

Oral History of Judge Douglas H. Ginsburg

First Interview

June 18, 2012

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, June 28, 2012. This is the first interview.

DANIEL MARCUS: This is Daniel Marcus on June 18th, 2012, interviewing Judge Douglas Ginsburg. Are you ready to start, Judge Ginsburg?

JUDGE GINSBURG: Yes, thank you, whenever you are ready.

DANIEL MARCUS: Judge Ginsburg, am I right in assuming from your biography that you grew up in Chicago?

JUDGE GINSBURG: Yes. I was there through secondary school and then went back for law school, so 17 years, and then another three later on.

DANIEL MARCUS: Was there anything in your family with your parents that connected you to the legal or academic worlds?

JUDGE GINSBURG: No. My father had wanted to go to law school. He was born in 1901. I guess it was the late '20s when he enrolled at Northwestern University Law School. In those days, one did not have to have a college degree and he had not gone to college.

But he was working two eight-hour shifts as a telegrapher, one for the Postal Telegraph and one shift for the United Press International. He got off work at six p.m. on Chicago Avenue and had to walk a few blocks east to Northwestern to get to his six o'clock class, so he was always among the last to enter, and their classrooms were these very steep amphitheaters. During the Chicago winters, they would have the steam heat on, so having come off 16 hours of work, he would almost invariably fall asleep. He'd have to come in late, sit up high, and so would become drowsy in the heat. I don't think he finished the first semester.

DANIEL MARCUS: But it didn't discourage you.

JUDGE GINSBURG: No. I was not working two other jobs, and life was a lot easier by the 1970s.

DANIEL MARCUS: So after high school, you went to Cornell as an undergraduate. And I see that you got a BS degree, not a BA degree, so it doesn't sound like a prelaw student to me.

JUDGE GINSBURG: I was supposed to attend in September of 1963. I didn't actually get there until January of '64, because I was in an accident and broke my leg and couldn't show up.

So when I did get there, I was enrolled in the College of Arts and Sciences with the intention of majoring in classics. I was taking ancient history with Donald Kagan and studying Greek. And at the end of a full year in residence, which would have been the middle of the next year, I was asked whether I wanted to enter the then new and experimental six-year PhD program in English literature, and I was quite torn as to whether I wanted to do that or stay in classics. But both seemed to be roads - particularly the PhD - roads leading solely to teaching, and I had some doubts as to whether I wanted to do that.

I ended up leaving school in 1965, taking a leave of absence, which enabled me to return, at any registration for the beginning of a new semester, any time within five years. I was out of school for three and a half years and I was in business and had a variety of experiences. So that when I returned, (a), I wanted to go to law school, and (b), I was financially independent of my parents, which is not to say that I had independent means, just that I was no longer their dependent.

Therefore I switched to the New York State School of Industrial and Labor Relations, and there I was able to finish my degree in two years. I had entered in the class of '67; I was graduated with the class of '70. In that two years I managed to take some economics, statistics, and constitutional law, and secure admission to law school.

DANIEL MARCUS: Who was your constitutional law professor at Cornell, if you remember?

JUDGE GINSBURG: Milton Konvitz, who taught a course in the Industrial Labor Relations school, the ILR school. It was a solid preparation in the sense that it confirmed my interest in law school.

DANIEL MARCUS: And during the period that you took the leave from Cornell, your experiences in the business world, is that what convinced you that you would like to go to law school rather than pursue the PhD?

JUDGE GINSBURG: Yes. I wanted to practice securities law. I had been a client for most of those three years, and as far as I could tell, the lawyers were the only ones who were consistently being paid and seemed also to have an

intellectually more interesting career and challenge than the business people did. So I went to law school thinking I would practice securities law on Wall Street.

DANIEL MARCUS: All right. Well, let's move to your law school years at Chicago. And I know from my colleague, Jeff Lubbers, that you were in a very illustrious class at the University of Chicago Law School, full of future academics and judges. Talk a little bit about your law school experience and how that shaped your view of what you wanted to do

JUDGE GINSBURG: Well, I was at the University of Chicago Law School at a very exciting time; I don't know of anything comparable to which I could compare it. But the fact is that it was a place of great intellectual ferment at the time. Richard Posner taught us torts, which he began by saying "Torts is not my field." He was teaching torts in order to test his theories about economic analysis of law. And indeed, the first edition of his treatise of that name appeared in 1972, I believe. Richard Epstein was there. I think it was his first or second year on the faculty; a very exciting intellectual presence.

I had two seminars with Ronald Coase, later a Nobel laureate in economics. The industrial organization workshop was held in the law school; that was attended by George Stigler and Gary Becker, both of whom later won Nobel prizes, as well as the prominent people from economics, the business school and the law school. And there was really electricity in the air as these ideas were being formulated, reformulated, tested, and resisted. Harry Kalven and some other members of the faculty were not at all interested in - some people were hostile to - economic analysis of law.

At the end of the first year, I interviewed for a couple of summer jobs; the one in particular I remember, was at Mayer, Brown, and Platt. In those days, first-year law students - I'm afraid it's true now with the recession - did not ordinarily get a law job unless they had a relative whose office they could hang around.

I was close to the top of the class in academic GPA, and so I did have a couple of interviews. And the one, as I said, with Mayer, Brown was memorable because Irwin Tomashaw was the partner who showed me around; I spent the morning going from one office to another, and at the end, as he was bidding me a farewell, he said, "You know Bernie Meltzer was an associate here." He was a member of the law school faculty. And I said, "No, I didn't know that." And he said, "Yes, but he didn't stay long; too independent." So that cooled me on the idea of spending the summer in that office.

But then Owen Fiss, who was on the faculty and who had taught us property law, asked me to be his research assistant for the summer, which I did, of course, and that proved an extraordinarily important event. For one thing, it confirmed the view that I had started to entertain by the end of the first year of law school that, of all things, I really did want to teach, not literature or classics; now it would be law.

DANIEL MARCUS: Of course, he was not an economics-and-law guy, was he?

JUDGE GINSBURG: No, no, not in the least, not in the least. But he was doing some research that involved a little bit of economic history. I was looking into the issuance of senior indebtedness by trustees for bankrupt railroads, where it was simply unacceptable, inconceivable, to let the railroad cease operating; all the farmers depended on it and the city markets depended on it.

The railroads would keep operating, but the only way to finance them through reorganization was to issue debt that was senior to the existing debt, and so the bankruptcy receivers were doing this and there was some litigation around the country. There were a lot of musty documents that I was going through, and court records and so on, to help Owen with this project.

It helped confirm my interest in law teaching and writing and research. And at the end of the summer, Owen asked me if I wanted to clerk for Justice Marshall.

DANIEL MARCUS: After your first summer after your first year?

JUDGE GINSBURG: Actually, that must have been the second summer after the second year. Because I had already just secured a clerkship with Judge McGowan here on the D.C. Circuit. I went to see Philip Kurland, who taught constitutional law, and said, "Professor Kurland, I have a clerkship lined up with Judge McGowan. Is it worth doing a second year of clerking?" And he said, "Oh, yes. It's quite a different proposition. It's the difference between law and politics."

So I told Owen, "I'd be delighted," and he said, "Well, when the time comes, you just apply," and that's all that I ever heard about it. I did apply and then got a letter of appointment in due course. Never had an interview, although I when I was in Washington the second summer -- I came here to work for Covington & Burling -- I did have lunch with Peter Lockwood, who ran a tax firm here in Washington and was a former Marshall clerk, and I believe was, along with Owen, a member - they were two of perhaps

three - members of a committee that screened the applicants for Justice Marshall. I guess that was probably a test as well.

