NEVERTHELESS, SHE DISSENTED: A PERSONAL TRIBUTE TO RBG

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As a woman lawyer, the honorable Justice Ruth Bader Ginsburg holds an important position of influence to me. I was a judicial clerk on the D.C. Circuit from 1990 to 1991, when Justice Ruth Bader Ginsburg was a judge on that still-auspicious court. I worked for RBG's colleague and fellow female liberal judge, Patricia M. Wald, who was the Chief Judge of the D.C. Circuit that year. Judge Wald was a mentor to me; equally, RBG was an inspiration. Both influenced me and my decisions about balancing family and career, and inspired me to overcome my own personal obstacles to pursue my career. Thirty years since becoming a lawyer, these women still inspire me every day to be "someone who use[s] whatever talent she ha[s] to do her work to the very best of her ability" and in doing so, "make life a little better … not just for oneself but for one's community."

At the age of 21, after marrying her college sweetheart, RBG worked for the Social Security Administration office in Oklahoma. Both Ruth and her new husband, Marty, had been accepted into Harvard Law School, but Marty was called into active duty as part of the Reserve Officers' Training Corps in the Army Reserve at Fort Sill, Oklahoma. RBG was demoted after becoming pregnant with her first child, whom she gave birth to in 1955. I remember being shocked by this when I first learned it, but then again, my own mother, just a few years younger than RBG, who had wanted to be an architect, had been told she could only be a teacher, nurse or secretary. I knew "that generation" had to fight hard to overcome gender discrimination. What I didn't know was that my generation would have to keep fighting just as hard . . . and my daughter's generation will, too.

In 1956, RBG enrolled at Harvard Law School, where she was one of only nine women in a class of about 500 men, and where she was told by the dean that she was "taking the place of a man." Unable to find a law firm in New York that would hire a woman lawyer after she graduated, RBG landed a prestigious judicial clerkship, and then became a professor of law at Rutgers Law School, where she later received tenure. (This reminds me of Justice Sandra Day O'Connor, who, after graduating at the top of her class from Stanford Law School in 1952, applied to New York "white shoe" law firms for an associate position, but was offered the job of legal secretary instead. My previous boss, Judge Pat Wald, who graduated from Yale Law School in 1951, landed a job at a new firm in D.C. called Arnold & Porter. Several of the partners at the firm had wives who were lawyers, so it was not a foreign concept. But, I digress by mentioning these other important female legal trailblazers.).

RBG co-founded the Women's Rights Law Reporter, the first law journal in the U.S. to focus exclusively on women's rights; she taught at Columbia Law School, where she became the first tenured woman and co-authored the first law school casebook on sex discrimination; and she spent a year as a fellow at the Center for Advanced Study in the Behavioral Sciences in Stanford, California from 1977–1978, my alma mater. RBG co-founded the Women's Rights Project at the American Civil Liberties Union (ACLU), and became the Project's general counsel, arguing and winning gender discrimination cases before the U.S. Supreme Court, on which she would later sit. She wrote the brief for Reed v. Reed, 404 U.S. 71 (1971), in which the Supreme Court extended the protections of the Equal Protection Clause of the Fourteenth Amendment to women. RBG continued to work on the ACLU's Women's Rights Project until her appointment to the federal bench in 1980, and was known as the Thurgood Marshall of women's rights.

When she was a professor at Columbia, RBG was called by her son's school teacher on a monthly basis about his behavior. She recalled for an interview that she finally told the teacher that her son had two parents and that it was his father's turn to take the call. After that, the teacher only called about once a quarter because, as RBG said, it was harder to call when they would be taking a man away from his job than a woman from hers. I was always impressed by RBG's husband, Martin Ginsburg (she called him "Marty"), a prominent tax lawyer and law professor, who supported her career. She said that Marty was the only man who appreciated her brain. Marty said that "I think that the most important thing I have done is to enable Ruth to do what she has done." Marty set the standard for supportive spouses, and RBG allowed us women to demand nothing less.

During my clerkship year on the D.C. Circuit, there were only three liberal judges on the court – Chief Judge Pat Wald, Judge Abner Mikva, and Judge Ruth Bader Ginsburg. I remember the dissents clearly from my time spent clerking for Judge Wald. More often than not, the majority was overturning law previously created by the liberal judges. It was a tough year for those judges, and by association, their law clerks. We were a band of brother and sisters, wearing a path in the carpet between the three judges' chambers as we traveled between our respective nests to collaborate on research and help each other compose compelling arguments for the judges to bring to conference. With each case, we'd have a moment of excitement and hope leading up to oral argument and the judges' conference, followed by the falling sense of defeat when our judges returned to chambers dragging with them the task of writing a dissent. I remember feeling the hope fade to doom as we added a dissent to another majority opinion that overturned one of the previous majority opinions written by one of our judges. By the end of that year, the sense of defeat became more of an assault on each of the liberal judges. I recall Judge Wald commenting that she had only written dissents all year. It had a real impact on her. No doubt, it had the same impact on RBG.

