Not Returned

Memorandum

Date: July 30, 1993

To: Senator Dole

From: Alec Vachon

Re: Disability-Related Decisions of Judge Ginsburg

I requested CRS locate and analyze the disability-related opinions of Judge Ruth Bader Ginsburg; their brief is attached. I have also read the text of the opinions.

Since joining D.C. Court of Appeals in 1980, Ginsburg published 325 opinions. Four involve Rehabilitation Act or Individuals with Disabilities Education Act (IDEA); 3 for the majority, 1 dissent. Although sample is too small to make definitive judgements, no surprises from popular view of a centrist, technical judge. Ginsburg is clearly sympathetic to plaintiffs, even where she does not favor an expansive reading of either statute.

Highlights:

1. In Lunceford v. District of Columbia Board of Education (1984), District Court found transfer in residence from a private to a city-run hospital of young man with mental retardation, and a concomitant change in meal program, constituted a change in "educational placement" and was barred unless parents consented or hearing held pursuant to IDEA. Appeals Court reversed, finding neither event in this case triggered IDEA. In a telling statement, Ginsburg wrote for the court:

> Pierce's surrogate parents have diligently sought the best possible treatment for Pierce, and this court is sympathetic to their concerns. But resources are finite, and many other demands compete for limited public funds. The [IDEA] does not secure the best education money can buy, it calls upon government, more modestly, to provide an appropriate education for each child.

2. In California Ass'n of the Physically Handicapped v. FCC (1985), plaintiffs sought to bar FCC from granting a "short form" ownership transfer in some TV stations (which merely recognized de facto control in this case) because owner failed to closed caption programs and make efforts to hire people with disabilities. "Long form" application would allow these issues to be raised. Appeals Court found plaintiffs lacked standing -- FCC action did not cause the alleged injury. Moreover, even if the petition were granted, no real relief would occur because effective control of the stations would not change. Ginsburg suggested complaints be raised in a license renewal hearing.

3. In Blackwell v. U.S. Dept. of Treasury (1987), plaintiff alleged hiring discrimination because he was a transvestite. Ginsburg affirmed lower court finding that neither transvestism nor homosexuality qualified as disabilities under Rehab Act. ADA of course specifically states neither circumstance a disability. However, lower court ruling vacated because opinion appeared to require a complainant notify a prospective employer if he or she had a disability not "automatically apparent." ADA also clarified issue of pre-employment inquiries.

4. The most recent and potentially most significant case is McKelvey v. Turnage (1988); Ginsburg dissented from majority, which Supreme Court 4-3 upheld on appeal. McKelvey requested extension of deadline to use G.I. Bill educational benefits because he was an alcoholic. Statute allowed for extension of benefits "because of a physical or mental disability which was not a resultof [their] own wilful misconduct"; VA interpreted alcoholism as such misconduct. Ginsburg found this interpretation unacceptable. Although on Court Ginsburg's vote would not be decisive, she could of course present her views directly to fellow Justices.

cc: Kerry Tymchuk