Oral History of Judge Douglas H. Ginsburg

Third Interview
June 18, 2013

This interview is being conducted on behalf of the Oral History Project of the Historical Society of the District of Columbia Circuit. The interviewer is Daniel Marcus, Esquire, and the interviewee is Judge Douglas H. Ginsburg. The interview took place on Tuesday, June 18, 2013. This is the third interview.

DANIEL MARCUS: This is Daniel Marcus interviewing Judge Ginsburg on June 18, 2013. Judge Ginsburg, today, we're going to discuss court judicial process and administration issues, and I thought I'd start with your thoughts, your approach, and whether it changed over the years, to hiring and working with law clerks. You've had a lot of law clerks over the last 25 years. How did you select your law clerks, and what was your approach to working with them?

JUDGE GINSBURG: Well, the task of selecting law clerks descends upon a new judge immediately.

Indeed, yesterday, Judge Srinivasan was sworn in, and mentioned that he was inundated with applications before he had even taken the oath, and was in the process of trying to sort through them. I was confirmed in, I think, late October and sworn in on November 10 of 1986. Starting shortly prior to my being sworn in, I started to receive a small number of applications, really in the form of – more informally received than they are today.

Of course, it was an odd time of year in terms of the annual term of the court and the annual cycle for new clerks to begin, which is quite often the case for a new judge. So I was not receiving applications from third-year law students, because they were not available to begin right away; although, I must say, I spent the better part of the first several weeks of my time on the court selecting law clerks to begin immediately, to begin the following fall, and to begin the fall after that, because, in those days, we were hiring law students in the fall of their second year, so I had to hire nine law clerks over a short period of time.

And each of the first three who came to me came, therefore, through a distinctive, indeed, unique route. The first clerk that I hired was James Swanson, who has since gone on to have a marvelous career as an historian and an author of books about President Lincoln, including, most prominently, *Manhunt*, but also several others that were excellent, as well. James was then working as an attorney advisor, I think it is called, for Susan Liebeler at the International Trade Commission. He had attended

UCLA Law School and the University of Chicago for college; that is where he – he grew up in Chicago and he attended the U of C for college, then to UCLA for law school, where he was noticed by Wesley Liebeler.

Wesley Liebeler taught antitrust and some other topics at UCLA and was someone of whom it could be said most truly that he suffered no fools. And so he sent James to work for his wife when she went on the International Trade Commission. And I knew Susan somewhat and was contacted, I believe, initially by a letter from James. I talked to Susan Liebeler, and she gave him a good send-off. I met with him, and I thought he was utterly charming and interesting in ways that are only tangentially related to legal skills, but I take transcripts as the best indication of legal skills.

And so I hired him to begin immediately. I'm not sure who was second or third, but the other two hires were Steve Aitken, who was a lawyer in the Office of the General Counsel at the Office of Management and Budget. I knew Steve somewhat and I knew his work somewhat from there, and I liked him. And he brought with him, even at that time, several years of government legal experience. He has remained in the same service and had a career at OMB and is one of the small coterie of people who make up the institutional memory of the Executive Office of the President.

Steve was available to start right away or almost right away. The third clerk was Robert Gordon, who was then clerking for Judge Kaufman on the Second Circuit. And Kaufman went through five or six clerks per year. He was tyrannical, abusive, and paranoid. Of course, there was a conspiracy of silence among the clerks who clerked for him when he was hiring new clerks, and so his reputation had not quite preceded him. Robert had been a student at Harvard Law School, and went directly to clerk for Kaufman. By November, it had become clear to him that this was a very unhealthful situation, and he had the gumption to call Dean Vorenberg at the Harvard Law School to discuss the situation with him, and with Jim Vorenberg's concurrence, he applied for a clerkship with me.

I found it really admirable on his part to take the position he did about the Kaufman clerkship, and really good judgment on his part to have called the Dean before deciding exactly what to do. I talked to Vorenberg, who gave him a great send-off, and so he came to clerk for me, again, on very short notice. That completed the chambers. Well, I should say I brought my secretary over from Justice – Mary Rose Udstuen. She had been with me at OMB before that. She had worked for my predecessor - Chris DeMuth - and I brought her and my special assistant – Nell Minow – who has also gone on to do great things – with me from OMB to Justice, and then Mary Rose came with me to the Court.

