

AN INTERVIEW WITH Judge Gladys Kessler

By Judge Michele D. Hotten

We have characterized a Waymaker as one whose contributions to the law, legal process, or judicial administration reflect a pioneering, courageous, or influential spirit. The essence of that definition is embodied in the Honorable Gladys Kessler, a renowned member of the U.S. District Court for the District of Columbia, who also received the Margaret Brent Women Lawyers of Achievement Award in San Francisco in August. I was privileged to interview Judge Kessler in Washington, D.C., on June 26, 2013.

Judge Kessler is the epitome of integrity, intellect, determination, fairness, and grace. Early on, she knew that she wanted a career that would be “intellectually challenging for a lifetime.” The fabric of her priceless efforts both on and off the bench reflect a common theme: a relentless dedication to the rule of law and a vision that the law can be a vehicle for change. Judge Kessler is committed to fostering a sense of justice that seeks clarity and equality. Illustrative of her long career of service was her participation as founding member and first president of the Women’s Legal Defense Fund, which may have been the first national organization that legally advocated in favor of critical women’s rights issues; her long-time association with the National Association of Women Judges, for which she also served as its third president; judge on the D.C. Superior Court, where she served as presiding judge of the Family Division, and became the catalyst for major advances in the administration of family and juvenile cases and projects, and, presently, an outstanding jurist on the U.S. District Court for the District of Columbia Circuit, where her numerous cases included an opinion upholding the constitutionality of the Affordable Care Act.

Her presence on the bench has profoundly impacted the evolving stream of justice. She endeavors to make judges more cognizant of their judicial responsibility to the Constitution, the rule of law, and the importance of remaining in touch with the reality of people’s lives. Judge Kessler fearlessly followed the road less traveled with determination, humility, and a sense of purpose. The measure of her legacy is incalculable and inspiring.

Judge Kessler, it is such an honor to be in your company. Let me start with some questions, and we will probably deviate because I’m very curious about how you perceive the direction of the law in family areas, privacy issues, and the like. But let me start first with: How did you develop your interest in the law?

Well, I knew that I was not going to follow the nice path my father would have liked, i.e., go to a good college; find a well-educated, hopefully Jewish, professional; and then, of course, live in the suburbs and have two to three children. I knew it wasn’t for me.

So starting from that premise, I had to figure out what to do with my life. I knew I had to be self-supporting, which was very important to me. We were very comfortable in my household. Not rich, but certainly comfortable. My father was very tight with money and so long as I was financially dependent on him, I felt that I couldn’t do the things I wanted to do. I knew I wasn’t fit for certain jobs that women were expected to take like teaching, secretarial work. And I wanted a job that would be intellectually challenging for a lifetime.



In college my first year, I was very fortunate in that I met a student who was interested in law school. I don’t know if she was a sophomore or she was a junior or senior, but she was definitely going to go to law school. And, while we weren’t close friends, she was a good role model for me because, after all, I went to college at either 17 or 18 and to hear that another woman maybe two years older than me was planning to go into the law made it perfectly acceptable for me to do, and something I could truly think of as a realistic alternative.

So, I got very interested and then somewhere along the way, I sat in some classes at the law school. I just wanted to sit in and get some idea of what in the world we were talking about because I didn’t know any lawyers. I’d never been in court, and I found it very interesting. My father wasn’t thrilled about my desire to attend law school and, even though things were less expensive in those days, they were still expensive. Cornell was an expensive school. I had a teeny little merit scholarship. And so my dad certainly wasn’t the least bit thrilled at law school, and my impression was that he wouldn’t help at all. So without his knowledge and my mother’s, I took more classes than I needed to. My aim was to graduate in the middle of my senior year and then work for the rest of that time. And I did this. When I made up my mind and I already had my credits and was clearly on the way to getting enough credits to graduate early, I told my father and my mother. I told him that since he had been prepared to pay the whole cost of Cornell, and living in the dorm, I would be saving him that money, so I thought he should contribute to law school costs the money I saved him, plus, of course, all my savings from working. I don’t know how I won that concession, but I did.

