Oral History of Judge Douglas H. Ginsburg
Seventh Interview
December 19, 2013

This interview is being conducted on behalf of the Oral History Project of the Historical Society of the District of Columbia Circuit. The interviewer is Daniel Marcus, Esquire, and the interviewee is Judge Douglas H. Ginsburg. The interview took place on Thursday, December 19, 2013. This is the seventh interview.

DANIEL MARCUS: This is Daniel Marcus interviewing Judge Ginsburg on December 19th, 2013. We're going to start the interview, Judge Ginsburg, by discussing your antitrust decisions on the court. One of the areas of the law that you're most steeped in. And I thought we'd take the major decisions chronologically. You had been on the court a year or so, when you got your first anti-trust case, an unusual one, the Superior Court Trial Lawyers Association.

That case involved a boycott, a strike if you will, by the Superior Court Trial Lawyers to get the District of Columbia, I guess, to increase the compensation paid to lawyers who represented indigent defendants in the Superior Court in criminal cases. And let me just ask you, you ended up writing a very interesting opinion that dealt with the difficult issues when the anti-trust laws intersect with or collide with the First Amendment. How did you come up with your approach to resolving that question?

JUDGE GINSBURG: Well the question was of course raised by counsel for the Trial Lawyers, Don Baker, taking the position that the Trial Lawyers, by trying to get the amount paid on these assigned cases raised were effectively petitioning the government and had immunity under the Noerr-Pennington doctrine, which relates to that aspect of the First Amendment, protecting the right to petition government for redress of grievances. The Federal Trade Commission had taken the position that this was a straight-up boycott in which most or all of the competing firms, that is to say the lawyers who accepted these appointed cases and belonged to the Association, had agreed among themselves to withhold their services until they were given a higher compensation and that no more need be said, basically. It was a *per se* violation of Section 1 of the Sherman Act and, as said in the opinion, that was correct insofar as it went. That is to say, all the elements of a Section 1 violation were there, but that left still unresolved the question whether the First Amendment right invoked here, nonetheless, immunized the conduct from penalty.

The Supreme Court had decided a couple of prior cases of some relevance, one of which I thought was the most relevant--*Claiborne Hardware*, in which the black residents of a town in Mississippi boycotted a store as a

civil rights matter because the store either didn't hire or somehow didn't treat equally its black patrons or employees. And the Supreme Court had held that that was conduct protected by the First Amendment.

Now that wasn't petitioning the government; that was expressing their own views on a matter of public importance. Here, it seemed to me that we had a parallel situation. But it was the petitioning aspect as well as expressing their views. And the idea that the antitrust laws would shut off and shut up this avenue of expression, whether as political redress or free speech, struck me as elevating the Sherman Act above all else rather than trying to reconcile it with the First Amendment.

Judge Silberman wrote a separate concurring opinion in which he agreed with that so far as it went, but thought that the task facing the FTC on remand was a little bit different in the way that he related the *Claiborne Hardware* case to another Supreme Court case that involved longshoremen boycotting ships taking grain to Russia, I believe it was. A political statement on their part. But he still signed on to the view that the Federal Trade Commission had erred in their single-mindedness.

DANIEL MARCUS: So this was not a Noerr-Pennington holding, in which case the First Amendment trumps the anti-trust laws, but a holding that because the economic boycott was directed at achieving political action, there was a First Amendment consideration that needed to be taken into account that you couldn't say was either per se a violation of the Sherman Act or absolutely immunized.

JUDGE GINSBURG: That's right. That's right. And it seemed to the two of us, at least, that that turned upon whether the dominant motivation was the commercial self-interest of the lawyers or the political cause of increasing representation for indigent clients in the Superior Court. That was Judge Robinson who agreed with me on that. Judge Silberman thought the motivation matter could be resolved and then remanded for some further fact finding.

But, of course, in fairness, the Federal Trade Commission, I think, would have exceeded its remit had it decided that it could not pursue this case because of a constitutional limitation. It could very well have simply, as a matter of prosecutorial discretion, never gotten in to the matter at all. But once having done so, I think it might have been inappropriate for it to say, well, we find a *per se* violation but we're going to stay our hand because we think even though there's no precedent directly on point, we think the First Amendment immunizes the conduct.

The General Counsel of the Federal Trade Commission was then Mary Azcuenaga who was a law school classmate and is a good friend of mine.

DANIEL MARCUS: Oh really?

JUDGE GINSBURG: And when she took the matter to the Supreme Court--I recount it as a contest directly between the two of us, which would have caused me, if dispassionate, to bet on her. And, of course, her position prevailed.

DANIEL MARCUS: Yes, although…I'm a little surprised that it did. I haven't read the Supreme Court opinion, but I'm a little surprised that it did, given *Claiborne Hardware*. If there had been a remand, what was your instinct? Would you have predicted based on what you saw with the case on appeal that the Commission would have or could have found that the economic motivations were predominant and that therefore the Section 5 violation could stand?

JUDGE GINSBURG: Well I think if they could have, they would have. But whether they could have, I don't know because they didn't make a record on that.

DANIEL MARCUS: Fair enough. Okay, if there is nothing else that you would like to add about that case, why don't we move on to probably the most important antitrust case ever decided by the D.C. Circuit, the *Microsoft* case in 2001.

I have some preliminary questions before we get in to the substance of this decision. I think we talked about this a little in an earlier interview when we were talking about the en banc practice of the court. But this was an unusual case in that the court decided *ab initio* to hear the case *en banc*. And is my recollection right that the reason for that was there were several judges who would have to be recused in the case and therefore it seemed to you and other members of the court that it made sense to have the case heard *en banc* initially? Maybe I should just ask you about what the reason was. I may not remember it correctly.

JUDGE GINSBURG: There were two reasons. I subscribed to one. Most of the other members of the court subscribed to the other one, although I'm not sure that anybody rejected my reason. But the proposal was made to hear the matter initially *en banc* solely because of the importance of the case.

DANIEL MARCUS: Was that proposal made by the party, one of the parties, or by one of the judges? Do you remember?

JUDGE GINSBURG: I'm not sure whether it was suggested by one of the parties. It may well have been. But it was certainly advanced by the Chief Judge to the full court to decide. It may have been by motion.
veral of the judges – and I believe the Chief Judge – thought that the case indeed was of such singular importance that it should be heard from the

outset by the full court. I objected that that seemed to me a very slippery criterion. We had done that the previous time in the case of the *Watergate* tapes, when I was a law clerk here for Judge McGowan. There were several cases in the intervening 25 years that might have qualified as being of great importance, not perhaps on the scale of the *Watergate* tapes, but then neither was this case on the scale of the *Watergate* tapes, which required every effort both to expedite the decision and to make it one in which the credibility and legitimacy of the judicial action at every level was as far above potential criticism as possible. And therefore I think the court was right in the *Watergate* tapes case to take the matter from the start *en banc*.

In this *Microsoft* case, I would not have done so on that ground, but I still agreed that it should be heard by the full court because the number of recusals was such that there were only seven active judges who could hear the matter. Under the rules of our court at that time, a panel's decision could be reconsidered by the full court only by a majority vote.

A majority vote of the active judges, of whom there were, I believe, ten – there might have been eleven – in either event would have required six votes. With seven active judges, it would not have been possible if the panel or if two judges on the panel went one way; the dissenter on the panel and all of the other judges on the court eligible to vote could not have reconsidered that decision.

And so a panel of three would have been set at large unsupervised without the possibility of being reviewed by the full court in a case that was utterly impractical for the Supreme Court to review in the condition in which it then stood. With a record of 70,000 pages, including many many documents, graphical documents that could not be reproduced or searched digitally, although the rest of the record could, and a plethora of issues; it was simply not ready for the Supreme Court to review it. And to remit that to the decision of possibly two of our judges seemed to be unwise from the point of view of making it a decision in which the public could have full confidence if the panel divided.