DANIEL MARCUS: Well, it is interesting that your background and connections in the academic world and at OMB were the secret to getting really good law clerks right away, in the middle of the season.

JUDGE GINSBURG: Yes, that is correct. It is a good observation. Well, of course, both my position at Justice and at my position at OMB were owing to classmates from law school. And classmates from law school have been among my closest friends ever since then and have been, in some instances, extraordinarily helpful to me.

DANIEL MARCUS: Well, how – after that first group of law clerks, which you had to hire right away, what was your approach after that, to the hiring of law clerks in terms of law schools, professors that you relied on the process and whether it changed over the years?

JUDGE GINSBURG: Well, I've had about 80 law clerks - 26 years, three clerks every year, and two or three years when I had a fourth law clerk. That fourth clerk is something that I resisted long after my colleagues had succumbed… When I took senior status, my complement shrunk.

For many, many years, I was able to evaluate many applicants, in part, on the basis of recommendation letters from people that I knew personally, not just people who taught at Harvard but people who taught at various law schools around the country - the University of Chicago, where I knew the faculty; Harvard, where I knew the faculty; and, to a lesser extent, Columbia and Berkeley, other schools - because faculty people move around.

Over the years, that connection to academia has become more narrowed simply because so many of the people that I knew or know have retired or moved on, or passed away, and most of the applicant letters of recommendation come from people that I do not know, with the exception of those from a few law schools where I still know a fair number of members of the faculty, where I've taught as an adjunct - at the University of Chicago, for most of the last 20-some years, and I spent the last two years at NYU full-time and, before that, two years part-time at Columbia.

So I still have good connections in some corners of academia. I receive an enormous number of applications every year. It has grown from year to year, and, in the last few years, topped out at about 950 applications for three slots – three or four slots; and, thank goodness, most of them now arrive electronically. So I gave my current clerks the criteria for selecting from the applicant pool the applications that I would want to look at. And I'm sure these criteria were refined over the years, but I can't unravel the process in hindsight.

I can say that, for almost all of the 26, almost 27 years now, I have taken the following approach:

First of all, I should say that there is a much larger number of fully qualified applicants than one could possibly even interview let alone hire for three slots, and so knowing that there are all of these highly qualified, for the most part young people who have done everything right in their lives from the time that they started secondary school through college, through law school, it is a difficult matter to sort them out. But it does not make much sense to put effort into finding the three absolutely most outstanding candidates in terms of their qualifications for the job narrowly conceived to be analytic ability, writing skill, and general devotion to and learning in the law. For most of the 26 years, I have spent more time with each of my clerks than I do with all of my family, and so it is extremely important to me to have clerks with whom I want to spend time.

And so, from among the pool that seem to be highly qualified, the question to my mind was which ones would be the most interesting associates to have in a fairly intimate professional relationship for a year. Therefore, I would have my clerks cull from the applicant pool everyone that I thought would be almost certainly qualified, and that meant different things at different law schools. I came to know the grading systems of many of the law schools, and I could say to them, "I want anyone with an average of 80 or, later, 180 or more at the University of Chicago; anyone who is a double-Kent at Columbia; anyone who had – I forget the cut-off point, but I had a cut-off point, also, for Harvard and for Yale in terms of on the number of honors versus pass grades, and, at Michigan, which also had reliable grading, and at Berkeley – in each case because I actually knew that there would be somewhere between zero and five or six people at the top of the class, who would – who might be in my applicant pool, and who would be almost certainly very qualified. In addition, I told them to bring me the application of anyone who finished first or second in his or her class anywhere, any law school. That same person might have finished first or second had they gone to Chicago or Harvard; you don't know. So I didn't want to overlook them just because they didn't go to Chicago or Harvard. And, indeed I had some very interesting interviews with people, a woman who went to Brooklyn Law School, who was a ballet dancer, as well, or had been; and a man who went to the University of Missouri in Kansas City Law School, who was a member of the City Council and a mid-life student, who really had a family and connections, and could not leave Kansas City when he decided to go to law school. So that would give me a pile of 50 or 60 in the later years, perhaps fewer in the earlier years – applications that I would look at very thoroughly. And I would look at whether they had experience other than going to school, which increasingly became the case; how their letters of recommendations read; and what they listed as their interests.

