end run around" the decision by the dissent, even though she recognized that the

¹²Ruth Bader Ginsburg, Styles of Collegial Judging: One Judge's Perspective, 39 Fed. B. News and J. 199, 200 (1992).

¹³Ruth Bader Ginsburg, Judgments in Search of Full Faith and Credit: The Last-In-Time Rule for Conflicting Judgments, 82 Harv. L. Rev. 798 (1969).

precedent conflicted with other decisions and should be revisited. See also, e.g., Mosrie v. Barry, 718 F.2d 1151, 1162-63 (D.C. Cir. 1983) (Ginsburg, J., concurring in decision based on Supreme Court decision which she believed should be revisited and was subjected to "penetrating criticism").

At the same time, Judge Ginsburg has recognized limitations on stare decisis. While the courts are bound by precedent, she has written, they are not obliged to extend past decisions where they do not apply and can distinguish them in new situations. See Lombard v. United States, 690 F.2d 215, 233 (D.C. Cir. 1982) (Ginsburg, J., concurring in part and dissenting in part). In addition, she believes that lower courts are certainly free to criticize prior Supreme Court decisions and suggest "further enlightenment from Higher Authority" or even "spring cleaning" of unfavorable precedents, as she herself has done in areas such as standing, immunity, and due process. See Dronenburg v. Zech, 746 F.2d 1579, 1581 n.1 (D.C. Cir. 1984) (Ginsburg, J., concurring); Browning v. Clerk, 793 F.2d 380, 381 (D.C. Cir. 1986) (separate statement of Ginsburg, J.).

In particular, Judge Ginsburg has written that the Supreme Court properly applies stare decisis with "muted zeal" in constitutional decision making because, in the absence of a constitutional amendment, "only the Court itself can uproot its past decision." Ruth Bader Ginsburg, Remarks on Writing Separately, 65 Wash. L. Rev. 133, 144 (1990). Judge Ginsburg has not had occasion to discuss comprehensively the circumstances under which the Court should reconsider prior constitutional decisions, other than to cite with approval such instances as Brown v. Board of Education and to criticize particular Court decisions. See, id.; Mosrie, 718 F.2d at 1162-63 (criticizing Paul v. Davis as having "re-rationalized" past due process decisions and contradicting fundamental principles of due process liberty). This is a subject worth further exploration by the Senate Judiciary Committee.

C. Statutory Interpretation

As a judge on the D.C. Circuit, Judge Ginsburg has rendered numerous decisions concerning the interpretation of statutes, particularly laws passed by Congress. The overriding judicial objective in such a case, she has indicated, is to determine the intent of Congress. See Abourezk v. Reagan, 785 F.2d 1043, 1053 (D.C. Cir. 1986), aff'd by an equally divided Court, 484 U.S. 1 (1987); Alaska Airlines, Inc. v. Donovan, 766 F.2d 1550, 1565 (D.C. Cir. 1985), aff'd, 480 U.S. 678 (1987) (Ginsburg, J., concurring). She has suggested that the primary indicator of intent is statutory language, which will take precedence over legislative history, particularly post-enactment attempts to explain a law. See Abourezk, 785 F.2d at 1054-5 n.11; Democratic

Congressional Campaign Comm. v. FEC, 831 F.2d 1131, 1134 (D.C.Cir. 1987). Unlike some judges, however, Judge Ginsburg has made clear that legislative history is an appropriate source for statutory interpretation, as are the views of other courts which have construed a statute.¹⁴ She has also applied the accepted principle that courts should avoid interpreting a statute in a way that presents significant constitutional questions unless Congress clearly indicates otherwise. See, e.g. Schor v. CFTC, 740 F.2d 1262, 1278 (D.C. Cir. 1984), vacated on other grounds, 473 U.S. 922 (1985); Galliano v. United States Postal Service, 836 F.2d 1362, 1369 (D.C.Cir. 1989).

On several occasions, Judge Ginsburg has discussed the so-called Chevron principle concerning the extent to which courts should defer to federal agencies' interpretations of statutes. She has properly recognized that such deference is called for only where a court first determines, based on statutory text, history, and other methods, that Congress did not have specific intent with respect to the issue in question. At that point, she has explained, a court should defer to the agency's interpretation unless it is not a "reasonable accommodation" of the policies committed to the agency by law. Abourezk, 785 F.2d at 1053. While deferring to agency interpretations in some cases under Chevron, Judge Ginsburg has also recognized important limitations on such deference, such as when the agency interpretation conflicts with accepted rules of statutory interpretation, when the agency has acted "erratically or inconsistently," and when constitutional issues or questions dealing with access to the courts are at stake. See Schor, 740 F.2d at 1278-79; Michigan Citizens For an Independent Press v. Thornburgh, 868 F.2d 1285, 1299-1300 n.6 (D.C. Cir. 1989) (Ginsburg, J., dissenting); Office and Professional Employees Union v. FDIC, 962 F.2d 63, 65 (D.C. Cir. 1992). She has also recognized that "congressional acquiescence (or lack thereof)" in a consistent administrative interpretation of a law is important in statutory construction. Abourezk, supra, 785 F.2d at 1054-55.

One important statute that Judge Ginsburg has construed on several occasions is the Freedom of Information Act, 5 U.S.C. § 552 et seq. In general, Judge Ginsburg has interpreted the Act in accord with Congress' intent to promote disclosure of government records. As she explained in one decision ordering release of requested information, "FOIA precedent, like the exemptions the decisions construe, must be read circumspectly,

¹⁴Abourezk, supra, 785 F.2d at 1053. See also, e.g., United States v. Jackson, 824 F.2d 21 (D.C. Cir. 1987), cert. denied, 484 U.S. 1013 (1988); United States v. Iannaco, 893 F.2d 394 (D.C. Cir. 1990); United States v. Chin, 981 F.2d 1275 (D.C. Cir. 1992).

with the statute's dominant disclosure direction in view."¹⁵ She has generally resisted efforts by government agencies and others to "stray from the legislature's will" to promote disclosure. Wolfe v. Department of HHS, 839 F.2d 768, 780 (D.C. Cir. 1988) (Ginsburg, J., dissenting).¹⁶

Judge Ginsburg has also recognized that judges often are forced to exercise a good deal of judgment in interpreting laws because Congress "expresses itself too often in commands that are unclear, imprecise, or gap-ridden."¹⁷ Sometimes, she has noted, this is because of legislative compromises resulting in ambiguities "deliberately adopted to let the courts put a gloss on the words the legislators could not agree upon."¹⁸ On other occasions, she has explained, the legislature deliberately enacts "grandly general mandates" such as the Sherman Act and the Civil Rights Act, as to which "judges quite properly build the law through a process of accretion, erosion, and correction," similar to the growth of the common law.¹⁹ For the most part, however, Judge Ginsburg has lamented broad and ambiguous legislative language as ineffective and as essentially requiring the judiciary to exercise too much discretion, and has called upon legislatures to pass more precise statutes and to correct

¹⁵Petroleum Information Corp. v. Department of Justice, 976 F.2d 1429, 1439 (D.C. Cir. 1992).

¹⁶Other examples of pro-disclosure FOIA opinions by Judge Ginsburg include Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992) (Ginsburg, J., dissenting from opinion broadening FOIA exemption for commercial and financial information; Campbell v. Department of HHS, 682 F.2d 256 (D.C. Cir. 1982) (reversing decision approving withholding of documents); Schlefer v. United States, 702 F.2d 233 (D.C. Cir. 1983) (reversing decision exempting documents from disclosure); and North v. Walsh, 881 F.2d 1088 (D.C. Cir. 1989) (reversing decision exempting records of office of Independent Counsel from disclosure to Oliver North). She has ruled against disclosure in the relatively few cases in which statutory exemptions did appear applicable. See Crooker v. Bureau of Alcohol Tobacco and Firearms, 670 F.2d 1051 (D.C. Cir. 1981); NTEU v. IRS, 765 F.2d 1174 (D.C. Cir. 1985).

¹⁷Ruth Bader Ginsburg and Peter Huber, The Intercircuit Committee, 100 Harv. L. Rev. 1417, 1420 (1987).

¹⁸Ruth Bader Ginsburg, Reflections on the Independence, Good Behavior, and Workload of Judges, 55 Colo. L. Rev. 1, 19 (1983).

¹⁹Ruth Bader Ginsburg and Peter Huber, The Intercircuit Committee, 100 Harv. L. Rev. 1417, 1425 (1987).

ambiguities when they arise.²⁰ Judge Ginsburg's views on statutory interpretation are clearly "within the mainstream" and reflect careful thought on this important issue.

D. Separation of Powers

Judge Ginsburg's writings generally demonstrate a fundamentally sound appreciation for and application of principles relating to separation of powers in our democracy. Initially, she has recognized the key role of the courts in policing the separation of powers and determining "what the law is" in our constitutional system. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). In exercising their authority, she has explained, the branches of our government "may not transgress constitutional limitations," and it is the "duty of the courts, in cases properly before them, to say where those...boundaries lie."²¹ Abourezk v. Reagan, *supra*, 785 F.2d at 1061. As discussed in section II.H, therefore, she has generally tended to reject claims that the courts cannot even consider alleged constitutional violations by other branches of government. *See, e.g., Kurtz v. Baker*, 829 F.2d 1133, 1149 (D.C. Cir. 1987) (Ginsburg, J., dissenting) (stating that "Congress' Rules and their implementation" are "subject to judicial review" with respect to constitutionality, despite contention that the issue presented an unreviewable "political question").

Judge Ginsburg has also recognized that by the very nature of American democracy, "our institutions of government" [should be viewed] "not as rigidly compartmentalized but as interdependent."²² Accordingly, she has written that it is proper for the courts in some cases to extend a statute that discriminates on the basis of gender to people of both sexes, rather than simply to invalidate the law, as the Supreme Court has done, even though it could be argued that this constitutes

²⁰See id. at 1420-24, 1429-35; Ginsburg, Inviting Judicial Activism: A 'Liberal' or 'Conservative' Technique?, 15 Ga. L. Rev. 539 (1981).

²¹See also Ruth Bader Ginsburg, Colloque sur le bicentaire de la Constitution des Etats-Unis (speech in Paris, France) (Jan. 9-10, 1987) at 6 (explaining that the function of determining the constitutionality of Acts of Congress under our Constitution is "committed to a separate department -- a detached, impartial judiciary that is not judging its own cause").

²²Ruth Bader Ginsburg, Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation, 28 Cleve. St. L.Rev. 301, 324 (1978).

"legislating" by the courts. Id. ²³

Judge Ginsburg similarly rejected a "rigidly compartmentalized" view of the separation of powers in voting to uphold the constitutionality of the independent counsel law in In re Sealed Case, 838 F.2d 476 (D.C. Cir. 1988). The fact that the statute was designed to combat Watergate-style "abuses of executive power, abuses which themselves threatened the balance among the three branches of government," she explained, militated strongly in favor of its constitutionality, even though it effectively transferred part of the prosecutorial function outside the executive branch. Id. at 527. Judge Ginsburg's opinion in the independent counsel case was a dissent, but her position was ultimately adopted by the Supreme Court in upholding the law in Morrison v. Olsen, 487 U.S. 654 (1988).

At the same time, Judge Ginsburg has acknowledged the importance of "divisions of responsibility, and the closely kept balance of powers that results from them," in our democratic system. Aboureszk, supra, 785 F. 2d at 1059 n. 23. She thus concurred in a decision striking down and severing a legislative veto provision in the Airline Deregulation Act. Alaska Airlines, supra. She has also argued, in response to the problem of conflicting interpretations of federal laws by different courts, that Congress should better fulfill its constitutional responsibility by clarifying such laws, rather than creating another appellate court to do so.²⁴

On one occasion, Judge Ginsburg was reversed for relying on separation of powers analysis. In Schor v. Commodity Futures Trading Comm., 740 F.2d 1262 (D.C. Cir. 1984), she held that the

²³See, e.g., Weinberger v. Weisenfeld, 420 U.S. 636 (1975) (ruling that Social Security Survivors' benefit law applied to both men and women). Since joining the D.C. Circuit, Judge Ginsburg has written that "in choosing between extension and nullification" of a discriminatory statute, "the reviewing court should defer to the choice that the legislature would likely have made." Quiban v. Veterans Administration, 928 F.2d 1154, 1163 (D.C. Cir. 1991). See also Ruth Bader Ginsburg, The Three Branches of Government and the Separation of Powers (speech at 92nd Street Y in New York City) (March 12, 1987) at 4,5 (noting that in accordance with "original intent," each branch of government has a "foothold in the other's territory" so that each can "check on or constrain the other" and so that "accretion or concentration of government power [is] difficult."

²⁴Ginsburg and Huber, The Intercircuit Committee, 100 Harv. L.Rev. 1417 (1987).

CFTC could not adjudicate counterclaims for breach of contract and other common law claims not directly related to the Commodity Exchange Act, based largely on her view that this would violate the exclusive constitutional autonomy of the courts to resolve such claims. The Supreme Court vacated and remanded in CFTC v. Schor, 473 U.S. 922 (1985), and reversed the D.C. Circuit's later decision in CFTC v. Schor, 478 U.S. 833 (1986). She has also relied on separation of powers concerns in cases where she has been reluctant to grant access to the courts in which a "public agency or officer is sued to achieve change in a government policy," as discussed further in section II.H. Spann v. Colonial Village, 899 F.2d 24, 30 (D.C. Cir. 1990).²⁵

E. The Judicial Role and Constitutional Interpretation

Judge Ginsburg has explained that every court, particularly the Supreme Court, has two sets of "complementary judicial responsibilities." These are to "maintain a stable, coherent, and uniform body of law" and also to "promote the law's adaptation to changing circumstances and modern realities." While the Court thus "plays a major role in stabilizing, unifying, and finalizing federal law," it also "remains a vehicle for gradual, considered change, at least under the open-ended mandates of the Bill of Rights" and common law. Intercircuit at 1427.

In many instances, Judge Ginsburg has written, the "need for interventionist decisions" by judges "would be reduced significantly if elected officials shouldered their full responsibility for activist decision making."²⁶ However, Judge Ginsburg has recognized that federal judges are like firefighters in our governmental system: "they do not ignite the conflagrations that produce litigation but, if their authority is

²⁵Judge Ginsburg has written a few opinions concerning federalism and the relative authority of the federal and state governments. See Alley v. RTC, 984 F.2d 1201 (D.C. Cir. 1993) (ruling that federal law pre-empted state law claims for denial of payments allegedly due to agency employees); United States v. Huser, 866 F.2d 1533, 1534-5 (D.C. Cir. 1989) (concurring statement) (suggesting that claim of federalism and states' rights did not justify altering disposition of criminal defendant found not guilty by reason of insanity which was agreed to by both state and federal authorities).

²⁶Ruth Bader Ginsburg, Inviting Judicial Activism: A Liberal or Conserative Technique, 15 Ga. L. Rev. 539, 550 (1981).

properly invoked, they must respond to all calls."²⁷ Judge Ginsburg has offered some suggestions on how judges should respond to such "calls," particularly those requiring constitutional interpretation.

First, she has rejected the notion of a "too strict 'jurisprudence of the framers' original intent.'" Ginsburg, Remarks on Women Becoming Part of the Constitution, 6 Law and Inequality 17 (1988). "It cannot be, for example, that although the founding fathers never dreamed of the likes of Dolly Madison...ever serving on a jury, we would today say it is therefore necessary or proper to keep women off juries." Id.

On the other hand, Judge Ginsburg has suggested that at least at a more general level, the "original understanding of our Constitution-makers" has "contemporary significance", at least as a "counterweight to arguments for judicial accommodation of constitutional doctrine to a changed social climate."²⁸ Thus, for example, she has supported the Equal Rights Amendment in part because it is a "historic fact" that "the framers of the 14th amendment were not thinking of the equality of men and women," so that the equal protection clause is not as "clear, clean" and firm a means of establishing such equality. Hearings Before the Senate Judiciary Committee on Selection and Confirmation of Federal Judges, 96th Cong., 2d Sess. 348 (1980).²⁹

Judge Ginsburg has also suggested that the debate between "originalists" and "nonoriginalists" may obscure a "middle ground" somewhere in between. Ruth Bader Ginsburg, Comments on "Interpreting the Constitution" (speech at American Enterprise Institute) (Sept. 11-12, 1987) at 1,2. She has noted, for example, that although the "specific intent" of the framers of the equal protection clause may not have been to eliminate school segregation, the "general equal citizenship or personhood value they enshrined in the Constitution allowed for extension of the clause" both to the abolition of such segregation in Brown v. Board of Education and to "cases involving separate confinement of other minorities, women, even white males." Id. at 2,3. She has also suggested, without specifically endorsing the view, that

²⁷Ruth Bader Ginsburg and Peter Huber, The Intercircuit Committee, 100 Harv. L. Rev. 1417, 1429 (1987).

