Oral History of Judge Douglas H. Ginsburg

September, 6, 2012
Second Interview

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, September 6, 2012. This is the second interview.

DANIEL MARCUS: This is Daniel Marcus, interviewing Judge Ginsburg on September 6, 2012. We concluded our last interview at the point in the fall of 1985 when you were about to leave the Antitrust Division to become Director of the Office of Information and Regulatory Affairs at OMB. How did that opportunity come about?

JUDGE GINSBURG: Chris DeMuth, a colleague and friend from my teaching days at Harvard Law School, when he was teaching at the Kennedy School at Harvard, asked me one day in the fall of 1985 if I would be interested in succeeding him as Director of OIRA. I jumped at the opportunity. While I enjoyed working in the antitrust area, my other main academic and teaching interest at Harvard had been in the field of administrative law and regulation. The Reagan Administration was committed to a program of deregulation, and the OIRA position would give me a chance to participate in that process from a unique vantage point. So, after talking to Chris DeMuth, I went over to talk to David Stockman, the Director of OMB, and I got the job.

DANIEL MARCUS: What was the nature of your relationship with the regulatory agencies of the Executive Branch?

JUDGE GINSBURG: Sometimes it would be necessary to disapprove an agency's draft and to deal with the agency head if it was a matter of importance enough to the agency to elevate the matter. There was a right of appeal. The agency could take the matter to the Director, they could go beyond the Director to the Vice President and ultimately to the President. When I came over and started, one of the memorable things that Chris said to me was, "Never be afraid to take something to the President, he'll always get it right." Well as it turned out, in the year I was there, it never became necessary to take anything to the President.

DANIEL MARCUS: None of your decisions were appealed by the agency?

JUDGE GINSBURG: There may have been one that was appealed to the Director but nothing to the Vice President or the President.

I observed two problems with the way in which this process worked. One was that the agency heads had very little, if any, continuing contact with anyone in the White House-- from the time they were confirmed by the Senate, until such time as they left, with the exception of being invited to the White House Christmas party and maybe the 4th of July on the lawn. So they came under pressure from every direction, from every interest group, primarily their permanent staffs, their oversight committees on the Hill, the associations representing whatever industry they regulated or multiple industries, sometimes with conflicting interests, and the trade press that covered intimately the dealings of their agency and often had inside information before the agency head would have it.

I set out to do two things to try to thicken the relationship between OIRA in particular, and the White House in general, and the political heads of the agencies, partly by building a personal relationship with some of them; having them to the White House Mess for lunch, talking on the telephone, inviting them to call when problems arose. But what I thought would be more important was creating a planning process so that the agency heads and OIRA were not surprised by proposals being presented by the staff for approval by the agency head and then by the White House, when they're essentially fait accompli and almost impossible to reject.

The gestation period for a complicated rule can be as long as ten or eleven years, beginning with perhaps a research grant to some academic recipient to do a study, maybe internal studies within the agency or analyses of existing literature, maybe an advanced notice of proposed rulemaking, which has no legal standing but invites public comment to help the agency narrow its options and think more deeply about a problem. And then of course a notice of proposed rulemaking and comments and a final rule, sometimes a second notice and comment, before there's a final rule. Commitments are made to oversight committees during that time, progress is being tracked in the trade press. Then after eight years, say, of this, a new agency head comes in, a new political party comes in and cannot just - well certainly not cavalierly but cannot even credibly - halt all of these processes that he may disagree with if he's going to survive as head of the agency and have a reasonably workable relationship with the staff. Choices are going to have to be made about where to spend political capital inside the agency.

My idea was to have the President put out an Executive Order requiring every agency to submit , once a year, just as they do their budget plan (and their legislative proposals, which are not annual but as needed), to submit

a list of all regulatory activity and pre-regulatory activity that may at some point develop into a regulatory proposal.

DANIEL MARCUS: Is this the so-called regulatory agenda?

JUDGE GINSBURG: Yes, that's what it was called.

DANIEL MARCUS: So you're the inventor of that?

JUDGE GINSBURG: Yes. I did a presentation to the Cabinet with the President in attendance, using a big chart about three feet by five, on an easel, showing over a timeline of 12 or 15 years, how long it took for various significant rules to have reached finality and become legally binding. It was quite shocking, I'm sure, to everyone in attendance. The President approved the proposal, signed the Executive Order and required the agencies to submit this document every year. Well this lasted only for a few years. I was gone in one year, the President was gone in four years. I'm not sure the agenda lasted beyond that. There's something that took its place that's a slimmed down version, it's not as comprehensive and it doesn't I think purport to be as binding. Under the Executive Order that President Reagan issued, requiring the agenda, an item that was not in the agenda could not be considered for approval of a notice of proposed rulemaking. It may have even been ineligible for funding, I don't remember that. It was an enormous undertaking for all of the agencies but I know it was a useful thing.

Mac Baldridge, who was Secretary of the Commerce, said to me that - well by way of explanation first, you know the Commerce Department is a conglomerate. At that point it had, the Weather Service and the National Oceanographic Administration and one of the wildlife agencies, the Trade Administration. It was all over the lot and there was no way in which a Secretary or even a lower level political appointee, could be on top of things that were down in the bowels of the agency, and that would not reach his or her successor's desk for another three or four years. So Mac thought the regulatory agenda was great. It brought everything up for him to take a look at. He could spike early on, when it was easy, things that he thought were inconsistent with the President's policies or his own views and exert a reasonable degree of political control on the regulatory output of the agencies, as always, subject to whatever the statutory requirements might be.

DANIEL MARCUS: By the time you came there at the end of 1984, was there still a lot of resistance (a) in the agencies and (b) in your own staff at OIRA, to the whole idea of cost-benefit analysis and choosing the most cost-effective alternative?