There were people who were qualified in every respect but whose interests, reflected not only in a statement of listing their hobbies but also in the courses they elected to take, had virtually no overlap with my interests because they had done things involving all criminal law or mental health and the law, or things that were clearly preparing them to do something in the criminal justice system, which is a very small portion of the work that we do here.

And then, at the same time, there were people who had studied economics in college, and maybe had done some economic analysis of law in law school, and were interested in regulation, and who were clearly on a path toward a Washington practice, and those were the people that I would more likely find of interest – not necessarily but more likely. And, indeed, a very high percentage of my clerks are in practice in Washington. Of 80 or 85 clerks, I think that there are six or seven in New York City. There are the same number – six in Chicago and five or six in San Francisco, and I think maybe three in Los Angeles. The overwhelming group and, certainly, the plurality and, I think, the majority are here in Washington, and that reflects my selection criteria. Very few of them are in academia, unlike some of my colleagues' clerks. My colleague Steve Williams has a roster of former clerks that would make up probably the single best law school in the country if they were all put together. (Chuckles) I wasn't disfavoring people with academic ambitions, but I wanted people who really wanted to practice law. And some of them have gone on to teach at good schools; but I'd say there are only about six in that category. And I'd say as many – about an equal number have left the law to do various things, including teaching high school, teaching test preparation, investment banking in two cases, and some other thing – business – high-tech business unrelated to the law. Of course, that person is the wealthiest of my alumni.

So I would then schedule interviews, having culled the 50 or 60 down to ten or 12. And I would schedule interviews for ten or 12 people to fill three or, in a few years, four slots. As it would happen, if I schedule ten or 12 interviews, I might actually see six or eight people, because some of them would never get out of New Haven or, more likely, out of New York on their way down here – or out of Boston if they were interviewing on the First Circuit. Six or eight interviews would probably be typical, and they would occur over the course of one morning, at least in recent years, because we've had this hiring plan by which there is a certain date at which the judges agreed they would first extend offers of interviews, and another date by which they would first have the interviews, and they could make the offers on the spot.

That system prevailed for – I don't know how long – ten or 15 years and has just recently fallen apart. I would see these applicants for anywhere

from 30 to 60 minutes, depending on how interesting our conversation was, and ask them to spend about 30 minutes with my clerks as a group, and I would typically, then, compare notes with my clerks before the applicant left. There were a few instances in which that was unnecessary because I knew that there was no way I was going to hire this person and, actually, a few in which I didn't wait to consult my clerks because the case was so clear, and I wanted to communicate that to the applicant – my enthusiasm for that person.

DANIEL MARCUS: I see, yes.

JUDGE GINSBURG: There were people I interviewed that I knew I wasn't going to hire when we said "hello." Although, I always gave them the courtesy of at least 30 minutes of discussion. I can remember one person who went to a top-15 law school, who was admirable in every respect. He was the first person in his family from a small town in Illinois to have gone to college, let alone law school; finished right at the top of his class – extraordinary record – but whom I knew immediately I would not be hiring. He was just awkward, ill at ease, and that didn't change over the course of the 30 minutes that we talked.

We never talked much about the law. I would sometimes ask a student about his or her law review note or some other aspect of law school, but I wasn't interested in testing them on the law; their faculties had done that. I was interested in, again, whether I'd want to spend time with them, and so we talked about opera, if that was their interest, or drama, or fiction, or whatever it was that animated that person.

I hired a clerk a few weeks ago to begin with me in January of 2015, because I'm on a calendar year cycle right now and have been just for the last two years. So she is going to be graduated from New York University Law School in 2014.

DANIEL MARCUS: A year from now.

