

Remarks at the installation of a portrait of Judge Douglas H. Ginsburg
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The first time Douglas Ginsburg would be my benefactor came in the fall of 1970 at the University of Chicago Law School. We were members of the entering class of 1973 and had not yet met. A disturbing rumor was sweeping the 1-Ls: someone in the class had allegedly been an operative in the Richard Nixon White House. That would be me—but I was dressed in the conventional jeans, sweatshirt, and sneakers, while Doug was conspicuous in a dark suit, wingtips, white shirt, and a very skinny black necktie. And so, as we both later learned, suspicion and ostracism were deflected from the true malefactor to an innocent bystander. That was doubly unjust, because Doug, in his own years before law school, had been a proto-Mark Zuckerberg—a college-dropout social-network entrepreneur, creating the first computerized dating service, Operation Match, in its time all the rage on campus.

Several years later, when we were both teaching at Harvard, I would again be a Ginsburg beneficiary. We had been battling around the old conundrum whether society shapes the path of technology or the other way around. Doug declared that we should make a study of the matter and teach what we learned. Our course, “Technological Change and the Law,” plumbed such cutting-edge issues of the day as whether copyright was just for poetry and prose or also for computer code, and the titanic collision of branch-banking restrictions with the development of the automated teller machine. Doug’s inspiration was a brilliant success and an intellectual feast.

At the end of Ronald Reagan’s first term, Doug would be my angel once again. I was running the regulatory policy wing of the Office of Management and Budget, and Doug was a deputy to William Baxter at the Antitrust Division, very likely to be the new chief when Bill returned to Stanford. I had decided it was time to take my leave, but my superiors told me they would accept my resignation if and only if I found a successor who would be better than me. That was a tall order indeed, so I turned to Doug. Despite the considerable career risk of leaving DOJ for OMB at that moment, Doug agreed to the move. And of course everyone else agreed immediately that I had abundantly fulfilled the condition for my departure.

In each of these cases, Doug was my benefactor not in the conventional philanthropic sense. Rather, he was a personified public good. His integrity and modesty; his gentle nature and undemonstrative demeanor; his great intellect and matter-of-fact disinterestedness; and his amazing industriousness and plain old-fashioned reliability—these provided a steady stream of non-rivalrous, uncompensated benefits to those around him. I have therefore made it a point to be in his vicinity at important junctures. Many others in this assembly have likewise been Doug’s personal and professional beneficiaries on innumerable occasions.

Now the virtues I have described are also the virtues of the judge. The judge’s essential function is to provide a public good—not only to decide a particular dispute justly, but to expound general principles in a clear and convincing manner for the guidance of bar and public. Courts work within the checks and balances of our constitutional structure, but the public goodness of judicial opinions is governed only by the regard of fellow judges and the profession—and excellence at its highest only by an individual judge’s character, intellect, self-restraint, and devotion to duty.

Doug Ginsburg was thinking like a good judge even as a law student; as I noted, he even dressed the part. During his years as law clerk, professor, author, and executive branch official, he acquired a deep knowledge of antitrust and administrative law, and of the mysteries of financial, communications, and environmental regulation, that have served the nation so well on the D.C. Circuit. Justice Scalia has said that the function of the Supreme Court in complex administrative litigation is to shoot the survivors. But things go much better when Judge Ginsburg is in the loop. *Chevron*, shlevron—he knows the world of the regulatory agencies; he sympathizes with, and is duly deferential to, their often impossibly difficult tasks and dilemmas; but halt right there, and woe betide you rule-making miscreants who practice bureaucratic aggrandizement at the expense of statutory law, or sheer willfulness gussied up as expertise.

And Judge Ginsburg’s contributions range further: To criminal and constitutional law, as in *United States v. Jones*, affirmed unanimously by the Supreme Court last term (a must for the reading list for today’s “Technological Change and the Law”). And, most important of all, to his distinguished tenure as Chief Judge, when he continued the tradition of Chief Judge Edwards in building real collegiality and mutual trust among judges of diverse viewpoints. True to form, this has been to provide a public good, not just an agreeable work environment. The D.C. Circuit has come to function as a *court* rather than a band of free-lance legal theorists; its decisions and opinions are famously clear, compact, and as consensual as circumstances permit.

Not that Doug is without strong personal convictions or incapable of forceful self-expression. He has maintained a crowded schedule of teaching and lecturing throughout his years on the bench, and produced an impressive body of legal scholarship. I can attest that he is at once collegial and adamant even as a co-author of academic articles.

How can we compensate such a prodigious provider of uncompensated public goods? Why, we can have his portrait painted and displayed for the ages in an august hall of state. How wonderful and how hopeful—in our age of broken government and never-ending political clamor—that this tradition of dignified gratitude should be sustained.