JUDGE GINSBURG: Well the staff at OIRA was really built around that project, so there was no resistance there. The statutory mandate or warrant, I should say, for the existence of the office, was the Paperwork Reduction Act. This program, initiated by the President in February of '81, which had informal historical successors going all the way back to President Nixon, was piggybacked onto the Paperwork Reduction Act and the existing staff, expanded for the larger new task. So there was no problem there whatsoever. The agencies, I'm sure, displayed some resistance, but I think that was mostly behind them by the time I got there.

There were two incidents worth recalling. One was that Milton Russell, who was a PhD economist, had come over from Resources for the Future and become the head of the policy office of the EPA. He told me that he thought the Executive Order was the best thing that ever happened to the policy office and really to the EPA as a whole, because it meant that rather than sending things over to the White House and having them disapproved, staff had figured out that if they ran them by the Policy Office within the EPA, they would get pretty much a preview of what they would get by sending it over to OIRA, but they'd get it from closer at home, by someone who is more intimate with their programs, and wouldn't have to get into a tussle. I would think something similar happened all around the Executive Branch.

At the same time there was a mishap during my year when Lee Thomas, who was head of the EPA during part of that time-- Ruckelshaus was head when I came in; he was really a prince. Lee Thomas was Administrator when the agency, either over his signature or his deputy's, sent a rule to the Federal Register that had not gone through OIRA. Legally, it was not a violation of a law, it was a violation of a direction from the President. I had Lee over for a session in one of the small rooms off the White House Mess and basically spent about an hour bringing in one person after another to pistol whip him. My deputy and I and Dick Darman and another person in the West Wing who worked for the President on domestic policy, and they were very tough characters. They were both very sophisticated. One of them, I think, had been an academic. Anyway, it was an extremely unpleasant experience for Lee and I doubt it ever happened again with any agency. I'm sure that got around.

DANIEL MARCUS: Was there still, at that point, some of the residual complaining by congressional oversight people like John Dingell for example? I think there was still a Democratic House of Representatives at the time.

JUDGE GINSBURG: Yes, until 1986.

DANIEL MARCUS: As I recall, people like Dingell said that the statute gives the authority to the Administrator of EPA to promulgate these regulations and OIRA and the President can't interfere. Now, was there still some of that political tension going on or not?

JUDGE GINSBURG: There was some concern on the Hill but it was, I think, based on claims that OIRA was being used as a backdoor to subvert what the agencies were doing and to allow interests that had not prevailed before the agency, to get another attempt to defeat a regulation and to do so in a secret and private channel, and there was really just no foundation for that but it's very hard to convince someone who doesn't want to be convinced of that.

During my year there, I had two meetings with outside groups concerning regulation. One was a union that was concerned that OIRA approve a regulation, I think coming from OSHA, the Occupational Safety and Health Administration, that was meant to prevent spontaneous combustion in grain silos. The meeting consisted of the union bringing in a portable television with about an eight inch screen, and playing a tape of a silo burning. It was a complete waste of time, as you can imagine. I don't remember why I decided to see them. I didn't get many requests frankly. The other was a meeting with the Cable Television Association and that concerned legislation, not a regulation. Those were my two outside meetings and they wanted the Administration to drop its opposition or not begin to oppose a provision in a cable television related bill that had been added at the last minute by the Black Caucus in the House, to require affirmative action in employment by cable television companies. I told them that I would recommend that the President veto the legislation if that was in it, and it was removed. That was my other outside meeting.

Now that's not to say that the office wasn't controversial. Public Citizen, Ralph Nader's group, was frequently expressing this concern about outside meetings and very articulately. Alan Morrison was their counsel and he was very good. I don't remember Mr. Dingell getting involved. He was my nemesis when I was at the Department of Justice, simply because his staff was constantly seeking documents which, if not clearly subject to executive privilege, were sensitive, and the end result of which is that we would put up an opposition and then give him the documents. He had a very professional staff and they were always trustworthy.

DANIEL MARCUS: Trustworthy but relentless.

JUDGE GINSBURG: They were relentless, they were tough, but they were respectable adversaries. And you know, he'd been there so long and risen so high that not surprisingly he had an excellent staff. I don't know which is cause and which is effect but that happened. Senator Kennedy, the same thing.

DANIEL MARCUS: Yes. Since you had a great interest in competition issues, were the Executive Order's cost-benefit provisions broad enough to enable you to push agencies to look at the impact of their regulations on competition?

JUDGE GINSBURG: I don't remember any specific instance like that. I'll tell you one instance though, one specific event. I got a call one day from Dr. Frank Young, who was the Commissioner of Food and Drugs, and I assure you this wouldn't have happened if I hadn't had Frank down to lunch at the White House. He called and he said Doug I have a problem. My staff tells me that the cereal that Kellogg makes is a new drug under the law, because they're making a health claim on the package and we have to tell them that they can't do that or they have to go through the drug approval process. The health claim is that they're quoting the National Cancer Institute's recent study to the effect that a diet high in fiber is associated with a lower rate of intestinal or colon cancer. So I told Frank what he needed to know about the First Amendment and he was able to shake the staff off of that particular bit of nonsense.

One night I got a call at 9:00 p.m. from a staffer for Senator Hatch, I think again because of just personal relationship, and this was a deregulatory matter. There was a bill in the Senate that would have reduced the number of commissioners on the Interstate Commerce Commission, which had been originally eleven, and I think this was taking it down to seven or five. But the path by which the reduction would occur, was gerrymandered in such a way that it was cherry picking. Instead of not filling vacancies as they arose, specific incumbent's vacancies were not to be filled, and those were the more deregulatory members. I got this call and it's about 9:20 on a weeknight, the bill is on the Floor and the question is what is the Administration's position on this. I had to take a few seconds but that's all I could have gotten, and then said this raises an important constitutional issue of infringement on the president's power of appointment. End of conversation. I got a call back later that just said that worked. That would have been in October of '84, when I was on the job for a month maybe. The Congress was coming to the end in an election season and all the business comes to the Floor and all the deals are made in the last days. Often, the administration isn't present, so fortunately we got a call on that.

