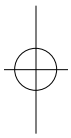
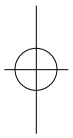
CALMLY TO POISE THE SCALES OF JUSTICE


CALMLY TO POISE THE SCALES OF JUSTICE

A History of the Courts of the District of Columbia Circuit

Written by

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with the assistance of

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for

The Historical Society of the District of Columbia Circuit

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To Dona
With Love

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Foreword

Prior to my 1993 appointment to the Supreme Court of the United States, I spent thirteen absorbing years on the bench of the Court of Appeals for the District of Columbia Circuit. It is a court like no other in the nation. In the view of many court watchers, it is second in importance only to the Supreme Court. Its history, and the history of the prominent federal District Court allied with it, should be better known. Established by Congress at the very time Washington, D.C., became the nation's capital, the courts of the District of Columbia Circuit gained judicial authority both federal and local in character. From the start and continuing to this day, a substantial number of major cases finally resolved by the Supreme Court originate in the District of Columbia Circuit.

The special character of this circuit, fully revealed in the twentieth century, springs from its dominant role in adjudicating government cases. Close to 70 percent of the suits lodged in the Court of Appeals involve the United States or a federal agency or officer on one side or another. The D.C. Circuit also differs from the regional circuits in that its appellate judges are drawn not from a particular set of states, but from a nationwide pool.

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. As the years unfolded, I became ever more certain that the history of the District's federal courts should be told in a manner accessible to interested lay readers as well as lawyers. My colleagues were of the same mind. Under the stewardship of the Historical Society of the District of Columbia Circuit, the decade-long endeavor was launched and sustained. Legal historian Jeffrey Morris, our unanimous choice as author, agreed to devote his fine mind and hand to the formidable

undertaking. I am pleased that in 2001, the bicentennial year of the federal courts of the District of Columbia, Professor Morris's comprehensive account of the courts' evolution is in print. *Calmly to Poise the Scales of Justice* illuminates the pathmarking contributions this circuit has made to law and justice in the United States. May the volume lead to further scholarly exploration.

Ruth Bader Ginsburg
Associate Justice
Supreme Court of the United States

Preface

My immersion in the District of Columbia Circuit began just over thirty-five years ago, with a paper written during my last year of law school on the judges and criminal decisions of the U.S. Court of Appeals for that circuit. My interest was initially spurred because the fathers of two of my friends sat on the Court. At that time, the only literature on the Court of Appeals consisted of articles about particular cases and on matters of the Court's administration. There was just one book, an anthology of opinions of one of the Court of Appeals' most distinguished judges, Henry W. Edgerton.

That paper provided the groundwork and stimulus for my doctoral dissertation at Columbia University, a much expanded study of the work of the Court of Appeals. After completing the dissertation, I moved on to cultivate other scholarly vineyards, although five years in Washington at the end of the 1970s as a member of the staff of Chief Justice Warren E. Burger gave me the opportunity to talk with the Chief Justice about his experiences on the Court of Appeals, to renew old acquaintances on that court, and to become newly acquainted with others of its judges.

Nevertheless, the D.C. Circuit was but a memory when Chief Judge Patricia M. Wald telephoned to ask if I would consider writing the history of the Court of Appeals and its predecessors. The only significant contribution to the literature on the Court since I had written my dissertation was a short history commissioned by the Court on the occasion of the nation's bicentennial. Although my initial reaction was to leave well enough alone, in the end I yielded because of the opportunity it offered to return to the subject of my earliest scholarship with the insights gathered over twenty-five years.

Writing the history of a single court is, in itself, a major undertaking. My task became far more complicated when the Historical Society of the District of Columbia Circuit yielded to the blandishments of Judge Gerhard

A.Gesell and his colleagues and commissioned a book that would not only trace the history of the Court of Appeals, but would embrace the U.S. District Court for the District of Columbia as well. The result was an enormous undertaking, yielding a long, sprawling manuscript, which required far more than the usual amount of shaping, cutting, and rewriting.

In that endeavor, I have been assisted by Chris Rohmann, a perspicacious editor and a talented writer, whose contribution to the finished work has been so substantial that it is properly recognized on the title page. In the revision of the book, I have also been invaluably assisted by the president of the Historical Society, Daniel M. Gribbon of Covington & Burling. Mr. Gribbon was no figurehead overseer of this project, but a hands-on participant without whom this book might not have seen the light of day.

Notwithstanding the substantive contributions of these two collaborators and of the many other contributors acknowledged below, all the judgments made in this book, as well as any errors, are those of its author.