Likewise expedition was of some value here. And if the government was right, allowing this to drag out for an extra year so that it could be reheard *en banc* if necessary, seemed bootless. Just as well to hear the case from the outset by the full court of seven.

DANIEL MARCUS: Okay. One of the other unusual things about this case is that the opinion for the court is *per curium* with no indication in the federal reports of which judge was the author, which judges were the authors of the opinion. First, can you tell me why that was done?

JUDGE GINSBURG: Yes. The Chief Judge, Harry Edwards, in I would say a characteristically wise and collegial move, suggested that the case not only be heard *en banc* as we all ultimately agreed, but also that everyone participate in the drafting of the opinion and take principal responsibility for at least some sections – some were large, some were small – of the opinion, and that it be subjected to intensive review by all of the non-authoring judges in a manner that invited scrutiny well beyond what a non-panelist would do in reviewing a circulating proposed opinion by a panel. And so it became a collective product in a true way.

DANIEL MARCUS: And was that decision by the court at the recommendation of the Chief Judge made at the outset or only after the case was argued and after the conference took place?

JUDGE GINSBURG: Was it before or after [illegible] argued? I think it was after it was argued because I think it was at the conference after argument where we decided and discussed the case.

DANIEL MARCUS: I see. And was there any consideration given to following the practice that is sometimes followed in panel opinions and lengthy opinions where there is a division of labor of indicating which parts of the opinion were written by which judge?

JUDGE GINSBURG: I don't recall that that was ever suggested. And I think it would have been inconsistent with the instinct behind the division of labor. Those clear cut lines were not as clear cut because of the invitation to everyone to participate fully. And even though the principal author's work may have survived largely intact, wholly intact in some sections or much less in others, it would have been inconsistent with that idea.

DANIEL MARCUS: Which part or parts of the opinion were you the principal author of?

JUDGE GINSBURG: Well, I guess you reminded me that a lot of Section 2 on monopolization was my province, but I don't recall whether that extended to all of it. But certainly a lot of it. But there were things that that cut across the whole opinion that are more important, or at least across the whole section of monopolization that are more important than whether I authored each subsection.

The framework of…in which the burden of proof was shifted was…I don't remember where that appears in here, but that was…

DANIEL MARCUS: The overview section at the beginning which is quite unusual.

JUDGE GINSBURG: You mean these first couple of pages?

DANIEL MARCUS: There's an introductory essay – I have different pages than you do – but it's right before the monopolization section, I think. That may not be what you're referring to.

JUDGE GINSBURG: I think it's in the monopolization section actually because it's most pertinent to that.

DANIEL MARCUS: Yeah, this should be in burden.

JUDGE GINSBURG: Right. That turns out to be somewhat controversial in the commentary that followed the case. It's based upon and it cites a precedent of the Supreme Court that is not fully…not adequate in and of itself to support the framework. But it did seem to me the appropriate way in which to handle the issue.

DANIEL MARCUS: This was the point that Microsoft had the burden to establish a justification for.

JUDGE GINSBURG: Well not the initial burden.

DANIEL MARCUS: I understand.

JUDGE GINSBURG: Right, but a burden once the government had made an adequate showing, a *prima facie* case.

DANIEL MARCUS: Okay, go ahead.

JUDGE GINSBURG: Turn to part 2, Monopolization. Subpart 2, Direct Proof, 56. Subpart B, Anti-competitive Conduct.

DANIEL MARCUS: Yes, I see.

JUDGE GINSBURG: You'll find the burden-shifting framework there.

DANIEL MARCUS: Yes, I marked it 1, 2, 3, 4; the layout of the steps.

JUDGE GINSBURG: Right, right. We begin by saying, "From a century of case law on monopolization under Section 2, however," the "however," relating back to the challenge for an antitrust court to state a general rule for distinguishing exclusionary acts, which reduce social welfare, from competitive acts, which increase it.

So that's what we're looking for, but there wasn't a handy-dandy off-the-shelf formula for dealing with that. What we laid out here was this burden-shifting framework for at least disciplining or structuring the inquiry so that first the monopolist's act has to have an anti-competitive effect, that is to say actually harm consumers.

And then second, the plaintiff, which here is the government, always retains the burden of proof, has to demonstrate that the monopolist's conduct indeed has the requisite kind of anti-competitive effect.

And then if that's done successfully and the government has made out its *prima facie* case, the monopolist can proffer a pro-competitive justification for that conduct…one that's not pretextual, that is.

And then finally, if that stands, that justification, then the plaintiff has to show--and this is the controversial part--that the anti-competitive effect outweighs the pro-competitive effect.

I think the controversy in the academic commentary and perhaps in some cases by now, but I'm not aware of a particular one--is first, whether the government really has to make that showing; in other words, the defendant can survive the *prima facie* case not by rebutting it, but by showing, by what's the word? What was the old common law term? Confess and avoid, saying that well that's true, but there's a pro-competitive justification that's even greater, that outweighs that.

And then finally, also controversial, is: how does a court determine whether that's happened? Which of course wasn't a necessity in this instance. So we didn't have to confront that. And I have since thought about it a bit and I'm not sure it is a tractable inquiry. It'll take some time and experience in the lower courts to determine whether that really is doable.

DANIEL MARCUS: And you didn't have to reach it because you found that the pro-competitive justification for it was insufficient?

JUDGE GINSBURG: The justifications were pretextual. They were not insufficient compared to the benefits, but rather they were no justification whatsoever.

DANIEL MARCUS: They were beside the point.

JUDGE GINSBURG: Now, the Supreme Court had, in the *GTE Sylvania* case in 1979, acknowledged that non-price vertical restraints, such as territorial clauses for retail stores and distributors could, would dampen intra brand competition because all of the distributors or manufacturers would prevent

the dealers from competing with each other by giving them exclusive territories. But that would intensify inter-brand competition by giving each dealer more incentive to promote its brand. And the Court left it to the lower courts to weigh those two effects.

The consequences have usually been that the vertical restraints have been upheld. I wrote an article some years after the *Sylvania* case tracking 44 reported decisions that came out of the district courts and courts of appeals after that, and the defendants had prevailed in 42. Of the two in which the plaintiff prevailed, I felt the court probably erred in one of them.

So as a practical matter, it became almost a *per se* legality for these non-price vertical restraints. And since then the court has extended that whole thing to resale price maintenance; vertical price restraints.

It made that a question, not of *per se* illegality, but like vertical non-price restraints, a question of the rule of reason, which implicitly means, I think, that following what they said in *Sylvania*, the courts are to weigh the pro-competitive and anti-competitive effects. So in that sense, we were following that precedent. But setting up the framework was novel in Section 2.

DANIEL MARCUS: So your recollection is that you were the primary drafter of most, if not all, of the monopolization section of the opinion? Is that correct?

JUDGE GINSBURG: I think most but I'm not sure.

DANIEL MARCUS: Most. And am I correct in assuming that you also played an active role in commenting on and making suggestions with respect to your colleagues' portions of the rest of the opinion? At least the subsequent parts of the opinion?

JUDGE GINSBURG: Well several of them or some of them, at least. The one of which I'm most reminded is the suggestion with respect to tying; not that we hold that there was no tie here, but rather that the tie could not be condemned *per se* under *Jefferson Parish* - which is an odd kind of *per se* case, but nonetheless, per se – on the ground that the whole concept of *per se* condemnation depends upon prior case law and market experience showing that a practice is always or so close to always anti-competitive that there's no reason to engage in an extensive or indeed perhaps in any inquiry into its effect in a particular case.

With regard to price fixing, for instance, there's basically no justification allowed. Now that's a little bit of an overstatement because what actually happens is that when there is some justification that is advanced and seems

plausible, the pressure is on to say well, it's not price fixing, as in the *Broadcast Music* case, where the court said it's an introduction of a new product; it's not really the fixing of the prices on the old products. It's this new product which is an ensemble.