You mentioned a mentor that was a couple of years older. I'll characterize her as a mentor. Apart from her, who did you draw your inspiration from growing up?

I don't mean to sound arrogant, but there really wasn't anybody. I didn't know any women who worked outside the home. I mean, everybody was a homemaker. They raised their families. This was the 1950s, don't forget, middle '50s.

I read a great deal always and by my last year in high school, I was reading books that had great influence on me. My best friend and I—she's still my best friend—we thought we were very intellectual and we were reading books by Sartre on existentialism (laughter). We must have been pretty weird except there was a teacher that we had who was head of the theater department in high school and taught us English and was very weird in her own way, although she loved what she taught. She loved teaching English. She worked us very hard. And I guess she helped to open me up intellectually.

Well, that was the beginning of your written exposure. What do you believe has shaped your core years—circumstances, people, combination, evolution of thought process?

A certain combination. I don't think my thinking has changed dramatically. It has changed in that I've learned more and, therefore, I think, come to understand more clearly the complexities of people's lives, but you learn as you live. And my experience as a judge in superior court were just so eye-opening for me and I thought I was moderately aware of the world. But there's no question that luck also plays an enormous part.

For example, I was in my third year at law school. I was interviewing. I certainly wasn't getting any job offers. I was facing overt gender discrimination. For example, one law firm partner told me that he would hire me, but his partners would never stand for it. I was taking labor law, which I liked a lot. I was not one to go visit my professors at all. I think I was a bit too shy to do that. For some reason, I went to visit Professor Derek Bok at his office and told him what was happening.

He said, "Well, if you're interested in labor law, I'll set up an interview for you." And the interview went well and, of course, it takes forever to get a government job. But the bottom line was that I had a very, very happy and useful two years at the National Labor Relations Board [NLRB]. When I say useful, I was in the Appellate Division and the lawyers in there were very good. They were wonderful at critiquing your appellate briefs and very demanding, which was very good training. Within a year, I was arguing cases in the federal courts of appeal. My first argument was when I was less than one year out of law school.

It was a wonderful place to work. And it's very interesting. I don't know about the rest of the NLRB, but that section had a lot of women in it, only one of whom, and this I didn't figure out until I left, was a supervisor. But I didn't have much feminist awareness at that early point. Definitely there were a number of women like me, either directly out of law school or one or two years out. And it was a very good learning experience and the people were very nice. And, quite frankly, I don't think, other than promotions, that I was treated in any sexist way at all.

I loved politics; I always have. I guess I did see, even way back then, government and politics as a way to improve the lives of people. So, again, you talk about pure luck. I had no political knowledge and so I would take vacation days off from the board; I would walk the halls of the Senate; I would knock on people's doors; I would speak to the receptionist and maybe to some legislative assistant to say I wanted a job. People were very polite and they would suggest that I talk to X or Y or Z. And ultimately, lo and behold, I got a job. I can't imagine that would happen now. And it was a very interesting job. The senator I worked for chaired a committee on migratory labor. I was on his staff, but I did a lot of work for the committee.

He was up for reelection that year, so I also was sent to his home state to work on the election. I was with him for just about two years. It was a major seminal experience in my life on so many levels. I

certainly learned how Congress worked. That was fascinating. He gave me an enormous amount of responsibility. He was interested in mass transit and he had a big mass transit bill he was trying to get enacted. So I worked on that committee and then we actually got it to the floor, and I sat on the Senate floor with him while the debate was going on. Ultimately, it passed. I thought that was pretty heady, and I enjoyed it a lot. I learned so much. But I also learned a lot of distressing things, including that there were very few women in responsible positions. At that time, and I hope not now, it was a very sexualized atmosphere. I have to say that my senator was wise enough not to bother the women in his office. One interesting thing is . . . this is so funny in retrospect . . . he was in favor of the ERA. I don't know why, but I was not and I would argue with him about it. I don't know why, to tell you the truth. But he had excellent political instincts.