JUDGE GINSBURG: Yes, and will clerk with me, and we'll have a six-month break during which she'll do something creative, I'm sure, and then will join me in January. When I was teaching at NYU, I made an appointment to meet with her. Oh, actually, I'll say my current clerk is from NYU. He is absolutely outstanding in very possible way. He is one of the best clerks I've had, and he came to me because the Dean called me and said, "If you're still looking for a clerk, I hope you will meet with Zander." Through a quirk of timing, he didn't get a clerkship on the day of the land rush when there are all of these interviews packed into the morning, and I think it had to do with a scheduling mishap. So, based on that, I sent the Dean an e-mail, and I said, "If you have another one like Zander, send him or her to me." So he took about a week but he did. And I asked this

woman to meet with me at 9:30 one morning, when I was at NYU. I came in around 9:15, and she was already waiting there, and I thought that maybe I'd made a mistake but, in fact, she was just early. We went into my office and sat down and talked.

And I said, "Well, this has been very interesting and a pleasure to chat with you, but I know you have a class at ten, so you probably ought to be on your way." She said, "It is 20 of 11." I said, "Well, why don't you just take this clerkship?"

DANIEL MARCUS: Yeah, that is nice. Well, it sounds like your method has proved pretty trustworthy over the years. Judges I've talked to have said that every once in a while, just however careful you think you're going to be, there is a clerk who doesn't work out. Have – has that happened to you very often, if at all, over the years?

JUDGE GINSBURG: I would say it has never happened that there was a clerk who didn't work out. There was never a clerk who didn't complete his or her term, and for whom I could not give a favorable recommendation.

There were probably a few clerks out of the group that required more of my attention to their work than others. And there were – it was about a normal distribution, because there were about a similar number who were so extraordinary in their writing ability and in their ability to see things as I would see them, to anticipate my questions and so on. But the distribution looks quite normal, I would say.

DANIEL MARCUS: Well, why don't we turn to how you work with your law clerks in terms of preparation for argument and research and writing opinions, and whether that changed over the years?

JUDGE GINSBURG: My style of writing opinions definitely changed - my style and that of my colleagues, I think. I clerked, as you know, for Judge McGowan in 1973 to '74, and that was at a time when the opinions coming from this Court were much longer than those coming from other courts; went into great detail on matters of some complexity in regulatory cases; were larded with, sometimes, over 100 footnotes; really each one was a magnum opus.

Judge Leventhal, as you know, was a leader in this style of opinion writing, but it was emulated by most members of the Court. I think Judge Tamm may have been the major exception in that respect. He was very direct. His opinions were short, and they were unburdened with many footnotes. When I came to the Court in 1986, only a dozen years after having left here as a clerk, I simply picked up where I left off in terms of the style of opinion with which I was familiar and comfortable. A little bit – there had been some gravitation away from that on the Court but not a dramatic amount of it.

Judge Robinson was still practicing that extreme – in his case, extreme form of elaboration, particularly with regard to the number of footnotes, but most of the judges were still working to some degree in that tradition.

DANIEL MARCUS: Judge Wald certainly did.

JUDGE GINSBURG: Judge Wald was, for sure. There were, over the years, people who had carved out exceptions – individualized exceptions from that mold; the most outstanding being Jim Buckley, who was the best stylist with whom I've served. I've worked with – with Sri now onboard, with 25 different judges. But I haven't worked with him yet, but I've worked with 24 different judges on this Court, and a few visitors that we had until 1993, and I have never encountered a person who was as elegant a writer as Jim Buckley. Janice Rogers Brown is incapable of writing an ungracious or awkward sentence. She is extraordinarily good, also. And this extends to brief memoranda, personal handwritten notes; everything that she does is done with elegance and style. I gravitated away from that 1970s style, in part, by following examples set in the opinions of Judge Posner and Judge Mikva.