DANIEL MARCUS: So did you work as a research assistant for Professor Fiss both summers?

JUDGE GINSBURG: No, no, just that first summer. The second summer, I was here at Covington. And when I was here at Covington, my mentor, the partner appointed to look after me, was Mike Boudin, and we became very good friends; we've never lost touch. He was doing railroad regulation work and antitrust work -- the very sort of thing that I ended up being interested in teaching. Our paths crossed in an interesting way later on as well.

DANIEL MARCUS: That summer at Covington: it did not change your mind about law practice?

JUDGE GINSBURG: It was a key element, because I concluded that law practice wouldn't get any more interesting or attractive than it was then at Covington, and that was not enough to make a career for me. I felt fairly confident at that point that, given my druthers, I would teach rather than practice.

And then in the middle of my second clerkship, or early spring perhaps, when I was arranging interviews for a position as an assistant professor of law, I was asked universally, everywhere I went -- I had interviews at six schools -- about the fact that I had not practiced and whether I really wanted to start teaching right away. I thought it was appropriate and practical to start teaching without having practiced for a while. At that time, three years of practice was the norm before becoming an assistant professor.

I said I had met a payroll. I had been a client. I had been out for three years doing things that were also useful and maturing, and I was confident about going directly into teaching. Although I must say, after a few years of teaching, a colleague and I started doing some consulting, and it vastly enriched my teaching, but that's because I was doing work that I never would have done as a third- or fourth-year associate. I was being called in by general counsels of corporations and by law firms to deal with novel and strategic problems that would never have been available to me short of 20 years in practice.

DANIEL MARCUS: So you've never had any regrets or second thoughts about not having practiced before you started your academic career.

JUDGE GINSBURG: No. I think that worked out well. And there was actually a fellow on the faculty at Harvard, a tax professor, who had done something similar. He had gone from law school to teaching. He may have practiced for a year or

two, but he went into teaching tax at the University of Connecticut Law School, specifically with the idea that he would then go into practice with a much better grounding in tax practice in the whole field because he would have taught it several times. As it turns out, he never did go into practice, but he not only had the benefit of teaching it each year, but he attracted a lot of consulting business, which similarly enriched his teaching, and in fact, I think that was something I knew and my colleagues knew before we started doing this.

DANIEL MARCUS: Going back to law school, you were on the Law Review, right?

JUDGE GINSBURG: Yes.

DANIEL MARCUS: And how did that experience, that mixture of God-awful drone work and wonderful stuff... Tell us about your experience on the Law Review.

JUDGE GINSBURG: Well, I was the articles editor. At the time, the masthead was very small. There was an editor-in-chief, Ronald Carr, who has since passed away; he was a superb antitrust lawyer, and worked for Mr. Levi as his assistant, when he was Attorney General; Frank Easterbrook, who was the comments and topics editor, which meant he handled all the student work; and I was the articles and book review editor. Frank and I had desks pushed up against each other and looked across those two desks for a year and chatted constantly. So the three of us were in one bullpen and it was a very stimulating place.

DANIEL MARCUS: I can imagine.

JUDGE GINSBURG: The other people -- there were another five, I think, maybe six in the office, and it was an excellent crew, really excellent. I had breakfast last week with one of them. These, my close friends, all come from law school, my lifelong friends. So it was very hard work; the ethos at Chicago at the time, and I think it's still true, was that the Law Review masthead people, the editors, made a point of attending all their classes. That was a part of the package. And typically, we continued to do well academically, I know Ron and Frank and I all did, through the ordeal of that year on the Law Review.

DANIEL MARCUS: Who was the dean of the law school at the time? Was it still Levi?

JUDGE GINSBURG: It was Phil Neal.

DANIEL MARCUS: Oh, it was Phil Neal? And Levi was president?

JUDGE GINSBURG: Phil Neal was dean. Levi was president of the university. About a year or two after that, he left to become Attorney General and then returned to the university.

I had two encounters with Mr. Levi, both of which were absolutely extraordinary and revealing about what an extraordinary person he was. My friend, Ron Carr, was working for him, after he finished clerking with Justice Powell. I'd finished clerking with Justice Marshall, and I hadn't left yet for Harvard.

I had lunch with Ron, and afterwards he said, "Come back to the department. I'll show you the attorney general's office." We were in his office when Mr. Levi returned from lunch. Ron introduced me, and Mr. Levi said, "Oh, Mr. Ginsburg. I understand you're a man of considerable talent and very poor judgment." I had just turned down an offer from the University of Chicago.

In 1985, I was the Assistant Attorney General for Antitrust. I was in Cambridge to attend an annual ALI-ABA antitrust conference at Harvard Law School, staying at the Sheraton Commander Hotel across the Common. I came down to breakfast, and Mr. Levi was sitting at a table, and I made my way behind him to another table. He looked around and said, "Oh, Mr. Ginsburg, are you judicial yet?" (Chuckling). At that point I was still waiting to be confirmed. So here he was attending to these things, these details.

DANIEL MARCUS: Oh, that's remarkable. Before we leave law school, you mentioned the great intellectual ferment and all that was happening at the law school with the law-and-economics world in the early and mid '70s. Who were the professors at the law school who had the greatest intellectual influence on you? You've probably named them already, but...

JUDGE GINSBURG: Well, I think I have. Posner, Epstein, Coase. I would include Kurland, and I'm sure I'm leaving some obvious gap that I should know. And of course, I mean in a way, they all did. Harry Kalven -- the elegance of his work and the craftsmanship is something that I've tried to keep in mind.

DANIEL MARCUS: Well, it sounds like law school was a central experience for you, as it was for me I know.

JUDGE GINSBURG: It certainly was; I loved it, too. I loved it. I had never worked as hard before as I did during that year on the Law Review. I have done so once again since then, indeed the year just finished.

DANIEL MARCUS: Well, that's because you were teaching while you were a judge.

JUDGE GINSBURG: That's right.

DANIEL MARCUS: Okay. So you had both your clerkships lined up before you left law school; indeed, before your last year in law school.

JUDGE GINSBURG: Just as the last year was beginning.

DANIEL MARCUS: So you graduated from law school in 1973 and came to Washington. So talk a little about your clerkship here on the D.C. Circuit with Judge McGowan.

JUDGE GINSBURG: Judge McGowan was a consummate gentleman, and not surprisingly, he was close to Justice Powell. He was a wonderful human being; modest and conscientious. You know, he had served Governor Stevenson as counsel and had run both the presidential campaigns. At one of the reunions, when I was teaching at Harvard and I came down as I did I think every year for the McGowan reunion, I had just read John Bartlow Martin's account of the Stevenson governorship, and of course, Judge McGowan figured prominently in that. I asked him if he had read the book, and if so, what he thought about it. This was in the table-wide discussion after dinner. He said, "No, Douglas, I haven't read it, and I'm not going to read it. I just want to remember things the way I remember them."

He was really a model of judicial modesty and dedication, and a wonderful judge. The court then was a court of nine with three distinct factions. Judge McGowan and Judges Leventhal and Wilkey.

DANIEL MARCUS: You're talking about the center.

JUDGE GINSBURG: Yes, yes. The conservative judges were Robb and MacKinnon and Tamm, and then there were Wright and Bazelon and Robinson. I later served with Judges McGowan, MacKinnon, and Robinson. They were all so different. Leventhal was arrogant, and frankly he had some things to be arrogant about.