The point here was to say we don't have that experience in these high-tech markets. We don't know with confidence that this practice in question here is always or even most of the time going to be anti-competitive. Judge Williams wrote that section and wrote it to conform to that suggestion.

DANIEL MARCUS: So that was also a potentially controversial gloss on existing law?

JUDGE GINSBURG: Well, yes and no.

DANIEL MARCUS: Was that criticized at all?

JUDGE GINSBURG: I don't think it has been, at least not widely. It's not so much that it was a bold gloss on clear precedent; it's that the clear precedent had been clearly based upon a premise repeated many times by the Supreme Court that simply didn't apply, we thought, in this unusual and unanticipated context.

High-tech markets, by which we really mean digital markets, I think, have posed a variety of challenges to established doctrine in which the courts are increasingly immersed because of the litigation involving digital services. They are requiring the courts to re-examine comfortable premises.

To give you an example which is perhaps the most bold, I think it's not entirely clear whether some digital markets, particularly Internet based markets, may turn out to be characterized not by competition within the field, but by competition for the field. Competition to be the monopolist.

Five years ago MySpace was the monopolist in social media. Murdoch's News Corp paid over $500 million to buy it. Last year they sold it for $38 million. I don't know how they got anything for it. But the competition to become the monopolist, which is now Facebook, means that the incumbent has to be constantly on its toes, constantly worrying about the hundreds, probably thousands, of college students who, in their dorms, are inventing something better, the way Zuckerberg invented Facebook. They don't know who they are. They don't know where they'll come from. And they must live, I would think, not the quiet comfortable life of a monopolist, but a perilous life in which they have no idea from where they're going to get attacked. And that must cause them to continually want to sharpen and improve their product or, if it's one for which there's

a fee, to compete on price as well. But they're competing with unknowns. So it may be that there will always be a dominant if not a monopolistic firm in that kind of a market and yet competitive conditions will prevail because of the potential for competition from so many possible sources.

Sedgwick wrote an article, an English economist, in 1858 by that title, "Competition for the Field as Opposed to Competition Within the Field."

DANIEL MARCUS: That's fascinating. This may not be a smart question but am I right in thinking – or am I completely wrong – that the reversal of the government's judgment on the tying question and sending it back to the district court to decide whether it can be anti-competitive or not was less of a victory for Microsoft than it would seem ordinarily because of their loss on the monopolization issue. In other words, since they've been found to have violated Section 2, does it really do them much good to be able to litigate the tying arrangement issue on remand?

JUDGE GINSBURG: Well I don't know that they ever really entered into that. I think once the case was narrowed down in a way that upheld the district court in saying that they had violated some provisions of the law, discarding others which were cast into doubt, perhaps others, and the remedial order was struck, that it simply went from there, I think, right in to the attempt to settle.

DANIEL MARCUS: To negotiate the case on remand.

JUDGE GINSBURG: We weren't apprised of that but…

DANIEL MARCUS: Yes. Of course a new judge was assigned.

JUDGE GINSBURG: Yes.

DANIEL MARCUS: Was it Judge Collar-Kotelly, I think?

JUDGE GINSBURG: Yes, we got fortunate in that. There are three things I want to say before we finish with this discussion. One is about the remedial aspect; that's where we are. Thomas Penfield Jackson--he's known as Pen Jackson--as you know, was roundly criticized by the court for having brought in to his chambers a journalist who chronicled the case from conception. He gave continuous interviews to this journalist, again, all to be embargoed until the case was completed sometime thereafter.

But in any event, this came to light and was the principal motivation, I think, for taking the case away from Judge Jackson on remand and assigning it…well, leaving it to the district court to reassign the case, which I think they do on a random basis.

I must say the court got lucky because Judge Collar-Kotelly was the draw. And this was still a complex case, still a case that's very challenging, and I think that she's one of the best, or was at the time, one of the best district judges and one of the most capable of handling the case. And she did a fine job once…when it fell to her to supervise the relief over a ten- and I think ultimately twelve-year period because that decree was extended.

DANIEL MARCUS: I see.

JUDGE GINSBURG: So we could have done a lot worse and not a lot better than to have her do it.

An irony of this all is that Jackson had also been the judge who in the case of the mayor's conviction…what's his name?

DANIEL MARCUS: Barry.

JUDGE GINSBURG: Marion Barry. Marion Barry's conviction involving heroin or crack cocaine. Judge Jackson had gone up to Harvard, his alma mater, I think, and had given a talk about the case when it was pending. And was the subject of similar action on appeal there.

So here's a judge who served ably for several decades and the things he'll be remembered for were two remarkably public and very substantial misjudgments. And the most remarkable thing is that he repeated the same type of error the second time. I mean it really is of the same nature as the first one…bringing publicity to bear on a pending case.

DANIEL MARCUS: Well, I think it's inexplicable except…if I could put myself in his head, maybe he thought, one, it's not a jury trial; two, I'm not doing it while the case is pending before me…well I'm not; well he's doing it. He's not prejudicing the case while it's before him. It's really a shocking thing.

JUDGE GINSBURG: I do not think it implicates the possibility that he's concerned with how he appears, his conduct of the case in a way that would not be true but for this reporter. I'm not sure that it wouldn't affect a judge's conduct of the case.

DANIEL MARCUS: I'm not either. Well that raises the question: did you and the court give any serious consideration to starting all over because of this?

JUDGE GINSBURG: I don't recall whether Microsoft even asked for that. Did they?

DANIEL MARCUS: I don't know that they asked, I don't think they asked for this at all. Maybe they did. Maybe they asked; I think they were more interested in getting the monopolization decision reversed.

JUDGE GINSBURG: Well no doubt. It's not clear from the opinion that I'm looking at which simply says, "A disqualification is mandatory for conduct that calls a judge's impartiality into question." And I think that means that whether it's a subject of a motion or not…

DANIEL MARCUS: Well, but if you thought that his misconduct poisoned the decision on the merits at the district court level, I mean there is an issue as to whether it's sufficient to have the Court of Appeals consider it.

JUDGE GINSBURG: Well, there's no indication that the parties were seeking anything. I just don't recall. But the bottom line in that section is to say the most serious judicial misconduct occurred near or during the remedial stage. So it is therefore commensurate that our remedy focus on that stage of the case. So that's why we didn't re-open anything or suggest that the whole case was infected by his dalliance with the press.

DANIEL MARCUS: Microsoft did raise the issue on appeal. But it's not clear.

JUDGE GINSBURG: A feature of the case which is often quoted is the observation, which I wrote, that…well, I guess, put another way: the oral argument in this case was conducted by Urowsky. I think he's from New York. And it could not have begun more imprudently or improbably. He opened with the argument that because all of the conduct in question involved Microsoft's intellectual property, it could do with that property what it wanted. And that was, of course, a very broad claim that would have wiped out all of the monopolization charges at the very least. Probably the tying as well. And it was an appallingly inept argument to make and more so to start his argument.

There was no chance that any judge having heard that argument would accept it. And in the opinion, I put it back to him, that was like saying that if I owned my baseball bat I could do anything I wanted with it, which is an oft-quoted phrase. It reflected just no nuance whatsoever.

There was a--I think I used the word myriad--there are innumerable unimaginable numbers of ways in which people could attempt to monopolize, from the crudest of burning down their competitor's factory to the most subtle form of deception. And the idea that all of these could be identified in advance is, of course, ridiculous, which is why I said we start…that's where the framework of the burden shifting framework

comes from, because one has to have some way of distinguishing between what's exclusionary and what's not.

But I just thought it was so inept and so disserved the client. I was astounded. And I thought only an out-of-towner could make this argument.

DANIEL MARCUS: I don't know if he's an antitrust specialist.

JUDGE GINSBURG: Maybe just a litigator. He takes on all sorts of things. The other thing I wanted to say was that my law clerk in this case did an extraordinary job. Her name is Leah Brannon. She's a partner at Cleary Gottlieb now and she does a lot of work on behalf of Google.

