

NOMINATION OF RUTH BADER GINSBURG TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

AUGUST 5, 1993 (legislative day, JUNE 30), 1993.—Ordered to be printed

Mr. BIDEN, from the Committee on the Judiciary,
submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany the nomination of Ruth Bader Ginsburg to be an Associate Justice of the U.S. Supreme Court]

The Committee on the Judiciary, to which was referred the nomination of Judge Ruth Bader Ginsburg to be an Associate Justice of the U.S. Supreme Court, having considered the same, reports favorably thereon, a quorum being present, by a vote of 18 yeas and 0 nays, with the recommendation that the nomination be approved.

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INTRODUCTION

The Senate Judiciary Committee unanimously recommends the confirmation of Judge Ruth Bader Ginsburg to be an Associate Justice of the U.S. Supreme Court. This unanimity results from two facts: First, Judge Ginsburg's qualifications and judicial temperament are indisputable. Second, and most important, Judge Ginsburg's extensive judicial record and style mark her as a true consensus candidate.

Judge Ginsburg is a nominee who holds a rich vision of what our Constitution's promises of liberty and equality mean, balanced by a measured approach to the job of judging. She accepts the Constitution as an evolving charter of government and liberty—as a limited grant of power *from* the people *to* the government—not a narrow list of enumerated rights. At the same time, she speaks and practices judicial restraint, understanding that a judge must work within our constitutional system—respecting history, precedent, and the respective roles of the other two branches.

The balance that Ruth Bader Ginsburg achieves—between her vision of what our society can and should become, and the limits on a judge's ability to hurry that evolution along—will serve her well on the Supreme Court.

This report canvasses the record of significant issues explored with the nominee during the hearings. Although individual Senators may not agree with the conclusions drawn in every section of this report, each of the issues was relevant to some members of this committee in reaching the recommendation that the Senate consent to this nomination.

The nomination of Judge Ruth Bader Ginsburg is one the committee can enthusiastically recommend for confirmation to the Senate. The committee's recommendation is based on Judge Ginsburg's temperament, character, judicial record, and judicial philosophy. It is made with full confidence.

PART 1: BACKGROUND AND QUALIFICATIONS

I. BACKGROUND

The committee received the President's nomination of Judge Ruth Bader Ginsburg to be an Associate Justice of the U.S. Supreme Court on June 22, 1993. The hearings on Judge Ginsburg's nomination were held on July 20, 21, 22 and 23. The nominee was questioned for nearly 20 hours on 3 days. The nominee was also questioned in a closed session, pursuant to rule 26 of the Standing Rules of the Senate, on July 23, 1993.

The committee heard testimony from a total of 20 witnesses, including William E. Willis, chairman, Standing Committee on Federal Judiciary, American Bar Association; Judah Best, D.C. Circuit Representative, Standing Committee on Federal Judiciary, American Bar Association; William T. Coleman, Jr., O'Melveny & Meyers; Chesterfield Smith, Holland & Knight; Shirley Hufstedler, Hufstedler, Kaus and Ettinger; Ira M. Milstein, Weil, Gotshal and Manges; Gerald Gunther, William Nelson Cromwell professor of law, Stanford University; Herma Hill Kay, dean, Boalt Hall School of Law, University of California at Berkeley; Paige Comstock Cunningham, president, Americans United for Life; Rosa Cumare, Hamilton and Cumare; Nellie J. Gray, president, March for Life Education and Defense Fund; Susan B. Hirschmann, executive director, Eagle Forum; Kay Cole James, Family Research Council; Howard Phillips, U.S. Taxpayers Party and The Conservative Caucus; Edith Roberts; Stephen Wiesenfeld; Kathleen Peratis; Angela M. Bradstreet, California Women Lawyers; Carlos Ortiz, president, Hispanic National Bar Association; John D. Feerick, president, New York City Bar Association.