DANIEL MARCUS: A smart guy, yeah.

JUDGE GINSBURG: But not a very nice person. And McGowan was universally loved.

DANIEL MARCUS: Was Bazelon still the chief judge?

JUDGE GINSBURG: He was.

DANIEL MARCUS: And who was your co-clerk that year for McGowan?

99JUDGE GINSBURG: There were just two of us. It was David Boyd.

DANIEL MARCUS: And that was your first experience in Washington, I take it, living in Washington or working in Washington?

JUDGE GINSBURG: Well, aside from the Covington summer - yes.

DANIEL MARCUS: Oh, the Covington summer, yes. So Washington was not new to you.

JUDGE GINSBURG: I was still a neophyte, but the two years of the clerkship coincided with the two years of the Watergate scandals and litigation. So while here, I worked on the tapes case for Judge McGowan, and I believe on the agricultural co-op case and another one. In fact, nine or ten of the clerks in this court decamped for clerkships on the Supreme Court, and some of the clerks worked for their Justice on the case a second time. Some, either because of their Justice or themselves, were recused.

DANIEL MARCUS: How did the tapes - I'm trying to remember, because we all are so steeped in *U.S. v. Nixon* in the Supreme Court, as to what happened in the D.C. Circuit in that case.

JUDGE GINSBURG: The circuit was affirmed by the Supreme Court. But the circuit had not been unanimous. I believe Judge Wilkey wrote a separate opinion in which he kept emphasizing, and I think putting in full capital letters, that the issue was "who decides." He didn't think it was really the province of the court, and it was basically more of a political question.

DANIEL MARCUS: I think he may have been the only dissenter, as I recall now. I just didn't remember it. And it's interesting that you mention the agriculture cooperative case, which must have appealed to you as a future antitrust professor. Was that a case on the exemption?

JUDGE GINSBURG: No, that was a case of corruption. It came to us initially on a mandamus petition; I'm not sure whether I was here when it came back on the appeal. The mandamus, believe it or not, was asking us to order - asking the Court of Appeals, I mean, to order Judge Gesell to stop rolling his eyes when their witnesses testified.

DANIEL MARCUS: (Chuckling). That's probably an order that would have been hard to carry out.

JUDGE GINSBURG: There were other intermediate appeals I believe as well, interlocutory appeals. And there was another Watergate-related case; I don't remember which one. Everything paled in comparison with the tapes case, which took a great deal of time. Well, it couldn't stay here long; it didn't take a great deal of time in the sense of being dragged out for months. It was

turned round very quickly. Everyone was working here long into the night and seven days a week until it was out. Judge Leventhal asked me to come see him, because, he said, "I understand from my law clerk that you have a different view on some of this," and we talked for about an hour, or an hour and a quarter. I thought that was - the protocol was a little dicey, but I thought it spoke well of him intellectually.

DANIEL MARCUS: Yes, that's interesting, very interesting. So after you - you move right from your clerkship to clerking for Justice Marshall in the '74-'75 term. And who were your co-clerks?

JUDGE GINSBURG: They were Bill Bryson, who is now on the Federal Circuit, and who had first gone into the white collar defense practice of Miller, Cassidy, Larroca and Lewin. Then he went to the Criminal Division, and he won 52 of 53 appeals in a 12-month period doing organized crime cases and got the Attorney General's award out of a hundred thousand employees.

DANIEL MARCUS: When you said 12-month period, did you mean 12 years?

JUDGE GINSBURG: No, no.

DANIEL MARCUS: He won 52 out of 53 in one year?

JUDGE GINSBURG: Yes, that's my understanding. It may have been over a longer period. He was arguing cases all over the country. And some of them were consolidated, I'm sure. Bill was always independent and self-reliant. He didn't want to be dependent on the clerical staff at Justice, so he had a brief binding machine in his closet that he bought and put there. He did everything on his own, including printing and binding his own briefs. (Chuckling). Very remarkable. So it was a great shame that he wasn't put on this court I thought, but the politics of it were such that that couldn't happen so he went to the Federal Circuit.

I think he was actually either nominated or discussed for the Fourth Circuit - he lives in Maryland - and then that didn't happen for some senatorial reason. And so he ended up being appointed or nominated for the Federal Circuit.

The other clerk was Karen Hastie Williams. Karen's father was Bill Hastie, who had been a judge on the Third Circuit; first African American appointed to the federal Court of Appeals. He'd been governor of the Virgin Islands. Karen had spent some time growing up there, and she and her husband, Wes, still have a home there. She has practiced law in Washington and has done a lot of legislative work, I guess some lobbying

over the course of the years as well, and she may have gone back into government at one point.

We had a division of labor among the clerks. Bill took the criminal and criminal procedure cases, which were legion.

DANIEL MARCUS: It was a natural for him.

JUDGE GINSBURG: Yes. And at the time, that was a big portion of the docket, bigger than it is now. Karen took all the civil rights and related cases, and that was quite a bit. And then I had what was left, which was a potpourri of business cases, security cases, antitrust, international cases. They were not the hot button issues of the day, and perhaps not the ones with which the Justice was as familiar as he was with the criminal procedure and civil rights cases, but he had been on the court already for several years and on the Second Circuit, so he knew what he was doing.

Interesting to me, when I finished there, we had never had a different view of how a case I was working on should come out. He was basically a fairly conservative person, and by that I mean he believed in American institutions. He had disdain for the people that he came up with who became communists or who were demonstrating in the streets. He thought the way to do things was through the courts and through existing institutions.

We had an *SEC* case. We had the Cuban intervenors' case in *Dunhill*, which actually then was reargued; it came out the following year. A labor case, the *Capwell Emporium* from San Francisco, a labor case where Justice Marshall wrote separately. It was a very good working relationship.

DANIEL MARCUS: So you found that despite his liberal reputation, that he wasn't sort of instinctively antibusiness?

JUDGE GINSBURG: No, not at all.

DANIEL MARCUS: Or pro-government, as a former solicitor general.

JUDGE GINSBURG: No, I don't think so, not in this realm. Certainly not in the criminal cases.

DANIEL MARCUS: No, not in the criminal realm, no.

JUDGE GINSBURG: Yeah, so no, no, I don't think so. Juan Williams's biography is subtitled "American Revolutionary." It's a superb book but a bad subtitle. Everything you read in the book tells you that that's not right. Laurence

Fishburne portrayed him on stage in a one-man show called Thurgood. The show begins and ends with Marshall as an older man, which was more or less where I encountered him in life, a little later on maybe, and it was unnervingly accurate. It was such a remarkable portrayal, at least at that stage in his life. I was really impressed. A lot of the clerks participated in financing that.

DANIEL MARCUS: Well, actually one of the things that we didn't touch on about the D.C. Circuit that I would like you to comment on with respect to both courts was you were - unlike clerking on the other courts of appeals, where the judges are scattered around the circuit in terms of their chambers, here everybody was in one building. And when you were clerking for Justice Marshall, everybody was in one building. What was the experience, to the extent you can generalize, as to the differences between the D.C. Circuit and the Supreme Court in terms of relationships among law clerks from different chambers and also the relationships among the judges and the justices themselves and the decision making process? That's a long question.

JUDGE GINSBURG: Well, among the clerks, the group here, of course, was smaller. And the court didn't ordinarily sit en banc. So there wasn't the intense interaction that there was among the clerks at the Supreme Court. On the other hand, the *Watergate*, the tapes case, really brought everyone together.