DANIEL MARCUS: Was Stockman the director the whole time you were there, because eventually he left and had a falling out with the administration, not on your kind of issues but on budget issues, taxes or something.

JUDGE GINSBURG: Yes, Stockman was the director the whole time.

DANIEL MARCUS: You were there for about a year?

JUDGE GINSBURG: I was there for a year almost exactly. Chris DeMuth had told me that it was important to keep the director apprised if anything was going to blow up, and he didn't want to be surprised by reading about it in the newspaper. Chris said that one time as he was leaving for the day, he opened the door, leaned in and said Dave, I just want to give you a heads up, we're disapproving a rule on formaldehyde and Stockman looked up and said, "Be careful, everything I've ever seen of that stuff has been dead."

DANIEL MARCUS: I would imagine that given Stockman's interest and the natural interest and focus of the Director of OMB, that you had a pretty free hand as head of OIRA in terms of decision-making with respect to regulations.

JUDGE GINSBURG: I never submitted anything to Dave for approval. When we did the Executive Order, in order to draw attention to the matter publicly, as well as for the agencies, we arranged for a press conference with Joe Wright, who was the Deputy Director of the agency and who really ran the management aspect. We had very little interaction but he had the title of deputy so that was helpful. Very early in the morning of that day there was a meeting in the Vice President's office, with the Vice President, George H.W. Bush, his counsel, Boyden Gray, myself, my deputy, perhaps one or two other people, and Joe Wright. We just spent a couple of minutes briefing the Vice President on the Executive Order, the background for it, the rationale for it, and he was a very quick study. As we broke up after fifteen minutes or so he said, "What's the question I'm most likely to be asked?" I told him whatever that was.

Around midday, there was a scheduled press conference in the Old Executive Office Building. It was in an auditorium actually, and there was a stage. Joe Wright introduced the Vice President, who spoke about the importance of the Executive Order, which he did without notes, and then turned it over to me to take questions about the details. As he left the reporters were simultaneously shouting out their questions. He turned and answered the question that we told him would be the most likely one asked. He did the whole thing with great aplomb, I must say.

That evening, I was at dinner at the steakhouse on Connecticut, on the second floor, and I was with my wife and a couple of friends. In fact, I think it was Chris DeMuth and his wife, and the Vice President came into the restaurant and as he was walking to his table, saw Chris and me, came by and said quite audibly for others to hear, "nice job today" and walked on.

DANIEL MARCUS: That was a good day for you.

JUDGE GINSBURG: He was just really so accomplished at what he did. That was a major milestone in that year, getting the Executive Order out.

DANIEL MARCUS: Let's move on to your return to the Justice Department. How did that come about?

JUDGE GINSBURG: The President nominated Ed Meese to be Attorney General. I had had a few brief dealings with Ed. We weren't really working in the same sphere so I didn't know him at all well but I had met him and had a favorable impression and hoped that he had also. I sent him a note and said that - I believe I waited for his confirmation, I'm not sure of that, and sent him a note and said that if there was anything I could do to help in his staffing, thinking about staff and having been there just a year before, to please feel free to call. In fact, he called or his office called and set up a meeting, and he proposed to - well we actually, in the meeting, we talked about the possibility of his appointing me.

DANIEL MARCUS: So there was a vacancy already.

JUDGE GINSBURG: I'm not sure whether Paul McGrath had left. Baxter left in December of '83.

DANIEL MARCUS: I see.

JUDGE GINSBURG: Paul McGrath had been head of the Civil Division.

DANIEL MARCUS: That's right.

JUDGE GINSBURG: Because the election was a year away, and because of controversial things the division was doing, they didn't want to have a confirmation hearing for a new Assistant Attorney General for Antitrust.

DANIEL MARCUS: Before the election.

JUDGE GINSBURG: So Paul just walked down the hall. These appointments are for Assistant Attorney General and they're not specific, although it's understood at confirmation, what one's responsibilities will be. Paul just was shifted down the hall to run the Antitrust Division. He had been a litigator and he had done some antitrust litigation. He wasn't a specialist but he was certainly familiar with the field. I guess he probably stayed either until Meese came or until shortly before. There may have been an acting for a while. So I had this discussion with Meese and he wanted to know what I thought should be done by the division in the President's second term. I gave him my thoughts and then I later learned that he was seriously

considering someone else as well, who was an active practitioner in the field, whereas I was an academic on leave to the government, but he ended up offering me the position, which I took. He was confirmed early, in 1985.

Well, I'm not sure how early in 1985, because I think there was some delay in his confirmation. But then I was nominated and confirmed in time for me to go back to the Division the day after Labor Day.

DANIEL MARCUS: So you took your position as assistant attorney general roughly in September of 1985. Was your confirmation hearing, which I guess was in the summer of 1985 for the assistant attorney general job, pretty much a pro forma hearing?

JUDGE GINSBURG: Oh, it must have been, because I can't say I clearly remember anything about it.

DANIEL MARCUS: So you were confirmed. And then you were in the job as Assistant Attorney General a relatively short time, right?

JUDGE GINSBURG: From September of 1985 until November 10th of 1986.

DANIEL MARCUS: It was a whole year, that's right.

JUDGE GINSBURG: Year and two months.

DANIEL MARCUS: And of course, it was an easy job for you to get accustomed to because you had been a deputy in the division, so you were very familiar with the division.

JUDGE GINSBURG: Yes. So here's what happened. I had been confirmed at some point, I believe, before August, but I took a family vacation in August. We had rented a condominium on the beach in the Virgin Islands. My daughter had been born in April 25th of 1985.

DANIEL MARCUS: First child?

JUDGE GINSBURG: Second. So she was a baby. And my wife and the baby and my older daughter were with me. We were in the Virgin Islands for four weeks or so. I had with me two enormous three-ring binders. One was on the *AT&T* case, from which I'd been away for a year. I was the regulatory deputy when I was deputy and I ran the A*T&T* staff, but things had happened in the course of a year. The other was a roster of all 400 plus employees in the division, with their positions and how long they had been there and so on.