The committee carefully and thoroughly scrutinized the nominee's qualifications and credentials, including her 13-year record as a circuit judge on the U.S. Court of Appeals, District of Columbia Circuit, her 8-year record as a professor at Columbia Law School, her 9-year record as a professor at Rutgers, the State University School of Law in Newark, N.J., her academic writings and her speeches.

On July 29, 1993, a quorum being present, the committee voted, 18 to 0, to report the nomination with a favorable recommendation.

AYES

Mr. Biden
 Mr. Kennedy
 Mr. Metzenbaum
 Mr. DeConcini
 Mr. Leahy
 Mr. Heflin
 Mr. Simon
 Mr. Kohl
 Mrs. Feinstein
 Ms. Moseley-Braun
 Mr. Hatch
 Mr. Thurmond
 Mr. Simpson
 Mr. Grassley

NAYS

Mr. Specter
 Mr. Brown
 Mr. Cohen
 Mr. Pressler

II. THE NOMINEE

Judge Ginsburg was born on March 15, 1933, in Brooklyn, NY. She received her bachelor of arts degree from Cornell University in 1954. Judge Ginsburg pursued her legal education, first at Harvard Law School and then at Columbia Law School, receiving her juris doctor in 1959.

From 1959 to 1961, the nominee served as law clerk to Judge Edmund L. Palmieri, U.S. district court judge for the Southern District of New York.

From 1961 to 1962, the nominee was a research associate for the Project on International Procedure at Columbia Law School, and from 1962 to 1963, she served as the associate director of that program.

From 1963 to 1966, the nominee was an assistant professor at Rutgers, the State University School of Law. From 1966 to 1969 she was an associate professor and from 1969 to 1972, the nominee was a full professor at Rutgers.

From 1972 to 1980, the nominee was a professor at Columbia University School of Law.

From 1973 to 1974, she was a consultant to the U.S. Commission on Civil Rights.

From 1972 to 1973, Judge Ginsburg was the director of the Women's Rights Project at the American City Liberties Union; from 1973 to 1980, she served as a general counsel.

From 1977 to 1978, the nominee was a fellow at the Center for Advanced Study in Behavioral Sciences in Stanford, CA.

In 1980, President Carter nominated Judge Ginsburg to the U.S. Court of Appeals for the District of Columbia. She has served on that court from 1980 to the present. President Clinton nominated her to the Supreme Court on June 14, 1993.

III. THE AMERICAN BAR ASSOCIATION'S EVALUATION

A. *The Standing Committee unanimously gave Judge Ginsburg its highest rating of "Well Qualified"*

The American Bar Association's (ABA) Standing Committee on the Federal Judiciary, chaired by William E. Willis, Esq., unanimously found Judge Ginsburg to be "Well Qualified," its highest rating. (Letter from William E. Willis to Chairman Biden at 1 (July 15, 1993) (on file with the Senate Committee on the Judiciary).) Based on its investigation, the Standing Committee determined that Judge Ginsburg "has earned and enjoys an excellent general reputation for her integrity and her character." (Letter from William E. Willis to Chairman Biden at 4 (July 19, 1993) (on file with the Senate Committee on the Judiciary).) Out of the hundreds of people questioned regarding Judge Ginsburg's integrity, no one interviewed expressed doubt on this issue. The committee also found that Judge Ginsburg possesses the highest level of judicial temperament and meets the highest standard of professional com-

petence required for a seat on the Supreme Court. An example of her professional competence was given by a member of one of the Reading Groups who said:

She is bright, able, sincere, and apparently a hard worker. Moreover, she is committed to being an excellent jurist and is a better writer than many of her colleagues. She graces the bench with style and understanding and the confidence of one with a well-trained mind and a sense of herself. (Id. at 8.)