Then I went to the House side and worked with a congressman who was the absolute polar opposite. He ran the office differently. There were no shady characters. I didn't have as much responsibility because his AA was extremely knowledgeable and smart. But the House is so big and he was not a senior person, although he never had to really worry about the election. He was a Democrat, but he was not endorsed by the democratic machine in his district. And the kind of ironic thing that everybody always noted was that while he was very patrician in looks, in speech, although not in substance, his district was a lot of little Jewish ladies,



Judge Michele D. Hotten is co-chair of *The Judges' Journal* Editorial Board. She is an associate judge on the Court of Special Appeals of

Maryland and has been a Maryland jurist since 1994.

Italian ladies, people who were not of his world at all—but they loved him. He was authentic; he was who he was. He didn't pretend to be anything different. And he always talked substance to his constituents. After four years on the Hill, I had figured out that either I was going to be a permanent Hill staffer or it was time to get out and be a lawyer. And I knew I didn't want to stay up on the Hill permanently and that atmosphere was not for me. So, then I took a job with the Board of Education in New York.

I did want to come back to New York to see if that was where I wanted to live. And I was at that job over a year. I worked for what was essentially the employer's side of labor relations; I worked for a woman who was brilliant, but I'm sorry to say one of the meanest, nastiest people I'd ever met. As a young woman lawyer looking for a role model, I found that very distressing.

At the same time, two of my friends were thinking about forming a public interest law firm. We certainly had many conversations about it. At some point, they formally asked me to join them, and I asked for a week to think about it, and then accepted. Economically, it was not very appealing. I don't think we had any clients yet. I just agreed to do it. My father was aghast. Aghast. And we worked together about seven years. And that was one of the most wonderful experiences. We represented all sorts of consumer groups, all sorts of environmental groups. I handled rent strikes for people here in the city. We took on a partner who specialized in Title VII, and I worked with him a lot because I was interested in Title VII. One of my partners specialized in representing citizen groups who were fighting nuclear power plants in their areas. The substance was fantastic. We argued in the court of appeals all the time, and we were doing really wonderful things. We never made much money. But it was still a fabulous experience. It was also fabulous because the partners became such close friends and there were never any significant differences between us.

It was during that period of time that the Women's Legal Defense Fund was formed. And that, of course, was very

significant. That was '70 or '71. I was terribly excited. I was married by then, so I think it was '70. It was formed on literally a meeting in the living room of Susan Ross, who teaches at Georgetown, and is still here, in fact. During that time frame, some people came to me and asked if I would teach a course on women in the law. They said, "Well, we have the syllabus from NYU, and we will help you and we will give you the syllabus and you can come teach it with Susan Ross," who had recently graduated from NYU Law School.

I guess I had a lot of what can only be called *chutzpah*. As I think about it—starting a public interest law firm and teaching a brand-new course—I don't think I'd have the courage to do it now. I mean, we didn't know what would happen moneywise. Susan and I taught for either two or three years at GW. Of course, we met lots of wonderful students. I learned a lot about Title VII and other civil rights statutes. I was very, very happy, but it took a lot of time.

On a very particular day, which I remember well, a wonderful man who I knew and had played bridge with for quite a while with his partner and with my best friend and her then husband called me. He was chair of the Nominations Commission for the District of Columbia. He changed the superior court practically singlehandedly. His name was Fred Abramson. And we now have a foundation in his honor. We created it upon his death to provide scholarships for D.C. children and actually just had a fund-raiser this week. We focus on a very intense mentoring program so that kids make it through college and many of them have. A number of them were at our fund-raiser this week, so that was delightful. Anyway, Fred called and I was litigating and he said, "What would you think about being nominated for a judgeship on superior court?" I knew instantly and I said, "Yes, I would love to apply." And so I did.

