

The Judge Who Climbed Mountains

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Abstract:

Shirley and Seth Hufstedler loved to climb mountains. The week before the U.S. Department of Education opened its doors in 1980, a profile of them reported that their “favorite hobby is mountain climbing” and noted they had made five trips to the Nepalese Himalayas. When interviewed decades later, Shirley Hufstedler fondly recalled how she and Seth “walked up and down mountains all over the world.”

Those were not the only mountains Shirley Hufstedler climbed. To ascend to the highest ranks of the legal profession she had to overcome enormous obstacles then facing women who pursued a legal career. Although the dream of making a woman’s first ascent to the Supreme Court ultimately eluded her, she blazed a trail for those who followed.



Rezumat:

Shirley și Seth Hufstedler au iubit cățărutul pe munți. În săptămâna dinaintea deschiderii porților Departamentului de Educație al SUA în anul 1980, într-o descriere a celor doi, se arăta că „hobby-ul lor preferat este cățărutul pe munți” și că acest cuplu făcuse cinci excursii în partea nepaleză a Munților Himalaya. Intervievată câteva decenii mai târziu, Shirley Hufstedler și-a amintit cu drag cum ea și Seth „au urcat și coborât munți din toată lumea”.

Acei munți nu au fost singurii pe care Shirley Hufstedler s-a cățărat. Pentru a urca pe cele mai înalte funcții ale profesiei juridice, ea a fost nevoită să depășească enormele obstacole întâmpinate de femeile cu o profesie juridică. Deși visul de a fi prima femeie care să accedă la Curtea Supremă nu s-a împlinit, ea a deschis drumul pentru cei care au urmat.

Keywords: mountain climbing, U.S. Supreme Court, Supreme Court Justices

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Judge Hufstedler

As a law student I was such a huge fan of Judge Hufstedler that I did something enormously foolish. I only applied to her for a clerkship. Only later did I realize how risky this was because she had only two clerks and no policy of favoring Stanford Law graduates.

I was drawn to Judge Hufstedler precisely because she was a trailblazer. She became an American success story by doggedly challenging the sexist stereotypes that had blocked women from legal careers. Despite graduating near the top of her class at Stanford Law School in 1949, no law firm would hire her for a legal job because she was a woman. Two years later, when future Justices Sandra Day O'Connor and William Rehnquist graduated from Stanford, Rehnquist had no problem finding a job, but no one would hire O'Connor because she was a woman.

Judge Hufstedler opened her own one-woman law practice. Her big break came when a former professor invited her to help defend the state of California in the *Arizona v. California*³⁷² water rights dispute being heard by the Supreme Court. Her brief-writing work on the case quickly earned widespread admiration, though she was not at the counsel table when the case was argued before the Supreme Court.

California Governor Pat Brown took notice of Shirley Hufstedler's extraordinary legal talent and appointed her to the Los Angeles County Superior Court in 1961. She then was the only woman out of 120 judges on that court. She quickly established herself as a valuable member of the court, pioneering a procedure for issuing tentative decisions

that helped reduce the court's enormous backlog of cases. When asked whether she felt like she had to do anything special to fit into a male-dominated world, Judge Hufstedler replied: "No, I just did my job. And I think doing my job and doing it capably was adequate to be able to help everybody else make a judgment that they didn't have a fox in the hen house."³⁷³

In 1966 Governor Brown elevated her to become an Associate Judge on the California Court of Appeal. Two years later, President Lyndon Johnson appointed her to the U.S. Court of Appeals for the Ninth Circuit. Judge Hufstedler was only the second woman ever to serve as a judge on a U.S. Court of Appeals and the only woman serving at the time. Today, 60 of the 167 active judges on the Courts of Appeals are women.³⁷⁴

On my first day as a law clerk, Judge Hufstedler told me that her job was "to do justice." This did not mean ignoring or rewriting the law, she explained, but rather having a fierce determination to apply it fairly. Her commitment to promoting equal opportunity had been demonstrated in 1974 when she dissented from a decision rejecting a challenge to San Francisco's policy of denying language services to Chinese students in public schools. Her position was vindicated when the U.S. Supreme Court unanimously reversed the Ninth Circuit's decision.³⁷⁵

Judge Hufstedler wrestled hard with difficult cases. She often expressed the view that "we just don't have the answer yet." When she did find what she thought was the answer, she was not afraid to take bold positions. Judge Hufstedler eschewed ideological labels at a time when it was far easier to do so than today. She engaged actively with all her

³⁷² 373 U.S. 546 (1963).

³⁷³ ABA SENIOR LAWYERS DIV., *supra* note 2, at 125.

³⁷⁴ Nat'l Women's Law Ctr., Women in the

Federal Judiciary: Still a Long Way to Go 1 (2016), <http://nwlrc.org/wp-content/uploads/2016/07/JudgesCourtsWomeninFedJud10.13.2016.pdf>.