During that month, through long telephone conversations with Rick Rule, who was my deputy, and Ralph Justus, who was the executive officer of the division, sort of the senior civil servant, a nonprofessional administrative person, we reorganized the entire division. When Bill Baxter had come in, there were about 1100 people in the division. When Bill left, there were about 550. Senator Metzenbaum and others had prevented him from closing some offices which are being closed this year, 2012.

DANIEL MARCUS: Undoubtedly including Cleveland.

JUDGE GINSBURG: It was Cleveland and two other regional offices. But he had been able through attrition and policy disagreements to shrink the size of the staff. The FTC had gone through a similar but less of a percentage decrease in staff. However, Bill had no interest in administration. And the result was that we had all these hollow sections where there was a section chief and assistant chief, and instead of 15 or 20 staff lawyers, perhaps 9, or anywhere from 7 to 12. And so the division was badly in need of reorganization.

Reorganizing the division meant, therefore, reducing the number of sections to reflect the reduced number of lawyers and support staff. Reorganizing and reducing the number of sections, in turn, meant reducing the number of section chiefs. Section chiefs were in the Senior Executive Service, or at least most of them were. Senior Executive Service slots are very hard to come by; there's a fixed number created by the Congress, and allocated to the Department of Justice. As it turned out, by doing the reorganization the way I did, no one, by the way, lost his job or her job, no one. Everyone was assigned to one of the new emergent sections. It meant that there were six SES slots vacated, because the person who would be in it would now be an assistant chief, which is not an SES level, and although I think they retain their pay.

It caused about seven or eight people to leave - who were either chiefs or assistant chiefs - to leave the Division. And most of them landed immediately on their feet, going to law firms, so it didn't engender a crisis for anyone that I'm aware of. The sections were all renamed and reorganized in terms of their functional responsibilities so that we ended up with one for transportation, energy, and agriculture, for instance, whereas transportation had been a section by itself when I came in as a deputy. So we reorganized all the sections, consolidated the personnel into them, freed up these positions, and every single person in the division had a job in a new section.

I returned from vacation and began my time as assistant attorney general on the day after Labor Day. On that Friday, we posted the reorganization, let everybody know. On the following Monday, we operated under the new organization chart. Now, there's no way in the world that I or anyone else could have done that without having been there in the recent past. I knew many of those lawyers. Rick knew all of them.

DANIEL MARCUS: And it was lucky because you were between jobs, as it were, in the administration. You had the luxury of really being able to focus on this for a few weeks, which would have been much harder if you were already running the division.

JUDGE GINSBURG: Well, yes, it would have been. If I hadn't come in knowing it… Plus it wouldn't have been possible to do it in complete secrecy.

DANIEL MARCUS: And I don't know if you know the answer to this question, but is the Ginsburg reorganization still the basic structure of the division today?

JUDGE GINSBURG: In one respect at least, yes, and that is probably the only thing that I did in my three years in the government that's still in place and that's likely to remain in place for a long while.

When I was a deputy, I was one of three. The senior person in the chain of command that handles criminal prosecutions is always a civil servant, and so the one deputy was the head of the criminal side of the office. Then I was the regulatory deputy, which gave me regulated industries and international affairs. And the third deputy, I believe, was for all other civil litigation.

There was a section of economists that was rather large, and which I broke into two sections, Economic Analysis One and Two, just as there'd been Litigation One and Two. And I made the Chief Economist a deputy, and no one has ever disturbed that arrangement. It elevated automatically, in an extremely important way, the role of the economists. Every investigation had an economist assigned to it from the day it was opened.

Prior to that, with the economist, the Chief Economist being on a par with the head of the section proposing a case, the dispute between them, if there was one, if there was a disagreement between them, would go to the deputy and possibly to the assistant attorney general. Now it would be a deputy for the economist, dealing with his peer - the regulatory deputy or litigation deputy, what have you - if he disagreed with the recommendation coming from a section, that was extremely important. Rick Warren Boulton was the Chief Economist when I came in, and I just elevated his position.

DANIEL MARCUS: So during the year that you were running the antitrust division, what were the two or three big events from a litigation or policy standpoint that you recall?

JUDGE GINSBURG: I had two interests, or goals, when I came in besides the reorganization and the elevation of the economic deputy. One was to get the department, the division, out of the morass created by the AT&T Modification of Final Judgment. The other was to continue my work from OMB in some interagency committees and task forces. There's really a third, I guess, and I proposed it to Ed Meese. I wanted to get some legislative reform of the antitrust laws.

Now, in the first one, the *AT&T* case, the proposed modification of final judgment to settle the case on which AT&T and the government had agreed, was submitted to Judge Greene for approval, and under the Tunney Act. And he, on his own initiative, wanted certain changes made. He wanted the Yellow Pages given to the local rate-regulated monopoly even though it could be a competitive business, so that was inconsistent with the philosophy of the decree, but it was accepted by the parties under a take it or leave it choice. He wanted…

DANIEL MARCUS: Was this while you were Assistant Attorney General?

JUDGE GINSBURG: No. This was in 1982. There were three changes. Well, the important one is this: His rationale made some sense, or I should say good sense. He said, "This modification of final judgment is occasioned by a technological change. The 1956 decree was created for a world of copper wires. The reason for the change is that satellite and microwave transmission has come in." I'm putting words in the judge's mouth, but this was the idea. This was no longer a natural monopoly. End to end, the local distribution may be a natural monopoly and origination of calls, but not the long distance transmission. That's the whole thesis of the decree - of the modification of the MFJ.

So he said, you know, things change. That's why we're here. This could change again. There ought to be a provision in here creating a waiver from the strict provisions of the decree, because, you know, eventually things will change. So a waiver provision was put in, which ended up being important because it meant that a company could get a waiver of the prohibition on a regulated telephone monopoly entering a competitive business. One of the regional Bell companies could get a waiver of the prohibition on its entering competitive businesses, if there was no danger that it could use its rate-regulated position to cross-subsidize and undermine competition in the competitive industry.