Judge Mikva wrote a little article called "Goodbye to Footnotes." It is a very brief article. I think it is in *University of Colorado Law Review*. And it is really extremely well done and ends with a chuckle. Judge Posner had already begun to write without any footnotes, incorporating references into the text and doing so only where a reference or citation was clearly called for. He also made his opinions much more straightforward and, indeed, almost conversational; although, conversation at Dick Posner's level is somewhat more like that of the great English diarist…

DANIEL MARCUS: Um, not Pepys, no…

JUDGE GINSBURG: No – I'm sorry, no. Boswell. And my classmate Frank Easterbrook, also, who went on the Seventh Circuit before I– came here. I read his opinions with enthusiasm and regularly from the time he went on the Court, and he, too, has a much more straightforward presentation than I was making. And so I tried consciously to change my style. I did omit almost all footnotes. My clerks are under an injunction never to present me with a proposed footnote, and I then make exceptions as I think are necessary. But I always use a star instead of a number because, if there is more than one per page, I will rethink the footnote.

DANIEL MARCUS: And does your injunction applies to citations as well as textual footnotes?

JUDGE GINSBURG: Citations go in the text or onto the cutting room floor. It is annoying, really, when you come to focus on it, to read an opinion full of footnotes. I have not made my opinions as conversational as Posner or Easterbrook have done, although, I still read their work with admiration.

I think I'm just more comfortable being slightly more formal in my diction and rhetoric than they are. I don't allow contractions, for instance. I don't write long, discursive passages about matters not presented. I remember having a good chuckle on an airplane, reading a slip opinion by Judge Posner, and the two facing pages as I opened the slip opinion began with, "The appellants do not argue – comma - and with good reason – comma – that 'such and such'." He then spent those two pages saying why that would have been a fruitless argument. (Chuckles) So I don't indulge that. I have many a thought that has not been published.

DANIEL MARCUS: Since we're talking about opinions, let's talk about your law clerks' role in drafting opinions.

JUDGE GINSBURG: Judge McGowan's practice was to have the clerks do a first draft of most of the opinions but for him to do the first draft of opinions dealing with subject matter with which he had such a clear comparative advantage; which, at the time, meant certain regulatory cases, particularly regarding railroads, where he was an aficionado, and some other subjects – economic regulation - and I thought I would adopt that practice when I came in.

In fact, however, the press of time was such that I found it – and I must say that I find a blank page very uninspiring; I'm much more comfortable editing extensively than drafting. So my practice quickly evolved into one of getting the first draft from the clerk.

Now, by way of background, before that, as we prepare for the case, except in the simplest of matters, I have the clerk do a bench memorandum with a limited page allocation, a page constraint. And that bench memorandum becomes the subject of a discussion between us. The law clerk will do a bench memorandum, which I will read prior to reading the briefs. As I instruct the law clerks, the purpose of the bench memorandum is not to give me more material to read; it is to save me time in that there are some things that I will not need to read and, in any event, I will read the briefs with a better understanding the first time through if I have their bench memorandum. The prototypical example of the benefit of this is a situation in which there is an argument presented in the appellant's brief, or the petitioner's brief – the topside brief – which the respondent makes clear was not preserved in the District Court or before the agency.

There may be a response to that, a reply to that in the reply brief, but sometimes there is not, or the reply may be inadequate, and it may be perfectly clear that an argument really was not presented. I don't want to read that argument. It is a complete waste of time. There are other instances where an argument is being made, but it is only to preserve the question for cert., because there is a precedent in the Circuit that is binding

on the panel, and we have no real choice in the matter. It is fine for the argument to be preserved, but there is no need for me to study it in detail, so knowing that in advance is helpful.

There are arguments that, although not foreclosed by a precedent, are, for one reason or another, without any possibility of success because of some adverse fact in the record or what have you and, again, I want to read the briefs or perhaps read the briefs only in part because I know that in advance. I always invite the clerks to give their opinions in the bench memorandum of the arguments and what should happen, because I think it is more satisfying for them to do so and, secondly, I don't want to read something that is nominally neutral only to find out that they really have a point of view that is affecting what they've written. I've had to cap these bench memoranda to 20 pages because, in some of the larger cases, they could easily run over and occasionally will do so with permission. On the other hand, there are cases that could be dispatched with a ten- or 12-page bench memorandum, as well. Oh, and I should also say that the bench memorandum ends every section with the relevant pages of all three of the briefs, any amicus or intervener briefs, and the joint appendix that pertain to this argument, so that, as I'm reading it, I can go quickly to those.

