
CRAVATH, SWAINE & MOORE LLP

Reflections on Justice Ruth Bader Ginsburg

SEPTEMBER 25, 2021

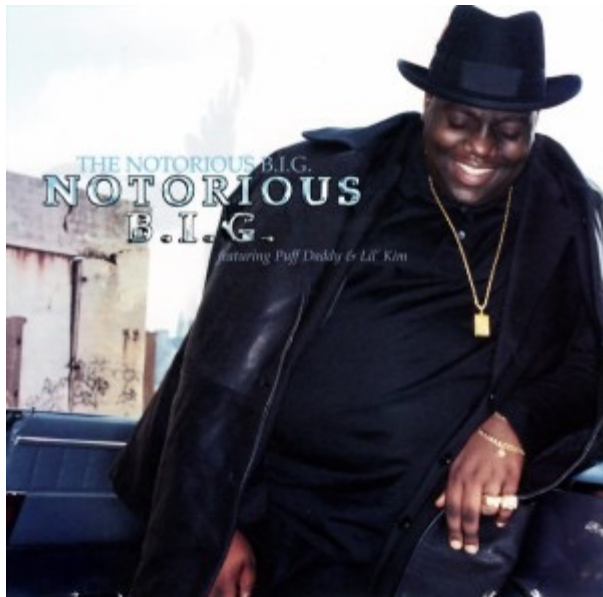
Benjamin Gruenstein

Reflections on Justice Ruth Bader Ginsburg

- Served on the U.S. Supreme Court from 1993–2020, after having served on the Court of Appeals for the D.C. Circuit from 1980–1993
- Second woman to serve on the Supreme Court, first to be appointed by a Democratic President
- Hon. David H. Souter on her passing: “Ruth Ginsburg was one of the members of the Court who achieved greatness before she became a great justice. I loved her to pieces.”
- Pioneering advocate for women’s rights, argued 6 cases before the Supreme Court between 1973 and 1978, winning 5
- Upon her death, was the first woman to lie in state at the U.S. Capitol

Reflections on Justice Ruth Bader Ginsburg

Notorious BIG



Born in Brooklyn, NY (1972)

Notorious RBG



Born in Brooklyn, NY (1933)

United States v. O'Hagan (1987): The Misappropriation Theory of Insider Trading

- **Facts**: Defendant O'Hagan was a partner in the Minnesota law firm of Dorsey & Whitney, which was retained to represent London-based Grand Metropolitan PLC in a potential tender offer for Pillsbury Co. O'Hagan didn't work on the matter, but learned about it and in advance of the public announcement of the tender offer purchased call options for Pillsbury stock, which he exercised and sold, netting \$4.3 million.
- **Relevant Law**: The relevant statute, Section 10(b) of the Exchange Act, provides:
 - “It shall be unlawful for any person . . . To use or employ, in connection with the purchase or sale of any security . . . , any manipulative or **deceptive device or contrivance** in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.” 15 U. S. C. § 78j(b).
- The SEC adopted Rule 10b-5, which provides: “It shall be unlawful for any person . . . To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.”

United States v. O'Hagan (1987): The Misappropriation Theory of Insider Trading

- **Outcome:** O'Hagan was convicted of insider trading under the misappropriation theory and sentenced to 41 months' imprisonment. The Supreme Court, in an opinion by Justice Ginsburg, upheld the conviction, establishing the misappropriation theory of insider trading.
 - Under the "traditional" or "classical" theory of insider trading, a corporate insider violates the securities laws when they trade in the securities of their corporation based on material, nonpublic information. By endorsing the "misappropriation" theory, the Court endorsed the prosecution of any person who misappropriates confidential information for purposes of trading securities, in breach of a duty owed to the source of the information.

Ring v. Arizona (2002): Sixth Amendment and the Death Penalty

- **Facts:** Defendant Ring was convicted of armed robbery and murder in connection with the robbery of a Wells Fargo armored truck. At trial, the evidence established that Ring was clearly involved in the robbery (the cash was found in his home), and that the murder took place during the robbery, which was enough to establish first-degree murder. This was not enough to sentence Ring to death under Arizona law, which required, as an aggravating factor, that he be the actual killer or a “major participant” in the robbery. At sentencing, Ring’s co-defendant cooperated with the Government and testified that Ring was the leader of the robbery crew and the one who shot the victim to death. Based on this additional evidence, the trial judge sentenced Ring to death.
- **Relevant Law:** The Sixth Amendment provides criminal defendants with the right to a jury determination of all elements of the offense that increase the statutory maximum. The Court, in an earlier decision in *Walton v. Arizona* (1990), held that the aggravating factors were sentencing considerations between sentences of life and death, and not elements of the offense.

Ring v. Arizona (2002): Sixth Amendment and the Death Penalty

- **Outcome:** The Supreme Court, in an opinion by Justice Ginsburg, reversed, overruled *Walton* and held that the aggravating circumstances must be proven to a jury:

“The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant’s sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both.”

- Quoting Justice Byron White in *Duncan v. Louisiana* (1968): “The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered . . . If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.”

Yates v. United States (2015): Evidence Overboard!

- **Facts:** Defendant Yates was the captain of the “Miss Katie” commercial fishing boat, when an officer of the Florida Fish & Wildlife Conservation Commission boarded to check on the boat’s compliance with fishing rules. The officer noticed what appeared to be 3 undersized red grouper, leading him to search for and segregate all fish that were under the 20” fishing minimum and issue Yates a citation for possession of undersized fish. When the boat docked in Florida four days later, the officer searched and measured the fish again, and they were all 20” or over. When questioned, one member of the crew admitted that Yates had directed him to throw overboard all undersized fish.
- **Relevant Law:** 18 U. S. C. §1519, a provision of the Sarbanes Oxley-Act enacted post-Enron and Worldcom, provides that “Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or **tangible object** with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.”

Yates v. United States (2015): Evidence Overboard!

- **Outcome:** Yates was convicted and sentenced to 30 days' imprisonment. The Supreme Court, in an opinion by Justice Ginsburg, reversed and held that fish did not constitute a "tangible object" despite the literal meaning of the term.
 - After an extensive discussion of dictionary definitions, canons of statutory construction and statutory purpose in support of the conclusion that Sarbanes-Oxley did not prohibit the spoliation of every object relevant to a government investigation, the Court also relied on the rule that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."
- **Justice Kagan's dissent:** "The plurality searches far and wide for anything—*anything*—to support its interpretation of §1519. But its fishing expedition comes up empty."

"As the plurality must acknowledge, the ordinary meaning of 'tangible object' is 'a discrete thing that possesses physical form.' A fish is, of course, a discrete thing that possesses physical form. See generally Dr. Seuss, *One Fish Two Fish Red Fish Blue Fish* (1960). So the ordinary meaning of the term 'tangible object' in §1519, as no one here disputes, covers fish (including too-small red grouper)."

Disclaimer

The information contained in these materials, and views expressed in connection with the related presentation, are for informational purposes only and do not constitute legal advice by Cravath upon which the recipients and viewers of this presentation may rely or which they may cite in an adversarial proceeding. The sharing of this information and presentation will not establish an attorney-client relationship between any person or entity and Cravath. Please note that changes may have occurred in the discussed laws or regulations following the date of these materials and presentation, and Cravath has no obligation to update or revise these materials and presentation to reflect any such changes.