So one of the very early waivers was for some regional Bell operating company to provide telecom consulting services in China. There was very little possibility, once one had accounting controls, that this would undermine competition in any market that we were concerned with, or in China for that matter. So the rationale made sense; the parties acquiesced in these changes.

On September 1, 1983, AT&T formed seven subsidiaries. Well, it had already formed them; it staffed them and appointed the presidents and senior executives of each one. And this is the greatest illustration I've ever seen of how hard it is for anyone to see things from someone else's perspective. As soon as those people were appointed, they started thinking about the businesses they might want to go into. January 1, 1984 was the breakup, and I was deputy then. And if I recall correctly, there were 19 waiver petitions filed that January. By the time I got back in 1985, there was a staff of about six lawyers who were doing nothing but working on waiver petitions, and we were acting like the staff of a Federal Communications Commission. We were making recommendations, analyzing this proposal, making recommendations about how a thing should be structured and whether it should be approved, acting as staff in this case to Judge Greene, but he was acting like the FCC. My goal was to get this monkey off of our back and over to the FCC where it belongs. And the Attorney General was on board with that. So this would raise extremely sensitive issues, both politically and constitutionally. It could not be done without legislation. And this would be legislation interfering in an ongoing judicial proceeding. So it was extremely sensitive that it be done, if it was done at all, that it be done in the proper way.

Somebody, I think a deputy in the Office of Legal Counsel, whose name I think I'll forget, was tasked with working with me on this, and we drafted legislation that we thought would pass muster under the precedents dealing with the problem of legislative interference with a judicial proceeding. Now, I frankly don't recall whether that ever got proposed before I left. I don't think so, but eventually something to that effect happened.

DANIEL MARCUS: Congress did pass a law.

JUDGE GINSBURG: I don't know if it was the '96 Telecom Act. I think it was earlier than that. My proposal was that the decree, in terms, become a regulation of the FCC; part of the CFR. But it had to be done - you know, it was complicated work then, but that was the basic idea. Because the worst thing for a competition agency is to be a regulator, worrying about price regulation and cross subsidization, all these things. All right, so that was

one path, you know, since I didn't reach the end of that on my watch. But the need for it was recognized eventually and it was done by the Congress.

I mentioned the interagency activity and the legislative package. The legislative package was something that I had not really come up with myself, but there was sentiment in the Administration for changing some of the statutes in a way that better reflected the current state of the case law, because the statutes had long been rendered somewhat irrelevant by the Supreme Court and the lower courts' decisions.

Section 7 of the Clayton Act prohibits a merger that will tend substantially to monopolize commerce in any line of commerce in any section of the country. And we wanted to take the tendency language out and just make it any merger that would monopolize, or substantially monopolize.

This was a modest reform that was meant to reflect reality. Also, Section 8 of the Clayton Act prohibited all interlocking directorates that would connect or interlock two firms that had any competition between them. So if you're the firm with a large number of lines of business, say a General Electric three-quarters of the directors of Fortune 500 companies are disqualified because you have $12 million worth of business in some kind of specialty transformer every year, so it made no sense to leave it that way. And that was not overcome by case law; that was the law. Firms tried to be careful to abide by that, and it was a major pain in the neck for everybody and to no benefit to anyone, so we wanted that changed. There were one or two others that were of significance and several that were even more modest.

DANIEL MARCUS: But you didn't tackle a big thing like Robinson-Patman.

JUDGE GINSBURG: I don't believe there was anything of that magnitude. But somewhat to my chagrin, this had to go through some interagency process within the administration, I think through the Economic Policy Council, which at one point Jim Baker chaired when I was over at the White House. I don't know exactly the details when I was at Justice. But that meant that other agencies that had a significant interest could assert themselves. The principal one was Commerce. The general counsel of Commerce was a man named Douglas Riggs, who would have taken on all kinds of major antitrust issues and bought us a controversy and no gains He was very aggressive. He wanted to radically change the antitrust laws. And so dealing with his concerns in the context of the small interagency group, maybe seven or eight, was a major obstacle to getting a proposal through the Administration and up to the Hill, and it didn't happen until, I believe, July, something like that, of 1986, an election year. And it was basically

too late; in November the Republicans lost their majority and it became a moot issue, even in the Senate.

DANIEL MARCUS: So it's never happened?

JUDGE GINSBURG: Well, since then I know Section 8 has been amended. Section 7 has been just left in the dust by the case law. And the other changes, which I don't think were as important, were not made. I think there were some remedial changes involving criminal penalties that I wanted to increase. But I got that through the Sentencing Commission actually.

Great irony: there was a cabinet meeting in which I was to present the proposals to the President. I got to the White House 10 or 15 minutes before the meeting, and I was shown into the Roosevelt Room. The meeting would be in the Cabinet Room. This would my second presentation to the full cabinet with the President. I was ushered into the Roosevelt Room to have a few quiet minutes. The next person to arrive was Mac Baldridge, Doug Riggs's boss. Mac said he liked the ideas, he said "But you've got to be awfully careful in this area. You relax this too much, we're going to have big problems with companies misbehaving." Riggs had been out on his own. I had no idea. Then Mac died, of course, the next year or so in a riding accident, but anyway, I was out by then. So Doug went off to become general counsel of Pitney Bowes in Connecticut.

There were a number of interagency task forces I was on when I was representing the White House, when I was at OMB, and I wanted to see them through to successful completion, or at least to do no damage. And I can't frankly tell you which ones they were or what the specific goals were, but I'll tell the lesson I learned from this. Sit around a table with various agencies represented on a given topic. And if you listen attentively and you know anything about the outside world, you can see immediately that the agency is shilling for one interest or another. If it's the Department of Energy, it might be the nuclear people one day. It might be the oil people another day. It might be Oil Chemical Atomic Workers the third day. But they're speaking for some interest group that has prevailed within the agency, which means that when State speaks, they're speaking for some other country; you just don't know which one. The only reliable voices were the Treasury, OMB, and the Justice Department, which the Antitrust Division represented on economic matters. They always got it, and whether anyone else got it was hit or miss, or a matter of whether the interest group they were representing happened to be on the same side. It was very depressing.