Similar to that period I recall from the D.C. Circuit, RBG became known in her years on the Supreme Court as the "great dissenter"; she wrote over 200 dissents, nearly the same number as her penned majority opinions. She said, "Dissents speak to a future age. It's not simply to say, 'My colleagues are wrong and I would do it this way.' But the greatest dissents do become court opinions and gradually over time their views become the dominant view. So that's the dissenter's hope: that they are writing not for today, but for tomorrow." RBG believed the United States Constitution is a living document that was originally and still is intended to adapt to the times. This is opposed to strict textualism, which requires that constitutional interpretation be based only on the text of the Constitution and what the common meaning of the language was at the time of its adoption. She stated in an interview in 2013 that she was part of the liberal opposition to what she called "one of the most activist courts in history."
Let us not forget, RBG had significant impact as an author of key Supreme Court majority opinions and she was one of the rare jurists who could bring different views together, in particular bringing Justice Kennedy over to her side as a swing vote. One of her favorite majority opinions ruled that the Virginia Military Institute's male-only admissions policy violated the Equal Protection Clause. She and her three liberal colleagues on the Supreme Court needed a fifth vote to achieve a majority. Justice Anthony M. Kennedy served that role and continued to do so more than any other conservative justice until he retired in 2018. With that coalition, cases on abortion, affirmative action, gay rights and the death penalty went to RBG's liberal bloc.

In 2013, RBG wrote a dissent in Shelby County v. Holder, a case involving limitations to the Voting Rights Act of 1965. In response to the majority stating that the Civil Rights Act was no longer needed, she wrote that "[i]t is like throwing away your umbrella in a rainstorm because you are not getting wet." I imagine if that case had been heard in 2020, she would've written that it is like throwing away your umbrella while you are standing outside in a 100-year storm. Justice Ginsburg, and my own boss Judge Wald, both held out hope that the dissents they had written or joined would someday become the majority. RBG once wished aloud that Citizens United would be overturned. There are countless other dissents of hers that should be majority opinions.

If you are reading this, you may be wondering what this is doing on an environmental law blog. First and foremost, I am a woman lawyer influenced by RBG and I am channeling my grief at her passing by writing this post. RBG paved the way for me and other women to follow our passions, whatever they may be, and to not be dissuaded by barriers placed in our paths. But, we also owe RBG a debt of gratitude for her impact on the environment.

RBG helped establish critical Supreme Court precedent in 2007, joining Justice Stevens' majority opinion in Massachusetts v. EPA, which affirmed EPA's power to issue rules limiting carbon pollution from cars, power plants and other sources. This opinion set up a legal battle over the extent of federal authority in environmental law that is still being fought today, and likely will be fought for years to come. In 2011, RBG brought the entire Court together in American Electric Power v. Connecticut to rule unanimously that EPA has authority to target greenhouse gases. In that landmark climate case, RBG wrote that private entities and states could not sue power companies for their contributions to climate change under federal common law.

In 2000, in Friends of the Earth Inc. v. Laidlaw Environmental Services Inc., RBG established a broad view of standing for environmental groups to sue, ruling that the fact that the company had stopped operating the facility releasing pollutants into the North Tyger River in South Carolina was not a barrier to the lawsuit because the company could restart their operations, and their discharges, at any time. She wrote that the plaintiffs had suffered "injury in fact" and they had standing because they had raised "reasonable concerns" about the discharges. This increased the ability of citizens' groups to sue, which was an anathema to dissenting Justice Antonin Scalia and other conservative justices who sought a narrow view of standing.

In a major Clean Water Act case that argued for broader applications of the statute, National Association of Manufacturers v. Department of Defense (2018), RBG joined the Court's unanimous decision that Clean Water Act lawsuits must first be heard in district court. In 2014, she led a 6-2 majority that reversed a lower court and upheld an Obama rule limiting air pollution that floats across state lines. Just this past April, she was part of a majority that ruled on County of Maui v. Hawaii Wildlife Fund, interpreting the Clean Water Act to create federal jurisdiction over water that travels into waterways via groundwater if it is the functional equivalent of a point-source reaching navigable waters. And, in the 2006 landmark Clean Water Act case, Rapanos v. United States, which resulted in a splintered 4-1-4 decision, RBG joined John Paul Stevens' bloc, which was effectively a dissent arguing for sweeping federal jurisdiction over virtually any water feature. RBG was a consistent vote in favor of broad Clean Water Act jurisdiction, writing or joining in dissents in landmark Clean Water Act cases, including Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Engineers in 2000. Federal jurisdiction questions are widely expected to reach the high court again in the coming years.

What will happen to environmental cases now, and, in particular, who will win the ongoing war between federal and state jurisdiction over environmental matters? We can surmise how Justice Kavanaugh will vote on similar cases that come before the Court now, and, without RBG on the bench, we may see a Court that supports the Trump administration's efforts to roll back Obama-era vehicle emissions, water permitting and other standards. Ironically, while she was on the Court, RBG struck down EPA v. EME Homer City Generation, a decision Brett Kavanaugh had penned while he sat on the D.C. Circuit. RBG wrote that then-Judge Kavanaugh had failed to take into account the complexities of air pollution and that his opinion would create an impossible standard for EPA. RBG wrote that "[n]othing in the text of the Clean Air Act … propels EPA down this path."

I watched these two women inspirations in my life, Judge Wald and Justice Ginsburg, fight for what they knew was right and never tire of writing dissents. They dissented; they did not quietly allow their previous opinions to be overturned and new law to be created. They believed; they used their words to try to bring the pendulum back to view our Constitution without a political lens, as was intended for the judicial branch of our government. In a recent *Vanity Fair* article, RBG said about Greta Thunberg and climate change, "The young people that I see are fired up, and they want our country to be what it should be," she said. "One of the things that makes me an optimist are the young people." All of us, including the "young people," have her to thank for that fire and for the belief that we can keep fighting, keep dissenting, until we accomplish the seemingly impossible.