It's a huge court. It processes zillions of cases. And I'm not saying that everything was perfect over there, but I am now chair of the Disabilities and Tenure Commission, which is a fairly powerful institution in that we recommend people

for reappointment by the president and have disciplinary authority over superior court judges, but I was, and am now more than ever, aware of what an outstanding court it is. Our Commission never reviews the substance of what they do—that's for the court of appeals—but we do address lots of other issues covered in the Code of Judicial Conduct.

It is a superb, hard-working court constantly making improvements to help the District of Columbia community. Unfortunately, there was a view that superior court is "inferior," which infuriates me. When it was announced that I was going to try and get on it (under our statute, we submit three names to the president and the president nominates), a lot of my friends called, so-called uptown lawyers, and said, "Why in the world do you want to do that? It's a terrible court. It's this; it's that; you'll have to work like a dog." And, you know, I really didn't appreciate that, nor did I give it any weight anyway. Well, Jerry Ford was president. I knew I wasn't going to get it at that time.

Strictly because of party lines?

Yes. So, he made his choice, but it didn't get through the Senate in time and so the names were sent back to the Nominations Commission and that's when Jimmy Carter was elected. And the three names were sent up to him. And then I did get it. I had a lot of support from the bar and from big-firm lawyers because I knew them well. I had been active in the bar. The man who had been nominated before was on the list, of course, and he was a good lawyer, much older than me; I was still pretty young. I got that job when I was 39, I think.

Wow, that was young.

That was just a wonderful 17 years. I don't know how I was able to work so hard; I really don't. I just got involved in many projects at the court. Chief Judge Moultrie became chief judge and he made all sorts of changes in the court management. I think it was in the early '80s that Judge Moultrie made me presiding judge of the Family Division, and I did that for, I think it was, four years. There was so

much opportunity to make improvements in the Family Division and Judge Moultrie was totally supportive. You just had to tell him in advance what you were doing because if it was going to end up in the newspaper, he wanted to know about it before it happened. And this was very enjoyable, an opportunity to work with zillions of different agencies and community initiatives.

To make change, you've got to have everybody buy in. And that was incredibly rewarding. I took difficult calendars for periods of time so I would know what the problems were and how to deal with them. And I did six months of neglect and abuse cases, which is all anybody can usually take of neglect and abuse cases. And that was a horrific six months. You were making incredibly important decisions, scary decisions about whether to return a child, and you knew anytime you returned a child and there was a terrible result, it would be on the front page of the *Washington Post*. Now, knock on wood, that never happened to me.

Every day you were really making a difference, and I, in many ways, loved it. I did the adoption calendar, which has always been a huge bureaucratic problem. We set up the Domestic Violence Coordinating Counsel. And that brought all the players together—the police, the prosecutors, all the women's groups, the shelters.

Then I went into other assignments and ended up in the Criminal Division, which was great—great in the sense that you see the very best prosecutors and criminal defense lawyers. And those were very difficult cases. It was murder 1, murder 2, and sex crimes against children. So, it wasn't happy, but it was so challenging to have the best lawyers every day.

But I certainly was ready for the intellectual challenge of being here on the U.S. district court. And also the confirmation process was not nearly as difficult as it is now. The nominations for appellate courts were much more scrutinized than those for the district courts. There wasn't the vitriol that exists now and incivility and small-mindedness. Consequently, I didn't have any trouble getting through the Senate.

Judge Bryant was on this court then. And this building was named for him. He was here for many years. He was here and working into his low 90s. And actually working, doing short criminal trials. So, that's kind of my legal career. Our law firm really, I'm sorry to say, we broke up and the one partner left. The rest of us remained.

What events during your career have shaped your assessment of the law as a vehicle for change? You seem to be very much in touch with using the law for change.

Well, I litigated class actions, and I've had for a long time a big Medicaid class action on my calendar. I have over the years and before the *Walmart* decision concluded that they're really not, in many instances, an effective vehicle. In employment cases, they can be. But they've been used to try and clean up prisons, to try and get children their Medicaid services. In terms of public services, I think they're not effective for the simple reason that once liability is found, if it is found, you get to the point that a judge is supervising, as part of the remedy, the executive branch. First of all, a judge doesn't know how to run an agency. That's not even appropriate. It is so foreign to the procedural way in which the judiciary operates. It's very hard to get straight answers about things. And I don't mean that people are lying to you, but it is hard to get an overview of how an agency is complying with a complex remedial order. And I do believe that the public interest bar has very much cut back on those kinds of cases.