³⁷⁵ Lau v. Nichols, 414 U.S. 563, 566 (1974).

colleagues and worked hard to reach consensus even with judges who sharply disagreed with her.

Judge Hufstedler considered her law clerks family and her fellow judges close friends. She was highly regarded by other members of the judiciary, including the Justices of the Supreme Court. Seven of her law clerks, including my co-clerk Janet Cooper Alexander and me, went on to clerk for Supreme Court Justices.³⁷⁶ Today, that would earn Judge Hufstedler the coveted designation as a “feeder judge” for Supreme Court clerks.

When I started work for Judge Hufstedler, I was the only male among the four persons in her chamber. She assigned me the task of making coffee in the morning for everyone in the office. I suspect she relished the role reversal after fighting to overcome gender stereotypes throughout her career. I was happy to be of service, even when at a charity function she introduced me to the Los Angeles chief of police, who was under fire for gender discrimination, as the law clerk who makes her coffee.

Judge Hufstedler worked hard, and she expected her law clerks to do the same. During Saturdays at the office she rewarded her clerks by taking us to lunch. No topic was off-limits during lunch, and she would emphasize that there is more to life than law. She was careful to instruct us on what to do during an earthquake, wryly noting how ignominious it would be to meet one’s end by being buried in the law books that lined the walls of her

chambers in the historic Spring Street courthouse.

Secretary Hufstedler

Judge Hufstedler’s appointment as the first U.S. Secretary of Education came as a complete surprise to her. She had just come back from a three-week vacation in Nepal in the fall of 1979 when she was summoned to Washington to meet President Carter, who had just signed legislation creating the new cabinet department. Even opponents of creating the department applauded her nomination. She was strongly endorsed by the editors of the *Washington Post*, who had opposed the new agency.³⁷⁷ Prior to her confirmation hearings, she reached out to members of Congress on both sides of the aisle.³⁷⁸ At her confirmation hearing on November 27, 1979, she was introduced by California Senators Alan Cranston and Republican S.I. Hayakawa. Hayakawa, who had been one of twenty-two Senators to vote against creating the department, stated: “With President Carter’s choice of Judge Hufstedler, I must say that my fears have been laid to rest.”³⁷⁹

Senators from both parties praised Judge Hufstedler’s fairness and objectivity. A profile of her for the *New York Times Magazine* reported that it was impossible to find a detractor.³⁸⁰ The only gossip about the nomination was the widespread rumor that Hufstedler was in line to become the first woman on the Supreme Court.³⁸¹ On November 29,

³⁷⁶ See generally TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* (2006).

³⁷⁷ Editorial, *The Hufstedler Nomination*, WASH. POST, Oct. 31, 1979, at A20.

³⁷⁸ Beryl A. Radin & Willis D. Hawley, *THE POLITICS OF FEDERAL REORGANIZATION: CREATING THE U.S. DEPARTMENT OF EDUCATION* 156 (1988).

³⁷⁹ *Id.* at 156-57.

³⁸⁰ Phyllis Theroux, *The Judge Goes to Washington*, N.Y. TIMES MAG., June 8, 1980, at 41, 102.

³⁸¹ See, e.g., Edward Walsh, *Education Nominee Told Her Chances for Supreme Court Not Precluded*, WASH. POST, Oct. 31, 1979, at A3. White House counsel Lloyd Cutler had described Hufstedler as “the best qualified” person for a Supreme Court appointment. Theroux, *supra* note 11, at 93.

1979, Judge Hufstedler's nomination was unanimously voted out of committee. The Senate confirmed her to become the first Secretary of Education by a vote of 81-2 on November 30, 1979.³⁸²

The task of bringing together 157 educational programs from multiple agencies into a cohesive whole was daunting, but the Department of Education opened in May 1980, nearly a month before the deadline set by Congress. Secretary Hufstedler later described it as "a murderous job" in which she "worked 18-20 hours a day, seven days a week," returning to California to see her family only once during Easter weekend.³⁸³

I joined the Department of Education as a special assistant to Secretary Hufstedler after finishing my clerkship with Justice White in August 1980. She assigned me to work on civil rights cases, where she was determined to help state college systems overcome the vestiges of segregation wrought by "separate but equal" policies.

After many years on the bench, Secretary Hufstedler seemed uncomfortable with the political dimensions of being in the executive branch. She admitted being uneasy about President Carter's efforts to involve the cabinet in his reelection campaign, but she was happy "to speak to groups about the President's record on education because I believe every word I'm saying."³⁸⁴

President Carter was defeated in the 1980 election by Ronald Reagan, who had vowed to abolish the Education

Shirley Hufstedler never reached the Supreme Court, but she climbed many other mountains at a time when it was much more difficult for women to do so.