A project of this magnitude is never completed without an accumulation of debts. I owe special appreciation to the Chief Judges of the Court of Appeals and of the District Court during the span of this project — Patricia M. Wald, Abner J. Mikva,and Harry T. Edwards; Aubrey E. Robinson Jr., John Garrett Penn, and Norma Holloway Johnson — with particular thanks to judges Wald, Mikva, and Robinson for the many courtesies they extended to me in the book's initial stages. Linda Ferren, the talented former Circuit Executive of the District of Columbia Circuit, was enormously helpful on a wide range of matters, as were members of her staff, including Jill Sayenga, Nancy Stanley, and Jackie Morson. Among the many others who worked at the U.S. Courthouse,particular mention should be made of James M. Davey, former Clerk of the U.S. District Court, and Linda C. O'Donnell of the staff of then-Judge (now Justice) Ruth Bader Ginsburg.

I am indebted to a number of libraries, including that of Touro Law School and its entire staff, headed by Daniel Jordan. The Harry S. Truman Presidential Library in Independence, Missouri, helped make a stay of few days very productive. Most of all, I am indebted to the library of the U.S. Court of Appeals for the District of Columbia Circuit. Its head librarian, Nancy Lazar, not only made her staff and other resources readily available, but offered many insights into the work of the Court of Appeals. I profited from the assistance of Theresa Sentella and Warren Juggins. Linda Baltrusch was not only enormously helpful in tracking down hard-to-find sources, but also proved a superb companion with whom to talk through research problems.

Over the years, a number of students have written papers on the work of the courts of the District of Columbia Circuit under my direction. Many of these were of assistance in writing this book. I ought particularly to single out the work of Vincent Geoghan of The City College of the City University of New York, Weslie Resnick of Barnard College, and Christopher Smith of the University of Pennsylvania. I have also benefitted from the able services of a number of research assistants, including Seth Muraskin, Richard Jacobson, Donna McElhinney, and Christine Lindwall of Touro Law School,and Shelly Hein of the University of Montana Law School. M. Raye Miller, of the Touro Law School, must be given special mention for her exceptional insights into the work of the courts of the District of Columbia in the nineteenth century.

I am indebted to Jeffrey Liss, of the D.C. Bar, and his colleagues, and to an able team of paralegals at Covington & Burling, for checking the numerous case citations throughout the book. Mary Jane Mullen of Smith College, and the staff of that college's Nielson Library, gave valuable bibliographic assistance in preparing the lists of sources. William Causey and Stuart Newberger of the D.C. Bar aided in the selection of illustrations. The index is the work of the meticulous Barbara Wilcie Kern.

Many scholars—law professors, political scientists, and historians—have offered useful advice over the years. One in particular must be singled out. The late Harry M. Jones of Columbia Law School, who was there at the outset of my research on the D.C. Circuit, not only shared his knowledge of the Court of Appeals and drew upon his friendships to facilitate access to the judges of that court, but critiqued my early work and, in all ways, was a role model for how professors should interact with students.

Over thirty-five years, judges of the U.S. Court of Appeals and of the U.S. District Court have been extraordinarily generous with their time, willing to sit down and talk with me, often at great length, about their work and the work of their courts. In writing this book, I have relied upon my notes from extensive interviews and conversations in the 1960s and 1970s with David L. Bazelon, Warren E. Burger, Harold Leventhal, Henry W. Edgerton, Charles Fahy, and Carl McGowan. During the course of this project I interviewed Spottswood W. Robinson III, George E. MacKinnon, Malcolm Richard Wilkey, Patricia M. Wald, Abner J. Mikva, and Ruth Bader Ginsburg of the Court Appeals. The District Court judges with whom I spoke were William B. Bryant, Oliver Gasch, John H. Pratt, Aubrey E. Robinson Jr., John J. Sirica, June L. Green, Harold H. Greene, Thomas A. Flannery, Gerhard A. Gesell, George H. Revercomb, and Louis F. Oberdorfer.

At the beginning of this project, two extraordinary judges oversaw the work: Ruth Bader Ginsburg, who was Chair of the Historical Society, and Gerhard Gesell. Judge Gesell's enthusiasm for the project was unbounded and he gave generously of his time for it. He took it so seriously and professionally that, prior to three full days of interviews, he prepared a series of memoranda as a basis for his discussions with me. Even without time to prepare, Judge Gesell was an enormous intellectual force, but with this preparation he was a wonder to behold. It is my great regret that he did not live to see the publication of this book. Fortunately, Justice Ginsburg has, and honors it with its foreword. Few persons this author has met during his lifetime have come near to combining her formidable intellect, judiciousness, and thoughtfulness.