She came to me at the recommendation of Steve Shavell, who's a friend of mine, an economist on the Harvard Law faculty but not a lawyer. And she had gone to the University of Virginia and majored in economics and studied there with a leading industrial organization economist, Ken Elzinga. A very prominent man. And she was in her third year when I was hiring her to begin; no, she was in her second year, but I was hiring her therefore to begin 18 – 20 months after the interview. And she was going to spend an intervening year at Covington. So maybe she was in her third year. In any event, she was going to be a year at Covington. And I said look, your number one job at Covington is not to get recused in the *Microsoft* case. I didn't know when it would exactly, but…

DANIEL MARCUS: But you knew it was coming eventually.

JUDGE GINSBURG: Yes.

DANIEL MARCUS: That's marvelous.

JUDGE GINSBURG: The case was argued here in February of 2001. She had started in August of 2000. But for the latter six months of her tenure – I'm under the impression it was issued in June.

DANIEL MARCUS: End of June. Yeah. Pretty quick for a big case.

JUDGE GINSBURG: Yeah, from late fall through June - I'll tell you about that – she was able to do little else than work on the *Microsoft* case. I mean she did do some other things, but it was really a prodigious 70,000 pages. And so not surprisingly, she's had a distinguished antitrust career. As have a number of my law clerks. Rick Rule and two others had been representing Microsoft. Rick Rule and Joe Bial and then Derek Moore, who just left to be Attorney Advisor for Josh Wright at the FTC.

DANIEL MARCUS: I didn't know they all clerked for you.

JUDGE GINSBURG: So Leah and Rick had locked horns on *Microsoft*. Oh, Rick didn't clerk for me. He was my deputy and my successor at Justice.

DANIEL MARCUS: Well as I mentioned, I was at the Justice Department until January 2001 and so I was there during the settlement, the mediation effort that Judge Posner ran that didn't work. It came close, but didn't work.

JUDGE GINSBURG: It caused him to write that he didn't think the states should have any role in antitrust.

DANIEL MARCUS: That's right, yes. And of course I was there when…this was the rather difficult transition from the Clinton Administration to the Bush Administration and I remember it well because of course, the brief had been written when Joel Klein and Doug Melamed had – he's a former partner of mine who was the principal deputy and who is, I think, the brains behind the…

JUDGE GINSBURG: Joel's no slouch.

DANIEL MARCUS: No, no, no, but Joel's not an antitrust lawyer.

JUDGE GINSBURG: Well, he is now.

DANIEL MARCUS: Yeah. Well no, Joel's no slouch, but when during the transition, we urged the incoming Bush transition team that they ought to keep Melamed around – he was at that point the Acting Assistant Attorney General because Joel had left, I think, in the summer – and we urged them to keep him around so he could argue the case in the D. C. Circuit because it was coming up and preparations were already under way. But they didn't do it and it's interesting. I had forgotten until I looked at the opinion again, that the case was not argued by lawyers from the Antitrust Division; it was argued by two lawyers from the Solicitor General's office – David Frederick and what's the other guy's name? Jeff Minear I think.

This comment of mine is triggered by your commenting on the argument for Microsoft. Do you have a recollection as to how these two bright guys from the Solicitor General's office who were not antitrust specialists themselves, how the argument for the government went?

JUDGE GINSBURG: I really don't; I can tell you that David Frederick is a terrific lawyer, but I can't recall the specifics of the argument.

DANIEL MARCUS: You indicated when you were making your three points about the short, relatively short timeframe between oral argument and the issuance of this very lengthy opinion written by seven judges, edited by seven judges, how did you get it done so fast?

JUDGE GINSBURG: Well Harry Edwards got it done. Harry is very quick with his opinions in general, plus he established when he became Chief, or shortly thereafter, which was in 1994, that we would try to have all of our opinions out by June 30th. And I'm sure he's never failed to do that himself.

I have almost never achieved it. It has always been one or two that's gone over. Our new Chief Judge has also always had some that went over the deadline, Judge Garland. But everyone tries to do that. And unlike the Supreme Court, we're not as rigid as that, but we make every effort. I think there's no less welcome task for a judge who spends much of the summer on the Cape as Judge Edwards does to receive an opinion from a colleague in August in a case that was argued the prior October. And have to get back into it.

That's why we got it out when we did. By the time the petition for rehearing came, I was the Chief Judge. So that probably took longer.

DANIEL MARCUS: So before the case went back to the district court, there was a petition for rehearing, which surprised me, because this was a unanimous decision. Of course the stakes were so great for Microsoft.

JUDGE GINSBURG: Right, and the opinion is 85 pages long, I think. There are a sufficient number of issues of a sufficient complexity that it's not unreasonable to expect the losing party to take a shot at saying that we misunderstood one or two things. And that does happen from time to time; that we misunderstood something and have to revise it. That's what reconsideration is for.

I will say another thing about the case. At the outset of it the Chief Judge thought it might be useful for all of us if we had the benefit of some technical education from a non-party. He had identified one, or perhaps two, academic people in computer science that he thought we might consider inviting to come speak to the court and answer our questions and so on; just about how APIs work and that sort of thing.

And I think everybody, but certainly most of us found the idea appealing. But of course we wouldn't do that without prior notice to the parties. We proposed that and the parties…[laughs] vehemently opposed the court doing this *in camera*; they wanted to be able to participate and to cross examine the experts. And so we abandoned the whole idea.

DANIEL MARCUS: That's terrible. It does highlight a problem for courts in deciding cases involving complex scientific and technical issues about how the court gets its education.

JUDGE GINSBURG: It does. And yet I have to say I think that the parties were on solid ground. I later wrote an article in the *Case Western Law Review*, about the idea of experts on appeal. And I think it's a thoroughly bad idea.

DANIEL MARCUS: You rejected the idea in your article.

JUDGE GINSBURG: Justice Breyer had made a glancing reference in favor of it, and Judge Leventhal had actually explored the idea at one point in an article. And so I took those as my jumping off places. But I think I mentioned the essence of *Microsoft* as well.

DANIEL MARCUS: The other thing that's remarkable about the case, of course, is with this many issues and this complex a case, you managed to get a completely unanimous court with no dissents, no separate concurring opinions. How did that happen?

JUDGE GINSBURG: I don't recall that there was anyone who even approached that, except that I had some reservations about the part that Judge Williams wrote, and I really didn't want to see it go out in the form in which it was. And I said I would write something. So we were able to resolve…as it turned out, we were able to resolve our differences. But if we hadn't, we certainly would have tried. We all knew it would be bad for the court to have this decision split.

DANIEL MARCUS: Well there is that dynamic, I think. You see it in the Supreme Court sometimes.

JUDGE GINSBURG: Rarely.

DANIEL MARCUS: Well in *Brown v. Board of Education*.

JUDGE GINSBURG: Yes, that's the outstanding example, but that's 70 years ago.

DANIEL MARCUS: That's why Warren's opinion is so short. This is an example of a really long one and it's unanimous.

Okay, Judge Ginsburg, let's turn now to your next significant antitrust opinion, *Covad Communications v. Bell Atlantic*, decided in 2005. This was another…this was a case in which one competitor sued another. One aspiring competitor sued the local telephone company on a

monopolization charge and you and your panel upheld the district court decision in large part, dismissing the complaint with one exception. And this case, to me, seemed pretty straightforward, but you had a couple of things you wanted to say about it.

JUDGE GINSBURG: Well there were two aspects of this case which is called *Covad v. Bell Atlantic*, that were of some significance in antitrust law and one of which remains of interest.

