Stanford Law Review

Volume 69 March 2017

Shirley Mount Hufstedler, Pioneer

Janet Cooper Alexander*

Shirley Hufstedler was a tiny woman, but in every other way she was a giant—intellectually, legally, morally. She was a feminist legal pioneer. One of only two female graduates of the Stanford Law School class of 1949,[1] she became in 1961 the only woman among 120 California state trial judges[2] and in 1966 became one of two women on the California Court of Appeal.[3] When she was appointed to the Ninth Circuit in 1968, she became the only female federal appellate judge in the nation and only the second woman ever to serve as a federal appellate judge.[4] In 1979 she was appointed by President Carter to be the first Secretary of Education. It's fitting that her hobby was trekking in the Himalayas.

Judge Hufstedler was one of the most respected and cerebral federal judges. Simply put, I revered her.

* Frederick I. Richman Professor of Law, Emerita, Stanford Law School; law clerk to the Honorable Shirley M. Hufstedler, Judge, United States Court of Appeals for the Ninth Circuit, 1979-1980.

1. Cal. Appellate Court Legacy Project, Video Interview Transcript: Judge Shirley Hufstedler 3 (2007), http://www.courts.ca.gov/documents/Shirley_Hufstedler_6036.pdf (noting that Judge Hufstedler was one of two graduating women in a class of roughly two hundred).
2. Jill Leovy, *Shirley Hufstedler Dies at 90; Judge Served as First Secretary of Education*, L.A. TIMES (Mar. 31, 2016, 7:47 PM), http://fw.to/KrTO5hV.
3. She joined Mildred Lillie, who served from 1958 until her death in 2002. *See Mildred L. Lillie*, CAL. CTS.: JUD. BRANCH CAL., http://www.courts.ca.gov/documents/LillieM.pdf (last visited Mar. 3, 2017). The first woman appellate judge in California was Annette Adams, who served from 1942 until 1952. Born in 1877, Adams was also the first woman U.S. Attorney, the first woman to be appointed Assistant U.S. Attorney General, and one of the first two women to receive a law degree from the University of California. *Annette Abbott Adams (March 12, 1877 – October 26, 1956)*, CAL. CTS.: JUD. BRANCH CAL., http://www.courts.ca.gov/2673.htm (last visited Mar. 3, 2017).
4. Florence Ellinwood Allen was appointed to the Sixth Circuit in 1934 by President Franklin D. Roosevelt. She served until her death in 1966 at the age of eighty-two. *Judge Florence Allen Biography*, NAT'L PARK SERV., https://www.nps.gov/romo/judge_florence_allen_biography.htm (last visited Mar. 3, 2017).

It's not quite accurate to say that she was a role model to me, because she was so talented, so capable, so energetic and hardworking that it was hard to imagine oneself ever measuring up. She once told me that she went back to work two weeks after her son Steven was born. Knowing how hard and what long hours she worked, I asked how she had balanced a demanding job with having a young child. She replied matter-of-factly, and not jokingly, "I just slept less." I had no doubt that was her solution, but it did make it difficult to imagine that I could follow in her footsteps.

Sometimes I wondered whether she really needed law clerks, or if having clerks was just another form of public service, allowing her to mentor and train young lawyers.[5] Unlike every other Ninth Circuit judge at the time, she never had her clerks write bench memos; she read all the briefs herself anyway and was faster and better at analyzing the issues than her recent-graduate clerks would have been. We were assigned to cases only after oral argument, when opinion drafting began. Rather than our preparing her for oral argument through bench memos, the Judge alerted us when we should be sure to attend oral argument to watch exceptionally good advocates argue important cases.

Indeed, we didn't even work on all of her opinions, only difficult or complex ones. In more routine cases, the Judge simply dictated her opinions. Some years later, I heard her testify before the Senate Judiciary Committee, and in the transcript her extemporaneous responses to questions are indistinguishable from her prepared remarks in their clarity and eloquence.