DANIEL MARCUS: That was heard en banc initially?

JUDGE GINSBURG: That was heard en banc initially. That, and *Microsoft* are the only two in modern times.

DANIEL MARCUS: Yeah. Really?

JUDGE GINSBURG: Each judge had only two clerks, so typically both of the clerks were involved in the case. It was just a big burden of a case. Not a big record, but a great deal in terms of legal issues and the briefing and, of course, the transcripts of the tapes themselves. But that I think made for more interaction among the clerks than there might otherwise have been and made for a more collegial group among the clerks.

The judges, were, as I said, quite fractious, and remained so; not particularly in that case, but I mean over the course of that year.

In the Supreme Court, there were twice as many clerks, or almost twice as many clerks, drawn from all over, and the court wasn't as riven in these distinct tranches the way this court was at the time. But there were personality clashes among the justices, and it was at a time when the court

was a great deal in the news. Just before I came to Washington for the summer at Covington, *The Super Lawyers* had come out, a book about major Washington law firms. And *The Brethren* came out at around that time when I was clerking -- I guess it was right after I was. . . .

DANIEL MARCUS: No, it had to have been after, because it was after Nixon had resigned.

JUDGE GINSBURG: Was it later? That's right. But it recounts that period, because I know some people who were called and asked if they would discuss some things on the phone with the authors. So, no, it was later on, that's right. But it recounts that, covers that period. And Nina Totenberg was getting scoops from within the court, and there were rumors about her relationship with one or another of the Justices, and Douglas was in his dotage. He was a nasty, really scandalous scoundrel, and hung on long after he should have. There was a time during that year when Douglas and Marshall were both in the hospital.

DANIEL MARCUS: Oh, Marshall got sick that year?

JUDGE GINSBURG: He was sick. He was out for about three weeks. And I remember - I think there was more than one - but I remember one Friday after conference, all nine clerks were assembled in Justice Brennan's office so he could tell us what was going on and who was to do what, what the assignments were. He was a brilliant strategist. He had I think a terribly wrong-headed view of the Constitution and what it is to have a constitution. But he had a vision, for better or worse, well beyond the particular case in front of him, and that most of the Justices did not.

DANIEL MARCUS: And even after the end of the Warren court, he managed to construct majorities for results in a number of important cases.

JUDGE GINSBURG: As I said, he was thinking strategically, whether that's appropriate for a court or not.

DANIEL MARCUS: So, now, Burger was the Chief Justice.

JUDGE GINSBURG: Yes.

DANIEL MARCUS: And while he was much lauded for his presiding over the federal judiciary and being a chief justice who was interested in the bar and so on, he's been criticized considerably for his internal running of the court and his relationships with the other justices. Did you have any sense for how the chief justiceship was going when you were there?

JUDGE GINSBURG: Well, only in that I do not think he was liked or respected by some of the Justices. I had very little contact with him, all of it unpleasant. In one instance, I simply saw him walking up the ramp to take his seat on the bench as the court opened and I was not out there yet, only to see that as he got to the top, he goes on tiptoe as he becomes visible in the courtroom.

DANIEL MARCUS: Well, he looked terrific.

JUDGE GINSBURG: I'll tell you a story about that in a moment. The other encounter was at the end of the year. I was leaving and I was growing a beard. Although I had run into him hardly ever before, he seemed to be ubiquitous during the weeks when my beard was scruffy.

DANIEL MARCUS: Yeah. Oh, I'm sure he didn't like it.

JUDGE GINSBURG: His look of displeasure was palpable. As for his appearance, Judge McGowan told me the night before Nixon nominated him, or rather announced that he would nominate him, Burger called Carl and said he was nervous and he didn't think he was going to get it. And Carl said, "I have no doubt, Warren, that you're going to get the job." Burger asked why and Carl said, "Because you look every inch the part." That was a comment on the president as well. Hegel, you know, wrote in the philosophy of history -- there are variations on it, but it's in there - he said that "No man is a hero to his valet." And that some people think that's a comment on heroes, but it's really a comment on valets.

DANIEL MARCUS: (Chuckling). Yeah. Well, you were there for, as you indicated, a memorable term. I guess it was at the end of your term as a law clerk that the *Watergate, U.S. v. Nixon*, was decided in the Supreme Court. Now, you said you recused yourself as a law clerk?

JUDGE GINSBURG: Yes. I didn't think it was appropriate. And Justice Marshall didn't have any disagreement with that, so I stayed away from that, and that was not true in some of the chambers. Justice Powell's clerks were the same as the one - well, one from here, Ron Carr worked, on the case here and there, so it just depended on the Justice or on the clerk.

But I met some extraordinary people there, Joel Klein being one of them.

DANIEL MARCUS: Who did he clerk for?

JUDGE GINSBURG: Powell, who had a wonderful crew. Penny Clark, who married Bryson. And Ron Carr and Joel. And I think there was - no, it may have been just those three. That's right.

DANIEL MARCUS: Were there any particular cases that you worked on that were particularly memorable for you as a law clerk?

JUDGE GINSBURG: Well, everything was dwarfed by the tapes case.

DANIEL MARCUS: Even though you were recused.

JUDGE GINSBURG: Well, my role here in the tapes case meant that everything else, including the Supreme Court, was less dramatic.

DANIEL MARCUS: I see. Isn't that interesting?

JUDGE GINSBURG: Except I wasn't on the tapes case up there.

DANIEL MARCUS: How did Justice Marshall work with you and your colleagues as law clerks?

JUDGE GINSBURG: Well, in time - and I don't think a very long time - he gave us a fair amount of leeway in the sense that he was content to let us deal with the things that were not important or important to him. So for instance, there was no cert. pool then. Every chambers did the cert. memoranda, except for Brennan, who didn't have the clerks do anything with certs.

DANIEL MARCUS: He'd go through them like that.

JUDGE GINSBURG: Yes, yes. He said he knew what he was looking for. And so I think to the degree that any Justice would, and perhaps more than anyone else, Marshall would accept a one-sentence memorandum that said this is another petition by a pro se prisoner in whose head the CIA has planted or the FBI planted electrodes or whatever; that was enough, as far as he was concerned.

DANIEL MARCUS: And that was easy on the law clerks.

JUDGE GINSBURG: Yes, right.

DANIEL MARCUS: They didn't have to write a three-page memo.

JUDGE GINSBURG: Right, and that cleared time to deal with the things that really deserved some time -- the question whether there's a true conflict when a conflict is claimed. And so that made life a lot easier and pleasanter, working with him in that way, so we could focus our time.

And Marshall, as you may know, was a really great storyteller/raconteur. He would return from lunch, and he would come into the clerk's bullpen -

the three of us had desks in one room -- and sit down in the one leatherette easy chair or whatever comfortable chair. He wanted to know about the status of cases -- and so there was some interchange on that -- but most of the time was simply his telling stories, memoirs really, and they were hair-raising in some instances. He's the bravest person I've ever met, bar none.

DANIEL MARCUS: In terms of his career as a civil rights lawyer, yeah.

JUDGE GINSBURG: I mean his career as a criminal defense lawyer. For years and years, he was grinding out trials in the South for black on white rapes and murders, and his life was at risk in a number of these. And of course, he wasn't staying at hotels, he was staying with families. Some of these stories are in the Fishburne play and recounted accurately, but not all of them. That was an education. That was a history of a time that you couldn't get anywhere else.

DANIEL MARCUS: Yeah, it was fascinating.