The Standing Committee concluded that Judge Ginsburg by "virtue of her academic training, her work as an appellate advocate, her academic service, her scholarly writings, and her distinguished service for thirteen years on the [D.C. Circuit] Court of Appeals, Judge Ginsburg meets the highest standards of professional competence required for a seat on the Supreme Court." *Transcript of Proceedings, Nomination of Ruth Bader Ginsburg to be Associate Justice of the Supreme Court of the United States: Hearings before the Senate Committee on the Judiciary*, 103d Cong., 1st sess., July 23, at 12 [hereinafter cited as "Transcript"].

B. The Standing Committee conducted an extensive investigation

The Standing Committee conducted an extensive investigation of Judge Ginsburg, including interviews with members of the Supreme Court and with many of her colleagues on the D.C. Circuit. Of the more than 625 persons interviewed by the committee, over 400 are Federal or State judges. The remaining 225 consist of practicing attorneys, former law clerks, and lawyers who have appeared before Judge Ginsburg. Committee members also inquired of law school deans, faculty members of law schools and constitutional scholars throughout the United States, including professors at Rutgers University and Columbia University Law School, where Judge Ginsburg served as a member of the faculty. (Letter from William E. Willis to Chairman Biden at 2 (July 19, 1993) (on file with the Senate Committee on the Judiciary).) Members of the Standing Committee also personally interviewed Judge Ginsburg. (Id.)

Judge Ginsburg's opinions were reviewed by: (1) a Reading Group of lawyers chaired by Rex E. Lee, former Solicitor General of the United States and presently president of Brigham Young University, who have practiced and argued cases in the Supreme Court; (2) a Reading Group chaired by Professor Ronald J. Allen of the Northwestern University School of Law, consisting of 21 members of that law school's faculty; and (3) a Reading Group composed of 12 professors from the University of Texas Law School, chaired by its dean, Mark G. Yudof. The three Reading Groups reported to the committee their independent analyses of Judge Ginsburg's opinions. (Id. at 3-4.) The comprehensive reports uniformly praised Judge Ginsburg's scholarship and writing ability. One group characterized her opinions as "lawyerly," "thoughtful," "careful," "measured, clear, precise and judicious," while another group commented on her "concern with the institutional needs of the court and the necessity for maintaining collegiality." (Id. at 7-8.)

IV. COMMITTEE RECOMMENDATION

A motion to report with favorable recommendation the nomination of Judge Ruth Bader Ginsburg to be an Associate Justice of the U.S. Supreme Court passed by a vote of 18 to 0.

PART 2: JUDGE GINSBURG'S JUDICIAL PHILOSOPHY AND CONSTITUTIONAL METHODOLOGY

I. JUDGE GINSBURG BELIEVES THE CONSTITUTION IS AN EVOLVING DOCUMENT

Judge Ginsburg's written record and testimony before the committee amply demonstrate that she believes the Constitution is a living document that adjusts to modern notions of ordered society to retain its vitality. She rejects any formulation of original intent that would freeze the Constitution in time, limiting its broad clauses to situations specifically contemplated by the framers. For example, in a speech given to the Eighth Circuit Judicial Conference, she said:

[A] too strict "jurisprudence of the framers' original intent" seems to me unworkable, and not what Madison or Hamilton would espouse were they with us today. It cannot be, for example, that although the founding fathers never dreamed of the likes of Dolly Madison or even the redoubtable Abigail Adams ever serving on a jury, we would today say it is therefore necessary or proper to keep women off juries.

We still have, cherish, and live under our eighteenth century Constitution because, through a combination of three factors or forces—change in society's practices, constitutional amendment, and judicial interpretation—a broadened system of participatory democracy has evolved, one in which we take just pride. (Ruth Bader Ginsburg, Remarks on Women Becoming Part of the Constitution, Address Before the Eighth Circuit Judicial Conference (July 17, 1987), in 6 *Law & Ineq. J.* 17, 17 (1988) [hereinafter cited as "Remarks"].)