²⁸Ruth Bader Ginsburg, Sex Equality and the Constitution, 52 Tul. L. Rev. 451, 453 (1978).

²⁹Judge Ginsburg has been a consistent supporter of the Equal Rights Amendment, both before and after becoming a judge. See e.g., Ruth Bader Ginsburg, Let's Have the ERA As a Signal, 63 ABA J. 70 (1977); Ruth Bader Ginsburg, On Amending the Constitution, 12 U. Ark. Little Rock L. J. 677, 692 (1989-90).

it may be possible to interpret original intent in a "synthesizing" manner which "requires determination of the impact of subsequent constitutional events" such as the adoption of the fourteenth amendment on the "original text." *Id.* at 5,6. This approach, for example, could mean that the equal protection guarantee of the fourteenth amendment, which applies only to the states, would be read into the fifth amendment as applying to the federal government, so that the constitution as a whole would be "kept coherent or harmonious." *Id.* at 5.

More precisely, however, what should guide the courts in ensuring that the Constitution can "serve through changing times" by providing "judicial interpretations that are neither 'mushy' nor too 'rigid'?"³⁰ Although offering no clear and simple formula, Judge Ginsburg has suggested a gradualist framework or methodology in her analysis of the courts' decisions concerning sex discrimination in the 1970s. "As society changed and evolved with respect to the roles of men and women," she has written, "so too did the force of the grandly general clause of the Constitution" providing for equal protection of the laws. "As the stereotypes were successfully assaulted in the world outside the Court, the laws founded upon those stereotypes were sent back for reconsideration" by the Court based upon evolving ideas of equality. The Court thus functioned "as an amplifier - responding to, and accelerating, the equalization process."³¹ In other words, without "taking giant strides and thereby risking a heavy backlash," the Court "reinforce[d] or moderately add[ed] impetus to a social change."³²

In contrast, although she remains pro-choice, Judge Ginsburg has criticized the type of constitutional interpretation that produced *Roe v. Wade*. She has suggested that at the time of *Roe*, abortion law was in a process of change, and the Court might have more properly reinforced that change by simply ruling the "extreme law [in *Roe*] impermissible," or by applying the equal protection-type analysis used in gender discrimination cases in the 1970s. *Id.* Instead, she has stated, *Roe* was "stunning" by calling into question "the constitutionality of the criminal

³⁰Ruth Bader Ginsburg, On Amending the Constitution: A Plea for Patience, 12 U. Ark. Little Rock L. J. 677, 693-94 (1989-90).

³¹Ruth Bader Ginsburg, Employment of the Constitution to Advance the Equal Status of Men and Women, in Constitutional Bases of Political Change in the United States 185, 193 (Shlomo Slonin ed., 1990).

³²Ruth Bader Ginsburg, A Moderate view on Roe, 4 Constitution 17 (spring-summer 1992).

abortion laws of every state, even those with the least restrictive provisions." Id. According to Judge Ginsburg, this not only created a political backlash by provoking the right-to-life movement and restrictive abortion legislation, but also was a questionable and extreme method of constitutional interpretation that stepped too far ahead of society and the political branches of government.³³

Although Judge Ginsburg's writings and speeches thus provide important information about her general views on constitutional interpretation, important questions about her judicial philosophy remain open. What precise role should "original intent" play in constitutional interpretation? How should a court treat "unenumerated" rights -- such as the right to privacy and the right to travel -- in our constitutional system? How does a court determine if it is going too far -- or not far enough -- with respect to evolving social ideas of equality or personal rights in constitutional adjudication? What other guidelines exist for judges in interpreting the "open-ended mandates of the Bill of Rights?" Such questions are important for the nominee to address as the Senate considers Judge Ginsburg's nomination.

³³Id. See also Legal Times, Apr. 5, 1993 at 10, col. 1.

II. Judge Ginsburg's Record on Civil Rights and Civil Liberties Issues

The remainder of this report examines Judge Ginsburg's record and judicial philosophy on specific civil rights and civil liberties issues. These include freedom of expression and association, freedom of religion and church-state separation, gender discrimination, other civil rights, the right to privacy and abortion and reproductive freedom, criminal law, other civil liberties, and access to the courts.

A. Freedom of Expression and Association

In general, Judge Ginsburg's opinions demonstrate sensitivity to First Amendment rights of free expression and association. She has authored eleven opinions addressing these issues, nine of which are clearly protective of First Amendment interests.

Judge Ginsburg has been particularly vigilant regarding the problem of "unconstitutional conditions" on government benefits or subsidies which penalize the exercise of First Amendment and other constitutional rights. In a concurring opinion in F.E.C. v. International Funding Institute, Inc.,³⁴ she explained that where "a benefit is provided contingent on an individual relinquishing a civil right," government funding and taxing restrictions "are most troublesome -- and in greatest need of justification." Id. at 1118-19 (Ginsburg, J., concurring). She has written of the "Hobson's choice" presented by such conditions on government funding, DKT Memorial Fund v. AID, 887 F.2d 275, 303 (D.C. Cir. 1987), and has emphasized that

taxing and spending decisions -- even those that might appear to offer the individual "a choice" or to leave her "no worse off" than she would have been absent government involvement -- can seriously interfere with the exercise of constitutional freedoms.

International Funding, 969 F.2d at 1118.

Although Judge Ginsburg has specifically recognized that government may sometimes restrict how private entities use

³⁴ 969 F.2d 1110 (D.C. Cir. 1992) (en banc) (upholding against First Amendment challenge the government's decision to make contributor lists filed with the F.E.C. publicly available for certain purposes, but not for use for political solicitations).

government subsidies,³⁵ she has objected specifically to conditions on federal funding which interfere with an organization's privately funded, constitutionally protected activities, including speech and association. In DKT Memorial Fund v. A.I.D., 887 F.2d 275 (D.C. Cir. 1989), Judge Ginsburg dissented forcefully from a panel decision upholding an A.I.D. ban on all U.S. foreign aid to any foreign family planning organization which used U.S. or any other funds to promote or perform abortion. Her dissent argued that "government may not deter private action" through the funding restrictions, and could "demand only that public funds be segregated by the grantee" so that they were not used for abortion. Id. at 299-300. Furthermore, Judge Ginsburg's DKT opinion suggested that the First Amendment applied to the government's restrictions upon foreign organizations acting abroad. Id. at 307-08.³⁶

Similarly, in F.E.C. v. International Funding Institute, Inc., Judge Ginsburg concurred in a judgment upholding a selective restriction on the use of information on file with the F.E.C. The majority relied upon the Rust v. Sullivan "gag rule" decision, which upheld a restriction on speech about abortion as a condition for receiving federal funds. Judge Ginsburg concurred specially to underscore that relinquishment of a constitutional right was not at issue in the IFI case, but that any such condition for receiving a government benefit would be constitutionally suspect. 969 F.2d at 1118-19. Although her concurrence did not mention Rust, it suggests that she disagrees with that decision.

Judge Ginsburg has issued several other decisions very supportive of free speech. The most noteworthy concern the chilling effect of punishments for deceptive political solicitation and the hours of F.C.C. "indecent" restrictions. In Galliano v. U.S. Postal Service, 836 F.2d 1362 (D.C. Cir. 1988), Judge Ginsburg held that because of First Amendment implications, only one of two statutes which appeared to apply to deceptive political advertising actually applies. She explained that because of the First Amendment concerns implicated in punishing such fundraising, the statute which incorporated special procedures to prevent First Amendment violations (the Federal Election Campaign Act) provided the exclusive federal

³⁵ John Glenn Presidential Committee v. F.E.C., 822 F.2d 1097, 1098 (D.C. Cir. 1987) (upholding F.E.C. state-by-state ceilings on expenditure of public campaign subsidies); see also IFI, 969 F.2d at 1119; DKT Memorial Fund, 887 F.2d at 304-305.

³⁶ The next year, the Supreme Court held that the constitution does not restrict actions of the United States against foreign citizens in foreign countries. United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

statutory remedy for political fundraising violations it proscribed. Id. at 1370-71.

In Action for Children's Television v. F.C.C., 852 F.2d 1332 (D.C. Cir. 1988), Judge Ginsburg authored an opinion invalidating a narrow, 12 midnight to 6:00 a.m. "safe harbor" period for the broadcast of programming deemed "indecent" by the F.C.C. She held that the F.C.C. must provide clear notice to broadcasters of safe harbor periods, and must base restrictions on broadcast times upon specific fact-finding demonstrating that the channelling furthers "parental -- as distinguished from government -- control." Her opinion also upheld an arguably broad FCC definition of indecency, based on her view that the Supreme Court's implicit approval barred the Court of Appeals from addressing the issue on the merits until so permitted by "higher authority." Id. at 1343-44.

In CCNV v. Watt,³⁷ Judge Ginsburg wrote a concurring opinion adopting a middle-of-the-road position regarding whether non-verbal, symbolic conduct can enjoy full protection under the First Amendment. Judge Ginsburg disagreed with opinions of Judge Mikva and Judge Edwards in the majority that the symbolic act of sleeping during a protest against homelessness was identical for constitutional purposes to speech. She also took issue with positions of dissenting Judge Scalia that only "spoken and written thought" are fully protected by the First Amendment, and of dissenting Judge Wilkey that only "traditional communicative activity" should be exempt from content-neutral restrictions. Id. at 605-06. Rejecting these proposed bright-line rules, she argued instead that sleeping had a "non-communicative aspect" which made it more susceptible to regulation than "pure speech." However she concluded that where the non-communicative component of symbolic conduct "facilitates expression" -- as CCNV members' ability to sleep facilitated their ability to protest through the night -- that conduct is protected by the First Amendment. Id. at 607-08. In an opinion authored by Justice White, however, the Supreme Court reversed the CCNV decision. Clark v. CCNV, 468 U.S. 288, 293 (1984).³⁸

³⁷ 703 F.2d 586 (D.C. Cir. 1983) (invalidating Park Service's prohibition against sleeping in temporary structures in LaFayette Park as part of protest against plight of homeless), rev'd sub nom. Clark v. CCNV, 468 U.S. 288 (1984).

³⁸Other favorable First Amendment decisions by Judge Ginsburg include: American Postal Workers Union v. U.S. Postal Service, 830 F.2d 294, 314 (D.C. Cir. 1987) (concurring in decision holding that postal worker was discharged for constitutionally protected speech on matters of public concern which outweighed the government's interests in discharging him); Tavoulareas v. Piro, 817 F.2d 762, 806 (D.C. Cir. 1987) (en banc)

In two opinions, Judge Ginsburg has rejected First Amendment interests. Neither were close cases.³⁹ Overall, Judge Ginsburg's record is one of strong support for First Amendment rights of expression and association.

B. Freedom of Religion, Including Separation of Church and State

Judge Ginsburg has a sparse record on First Amendment religion issues, particularly establishment clause questions. Recently, the Supreme Court has been divided over whether the established test for church-state separation mandated by Lemon v. Kurtzman remains good law. Judge Ginsburg has never written an opinion applying the Lemon test, and has written few opinions on the general subject of church-state separation.

Judge Ginsburg has written several opinions on the subject of public prayer at the opening of legislative sessions, a practice which the Supreme Court approved and stated was not covered by Lemon in Marsh v. Chambers, 463 U.S. 783 (1983). In Kurtz v. Baker, 829 F.2d 1133 (D.C. Cir. 1987), a challenge to the exclusion of a non-theist from speaking during House and Senate prayers, Judge Ginsburg disagreed with the majority's

(concurring separately in affirmance of judgment for Washington Post in libel case to suggest ways that district judges may ensure that constitutional protections for libel defendants do not become "mythical"); S.E.C. v. McGoff, 647 F.2d 185, 191 (D.C. Cir.), cert. denied, 452 U.S. 963 (1981) (holding that publisher was not exempt from compliance with S.E.C. subpoenas regarding securities transactions, although some "accommodation" was required to permit withholding any segregable part of a document relating solely to editorial policy or news gathering). See also Telecommunications Research and Action Center v. F.C.C., 806 F.2d 1115, 1118 (D.C. Cir. 1986) (joining in dissent from denial of rehearing en banc of panel decision holding "fairness doctrine" is not statutorily required, and joining statement of Judge Starr which expressed no view on the merits).

³⁹ See Professional Reactor Operator Society v. U.S. Nuclear Regulatory Comm'n, 939 F.2d 1047 (D.C. Cir. 1991) (upholding agency sequestration rule barring presence of persons other than witness' lawyer during interview where petitioners "apparently concede[d]" that rule did not violate First Amendment); Robinson v. Palmer, 841 F.2d 1151 (D.C. Cir. 1988) (affirming, under a Supreme Court decision mandating a permissive standard of review, a permanent suspension of prisoner spousal visitation privileges because of spouse's attempt to smuggle marijuana into prison).

reasoning that the defendants should prevail on standing grounds. She would have found the plaintiff's claim foreclosed by Marsh. However, she wrote that Marsh's holding regarding legislative prayers

fits into a special nook -- a narrow space tightly sealed off from otherwise applicable first amendment doctrine.

Id. at 1147 (Ginsburg, J., dissenting in part). Although unclear, this statement suggests that Judge Ginsburg recognized that the substantially lowered wall of church-state separation in Marsh was an exception to the rule for establishment clause claims.⁴⁰

Judge Ginsburg also considered a hybrid establishment clause/equal protection claim in Olsen v. D.E.A., 878 F.2d 1458 (D.C. Cir. 1989), a case challenging the D.E.A.'s denial of a religious exemption from marijuana laws for a Jamaican sect, despite the D.E.A.'s accommodation of peyote use by the Native American Church. Judge Ginsburg read the establishment clause in Olsen as requiring only that other religious groups be permitted to use peyote. She reasoned that the greater prevalence of marijuana use than peyote use justified a selective exemption for peyote use only. Id. at 1463-64. Judge James Buckley, a conservative, dissented vigorously on the ground that Judge Ginsburg had failed to apply strict scrutiny to the apparent denominational preference at issue. Id. at 1468-72. Judge Ginsburg may have been reluctant actually to apply strict scrutiny in Olsen because of her perception of "the immensity of the marijuana control problem in the United States." Id. at 1464.

Judge Ginsburg's approach to the first amendment guarantee of free exercise of religion has been spelled out somewhat more clearly. She has authored three free exercise opinions. Two are protective of free exercise rights. Judge Ginsburg's brief statement dissenting from denial of rehearing en banc in Goldman v. Secretary of Defense, 739 F.2d 657 (D.C. Cir. 1984) (en banc), aff'd, 475 U.S. 503 (1986) has attracted particular attention. In Goldman, a panel of the Court of Appeals, and later the Supreme Court, rejected a free exercise challenge to the Air Force's decision suddenly to prohibit a Jewish officer from

⁴⁰In another of Judge Ginsburg's establishment clause opinions, the merits of the controversy were also directly controlled by Marsh v. Chambers, 463 U.S. 783 (1983). Murray v. Buchanan, 720 F.2d 689, 699 (D.C. Cir. 1983) (en banc) (separate statement). Judge Ginsburg concluded that the court should reach the merits of the controversies in both Murray and Kurtz, rather than dismissing on standing or political question grounds, as discussed in section II.H.

wearing a yarmulke. These courts held that decisions by military authorities are subject to almost total deference, even when they infringe on religious liberty. Judge Ginsburg disagreed, stating that she would have applied free exercise requirements to the armed forces, and suggesting that the Air Force's decision was arbitrary and exhibited "callous indifference" to the officer's religious faith. *Id.* at 660 (Ginsburg, J., dissenting in part).⁴¹

Judge Ginsburg was also receptive to free exercise rights in Leahy v. District of Columbia, 833 F.2d 1046 (D.C. Cir. 1987), where she reversed a district court decision granting summary judgment for the District of Columbia and applying a rational basis test in a challenge to a D.C. requirement that applicants for drivers' licenses disclose their social security numbers. Judge Ginsburg's decision specifically rejected the District's argument that strict scrutiny in free exercise cases should be confined only to claims regarding public benefits, and should not be applied public safety rules.⁴² *Id.* at 1048 & n.4.