JUDGE GINSBURG: All of us had a sincere affection for him and an enormous respect for his accomplishments, and just, to me, the career. His career was not a glamorous one. He was, as I said, grinding it out, and losing most of his cases, and often in danger, and sometimes very great danger.

DANIEL MARCUS: And did you keep - you obviously kept in touch with Judge McGowan after your clerkship. Was the same true with Justice Marshall and other reunions?

JUDGE GINSBURG: To a lesser degree. Marshall had reunions, oh, I think it was every five years. And I always went to those. Let's see, I had left in '75, and there might have been two or three of those. Because of that, I've known others of his clerks from prior and later years: Elena Kagan, Ricky Revesz, now at NYU; so many others. And, you know, I sometimes lose track of why it is I've known them.

DANIEL MARCUS: You may have known an earlier clerk, my former law partner, who died prematurely: Ron Greene.

JUDGE GINSBURG: I remember the name. Deborah Rhode was another one. She is at Stanford.

DANIEL MARCUS: Gary Wilson, who was also at Wilmer.

JUDGE GINSBURG: Yes. Gosh, there were so many, and of course Owen Fiss -- and Ralph Winter, his first clerk on the Second Circuit.

DANIEL MARCUS: So let's move on to Harvard Law School.

JUDGE GINSBURG: Okay.

DANIEL MARCUS: Now, you said you were interviewed by six law schools.

JUDGE GINSBURG: Right.

DANIEL MARCUS: And you chose Harvard over at least the University of Chicago.

JUDGE GINSBURG: Right.

DANIEL MARCUS: Was it an easy decision, difficult decision? Who else was in the running?

JUDGE GINSBURG: Well, here's how it happened. I applied by letter for these positions. The AALS market wasn't really developed then. I think it existed, but I didn't participate in it. And no, I didn't apply for those positions. I got phone calls, as did other clerks at the same time, from various schools, or a letter, phone calls or a letter. And I arranged interviews at Penn, Virginia, Berkeley, Chicago, Harvard, and Yale; those six. I made a trip west for the interview at Berkeley, which was - I put them in the sequence. I arranged them in that sequence for a reason.

DANIEL MARCUS: West to east?

JUDGE GINSBURG: No, no. Least difficult to most difficult.

DANIEL MARCUS: Oh, I see, yeah.

JUDGE GINSBURG: And they were all highly competitive schools.

DANIEL MARCUS: Yes.

JUDGE GINSBURG: But I had a friend on the faculty at Penn, the late James O. Freedman. And Jim had been a professor of law at Penn when he wrote an article for which I was the editor. The article was a study for the Administrative Conference, on emergency administrative action. Say a horse has glanders, to take Holmes's case, and it has to be destroyed and you really can't have much of an inquiry; you have to deal with it after the fact.

So he wrote this very lengthy report, and I served as the editor. And he was a very gracious and pleased customer and was behind my getting an invitation to come there. And in fact, that's why I wanted to be articles editor. I dealt with all these faculty.

DANIEL MARCUS: Professors, yes.

JUDGE GINSBURG: Bo Burt.

DANIEL MARCUS: Oh, he edited my law journal note when I was in law school.

JUDGE GINSBURG: Well, I edited his article. He was at Michigan. I think he then went on to Yale. Well, he came from Michigan to spend the night in Chicago and stayed with Owen. So I gave Owen the manuscript I'd marked up. And I had interlineated a largely new manuscript; nothing substantively different, but raising questions and rephrasing things. Owen later described Bo looking at this thing and throwing it on the floor of his living room in an outrage, and Owen said, "No, no," you know, "Calm down and read it. I know this fellow." So although I didn't apply to Michigan - he may have been at Yale by then; I'm not sure. So the idea - well, I knew enough about this process that all the appointments committees at various law schools talked to each other. So I wanted to start at schools where I was most likely to get an offer so that the next schools would know I'd gotten offers from the first ones. That worked everywhere except I didn't get an offer from Yale. I didn't get an invitation to interview at Stanford until I'd just gotten back from Berkeley, and I wasn't going to make another trip. It was a very apologetic letter about how somebody had been ill and it had fallen through the cracks and blah-blah-blah, but I wasn't going to do it. Yale had gone through a period...

DANIEL MARCUS: Oh, a very difficult period, yeah.

JUDGE GINSBURG: A very difficult period of denying tenure to people, particularly interdisciplinary people who were brought on when that was thought to be a good idea and then the wind changed and so they were very risk-averse.

Now, part of my plan was that Hal Scott and I wanted to teach together. Hal was two years ahead of me in preparatory school and one year ahead of me in law school, and we had been the closest of friends from high school. When he left the law school a year ahead of me, he clerked for Leventhal, and then for Justice White. While he was a third-year student, Berkeley offered him an assistant professorship. He said, "Well, I'm going to be clerking for Leventhal." They said, "That's okay, come afterwards." He said, "Well, I want to apply at the Supreme Court." They said, "That's okay. Just make a one-year commitment to us."

DANIEL MARCUS: Wow.

JUDGE GINSBURG: So he did. So he went out there and taught for a year. And that's why I put Berkeley on my list. And he applied to Harvard and Chicago and Yale; that's three places where we thought if we overlapped we could really

have to make a decision because we wanted to work together. I didn't get an offer from Yale. I got one from Berkeley, but he had determined to come East. So it was going to be Harvard or Chicago. And we talked it through for a long time and then decided we would both go to Harvard. And we did co-teach and -

DANIEL MARCUS: And he's still there, right?

JUDGE GINSBURG: Oh, yes. Then we opened our consulting practice for a while until I left. I should say rather that we did consulting together. And that's how that sequence came about of why I landed at Harvard. But Hal's wife was from Massachusetts and I had spent a summer in Cambridge in summer school at Harvard, and we both liked it there. Believe it or not, at that time, the fact that the library was so extensive was a real asset for a faculty member. Now pretty much everything is electronic.

Hal was doing some international work and they had the international legal studies library there, and it was just a great resource for both of us, really, to be there.

DANIEL MARCUS: I can see you still feel a little guilty about not going to Chicago.

JUDGE GINSBURG: Well, I have since taught a seminar there for about 20 years, while I was on the court.

DANIEL MARCUS: So it was a tough decision, or it would have been tougher were it not for the Scott-Ginsburg deal.

JUDGE GINSBURG: And then as much as I love the University of Chicago and its law school, my family was still there, my parents were there. And that was not an attraction, because in those days, the difference between a local and long distance phone call was a barrier. And I really didn't want to be a local call away.

DANIEL MARCUS: You didn't want to be smothered by the family.

JUDGE GINSBURG: And I didn't like Chicago nearly as much as Boston or New York. Chicago is easier to navigate, it's less expensive and less of a hassle, but I found it much more materialistic. Not around the University; that's the big exception.

DANIEL MARCUS: Right.

JUDGE GINSBURG: But everyone you know has a son or a cousin in the markets. You know, it's a place where things get paid and processed and bartered, and that's what makes it go 'round, and Cambridge is an intellectual community.

DANIEL MARCUS: Yes, it really is. So you came to Harvard in '75.

JUDGE GINSBURG: Um-hmm.

DANIEL MARCUS: And what were the main subjects you taught while you were there?

JUDGE GINSBURG: Well, the first year - I had volunteered. They said, "What are you interested in teaching?" And I had said I was interested in teaching labor law, for which -- I'm not sure if I knew it -- there was a real need there at the time.

DANIEL MARCUS: In those days, it was NLRA, the law.

