



Historical Society of the District of Columbia Circuit

IN TRIBUTE TO JUSTICE RUTH BADER GINSBURG



Introductory Note:

In 1990, Linda Ferren, then Circuit Executive, received a call from then-Judge Ruth Bader Ginsburg. Judge Ginsburg invited Linda to come to her Chambers to discuss an idea – the creation of a historical society for the D.C. Circuit Courts. In particular, Judge Ginsburg wished to facilitate the writing of a history of these Courts and the creation of oral histories of judges, lawyers and others serving them. In 2020, we celebrate the 30th Anniversary of Justice Ginsburg’s vision and of her service as the Honorary Chair of the Historical Society of the District of Columbia Circuit. With her passing, and because of her importance to the Society, it is fitting that we reflect on what some might say is a “Missing Chapter” in the remembrances of her exemplary career – her 13 years on the D.C. Circuit Court of Appeals. The following article draws on recollections of her judicial colleagues and law clerks 1980 to 1993.

A Missing Chapter in the Story of Ruth Bader Ginsburg

Ruth Bader Ginsburg joined the D.C. Circuit in 1980 as a renowned advocate on discrimination issues and equal opportunity for women. During her 13 years on the D.C. Circuit, she evolved from courtroom ground-breaker and advocate to a widely competent judge with a broad understanding of the law across many fields, a knack for working harmoniously, respectfully and collegially with her judicial colleagues, and a reputation for precision, detail and thoroughness in her work.

Judge Harry Edwards, who joined the D.C. Circuit in the same year and who had been a prominent labor lawyer and law professor, believes that he and Judge Ginsburg both grew on the Court of Appeals by being exposed to many more bodies of the law than they had dealt with as practitioners and academics. “So,” he says, “when she went to the Supreme Court, she had a wealth of experience in a broad range of legal areas – civil and criminal cases, administrative law, constitutional law, and procedural issues – and her work was sterling in all areas.” She became the Circuit Court’s “resident expert” on procedural issues, an area in which she continued to shine when she joined the Supreme Court.

Her reputation as a procedural expert didn’t lessen her concern for the people her rulings touched. “We were told to focus on the particulars of a case – who are the parties, how did they

get to this point in the dispute, what were the prior proceedings, what happens to them if we rule one way or the other,” says David Post, one of her clerks in 1986-87. And former law clerks Edith Lampson Roberts and Matt Roberts (1989-90), later married with Justice Ginsburg officiating, remember her arranging trips for her clerks to the DC jail, to the former Lorton Correctional Complex and the women’s wing there, and to a juvenile detention facility. “She wanted us to see how decisions affected people,” they recall.

An unfailingly hard worker, she often stayed so late at the office that it might take two or more calls from her husband Marty at the end of a long day to get her to head home, her law clerks remember. She prepared for oral argument so thoroughly that, Judge Edwards recalls, she sometimes arrived at the judges’ post-argument conference with a prepared judgment (which invariably reflected the correct disposition of the case). Judge Edwards remembers teasing her about this, saying “Oh, no, Ruth, you may have a strong view about the case, and you may even be right, but we get to talk about it first before we reach judgment.”

Her evolution from noted courtroom advocate to respected persuader would serve her well. "She came to the Court of Appeals as a top litigator and advocate," says Post. "But as a colleague on the bench, it was a different type of persuasion. She was no longer an advocate, and had to learn the art of persuasion in a court setting where everyone was equally as smart, accomplished and persuasive."

Judge Edwards says that “Judge Ginsburg was a terrific colleague on the court of appeals. She was always well-prepared, meticulous, and precise in her work. She was a stickler for details, and she missed nothing.” Judge Edwards believes that Judge Ginsburg’s sterling work as a jurist emanated from her seminally important work to achieve gender equality during her years as a practitioner and legal scholar. “As a leader in the movement for equal rights, she knew that she could never afford to make a mistake, not even a small one, in advancing her positions. She had to be precise, accurate, clear, and compelling in addressing legal issues. She had developed a practice of always striving for absolute accuracy and it showed in her work on the court.”

During the mid-1980s, the D.C. Circuit fell into factional discord as a succession of judges appointed by President Reagan joined those previously appointed by Presidents Kennedy, Johnson, and Carter. The court’s opinions had become a “parade of horrors -- the slippery slope, the barbed jibe, the ad hominem jab, the bitter accusation, the catastrophic prediction,” recalled former Chief Judge Patricia Wald, a Carter appointee, before her death in 2019. Judge Edwards has written that “judges of similar political persuasions too often sided with one another . . . merely out of partisan loyalty, not on the merits of the case.”¹ He says that “it was so bad that I seriously considered resigning from the court.” Judge Ginsburg had a unique place on the court during the 1980s because she could not be aligned with any faction.

Throughout all of this, her demeanor was unfailingly polite and soft spoken. Even in Chambers, she never said anything disparaging or critical of another judge or an advocate, according to the Roberts. Michael Klarman, one of her clerks in 1983-84, and David Post recall the same, that she

¹ Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 Pa. L. Rev. 1648-49 (2002).

never uttered an innuendo or a snarky remark about another judge and was “never exasperated” by anyone. This was both natural and strategic, Edith Roberts says: “She always believed you would be more persuasive through mutual respect and the strength and detail of your arguments.”

With her judicial colleagues, she did her best to soften the court’s sharp divisions and “maintain a positive atmosphere,” recalls Judge Laurence Silberman, a conservative Reagan appointee who says that he and Ginsburg became “close friends on the court.” He remembers how Ginsburg and Wald urged him in 1987 to calm the troubled waters by reversing his votes to rehear *en banc* several politically charged rulings his conservative colleagues hoped to overturn.

“They said that there was too much tension on the court,” and that it would be better to let the panel decisions stand unless overturned by the Supreme Court. He was persuaded. “Bob Bork” – who at the time was Reagan’s nominee to fill a Supreme Court vacancy – “never forgave me for that,” says Silberman.

None of this means that Ginsburg was reluctant to use the pen to make a point. In a 1983 *en banc* decision upholding the right of members of the D.C. “Community for Creative Non-Violence” to sleep in camp sites in Lafayette Park in order to draw attention to the plight of the homeless, Ginsburg dealt a pointed blow to the dissent for contending that the First Amendment fully protects only spoken and written words and thoughts. “[I]t would be surprising,” she wrote, “if those who poured tea into the sea and who refused to buy stamps did not recognize that ideas are communicated, disagreements expressed, protests made other than by word of mouth or pen.”

Ginsburg biographer Jane Sherron de Hart contends that by the late 1980s her “moderating instinct” led her to vote with Reagan appointee Judge Silberman more often than with her fellow Carter appointee Patricia Wald. “By 1991,” she writes, “Ginsburg had jumped to the top in a survey of ‘leading centrists’ likely to be considered for the Supreme Court [S]he had thoroughly secured her reputation as a thoughtful, fair judge, renowned in judicial circles for her intellectual rigor, caution and collegiality.”

Two years later, President Bill Clinton appointed her to succeed retiring Justice Byron R. White.

A decade after that, Justice Ginsburg penned her own remembrance of her years on the D.C. Circuit. In the forward to Professor Jeffrey Brandon Morris’s book on the history of the Circuit, [*Calmly to Poise the Scales of Justice*](#), she wrote, “I consider it my great good fortune to have served on the D.C. Circuit. For thirteen years I thrived in the challenges that daily trooped before the Court of Appeals, a bench uncommonly vibrant on two complementary counts: the quality of its members is matched by the complexity and significance of the cases on its docket.”