Finally, Judge Ginsburg also addressed a free exercise claim in the Olsen v. D.E.A. decision discussed above. In addition to his establishment clause claim, Olsen raised a free exercise claim in attempting to obtain a religious exemption from marijuana laws for his church. As Judge Ginsburg observed in ruling for the government, several courts had rejected similar exemptions from marijuana laws. 878 F.2d at 1462. However, as with the establishment clause claim, Judge Ginsburg appears to have applied something less than strict scrutiny in light of the government interest in drug control at stake in the case.

Overall, Judge Ginsburg's record generally demonstrates appreciation for free exercise of religion rights, but much

⁴¹Then-Judge Antonin Scalia joined Judge Ginsburg's statement. Congress subsequently agreed, at least as a matter of policy, with Judge Ginsburg's view of the proper outcome of the case, passing a statute to protect religious liberties of military personnel. Very recently, the attorney who argued Goldman, Nat Lewin, has expressed "worry" about Judge Ginsburg's views on religious freedom and suggested that the subject should be explored by the Senate Judiciary Committee, based on her decision not to join a vigorous dissent by Judge Starr in the case and on a subsequent statement by Judge Ginsburg indicating that her vote was not on the merits of the case. See Lewin, Getting to Know Ginsburg, Forward (July 9, 1993).

⁴² Three years later, in an opinion by Justice Scalia, the Supreme Court adopted a far more severe limitation upon the application of strict scrutiny for free exercise cases. Employment Division v. Smith, 494 U.S. 872 (1990).

remains unknown about her judicial philosophy concerning freedom of religion, particularly with respect to separation of church and state. This is an area of continued controversy both on and off the Court. The justices have considered three cases on church-state separation over the last two terms alone, and religious right groups have announced, for example, a campaign to send legal "SWAT teams" into school districts that do not support their view of the "right" to prayer at school graduations, despite the Supreme Court's ruling on the unconstitutionality of school prayer at and graduations in Lee v. Weisman, 112 S.Ct. 2649 (1992).⁴³ While no nominee for the Court can anticipate or should be asked about potential rulings on particular cases, both Justices Souter and Thomas were asked and answered general questions about their judicial philosophy on church-state and religion issues. Such questions would similarly be appropriate for Judge Ginsburg.

C. Gender Discrimination

Upon being nominated by President Clinton to serve as the second woman justice on the Supreme Court, Judge Ginsburg noted that she hoped her nomination would mark the end of the "days when women, at least half the talent pool in our society, appear in high places as one-at-a-time performers."⁴⁴ If this is so, it is in no small part due to Judge Ginsburg's own efforts. The cases on which Judge Ginsburg worked, as the head of the ACLU Women's Rights Project throughout the 1970s, have played a vital role in the struggle for sexual equality.

In the 1970s, Ruth Bader Ginsburg took part--either filing a brief or arguing herself--in virtually all of the landmark cases that ultimately convinced the Supreme Court to apply heightened scrutiny to laws that classify on the basis of gender. This line of cases began with Reed v. Reed, 404 U.S. 71 (1971), where the Court, applying the lenient "rational basis" standard of review, struck down a provision in Idaho law that gave a preference to male parents over female parents in choosing an administrator of a child's estate.

Most of the cases in which then-Professor Ginsburg was

⁴³See also Zobrest v. Catalina Foothills School district, 61 U.S.L.W. 4641 (1993); Lamb's Chapel v. Center Moriches Union Free School District, 61 U.S.L.W. 4549 (1993); Michael deCourey Hinds, Robertson Trying Again to Put Prayer In Schools, N.Y. Times, April 16, 1993 at A12. Both Lee and Zobrest were decided by 5-4 margins.

⁴⁴Ruth Marcus, Clinton's Unexpected Choice Is Women's Rights Pioneer, Wash. Post (June 15, 1993).

involved were challenges to laws that purported to "protect" or "favor" women. For instance, she successfully argued in Frontiero v. Richardson, 411 U.S. 677 (1973), that a military pension system that automatically gave additional benefits to husbands in order to provide for housing and medical care for their wives, while requiring women to prove that their husbands were dependent on them before granting similar benefits, amounted to unconstitutional sex discrimination.

A similar argument was rejected, however, in Kahn v. Shevin, 416 U.S. 351 (1974) where she argued that a Florida statute that gave widows, but not widowers, a \$500 exemption from state property tax.⁴⁵ Her view ultimately prevailed, however, as the Supreme Court in Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), at Judge Ginsburg's urging, struck down a federal statute that provided greater social security benefits to widows with young children than to widowers. This victory was cemented in Craig v. Boren, 429 U.S. 190 (1976), in which she filed an amicus brief on behalf of the ACLU. There, the Court found unconstitutional a state law prohibiting the sale of beer to males from ages 18-20, but allowing its sale to women of the same age. In striking down the law, the Court announced that laws that discriminate on the basis of gender will be subject to an "intermediate level" of scrutiny--they must be "substantially related to an important state interest" in order to survive constitutional challenge.

In her academic writings on gender discrimination, Judge Ginsburg advanced many of the same arguments that she made before the Supreme Court. In these articles, written while she was a law professor at Columbia, Judge Ginsburg criticized the series of Supreme Court opinions that--in the guise of "protecting" women--served to reinforce outmoded and stereotypical views about the role of women in society. "Occupations from bartending to lawyering were once closed to women, ostensibly to spare them from exposure to noxious atmospheres."⁴⁶ Judge Ginsburg also applauded the Court's decision to apply some form of heightened

⁴⁵Shevin was the only one of six Supreme Court cases argued by Judge Ginsburg in which she lost. She clearly prevailed in four: Frontiero, Weinberger, Duren v. Missouri, 439 U.S. 357 (1977) (striking down state laws granting automatic exemptions from jury duty to women) and Califano v. Goldfarb, 430 U.S. 199 (1979) (invalidating Social Security survivors benefits law discriminating on the basis of sex). In Edwards v. Healy, 421 U.S. 772 (1975), the court remanded a decision striking down a statute discriminating on the basis of sex in jury service for consideration of mootness issues.

⁴⁶Ruth Bader Ginsburg, Some Thoughts on Benign Classification in the Context of Sex, 10 Connec. L. Rev. 813, 814-815 (1978).

scrutiny to gender classifications, but observed in 1979 that "the development to date has been uneven, insecure, and marked by sharply divided opinions."⁴⁷

Perhaps because her attack on gender discrimination focused so heavily on laws that purported to "benefit" or "protect" women, but that in reality served to buttress anachronistic stereotypes, Judge Ginsburg has often expressed reservations about some types of affirmative action programs for women. "Because of the historical tendency of lawmakers and jurists to regard virtually all gender-based classifications as designed for women's benefit or protection," Judge Ginsburg wrote, "the notion of affirmative action in the context of sex presents a special problem."⁴⁸ This is so, she noted, because "the law's special treatment of women has long been considered 'preferential.' Classification by sex was thought by gallant men to operate benignly in women's favor--to place women on a pedestal."⁴⁹

Judge Ginsburg insisted, however, that such laws actually serve to discriminate against women. Accepting this argument, Justice Brennan wrote in Frontiero that such protectionist legislation traditionally "was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage," Frontiero, 411 U.S. at 684. Therefore, Judge Ginsburg has written that courts need to be sensitive to this problem when evaluating affirmative action programs that purport to favor women. To this end, she has praised the Court's decision in Califano v. Webster for attempting "to preserve and bolster a general rule of equal treatment while leaving a corridor open for genuinely compensatory classifications."⁵⁰ Affirmative action on behalf of women, on this view, is appropriate in limited circumstances--particularly those where discrimination against women mirrors the types of discrimination that African-Americans have traditionally suffered.

She has thus expressed reservations about affirmative action

⁴⁷Ruth Bader Ginsburg, Sexual Equality Under the Fourteenth and Equal Rights Amendments, 1979 Wash. U.L.Q. 161, 171.

⁴⁸Ruth Bader Ginsburg, Some Thoughts on Benign Classification in the Context of Sex, 10 Connec. L. Rev. 813, 814 (1978).

⁴⁹Id. at 814.

⁵⁰See Ruth Bader Ginsburg, Women, Equality & the Bakke Case, 4 Civ. Lib. Rev. 8 (Nov.-Dec. 1977) ("But as to performance on the Law School Aptitude Test, for example, in recent years females have held an ever so slight lead over males.").

on behalf of women in the admissions process to graduate and professional schools because, she writes, women are already able to compete with men on equal footing.⁵¹ "In contrast to professional school admission, where the race/sex linkage falters in the employment sector women and members of racial minorities do confront common or similar barriers, barriers difficult to overcome without race- or sex-conscious transition-period remedies."⁵² Thus, because "women and racial minorities have been prejudged based on unfounded, or at least unproved, assumptions about their abilities or proclivities, or rejected because they are different, not one of the boys,"⁵³ affirmative action on behalf of women in employment would be an appropriate remedy. In such situations, a "transition-period race-or sex-conscious remedy--goals and timetables for placing minorities or women in management jobs--may be the only feasible means . . . to dismantle the discriminatory pattern and secure for the future genuinely non-discriminatory hiring and promotion practices."⁵⁴

Since being named to the Court of Appeals, Judge Ginsburg has written only a few opinions in cases alleging gender discrimination. None of Judge Ginsburg's opinions involve novel constitutional challenges to laws that categorize on the basis of gender, but are instead more technical applications of federal statutes forbidding discrimination in employment and education or well-settled Supreme Court precedents outlawing intentional governmental discrimination. These opinions do not reflect the views of an advocate committed to eradicating the vestiges of sexual discrimination from American society, but are instead carefully measured efforts to give effect to Supreme Court precedent and to the congressional purpose that underlies the federal legislation at issue.

Judge Ginsburg has twice ruled against plaintiffs who were raising claims relating to gender discrimination. In Women's Equity Action League v. Cavazos, 906 F.2d 742 (D.C. Cir. 1990). Judge Ginsburg, joined by two conservative judges, found that federal law which prohibits federally-assisted educational institutions from engaging in discrimination did not create a private cause of action against federal government officers for failure promptly to enforce the statute. In addition, in Valentino v. United States Postal Service, 674 F.2d 56 (D.C. Cir. 1982), Judge Ginsburg wrote for a three-judge panel including Judge Patricia Wald that rejected a Title VII sex-discrimination

⁵¹Id. at 14.

⁵²Id. at 15.

⁵³Id.

⁵⁴Id. at 15-16.

claim. There, in a suit that charged both individual discrimination as well as a claim on behalf of a class, Judge Ginsburg wrote that the employer provided adequate evidence of a nondiscriminatory reason for its decision to deny the individual plaintiff a promotion, and that the statistical evidence offered was too general to make out a prima facie case of class-wide discrimination.

In two other cases, however, Judge Ginsburg was more receptive to claims of gender-based discrimination. In Walker v. Jones, 733 F.2d 923 (D.C. Cir. 1984), Judge Ginsburg, over the partial dissent of Judge MacKinnon, found that neither the speech or debate clause nor qualified immunity shielded either a member of the House of Representatives or a subcommittee staff director from liability for firing an employee of the House of Representatives Restaurant System on account of her sex. Thus, because the Supreme Court had made it clear that a "claim for damages based on sex discriminatory congressional employment decisions can be presented directly under the fifth amendment,"⁵⁵ Judge Ginsburg reversed a district court opinion dismissing the plaintiff's suit. In addition, in Goodrich v. International Brotherhood of Electrical Workers, AFL-CIO, 712 F.2d 1488 (D.C. Cir. 1983), Judge Ginsburg reversed a district court's decision to dismiss a suit brought under the Equal Pay Act, finding that the existence of a material factual dispute, over whether the more highly-paid male employees truly had "additional duties" or "special expertise," precluded the entry of summary judgment for the defendant. Although her judicial opinions on the subject have been careful and dispassionate, Judge Ginsburg has clearly played a pioneering role in the struggle against gender discrimination, and can be expected faithfully to apply constitutional and statutory bans on gender discrimination.

D. Civil Rights Other than Gender Discrimination

The last Supreme Court term reveals that whatever areas of consensus may be developing on the Court, the justices remain sharply divided over whether to narrowly limit and damage congressional anti-bias laws and whether to pursue an agenda of striking down race-conscious remedies for historical discrimination. In two highly controversial decisions at the end of the term,⁵⁶ a 5-4 majority of the Court prevailed on both

⁵⁵Id., citing Davis v. Passman, 422 U.S. 228 (1979).

⁵⁶ See St. Mary's Honor Society v. Hicks, 61 U.S.L.W. 4782 (1993) (holding that trier of fact could require presentation of extremely hard-to-find direct evidence of discrimination in order to establish Title VII violation); Shaw v. Reno, 61 U.S.L.W. 4818

accounts. Justice White was in the dissent in both of these cases, and Judge Ginsburg's nomination thus may well not alter the Court's decision-making on these important questions. Nonetheless, these decisions underscore that it is essential that nominees to the Supreme Court be committed to civil rights and equality.

Judge Ginsburg's opinions on race and other discrimination issues are generally--although by no means uniformly--favorable to civil rights plaintiffs. Many do not concern close questions and most were written for unanimous panels. The opinions are usually written in the cautious manner typical of Judge Ginsburg's jurisprudence. She rarely editorializes or writes broadly either of policy considerations or how the law ought to function, and almost always casts her opinions as being required by or faithful to Supreme Court precedent.

Several themes emerge from Judge Ginsburg's opinions on race and other discrimination issues. First, Judge Ginsburg has frequently resisted attempts to close the courthouse door on civil rights plaintiffs. In several important decisions, she has taken a broad view of standing for civil rights plaintiffs.⁵⁷ Furthermore, Judge Ginsburg has proven willing to apply equitable tolling doctrines in Title VII cases to prevent lay plaintiffs from losing claims due to lack of notice of Title VII's sometimes byzantine procedural requirements.⁵⁸ For example, in Loe v.

(1993) (extending Croson v. City of Richmond to bizarrely shaped single-member election districts whose shape cannot be explained other than as a racial gerrymander). A previous series of Court decisions narrowly construing federal civil rights laws was overturned as a result of the Civil Rights Act of 1991.

⁵⁷ See Spann v. Colonial Village, 899 F.2d 24 (D.C. Cir. 1990); WEAL v. Cavazos, 879 F.2d 880 (D.C. Cir. 1989); Wright v. Reagan, 656 F.2d 820 (D.C. Cir. 1981), rev'd, 468 U.S. 737 (1984). All these decisions are discussed more fully infra in section II.H.

⁵⁸ See Bayer v. U.S. Dept. of Treasury, 956 F.2d 330 (D.C. Cir. 1992) (reversing grant of summary judgment for defendant in Title VII case because of contested factual issue regarding whether plaintiff was aware of requirement that administrative charge be filed); Loe v. Heckler, 768 F.2d 409 (D.C. Cir. 1985) (reversing dismissal of Title VII claim on exhaustion and timeliness grounds where "the government erected, and the district court approved, an obstacle course" incompatible with the remedial purposes of Title VII). In Blackwell v. U.S. Dept. of Treasury, 830 F.2d 1183, 1184 (D.C. Cir. 1987), Judge Ginsburg authored a decision vacating a district court opinion which would have imposed a somewhat similar requirement for Rehabilitation

Heckler, 768 F.2d 409 (D.C. Cir. 1985), she wrote

Suit thresholds warrant interpretation with sensitivity to Title VII's remedial aims. An overly technical approach would improperly impede the goal of making federal employment free from proscribed discrimination [citations omitted]. We stress, in particular, that judges slight the legislature's central command if they fail to recall that Title VII was devised as a measure that would be kept accessible to individuals untrained in negotiating procedural labyrinths.