The first one is the price squeeze argument. The situation here is that the plaintiff, which was a competitive local exchange carrier, asserted its right under the Telecommunications Act of 1996 to have the incumbent local exchange carrier, Bell Atlantic, the historical, the legacy company, part of AT&T, give it leased access to certain of its facilities that would enable it to provide competing service. And the purpose of the 1996 Telecommunications Act was, in this respect, to encourage competitive entry. But the act had the unintended consequence of discouraging facilities-based new entry and encouraging only the new entry by firms that depended very heavily upon leased access to the incumbent firm's facilities, and Covad was such an example.

One of the complaints that they made against Bell Atlantic – this was a monopolization case also – was that it had refused to lease facilities on reasonable terms, engaging in a so-called price squeeze. That is to say, they would lease access to facilities, essentially at the wholesale level, to the competitor at a price that made it impossible or impractical for the competitor to sell at the retail level at a price that matched or was below the incumbent's price.

So when you have a firm that's vertically integrated and that is making sales at the wholesale level, there's this potential for a price squeeze allegation by a competitor at the retail level that's buying from it at the wholesale level. The European Union holds, or has since held, I mean, that a price squeeze is actionable under their antitrust law, their competition law. And again, a matter that arose with incumbent carriers, whether it was telephone or railway or what have you--previously regulated monopolists in markets that are liberalizing, as the term was used.

And so I took the position, this court took the position, that the plaintiff had not plead an antitrust violation because the defendant here had its obligation to lease the facility solely as a matter of the Telecommunications Act. It was not dealing in the ordinary course with a transaction of its own volition.

DANIEL MARCUS: Ordinarily it wouldn't be required to.

JUDGE GINSBURG: It would not be required to. It would have virtually absolute discretion not to deal with a competitor. And that therefore a price squeeze case wouldn't lie. That soon became part of a conflict because the 9th Circuit held the opposite in a case called *LinkLine.* And *LinkLine* went to the Supreme Court and the Supreme Court reversed the 9th Circuit and adopted the position that we had taken in this court. It wasn't whole cloth on my part. The Areeda treatise had already taken this position. I was pleased when the matter went to the Supreme Court that there was a brief filed by I think 27 economists who basically just said the D.C. Circuit got it right; the 9th Circuit got it wrong.

The other matter of some interest here was what I just said a moment ago, virtually no obligation to deal with a competitor--virtually unfettered discretion to refuse to deal with a competitor or any other firm. And I said virtually because of the exception that the Supreme Court created in *Aspen Skiing* in which one firm that owned three of the four ski areas in and around Aspen refused to renew its relationship with the second firm that owned the fourth mountain; a relationship by which they had marketed a joint ticket. It refused even to sell tickets at the retail price to the other firm so that it could resell them to its customers as a convenience. The Supreme Court held that Aspen had violated Section 2 and that this was an attempt at monopolization.

But in the *Trinko* case, which is the one involving the Telecommunications Act, Justice Scalia, for the Supreme Court, had written that if there is any such thing as a so-called essential facility as to which the proprietor has an obligation to deal with rivals, *Aspen* represented the outer perimeter of that obligation. And in the literature since then, there's a division of opinion as to whether – and several cases have been tried since then – a division of opinion in the lower courts as to whether a prior course of dealing is -a *sine qua non* for an obligation to continue dealing, or whether there is some other way to meet that standard, such as where it would be in, at least, the short-term economic interest of the firm to do so. It would make a profit on every sale, but it refuses to do so in the hope of, perhaps, driving out the other firm and monopolizing the market.

I took the position here basically, or this court did, that absent a prior course of dealing there was no such obligation other than the one imposed by the Telecom Act, which was not an antitrust liability at all. So that's outstanding still as an issue to be resolved by the Supreme Court.

DANIEL MARCUS: As an issue as to whether *Aspen* really is the outer limit.

JUDGE GINSBURG: Well it's clearly the outer limit; but whether that means that all the facts in *Aspen* have to be replicated? Is it this one or is it something else or could there be something that is not true in *Aspen* but nonetheless comes within the outer limit? So that was the interest in that case.

DANIEL MARCUS: Okay, the final case that I wanted to ask you about is the Polygram case, which was the same year as *Covad*. This was the colorful *Three Tenors* case.

JUDGE GINSBURG: Which is how it's usually referred to.

DANIEL MARCUS: Well that's a good way to remember it and it was an interesting case. Am I right in thinking, I mean, it looks, again, to me – and I'm not an antitrust lawyer – that this decision makes a lot of sense. What was the main pitch of the private parties here, the joint venturers? Were they trying to suggest this idea that it was really pro-competitive? It seems to me that they were sort of asking the court even though the two earlier releases had been by independent companies, not a joint venture, that they were sort of saying well now the whole thing is a joint venture and so we get the benefit of that. We're trying to make the joint venture as efficient and profitable as possible.

JUDGE GINSBURG: Pretty darn good for not an antitrust lawyer because what you've said raises what is really the tough question that's presented, which is to say, what if they had thrown all of the recordings into the joint venture? Could they legitimately have done that? They would have each contributed one of the prior recordings and the joint venture would have gone on to create the third one. And the answer is probably yes; that that probably would have been legitimate, I'm venturing to guess, but that's not what they did. They created a joint venture to issue the third recording and then realized that the joint venture was about to do something that would compete with each one's prior recording. And that in order to maximize the benefit, the profit of putting out the new recording, they needed to coordinate the promotion of the earlier recordings by coordinating, meaning stop promoting them; not sell them at a discount, not advertise them, to give the new recording the maximum possible appeal.

The problem that they raised by doing that was that they exceeded the limits of the joint venture, which has to be policed. When you have two direct competitors who enter into a joint venture to offer a new product, one really has to police the conduct of the joint venture so that it stays within the thing that justifies collaboration by the competitors and not become the occasion for meeting and discussing pricing on their other products.

As we said in the opinion, suppose they said well this is going to compete with all of our opera recordings or all of our classical recordings. Let's not promote any of those. One of their justifications was, well, we had to do this because otherwise, the old recordings and the proprietors of the old recordings who are you and me, will free-ride on the promotion of the new recording. And that justification didn't fly because that is like saying when General Motors puts out a new model of SUV, all of the existing SUVs will benefit from the promotion of the idea of an SUV, so therefore they can all collaborate on withholding their advertising or somehow sharing in the benefits.

So the tough question is, well, what if they had put it in? Put those other recordings into the joint venture to begin with? Whether that would have passed muster in terms of being necessary to make the joint venture viable and not a major imposition on competition between the firms is an open question. I think they might have been able to justify that. It seems pretty closely related. But they didn't do it. But the key thing about this opinion is actually the presumption that the FTC was making. This is why the case is important. When Tim Muris was Chairman of the FTC, the Commission issued an opinion called *Massachusetts Board of Optometry*. The *Mass Board* case, as I wrote, begins with the proposition that conduct "inherently suspect" as a restraint to competition; that is conduct that "appears likely, absent an efficiency justification, to restrict competition and decrease output," is to be presumed unreasonable. Now that was my opinion, quoting his opinion.

I took the "inherently suspect" category and upheld the concept with a phrase that…well, the point was that such restraints by their nature tend to raise prices and reduce output. It has to be something that looks like that by its nature. It would do that and the way I rephrased it was to say that…well, I traced the history of the non-*per se* category through the Supreme Court. And ended up by saying that although the Commission uses the term "inherently suspect" to describe these restraints, the judicial experience and economic learning have shown them to be likely to harm consumers. We note that under the Commission's own framework, the rebuttable presumption of illegality arises, not necessarily from anything "inherent" in a business practice, but from the "close family resemblance" between the suspect practice and another practice that already stands "convicted in the court of consumer welfare." The Commission appears to acknowledge, as it must, that "As economic learning and marketplace experience evolve, so too will the class of restraints subject to summary adjudication."

Now, in a way, that itself bears a family resemblance to what we were talking about in the tying aspect of *Microsoft*. Business practices come

into being; new things happen. Courts then gain experience with those new things. It's a fluid situation.

DANIEL MARCUS: And so it's important not to have a *per se* rule or…

JUDGE GINSBURG: Yeah, there's nothing inherent about it.