JUDGE GINSBURG: That's right, it was the NLRA - right, and I'll go back to that. But then I also, for the spring - that was in the fall - and for the spring I created a seminar on regulation of broadcasting for a first-year elective.

The labor law course I taught was in the first several years. At that point, the Law School was a few years into a staffing problem. The nature of the subject had changed, and the people who had taught the labor act cases were I think losing interest in it and weren't really - a lot of them weren't keen to pick up what later became employment law. So there was a period of some years where the course was being reorganized, and I was ready to teach the conventional labor law course as it then was. Because I studied a lot of labor - not just law, but labor history, labor economics, as well as labor law. That was in college, and then I had Bernie Meltzer for labor law and worked on a case with Justice Marshall, so I was happy to do that.

As it turned out, that was a fateful decision, because I couldn't get out of it after a couple of years. I would like to have done so, but in fact the school needed - we always had a visitor. I think we had one regular insider other than myself. Well, maybe it was just me. And then each year - Jan Vetter came from Berkeley one year. Then they hired Harry Edwards, and he came and stayed for a few years, but that didn't last. He had tenure, but he didn't like Harvard and went back to Michigan.

One time I asked Archie Cox, literally in the men's room, why he didn't - he'd returned from being Solicitor and then *Watergate* - why he didn't resume teaching labor law. And he said, "Well, it'd become too much like tax law; all the big questions have been answered."

I thought that was a very peculiar statement, and I repeated it some years later to Richard Epstein, who laughed and said, “The big questions hadn’t even been asked at that point.” (Chuckling).

That was a large course, and that went on for quite a few years. And then in the spring of ‘76, I put together materials and started teaching Regulation of Broadcasting. At the end of the fourth year, my materials became my case book, which West published. Later I did a second edition and then a supplement, so I stayed with that for quite a while. It started out as Regulation of Broadcasting and evolved into Regulation of Electronic Media. Cable was already in it, but more things came into it.

And following that, I wrote a lot of FCC cases here, but I gave up the case book once the Telecommunications Act of ‘96 passed; it was impossible to keep up with the field without either teaching it or practicing it. Finally I got labor law behind me and Hal Scott and I started co-teaching Regulation of Financial Institutions, which we did for primarily third-year students and LLM students, foreign graduate students. It was a very sophisticated course in which the students would be assigned different roles, such as board of directors of a bank holding company, staff of the Controller of the Currency, whatever; four or five different groups. And for most every class, they would be given a set of readings, and it could be up to six or seven hundred pages, which were just complete unedited documents.

And when the first time somebody said we can’t do this, one of us said - “You know, we’re just trying to make it easy for you. This stuff’s all in the library. We’re winnowing it down to this universe here.”

That course profited greatly from the consulting that we were doing for money center banks. And then I taught a course called Economic Regulation of Business, which is the successor to the old utilities regulation course. We covered rate of return regulation, but it was much broader than that, including things like certificates of need and necessity for entry into the hospital industry. There was a nice case book on that by Tom Morgan. And that was a small class every year; I had Barney Frank as a student one year. He was already a state representative; he’s very smart, so it was a pleasure to have him. Plus, he’s quite colorful.

DANIEL MARCUS: So it’s you who are responsible for the Dodd-Frank law, right?

JUDGE GINSBURG: Well, when I’ve read it, I’ll let you know. But Barney came in one day and read a letter from a constituent about the urgent necessity of requiring licenses for dance instructors - maybe it was ballet instructors - but anyway, because of the hazards involved. You know, it was a complete

protectionist thing. But I had just had them read Chapter 9 of Milton Friedman's book, *Capitalism and Freedom*, on occupational licensing.

DANIEL MARCUS: So they never made you teach contracts or torts or...

JUDGE GINSBURG: No, and I had no interest in doing so. But I think - I don't know whether this was really true at Harvard, but it was I know true at Chicago. It was an honor to be asked to teach a first-year required course. I think that had broken down by the time I was at Harvard. It was still true while I was a student at Chicago. Not much time had elapsed, but I think there was a different tradition in that regard.

DANIEL MARCUS: Were you and Scott sort of pioneers at Harvard in the law and economics world?

JUDGE GINSBURG: Yes.

DANIEL MARCUS: Or had it already taken root?

JUDGE GINSBURG: No. Mitch Polinsky, who left for Stanford a few years after we came, was a PhD economist without a law degree, and he was succeeded by Steve Shavell, who's still there. They had an economist teaching economics for lawyers. At the faculty meeting I've been told, secondhand if not third, that - well, I should say, by the way, that until that year, when Hal and I and a woman who had gone to Stanford, were made assistant professors, there was no one on the faculty who hadn't gone to Harvard or Yale.

DANIEL MARCUS: Really.

JUDGE GINSBURG: So it was a little bit - I won't say it was inbred, but they were being adventuresome. And I'm told that at the faculty meeting, when my name came up, somebody said - "We just voted an offer to Scott. Why do we need Ginsburg?" (Chuckling). It was definitely a new idea.

DANIEL MARCUS: A new thing.

JUDGE GINSBURG: Yeah. Phil Areeda was on the faculty. But he was doing something more specialized in antitrust and not trying to apply his economic analysis elsewhere.

DANIEL MARCUS: So did you teach antitrust ever at Harvard?

JUDGE GINSBURG: Yes, I picked up antitrust for the last several years, until I went to the Antitrust Division in 1983. I used Phil's book, of course. One winter term, I co-taught Advanced Corporations, which was economic literature, for a

three-week term; co-taught it with Victor Brudney. Victor had taught corporations for 20-some years, and I had not taken it in law school, so I thought I'd better read my way into the secondary literature.

The only lasting legacy that I had at Harvard, maybe anywhere, because most things don't last 25 years including case law, was the January term at Harvard. Al Sacks was the Dean, and he was firmly of the view that the fall exam should be before Christmas so the students would have a clean break. The students were riven 50-50 on this. There was a poll in the *Record*, and they were just about evenly divided, but Al wanted to do that.

So he appointed a committee chaired by Bob Keeton, who was later a district judge, and comprised Duncan Kennedy and myself, along with Bob. And we worked - we surveyed what other places were doing; colleges, not law schools. No law school was doing anything like this. The possibilities were a 13-week fall and a 17-week spring, or a 13-week fall with longer classes and the 13-week spring. There were variations. What we settled on was called 4-1-4, and it was four months, one month, four months, but of course, the months weren't whole in September or May or even in January. It was a three-week January term. And I had to make the presentation to the faculty to sell this, and did. The faculty, not unanimously by any means, agreed to it, and it's still there. It had the virtues that we thought it would have. People who could not come up for a day a week from New York or Washington could come for three weeks. Alan Morrison came year after year, and did his thing. Judges from other countries; Barak came from Israel for several years, well, many years during the January term. And academics from places on a quarter system, from Oxford and Cambridge and elsewhere in the English-speaking world. They were between terms, so they could come for three weeks.

But the most important thing was that Bob Keeton's trial advocacy workshop could have three weeks' with students who weren't doing anything else. And then Roger Fisher got on board because the negotiation workshop could be reformatted to fit that also, which was, I think quite successful, both of those, fitting in there. So that did take root and has been there ever since.

I also taught Administrative Law in the January term, but that was when I came back as a visitor. That was after I was in government. So I think that's my whole roster. I might be missing one, of course. But they all were economic - except labor law, which was at the fringe, they all had an economic core.

