

Denver Law Review

Volume 63 | Issue 1

Article 5

February 2021

Jean Eberhart Dubofsky

Lawrence G. Weiss

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

Recommended Citation

Lawrence G. Weiss, Jean Eberhart Dubofsky, 63 Denv. U. L. Rev. 5 (1985).

This Article is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

JEAN EBERHART DUBOFSKY

LAWRENCE G. WEISS*

On the 4:45 P.M. express bus from Denver to Boulder on almost any weekday evening, a slender, youthful woman with large glasses sits by the window with a pile of legal documents in her lap. There is a look of intense concentration on her face as she reads her way through legal arguments and writes down her reactions in small precise notes. It is Jean Eberhart Dubofsky, the youngest member of the Colorado Supreme Court, making every moment count in the ceaseless struggle to balance her duties on the court in Denver with her interests and responsibilities as a wife and mother of two young sons in Boulder.

Since her appointment to the court in 1979, Justice Dubofsky has been successful in this balancing act partly because of the special emphasis she places on efficiency. She organizes her time carefully. By focusing on what has to be done and putting aside the non-essential, she makes the most of her worktime, even in the midst of RTD hubbub.

Like other professionals who have had to deal with the competing demands of a high professional position and a private life, Justice Dubofsky is practical and down to earth. Critics complained about her liberal views at the time she took her seat on the high bench, but Justice Dubofsky has not focused on any ideology—liberal or otherwise—in her work on the court. Her focus has been on the facts and the law in each case. The function of the court, she believes, is not to build ideological edifices, but to decide cases in a pragmatic way. She believes that the justices should deal only with the issues that are necessary to decide each case, that decisions should be narrow in scope, that the justices should not indulge themselves in expressions of personal philosophy, and that the court should not have to take every case and decide every issue. She believes in efficiency in the use of judicial time and court resources.

Jean Dubofsky was born in Topeka, Kansas, forty-three years ago into a family that placed a high value on education. Her father was a mathematics professor and her mother a librarian. Justice Dubofsky understood from her early years that she would not only go to college, but would also go on to graduate or professional school. She was successful in high school as a student, a debator, an editor and a school leader, and she was admitted to Stanford University in 1960.

At Stanford, as at other universities in the early 1960's, the stirrings of a new idealism among educated young people were beginning to gather force. Justice Dubofsky came to share in the campus concerns for

* Former Director of Public Affairs for the Denver and Colorado Bar Associations and former editorial writer for The Denver Post.

civil rights, women's rights and human rights in general. She began to see in law and government the opportunity to relieve suffering and oppression and to build a better society. When Justice Dubofsky graduated from Stanford in 1964, with high grades and good recommendations, she faced a choice between going on to graduate school to get an advanced degree in history or going to law school. A career as a lawyer seemed to her to offer both a better chance to make a difference in society and a better opportunity to find work and earn a good living at the same time. She applied to, and was accepted at, Harvard and arrived in Cambridge in the fall of 1964.

In many ways, Justice Dubofsky was not happy at Harvard Law School. Some of the professors seemed to be prejudiced against the few women law students. One in particular, who may have been the model for Professor Kingsfield in "The Paper Chase," announced in class that women would not be called upon except on the single "Ladies Day" when the class would be discussing less important subjects. Also, women were not to volunteer.

The law courses at that time appeared to her to focus too much on the legal problems and financial transactions of businesses, and not enough on the areas of public law which seemed to her to offer the best opportunity to bring about reforms in government. She enjoyed courses in labor law and local government law, but she was generally an unenthusiastic law student who did her work, passed her courses and waited for the time of graduation.

As graduation approached, she decided not to seek a job in a law firm, but to pursue her interest in public law by finding a place in Washington. The job she found was as legislative assistant to Senator Walter F. Mondale of Minnesota, seventeen years before Mondale became the Democratic nominee for President of the United States. During the job interview she told the Senator she disagreed with some of his views on foreign policy; he hired her anyway, and they became good friends.

The job in Washington was exciting and fulfilling. Justice Dubofsky wrote speeches, researched legislative issues and helped the Senator prepare for hearings. She prepared the major draft of Mondale's East-West Trade Bill, which took effect in 1969 and relaxed restrictions on United States' trade with communist countries. She was also responsible for the staff work on an amendment to the Civil Rights Act of 1968 which outlawed racial discrimination in housing sales and rentals.

Among the events in her new life in Washington was her marriage in 1968 to Frank N. Dubofsky, who had just graduated from Georgetown University Law School and passed the District of Columbia bar. They had known each other when they were both students at Stanford. In an exciting era, when the Great Society was beginning to take shape and the agony of the Viet Nam War was beginning to divide the nation, the Dubofskys felt at the center of things in Washington.

Frank Dubofsky worked for the D.C. public defender's program, while Justice Dubofsky worked for the Senator. Although they had

hoped to make a difference and work for some of the reforms they had talked about at Stanford, the Great Society had fallen into neglect. The Viet Nam War was poisoning the atmosphere, and Richard Nixon was elected to the presidency in 1968. After the election there was a turnover in government jobs and a change in the government's mood. The Dubofskys began to feel that Washington was neither a very stable nor a very hopeful place.

Justice Dubofsky and her husband wanted to become part of a stable community, where they could settle down and raise children free of the turmoil of the capitol. Friends told them of Boulder, Colorado, and about jobs that were suitable for both of them. They came to Boulder in 1969, he as a staff attorney with the Legal Aid and Defender Program at the University of Colorado Law School, and she as an attorney for Public Rural Legal Services in Boulder.