DANIEL MARCUS: "Inherently suspect" was too strong…too strong an indictment, right?

JUDGE GINSBURG: Right, right, right. And it's not per se treatment; it's a presumption. But the objection was that this relieves the Commission from making out its *prima facie* case. That it really isn't producing evidence of actual effect.

Well, you know, in a *per se* case you don't have to produce evidence of actual effect because of what we discussed. The probability that experience shows something being beneficial is so remote. And this is a lesser version of that. But the Commission's decision in *Mass Board* was out there from 1988 without judicial imprimatur until this case in 2005. But it was vindicated. That had been controversial until finally it was laid to rest, at least in this circuit. But I have no doubt that this fits within the evolution of the Supreme Court's jurisprudence creating a series of gradations between *per se* condemnation and the full blown rule of reason.

DANIEL MARCUS: It is interesting because these cases, although you haven't had a lot of antitrust cases here, they span a significant period of time, so it's giving you an opportunity to participate in, if you will, in this dialogue with the Supreme Court that it has moved, as you said, moved antitrust law toward a more gradated, if that's a word, an approach to…

JUDGE GINSBURG: Nuanced.

DANIEL MARCUS: Nuanced approach to these things.

JUDGE GINSBURG: This court does not get many antitrust cases. In fact we get more competition cases arising from regulatory agencies. I think maybe we discussed already the FCC cases. And I've had cases from the Federal Energy Regulatory Commission that involved competition. But the one I most regret not having had a hand in is the *Whole Foods* case, which was a merger that the FTC sought to enjoin preliminarily so they could conduct a part 3 proceeding within the Commission. Judge Friedman in the district court did a superb job with it and was reversed by this court.

DANIEL MARCUS: He denied the PI.

JUDGE GINSBURG: He denied the PI, which is unusual for the FTC. This court reversed it in opinion by Judge Brown that I think had really taken the wrong tack in the analysis, talking about infra-marginal consumers and so on. And then in the petition for rehearing *en banc*, I wrote separately, concurring in the denial of rehearing *en banc* and explaining why I thought the opinion didn't actually set a circuit precedent. Judge Sentelle alone joined me in that. But not too much thereafter Judge Collyer had a PI application in which she cited the *Whole Foods* panel 23 times.

DANIEL MARCUS: Oh my. Does that mean you wish you would have voted for rehearing en banc?

JUDGE GINSBURG: No. That would have just been dissenting, and advertising that I couldn't convince my colleagues.

DANIEL MARCUS: Ah, that's interesting.

JUDGE GINSBURG: Because no one undertook to disagree with this point; it was just myself saying this along with Judge Sentelle, there wasn't an opinion for the court saying, oh yes, it is a precedent.

DANIEL MARCUS: Well, the *Microsoft* case was such a big case, it made up for…it probably constituted several cases in terms of giving you an opportunity to flex your antitrust learning.

JUDGE GINSBURG: Well I have been dining out on that case for a decade and more; getting invited to panel discussions and so on.

DANIEL MARCUS: Well, I was going to say that your academic and writing work has supplemented your judicial work in the antitrust field and made you a figure in the field.

JUDGE GINSBURG: But I never write about my own cases.

DANIEL MARCUS: But you talk about them, right? And then you said you've been dining out on the *Microsoft* case.

JUDGE GINSBURG: Well I mean I recounted in the *Case Western* article about the experts on appeal. And I served on a panel a couple of summers ago in San Francisco when the decree was finally expiring, even after the two-year extension by the district court, and I was the moderator, and the government and Rick Rule for the company discussed how they made their quarterly appearances before the district court and reported on compliance efforts and so on. And I simply dined out.

DANIEL MARCUS: Literally and figuratively.

JUDGE GINSBURG: Literally and figuratively.

DANIEL MARCUS: Let's turn to a new area, Judge Ginsburg, where I have some general questions about your views on the role of the court and the developments of the law. The first of those is Freedom of Information Act cases. There are a lot of them. This court, as you've observed in earlier interviews is, in effect, pretty much the court of last resort for Freedom of Information Act questions. The Supreme Court doesn't take that many cases and almost all the cases are here, an awful lot of them, anyway, and so what are your reflections after dozens of these cases in the last 25 years about one, how the statute is working and, two, whether there is anything that could be done to simplify this area to reduce the amount of litigation?

JUDGE GINSBURG: Well first let me say that I think it's one of the great accomplishments of the latter part of the 20th century in our government to have enacted the Freedom of Information Act. There may be some countries that have something comparable – maybe Canada – but I'm not aware of it. And I've observed in the past that when I go to the United Kingdom, I and others, I think, have absolutely no insecurity or doubt about our conduct and what's going to offend the laws and what's not; we might be not nearly as confident in the Orient or in Africa. Yet the Official Secrets Act is, I think, one of the most important legal distinctions between United Kingdom and our regime, which are otherwise so very very close.

So there's our closest peer, maybe along with Canada, that takes the opposite tack, basically. Everything, almost everything is prohibited unless it's permitted. And here we take the position and the statute that Congress did and the President did, that everything is open unless there is some reason why it's not. And that includes your own FBI file. Although there may be redactions for legitimate reasons.

So I think it's a great tribute to our government that we have it and a major responsibility for the courts, and this court in particular, and the Supreme Court, which had weighed in more frequently in the first 20 years or so, to administer this statute and interpret it in a way that accommodates the sometimes conflicting forces at work.

The major conflicting force is the bureaucratic inertia and instinct for secretiveness that the statute was directed at overcoming. And even that, of course, in ways that often, usually, I would think, escape notice in court or any litigation, still means that some agencies are woefully slow in responding to requests and just drag their feet in general about this.

But there are a number of institutional parties that are frequent claimants under the Freedom of Information Act, frequent demanders of information and when they're not obliged will take the agencies to court, and that keeps the thing from collapsing under bureaucratic inertia.

We've had some very interesting and challenging cases involving such things as e-mails from an outgoing administration and how this intersects with the presidential libraries and National Archive Acts, all sorts of things of that nature. But even though it's an Act that has fairly specific-- well, has I think nine specific exemptions in it, the myriad variety of facts generate a continuing need to revisit those exemptions.

The exemptions inherently have to be written in somewhat general language. I mean they're specific enough that it required nine of them to accomplish the task. But even so, circumstances just differ from one document to another, one agency to another, in ways that the Congress wisely did not try to anticipate and left it to the courts to administer this Act in a sensible way.

So, for instance, beyond the interesting ones with e-mails and presidential documents or presidential preservation requirements, we had a case in which ABC and other news organizations – I think the *New York Times* and several others -- requested from NASA the audio version or the audio tape of the communications between the ground control and the *Challenger* space vehicle that blew up. The agency had released a transcript and there wasn't any serious suggestion that the transcript was inaccurate. If so, that could have been resolved in camera readily enough.

Their motivation is utterly irrelevant under the statute. They can have any reason or no reason for wanting a document. That doesn't matter. But the question was whether that was an undue invasion of personal privacy and part of the argument was whether one could consider the personal privacy of the decedent, but of course there was also the personal privacy of the decedent's relations. I wrote that opinion denying the FOIA request on that ground of personal privacy.

The national security exemptions have been…the occasion; law enforcement and national security, they are separate exemptions have been the occasion for a fair amount of litigation. And I've seen cases in which the FBI has necessarily and legitimately redacted so much information that the remaining releases, essentially are unintelligible. In most instances we have found that they were on solid ground in doing so, but not always. And so I think the Act has a therapeutic effect of correcting them when they're challenged and wrong, and I think that has a great effect on how they do their business to try to get it right.

They put a lot of resources into this. I'm sure they get many, many thousands of requests that we never hear about because they're satisfied.

I may have told you, but earlier, about a case that was not a FOIA case; it was the case in which the government said it couldn't go to trial without disclosing national security information.