DANIEL MARCUS: Yeah. It's interesting that two of your prime areas when you started out, labor law and broadcast regulation, have all but vanished completely or disappeared.

JUDGE GINSBURG: Well, we started the course on Regulation of Financial Institutions. That has endured and become six courses now.

DANIEL MARCUS: Yeah, now that was prescient, right?

JUDGE GINSBURG: New York Law School has a whole cluster of courses, even one just on derivatives.

DANIEL MARCUS: So who were your closest colleagues at Harvard besides Scott?

JUDGE GINSBURG: Phil Areeda. Phil's not someone who was cuddly, but he was very helpful, and of course we had a lot to talk about, and a common interest in food and wine, although he was many decades more experienced than I and had a better palate. And then Bob Clark, who later became Dean. Derek Bok, when he was President of the University, invited anyone on the law faculty who wanted to come see him about the new Dean to do so. And I went, and I think Hal did, too, and promoted Bob Clark, and he did not choose Bob then. The next time, he chose Bob.

DANIEL MARCUS: Oh, really? Is that when he chose Sacks?

JUDGE GINSBURG: No, Sacks was outgoing, and it might have been when he chose Vorenberg.

DANIEL MARCUS: Yeah. But Clark became dean before or after you left?

JUDGE GINSBURG: I think two years later. And David Rosenberg, who had been a sort of left-wing political lawyer, worked a lot with civil liberties, with the ACLU and others, came as an assistant professor and started teaching torts, I think; but anyway, he was a spectacular friend and teacher. Steve Shavell, the economist on the faculty. And then there was something called the Harvard Project on Deregulation, which was started by Chris DeMuth, a Chicago classmate who was then at the Kennedy School of Government. Chris later spent 22 years as head of the American Enterprise Institute. And Chris convened a group -- Steve Breyer and Dick Stewart also. They were both terrific to me.

The Harvard Project on Deregulation was housed in Chris's office at the Kennedy School, but he brought in people from the business school and the economics department and MIT and the law school. Stewart and Breyer had joint appointments at the Kennedy School, and they would

participate in this, as did I and John Dunlop from the business school. And Peter Diamond, who's now got a Nobel Prize, came over from MIT. I don't know how regular he was, but I remember a presentation he made. Fred Kahn came. We had Liz Bailey, who worked with Fred later on at the CAB. And, of course, Steve engineered the Airline Deregulation Act, getting it through the Senate for Senator Kennedy; that was terrific. That was almost a continuation of the Chicago experience.

DANIEL MARCUS: So it's very interesting. Did you play any role toward the end of your time at Harvard in the founding of the Federalist Society, which I guess was in the early '80s, and started at Yale and Harvard and Chicago, right

JUDGE GINSBURG: Well, starting at Yale, it was Steve Calabresi and Lee Otis. And was it Gene Meyer?

DANIEL MARCUS: I don't know.

JUDGE GINSBURG: Here's what happened. Spencer Abraham, who later became a Senator from Michigan, came to me with a small group of students and said, "We want to start this journal, the *Harvard Journal of Law and Public Policy*, and we have to have a faculty advisor."

I was very reluctant because I was an assistant professor, I wasn't tenured. I got tenured in '81 and this was before that -- but just before that, maybe 1979 or '80, but I agreed to do it. And it didn't involve me to any degree, but they set up the *Journal*. Later, when the Federalists - very shortly later, a couple years at most, when the Federalist Society had a chapter at Harvard, their publication became the flagship of the whole Society.

Since then they've spawned others; there's one at Georgetown, there's one in Texas, but I don't know how they exactly related, whether there was diffusion or reinvention. But the Harvard JLPP seems to be the official repository of the papers that are given at the annual meeting and that sort of thing.

DANIEL MARCUS: Okay, I'm trying to think of anything else that stood out.

JUDGE GINSBURG: David McIntosh may have been the other founder.

DANIEL MARCUS: At Harvard or -

JUDGE GINSBURG: At Yale, I think.

DANIEL MARCUS: So it really started at Yale.

JUDGE GINSBURG: Yeah.

DANIEL MARCUS: And so at the time you left Harvard, it was really just getting going.

JUDGE GINSBURG: Yes, I left in '83. And so it was a couple of years going, I guess.

DANIEL MARCUS: Did you play any role as an advisor or a paper writer or anything in the 1980 campaign for the Reagan campaign?

JUDGE GINSBURG: No. And to my embarrassment, I didn't vote because -

DANIEL MARCUS: I won't tell anyone.

JUDGE GINSBURG: Well, the Justice Department - rather, the Office of Personnel Management knows, because they asked. My wife at the time was going to vote for - was Carter running again?

DANIEL MARCUS: Yes.

JUDGE GINSBURG: And she later became very different politically - a libertarian. She was not very active, but she was going to vote, and she was registered up in Newburyport, Massachusetts, where she was living when we had gotten married. Actually we didn't get married until the spring of '81 and this was the fall of '80. But we were engaged. But she could not vote, and so we paired; I didn't either.

DANIEL MARCUS: Okay. So I think we have time to talk about - at least begin to talk about your Department of Justice experience. So how did you come to get your job, your first job in the Justice Department, as Deputy Assistant Attorney General?

JUDGE GINSBURG: In the spring of 1983, having gotten tenure in '81, I was anxious to be away for a while, to take a leave. The political division within the faculty was just unbearable. It was highly publicized in the *New Yorker* and the *New York Times*. The Critical Legal Studies people were making mischief all the time, and nothing was too small for them to make an issue of it or statement.

I remember one time that the Dean appointed a committee of three to name the Oliver Wendell Holmes Devise speaker that year, or to give the Langdell lecture it was. And the committee had two crits on it and the result was a disaster. So nothing was too small. It was much more of a pain for the Dean than it was for me, but I really was tired of all of the distraction, and it was a bad time for the place. Alumni were not giving money because of all the disruption. The students were very unhappy. You

know, they were sort of like children whose parents are going through a divorce or leading up to it. They say “look at me,” and instead the faculty were off fighting with each other.

So I wanted to explore a little bit what other possibilities there were. Hal had been away for a year. Hal had gone to the Dean and said, “I’ve learned all I can learn about international business transactions in the library. I’d like to spend a year doing this.” And the Dean kindly set him up with Nick Katzenbach.

DANIEL MARCUS: At IBM, yeah.

JUDGE GINSBURG: So he spent a year - spent four months at Armonk and four months in Paris and four months in Tokyo, and that enriched his teaching greatly, I’m quite sure.

So I wanted to do something; it was just to spend a year away. I could see from Hal it was good medicine. And so I came down to the McGowan reunion and had no occasion to say anything to anybody, didn’t hear of anything; I was just keeping my ears open. That was probably in May.

And then in June, I went to the wedding of a classmate, the man with whom I had breakfast last week. I was walking from the church to the reception, down Madison Avenue, stepping over a puddle at a cross street, talking to Ron Carr, who was then Bill Baxter’s deputy. And I was telling him Harvard was not a happy place. And Ron said, “Would you take my job?” And I said, “In a trice.” And he said, “I’ll talk to Bill.” And then somewhere in July I got a call from Baxter offering me the job. He said he wanted me to start right away, or August 1st or something. And I said, “Well, we have a family vacation in August. We’ve taken a place in the Virgin Islands, and we’ll be there for the month. So I can’t really start until after Labor Day.” And Bill characteristically said, “Well, that just means I’ll have to do both jobs that much longer.” So it was that I began the day after Labor Day.