Following the death of Judge Gesell and the elevation of Justice Ginsburg to the Supreme Court, the role of judicial shepherd was performed ably and graciously by Judge Louis F. Oberdorfer, who succeeded Justice Ginsburg as Chair of the Historical Society. The Society's Historian, Maeva Marcus, an old and good friend, has provided valuable insight and perspective.

The writing of a book consumes a great deal of time, too much of which is taken away from one's family. I can only say a deep "thanks" to David Brandon Morris and Deborah Helaine Morris for the sacrifices they made, as well as to my talented wife and companion, Dona Baron Morris, who was forced yet again to share a large chunk of her life with a book.

Jeffrey Brandon Morris
December 29, 2000

Introduction

This book is a history of two of the most important courts in the United States, the U.S. Court of Appeals and the District Court for the District of Columbia, and their antecedents. It attempts to trace the development of these courts over two centuries, to portray some of their most influential judges, and to consider the most important decisions and case lines. Some of the most memorable cases in American history have taken place in the D.C. Circuit, and more justices of the United States Supreme Court have been drawn from the Court of Appeals than from any other court. The Court of Appeals is now the undisputed chief tribunal for administrative law in the United States, and the District Court has become a principal venue for cases involving the separation of powers.

From the outset, the major court for the District of Columbia was an unusual hybrid. The Circuit Court of the District of Columbia, which existed from 1801 to 1863, had most of the trial and appellate authority of other federal courts of that era, but also heard civil and criminal matters that elsewhere would have come before state courts. This meant a diet of litigation over real property, commercial transactions, and family matters, as well as prosecutions for local crimes. The richness of that jurisdiction was qualified somewhat, however, by the confined geographical area of the District, its small population, and its rather specialized economy.

Far more important to the docket of the Circuit Court and its successors have been the cases derived from the courts' location in the nation's capital. These have ranged from prosecutions for contempt of Congress and political corruption to state trials of presidential assassins, from trials and appeals arising from political demonstrations and alleged breaches of national security to cases testing the powers of Congress, the President, and the independent regulatory agencies. Moreover, for well over a century, the power to issue the writ of mandamus to order a federal official to perform

a nondiscretionary action was held uniquely by the Circuit Court and its successor, the Supreme Court of the District of Columbia—an authority that provided a vital forum for oversight of the executive branch.

The courts of the District have been closely involved in the development of the city of Washington ever since its beginnings as a provincial village with muddy streets and grand designs. The racial mix of the population, the dominance of the federal government in Washington's economy, the involvement of Congress in the District's affairs, and the absence of representative institutions for most of the city's history have contributed to shaping the courts' unique role in the life of the District. The impact of the legal system on African-Americans—and vice versa—has been a constant factor, and the courts of the District have repeatedly played an important role in the struggle for racial civil rights.

This history proceeds more or less chronologically from the founding of the D.C. Circuit in 1801, shortly after the federal capital was established at Washington, through the 1980s. Each of the ten chapters is devoted to an important stage in the courts' history. They are demarcated by the lifespans of the present courts' predecessors or by significant eras—particularly those defined by presidencies in which the work of the courts was greatly affected by appointments to the Circuit bench and, in some cases, by bitter clashes between the executive and the judiciary.

The Circuit Court of the District of Columbia existed from 1801 until its abolition, in part for political reasons, in 1863. It had both trial and appellate jurisdiction, and a docket of both federal and local cases. In its first few years, the Court heard two notable prosecutions born of the contentious political climate of the young republic,including the trial of several participants in the Aaron Burr conspiracy. It also decided a range of cases spawned by the developing city, from local misdemeanors to litigation over land speculation. In this period, the landmark *Kendall* case established the Circuit's unique role in overseeing the actions of high officials of the federal government.

The Supreme Court of the District of Columbia succeeded to the jurisdiction of the Circuit Court in 1863. The Court decided *Kilbourn v. Thompson*, the most important nineteenth-century case limiting Congress's power to investigate, heard the prosecution for political corruption of the Star Route conspirators, and played a central role in the growth of the federal city. In the case of Charles Guiteau, the assassin of President James A. Garfield, it gave the most important opinion on the test for criminal insanity issued by any American court during the century.

The Court of Appeals of the District of Columbia was created in 1893, assuming the appellate authority of the D.C. Supreme Court. During the first three decades of the twentieth century, both courts heard, most notably, a number of controversial labor cases, including challenges to the use of secondary boycotts and contempt citations in labor disputes and a test of the District's minimum wage law. In this period, two prosecutions attracting nationwide attention were conducted in the District Court: the trials of those involved in the Teapot Dome scandal and a trial of prominent local bank officers at which two former presidents of the United States testified. During this era, the judges of the Circuit, especially of the Court of Appeals, were increasingly chosen from all over the country, setting a pattern that still holds true.