Id. Furthermore, in Mitchell v. Baldrige, 759 F.2d 80 (D.C. Cir. 1985), Judge Ginsburg was careful to protect the rights of Title VII plaintiffs to respond to evidence defendants introduce during the plaintiff's case. She reversed in part a directed verdict for a Title VII defendant because the verdict was issued at the close of the plaintiffs' case, on the basis of evidence which the defendant had introduced during the plaintiff's case and to which the plaintiff was denied "full and fair opportunity" to respond. Id. at 88-89.

On the other hand, Judge Ginsburg has refused to waive procedural requirements where plaintiffs received notice of the obligation to pursue their claims in a timely fashion. See e.g., Dougherty v. Barry, 869 F.2d at 605, 613 (D.C. Cir. 1989) ("lack of prejudice" to government is insufficient to excuse timeliness problem; tolling requires an "independent basis" such as inadequate notice or misleading comments by defendant, the court or a government agency).

Second, Judge Ginsburg harbors concerns regarding broad judicial supervision of agency obligations to enforce statutory non-discrimination requirements. Most prominently, in a major case involving oversight of the Education Department's enforcement of its obligations under Title VI of the Civil Rights Act, Judge Ginsburg issued an opinion asking sua sponte for briefing on the issue of whether plaintiffs had a cause of action. WEAL v. Cavazos, 879 F.2d 880, 887 (D.C. Cir. 1989). In an earlier phase of the same litigation, the D.C. Circuit had already recognized that plaintiffs had a valid cause of action. Nonetheless, Judge Ginsburg answered her question in the negative, reasoning that Title VI authorized "situation-specific suit[s]" against the federal government for failing to enforce Title VI, but not "across-the-board judicial supervision of continuing federal agency enforcement." WEAL v. Cavazos, 906

Act claims based on handicaps which are not readily apparent. She expressly stated that under the Rehabilitation Act, there is no requirement that plaintiffs put the defendant on notice of such handicaps.

Finally, as a scholar and a judge, Ruth Bader Ginsburg has expressed a fairly broad view of the constitutionally permissible scope of affirmative action programs. During the late 1970's and early 1980's, Judge Ginsburg wrote many articles on gender classifications which included a brief discussion of affirmative action on behalf of African-Americans.⁶⁰

⁵⁹In Wright v. Regan, 656 F.2d 820 (D.C. Cir. 1981), rev'd, 104 S.Ct. 3315 (1984), Judge Ginsburg rejected a similar institutional competence argument, but noted that plaintiffs' claims in that case did not require "large scale judicial intervention in the administrative process," and agreed with the district court she reversed that "[t]he district court should not . . . become a 'shadow [C]ommissioner of Internal Revenue' or 'the administrator of a nationwide tax enforcement program.'" 656 F.2d at 837. Other opinions by Judge Ginsburg on discrimination issues include: McKelvey v. Turnage, 792 F.2d 194, 203 (D.C. Cir. 1986), aff'd, 485 U.S. 535 (1988) (Ginsburg, J., dissenting in part) (Rehabilitation Act non-discrimination mandate forbids deferring to Veteran's Administration classification of alcoholism as "willful misconduct" justifying denial of veteran's benefits); Brown v. Secretary of the Army, 918 F.2d 214 (D.C. Cir. 1990) (construing waiver of sovereign immunity in Backpay Act narrowly as not applying to prejudgment interest on Title VII awards in actions for failure to promote); Machakos v. Attorney General, 859 F.2d 1487 (D.C. Cir. 1988) (in reverse discrimination Title VII case, holding that plaintiff was not entitled to backpay for period before plaintiff had proven concrete injury from affirmative action program); Quiban v. Veteran's Administration, 928 F.2d 1154 (D.C. Cir. 1991) (reversing district court decision and ruling that the government did not violate equal protection when it excluded certain Phillipino veterans who had served in the U.S. Army during World War II from veterans benefits accorded other troops); Lunceford v. D.C. Board of Education, 745 F.2d 1577 (D.C. Cir. 1984) (discharge of plaintiff from treatment facility in order to treat another severely handicapped child did not constitute discrimination on the basis of handicap violating the Rehabilitation Act); Kizas v. Webster, 707 F.2d 524, 540-548 (D.C. Cir. 1983) (Ginsburg, J. delivering part III of the opinion of the Court) (in reverse discrimination case, refusing to excuse Title VII plaintiffs' "total bypass" of EEOC regulation requiring that plaintiffs file an administrative charge).

⁶⁰Ruth Bader Ginsburg, The Burger Court's Grapplings with Sex Discrimination, in The Burger Court: The Counter-Revolution That Wasn't, 132, 142-43 (Vincent Blasi ed., 1983); Sex Equality

Judge Ginsburg took the position that temporary affirmative action measures are constitutional, and at times necessary to achieve equal opportunity. Both before and after the landmark Bakke decision, she defended the constitutionality of the affirmative action program at issue in the case because it was "transitional;" sought "to redress long-standing disadvantageous treatment of racial minorities;" and because it actually remedied some part of the effect of "past discrimination."⁶¹ Moreover, Judge Ginsburg's encounters with "deeply entrenched discriminatory patterns" led her to believe that affirmative action, including "numerical" relief, was at times the only way of ending discrimination in employment.⁶² Finally, her articles recognize that the effects of racial discrimination on equal opportunity are far more severe than those of gender discrimination, and are more likely to require remedy through affirmative action.⁶³

Consistent with her scholarship of the 1970's, Judge Ginsburg recently concurred specially in an affirmative action case to embrace a narrow interpretation of the City of Richmond v. Croson, 488 U.S. 469 (1989), which erected constitutional limitations to affirmative action programs. The panel in O'Donnell Construction Co. v. District of Columbia, 963 F.2d 420 (D.C. Cir. 1992), reversed the district court's denial of preliminary injunctive relief against further use of D.C.'s minority set-aside program. Judge Ginsburg concurred in the judgment recognizing the problems with the D.C. program, but underscored that Croson held that minority preference programs are not unconstitutional per se and need not be "confined solely to the redress of state-sponsored discrimination." Id. at 429 (Ginsburg, J., concurring). Furthermore, Judge Ginsburg added that she agreed with Justice Stevens' narrow view of the holding

and the Constitution: The State of the Art, 4 Women's Rts. L. Rep. 143, 146-47 (1978); Some Thoughts on Benign Classification in the Context of Sex, 10 Conn. L. Rev. 813, 824-25 (1978); Women, Equality and the Bakke Case, 4 Civil Liberties Rev. 8, 14-15 (1977); Gender and the Constitution, 44 U. Cinn. L. Rev. 1 (1975).

⁶¹Ruth Bader Ginsburg, Sex Equality and the Constitution: The State of the Art, 4 Women's Rts. L. Rep. 143, 146 (1978).

⁶²Ruth Bader Ginsburg, Gender and the Constitution, 44 U. Cinn. L. Rev. at 29-30.

⁶³See, e.g., Some Thoughts on Benign Classification in the Context of Sex, 10 Conn. L. Rev. at 824; Women, Equality and the Bakke Case, 4 Civ. Liberties Rev. at 14; Sex Equality and the Constitution: The State of the Art, 4 Women's Rts. L. Rep. at 147; Gender and the Constitution, 44 U. Cinn. L. Rev. at 29.

in Croson: that affirmative action programs may be justified for reasons other than "remedy for past wrong", for example, to promote racial diversity under some circumstances. Id. at 429 (Ginsburg, J., concurring) (citing Croson, 488 U.S. at 511 (Stevens, J., concurring)).

Although she has defended the constitutionality of a variety of affirmative action measures, Judge Ginsburg appears very concerned by unfairness which may be engendered by racial quotas. While endorsing less intrusive affirmative action measures, including goals and timetables, in her 1970's scholarship, Professor Ginsburg viewed hiring and promotional quotas as the most "abrasive" and least favored form of affirmative action due to their effects on third parties.⁶⁴ Her views expressed on the bench are similar. In Lander v. Lujan, 888 F.2d 153 (D.C. Cir. 1989) (Ginsburg, J., concurring), a reverse-discrimination Title VII case, the majority held that Title VII authorized "bumping" -- ordering that the plaintiff displace an incumbent uninvolved in the discrimination -- as a remedy for the discrimination the plaintiff had suffered. Judge Ginsburg concurred specially to express her general preference for alternative remedies such as "front pay" and concern over the "problematic" nature of bumping where "someone other than the wrongdoing employer is made to pay for the employer's violation."⁶⁵ Id. at 159. Overall, Judge Ginsburg has a solid record on civil rights issues.

E. The Right to Privacy, Including Abortion and Reproductive Freedom.

⁶⁴Ruth Bader Ginsburg, Gender and the Constitution, 44 U. Cinn. L. Rev. at 30.

⁶⁵ Judge Ginsburg voted to affirm the bumping remedy because the defendant agency was aware of the plaintiff's claim when it promoted the current incumbent, and because that incumbent was not dismissed or discharged, but instead was simply transferred to another senior executive service post. Id. See also Evolving Law in the U.S. on the Changing Role of Women and Men. (Lecture III at Salzburg, Austria seminar) (July 1984) at 19-20 (commenting that few would disagree on the appropriateness of affirmative action "if it means trying to attract female candidates, efforts to get across the message that women are now welcome in jobs once off limits to them," that goals and timetables in Title VII remedial decrees "are not rigid requirements," that employers are "required only to make a good faith effort to meet the numerical targets," and that such relief "must be used cautiously -- only when less severe measures -- measures that do not intrude on expectations or opportunities of others -- are unlikely to remedy a past discriminatory pattern").

Judge Ginsburg's record leaves open questions about her views concerning the right of privacy. Three aspects of her record on this issue are considered below: her views on privacy in general, on abortion and reproductive freedom, and on homosexuality and sexual preference.

1. Privacy as a Constitutional Right

In one law review article, Judge Ginsburg appeared to disparage the Supreme Court's opinion in Griswold v. Connecticut, 381 U.S. 479 (1965), the case in which the Supreme Court struck down a Connecticut law banning the use of contraceptives, even by married couples, and expressly recognized a fundamental constitutional right of privacy. In describing the approach taken by the Court in Roe v. Wade, Judge Ginsburg wrote that the Griswold decision drove the analysis. She described Griswold as "holding inconsistent with personal privacy, somehow sheltered by due process, a state ban on the use of contraceptives even by married couples."⁶⁶ Although she did not elaborate, the characterization of the right of privacy as "somehow sheltered" by the due process clause suggests some skepticism about the holding in Griswold with respect to the constitutional basis of the right to privacy.

On the other hand, as an advocate, Ruth Bader Ginsburg argued for a constitutional right to privacy in a brief she filed in 1972 in Struck v. Secretary of Defense. That case involved an Air Force policy requiring that women become discharged after becoming pregnant. Recently, Judge Ginsburg has suggested that the Supreme Court should have used the case as an opportunity to announce that discrimination based on reproductive choice represents gender discrimination.⁶⁷ In her brief before the Supreme Court on Struck's behalf, the majority of Judge Ginsburg's argument was devoted to this gender discrimination theory. However, her brief also suggested that a right to control one's reproductive decisions free from governmental interference could be inferred from the privacy right embedded in the due process clause. "Individual privacy with respect to procreation and intimate personal relations is a right firmly embedded in this nation's tradition and in the precedent of this Court."⁶⁸ Citing Griswold, the brief noted that "sexual

⁶⁶Ruth Bader Ginsburg, Some Thoughts on Autonomy and Equality in Relation To Roe v. Wade, 63 N.C.L. Rev. 375, 380 (1985). (emphasis added).

⁶⁷See Legal Times, April 5, 1993, at 10, Col. 1.

⁶⁸Brief for Petitioner at 52, Struck v. Secretary of Defense.

intimacies within marriage fall squarely inside the zone of individual privacy protected by the Constitution from unnecessary governmental intrusion."⁶⁹

The closest Judge Ginsburg has come to addressing the constitutional right to privacy in her opinions in the D.C. Circuit was in her statement explaining her vote to deny rehearing in Dronenburg v. Zech, *supra*. As discussed in further detail below, that case concerned the Navy's policy of mandatory discharge for homosexual conduct. The original opinion in the case, written by then-Judge Bork, severely disparaged the Supreme Court's decisions concerning the right to privacy, in what Judge Robinson and several other progressive judges characterized as a "general spring cleaning of constitutional law." 746 F.2d at 1580. Judge Ginsburg disassociated herself from Judge Bork's opinion, suggesting that it "airs a good deal more than the disposition of the appeal required" and essentially constituted little more than non-binding *dicta*. *Id.* at 1581-82. Judge Ginsburg voted, however, not to reconsider the appeal, and did not comment substantively on the privacy analysis in Judge Bork's opinion or join Judge Robinson's criticism of the opinion.

All this leaves unanswered questions about Judge Ginsburg's views on privacy. As recognized in Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S.Ct. 2791, 2806 (1992), it is settled law that the due process clause clearly protects "a person's most basic decisions about family and parenthood, as well as bodily integrity." What are Judge Ginsburg's views on that subject? Are her views about Griswold and privacy represented by the strong arguments in her brief in Struck or by the ambivalent suggestion that privacy is "somehow sheltered" by due process? Is privacy a "fundamental" right, and what level of protection does it properly warrant in general? The Senate Judiciary Committee should consider these and related questions regarding Judge Ginsburg's judicial philosophy in this area.

2. Reproductive Freedom and Abortion

Judge Ginsburg has consistently argued that discrimination on the basis of pregnancy should be treated as a form of gender discrimination. For example, in Geduldig v. Aiello, 417 U.S. 484 (1974), Judge Ginsburg argued unsuccessfully that a state-operated disability plan that excluded from its disability coverage women unable to work because of pregnancy or childbirth violated the Fourteenth Amendment's equal protection guarantee. She also argued that the Court's decision in General Electric Co. v. Gilbert, 429 U.S. 125 (1976), finding that such disability plans did not violate Title VII, left "a gaping hole in the

⁶⁹*Id.* at 53.

protection guaranteed women," and called on Congress to amend Title VII to overturn the opinion.⁷⁰

Along these same lines, Judge Ginsburg has argued that a woman's right to choose an abortion should be protected as a matter of equal protection. The Supreme Court's decision in Roe v. Wade, Judge Ginsburg has written, "presented an incomplete justification" for its decision to strike down the Texas law that criminalized abortion.⁷¹ The abortion question, Judge Ginsburg contends, should not be seen as merely involving "state versus private control of a woman's body for a span of nine months."⁷² Instead, also "in the balance is a woman's autonomous charge of her full life's course . . . her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen."⁷³ Her views are not unusual. The argument that anti-abortion legislation represents a form of gender discrimination is frequently advanced in academic circles and elsewhere.⁷⁴

While Judge Ginsburg thus undoubtedly believes that the constitution protects the core of a woman's right to choose to terminate a pregnancy, her precise views on the extent of this constitutional right are unclear. In a speech delivered at New York University Law School on March 9, 1993, Judge Ginsburg described the Supreme Court's decision in Roe as "immoderate", and suggested that the Court could have merely struck down the Texas law, saying only that "the most extreme brand of law in the

⁷⁰See Ruth Bader Ginsburg and Susan Deller Ross, Pregnancy and Discrimination, N.Y. Times, Jan. 25, 1977, at 35, Col. 2., Congress responded, reversing General Electric by enacting the Pregnancy Discrimination Act.

⁷¹Ruth Bader Ginsburg, Some Thoughts on Equality In Relation To Roe v. Wade, 63 N.C.L. Rev. 375, 382 (1985).

⁷²Id. at 383.

⁷³Id.