DANIEL MARCUS: Yes.

JUDGE GINSBURG: That was legitimate in my view. The Chief Justice issued a stay and then the case settled. But these things do come up and there are legitimate reasons and it's not always just bureaucratic inertia, trying to cover themselves from some embarrassment. But that's there too.

DANIEL MARCUS: But there's a lot of pressure, I think, on the national security exceptions now because of the political controversies over so much of the various aspects of the war on terror. The Guantanamo, access to Guantanamo related records. Access to records and OLC opinions and so on and on; the NSA programs and so on.

JUDGE GINSBURG: Well bear in mind that this is not a reason for the court to deny a claim for access to documents. But if the court does deny the claim for access to documents, there is still a political process out there and it doesn't require legislation. Administrations routinely, for political reasons, find themselves having to give up documents they would rather not give up.

DANIEL MARCUS: Of course, they also are in the awkward position of sometimes releasing documents for their own purposes that they, in other circumstances, might claim are exempt from required disclosure.

JUDGE GINSBURG: Sure. When I was in the Justice Department, we would get demands for documents, particularly from the House Commerce Committee then chaired by the gentleman from Michigan.

DANIEL MARCUS: Dingell.

JUDGE GINSBURG: Yes. Mr. Dingell, who is still there. And when, the circumstances warranted, which was not infrequent, we would initially state that there was an executive privilege there, but that staff was superb and very professional. We almost always worked things out and we almost always ended up giving the…maybe even always, ended up giving over the documents. I mean a claim of executive privilege against a Senate or House Committee has to be…is a rare thing for political reasons. So I

think it's a triumph anyway; the Freedom of Information Act is a triumph of our system.

DANIEL MARCUS: It is. It's a big burden on government officials. In other words, I think you're right in suggesting that agencies often, without good reason, drag their heels and resist. But they also have a big problem in dealing with the volume of requests, particularly some agencies.

The Food and Drug Administration, for example – and this is…the pharmaceutical companies use the FOIA for a little industrial espionage against their competitors. And the FDA has gotten very adept at dealing with these things.

So your bottom line is the statute is a triumph of American democracy and that the courts, this court has done a good job of establishing a body of law that governs here.

JUDGE GINSBURG: I think we have, but there will always be a huge factual component that makes it incumbent upon the court to work through voluminous documents. Judge Wald described this in an article that she wrote--sitting late at night with a law clerk, paging through thousands of pages and reviewing the redactions and that sort of thing. It's very tedious. But, that's why we get the big bucks.

DANIEL MARCUS: Well let me ask you, since we were talking about national security, the district court and this court have, thanks to the Supreme Court's decision in the *Boumediene* case, been assigned a major responsibility of deciding all these habeas cases brought by Guantanamo detainees.

You haven't really been involved in a lot of those cases, but you've been involved in some of them.

JUDGE GINSBURG: More than enough for my taste.

DANIEL MARCUS: More than enough. The poor district judges have really had a tough assignment in that regard, conducting all these hearings. But what's your overall…this whole thing is winding down now to some extent, I think, because there are fewer detainees and most of their petitions have already been decided. But do you have a view as to whether this court and the district court judges had to create, really, a whole new body of law? There's a lot of habeas law before, but this was a kind of unique kind of habeas situation. What's your view as to how that process has worked in the district court and this court?

JUDGE GINSBURG: Well, first, I think it was utterly irresponsible of the Supreme Court. I think it was wrong to think that habeas applied at Guantanamo. But utterly irresponsible to basically say simply the lower courts will have to work it out. And then when we tried, of course, they said that that was not adequate.

DANIEL MARCUS: Well, they didn't really say…

DANIEL MARCUS: The habeas, they actually, they've effectively blessed your work by denying cert in every case since *Boumediene*.

JUDGE GINSBURG: Yes; Yes, I correct the record on that, the habeas case. Now, as I understand – I don't have this except from a news account – the government lost 19 of its first 26 habeas cases in the district court. And it appealed only a couple or three of those; a few of those.

I think a great embarrassment coming out of this application of habeas to this situation is that the court cannot effectively give habeas relief, which is to say release. And to give you an example, which has now been publicized, it is the perfectly reasonable position of the State Department that any person who is eligible for release can be repatriated, should be repatriated rather than sent to a third country where the third country that might be willing to accept one or two or three detainees and to not have that slot used up by somebody who could be sent to their home country.

Well, at the same time, some prisoners, detainees, reasonably claim that they will be persecuted if sent to their home country. Okay, well that's a standard that we have for which there is a pre-existing body of conduct and precedent and that involves the extradition and the convention on the prevention of torture. The government is not supposed to send someone back to their home country if they have a reasonable expectation of persecution; not prosecution. If they violated the laws of that country that's no reason not to send them there. But of persecution.

And so we find the courts saying detainee X is entitled to relief, but the government, as a practical matter, can find no country that's willing to take that person. The one that's been publicized is one where a person from the Levant is seeking to join some family members in Canada and is eligible for release, but the government wanted to see if they couldn't repatriate him. And he, on the other hand, wanted his lawyer to be authorized to tell the Canadian government; show them the papers saying that he was eligible for release and then appeal to them on the ground of family connection.

Well so the court's out of it at this point, right.

DANIEL MARCUS: Yes. So it's an uncomfortable situation.

JUDGE GINSBURG: It's a very awkward situation in which governments are dealing with each other and in which high foreign policy is at stake, in which we have added very little value.

DANIEL MARCUS: Well the rule of law, I suppose, is vindicated to some extent when the district court or this court says that he's entitled to release and must be released. It's never great when a court order effectively can't be carried out.

JUDGE GINSBURG: And then, of course, the few cases we've seen of this nature are ones where the government has told a credible story. It seems to have been on solid ground. But once you have court orders that can't be carried out, then you don't know whether some of them aren't being carried out for other reasons. So it's a very uncomfortable and awkward situation. I don't know that we've added anything of value. I'm very skeptical about inserting the courts in to what is essentially a conflict situation. And now, I guess, the next step is the *Bagram* suit.

DANIEL MARCUS: And that case is still pending, although it may effectively be mooted, I suppose.

JUDGE GINSBURG: By the turnover?

DANIEL MARCUS: Yeah. If we can talk about one other general area briefly where you get a lot of cases, and that's the EEO cases, the Title 7 cases. Basically employment discrimination.

JUDGE GINSBURG: And basically against the government because that's the biggest employer here by far.

DANIEL MARCUS: Yes. And you've been involved in a lot of those cases. Are there any general things or lessons or views about equal employment law that you draw from that?

JUDGE GINSBURG: I think we could use something comparable to the three-strikes rule, which is to say, if a prisoner brings three cases that are dismissed as frivolous, then he's no longer entitled to proceed *in forma pauperis* and burden the courts with more such cases.

There's something of an analogy there because the records in these cases so often reveal the fact that the complainant claiming discrimination in employment has made the same claim in multiple situations in the past.

DANIEL MARCUS: I see.

JUDGE GINSBURG: When I first came to the Justice Department I was told that 80% of all EEO complaints were filed by someone who had filed one in the past, one or more in the past. It's a way of, for someone who is on slippery ground for their performance, to prolong their employment, perhaps indefinitely, because it's so difficult for the government to fire anyone in the civil service. The civil service rules are a huge deterrent to managers weeding out incompetent employees.

When I was Assistant Attorney General, as you may know from your own experience, I did not have the authority to fire someone. I had to recommend that to the – at least in the case of a lawyer where this came up – to the Deputy Attorney General to make the decision. I had a lawyer whose insubordination caused me to make that recommendation. He, of course, then sued in this court. By that time I was on the court and everyone here recused him or herself and it went to a panel from another circuit. He was not a repeat complainant, I should say. But the cases are so rarely even really interestingly ambiguous or involve colorable claims.