Judge Ginsburg recognizes that our Constitution has grown from a document with a cramped view of "We, the People" to one increasingly inclusive of traditionally excluded social groups, including women and racial minorities. In her view, this evolution toward a more inclusive understanding of our Constitution's meaning is consistent with the broad intent of the framers. She believes that judges do their jobs properly when they act in accordance with the framers' "original understanding," but she does not find that "understanding" confining.

The nominee believes the framers understood that the Constitution would not remain static, constrained by the specific notions of the framers themselves. She believes they intended the Constitution to be subject to a careful process of extension—either through amendment, interpretation, or social practice. (Ginsburg, The James Madison Lecture on Constitutional Law, Speaking in a Judicial Voice, Address Before the New York University School of Law (March 9, 1993) in *N.Y.U. L. Rev.* (forthcoming 1993) (manuscript

on file with the Senate Commission on the Judiciary) [hereinafter cited as "Madison Lecture".] Supporting her view is her recitation of the history of our Nation. That history is one in which the framers contemplated continued slavery, refused women the franchise, and imposed property qualifications on men seeking to vote. Through the process of extension she describes, however, the Constitution grew—ultimately abolishing slavery and giving women the right to vote through amendment, recognizing women's equality through interpretation, and eliminating most voting qualifications other than age and citizenship through a combination of amendment, legislation, and social convention.

The nominee further articulated her view of the framers' original understanding in testimony before the committee. Judge Ginsburg testified in response to a question from the Chairman:

[T]he immediate implementation in the days of the Founding Fathers in many respects was limited. "We the People" was not then what it is today. The most eloquent speaker on that subject was Justice Thurgood Marshall when, during the series of Bicentennials when songs of praise of the Constitution were sung, he reminded us that the Constitution's immediate implementation, even its text, had certain limitations, blind spots, blots on our record. But he said that the beauty of this Constitution is that, through a combination of interpretation, constitutional amendment, laws passed by Congress, "We the People" has grown ever larger. So now it includes people who were once held in bondage. It includes women who were left out of the political community at the start.

So I hope that begins to answer your question. The view of the Framers, their large view, I think was expansive. Their immediate view was tied to the circumstances in which they lived. (Transcript, July 20, at 112.)

When Senator Hatch asked the nominee whether she agreed with the statement, "the only legitimate way for a judge to go about defining the law is by attempting to discern what those who made the law intended," the nominee replied:

I think all people could agree with that, but as I tried to say in response to the Chairman * * *, trying to divine what the Framers long did, intended, at least I have to look at that two ways. One is what they might have intended immediately for their day, and one is their larger expectation that the Constitution was meant to govern, not for the passing hour, but for the expanding future. And I know no better illustration of that than to take the great man who wrote the Declaration of Independence, who also said, for our state, a pure democracy, there would still be excluded from our deliberations women who, to prevent depravation of morals or ambiguity of issues, should not mix promiscuously in gatherings of men.

Now I do believe that Thomas Jefferson, were he alive today, would say that women are equal citizens. * * * But what was his understanding of all men are created equal for his day and for his time, it was that the breasts of

women were not made for political convulsion. So I see an immediate intent about how an ideal is going to be recognized at a given time and place, but a larger aspiration, our society improves. I think the Framers were intending to create a more perfect union that would become ever more perfect over time. (Transcript, July 20, at 131-32).

In short, Judge Ginsburg believes that the effort to divine the framers' specific original intent is an appropriate starting point in constitutional review, but she rejects the notion that the inquiry ends where it begins.

II. JUDGE GINSBURG ADVOCATES JUDICIAL RESTRAINT

One theme that emerged from the committee's extensive review of Judge Ginsburg's written record, as well as her testimony, is her belief in a judicial branch that moves incrementally. A careful adherent to a case-by-case method of gradual evolution in the law, Judge Ginsburg believes the Court should move in "measured motions." This view is exemplified by the following testimony from her opening statement:

My approach [to judging], I believe is neither liberal nor conservative. Rather, it is rooted in the place of the judiciary, of judges, in our democratic society. The Constitution's preamble speaks first of "We, the People," and then of their elected representatives. The judiciary is third in line and it is placed apart from the political fray so that its members can judge fairly, impartially, in accordance with the law, and without fear about the animosity of any pressure group.