DANIEL MARCUS: Yeah. The process problems in the executive branch are enormous. Okay, well, maybe the time has come to at last arrive at your nomination and

appointment and confirmation to be a judge on the DC circuit. And I guess the first question is, here you are sitting happily as head of the antitrust division. How did you come to be nominated for the DC circuit?

JUDGE GINSBURG: Remember those ads, "I got my job through the *New York Times*?"

DANIEL MARCUS: Yes.

JUDGE GINSBURG: It wasn't that. One day, probably around May or - well, let me back up. There was a group within the Department of Justice who did interviews of people being considered for judgeships. That was chaired by OLP, the Office of Legal Policy. Steve Markman, who's now been a judge for probably 25 years on the Michigan Supreme Court, I think, was the head of that. I had sat in for some absent member a few times to interview someone who wanted to be considered, including, if I can digress for just a moment, a district judge from New York who was interested in being on the Second Circuit, who told me this wonderful story, which I've always remembered as a bit of practical wisdom about being a judge, especially a trial judge.

He had a first status call on a case, and the lawyers came in basically to tell him what the case was about. It seemed that in a certain congregation in Brooklyn, the rabbi had died. And there was a schism in the congregation or the board between the son of the rabbi, the backers of the son, and some other pretender to the throne. And after enough skirmishing and they'd reached an impasse long enough, one of them sued the other under RICO. This judge, who was of Irish Catholic heritage, born and bred in Brooklyn, , said, "Okay, so you want me to say who's the real rabbi, right? I'm not going to do it. Dismissed."

So anyway, I saw some of these people coming through. But I had never had any personal interest in being a judge. All of my academic work had been on subject matters that come before administrative agencies. I had written a book on communications, a case book, I should say, on communications law, with the FCC basically. I taught labor law. I did financial regulation, which comes before the bank regulatory agencies. I had been in a courtroom once in my life. When I was a law student at the University of Chicago, I chose to go down to traffic court and defend a ticket. What I didn't know was that if I had carried a law school case book in my arms, the case would have been dismissed as I came up before the judge, which I saw happen with others. So that was my total courtroom experience, and I think I lost.

At some point in the spring of 1986, Steve Markman asked me, "Would you like to be considered for the D.C. Circuit?" So you will not be

surprised that I said, "I don't know, Steve. Let me think about it for a week." This was a totally new idea. I'd never, ever considered such a possibility. I discussed it with my wife and she understandably but naively said, well couldn't you get them to consider you for the First Circuit so we could go home? Sensible question, we still owned our house in Cambridge and I loved living there. So anyway, I said no, I said I have absolutely no interest in the kinds of things that come before the courts, except the D.C. Circuit. The First Circuit, with its small states, they're going to have a lot of diversity cases, and it's not just something of interest to me. By the way, years later, I was sitting with Ab Mikva and someone else, and we came off a diversity case, of which we had very few, and Ab said, "I really like these diversity cases, they make me feel like a real judge." And I said, "Ab, I hate these diversity cases, they make me feel like a real judge." Anyway, when the week was up I had to go overseas. I think it was probably June, because it was the OECD meeting I think, and maybe on to an economics seminar at the University of Saarbrucken, which I had gone to for many years. So I went back to Markman and I said, "Steve, I have to leave the country for ten days or two weeks, don't count me out just because I'm away." And my thought process was this: I can't go on doing what I'm doing now for very long. At that point the average tenure for a political appointee in the Administration, I had read, was 22 months, in any administration. I had been in for almost three years. I was young and vigorous but the Administration was going to come to an end in a little over two years, even if I lasted that long. So the question was, what am I going to do when I leave here, that's what I have to decide. Do I want to go on the court or do I want to do something else after government?

DANIEL MARCUS: Did that include going back into teaching?

JUDGE GINSBURG: It specifically included going back to Harvard. I had given up my tenure but there was every reason to think that as with others, I'd been gone more than two years but less than a long time, that it would be restored, that I could be reappointed. So the question was what do I want to do. I talked to a lawyer who was a friend of mine, in Boston, for whose firm I'd done some consulting. He at one point had said to think about joining him. It was a small firm, very high level people, just two partners. His one partner at the time was a former President of the Harvard Law Review. Anyway, they had a great practice, it was interesting. I talked with him, thought about what else I might do, and I decided I would go back to Harvard. So now the question was do I want to do that or go on the Court. And I had left Harvard because of the political environment, internal faculty political environment.

DANIEL MARCUS: And had that changed in the three years, as far as you could tell, the schisms?

JUDGE GINSBURG: It had because Bob Clark had become dean and yes, it was definitely on the mend. So there was that possibility. And this lawyer I talked to, as I say, he said look, you can do any different number of things but the one thing you can't do in life is go back. And I thought there was something to that, there was some wisdom to that. I was in Germany, during this two-week interval, and I was reminded of the respect in which professors were held in Germany. And while it's not the same in this country, the reasons for it are, or the culture is similar within the academic arena. So I knew that I wanted to go back into teaching and then the question was how do you compare that with going on the court. Well, here you get three students and they're all very, very good, and you get to choose them. On the other hand, you don't get to choose what you work on. Cases come along and that's what you get, whereas you have a lot of but influence over what you teach.

DANIEL MARCUS: And what you write and work on.

JUDGE GINSBURG: Exactly. At that time it was still the case, as it had been historically, that Harvard faculty members were paid at about the level of a circuit judge, so financially it was not an issue. (That turned out to be wrong.) So I decided that this was what I would do.