⁷⁴See Casey, supra, 112 S.Ct. at 2809 (explaining that "[t]he ability of women to participate equally in the economic and social life of the nation has been facilitated by their ability to control their reproductive lives"); David A. Strauss, Discriminatory Intent and the Taming of Brown, 56 U. Chi. L. Rev. 935, 991 (1989); Catharine A. MacKinnon, Reflections on Sex Equality Under Law, 100 Yale L.J. 1281, 1319 (1991); Cass R. Sunstein, Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy), 92 Colum. L. Rev. 1, 43 (1992)

nation" was unconstitutional.⁷⁵ But according to Judge Ginsburg, the Court need not have "gone on, as the Court did in Roe, to fashion a regime blanketing the subject."⁷⁶ Had the Court limited itself to declaring the extreme Texas law unconstitutional and not said anything more, she has written, "the legislative trend might have continued in the reform direction in which it was moving in the early 1970s, and the animus against the Supreme Court, brought on by the actual Roe decision, might have been avoided or muted."⁷⁷

Judge Ginsburg recognizes that there are occasions where courts need to "step ahead of the political branches." For instance, she noted that in the context of school desegregation, where the "prospects in 1954 for state legislation dismantling racially segregated schools were bleak," it was appropriate for the Court to get out in front of social change by declaring, in Brown v. Board of Education, that segregated schools violated the Constitution's equal protection guarantee.

Yet Judge Ginsburg apparently sees the right to choose an abortion as a different matter, one where the Court should limit its role to reinforcing or signaling "a green light for social change."⁷⁸ To this end, her well-known New York University speech appeared to applaud the Supreme Court's 1992 decision in Planned Parenthood v. Casey, where the Court upheld several Pennsylvania restrictions that burdened a woman's right to choose an abortion. She suggested that Casey "appears to have prompted a renewed dialogue, a revival of the political movement" that was cut-off by the Court's "breathtaking" decision in Roe.⁷⁹ Judge Ginsburg later edited her remarks at NYU to include criticism of Casey because it further "excludes from the high court's protection women lacking in the means to surmount burdensome legislation."⁸⁰ This is in accord with previous statements by Judge Ginsburg criticizing the fact that "leaving 'the poor alone

⁷⁵Legal Times, Apr. 5, 1993, at 10, Col. 1.

⁷⁶Id.

⁷⁷Ruth Bader Ginsburg, Employment of the Constitution to Advance the Equal Status of Men and Women, in Constitutional Bases of Political Change in the U.S. 185, 189 (Shlomo Slonim ed., 1990).

⁷⁸Legal Times, Apr. 5, 1993, at 10, Col. 1.

⁷⁹Id.

⁸⁰Lyle Denniston, Ginsburg Modifies Critical Remarks About Roe Decision in College Lecture, Baltimore Sun, June 18, 1993, at 1A; Col. 1.

ineligible for abortion defies justice, common sense, and rational policy."⁸¹

While on the bench, Judge Ginsburg filed a separate opinion in DKT Memorial Fund, Ltd. v. Agency for International Development⁸² which, although it does not directly concern the right to privacy or abortion, appeared sympathetic to a woman's right to choose abortion. At issue in DKT was a Reagan Administration policy directing that the Agency for International Development not allocate any funds to any foreign private organization that--even with private funds--performs or actively promotes abortion as a method of family planning. While the D.C. Circuit panel found this provision constitutional on the grounds that foreign organizations are not protected by the First Amendment, Judge Ginsburg dissented. The provision was unconstitutional, according to Judge Ginsburg, because of its impact on the ability of domestic groups "that use their own private resources to enable poor women, at home and abroad, to gain access to abortion services."⁸³ Because the "condition effectively picks off or buys up the audience or associates abroad that [domestic] organizations like DKT must have if they are to act in the international arena," it is unconstitutional.⁸⁴ In the area of privacy and reproductive choice, therefore, Judge Ginsburg's mixed record and judicial philosophy are appropriate subjects for questioning by the Senate Judiciary Committee.

3. Privacy and Sexual Orientation

Many advocates and scholars have maintained that the constitutional right to privacy should encompass matters relating to sexual orientation, a view narrowly rejected by the Supreme Court in Bowers v. Hardwick, 478 U.S. 186 (1986). Judge Ginsburg has not ruled specifically on this question, but has written three opinions relating to the issue. The first such opinion was in Dronenburg v. Zech, *supra*, which concerned Navy's policy of mandatory discharge for homosexual conduct. The case was first heard by a conservative panel of the D.C. Circuit (Robert Bork,

⁸¹Ruth Bader Ginsburg, Gender in the Supreme Court: the 1976 Term, Constitutional Government in America, 217, 224 (Ronald K.L. Collins, ed., 1980). See also Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 N.C.L. Rev. 375, 377 (1985).

⁸²887 F.2d 275 (D.C. Cir 1989).

⁸³Id. at 300 (Ginsburg, R., dissenting).

⁸⁴Id. at 300-01 (Ginsburg, R., dissenting).

Antonin Scalia, and Stephen Williams). The panel, in an opinion by Judge Bork, upheld the Navy's policy, based on an extremely disparaging and limited view of the Supreme Court's privacy precedent. It found that the military ban is constitutional because the "effects of homosexual conduct within a naval or military unit are almost certain to be harmful to morale or discipline." 746 F.2d at 1397-98. The court additionally relied on the Supreme Court's summary affirmance in Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976), where the Court let stand without opinion a district court ruling that upheld a Virginia statute criminalizing private consensual homosexual conduct.

When Dronenburg asked the full D.C. Circuit to rehear his case, the court voted against him 7-4. Four liberal judges (Robinson, Wald, Mikva and Edwards) voted to rehear the case, and in an opinion by Judge Spotswood Robinson, III, strongly criticized the panel's opinion.

Judge Ginsburg voted against re-hearing the case, and filed an opinion explaining her reasons. According to Judge Ginsburg, while the panel's generalized discussion of the right to privacy was unnecessary and little more than dicta, she was "of the view that the Supreme Court's disposition in Doe" controlled the decision. 746 F.2d at 1581-82. Yet this reliance on the summary disposition in Doe is problematic. As Judge Robinson explained, to "hold Dronenburg's claims hostage to a one-word summary affirmance disregards the well-established principle that such a disposition by the Supreme Court decides the issue between the parties on the narrowest possible grounds." 746 F.2d at 1580.

Judge Ginsburg also wrote opinions in two other cases involving the rights of gays and lesbians. In Blackwell v. United States Dep't of Treasury, 830 F.2d 1183 (D.C. Cir. 1987), Judge Ginsburg wrote for a unanimous panel that held that the Rehabilitation Act's prohibition against discrimination on the basis of disability does not cover discrimination on the basis of sexual orientation. Finally, in Doe v. Casey, 796 F.2d 1508 (D.C. Cir. 1986), Judge Ginsburg sat on a panel that was faced with a challenge to the CIA's firing of an undercover employee after that employee informed the Agency that he was a homosexual. There, Judge Ginsburg joined Judge Edwards' majority opinion, finding that the record was unclear whether Doe's firing was part of a general policy forbidding homosexuality and sending the case back to the lower court. Were Doe's firing part of a general policy, it would pose no constitutional problem, Edwards wrote. Only if "the CIA terminated Doe because his homosexuality presented a unique security risk not necessarily presented by other homosexuals," Id. at 1523, would the firing have implicated a "liberty" interest. Judge Ginsburg also wrote a separate concurring opinion, where she explored the points of agreement and disagreement between Judge Edwards' opinion and the dissent

filed by Judge Buckley. Id. at 1524.

Judge Ginsburg's precise views on the subject of privacy, sexual orientation and the Constitution are thus unclear. This reinforces the appropriateness of questioning in the Senate Judiciary Committee on her general judicial philosophy on privacy issues.

F. Criminal Law⁸⁵

As a member of the D.C. Circuit Court of Appeals, Judge Ginsburg has participated in a number of high profile cases impacting the administration of the criminal justice system. While many of her opinions reflect concern for the rights of individual defendants, the overriding theme that emerges is her adherence to stare decisis.

Judge Ginsburg has authored four opinions on warrantless searches. Judge Ginsburg has crafted middle-of-the road opinions that attempt to treat with respect the right to privacy while providing some guidelines for police to follow. In fact, two convictions were reversed and two were affirmed.

In United States v. Gibson, 636 F.2d 761 (D.C. Cir. 1980), Judge Ginsburg wrote an opinion affirming the convictions of defendants on a drug-related offense despite the warrantless search of a purse seized from defendants' car during the arrest, holding that the warrantless search was permissible under the "plain view" exception to the warrant requirement because the police officer saw the contents of the purse. Id. at 763. A year later, however, in United States v. Ross, 655 F.2d 1159 (D.C. Cir. 1981), rev'd, 456 U.S. 798 (1982), Judge Ginsburg wrote an en banc opinion holding that the Fourth Amendment protection of an unlocked small suitcase extends to a closed but unsealed brown paper bag. Judge Ginsburg's opinion flatly rejected the Government's argument that the bag was an "unworthy container" in which defendant had little or no expectation of privacy. She noted that the Government's proposed theory presented administrative problems and would "snare those without the means or the sophistication to use worthy containers." Id. at 1170.

Based on the holding in Ross, Judge Ginsburg reversed a conviction of the defendant in United States v. Russell, 655 F.2d 1261 (D.C. Cir. 1981), because of a warrantless search of a

⁸⁵This section was researched and drafted by Robert Plotkin, Scott M. Flicker, Patti Hurst, and Sandra Wilkinson of the Washington Office of Paul, Hastings, Janofsky, & Walker. Their work is gratefully acknowledged by People For the American Way Action Fund.

grocery bag found in a car. Six weeks after the Russell decision, a new Supreme Court decision held that warrantless searches of items found within the passenger compartment of a car fall within the "search-incident-to-arrest" exception. The D.C. Circuit invited the Government to reargue the case. On rehearing, Judge Ginsburg, demonstrating her high regard for precedent from a higher court, vacated her prior decision and affirmed the defendant's conviction in all respects. See United States v. Russell, 670 F.2d 323 (D.C. Cir.), cert. denied, 457 U.S. 1108 (1982).⁸⁶

Judge Ginsburg twice addressed an attempt by a defendant to withdraw a guilty plea prior to sentencing. In both cases, the district court had rejected the defendants' motions. Balancing deference for the discretion of the trial court against fairness to the defendant, Judge Ginsburg affirmed one denial, but reversed the other and vacated the plea.⁸⁷

Judge Ginsburg often defers to the discretion of the trial court where the defendant seeks to overturn a conviction on a claim of reversible error. She shows great deference to the trial courts handling of jury issues and, in accord with D.C. Circuit case law, is influenced by the strength of the prosecution's case in determining whether error is reversible, as evidenced by her opinions affirming convictions in several cases.⁸⁸ However, if she concludes that the evidence in support

⁸⁶In what appears to be her only written opinion on the Fifth Amendment, Judge Ginsburg wrote a unanimous opinion in In re Sealed Case (Government Records), 950 F.2d 736 (D.C. Cir. 1991), holding that the Fifth Amendment does not permit withholding of potentially incriminating government records, but that a fact-intensive inquiry is needed to determine if a record is personal or governmental.

⁸⁷See United States v. McKoy, 645 F.2d 1037 (D.C. Cir. 1981) (affirming denial of motion to withdraw guilty plea); United States v. Watley, 987 F.2d 841 (D.C. Cir. 1993) (vacating guilty plea because of misunderstanding by all parties concerning minimum sentence for crime).

⁸⁸See United States v. Dorsey, 865 F.2d 1275 (D.C. Cir.), cert. denied, 492 U.S. 924 (1989) rejecting defendant's claim that the district court "coerced" a juror into rendering an unanimous verdict by refusing to dismiss the juror after she communicated to the court during deliberation concerning her problems in reaching a verdict; United States v. Sobamowo, 892 F.2d 90 (D.C. Cir. 1989), cert. denied sub nom. Adair v. United States, 111 S.Ct. 78 (1990) (rejecting defendants' attempt to overturn conviction based on two jury issues and at least six additional grounds, ranging from improper admission of wiretap

of the conviction is tenuous, Judge Ginsburg does not appear hesitant to overturn a conviction due to trial error.⁸⁹

A critical component of any criminal trial is the availability of legal defenses against the Government's charges. In an era when legislatures and courts have generally moved in the direction of limiting such defenses, Judge Ginsburg's opinions have demonstrated her usual mix of sensitivity for individual rights and respect for precedent.

For example, she wrote a concurring opinion in United States v. Kelly, 707 F.2d 1460 (D.C. Cir.), cert. denied, 464 U.S. 908 (1983), which involved the indictment of Congressman Richard Kelly in the so-called Abscam undercover operation in the late 1970's. Judge Ginsburg characterized the Abscam investigation as an "extraordinary operation" staged by "con men" and "without close supervision by responsible officials." Id. at 1474. Nevertheless, she noted that "we may not alter the contours of the entrapment defense under a due process cloak ...", because "precedent dictates" that it may be used only where the conduct is outrageous. Id. at 1475-76. "Without further Supreme Court elaboration," she wrote, the appellate court was not free to "devise" new theories. Id. See also United States v. White, 887 F.2d 267 (D.C. Cir. 1989) (reversing the conviction of defendant because of testimony violating attorney-client privilege).

During Judge Ginsburg's tenure on the Court of Appeals, controversial new federal sentencing guidelines were implemented, drastically changing the law of sentencing by limiting a judge's previously broad sentencing discretion. Given Judge Ginsburg's propensity for following precedent, it is not surprising that she has been a proponent of strict adherence to the Guidelines.⁹⁰

evidence to a defective indictment due to a typographical error); United States v. Coats, 652 F.2d 1002 (D.C. Cir. 1981) finding prosecutor's reference during closing argument to the defendant's prior conviction to be harmless error in light of overwhelming evidence of guilt).

⁸⁹See United States v. Eccleston, 961 F.2d 955 (D.C. Cir. 1992) (reversing conviction because improper introduction of hearsay evidence was "devastating" to the defense and incapable of being cured by a cautionary instruction to the jury); United States v. Foster, 982 F.2d 551 (D.C. Cir. 1993) (reversing conviction where district court improperly limited scope of defense counsel's cross-examination of key police witness and failed to cure effect of improper prosecution argument).

⁹⁰See United States v. Harrington, 947 F.2d 956 (D.C. Cir. 1991) (remanding case for more stringent re-sentencing in compliance with the Guidelines); United States v. Dockery, 965

She has, however, dissented from a ruling upholding the D.C. U.S. Attorney's practice of transferring local cases to federal court in order to take advantage of stiffer federal penalties based on speedy trial and due process problems. See United States v. Mills, 964 F.2d 1186 (D.C. Cir.) cert. denied, 113 S.Ct. 471 (1992).

Finally, closely related to criminal law issues, Judge Ginsburg has been involved in several cases concerning prison overcrowding. Judge Ginsburg seems sympathetic both to crowded prison conditions and to the District's inability to house the number of defendants sentenced by the courts. She dissented (along with Judges Wald, Robinson, Mikva and Edwards) from the court's refusal to rehear its decision in Inmates of Occoquan v. Barry, 850 F.2d 796 (D.C. Cir. 1988), which lifted a population ceiling imposed by the district court on the Occoquan prison. She agreed with the district court that an absolute population ceiling "is not too blunt an instrument" but rather "appears necessary and proper, as an interim measure, to defuse at once a situation 'both deplorable and explosive,' an to impel precise, enduring remedial actions designed and installed by the local correctional administration." Id. at 800 (Ginsburg, J., dissenting).

Judges Ginsburg and Wald also observed that the public outcry against paying for more prisons creates a situation where the legislative and executive branches will "naturally opt for incarcerating increasing numbers of persons in whatever space can be found in existing institutions, even if that should result in conditions which are violative of Eighth Amendment rights." Id. at 800-01 (Ginsburg, J., dissenting).

In 1990, when the federal government sought an injunction against the District of Columbia for refusing to accept prisoners who had been sentenced by the Superior Court, Judge Ginsburg modified the district court's finding that the District was required to accept all newly-sentenced prisoners unless acceptance would violate the court-ordered population limit. See United States v. District of Columbia, 897 F.2d 1152 (D.C. Cir. 1990). Judge Ginsburg held that the District could refuse to accept newly-sentenced prisoners if accepting those prisoners would violate court-order. However, she found the lower court's requirement that the District demonstrate it had "undertaken all feasible measures" to provide space before seeking judicial authorization to refuse the prisoners to be unnecessarily strict.

F.2d 1112 (D.C. Cir. 1992) (rejecting district court attempt to depart from Guidelines).