The courts of the District of Columbia Circuit, especially the Court of Appeals, were the beneficiaries of the enormously enhanced role and power of the federal government brought about by the New Deal. During the presidency of Franklin Delano Roosevelt, seven appointments to the Court of Appeals changed its character and philosophy considerably. Two of its judges, Fred Vinson and Wiley Rutledge, later became Supreme Court justices. Administrative law began to become an important area of law in the United States, and the Court of Appeals became a major participant in its growth. Both the Court of Appeals and what now was titled the District Court of the United States for the District of Columbia began to wrestle with civil rights cases of increasing importance.

President Harry Truman appointed several of the strongest appeals court judges of the century, in particular David L. Bazelon, Charles Fahy, and E. Barrett Prettyman. Some of the most pressing domestic issues Truman encountered as President—civil rights,loyalty-security, and labor relations—made their way into both courts during his administration, resulting in some of the courts' most significant jurisprudence. The courts proved critical in the battles against segregation in housing, public accommodations, and schools in the District of Columbia. In the uneasy political atmosphere of the early years of the Cold War, the courts handled several high-profile loyalty cases cautiously, tending to defer to the political branches. The era was bracketed by two incendiary cases arising from labor-management conflicts of considerable political significance: the contempt prosecution of United Mine Workers leader John L. Lewis and the litigation over Truman's seizure of the steel mills.

In the years of Dwight D. Eisenhower's presidency during the 1950s, the courts wrestled repeatedly with volatile questions, especially in the areas of

loyalty-security issues and criminal law. These struggles opened a fissure between the District Court and several of the judges of the Court of Appeals, as well as causing clashes among the judges of the Court of Appeals, especially between David L. Bazelon and the newly appointed Warren E. Burger. By the end of the 1950s, the Court of Appeals had become one of the nation's most closely watched courts, with a reputation for boldness and innovation, as well as for attracting controversy.

During the 1960s, the U.S. Court of Appeals for the District of Columbia Circuit was emerging as the nation's second most important court, its prominence deriving from the ability of its judges, the quality of its jurisprudence, and a docket more varied than virtually any other court in the country. This period, too, saw the appointment to the Court of a number of outstanding jurists, including J. Skelly Wright, Carl McGowan, and Harold Leventhal. In such areas as landlord-tenant relations and mental health, the Court of Appeals reshaped legal doctrines in a manner favorable to the poor of the disenfranchised District, and it greatly expanded the rights of criminal defendants. Concurrently, the Court continued to employ its rich administrative-law docket to press the regulators to represent the interests of the public rather than those of the regulated industries.

Rarely in the history of the United States has the government been challenged so often and so momentously as in the District Court for the District of Columbia during the presidency of Richard M. Nixon. It was through these confrontations that the District Court came of age as a national court, becoming the focal point for great tests of American constitutionalism in a cascade of separation-of-powers issues,including the struggle for control of the Nixon tapes, and the battle over publication of the Pentagon Papers.

While the two major courts of the District of Columbia Circuit lost their "state court" jurisdictions in the early 1970s, in that decade they achieved milestones in poverty and mental-health law, civil rights, and administrative law, particularly concerning the environment. In a period of explosive growth and rapid changes in government regulation, arising in a time of a weakened presidency, a more assertive Congress, and an active public-interest bar, the judges of the Court of Appeals engaged in a crucial dialogue about how courts should review administrative agencies and interpret statutes. By the end of the decade, the Court of Appeals for the District of Columbia Circuit was the nation's premier administrative tribunal.

In the 1980s, the era of Ronald Reagan's presidency, the dockets of both courts of the District of Columbia Circuit reflected the perennial concerns

that have confronted and defined the Circuit from the beginning: cases involving the city of Washington, civil rights, and the rights of the insane; prosecutions for political corruption and malfeasance and for attempted assassination of the President; constitutional tests of the separation of powers and First Amendment freedoms. The accelerating drive toward deregulation shaped much of the Court of Appeals' administrative-law docket,and one case in the Circuit affected just about every American—the antitrust prosecution that led to the dismantling of the Bell Telephone system. During this period, appointments to the Court of Appeals gave it a conservative majority for the first time since the 1950s. It remained, however, as it has been throughout its history, a court of extremely able judges holding strong, sometimes clashing, views.