DANIEL MARCUS: Were you influenced by your fond recollections of the court from the time you were a law clerk?

JUDGE GINSBURG: Well certainly, having been here, I had some idea of what I was getting into. And I must say, I had a great fondness for Carl McGowan, for whom I'd clerked. I don't think I ever, not more than once, missed a reunion, which he had annually, and I would come down from Boston.

DANIEL MARCUS: And he was still here.

JUDGE GINSBURG: He was still here, I sat with him one time when I came on the court. He was not at his peak then and he retired not long thereafter - during that first year of mine I think, probably in '87. I came on November, '86. So this is what I decided to do because it was a congenial, intellectual environment, collegial, and very much operating on the same plane as law teaching. As I tell clerks and prospective clerks, it's the fourth year of law school, you're dealing at the same level of abstraction. In law school you read appellate decisions, here you're working on appellate decisions.

DANIEL MARCUS: This is 1986. I remember you telling me when you were a law clerk, you were struck, of course, by how sharply divided the D.C. Circuit was, and by 1986, it was still somewhat divided, but President Reagan had already

had an opportunity to shape the court a little, by appointing, I guess, Bork and Scalia. Was there anybody else before you?

JUDGE GINSBURG: Ken Starr., Steve Williams and Larry Silberman.

DANIEL MARCUS: So the court had changed tremendously then, by the time you were considering this question.

JUDGE GINSBURG: In fact, Scalia had come and gone. I knew Silberman slightly, from my consulting practice. He had been General Counsel of the Crocker National Bank. I had enormous regard for Bob Bork, still do. I knew Ken briefly, from when he was in the Department. Steve Williams I didn't know. He turned out to be one of my best colleagues. So I thought it was a very congenial environment and likely to become evermore so.

In January of 1985, when I was at OMB, I had given a talk to the administrative law section of the Association of American Law Schools, which had their January meeting in Washington, and I referred to the D.C. Circuit as the arrogant and intrusive D.C. Circuit. There was an audible gasp among the professoriate sitting there. But that had changed drastically in a couple more years, and the work they were doing was exactly what I was interested in. It was difficult to imagine being a judge, but once I got into the substructure of what would be involved, it was very appealing.

DANIEL MARCUS: So you came back from Europe.

JUDGE GINSBURG: And I told Steve right away.

DANIEL MARCUS: And you said yes.

JUDGE GINSBURG: Yes, exactly.

DANIEL MARCUS: And so he then - what happened next? One of the reasons I ask this is that in subsequent administrations, particularly ones I'm familiar with; the Clinton Administration and the Obama Administration, the Justice Department and the Office of Legal Policy doesn't play as important a role in judicial selections for the courts of appeals as the White House Counsel's Office does. Did you have to go through the White House Counsel process as well or not?

JUDGE GINSBURG: Not that I recall.

DANIEL MARCUS: And the White House Counsel's Office was much smaller then I think.

JUDGE GINSBURG: Well Meese had been counsel to the President. So when he came down, that portfolio came with him.

But there is a back story to getting confirmed. By the time I was nominated it was July or August, probably early August, and there was an election coming in November. It turned out to be a watershed election in terms of change of control. One of my deputies was Steve Cannon. Steve had worked at the FTC for a couple of years I think, and he had worked for Senator Thurmond, and then he came and worked in the Antitrust Division. I think I hired him.

But in any event, he went up to see Duke Short, who was Thurmond's chief of staff, and said "Duke, can we get a hearing together? I know it's late but can we get a hearing organized for this nomination?" Duke said no, it's too late. Steve said, "Well do you mind if I try?" And Duke said, "Be my guest." Steve, who was no longer working for Senator Thurmond, got this thing together, got it scheduled, and got me a hearing in what must have been September. As soon as that hearing was scheduled, they got five district judges and Bruce Selya for the First Circuit on the same docket. So Steve was the engine that pulled the seven of us through.

The hearing was very brief. I read Easterbrook's hearing transcripts so that I could answer Senator Thurmond's questions. Senator Kennedy introduced me. I'm pretty sure it was because my appointment, my commission says Douglas Ginsburg of Massachusetts. And I speculate that one of his staffers or he checked with Steve Breyer, then on the First Circuit, and my former colleague at Harvard.

The hearing and maybe the committee vote came early, but there was no action on the Floor. There was tremendous pressure among the members to get out and go home for the election, and every day that it dragged on was a small miracle because everyone wanted to get out, but the leadership was keeping them there to get some business done before they adjourned. Somewhere in October, they still hadn't gone home. This is unheard of really. Four o'clock in the afternoon, Rick Rule was in my office, we had C-SPAN on, and there was routine business on the Floor. Rick picked up the phone and he called Bob Dole's legislative assistant and he said why don't you fellows move the executive calendar? About ten minutes later the Majority Leader moved the executive calendar. At that time Senator Byrd was the Minority Leader. Dole moved the executive calendar, Byrd called for a recess. They reconvened about 15 or 20 minutes later, went back into session. At Senator Byrd's request, they struck three names from the list, which had about 1,500 names, I believe, mostly military promotions and some diplomatic positions, and then it was done by unanimous consent.

Rick picked up the phone and it was Bob Pettit, I think, who was Dole's legislative assistant. Rick picked up the phone to say thank you and Bob said, every time the Majority Leader calls the executive calendar, the Minority Leader says, "Who telephoned?" It simply doesn't happened unless someone makes it happen. I later saw Lillian BeVier of the University of Virginia faculty, when she had been nominated to the Fourth Circuit, and I said Lillian, who's representing you in Washington? She said the White House and I said this isn't going to happen. You just have to have someone, Tom Korologos or someone who can move it along, who cares. The White House OA has a zillion things on his plate and you're not at the top of his list.

DANIEL MARCUS: Well, in going back to your confirmation hearing for the judgeship, you indicated before that the potent combination of Judge Breyer and Senator Kennedy was very helpful on the Democratic side at the hearing. It was pretty uneventful, I take it.