Department. Before leaving office, Secretary Hufstedler wrote a warm, open letter to her successor, Terrell Bell. In it, she noted that "we were among the last industrialized nations in the world to create a Cabinet-level department for education. I do not believe we want to be the first to dismantle one."³⁸⁵

The official poster celebrating the opening of the Department of Education features a reproduction of Josef Albers's *Homage to the Square: Glow* and the caption "Learning Never Ends." Secretary Hufstedler stated that she never regretted leaving the bench to become the Department's first Secretary because "[b]uilding a new Cabinet-level department taught me more than I learned in all my years on the bench, and I learned something every day of those 18 years."³⁸⁶

Conclusion

Following her return to private life, Secretary Hufstedler practiced law, taught and lectured in several countries, chaired the U.S. Commission on Immigration

³⁸² One of the two negative votes was from North Carolina Senator Jesse Helms, who objected not only to the creation of the department but also to Hufstedler's involvement with the Aspen Institute, which he described as a bunch of "secular humanist[s]." WILLIAM A. LINK, *RIGHTEOUS WARRIOR: JESSE HELMS AND THE RISE OF MODERN CONSERVATISM 179-80* (2008).

³⁸³ ABA SENIOR LAYWERS DIV., *supra* note

2, at 94.

³⁸⁴ Adelson & Crawford, *supra* note 1.

³⁸⁵ Shirley M. Hufstedler, *Open Letter to a Cabinet Member*, N.Y. TIMES MAG. (Jan. 11, 1981), <http://www.nytimes.com/1981/01/11/magazine/open-letter-to-a-cabinet-member-by-shirley-m-hufstedler.html?pagewanted=all>.

³⁸⁶ *Id.*

Reform, and continued to climb mountains. She did not become a Supreme Court Justice.

What kind of Justice would she have been? An important clue can be gleaned from her testimony in 1987 on the confirmation of Robert Bork. Citing the model of Lewis Powell, whose seat Bork had been nominated to fill, Hufstedler stated:

*The nation now needs a great moderator as the next Associate Justice of the U.S. Supreme Court. That person must have the ability to help the Court maintain the delicate balance that the Constitution must preserve if it is to continue to be the stabilizing, yet dynamic, force that it is in our country today.*³⁸⁷

Looking back on her career in 2008, Shirley Hufstedler was asked what the best career advice was that anyone had ever given her. Her response:

*I don't remember anybody ever gave me any particularly good career advice. If anything, I remember being told I couldn't do very much of anything, and I just decided I wouldn't believe it. So it just reminds me to tell other people, 'Don't believe everything everybody else tells you about who you are or what you should do. You're going to have to decide that for yourself.'*³⁸⁸

Tales of her trekking in the Himalayas inspired me to visit Nepal after the close of the Carter administration. Like her, I shared a lifelong love of mountains fostered by my parents' penchant for summer vacations in Rocky Mountain National Park. Secretary Hufstedler convinced me that I would not see real mountains until I visited the Himalayas. She was correct.

I signed up for a climbing seminar led by a Sherpa who at the time was one of the few people to have climbed Mount Everest three times. Our group climbed Island Peak, a 20,000-foot mountain aptly named because it is surrounded on all sides by much higher peaks. After descending the mountain, we headed back toward Lukla to meet our return flight to Kathmandu. I was surprised and delighted to have a chance encounter on the trail with Shirley and Seth Hufstedler, hiking in the opposite direction on a trek to Everest base camp. I had never seen her so visibly happy. Two months removed from the burden of her duties in Washington, she was in the midst of the two things she most cherished—her beloved husband and the most spectacular mountains in the world. Her visible joy in the photo I took of them that day (see below) remains my favorite memory of her.

Later that day we had another surprising encounter on the trail with a group of Sherpas accompanying a tall New Zealander. He turned out to be Sir Edmund Hillary, the first person to climb Mount Everest. He stopped and visited with us, explaining that he was inspecting a new school his Himalayan Trust charity had funded in the Khumjung region. Sir Edmund could not have been nicer to us, acting as though our climb of humble Island Peak was a great accomplishment.

Sir Edmund will be forever known as the first to reach the summit of the highest mountain in the world. But as mountaineers well know, circumstances beyond one's control often preclude you from reaching the summit. Shirley Hufstedler never reached the Supreme

³⁸⁷ *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on*

the Judiciary, 100th Cong. 2331 (1987) (statement of Shirley Hufstedler).

³⁸⁸ ABA SENIOR LAWYERS DIV., *supra* note 2, at 214.

Court, but she climbed many other mountains at a time when it was much more difficult for women to do so. Her warmth, grace, wisdom, and passion for

justice enriched the world. I am forever grateful that I was able to walk with her for a tiny portion of her remarkable journey.



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