Some cases, the shorter ones, I read horizontally; that is to say, I read through the blue brief, then through the red brief, then through the gray brief. For more complicated cases, it is more efficient to read vertically:read the first argument of the blue brief, the first argument of the red brief, the first argument of the reply brief, and then I go back and do the second one. So these references in the bench memorandum are important. The bench memorandum ends with a chart or summary laying out all of those pages and reading recommendations--what cases I should be sure to read, that are not optional, and those cases are attached and highlighted. This makes my work on the case go faster even though it accumulates a lot of paper and a lot of reading. It is the nature of the job.

Usually, when I've read the brief but sometimes after I've read only the bench memo I will have a first discussion with the clerk. If the bench memorandum raises questions in my mind that I'd like to see addressed or like to kick around with the clerk before reading the briefs, I will have a first discussion before reading the briefs. But after having read the briefs, we will in any event have a discussion, and it may lead to a supplemental memorandum on the things that are of concern to me; it may involve sitting down together and closely parsing relevant precedents or the exact way the argument is put, and may culminate in preparation of specific written questions that I want to raise in oral argument.

DANIEL MARCUS: And is this typically – well, it is not always, I guess, on the eve of oral argument because you may want to have additional work done.

JUDGE GINSBURG: I ask for the bench memoranda to come to me one week apart, the last one coming a week before the day of argument. Now, that doesn't mean that I will deal with them as they come in; I will often fall behind and sometimes have to deal with three cases in the week before oral argument, although I try not to do that. That creates a peak load problem for me and for the clerk, particularly if I need supplemental materials.

Under the case management plan that was in place when I arrived and for a few years before that – and that was pioneered by, or shaped by Judge Edwards – each of us would sit for one week a month, from September through May, the exception being that December and January were treated as one month, so there were eight sitting periods; and in that month each judge would sit on a consecutive Friday, Monday, Tuesday, and Thursday, hear four cases on Friday, four cases on Monday, three on Tuesday, and three on Thursday. And there would always be at least one week of separation between two sittings, so if you sat in the fourth week of September then you would not sit again until at least the second week of October, and even that would be quite a difficult sitting schedule.

That plan is still basically in effect, but we've had to depart from it in that we have a lot of senior judges, and some of the senior judges will say, "I want to hear cases September through March." I would say, typically, most of the senior judges do not want to hear cases at the end of the term because they want to be finished with their work and their opinions in time to have a real summer break. The active judges, who may sit as late as the middle of May – and I sat until the sixteenth last year, in May this year - may finish as late as the middle of May and may not have their opinions out by our informal term deadline of June 30. But there is a lot of incentive and peer pressure – not pressure but expectation to do that - to get the opinions out by June 30. For a judge such as myself or one of my colleagues, who would typically be somewhat late with at least a couple of opinions, we would end up sending the opinions to the other two judges on the panel when they are otherwise free of case obligations and do not welcome the necessity to review the opinion while on vacation. So there is some desire to get everything out by June 30. Going back to the bench memoranda, the preparation for argument, we then go into argument with a very thorough understanding of the case, the arguments on the record, and some questions that I'd like to see addressed. And, frankly, however they do it – and we really don't discuss these matters among ourselves - all of the judges come to that oral argument equally and thoroughly immersed in the record. It is really impressive. I've never seen it fail with the exception of a couple of instances, in judges who were about to retire in their '80s.

If we hear four cases or three cases, there are likely to be three opinions to go around; sometimes, it is two. Nowadays, in particular, we are hearing

fewer cases. For many years – 20, 21 years – under the case management plan, those 14 cases per sitting – four, four, three, and three – done eight times a year, yielded 112 cases for each active judge, not counting en banc, specially complex cases which were on a separate wheel, three-judge District Court cases, and some other matters including motions practice.