G. Other Civil Liberties Issues

Judge Ginsburg has also addressed several other civil liberties issues -- primarily police and prison brutality claims. Judge Ginsburg's record in police brutality cases can be characterized as moderately pro-defendant. As discussed in section II.H, she has applied immunity doctrines in some circumstances to dismiss police misconduct claims. In addition, she has required plaintiffs in police misconduct cases to include quite specific allegations in their complaints in order to have even the chance to conduct discovery to rebut an immunity defense. Martin v. Malhoyt, 830 F.2d 237, 256-57 (D.C. Cir. 1987).

Judge Ginsburg appears to hold a middle-of-the-road view on the degree of evidence sufficient for plaintiffs to establish liability of supervisors or municipalities for a pattern of police misconduct. In Carter v. District of Columbia, 795 F.2d 116 (D.C. Cir. 1986), in an opinion she co-authored with Judge Bork, the court affirmed the dismissal of claims against the District of Columbia and Chief Maurice Turner because alleged incidents of misconduct were neither sufficiently numerous nor of a "common design" to support an inference that they were the product of "municipal tolerance." Id. at 123-24.⁹¹

Judge Ginsburg has applied a more permissive definition of excessive force in prison brutality cases. In Norris v. District of Columbia, 737 F.2d 1148 (D.C. Cir. 1984), reversing a district court decision, she ruled that a jail inmate need not suffer permanent injuries to recover under the constitution for a beating by prison officials.⁹² Judge Ginsburg held that minor pushes and shoves were not actionable, but that "gratuitous

⁹¹ In the Carter case, the court also reversed the jury's police brutality award for the plaintiffs against individual officers because of the admission of prejudicial evidence of limited probative value regarding other complaints against the defendant officers as well as other D.C. officers. Id. at 126-33.

⁹²Senior Judge James Doyle concurred in the result in Norris, but criticized the majority for implying that the interest of persons accused of a crime in bodily security "is to be considered significantly...lower" than the interest of others. Id. at 1153 (Doyle, J., concurring). Doyle suggested that the lower court should examine only whether use of force was unjustified or "the force applied was excessive." Id. at 1153. Last year, the Supreme Court, by a 7-2 decision, agreed with the result in Norris in an Eighth Amendment case. Hudson v. McMillian, 112 S.Ct. 995 (1992).

brutalization" or force which "grossly exceeds that warranted by the circumstances" violates the constitution. Id. at 1152, & n.8.

Finally, Judge Ginsburg joined a panel decision, Hohri v. United States, 782 F.2d 227 (D.C. Cir. 1986), vacated and remanded, 482 U.S. 64 (1987), which permitted Japanese American victims of the notorious World War II internment to proceed with a Takings Clause challenge to confiscation of their property. Through elaborate reasoning, Judge Wright's opinion found the statute of limitations for the Takings claim -- unlike many other claims plaintiffs raised -- to have been tolled due to the government's misrepresentations to the Supreme Court in the infamous Hirabayashi and Korematsu cases. The panel found that these false assertions of military necessity foreclosed plaintiffs' Takings claim by concealing its factual basis. Id. at 250-52. In a joint statement with Judge Wright upon denial of rehearing en banc, Judge Ginsburg explained that it would be unfair to expect a litigant to bring a suit seemingly foreclosed by a wrongly decided Supreme Court decision until some branch of government had directly repudiated the decision. 793 F.2d 304, 314 & n.2. Judge Bork, joined by all of the Circuit's other Reagan appointees, wrote a bitter dissent from denial of rehearing en banc complaining of "the costs to the legal system when compassion displaces law." Id. at 313. He accused the panel of giving harmful weight to the notorious internment decisions and erring on statute of limitations and jurisdictional grounds. Id.

H. Access to the Courts

An important set of issues often before the federal courts concerns access to the courts themselves. A judge's approach to such issues is often as important as the judge's views concerning the substantive rights and liberties discussed above. Legal doctrines such as standing, ripeness, mootness, immunity, and exhaustion of remedies have often prevented citizens from obtaining any relief by foreclosing judicial decisions on the merits of their claims. Judge Ginsburg has clearly recognized the importance of access to the courts, and has a generally favorable although mixed record in this area. She has authored a number of important decisions ruling that plaintiffs could bring civil rights, civil liberties, and other claims to court. On the other hand, in a smaller number of cases, she has written opinions that have limited access to the courts.

Judge Ginsburg has written more than a dozen opinions concerning whether particular plaintiffs could properly pursue their claims. In most of these cases, many of which concerned civil rights, Judge Ginsburg ruled that the plaintiffs were entitled to access to the courts. For example, in Spann v.

Colonial Village, Inc., 899 F.2d 24 (D.C. Cir. 1990), Judge Ginsburg wrote an opinion reversing a lower court and holding that fair housing groups had standing to sue under the Fair Housing Act for injury to their fair housing efforts caused by real estate ads using white models to the exclusion of black models. (She also ruled that the plaintiffs' claims were not barred by the statute of limitations because they were aimed at a continuing violation.) In another important civil rights case, Wright v. Regan, 656 F.2d 820 (D.C. Cir. 1981), Judge Ginsburg reversed a lower court and ruled that parents of black children attending desegregated schools could challenge the IRS' failure to deny tax exemptions to discriminatory private schools, although that ruling was later reversed by the Supreme Court. See Allen v. Wright, 468 U.S. 737 (1984). Judge Ginsburg also held, reversing a district judge, that a union could properly bring a claim on behalf of its members for severance and other benefits against a failed bank placed in receivership. Office of Professional Employees International Union v. FDIC, 962 F.2d 63 (D.C. Cir. 1992).⁹³

In a minority of her decisions in this area, Judge Ginsburg

⁹³Other cases in which Judge Ginsburg ruled that particular plaintiffs could pursue their claims include: Abourezk v. Reagan, 785 F.2d 1043 (D.C. Cir. 1986) (holding that U.S. residents could challenge refusal to issue visas to foreign residents invited to speak); Action Alliance of Senior Citizens v. Heckler, 789 F.2d 931 (D.C. Cir. 1986) (finding that senior citizens advocacy groups had standing to challenge HHS regulations implementing Age Discrimination Act); National Coal Ass'n v. Lujan, 979 F.2d 1548 (D.C. Cir. 1992) (ruling that coal producers associations had standing to challenge regulations imposing penalties for surface mining); WEAL v. Cavazos, 879 F.2d 880 (D.C. 1989) (holding that plaintiffs had standing to pursue claims alleging improper federal agency enforcement of civil rights laws); Connors v. Hallmark & Son Coal Co., 935 F.2d 336 (D.C. Cir. 1991) (vacating decision which dismissed trustees' claims of misreported and underpaid pension fund contributions as untimely); Murray v. Buchanan, 674 F.2d 14 (D.C. Cir. 1982), vacated and alt. opinion issued, 720 F.2d 689 (D.C. Cir. 1983) (ruling that taxpayers had standing to challenge payment to chaplains of Senate and House); Bayer v. Department of Treasury, 956 F.2d 330 (D.C. Cir. 1992) (reversing decision which dismissed claim of job discrimination as untimely); DKT Memorial Fund v. AID, 887 F.2d 275, 303 & n.5 (D.C. Cir. 1989) (dissenting from opinion suggesting that U.S. birth control groups lacked standing to assert right to associate with foreign groups to provide abortion services); and Hohri v. United States, *supra*, (defending panel decision to reject statute of limitations defense against claims by World War II-era Japanese-American internees).

has ruled that plaintiffs did not have standing to sue. The most significant was California Assn. of Physically Handicapped, Inc. v. FCC, 778 F.2d 823 (D.C. Cir. 1985), where she wrote an opinion holding that an association representing persons with physical handicaps did not have standing to challenge the FCC's expedited approval of a transfer of controlling stock of a television station owner. She reached this conclusion even though the group contended that the FCC's action continued and exacerbated the station's actions disadvantaging disabled persons. Judge Wald vigorously dissented, contending that Judge Ginsburg's opinion "overreache[d]" to "erect a new barrier to public participation in the broadcast licensing process." Id. at 834.⁹⁴

Judge Ginsburg has a more mixed record in cases where defendants have sought to dismiss lawsuits against them by claiming that the challenges were brought at the wrong time or place or failed to follow other procedural rules. In several cases dealing with alleged failure to exhaust administrative remedies, she has rejected such claims. See Loe v. Heckler, 768 F.2d 409 (D.C. Cir. 1985) (employment discrimination lawsuit); Rafeedie v. INS, 880 F.2d 506 (D.C. Cir. 1989) (suit for injunction against INS exclusion proceeding) (concurring opinion); Utah Power & Light Co. v. ICC, 747 F.2d 721 (D.C. Cir. 1984) (review of ICC decision) (concurring opinion); see also DKT Memorial Fund v. AID, 887 F.2d 275, 301-2, n.3 (dissenting opinion) (rejecting "ripeness" defense to challenge to AID antiabortion funding policy).

In several decisions in this area, however, Judge Ginsburg has dismissed claims on ripeness or other procedural grounds, twice over vigorous dissents by Judge Mikva. In Randall v. Meese, 854 F.2d 472 (D.C. Cir. 1988), Judge Ginsburg wrote an opinion dismissing as premature a challenge to an INS official's denial of a request to adjust the residence status of a controversial writer who had criticized U.S. policies. Judge Mikva dissented, contending that the plaintiff had been "deprived of a status adjustment for an unconstitutional reason" and could suffer "irremediable adverse consequences." Id. at 490. Similarly, in AFGE v. O'Connor, 747 F.2d 748 (D.C. Cir. 1984), Judge Ginsburg wrote an opinion dismissing on ripeness grounds a challenge to an opinion by the Special Counsel of the Merit Systems Protection Board concerning the permissibility of voter

⁹⁴Judge Ginsburg also ruled against plaintiffs on standing grounds in several unanimous, less controversial decisions, such as TRAC v. Allnet Communication Services Inc., 806 F.2d 1093 (D.C. Cir. 1986) (ruling that nonprofit association did not have standing to pursue damage claim on behalf of its members), and Capital Legal Found. v. Commodity Credit Corp. 711 F.2d 253 (D.C. Cir. 1983) (holding that private group which did not allege a concrete injury could not challenge CCC regulations).

registration drives by public employee unions. Judge Mikva strongly dissented, explaining that the decision would mean that public employees "throughout the nation will effectively be barred from participating in neutrally conducted voter registration drives sponsored by" the unions. Id. at 758-59. See also Save Our Cumberland Mountains, Inc. v. Lujan, 963 F.2d 1541 (D.C. Cir. 1992) (dismissing suit under Surface Mining Control and Redemption Act as having been filed in incorrect jurisdiction).

Judge Ginsburg has also written concerning whether under some circumstances, it is proper for anyone to challenge certain governmental actions. She has written disparagingly about the so-called "political question" doctrine, under which issues considered politically sensitive are exempted from any court review. See Kurtz v. Baker, 829 F.2d 1133, 1148-49 (D.C. Cir. 1987) (dissenting opinion); Murray v. Buchanan, 720 F.2d 689, 699-700 (D.C. Cir. 1983) (concurring opinion). She has also criticized proposals that would remove federal court jurisdiction on specific issues, such as school prayer, school desegregation, and abortion, while agreeing with suggestions to limit federal jurisdiction over commercial and other lawsuits between citizens of different states and over review of certain federal agency decisions.⁹⁵ In a decision criticized by civil rights advocates, however, she ruled in WEAL v. Cavazos, 906 F.2d 742 (D.C. Cir. 1990), that there was no cause of action to sue federal education officials for failure to enforce specified civil rights laws and that a long-standing enforcement action had to be dismissed, despite her earlier ruling that the plaintiffs had standing to sue and despite a previous ruling by the full D.C. Circuit court of appeals that such a cause of action did exist.

Judge Ginsburg also has a mixed record on the issue of whether government officials or entities are immune from lawsuits for alleged misconduct. In several cases, she has specifically rejected immunity defenses. See Walker v. Jones, 733 F.2d 923 (D.C. Cir. 1984) (ruling that Member of Congress was not immune from sex discrimination suit by discharged manager of House restaurants); Lombard v. United States, 690 F.2d 215 (D.C. Cir. 1982) (dissenting from ruling that sovereign immunity required dismissal of claim for injuries resulting from serviceman's exposure to radiation during atomic bomb project). In cases involving alleged police misconduct, she has held that police officers are immune from some types of claims, but has permitted plaintiffs to pursue some claims concerning improper arrest and prosecution practices. See Martin v. Malhoyt, 830 F.2d 237 (D.C.

⁹⁵Ruth Bader Ginsburg, Reflections on the Independence, Good Behavior, and Workload of Federal Judges, 55 U. Colo. L. Rev. 1, 13-17 (1983).

Cir. 1987); Martin v. D.C. Metropolitan Police Dept., 812 F.2d 1425 (D.C. Cir. 1987). In Brown v. Secretary of the Army, 918 F.2d 214 (D.C. Cir. 1990), she ruled that sovereign immunity did not prevent awarding back pay to successful federal job discrimination plaintiffs but, contrary to the dissenting opinion of Chief Judge Wald, that it did preclude prejudgment interest on such awards. Access to the courts is also affected by the availability of court-awarded attorneys' fees to successful civil rights and civil liberties plaintiffs, a subject on which Judge Ginsburg similarly has a mixed record.⁹⁶

Although it may be difficult to explain fully Judge Ginsburg's differing opinions concerning access to the courts, some patterns have emerged from her writings. She is most likely to rule in favor of access to the courts where plaintiffs are alleging concrete injury or where the law on the merits of the claims is clear. See, e.g., Kurtz v. Baker, 829 F.2d at 1152 n.12; Spann v. Colonial Village, Inc., 899 F.2d at 30. Conversely, in a discussion on civil rights strategies in the 1980s, she has suggested that it is "not sensible" for civil rights advocates to "press today in federal court litigation for lowered standing barriers".⁹⁷ As a judge, she has expressed reluctance with respect to access issues where a "public agency or official is sued to achieve change in a governmental policy"

⁹⁶Favorable opinions by Judge Ginsburg concerning attorney's fees include: Trout v. Garrett, 891 F.2d 332 (D.C. Cir. 1989) (ruling that interim attorneys' fees could be awarded against federal government) and Full Gospel Portland Church v. Thornburgh, 927 F.2d 628 (D.C. Cir. 1991) (dissenting from ruling that plaintiffs could not recover fees for post-litigation administrative proceedings). See also King v. Palmer, 950 F.2d 771 (D.C. Cir. 1991) (joining dissent from ruling that contingency enhancements cannot be awarded for attorneys' fees). Other Ginsburg opinions which are less favorable in this area include: Elmore v. Shuler, 787 F.2d 601 (D.C. Cir. 1984) (reversing trial court and ruling that attorneys' fees could not be awarded following broadly worded release in which fees issue was not reserved); Grace v. Burger, 763 F.2d 457 (D.C. Cir. 1985) (affirming denial of fees under Equal Access to Justice Act); Save Our Cumberland Mountains, Inc. v. Hodel, 826 F.2d 43 (D.C. Cir. 1987) (concurring in decision to limit hourly rate in fee award); Shaw v. Library of Congress, 747 F.2d 1469 (D.C. Cir. 1984), rev'd, 478 U.S. 310 (1986) (dissenting from majority holding that sovereign immunity did not bar interest awards on fees against the government to compensate for delay in payment, but suggesting that other adjustments may be made instead).

⁹⁷Ruth Bader Ginsburg, Where Do We Go From Here?, 37 Rutgers L. Rev. 1093, 1108 (1985).

in a case "presenting only abstract concerns or complaints about government policy or conduct." Spann, supra, 899 F.2d at 30. Even when ruling against access, she has often sought to point out other avenues for seeking judicial relief to the extent that concrete injury occurs. See, e.g., WEAL v. Cavazos, 906 F.2d at 746 n.2 (stating that "for the injuries [plaintiffs] continue to assert, they have another adequate remedy", notwithstanding dismissal of case). While even civil rights and civil liberties advocates may differ with her opinions in particular cases, her overall record indicates that she clearly recognizes the importance of access to the courts by civil rights and civil liberties litigants.