But how do you manage a remedy that must be adhered to by a separate branch of government? How do you keep the lines between the three branches of government in place and yet still manage the remedy?

Perfect question. One thing you do is in the final order you write at great length, based on the parties' proposals, going into as much detail as humanly possible. You use numbers. You use percentages. We have them in my Medicaid case. You use time deadlines. Another thing you can do is appoint, after much vetting, one or two

people to be monitors of the class action. In my Medicaid case, I have a very knowledgeable person, who for many years taught at Johns Hopkins. That's why we hired him. Now he's at a very fine consulting firm called Mathematica. He has stayed on with us at very modest rates. I don't call him a manager. He really operates in a slightly different way. But you've got to have a neutral human being who's very knowledgeable about the substantive area.

Medicaid, for example, is very complicated. You go to the federal statute; you have the federal regulations; then we have our own local regulations. You just use your discretionary powers as much as you can.

There is a quote from Frederick Douglass, "If there is no struggle, there is no progress." So, when the struggle takes place, progress is achieved, and then it's almost like a relaxing of the muscles, as opposed to a continued vigilance. If you had total power and discretion, how would you alter or encourage other judges to effectuate change, keep the momentum going, and you pick whether it be civil rights or something else?

I think it's important to stay as close to our standard judicial model as possible. But you've got to educate judges. First of all, basically, we all come from a comfy world. Second of all, we live in a comfy world, and I think that we have to go out of our way to do all we can to keep in touch with the reality of people's lives. And that's hard to do. I don't think in most cases judges are disinterested or don't want to know what's happening in the world. There are so many organizations in town, most of which would be delighted to have a judge show up, and we're invited to many, many things, bar events in particular. And we have intellectual challenges all the time. That's part of why I read so much. But just reading is not enough either. You have to get out and be with people and observe people.

What aspects of the law have appealed to you or impacted you over time?

I'm still interested in a lot of the family issues. Not all, but certainly the

family issues that affect children: adoption, neglect, and abuse. It carries over into the criminal areas. We have a lot of criminal cases in this court now involving prosecutions under federal law for the interstate dissemination or creation of child pornography. And that was a big push from the Bush administration. Those cases mostly plead out. Some don't; some are foolish enough to go to trial. And the reason I say foolish enough is because there are mandatory minimums that are very high: 10-year mandatory minimums. And what you see are defendants that you wouldn't expect to see. They are mostly pillars of the community, well-educated, working people of all kinds—social workers, doctors, rabbis, ministers, lawyers. It takes your breath away. So, that's a very interesting area to work in. And in its way, terribly, terribly sad. You are ruining the lives of most of those defendants when you impose the mandatory minimum. But then you think of the despicable, disgusting pictures and videos that are out there. And I've seen some of it because, if you go to trial, you have to preview it so not too much gets to the jury.

I've always been interested in [Freedom of Information Act] FOIA cases because, while it is a very technical statute and not the most exciting, it is, in my view, an incredible aid to learning what our government is doing. You can get so much information that is valuable and necessary, and you can uncover so many issues. It's hard for the government to comply. There are millions of requests for information. And the statute is unrealistic because it says the government has to respond within 20 days. Everybody knows that's impossible.

And I'm very interested in health care issues. I had the big health care decision, upholding the constitutionality of the Affordable Care Act. And now regulations have to be written by [Department of Health & Human Services] HHS, and they will soon be challenged. So, there's a lot that's going to come into the courts, not immediately, but soon. Then there are the First Amendment challenges to that statute, which are not easy. They raise tough issues about what people can

be forced to do even though it's against their religious beliefs. So, that can be very hard. I think there's going to be a lot of litigation about that.

