AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 10: The Reagan Era – Judicial Powers and Constitutional Authority/Judicial Structure and Selection

*Ron Klain***, Memo on Judge Ginsburg Performance Pitfalls** (1993)[[1]](#footnote-1)

*In the summer of 1993, Byron White, an appointee of President John F. Kennedy, retired from the U.S. Supreme Court. President Bill Clinton moved quickly to nominate Ruth Bader Ginsburg for the vacancy. Ginsburg had been placed on the prestigious Court of Appeals for the District of Columbia by President Jimmy Carter and had developed a reputation as a consensus builder. The administration internally expected her to be easily confirmed. She would eventually be confirmed by a nearly unanimous vote in the Democratic-controlled Senate.*

*Associate Counsel to the President Ron Klain took the lead in preparing the Ginsburg for her confirmation hearings. In the summer of 1993, he wrote a memo to David Gergen, a longtime journalist and newly installed counselor to the president, outlining the potential pitfalls that Ginsburg was likely to face at the hearings. In particular, he had found in his conversations with the circuit court judge that she was generally disdainful of the entire modern judicial confirmation process – and he warned that she would likely be prickly in her interactions with the senators. Particularly worrisome was the fact that Ginsburg thought her former colleague Robert Bork had been unfairly treated in his confirmation hearings and tended to embrace Bork’s style in answering questions (though endorsing a different judicial philosophy) and she disliked how the “stealth candidate” David Souter had conducted himself in his successful confirmation hearings.*

*By the time of her public testimony, the administration had convinced Ginsburg to take a more toned-down approach. Her steadfast refusal to answer questions about cases or doctrine has been characterized by later nominees as the “Ginsburg rule” of “no hints, no forecasts, no previews.” The approach proved frustrating to senators but useful to nominees who wanted to avoid expounding on controversial issues as Robert Bork had done in his unsuccessful nomination to the Supreme Court.*

Based on our preparation thus far, here are the potential dangers in Judge Ginsburg's hearing performance:

1. Stalwart Defense of the ACLU

When asked about her support for ACLU policies to legalize prostitution, decriminalize the distribution of pornography to minors, decriminalize marijuana, and ban the death penalty, Judge Ginsburg has a strong tendency to defend the ACLU position. She has an instinct for defending some rather extreme liberal views on these questions.

She also relishes defending the ACLU as an institution, and its importance in American society.

1. Rejection of the Souter Approach

When shown videotapes of confirmation hearing answers by Judges Souter and Bork to similar questions, Judge Ginsburg's reaction has been that Judge Souter "demeaned" himself in giving "political" answers, while Judge Bork was "unjustly crucified" for his "candid" responses.

Her answering style is more akin to Bork than Souter: her answers tend to be legalistic and doctrinal -- even when dealing with crucial issues – rather than conveying core values.

1. Disdain for Confirmation Process

At the same time, Judge Ginsburg believes that Judge Souter answered "too many" questions of the Committee about specific legal issues – like religious freedom and free speech and intends to be less responsive than he was in an effort to "restore dignity’ to the confirmation process.

Her hostility to the process – to the Committee's "victimizing" of Judge Bork (on the one hand) and Anita Hill and Lani Guinier (on the other) – is evident. She believes (and may publicly state) that the current process should be replaced by the one used for Chief Justice Burger: a one-hour hearing with no substantive questioning.

1. Failure to Reassure in Answers

When asked a specific question about a prior decision or writing, Judge Ginsburg seems unable (or unwilling) to reassure that questioner's underlying concerns, and instead, seems set on answering the specific charge (or, more often, nitpicking some aspect of the question's premise).

As noted above, the Judge has trouble addressing larger issues and speaking to core values.

1. Style Problems

And finally, Judge Ginsburg's technique – her failure to make eye contact, her halting speech, her "laconic" nature (to use Jim Hamilton's phrase) – is not helpful.

You should be cautious in dealing with her on these and other points. *Judge Ginsburg views the White House's interest and her interests as being.at odds with each other*: she sees us as having a stake in presenting her as a moderate and in getting along well with the Senate; she sees her interests as "being herself, " preserving her "dignity," and promoting her "independence."

1. Excerpt taken from Ron Klain, Memorandum for David Gergen, re: Judge Ginsburg: Performance Pitfalls (July 14, 1993), Clinton Library. [↑](#footnote-ref-1)