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THE WHITE HOUSE

WASHINGTON

DETERMINED TO BE AN ADMINISTRATIVE
MARKING Per E.O. 12958 as amended, Sec. 3.3 (c)

Initials: JS Date: 3/11/2014

August 31, 1993

MEMORANDUM FOR BERNIE NUSSBAUM, BRUCE LINDSEY, JACK QUINN, RICKI
SEIDMAN, MELANNE VERVEER, SUSAN BROPHY, ELEANOR
ACHESON

FROM: RON KLAIN *RK*

SUBJECT: COURT OF APPEALS VACANCIES -- DECISION MEMO

The attached memorandum presents new recommendations on candidates to fill six more vacant Court of Appeals judgeships (all but one of which we discussed at our last meeting); it reiterates recommendations for four more positions.

I would like your comments at Thursday's meeting, and would like to send it to the President later that day.

You can call me at x7901 if you have any comments before the meeting.

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	For the President from Bernie Nussbaum, et al., re: Court of Appeals Vacancies - Decision Memo (13 pages)	08/31/1993	b(6)

COLLECTION:

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Melanne Vermeer
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FOLDER TITLE:

Judges IV

2013-0534-S
ry1592

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
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- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
002. memo	To Judicial Selection Group from William Marshall re: Status of District Court Candidates (2 pages)	07/29/1993	b(6)

COLLECTION:

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Melanne Verveer
OA/Box Number: 20039

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Judges IV

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- P1 National Security Classified Information [(a)(1) of the PRA]
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- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
003. list	U.S. District Judge Tracking Sheet (6 pages)	07/29/1993	b(6)

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Judges IV

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RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
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THE WHITE HOUSE

WASHINGTON

July 28, 1993

MEMORANDUM FOR MEETING PARTICIPANTS -- JUDICIAL SELECTION

FROM: RON KLAIN

SUBJECT: DISTRICT COURT UPDATE

Because of the Ginsburg confirmation vote in the Senate Judiciary Committee, we will hold this week's judicial selection meeting on Friday instead of Thursday. The meeting will be held Friday, July 30 at 10:30 am in Bernie Nussbaum's office.

Attached is an update on where we stand with respect to District Court nominees. All materials on the "old" candidates are being reviewed by DoJ at present, and Eldie will extensively discuss the progress of these evaluations at our meeting.

Please note that we have not received new recommendations from Senators since last week's memorandum, and the "new candidates" (page 15) are ones we have seen before without making a decision.

If you have any questions, call me at x7901.

→ Braakley
· Karen Hoxley Wms.

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
004. list	District Court Candidates - Pending (16 pages)	07/28/1993	b(6)

COLLECTION:

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Melanne Verveer
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FOLDER TITLE:

Judges IV

2013-0534-S
ry1592

RESTRICTION CODES

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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
005. list	Courts of Appeals - Current Status (7 pages)	07/30/1993	b(6)

COLLECTION:

Clinton Presidential Records
First Lady's Office
Melanne Verveer
OA/Box Number: 20039

FOLDER TITLE:

Judges IV

2013-0534-S
ry1592

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
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THE WHITE HOUSE
Office of the Press Secretary

For Immediate Release

August 7, 1993

PRESIDENT NAMES CIRCUIT AND DISTRICT COURT JUDGES

President Clinton yesterday nominated three U.S. Court of Appeals judges: Martha Craig Daughtrey for the 6th Circuit, Pierre N. Leval for the 2nd Circuit, and M. Blane Michael for the 4th Circuit. In addition, the President also announced the nominations of U.S. District Court Judges for Maryland, South Dakota, Nebraska, New Mexico, the Eastern District of New York, the Eastern District of Virginia, the Eastern District of Kentucky, and the Eastern District of Arkansas.

"There are few things that I will do that will have more lasting effect than the appointment of federal judges," said the President. "Along with Ruth Bader Ginsburg on the Supreme Court, and the many other judges yet to be named, this outstanding group of jurists will change the face of the Federal courts and help move our country forward."

The President has now made 14 judicial nominations, compared to 8 by President Bush at this point in his presidency, 9 by President Reagan, and 10 by President Carter.

Biographies of the three Circuit Court judges are attached. The District Court Judges nominated yesterday are:

Leonie M. Brinkema, Eastern District of Virginia -- Brinkema, 48, has been a U.S. Magistrate in Alexandria since 1985. She previously worked briefly in private practice, and spent eight years in the Department of Justice as an Assistant U.S. Attorney and a Trial Attorney in the Department's Public Integrity Section. She spent a year as head of the Criminal Division in the Alexandria U.S. Attorney's Office. She is an honors graduate of Cornell Law School.

Deborah Chasanow, District of Maryland -- Chasanow, 45, has been a U.S. Magistrate since 1987. For the preceding twelve years, she was an Assistant Attorney General in the State of Maryland, ending her career as Chief of the state's Criminal Appeals Division. In that role, she was the principal legal advisor to State's Attorneys throughout Maryland. Chasanow is a graduate of the Stanford Law School.

(more)

Jennifer Coffman, Eastern District of Kentucky -- Coffman, 45, has been a partner in firms specializing in employment discrimination law since 1982, litigating both sides of such issues. She was appointed by the District Court judges as one of three lawyers on the Civil Justice Reform Act Advisory Committee for the state. Coffman, who would be the first woman ever to serve on the District Court in Kentucky, is an honors graduate of the University of Kentucky Law School.

Peter Messitte, District of Maryland -- Messitte, 51, has been a state trial court judge in Maryland since 1985. For 16 years before coming to the bench, he had a civil litigation practice and has had extensive trial experience. He is a graduate of the University of Chicago School of Law.

Lawrence Piersol, District of South Dakota -- Piersol, 53, is a partner at Davenport, Evans, Hurwitz & Smith, a prominent Sioux Falls law firm where he specializes in civil litigation. Piersol, a veteran of the U.S. Army Judge Advocate Corps, is a graduate of the University of South Dakota Law School.

Thomas Shanahan, District of Nebraska -- Shanahan, 58, has been a Supreme Court Judge in Nebraska since 1983. He was previously a partner in the firm of McGinley, Lane, Mueller & Shanahan. Shanahan holds a law degree from the Georgetown University Law Center.

David Trager, Eastern District of New York -- Trager, 53, is the Dean of the Brooklyn Law School and a former U.S. Attorney. He also has served as Chairman of the Mayor's Committee on the Judiciary from 1981-89, and the Temporary State Committee on Investigations from 1983-90. He is a graduate of Harvard Law School.

Martha Vazquez, District of New Mexico -- Vazquez, 40, is a partner at Jones, Snead, Wertheim, Rodriguez & Wentworth, a criminal defense and plaintiffs' litigation firm in Santa Fe. She previously served for three years as a public defender after graduating from Notre Dame Law School. Vazquez would be the first woman ever to serve on the District Court of New Mexico.

Alex Williams, District of Maryland -- Williams, 45, is the State's Attorney for Prince George's County, a position he was first elected to in 1986. For the previous decade, he had been Special Counsel to the Board of Education. He previously worked as a public defender, and has taught on an adjunct basis at Howard University Law School, from which he also graduated.

William Wilson, Eastern District of Arkansas -- Wilson, 54, is the senior partner in Wilson, Engstrom, Corum & Dudley, a Little Rock law firm, and a former president of the State Bar. A former legal officer in the U.S. Navy, he holds a J.D. from Vanderbilt University Law School.

#

MARTHA CRAIG DAUGHTREY

Nominee for the U.S. Court of Appeals for the Sixth Circuit

Martha Craig Daughtrey is the sole woman justice on the Tennessee Supreme Court. Daughtrey, 51, overcame discrimination against women in the legal profession and has established herself as a respected and independent justice. In activities both on and off the bench, she has been a participant on the national level in shaping the future of the judiciary and the legal profession.

Born Martha Craig Kerkow in 1942, she grew up in Covington, Kentucky. She enrolled in Nashville's Vanderbilt University in 1961. She earned her Bachelor's degree in 1965, and she placed sixth in her graduating class at Vanderbilt Law School in 1968.

As a woman lawyer, judge and justice in Tennessee, Daughtrey has had to break a path for other women to follow. She found few opportunities available to her as a young woman lawyer in 1968, despite her distinguished record at Vanderbilt Law School.

Unable to secure a job at any law firm in Nashville, Daughtrey was ultimately hired as an Assistant U.S. Attorney under Gilbert S. Merritt (who now serves as the Chief Justice of the U.S. Court of Appeals for the Sixth Circuit). She was the first female prosecutor in Tennessee. A year later, she was hired to work as an assistant prosecutor in Davidson County, Tennessee, where she continued to dispel widespread skepticism from the male-dominated bar to earn a reputation as one of the state's most effective prosecutors.

In 1972, Daughtrey became an assistant professor at Vanderbilt Law School, one of the first female tenure track professors at that school. In 1975 she was appointed to serve on the State Court of Criminal Appeals by then-Governor Ray Blanton. And again, as with most positions Daughtrey held throughout her career, it was another first: Daughtrey was the first woman to serve as a state court judge in Tennessee.

Daughtrey served on the State Court of Criminal Appeals for fifteen years. In early 1990, she was appointed by Governor Ned McWherter to fill a vacancy on the Tennessee Supreme Court. After completing the term of a justice who resigned, Daughtrey was elected to an eight-year term in November of that year.

In addition to her official work as a prosecutor, a professor and a judge, Daughtrey has been active in the legal profession. She has placed most of her emphasis on promoting women and minorities in the judiciary and in the profession generally, and on court reform. Daughtrey has been associated with many legal organizations, including the National Association of Women Judges, where she has served as the group's president. She has also chaired the 7,500-member Judicial Administration Division of the American Bar Association.

Daughtrey has received a number of important awards. Among other honors, she was named one of the Ten Outstanding Young Women of America in 1976. She was awarded the title of Woman of the Year by the National Women Executives, the Women Professionals International and Nashville Business and Professional Women.

Daughtrey is married to Larry G. Daughtrey, who is a columnist for The Nashville Tennessean. The couple has one daughter, who currently attends Vanderbilt Law School.

If confirmed, Daughtrey will become just the third woman ever to serve on the U.S. Court of Appeals for the Sixth Circuit. Based in Cincinnati, the appellate court judges cases from Tennessee, Kentucky, Ohio and Michigan.

PIERRE N. LEVAL

Nominee for the U.S. Court of Appeals
for the Second Circuit

Pierre Nelson Leval is serving in his 17th year as a federal judge in the Southern District of New York. Appointed by President Carter in 1977, Leval, 56, has earned a reputation in the legal profession for his strength of his intellect and the fairness of his deliberations. His reputation is such that a notable legal magazine rated him a "First-Rate Centrist" candidate for the U.S. Supreme Court.

Leval was born in New York City in 1936. His father, a grain merchant, was an immigrant from the French-speaking region of Switzerland.

Leval studied at Harvard College, majoring in art history and graduating with honors in 1959. After spending six months as an enlisted man in the Army, he attended Harvard Law School. Elected to the Law Review, Leval graduated magna cum laude in 1963.

After law school, Leval clerked for Judge Henry J. Friendly of the U.S. Court of Appeals for the Second Circuit. Friendly remembered Leval as a hard-working, pleasant young man with a good sense of humor, describing him as one of several in his "pantheon of best clerks."

From 1963 to 1968, Leval served as an Assistant U.S. Attorney in the Southern District of New York under Robert M. Morgenthau, the former U.S. Attorney and current Manhattan District Attorney. Leval rose to the position of Chief Appellate Attorney before leaving to join the law firm of Cleary, Gottlieb, Steen & Hamilton. Handling litigation and financial matters, Leval became a partner in the firm.

He left Cleary, Gottlieb in 1975 to rejoin Morgenthau in the race for Manhattan District Attorney. Leval managed Morgenthau's campaign, and when he won, Leval became the Chief Assistant District Attorney.

Two years later, Leval was named to the federal bench by President Carter in 1977 at the age of 41, becoming one of the youngest judges appointed to the federal bench in New York. As a District Court judge, he has presided over a number of illustrious cases in the last decade, including General Westmoreland's libel suit against CBS in 1983, and the 1987 mafia drug trial known as the "Pizza Connection" case.

His former employer, Robert Morgenthau, has echoed the strong public consensus about Leval, praising him as "a first-rate lawyer and a great judge, a conscientious, hard-working man who has served the public well." Leval has been recognized for a fundamental sense of fairness mixed with a profound love for the intricacies of the law. In 1991, American Lawyer magazine included Leval on a short list of "First-Rate Centrist" candidates for the Supreme Court.

Leval is married to the former Susana Torruella, an art historian. The couple has one daughter.

If confirmed, Leval will become one of 12 judges on the U.S. Court of Appeals for the Second Circuit, which hears cases from New York, Vermont and Connecticut.

M. BLANE MICHAEL

**Nominee for the U.S. Court of Appeals
for the Fourth Circuit**

M. Blane Michael, a prominent Charleston, West Virginia attorney, has led a diverse and extensive career in both government and private practice. Michael, 50, has served as Counsel to the Governor, prosecuted in both urban areas and rural communities, and practiced law both on his own and in a large law firm. In addition, Michael has balanced his legal career with a deep and abiding commitment to his family and to his community.

Born in 1943 in Charleston, South Carolina, Michael grew up in a small agricultural community in the Potomac highlands, in West Virginia's eastern panhandle.

He has distinguished himself both academically and extracurricularly throughout his life. A Phi Beta Kappa and magna cum laude graduate of West Virginia University, Michael majored in political science and was also President of the student body. He then attended New York University Law School, where he was named a prestigious Root-Tilden Scholar and graduated in 1968.

The same year, Michael joined the Wall Street law firm Sullivan & Cromwell as an associate. In 1971, he left the private sector to work as an Assistant U.S. Attorney in the Southern District of New York.

Michael sacrificed his developing career in New York, however, to return to West Virginia in 1972 to help care for his ailing father. Upon his return, he resumed his prosecutorial work as a Special Assistant U.S. Attorney for the Northern District of West Virginia. A few years later, Michael served as a clerk for the Honorable Robert Maxwell, the Chief Judge of the Federal District Court for the Northern District of West Virginia.

During the several years he cared for his father, Michael opened a solo practice in Petersburg, West Virginia, a rural county seat town with a population of approximately 2,000. His work there included representation of local farmers as well as juveniles assigned to him from a nearby youth detention center.

After his father's death, Michael moved to Charleston where he became Counsel to West Virginia Governor John Rockefeller IV during his first four years in office. Michael has remained active in Democratic politics in his state.

Since 1981, Michael has been associated with West Virginia's largest law firm, Jackson & Kelly, where he became a partner in 1982. He is currently a senior litigator there, handling both trial and appellate cases. He also concentrates in administrative and communications law.

Long active in bar and community activities, he has been one of the leaders over the last five years in the effort to promulgate new "local rules" for courts in the Southern District of West Virginia.

Throughout his career, Michael's reputation for integrity, honesty, exceptional intelligence, and character has gained him numerous admirers. When Michael left government service in the early 1980s, Rockefeller called him "one of the most dedicated and hard-working people I have ever known. Blane brings character and good judgment to every task he undertakes."

Michael is married to the former Mary Anne Eckert. They have a college-aged daughter, Cora.

If confirmed, Michael would fill the seat recently vacated when Judge James Sprouse took Senior Status. He would become one of thirteen judges on the U.S. Court of Appeals for the Fourth Circuit, which hears cases from West Virginia, South Carolina, North Carolina, Virginia and Maryland.

Withdrawal/Redaction Marker

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
006. note	To Melanne from Ron re: materials (1 page)	n.d.	b(6)

COLLECTION:

Clinton Presidential Records
First Lady's Office
Melanne Vermeer
OA/Box Number: 20039

FOLDER TITLE:

Judges IV

2013-0534-S

ry1592

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

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- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Withdrawal/Redaction Marker

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
007. list	Courts of Appeals - Status Summary Sheet (1 page)	n.d.	b(6)

COLLECTION:

Clinton Presidential Records
First Lady's Office
Melanne Verveer
OA/Box Number: 20039

FOLDER TITLE:

Judges IV

2013-0534-S
ry1592

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THE WHITE HOUSE

WASHINGTON

September 20, 1993

MEMORANDUM FOR BERNIE NUSSBAUM, BRUCE LINDSEY, JACK QUINN,
MELANNE VERVEER, SUSAN BROPHY, ELEANOR ACHESON

FROM: RON KLAIN *RK*

SUBJECT: COURT OF APPEALS VACANCIES -- DECISION MEMO

The attached memorandum presents new recommendations on candidates to fill two more vacant Court of Appeals judgeships; it reiterates recommendations for six more positions.