The district court sorts out the vast majority of these things. The vast majority that come to us were decided on summary judgment below. And, of course, we don't defer to the district court on summary judgment; we look at the record anew. But how often the district judges are wrong on these cases when they grant summary judgment to the government? Not very often.

DANIEL MARCUS: Well in my experience, a lot of incompetent employees are genuinely convinced, wrongly, that they've been discriminated against because they don't recognize, they're not self-aware of their own abilities.

JUDGE GINSBURG: Right, but these are not typically *pro se* cases. They get lawyers. I presume the lawyers…I don't know; I presume the lawyers are on contingencies. I don't know. Maybe not.

DANIEL MARCUS: Well of course the EEOC cases you get, or some of those cases, are ones where the Commission has found discrimination.

JUDGE GINSBURG: Yes.

DANIEL MARCUS: And the agency or the private party, the private employer – I know you don't get a lot of private employer EEOC cases – but the agency or employer is appealing. You've had a fair number of the EEOC cases.

We've talked a little about your views on other administrative agencies. What's your view on the performance of the EEOC?

JUDGE GINSBURG: I think it's been over the years pretty consistently a zealot pushing anti-discrimination law well beyond anything that was ever contemplated by the Congress and really beyond what should be expected of employers in some of these situations. The whole disparate impact doctrine, seems to me, is quite questionable; dubious. But the recent, the more recent cases…disparate impact is sort of an artifact of the 80's, I guess.

DANIEL MARCUS: Yeah, to some extent. It's in some statutes, but I know they've created it in some situations where it's not.

JUDGE GINSBURG: Oh yes, definitely.

As for instance, with a test that has a disparate impact. But the agency has been pushing much further in more recent times on sex discrimination, hostile work environment in particular. And I think it's there probably--I'd have to refresh myself on some of the cases--but I think it's there that they've more often met with correction in this court.

DANIEL MARCUS: In this court, yes. I think that's right. You know, you mentioned that there's a zealotry issue there. I wonder to what extent that's a problem with sort of mission-related agencies. Let me ask you this about another agency you review a fair amount over the years, the National Labor Relations Board. The criticism of the Board from time to time is that it is either zealously pro-employer or zealously pro-employee, depending on whether it's a Republican administration or a Democratic administration. Is that a fair criticism of the Board, do you think? Or do you think the Board…well, what do you think about the Board's performance?

JUDGE GINSBURG: I should say first that I agree that this single-mission focus can distort an agency's incentives. And in the case of the EEOC, for instance, the greatest threat to the EEOC would be the absence of discrimination.

DANIEL MARCUS: They'd go out of business.

JUDGE GINSBURG: So they have every incentive to continue to find new frontiers of things that can be pursued.

The Labor Board's in a somewhat different position, as you've already suggested. When I taught Labor Law, it was up to that point clearly the case that the agency had on many different issues, particularly in the area of union elections – that is to say, not union internal elections, but union employee elections – had reversed itself, then reinstated precedent, and

then reversed itself again in just the way you suggested. And that was documented in a book by Julius Getman called *The Myth of Labor Board Expertise*, which came out in 1972.

Since I don't teach it and haven't taught it since 1981 or 82, I don't know whether from my episodic exposure to particular cases, whether that's still true, but the structure that created that is still there, so I would think it would still be true. And I read every so often about someone who's been nominated and they come from a union background or a background of representing employers in labor cases. The only exception was Betty Murphy, who died recently, the only lawyer I've ever heard of, and was reputedly the only such lawyer, to represent both sides in these things; both labor unions and employers.

DANIEL MARCUS: And she was on the Board.

JUDGE GINSBURG: She was on the Board, right. Served ably on the Board. But I think one should understand the Labor Board in context of its creation and of its current situation.

When the Labor Board was created, the conflict between labor and management had become one of violence. The River Rouge plant was occupied in '37, I think it was; I mean this was 40 years after the Pullman strike and we had Pinkertons and the whole thing replaying itself but on an even bigger scale. The Labor Act was, in that respect, a complete success. It almost instantly took this conflict out of the streets and put it in to hearing rooms with lawyers. And that was an enormous accomplishment.

Now, the way it was structured meant that the control of the Board would be part of the spoils of the quadrennial election because the conflict was still there and so it just had been proceduralized and lawyerized, but it was still a conflict and it would still be associated with the two political parties for opportunistic reasons. So that's still the structure of it.

Meanwhile, in the intervening years since 1935 - the Act was upheld in '37, April 1st of '37 – and I think that was the year of the Rouge sit-in. In the period from 1935 and through the amendments in '47 and '59, the labor movement has waxed and waned in the private sector. The Labor Act really made it possible for the CIO to organize steel, rubber, and automobile sectors and to expand the membership enormously. But through a combination of forces, including foreign trade and right-to-work states and overplaying their hand, the private sector unions have dwindled to the point where I believe 7% of the employees are now members of unions.

So we still have this structure of the Labor Board. It was created to regularize and routinize and proceduralize this conflict, which meant inherently favoring labor because when it wasn't the subject of those forces, they were in a bad place. It didn't mean their decisions had to favor labor, but doing this was favorable. And now the labor movement is a primarily a public sector phenomenon and a state-by-state phenomenon.

When the Labor Board was important, it attracted very good people. Judge Silberman began his career there. And I've come across many other people's names who went on to do things, important things in government and in practice. But I doubt very much that's the case today. It's an agency that's diminished in its importance and not a challenging proposition.

They've been plagued through the recess appointments and we've had, for I think about four years now, cases held in abeyance, so we haven't had any labor cases coming out for a long time. First it was because there was no quorum.

DANIEL MARCUS: And you held that they couldn't act without a quorum..

JUDGE GINSBURG: So held. And then it was because one of the appointees was an invalid recess appointment.

DANIEL MARCUS: Subject to review by the Supreme Court.

JUDGE GINSBURG: Still pending, right. Yes, the 11th Circuit went the other way – not on the same person obviously, but – on the reach of the recess appointment authority, and Judge Barkett's dissent in that case, which preceded our court's decision, I thought was very powerful and that's the way our court went. And I'm confident that's what the Supreme Court will say. I think the law is pretty clear on it.

DANIEL MARCUS: I don't know if they'll go as far on all aspects of it, you know. There are several issues there.

JUDGE GINSBURG: Oh, well I'm thinking of whether …I guess it's whether this was a recess, right?

DANIEL MARCUS: Well, this one was a recess, yes. But there's also the intra session vs. inter session question.

JUDGE GINSBURG: So we haven't seen a lot from the Labor Board lately. There's a huge avalanche of cases being held back and I look forward to getting them because we haven't had enough cases. And I used to write a lot of labor

cases because I taught the subject. I was interested in it. So when I had the opportunity, I took a labor case.

DANIEL MARCUS: Okay. Well one other agency that sort of we talked about before that's kind of a mission agency, in a sense, is the Environmental Protection Agency. That's true of, I suppose of OSHA too.

JUDGE GINSBURG: Well OSHA's contained within the Labor Department.

DANIEL MARCUS: Yeah.

JUDGE GINSBURG: So it's not entirely a free agent the way the EPA is.

DANIEL MARCUS: Alright, so the EPA is more of a free agent but its statutes are environmental protection statutes. But I take it from our discussion of EPA cases before that you think the EPA has done a pretty good job in terms of its overall rulemaking approach?

JUDGE GINSBURG: It has an extremely challenging set of statutes to administer and limited tools, scientific tools available. They have been some…I'm not sure I would say zealots. I think that's overstating it, but they have been aggressive on some fronts. And it's a misfortune that they have all of the responsibilities that they have because so many of these problems would have been better dealt with by leaving them to the states and giving the EPA jurisdiction over the largest sources, which is what has been proposed, but is politically very difficult, as you would imagine.

DANIEL MARCUS: So they have to waste a lot of time on local…?

JUDGE GINSBURG: Well, on regulating millions and millions of point sources when a tiny, tiny percentage of them account for the vast majority of the emissions.