The other area is national security. There are, I believe, well over a hundred people languishing at Guantanamo Bay. Most of that litigation is over now. But the national security issues are certainly not going to go away, especially with recent disclosures.

But how do you balance the need to keep the country safe with individual rights with privacy, the significant Fourth Amendment issues? A judge has to consider that.

Absolutely. I don't have an easy answer to that. You just examine the specific facts of each case. You apply and construe a particular statute. And you parse that statute word by word. You may have to consider whether the statute itself is constitutional, as really the first issue, and then come to a reasoned decision. I don't have any formulas about that. I don't think anybody does, really. A lot of people want a very broad statute that, for example, allows for the permanent detention of the people at Guantanamo; others want the existing statute clarified. That may or may not happen. I don't know. That area is becoming more important every day. And there's the fundamental question of what are we doing with a secret court?

There are and have been fine judges on that court, and I am sure they do their best. But no one knows what they're doing. Now, you have to give a lot of thought as to how you structure the handling of cases that are so difficult and potentially dangerous to our security. And I don't pretend to have a simple answer to that.

You probably don't perceive yourself as a trailblazer.

No, I don't.

But assuming, arguendo, that you are, what points of wisdom could you provide young judges, young lawyers?

I hope this doesn't sound like Pollyanna, but it is what I think. And it is always: Do

what you believe is fair and just *so long* as it doesn't conflict with controlling precedent. If you can't follow the law, which is the fundamental principle that we should operate on, and you can't do it in good conscience, then you should leave the judiciary and seek to obtain your goals in other ways. But, while I certainly think that judges have views, political views, and that, to some extent, they can't but help affect decisions, the bottom line is that every judge should be doing their human best to follow the law as they interpret it.

To what extent should judges be advocating a particular position?

I'm not at all sure they should be. They can be advocating procedures to make the courts fairer, more effective, more timely. That's a real problem for all of us. But I don't think anybody has any problem with that. But there's no question that policy-making is for the legislature. It has to be that way, whether we like who's in power or we don't. Otherwise you have chaos or a dictatorship, which is why I consider myself a conservative. I am always aware of what the boundaries of my authority as a judge are.

We, the judges, don't run the world, and we're not supposed to. You know we're always engaging in self-criticism. You have to; that's important to do.

Tell me how significant receiving the Margaret Brent Award is to you.

It's very, very significant. I've looked over the list of prior recipients, and it's an awesome list of spectacular women who have made very, very great contributions to law in general and to helping women enter the legal profession and achieve influential positions, whether they're lawyers or judges. I do remember saying a couple of years ago to a very close friend that this was the only award I would really want to be given.

Do you believe that you have taken the road less traveled in your career?

In the Family Division, we had so many controversial cases. I don't know if the words are *less traveled*. If you just look at

the Affordable Care Act, people were counting how many judges were upholding it and how many judges were not. And it was pretty even, so in that sense it may not have been less traveled, but, you know, that was one tough decision that you wanted to get right.

The Women's Legal Defense Fund, which now is the National Partnership for Women & Families, has played a very, very important role over the years. I am still active in the National Association of Women Judges. We have been very influential, particularly at the state level, in terms of improving treatment and processing of domestic violence cases and child support guidelines and instituting gender bias task forces that were very effective in bringing change in many states. Unfortunately, we have not been very effective in convincing the Federal Bureau of Prisons to provide more programs for women, and to recognize the enormous benefit that families—and ultimately society—receive from facilitating contact with loved ones outside of prison—especially children.

The International Association of Women Judges [IAWJ] has a much harder road than we did here in the United States. I mean, the oppression of women on almost every continent except Europe is horrendous. I think in many ways the IAWJ has the potential to make even more difference because it is worldwide. We even have members from the Chinese judiciary, many members from Latin American countries, many from African countries. They're going to hold a big conference here in Washington in 2016, which will be very exciting.

Judge Kessler, thank you so much. I have absolutely enjoyed this interview.

You asked very good questions. While I am proud of my accomplishments, I know so many women who have accomplished so much more. ■