I would like your comments at Thursday's meeting, and would like to send it to the President on Monday of next week.

You can call me at x7901 if you have any comments before or after the meeting.

Withdrawal/Redaction Marker

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
008. memo	For the President from Bernie Nussbaum, et al., re: Court of Appeals Vacancies - Decision Memo (5 pages)	09/20/1993	b(6)

COLLECTION:

Clinton Presidential Records
First Lady's Office
Melanne Verveer
OA/Box Number: 20039

FOLDER TITLE:

Judges IV

2013-0534-S
ry1592

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

Freedom of Information Act - [5 U.S.C. 552(b)]

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concerning wells [(b)(9) of the FOIA]

STATISTICAL BREAKDOWN OF
DISTRICT COURT VACANCIES

I.	No Recommendation Received	23*
II.	Recommendation Under Review	77
A.	At White House Less Than 2 Weeks	0
B.	At White House More Than 2 Weeks	3
C.	At White House -- Special Circumstances	2
D.	Forms with Candidate	17
E.	At Department of Justice	24
	1. Under Review	14
	2. Awaiting Review	2
	3. On Hold	8
	4. White House Hold	0
F.	At ABA/FBI	31
III.	Ready for Nomination	2
IV.	Nominated	10
	CURRENT VACANCIES	108
	ANTICIPATED NEW VACANCIES	4
	TOTAL ANTICIPATED VACANCIES	112

* Recommendations not yet received include:
New York (11)
District of Columbia (5)
California (2)
Connecticut, Illinois, Iowa, Louisiana, Tennessee

updated(9/14/93, 4:21pm)

Withdrawal/Redaction Marker

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
009, list	District Court Candidates - Pending (19 pages)	09/14/1993	b(6)

COLLECTION:

Clinton Presidential Records
First Lady's Office
Melanne Verveer
OA/Box Number: 20039

FOLDER TITLE:

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2013-0534-S
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THE WHITE HOUSE
WASHINGTON
September 21, 1993



MEMORANDUM FOR MEETING PARTICIPANTS -- JUDICIAL SELECTION

FROM: RON KLAIN
SUBJECT: DISTRICT COURT UPDATE

We will hold this week's meeting on Wednesday September 22nd at 10:00 am in Bernie Nussbaum's office.

Attached is an update on where we stand with respect to District Court nominees. All materials on the "old" candidates are being reviewed by DoJ at present.

We have received one new recommendation, from Senator Feinstein, since our last meeting. This "new candidate" appears on page 18.

If you have any questions, call me at x7901.

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
010. list	District Court Candidates - Pending (19 pages)	09/21/1993	b(6)

COLLECTION:

Clinton Presidential Records
First Lady's Office
Melanne Verveer
OA/Box Number: 20039

FOLDER TITLE:

Judges IV

2013-0534-S
ry1592

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
011. questionnaire	Re: Robert J. Timlin (partial) (1 page)	n.d.	b(6)

COLLECTION:

Clinton Presidential Records
First Lady's Office
Melanne Verveer
OA/Box Number: 20039

FOLDER TITLE:

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b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

RESUME OF ROBERT J. TIMLIN

1. Present Judicial Position: Appellate Justice, Fourth District Court of Appeals, Division 2, San Bernardino, CA

303 5th Street, San Bernardino, CA, (714) 383-4445

2. Personal Background:

A. Date and Place of Birth: (b)(6) in Buffalo, New York

B. Home Address: (b)(6)

C. Telephone No.: (714) 735-7690

D. Immediate Family Status: Married to Caroline Joan Atlee since 1963. My wife is a graduate of California State College in Fullerton with a B.A. degree in Art History. She was recently a volunteer member of the Riverside County Juvenile Justice and Delinquency Prevention Commission, Board of Directors of Edward-Dean Museum and Youth Service Center. She is now president of the Riverside Law Alliance.

We have two children. Our son Patrick is a Senior at Northeastern University in Boston, studying Electrical Engineering.

Our daughter is a graduate of University of California at Riverside, with a B.A. degree in Studio Art. She was employed as a teaching assistant at a public school for developmentally disabled and disadvantaged children in Santa Barbara, California. Presently she is a fulltime student at California State College in San Luis Obispo in quest of a teaching credential.

E. Religious Affiliation: Catholic

F. Voter Registration: Democrat

G. Military Service: U.S. Army 1955-1957

3. Educational History:

A. <u>High School Attended</u>	<u>From</u>	<u>To</u>	<u>Degree Received</u>
Gonzaga High School, Washington DC	1946	1950	Diploma
B. <u>Colleges and Law Schools Attended</u>			
College of Arts & Sciences Georgetown University	1950	1954	AB <u>cum laude</u>
University of Michigan Law Center	1954	1955	

Georgetown University Law Center

1957 1959 J.D.

Georgetown University Law Center

1959 1964 L.L.M.

4. Bar, Court and Commission Admissions:

U.S. Supreme Court (December 17, 1962)

Supreme Court of Illinois (November 9, 1959)

Supreme Court of California (April 9, 1965)

United States Court of Appeal
District of Columbia (June 30, 1960)

United States Court of Appeal
Ninth Circuit (October 5, 1964)

U.S. District Court
Northern District of Illinois (November 24, 1959)

U.S. District Court
District of Columbia (June 30, 1960)

U.S. District Court
Southern District of California (April 8, 1965)

Interstate Commerce Commission (1960)

Indiana Public Service Commission (1959)

District of Columbia Court of General Sessions (July 25, 1960)

5. Professional Work History:

<u>Employer</u>	<u>Position</u>	<u>City</u>	<u>From</u>	<u>To</u>
State of California Court of Appeal	Associate Justice	San Bernardino, CA	4/24/90	Present
Riverside County Superior Court	Judge	Riverside, CA	12/19/80	4/24/90
Municipal Court Corona Judicial Dist.	Judge	Corona, CA	3/1/76	12/80
Self Employed and Member of Hunt, Palladino & Timlin in Private Practice of Law	Attorney	Riverside, CA	1/70	3/1/76

Employer	Position	City	From	To
(Continued...)				
U.S. District Court Central District of California	U.S. Magistrate	Riverside, CA	1/18/71	1/17/75
City of Corona	City Atty.	Corona, CA	5/67	1/70
Hennigan, Ryneal & Butterwick	Associate Attorney	Riverside, CA	5/66	5/67
U.S. Attorney, Central & Southern Districts of Cal.	Assistant U.S. Atty.	Los Angeles, CA	7/64	5/66
U.S. Dept. of Justice Criminal Division	Special Attorney	Washington, DC	9/61	7/64
Law Offices of A.L. Wheeler	Associate Attorney	Washington, DC	5/61	9/61
Douglas, O'Bear and Campbell	Associate Attorney	Washington, DC	6/60	5/61
Pennsylvania Railroad	General Attorney	Chicago, IL	11/59	6/60

6. General Nature of Professional Practice Before Becoming a Judge:

During the period September 1961 to May 1966, the nature of my practice involved Federal criminal prosecution. From January, 1962 to May, 1964, I was a special Attorney for the United States Department of Justice, Criminal Division. From July 29, 1964 to March 13, 1966, I was employed as an Assistant United States Attorney by the United States Attorney's Office in Los Angeles. During those periods, I assisted investigative Federal Grand Juries, prosecuted violations of Federal law in jury and non-jury trials and represented the United States Government on appeals from convictions. At this stage, my specialized practice was Federal criminal law.

The general character of my practice from May 1967 to March 1976 was a general practice representing private and public agency clients. Approximately seventy percent of my practice time was devoted to counseling and representing the cities of Corona and Norco as their City Attorney on all legal matters. The private practice included representing business organizations and individuals involved in real estate, business and domestic relations problems. A substantial portion of my cases involved contested matters requiring active litigation. During that period I developed a specialized knowledge

and expertise in the field of public agency law, primarily involving municipalities.

7. Public Offices Other Than Judicial:

During the periods May, 1967 to January, 1970, and January, 1971 to March 1, 1976, I served as City Attorney for the City of Corona, California.

From January, 1970 to July, 1972, and from July, 1974 to March 1, 1976, I served as City Attorney for the City of Norco, California.

Member of the Board of Riverside County Law Library Trustees from 1978 to 1990; President 1979-1980; elected by the judges of the Municipal Courts and Superior Court in Riverside County.

8. Honors, Awards and Recognitions:

- A. Elected Presiding Judge of Riverside County Superior Court for 1984-85 and 1985-86.
- B. Selected as Trial Judge of the Year for Riverside County (1985) by the Inland California Trial Lawyers Association.
- C. Resolution of Appreciation and Commendation by the City Council of the City of Corona at the time of my resignation as its full-time City Attorney to enter the private practice of law in January, 1970.
- D. Special award from the Riverside County Heart Association of Riverside County for my efforts in 1968 Heart Fund Drive.
- E. Special citation from the Comprehensive Health Planning Association of Riverside County for services rendered to the Association.
- F. Listed in Who's Who in American Colleges and Universities for 1953-54, Who's Who in the West, 1974 - present, and Who's Who in The Law, 1977 - present.
- G. Resolution and Commendation of City Council and Planning Commission of City of Corona for legal services to the city, 1971-76.
- H. Resolution of Outstanding Service to the Corona-Norco YMCA.
- I. Resolution of Appreciation for Services as Chairperson of the Public Information Committee, California Judges Association for 1980-81.

9. Present and Former Membership in Bar, Judicial and Professional Associations:

A. California Judges Association (1976 - present)

1. Member of its Appellate Court Committee (1991 - present).
2. Former member of Executive Board (1987)
3. Former member of its Coordinating Committee Mid-year Conference (May, 1986 and May, 1991).
4. Former member of its Committee on Civil Law and Procedure (1985).
5. Former member of its Judicial Ethics Committee (1983-84).
6. Former member of its Public Information Committee, 1978-1982, and Chairperson 1980-81.
7. Former member of its Municipal Court Economy and Efficiency Committee 1976-78 and Chairperson of its Civil Sub-Committee 1977-78.

B. American Bar Association (1959 to present)

C. Phi Alpha Delta Law Fraternity

D. Riverside County Bar Association 1966 - March 1, 1976. I was Chairperson of the Riverside County Bar Association's Public Affairs Committee. In 1972 I was a member of the Riverside County Bar Association's Judicial Selection Committee.

Although, as a Judge, I am not a member of the Association, I am:

1. Co-Chairperson (representing the judiciary) of the Law and Media Committee (1979 to present);
2. Judicial faculty member of Annual Civil Litigation Program (1984 to present);
3. Former member and a Chairperson of the Professional Education Committee (1981 to 1985); and
4. Member of the Committee on Administration of Justice (1981 to 1986)

E. Former member of the Federal Bar Association, Los Angeles County Bar Association and District of Columbia Bar Association.

F. Former member of the Condemnation and Condemnation Procedure Committee of the American Bar Association (1968).

G. From March 1, 1976 to present, I have been involved in the following judicial and Attorney education programs and publications:

1. California Center for Judicial Education and Research (CJER):

- (a) Member of Continuing Judicial Studies Program (CJSP) Planning Committee (1984 to present); Chairperson (1990 to 1991);
- (b) Faculty member, California Judicial College at Berkeley (1982);
- (c) Faculty member for CJSP. Team Leader of faculty group that presented the Judicial Assignment course on Civil Trials for Municipal and Justice Courts (1981);
- (d) Member of Judicial Planning Committee for 1978 Institute for Municipal and Justice Court Judges; gave oral presentation on Selected Civil Case problems at the Institute;
- (e) Group Discussion Leader for special orientation programs for new Municipal Trial Court Judges (May 21-25, 1978) and (March 5-9, 1979);
- (f) Group Seminar Leader at the 1979 Institute for Municipal and Justice Court Judges;
- (g) CJER Journal Planning Committee - representing Small Municipal Courts (South) (1979-1980);
- (h) Chairperson, California Municipal and Justice Courts Manual Update Planning Committee (1979-80);
- (i) Contributing Editor to "California Judges Handbook - Civil Trials" published 1981; and
- (j) Lecturer on Civil Law and Motion, Trials and Unlawful Detainer at special orientation program for new Municipal Court Judges (1980-81).

H. Member of San Bernardino - Riverside Court Improvement Advisory Committee, as created by the Chairperson of the Assembly Committee on the Judiciary (1980).

I. Attended and successfully completed CJER 1976 and 1981 Trial Judges College and 1984 CJSP Court Management Course.

J. Taught Torts at California Southern Law School, 1976-77.)

- K. Participant in CEB Program "One Day Non-jury Trial" (1975).
- L. Vice Chairperson of the Leo A. Deegan Inn of Court (Riverside County.)

10. Non-professional Involvement in Community Affairs:

I was a member of:

- A. The School Board, San Bernardino Diocese (1980 to 1984) and President (1980 to 1983).
- B. The School Board, Notre Dame High School, Riverside (1983 to present).
- C. Corona-Norco YMCA Board of Directors (1969-1979) and President (1976-77).
- D. School Board of St. Edward's (grades 1 through 9)-1976 to 1980 and President (1977-78).
- E. Alcoholism Council of Riverside County (1977-78).
- F. School Committee, Northern Educational Board, Diocese of San Diego (1977-78).
- G. Corona Good Samaritan Home Advisory Board (1978-81).
- H. Board of Directors, Corona Boys Club (1980-81).
- I. The Laity Commission for the Synod of the San Diego Archdiocese (1975).
- J. The Riverside-San Bernardino County Arthritis Foundation Board (1975-76).
- K. The Small Business Advisory Council for Southern California (1968-69).
- L. The Comprehensive Health Planning Association of Riverside County (1969-71).
- M. The Comprehensive MEDI-CAL Review Committee, Southern California Comprehensive Health Planning Council, and its Chairman (1971).
- N. The ad hoc Legal Committee of the Southern California Comprehensive Health Planning Council, and its Chairman (1971).
- O. The Health Facilities and Services Review Procedures Committee, Southern California Comprehensive Health Planning Council, and its Chairman (1971).

- P. The Board of Directors of the Corona Red Cross (1967-70).
- Q. The Goodwill Foundation Board of Trustees for Riverside and San Bernardino Counties (1970-71).
- R. Member of State Democratic Central Committee (1970) and member of Riverside County Democratic Central Committee (1968-71; Vice Chairperson 1969-70).

I assisted pro bono the Catholic Lay Board of Riverside County and Corona-Norco Family Young Men's Christian Association in their organization as non-profit corporations by preparing their corporate organization papers and obtaining for them official recognition of exemption from Federal and State income taxes.

I also represented pro bono the Corona-Norco Family YMCA in a number of legal matters.

I gave speeches to following service clubs concerning the organization of the California judiciary and current trends for changes in the judicial system: 1) Corona Lions Club; 2) Corona Soroptimist Club; 3) League of United Latin American Citizens (L.U.L.A.C.); 4) Norco Kiwanis Club; and 5) Corona Rotary Club.

I taught real estate law in 1969 and 1970 for Chaffey Junior College to persons interested in becoming real estate salespersons and brokers.

In December, 1970, I addressed the California Library Association at its annual meeting on the topic of financing public library construction by Redevelopment Agency bonds, and addressed the Trustees Division of said Association concerning the legal framework for public libraries in California.

11. Legal Publications:

- A. "Pitchess Motions Revisited" - CJER Journal, Spring, 1981, Vol. 3, No. 2.
- B. The January, 1973 edition of the "Municipal Attorney", vol. 14, No. 1, as published by the National Institute of Municipal Law Officers. Discussed my prosecution, as City Attorney for the Cities of Corona and Norco, of certain criminal and civil proceedings to enforce the cities' ordinances regulating the sale, rental and installation of on-site regenerating water softeners to prevent the pollution of the underground water-supply of the Santa Ana River Basin.
- C. Attached is a list of published majority, concurring and dissenting opinions, which I have authored as a member of the State Court of Appeal.