JUDGE GINSBURG: Yes, absolutely.

DANIEL MARCUS: Now, of course, if you hadn't been confirmed by the Senate in the fall of 1986, the President could have re-nominated you, and I presume he would have, in January of 1987. Now there would have been a Democratic Senate and I assume there might have been a little more turbulence but there's no reason to think you would not have been confirmed, don't you think?

JUDGE GINSBURG: Probably correct, but it would have been probably a year later, in the early fall of 1987, with who knows what uncertainties and things would arise in that year. And acting as Assistant Attorney General while under that prospect for a year, would have been very awkward.

DANIEL MARCUS: Yes. Not so much because you had matters pending before the D.C. Circuit though, but because you're making decisions all the time that Senators might not like.

JUDGE GINSBURG: Yes, exactly. Now my experience with the members of the Senate was that they were extremely cautious about not trying to influence something or seeming to influence something at Justice. I had a call from Senators Glenn and Metzenbaum, to come up and meet with the two of them, which I did, about a steel merger pending in Ohio, and they just wanted to be on record about the employment implications and so on. I politely heard them out and that didn't affect things one way or the other. Senator Simon, I was up to see on some matter once, at his request of course, and Senator D'Amato. That was actually I think when I was at OMB, yes. But to have

every transaction of any consequence - there would have been much more activity like that because the Senator would reasonably think, well, he wants my vote, to be confirmed, so I think he ought to listen to my story.

DANIEL MARCUS: So that was very nice. So you took your seat on the D.C. Circuit. I should know the date for this.

JUDGE GINSBURG: November 10th, 1986. The swearing in was here in the court. I should say Pat Wald was Chief Judge; I think she had become the Chief Judge in July 1986. She did what no predecessor had done. She invoked the September rule. Under the rules of the court, a judge who, on September 1st, has more than two opinions assigned, that have been assigned for more than six months, may not hear additional cases until that is worked off. And Judge Robinson had, I believe, 23 opinions, virtually all of which were more than six months old. And she invoked the September rule so that Spotts couldn't sit in September, which I thought was really admirable. It was very difficult, because he was a dear man. But it was important. As it turned out, his wife was sick and died the next year, and he retired the following year and died shortly thereafter. Towards the end of my second year, one of my clerks started working for him for a few months, when he finished his last work for me. Anyway, Pat had become chief, there was a swearing in here, and I think she must have done it. My secretary, who had come over from OMB to Justice, came with me here, Mary Rose Udstven. We had a practice, which I picked up when I was at OMB, of having a three-by-five index card set vertically, with the days' appointments typed on it. It could go in the front pocket of a man's suit, so one could pull it out and see the schedule; you know 3:00 here, 3:20 there, 4:00 there, 4:30 there. She handed me my card, it had two or three things on it, one of which was I had an airplane to go somewhere. So there were only two or three entries on this card and I said it looks like a quiet day. She said, "That's your week."

DANIEL MARCUS: Well it is - I'm sure it was an enormous change. First of all, it was an enormous change going from the legal academy to these political jobs in the Justice Department and OMB, in terms of the hecticness of one's schedule. So it must have been quite a stunning thing, to go from the days when you pull out your card, the three-by-five card, and there's one meeting after another and you wonder when you're going to have time to read anything.

JUDGE GINSBURG: Right.

DANIEL MARCUS: And to come over here, where suddenly….

JUDGE GINSBURG: It's back to the academy.

DANIEL MARCUS: It's back to the academy, even more so.

JUDGE GINSBURG: Even more so, exactly.

DANIEL MARCUS: Even more so. It's the cloister.

JUDGE GINSBURG: That's right. I adapted well to both changes, and quickly. I didn't miss the turmoil and hecticness of the political branches when I came here. But I'd done it for three years and I took to it readily when I started at Justice. It didn't take long at all and things at Justice were much more paced and thoughtful than at the White House. At OMB, my day began, I believe it was 7:30, if it wasn't 7:00. Dave Stockman had a staff meeting every morning. It was the 11 or 12 political appointees and the senior civil servant, and with 600 employees in the agency, that's a very small lever with which to move in, but the staff is highly responsive. OMB is the Swiss Guard of the presidency. It's the institutional memory as well. My day would end sometimes after 9:00 p.m. (I've mentioned about getting a call from the Hill after 9:00). The pace was very demanding. Back at Justice, it was intermediate, because I was playing in these interagency games. I had legislative things going on, I had members of Congress occasionally calling, Mr. Dingell asking for documents. So it was a constant activity level.

When I was sworn in here, I had a preexisting commitment that I had made when I was Assistant Attorney General, to speak at a major meeting in Australia. It was an annual governmental affair that dealt with trade, and I really couldn't avoid going. So one of the first things I had to do when I got here was leave. I asked my secretary again, almost immediately after being sworn in, how am I getting to the airport?

DANIEL MARCUS: And this is a time when the chief judge was counting on you to be able to sit on all these cases.

JUDGE GINSBURG: Well, that worked out okay. They give you a very slow introduction. At Justice, there was a small motor pool, so you could pick up the phone and say I need a car in ten minutes, I'm going to the White House or I'm going to the Hill. Usually it was one of those two. So I said to my secretary, "How am I getting to the airport?" She said, "Darned if I know." And the answer was, I was taking a taxi. The chief judge makes a point of allowing a new judge to get used to the work by ramping up the workload slowly. And I know, having been Chief Judge, phasing people in, so that each new person would be given probably about three months before he or she had a full sitting in a month. They need to staff their office at first, they need to get used to reading the volume of briefs and doing the work. Maybe even

six months before you're carrying a completely full load, and that's essential, it really is, unless the person has been a judge before.

We have two judges on this court who were experienced district judges when they came onboard here, so the learning curve was not very steep for them. That's Judge Henderson and Judge Sentelle. But for the rest of us, it was a more prolonged initiation.