She was immensely capable in every possible dimension. After nineteen years as a judge, with only a secretary and two law clerks working for her, she was appointed the first Secretary of Education and was suddenly responsible for bringing a controversial new government department into being by merging more than 150 programs from the Departments of Health, Education, and Welfare; Defense; Justice; Housing and Urban Development; and Agriculture into a single department with 17,000 employees and a budget of $14 billion.[6] She accomplished this mission brilliantly, not only managing a huge government department but, characteristically, establishing as its first priority protecting civil rights and assuring equality of opportunity with respect to race, sex, ethnicity, language, and disability.[7]

5. She did regard her clerkship selections as investments in the careers of future legal leaders.

6. Emily Langer, *Shirley Hufstedler, First Secretary of the Newly Created Education Dept., Dies at 90*, WASH. POST (Mar. 31, 2016), http://wpo.st/DTIZ2.

7. *See* Sam Roberts, *Shirley Hufstedler, Judge and Cabinet's First Education Secretary, Dies at 90*, N.Y. TIMES (Mar. 31, 2016), https://nyti.ms/1SD6vDH (quoting Secretary of Education John B. King Jr., who called her "a trailblazer and a champion for equity, defining the department's role as a protector of civil rights").

Shirley Hufstedler was one of the great liberal judges, and though liberals were a distinct minority on the Ninth Circuit at the time, she regularly commanded a majority on her panels through the rigor, tact, and persuasiveness of her reasoning. She was deeply committed to civil rights and civil liberties, women's rights, the First, Fourth, and Fifth Amendments, broad access to justice, and affirmative action.

The year I clerked for Judge Hufstedler, she delivered a speech in which she argued that in a series of decisions over several decades the Supreme Court had eroded the protections of the Fourth Amendment by upholding, in case after case, "invisible searches" such as wiretaps for "intangible things"—information, conversations, and the like.[8] By viewing the Fourth Amendment through the lens of common law concepts such as trespass that were focused on tangible things; by not acknowledging the importance of privacy interests—as opposed to property rights—in intangible things like biographical, associational, and communicative information; and by failing to appreciate the "onrush of technology"[9] that had vastly increased the government's ability to amass personal information about individuals, a majority had "gradual[ly] depreciat[ed]" the "rights secured by the fourth amendment"[10] and broken the link between the Fourth and Fifth Amendments by permitting the evidentiary use of intangible personal information compelled from defendants.

"It is fair to say," she wrote, "that the majority of the Court, deciding one case at a time, did not fully appreciate the synergistic effect" of its decisions.[11] She didn't mince words about the result, though.

> Zealous efforts of the Supreme Court and of Congress to protect us both from the fact of crime and the fear of crime have left law-abiding Americans today with little more protection from governmental spying, searching, and seizing expeditions than our colonial forebears had from writs of assistance and general warrants.[12]

On rereading the speech nearly forty years later, I'm struck by how presciently Judge Hufstedler discerned, and how clearly she analyzed, a threat to core constitutional civil liberties when the threat was just a speck on the horizon. The practices Hufstedler was talking about were *Eohippus* to today's Clydesdale. She worried about the threat to liberty from judicial authorization of primitive surveillance methods such as mail covers (copying down

8. Judge Shirley M. Hufstedler, Invisible Searches for Intangible Things: Regulation of Governmental Information Gathering, Owen J. Roberts Memorial Lecture at the University of Pennsylvania Law School (Oct. 17, 1978), *in* 127 U. PA. L. REV. 1483, 1493 (1979).

9. *Id.* at 1503.

10. *Id.*

11. *Id.*

12. *Id.* at 1486.

information on the outside of envelopes and packages sent through the postal service), individual landline wiretaps, physical bugs placed in homes and offices, and warrants or subpoenas for bank records and tax returns.

