

# Ruth Ginsburg's Role With the ACLU

By Bill Donohue

*Editor's Note: The following article by Catholic League president William A. Donohue, Ph.D., appeared in the July 3, 1993 issue of Human Events. In it, Dr. Donohue, a nationally recognized authority on the ACLU, offers some very enlightening background on Judge Ruth Bader Ginsburg, whose nomination hearings were compared to a canonization by more than one observer.*

Ever since President Clinton selected Ruth Bader Ginsburg to fill the vacancy on the Supreme Court, the media have repeatedly referred to Judge Ginsburg as a centrist. Perhaps her writings from the bench suggest that she is, but there is other evidence that suggests otherwise.

On April 12-13, 1975, the board of directors of the American Civil Liberties Union passed a new policy on "Homosexuality" (Policy #257). In doing so, the board accepted the proposed revision of its existing policy that was forwarded from the Due Process and Privacy Committees. One of the persons who played a key role in the revised policy was Ruth Bader Ginsburg. Indeed, the most controversial suggestions came from her.

Before considering the new policy, and Ginsburg's role in framing it, mention should be made of the earlier ACLU policies on homosexuality. The ACLU issued its first policy on homosexuality on January 7, 1957.

At that time, the board stated that it was not the business of the ACLU "to evaluate the social validity of laws aimed at the suppression or elimination of homosexuals." Homosexuality constituted a common-law felony, argued the ACLU, and "there

is no constitutional prohibition against such state and local laws on the subject as are deemed by such states or communities to be socially necessary or beneficial."

Homosexuals were regarded by the ACLU as belonging to a "socially heretical" and "deviant group." As such, homosexuality may be regarded as a "valid consideration in evaluating the security risk factor in sensitive positions."

On December 13, 1965, the board met to reconsider its policy on homosexuality. It now declared that it "supports the idea that this kind of sexual behavior [homosexuality] between consenting adults in private, as distinct from acts in public and improper public solicitation, should not be made the subject of criminal sanctions."

It still maintained, however, that homosexuals were members of a "socially heretical" and "deviant group" and continued to argue that gays could be screened as a security risk in "sensitive" employment .

Eleven months later the board met to draw up another new policy on homosexuality. Like the policy of 1965, it stated that what consenting adults do in private was not the business of the state. Although it stopped labeling gays as "socially heretical" and "deviant," it nonetheless said that the public had a right to be protected from "solicitation, molestation, and annoyance in public facilities and places"; minors, in particular, deserved protection against "adult corruption."

As for government employment, the ACLU maintained that no person should be disqualified because of private sexual conduct. But there was this caveat: "in certain jobs there may be relevancy between the job and a person's private sexual conduct, including homosexuality."

In 1975, the ACLU issued its most absolutist policy on homosexuality. "Homosexuals," the policy stated, "are entitled to the same rights, liberties, lack of harassment and

protections as are other citizens." In every respect, discrimination was condemned whether in employment, public or private ("sensitive" jobs or not), housing and the like.

And in a major departure from previous policy on the subject, the board voted to oppose criminal sanctions for "public solicitation for private sexual behavior between or among adults of the same sex." Joining her colleagues from the Due Process and Privacy Committees in this unanimous decision was Ruth Bader Ginsburg.

The evidence shows that Ginsburg did more than vote with her colleagues. She led the fight by introducing two controversial motions. She objected to the words "in great detail" in the following statement: "The government practice of inquiring *in great detail* into the sexual practices and preferences of its employees or prospective employees and of disseminating such information to other government and non-government agencies is an unconstitutional invasion of privacy."

Ginsburg objected to the phrase "in great detail" because she did not want the ACLU to imply that the government had any right to make such an inquiry. Her motion carried.

*Most alarming, however, was Ginsburg's motion to delete the following sentence from the proposed revised policy on homosexuality: "The state has a legitimate interest in controlling sexual behavior [sic] between adults and minors by criminal sanctions." The minutes of the board state that Ginsburg "argued that this implied approval of statutory rape statutes, which are of questionable constitutionality. "*

As a result of her effort, David Isbell offered a new statement, which was approved by a vote of 18 to 7: "The state has an interest in protecting children from sexual abuse, an interest underlying some laws concerned with sexual conduct between adults and minors. Such laws may not properly discriminate on the basis of the sexual preference involved in

the conduct.”

The senators on the Judiciary Committee will now have to decide whether someone who opposes the laws on prostitution, thinks that statutory rape statutes are of dubious constitutionality and has a problem with criminalizing all sexual conduct between adults and minors is qualified to be on the Supreme Court.

Furthermore, Mr. Isbell’s substitute motion arguing that the state has an interest “underlying some laws concerned with sexual conduct between adults and minors” suggests that some laws should be stricken. It would be instructive to know which ones Ginsburg thought should have been deleted – and to what extent, if at all, she still holds such views.

Since Clarence Thomas was almost denied a seat on the Supreme Court because of unsubstantiated charges of “talking dirty,” it seems that simple justice calls for a more severe judgment regarding someone who finds fault with the state’s banning all sexual relations between adults and minors. But fairness also dictates that Judge Ruth Bader Ginsburg deserves the opportunity to explain herself.