In her legal services job in Boulder, Justice Dubofsky had an opportunity to pursue her conviction that law and government could be used to ease the plight of the poor and to bring about reform. She handled few individual clients, but organized the resources of the legal services program to prepare class action suits, to secure rights and benefits under the law, and to pass new laws. She was one of the attorneys who, in *Euresti v. Stenner*,¹ won a decision that the Hill-Burton Act required that free or below-cost hospital services be provided to people in lower income groups. She drafted bills, lobbied in the Colorado Legislature and contributed in one way or another to the passage of about thirty new laws benefiting poor people.

She became an attorney for the Legal Aid Society of Metropolitan Denver in 1972 and a year later decided to try her hand at private practice as a partner in the firm of Kelly, Dubofsky, Haglund & Garnsey. The firm spent a considerable amount of time on pro bono work, civil rights cases, cases for the American Civil Liberties Union and lobbying for social legislation—the kind of work in which Jean Dubofsky was most interested.

In 1975, a new attorney general, J. D. MacFarland, invited Justice Dubofsky to become a deputy attorney general. She spent the next two and one-half years handling the administrative, budgetary and lobbying work for an office of more than 100 attorneys, as well as participating in the shaping of legal policy and the preparation of major lawsuits. At the statehouse, she enjoyed working with legislators of both parties. She liked the legislators and made friends among Republicans as well as Democrats. She worked to improve the morale and cohesiveness of the Attorney General's Office and the relations between the attorney general and the governor.

Her first son, Joshua, was born in May, 1975, shortly after she began working for the attorney general. Her second son, Matthew, was ready to enter his appearance in the fall of 1977 when Justice Dubofsky

1. 327 F. Supp. 111 (D. Colo. 1971).

resigned as Deputy Attorney General in order to devote her attention to both children. But she also became of counsel to her old firm—now Kelly, Haglund, Garnsey & Kahn—and she began to practice law again on a part-time basis a few months after the baby was born.

In 1979, Chief Justice Edward E. Pringle retired from the Colorado Supreme Court, leaving a vacancy which brought applications from many Colorado lawyers to the Supreme Court Judicial Nominating Commission. Justice Dubofsky was one of the applicants, and hers was one of the three names sent to Governor Richard D. Lamm after the Commission examined all of the applications, read the letters of recommendation and interviewed many of the applicants. The Governor appointed Jean Dubofsky to the Supreme Court bench as of July 16, 1979.

Justice Dubofsky and Governor Lamm knew each other when he was a legislator and she was a lobbyist, and, as Governor, he had occasion to confer with her and observe her work as Deputy Attorney General. She was known at the statehouse as an intelligent, well-educated lawyer with a good grasp of public issues, the capacity to get along with people and a good sense of balance in dealing with problems. Since her appointment, however, the Justice and the Governor have rarely seen each other. When they meet, mostly at large social affairs, they do not discuss the Justice's judicial philosophy or her opinions on the bench. She suspects the Governor doesn't always agree with her opinions, but he hasn't told her that.

Where does Justice Dubofsky stand as a Supreme Court Justice and in relation to her colleagues on the court? If there is a satisfactory answer to that question, it cannot be expressed in terms of a political polarity; rather, it must be expressed in terms of a political spectrum. The adjudication of legal and constitutional issues by a high court is not a political process or an exercise in political philosophy. The justices respond to the facts, the law, the evolving doctrines of the United States Supreme Court, and, in some cases, to the changing realities of American life. Moreover, the problems in many supreme court decisions do not lend themselves to approaches that can be called liberal or conservative. The court deals with many problems on which there is no clear liberal or conservative line to apply.

An example of this is the case of *People v. Deitchman*.² In that case, a major question was whether evidence that had been seized by police on the authority of a search warrant that did not correctly describe the place to be searched should be excluded under the fourth amendment to the federal Constitution. The affidavit on which the warrant was based listed the wrong address and did not link the defendant to the place to be searched. All of the justices agreed in a per curiam opinion that the evidence should not be excluded. They then set forth their separate views of the matter in four concurring opinions.

Chief Justice William H. Erickson argued that the address defect in

2. 695 P.2d 1146 (Colo. 1985).

the affidavit was a technical violation committed in good faith by police and was covered by a good faith exception to the exclusionary rule authorized in some warrant cases by the United States Supreme Court. Justice Joseph Quinn argued that the United States Supreme Court had specifically refused to apply the good faith exception to “an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.” Although he thought the Dietzman affidavit fit that description, he voted to uphold the conviction because he believed the defendant would have been convicted even without the challenged evidence.

Justice Dubofsky, unable to accept either position in full, focused on the fourth amendment’s requirement that a search warrant must be based on probable cause. She did not agree with Justice Quinn that there was no probable cause for the issuance of a warrant in this case. But she believed Chief Justice Erickson was applying the good faith exception more broadly than necessary to decide the case at hand and in a way that might invite violation of the fourth amendment. She argued that a good faith exception should be allowed in Colorado only in cases in which the police had probable cause to make the search. She wrote:

I would confine our analysis to the narrow facts of this case, and hold that the underlying rationale of the exclusionary rule permits the introduction of the challenged evidence here solely because the objective circumstances of this case demonstrate unequivocally that the police officer possessed probable cause at the time of the search, and that his failure to supply such information in the search warrant application was truly inadvertent.³

Throughout her public career, Justice Dubofsky has had an instinct for the middle ground, for bringing people with differing views together and for working out compromises. But she remains a private person. She does not like to argue with her colleagues, and often communicates her disagreements in writing. She enjoys time spent alone, and the solitude of a Supreme Court Justice’s life suits her well. When she is not doing the work of the court in Denver, in Boulder, or on the bus, she enjoys reading and gardening, but the court and her family takes up almost all of her time.

3. *Id.* at 1157 (Dubofsky, J., concurring).