It was 1979—before airport security checkpoints and body scanners; before laptops and smartphones; before the Internet, cookies, GPS, and RFID tags. Before e-commerce, before private companies like Facebook and Google began to collect millions of pieces of information on consumers, before hacking. Before the secret Foreign Intelligence Surveillance Court and its secret, blanket warrants. At the time, who would have predicted a massive government surveillance program that would capture trillions of electronic communications over the phone and Internet, or that something called Big Data would make it possible to search and analyze all that information?[13] Who could foresee that every person would carry with them at all times a device the size of a deck of cards containing all of their personal information, letters, contacts, diaries, financial and health records, and photo albums, or that the government would argue that it could seize such devices pursuant to a warrant or incident to arrest and search them to read all of the intangible information located within?

The article is remarkable today for several reasons. First, it is a reminder that not so long ago even practices as seemingly mild (at least from today's perspective) as mail covers and subpoenas of bank records could so alarm an establishment judge that she would equate them with the writs of assistance and general warrants that impelled the Founding generation to revolution. Today, much greater intrusions by government and corporations are so commonplace, so seemingly inevitable and unstoppable, that we don't even register them as objectionable.[14]

Second, Judge Hufstedler correctly identified practices such as mail covers, wiretaps, and bugs as technological innovations that had fundamentally changed the Fourth Amendment landscape and foresaw that these were the leading edge of an "onrush of technology" that would create even more serious intrusions.

Third, and most importantly, she recognized that constitutional doctrine needs to adjust to changed realities, that rather than applying eighteenth-

13. *See* Jonathan Stray, *FAQ: What You Need to Know About the NSA's Surveillance Programs*, PROPUBLICA (Aug. 5, 2013, 2:20 PM), https://www.propublica.org/article/nsa-data-collection-faq (noting that the National Security Agency (NSA) collects "nearly everything a user does on the Internet," including "emails, Facebook chats, websites visited, Google Maps searches, transmitted files, photographs, and documents of different kinds"); *How the NSA's Domestic Spying Program Works*, ELECTRONIC FRONTIER FOUND., https://www.eff.org/nsa-spying/how-it-works (last visited Mar. 3, 2017) (explaining that the NSA's objective was "to create a database of every call ever made").

14. I fume every time I'm wanded at the airport, but my adult children can't understand why I consider this an invasion of privacy. *It seems normal to them.*

century property doctrines to current conditions we must ask whether the practices impinge on the intangible interests and the values of privacy and personhood that undergird the Fourth and Fifth Amendments.

These principles guided Judge Hufstedler through her long life in the law. As she eloquently put it:

> Without the creative power to interpret the Constitution, we could not have managed to save our freedoms through devastating wars and the multiple revolutions in geopolitics, economics, technology and society that have moved us from the isolated agrarian world in which our country was born to the interdependent, pluralistic, industrialized, urbanized nation we have become. . . .
>
> . . . .
>
> . . . . The struggle to adapt the role of the Court and the Constitution in a changing society is constant.[15]
>
> "Justice," "liberty," "welfare," "tranquility," "due process," "property," "just compensation" are neither neutral nor static concepts or principles. They are words of passion. They are words of dedication. They are words that cannot be drained of their emotional content and carry any meaning. None can be cabined without destroying the soul of the Constitution and its capacity to encompass changes in time, place, and circumstances.[16]
>
> History can illuminate some aspects of the draftsmen's intent in writing these glorious ambiguities, but history alone cannot teach us how to make the fourth amendment a living force in a constantly changing world. The vitalizing principle must always be the effort to adapt those constitutional concepts to the ever-changing demands of a complex, pluralistic society.[17]

We have always needed, and we still need, wise, humane, brilliant, and passionate judges who understand that their job is to protect and preserve the lasting values of the Constitution in a changing world. Shirley Hufstedler was the very model of such a judge.

---

15. *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).

16. *Id.* at 2334.

17. Hufstedler, *supra* note 8, at 1490.