In Alexander Hamilton's words, the mission of judges is "to secure a steady, upright, and impartial administration of the laws." I would add that the judge should carry out that function without fanfare. She should decide the case before her without reaching out to cover cases not yet seen. She should be ever mindful, as Judge and then Justice Benjamin Nathan Cardozo said, "Justice is not to be taken by storm. She is to be wooed by slow advances." (Transcript, July 20 at 91-92.)

Judge Ginsburg has written extensively about how the judicial branch should take incremental steps, allowing legislatures and society to address and respond to court-ordered changes. In her Madison Lecture, she articulated a view about how judges should go about interpreting our evolving Constitution to accommodate modern circumstances. There is one overarching theme: the Court should generally lay markers along the road to doctrinal change, allowing public debate and legislative acceptance to occur, rather than making abrupt changes that lack secure foundations. She wrote, "[W]ithout taking giant strides and thereby risking a backlash too forceful to contain, the Court, through constitutional adjudication, can reinforce or signal a green light for a social change." (Madison Lecture at 36-37.)

As an example of this process at work, the nominee cited the gender equality cases of the 1970's, from *Reed v. Reed*, 404 U.S. 71 (1971), through *Craig v. Boren*, 429 U.S. 190 (1976). Prior to *Reed*,

the Supreme Court had never found gender discrimination unconstitutional under the 14th amendment. In this line of cases, however, the Court developed a new theory of gender equality under the Constitution—ultimately concluding in *Craig* that gender classifications would be subjected to an intermediate standard of equal protection scrutiny. Each of these cases, beginning with *Reed* and culminating in *Craig*, was, in her view, a “pathmarker” toward the constitutional principle of gender equality. The nominee wrote of this development:

For the most part, the Court was neither out in front of, nor did it hold back, social change. Instead, what occurred was what engineers might call a “positive feedback” process, with the Court functioning as an amplifier—sensitively responding to, and perhaps moderately accelerating, the pace of change, change toward share participation by members of both sexes in our nation’s economic and social life. (Remarks at 24.)

She stated further:

The ball, one might say, was tossed by the Justices back into the legislators’ court, where the political forces of the day could operate. The Supreme Court wrote modestly, it put forward no grand philosophy; but by requiring legislative reexamination of once customary sex-based classifications, the Court helped to ensure that laws and regulations would “catch up with a changed world.” (Madison Lecture at 31–32 (footnotes omitted).)

Judge Ginsburg echoed this view in her testimony before the committee. Under questioning by Senator DeConcini, the nominee testified that the Court did not lead society in the gender equality cases, stating, “From my viewpoint, [these cases] were reflecting social changes and putting the imprimatur of the law on the direction of change that was ongoing in society.” (Transcript, July 21, at 10.)

At least in part, Judge Ginsburg’s prescription for cautious judicial advances reflects a recognition of the limitations under which the Court operates. The judiciary lacks a “sword” with which to enforce its pronouncements. She has written:

With prestige to persuade, but not physical power to enforce, with a will for self-preservation and the knowledge that they are not “a bevy of Platonic Guardians,” the Justices generally follow, they do not lead, changes taking place elsewhere in society. But without taking giant strides and thereby risking a backlash too forceful to contain, the Court, through constitutional adjudication, can reinforce or signal a green light for a social change. (Madison Lecture, at 36–37 (footnotes omitted).)

III. JUDGE GINSBURG ACKNOWLEDGES THAT COURTS MUST ACT BOLDLY WHERE THE POLITICAL PROCESS WILL NOT ADMIT CONSTITUTIONALLY NECESSARY CHANGE

In her Madison Lecture, Judge Ginsburg wrote:

