

PROLOGUE

A Braided Life

IF YOU PICKED UP THIS BOOK BECAUSE YOU WANT TO LEARN more about the beautiful German shepherd on the cover, you're in luck. Vixen, my guide dog, is even more amazing than she is beautiful. I'm eager to tell you all about her. But I hope you won't be too disappointed to learn that this is my memoir, not hers.

I've lived a rich and varied life: as a civil rights lawyer, as a federal judge, as a husband of sixty years, as a father of four, as a grandfather of eight, and now as a great-grandfather. I've spent my professional career in the pursuit of justice, and I could have written a memoir entirely about that pursuit. But unlike most lawyers and judges, I've been blind for over half my life due to a rare, inherited eye disease called retinitis pigmentosa (RP). Throughout my thirty years on the nation's second highest court, the United States Court of Appeals for the District of Columbia Circuit (known as the "D.C. Circuit"), I could neither read a

word of the thousands of legal briefs submitted to my court nor see the faces of the hundreds of lawyers who argued before me. A blind judge sounds like a cliché, I know—like the statue of Lady Justice wearing a blindfold and holding her scales. But it's no cliché to me.

I can't see, but I can listen closely. I didn't need to see the lawyers to hear their arguments, and I absorbed all the written material by having it read to me or, later, by using digital audio devices. For decades I fooled myself into thinking that my blindness was irrelevant to my work and my worth. Only now, in my eighties, and in writing this memoir, have I finally come to accept my blindness as an essential part of who I am.

This memoir is about my life in the law and my journey into blindness. It's also about the Supreme Court, and my grave concerns about the state of our judiciary. To give you a sense of how those pieces fit together, I'll tell you a short story about a recent and dramatic case that Vixen helped me navigate. It concerned the first federal execution in seventeen years. This story will give you a glimpse of how I functioned as a blind judge (before I retired), a taste of the appellate process, and a sense of how today's Supreme Court has veered off course.



The day we heard the case—July 13, 2020—began like any other sunny summer morning in the foothills of the Blue Ridge Mountains. Vixen and I headed down our long dirt driveway for our first job of the day: fetching the daily newspapers. My wife Edie and I spend most of our time here in rural Virginia, which is just over an hour from D.C. but a world away in temperament. The novel coronavirus was running rampant, so the D.C. Circuit, like most federal courts, was operating remotely. Although the internet out here isn't what we're used to in the city, it works well enough to

Zoom with my colleagues and law clerks. We even heard oral arguments online, with no one in Zoomland knowing that beneath my black robe I wore shorts and sneakers.

That July morning, Vixen guided me down the driveway to get the *Washington Post* and the *New York Times*, which had been tossed somewhere in the vicinity of the mailbox. “Vixen, find it” is all I had to say. She let me know when she located the papers by pointing her nose at them. In return, she got one of Edie’s specially baked dog treats. I scooped the papers into my old McGovern-Shriver shoulder bag and said, “Vixen, forward. Let’s head home.” She turned around, picked up the pace, and guided me back up our driveway to have breakfast with Edie and read the papers. That day the headlines were about the Trump administration’s response to the pandemic and whether the delayed baseball season would finally get underway.

After breakfast I went upstairs to my desk to begin what I thought would be a normal workday. My court doesn’t schedule arguments in the summer, and that recess allowed us judges to finish writing our opinions and get started on the cases we’d be hearing in the fall. So I had work to do, but none of it was urgent. I’m an enthusiastic patron of email, and I wanted to catch up with our four kids and the latest legal gossip, including about the Supreme Court’s recent decisions involving President Trump’s financial records.

But everything changed at 10:30 a.m. when I received an email from court staff reporting that a district court judge had just blocked the first of several executions scheduled by the Trump administration. The government had planned to execute a convicted murderer, Daniel Lewis Lee, by lethal injection that very afternoon at the federal death chamber in Terre Haute, Indiana. But the district court had temporarily halted the execution, and our staff anticipated that the Justice Department

would quickly ask us to reverse the district court and let the execution proceed. Until that morning I knew nothing about Daniel Lewis Lee or his legal claims. But now—on that otherwise ordinary day—a human life was hanging in the balance, and we had to act quickly.

Let me be clear: I oppose the death penalty. I think capital punishment is often applied arbitrarily and discriminatorily. Were I a member of Congress, I'd vote to abolish it. But I wasn't a member of Congress. I was a judge. I took an oath to apply the law faithfully, and that includes the federal death penalty. So the question I would have to answer was not whether I agreed with the government's decision to execute Lee. It was whether Lee's execution would violate the Constitution. To answer *that* question, I needed to understand the details of Lee's case and the nature of his claims.

Lee had been convicted of robbing, torturing, and murdering a firearms dealer, his wife, and their eight-year-old daughter, whose bodies were found in a bayou with plastic bags over their heads. The murders were heinous. No one disputed that he had committed them. Nor was there any question that he would eventually be executed. The only legal issue in the case was how Lee would die. The government planned to use a drug called pentobarbital. Lee argued that the drug would cause "extreme pain and needless suffering" and thus violate his Eighth Amendment right to be free from "cruel and unusual punishment." His case turned on a single unresolved question: Might a massive dose of pentobarbital cause Lee's lungs to fill with fluid, make him feel like he was drowning, and inflict extreme and unnecessary pain? If not, the government was entitled to execute him as planned. If so, the government would have to find another method. Until that factual question was answered, the execution couldn't proceed.

The district judge had found that Lee's allegations about the effects of pentobarbital were plausible, so ordered the government to hold off on the execution. A brief delay, the district court reasoned, would give it time to hear from experts, look at the evidence, and determine whether the government's proposed method of execution was "very likely" to cause the pain and suffering Lee claimed.

At 11:52 a.m. the Justice Department informed my court that, as anticipated, the government wanted us to immediately reverse the order blocking Lee's execution so it could move ahead as planned. Now it was up to our three-judge panel—two other D.C. Circuit judges and me—to review the district court's ruling and decide whether Lee would live or die that very day.

Ordinarily, the appellate process takes many months, if not longer. Lawyers need time to do legal research, write briefs, and argue the case. Judges need time to do their own research, deliberate with each other, and write an opinion that explains their reasoning. Emergency requests, as in Lee's case, are not the norm. Courts can rule quickly when strictly necessary, but they lose the benefit of the extended deliberation undertaken in most cases. Death penalty cases, in particular, can be grotesquely rushed. Speed is what you want when you're trying to catch a flight. You don't want undue haste in judging, and you definitely don't want it with a life on the line. Nevertheless, respecting the government's request for speed, we ordered Lee's lawyers to respond by 5:15 p.m. and the government to reply by 7 p.m.

While we waited for Lee's brief to arrive, I decided to take a walk to clear my mind. Vixen and I go for afternoon walks together almost every day. She's always on my left and always in the lead. Until Vixen, I'd never appreciated the many pleasures of walking a dog, not least of which are the serendipitous

conversations with other folks we encounter. We talk about the weather and last night's ball game, but mainly we talk about our dogs. Everyone wants to know about Vixen. "How was she trained?" "How did you get her?" "Can she really guide you across busy streets?" "What's her name, and did you name her?" In the coming pages, I'll answer all those questions for you, just like I answer them for passersby. But I'll tell you now that the answer to the last question is no. Vixen was in the "V" litter, so she and all her siblings were given names starting with "V." (We once met her brother Viper, a ninety-pound long-haired giant beloved by his owner.) People also want to tell me their aunt is blind, to ask how they can get a dog like Vixen, or to find out how they can become a puppy raiser. In these rural parts of Virginia, I might very well be discussing the ins and outs of German shepherds with a full-fledged MAGA supporter without realizing it, since I can't see the red hat. Dogs bring people together.

For nearly forty years, I couldn't take these country walks by myself, even with my white mobility cane, so I treasure the independence and solitude Vixen's given me. Sometimes I plug in my earphones and listen to a book, but mostly I just walk, savoring the breeze and the birdsong and the ripples of the Thornton River. Vixen makes these walks possible. She stops only when there's danger or if she sniffs a deer or fox or other irresistible scent—or when she has to pee. That's what her wet nose on my hand means.

On that day, our walk was shorter than usual. But it did the job. I returned home refreshed and ready to reengage. When the briefs arrived, my law clerk read them out loud to me over Zoom, going as fast as possible and stopping only for sips of tea to save her voice. We both knew we had no time to waste. Even Vixen knew something important was happening. As I read the government's arguments about why it should be allowed to execute Lee

using pentobarbital, and Lee's arguments about why the district court had been right to delay the execution for fuller consideration of his claim about pentobarbital's effects, Vixen kept pushing her nose under my elbow. She didn't need another walk. She wasn't hungry. She simply sensed my tension, and this was her way of offering some comfort.

Two hours and hundreds of pages later, I concluded that there was nothing unlawful about the district court's order delaying Lee's execution. The law guarantees due process for everybody—murderers, presidents, and everyone in between. Lee's lawyers had raised a serious claim that demanded a thorough evaluation of medical and scientific evidence, and only the district court could conduct that evaluation. Appeals courts don't answer factual questions: They don't hold trials, they don't hear witnesses, and they don't weigh competing evidence. Their job is just to apply the law to the facts as the district court finds them. Here, the district court had reasonably determined it needed more time to weigh the evidence and evaluate the effects of pentobarbital. I had no choice but to uphold its order delaying Lee's execution. My two colleagues, Judges Thomas Griffith and Patricia Millett, agreed.

If you've become accustomed to viewing judges as politicians in robes, you might think it relevant that Judge Griffith was appointed by a Republican president (George W. Bush) and Judge Millett by a Democrat (Barack Obama). But they're judges, not politicians, and both saw what I (appointed by Democrat Bill Clinton) saw: a serious constitutional claim, a thoughtful district court order, and no legal basis to overturn it. Regardless of our personal views about the death penalty, the neutral legal principles we'd sworn an oath to uphold required that we pause Lee's execution so his claim could be given the consideration it deserved. To be clear: If those principles had required us to allow

the execution to proceed, we wouldn't have hesitated to say so. Indeed, a few weeks later I signed off on another Trump-ordered execution, and a prisoner was put to death hours after we turned down his appeal.

My law clerk and I began drafting an opinion, she on her desktop, me on my black Braille computer. The size of a keyboard, it has six rectangular Braille buttons and connected to an earphone that allowed me to hear the words as I typed them. As soon as we had a draft, I sent it to Judges Griffith and Millett for their input. We were exchanging edits and refining the draft when, at 9:51 that evening, we received word from the Supreme Court that the justices were growing impatient. The Court, we were told, "would really like us to act tonight"—and, if possible, "within an hour." That kind of pressure was highly unusual, but, recognizing the Supreme Court's higher authority, we did our best to comply. At 11:24 p.m., we released our opinion rejecting the government's request to proceed with the execution. The case, we explained, involved "novel and difficult constitutional questions" that required "further factual and legal development." We then scheduled all remaining briefing to occur within the next ten days, far faster than usual.

Fewer than four hours later, around 2 a.m., the Supreme Court voted 5–4 to reverse us. The Court's order was unsigned, but the names of those who approved Lee's immediate execution were obvious because all four justices who objected signed their names to a dissent. The five in the majority were the Court's purported conservatives: Chief Justice John Roberts and Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, and Brett Kavanaugh. All had been appointed by Republican presidents. The four who thought Lee merited a hearing? All appointed by Democrats.

The Supreme Court's opinion was nothing short of astonishing. For starters, it made sure to emphasize that Lee had murdered a

child, even though nobody representing Lee had suggested that he deserved sympathy or that he'd been wrongfully convicted. With respect to the sole issue actually before the Court—the propriety of the district court's order delaying the execution to give it time to consider conflicting expert testimony about the possible inhumane effects of pentobarbital—the Court said very little. It acknowledged the evidentiary dispute, yet it refused to give the district court the time it needed to assess that evidence and resolve Lee's legal claim. And it never even mentioned the ruling by my court. Instead, the Supreme Court invoked a need for urgency—"expeditiously" was the word it used—so that "the question of capital punishment" can remain with "the people and their representatives, not the courts, to resolve." But no one was questioning the validity of capital punishment. And anyone who thinks limiting briefing to ten days isn't acting "expeditiously" has never spent much time in the US court system. Anyway, isn't ensuring that the government doesn't execute a person in violation of the Constitution precisely the role of the courts?

Fewer than six hours later, at 8:07 a.m., the government executed Daniel Lewis Lee. He died never having been given the opportunity to prove his claim, a claim that two lower federal courts believed worthy of careful consideration and that the Supreme Court itself acknowledged raised an unresolved factual issue. That isn't how our legal system is supposed to work, especially when a human life is at stake.



This book chronicles my journey from a curious student to a passionate civil rights lawyer to the seasoned federal judge you saw at work on the Lee case. It also chronicles another, more private, journey, from shame about my deteriorating vision, to denial about the effects of my blindness, and ultimately to acceptance

and equanimity. This memoir is the coda to both of those journeys. And yes, it's also about a love story and a marriage made challenging at times by my blindness. Without Edie, my partner in life and in love, my story—let alone this memoir—would not have been possible.

The decision to write this book—and to name it *Vision*, of all things—has not been an easy one. For most of my life, I was embarrassed by my disability and would have recoiled even from the use of that word in connection with me. In my early years, I tried to hide my declining sight. On the ball field, in the classroom, as a young lawyer in a large firm, and in the Carter administration, I had a repertoire of strategies to conceal how little I could actually see. And I was pretty good at it. Edie, when she was my girlfriend in law school, knew that I had an eye disease and that my vision might deteriorate. But few others knew until I started to use a white cane. Even once I became completely blind and could no longer hide it, I still avoided the subject as much as I could. I know that President Clinton nominated me to the D.C. Circuit in part because my blindness made me a “first.” I was thrilled to be on the bench, but I had zero interest in being known as “the blind judge.” Even now, my blindness is something I’ve never much talked about with anybody other than Edie and my children. To my great regret, it took me until I was seventy-seven to get a guide dog.

I’ll try to explain the evolution of my thinking as I’ve navigated the challenges of losing my sight and living with blindness. There have been many, ranging from the simple (learning to listen to audiobooks), to the difficult (learning to use the cane), to the sublime (entrusting my life to a dog). The deeper lessons of my journey—tackling life-altering change, dealing with uncertainty, surviving fear—are universal. And the most profound lesson is

one I've learned only very slowly: Don't deny your challenges, embrace them.

Please understand me, though: I'd rather not be blind. For all that I've learned about personal growth, trust, the ineffable love of family, and the abiding devotion of a wondrously skilled German shepherd, I'd rather be able to see. I'd like to see my grandchildren's faces. I'd like to play tennis and to wander on my own through a bookstore. I'd like to see cumulus clouds on a crisp afternoon, the Milky Way on a moonless night, and Edie's beautiful white hair. Being blind is hard, every day. It tests me. It tests Edie. It tests our marriage and our family. I love Edie's daily touches, many of which happen because she's simply helping me move around safely when Vixen's off duty. I'd still rather not be blind. But I am.

At long last, though, I'm comfortable with that part of me. As much as I'd like to be just like anyone else, the reality is that I most assuredly am not. And as much as I'd like my blindness to be irrelevant to my story, it most assuredly is not. My blindness affects how I function, how I relate to people, and how I view the world. In most ways that's okay—maybe even more than okay. There's just one exception. When it came to my service as a federal judge, I always strove to ensure that my blindness never affected my rulings. I know that the presence of a blind judge on a federal appeals court was inspirational to people both with and without disabilities. But when sitting on the bench, I was a judge first. My decisions flowed from the law and the facts, and I did my best to make sure that nothing else, including my blindness, got in the way. I was not a blind judge, you see. I was a judge who happened to be blind. To me, that's not just a semantic difference.

The two threads of this memoir have inverse trajectories. When I was coming of age, I was inspired by the role that lawyers and

courts were playing in enforcing the guarantees of our great Constitution. But I was unwilling and unable to deal with my declining vision. Now, a half century later, I've made peace with my blindness. But I'm concerned about the Supreme Court's apparent disregard for the principles of judicial restraint that distinguish the unelected judiciary from the two elected branches of government—and about what that might mean for our planet and our democracy. Braided together, those two threads are my story.