DANIEL MARCUS: Had you known Baxter before through antitrust circles?

JUDGE GINSBURG: I’d never met him.

DANIEL MARCUS: He was out in California.

JUDGE GINSBURG: He was at Stanford. He had a good reputation for *People and Penguins*, a book on the economics of law - well, actually the emphasis was on the environment - and was doing interesting things in antitrust.

DANIEL MARCUS: And you were the deputy for regulatory affairs.

JUDGE GINSBURG: Right.

DANIEL MARCUS: Which means you got to poke your nose in at the FCC and the Department of Transportation, places like that?

JUDGE GINSBURG: Well, yes. In addition to dealing with transactions, mergers, cartel investigations that might have come out of regulated industries, we also did amicus briefs, and some of those were in my portfolio. But one of the main things that we did and in which I took an interest was that we filed comments before agencies in rule-making proceedings, as the FTC does with the state legislatures that are considering anticompetitive legislation.

The Thursday after Labor Day at four o'clock, I was handed a long document, a comment for submission by ten the next morning at the Department of Transportation; probably 70, 80, 100 pages, on the subject of computer reservation systems. One was run essentially by American Airlines, and one by United, and there was a third smaller one around. And this raised some of the same issues that are with us today with Google -- display bias and all of that -- because most tickets were booked off the first screen.

Anyway, I kept the staff overnight and we tore the thing up and started over again. And I was never again handed a document the night before it was due to be filed. I had worked them right through the night, and they'd never had an experience like that before. That was how I started.

DANIEL MARCUS: Oh, so your responsibilities also included the process of looking at mergers in regulated industries.

JUDGE GINSBURG: Sure, right. There were certain sections. There was Transportation, Energy and Agriculture, there was Communications and something else. There were various sections with about 15 lawyers each, and some of those sections reported through me because they dealt with regulated industries. There were litigation sections that reported through the criminal deputy and so on.

DANIEL MARCUS: So you probably didn't have the big case that Baxter is famous for, unless I'm mixing things up.

JUDGE GINSBURG: No, you're not.

DANIEL MARCUS: Is *IBM*, right?

JUDGE GINSBURG: Well, he dismissed *IBM* immediately, in 1987.

DANIEL MARCUS: Oh, he dismissed *IBM*, that's right.

JUDGE GINSBURG: Unilaterally and immediately.

DANIEL MARCUS: *IBM* was a hangover, yes.

JUDGE GINSBURG: *IBM* was filed on the 19th of January, 1969.

DANIEL MARCUS: The end of the Johnson administration, yeah.

JUDGE GINSBURG: And it lingered there for 12 years.

DANIEL MARCUS: Don Turner, right?

JUDGE GINSBURG: I think Don had left. I'm not sure. But he had developed the case. So it languished. There were activities, but the case had not come to trial. And the world had changed, so Baxter dismissed that case, shortly after taking office. And then in '82 he settled the *AT&T* case.

DANIEL MARCUS: He settled.

JUDGE GINSBURG: Well, it was '82 before the modification of final judgment was approved by the court, so sometime in '81 he settled the case. It was called a modification of final judgment because it was reopening a judgment against *AT&T* that had been filed 25 years earlier. He settled that case. Judge Greene insisted on certain variations, some of which proved disastrous, in the original proposal on which the parties had agreed. That was all behind us when I came. However, I came in September '83. That week or so, the regional Bell operating companies were formed and staffed; they were subsidiaries of *AT&T*, and they would be spun off and take on an independent existence on 1/1/84. That was my second all-nighter at the department.

DANIEL MARCUS: (Chuckling). Making sure they did it right?

JUDGE GINSBURG: Absolutely. And one problem did arise. I got a call from the head of the Civil Division, I think it was Civil, saying -- no, it was Hank Habicht, who was in Natural Resources, saying "Department of Interior," I think it was, "is after us to sign off on a transaction. They want to buy 300,000 phone lines or equipment or something. It's got to be done today." And I said, "Bring it over." Well, it was a very cynical attempt to move part of the rate base. It had to do with Chesapeake and Potomac - the local telephone company.

And the government and the GSA, I guess it was, so it was Civil after all. And I said, "This is a scam. You can't do it." Apart from that, everything went very smoothly.

Earlier that week, I was in New York, walking on Fifth Avenue. You may remember that from the dawn of time until the breakup, Western Electric made all the equipment, and nothing else could be plugged into the system unless the FCC approved it, which is what they wouldn't ordinarily do. And Western Electric's handsets, their desktop telephones, were made to last forever. I mean some day archeologists will dig them up and they might even get a dial tone. And if you dropped them, they wouldn't break.

DANIEL MARCUS: Right.

JUDGE GINSBURG: One theory of this is that AT&T got a return on investment in the rate base, so a gold-plated phone goes into the rate base. If they had to repair a phone, they got only dollar-for-dollar reimbursement for the labor costs. So arguably it was in their interest to grow the rate base in this way; that's called the Averch-Johnson hypothesis. And as of last time I looked, there's no empirical validation. Whether Averch-Johnson applies should depend on the alternative rate of interest they could get in the market.

Anyway, I'm walking down Fifth Avenue, and some men had set up sawhorses and a table and they were selling telephones for \$3, made in Korea. And having picked one up and looked at it, I'm sure that if you dropped it, it would break. And it turns out there's a huge market for breakable telephones.

DANIEL MARCUS: Well, so you were there. You came in at the tail-end of this revolution in telecommunications.

JUDGE GINSBURG: Yeah. But I spent a lot of 1984 on the case, because one of the things Judge Greene had done was - this was not unreasonable - he said, you know, "This case arises from the technological change." Everything used to travel on copper wire, a twisted pair of copper wires. Now it's satellites, microwave. Things can change again. So we'll put in a waiver provision so that a regional Bell Company can come in and seek a waiver from the terms of the decree based on whatever showing they can make. The government and AT&T acquiesced, and in January there were already 19 petitions for waivers.

When the companies were set up in September, they immediately started thinking from their own perspectives, and they needed a waiver in order to go into any non-regulated, non-tariffed business. For example, one of

them wanted to go into telecommunications consulting in China. Well, there was no way that that could be a problem with a cross-subsidy.

So the court in essence made the Antitrust Division the staff of the court, like the staff of a regulatory agency, and we would investigate each of these petitions and then give an opinion, and the court would grant or deny the waiver. And we actually had five or six lawyers working that whole year on waivers, and it lasted for several years until we got the thing out of the Department. In fact, I worked on legislation.

DANIEL MARCUS: And this was all before Judge Greene?

JUDGE GINSBURG: Yeah. I worked on legislation to take the case away and turn the decree, by statute, into a regulation of the FCC. Let them change it, go through rulemaking to change it if they want to change it. It raised interesting constitutional issues.

DANIEL MARCUS: Taking it away from the court.

JUDGE GINSBURG: Yes.

DANIEL MARCUS: This separation of powers that -

JUDGE GINSBURG: Right.

DANIEL MARCUS: Judge Greene probably didn't like it.

JUDGE GINSBURG: Well, it never saw the light of day.

DANIEL MARCUS: Oh, it never was actually proposed.

JUDGE GINSBURG: No. I worked with somebody from I guess it was OLC, and I left the Department around August or September of '84 to go over to the White House.

That was an election year, and the Congress was going to go home early. By the time we got the legislation drafted, it was too late to expect anything to come out of the Congress that year, so I don't think we sent it up. And then I left, and I lost track of what happened. But basically something like that happened a few years later.