Those 112 argued cases would probably give rise to between 90 and 100 published opinions. Every year for 20 or 21 years, I wrote between 30 and 33 opinions for publication. My practice is never to write a per curiam opinion, because I think it is important for the authoring judge to take responsibility. Not everyone agrees with that, and I respect the point that not every opinion justifies quite as much input and effort as one would feel compelled to do if you sign it but I disagree with that. I've almost never authored a per curiam, and it is only when there is some unusual circumstance such as a per curiam that all of the judges join and then separate opinions by two or three of the judges.

Of the four cases or three cases that my clerk and I will have prepared in the manner I described, one of them will come back to us for an opinion. When I was presiding on the panel, being the judge with the most seniority among the active judges, I would do a disposition memorandum for each case, reflecting the conference. The conference occurs immediately after the day's arguments. Very rarely is it postponed or sometimes continued because we haven't been able to finish our deliberations. And so the notes of the conference become the basis for a disposition memorandum, which the presiding judge typically circulates either that day or at the end of the sitting week.

I would sometimes ask another judge who was going to write the opinion to do the disposition memorandum, usually because there would be some open matter, something on which we really could not make a decision and needed some additional input, and that judge who was going to author the opinion would do the additional research and circulate a disposition memorandum that reflected that; and then, of course, if someone disagreed with it, then we would have to reconsider, perhaps even reconvene. But, basically, I would come back from oral argument with one opinion assignment and, if I was presiding, perhaps several disposition memoranda to do.

DANIEL MARCUS: If I could interrupt to ask a question I've never known the answer to, is the practice on deciding who writes the opinion in the conference pretty informal, or is it more set like the Supreme Court practice, where the Chief Justice or the senior judge in the majority decides who is going to write the opinions?

JUDGE GINSBURG: Well, the presiding judge decides the assignment – makes the assignments.

DANIEL MARCUS: So it is similar in that sense?

JUDGE GINSBURG: But I have never known a presiding judge not to try to accommodate a colleague who says or just has, through the course of oral argument expressed a deep interest in a particular cases, or, alternatively, says, "I have a clerk who is way behind who worked on this case, and I'd rather not take this one." Or, alternatively, again, "I have a clerk who is in danger of having idle hands that do the devil's work, so I would appreciate having an assignment of this particular case." And the presiding judges have always been very accommodating. When I was presiding, I treated our senior judges, if we had a senior judge on the panel – because he is basically a volunteer, as entitled to special consideration in terms of what he or she might want to write.

I was new on the Court – it was within the first couple of years – when I was not unexpectedly assigned a FERC case – Federal Energy Regulatory Commission opinion. These were regarded as somewhat of a burden because they are often very complicated and rarely very interesting, except to Judge Williams who taught oil and gas law at the University of Colorado, and who came to write an extraordinary number of opinions on this agency's work.

I really didn't mind – I really never disliked them. In fact, I came to take quite an interest in FERC matters but, at this point, that hadn't gelled, and I was assigned a FERC case. I started to work on the case, and notwithstanding all of the preparation that went into the case before oral argument, I came to the conclusion early in the writing process that a principal argument had not been preserved. I called the presiding judge and said, "Here is what I found, so I don't think that the issue was preserved, so I guess you're going to want to reassign the opinion." He said, "No, we assign the work so that it comes out as an equal burden on each of the judges. If you don't agree with what we all decided, then you can dissent, but you still write the opinion."

DANIEL MARCUS: (Chuckles) For the majority?

JUDGE GINSBURG: For the Court.

DANIEL MARCUS: Oh, my goodness.

JUDGE GINSBURG: And so I wrote the opinion for the Court--as a per curiam, and then I wrote a separate opinion – I forget if it was concurring or dissenting, but taking the position that this important argument had not been preserved.

DANIEL MARCUS: That is remarkable. That is not the general practice, is it?

JUDGE GINSBURG: (Chuckles) In my 26 years, it never happened again.

So the opinion-writing process, then, begins with the clerk and I having another discussion about what will go in the disposition memorandum. And, in that respect, I may want to put in more or less detail depending upon who is writing the opinion, particularly whether I'm writing it or someone else is writing it (Chuckles), because more or less detail means less or more flexibility. The discussion that leads to a disposition memorandum– which is very carefully crafted even though it might be as little as a paragraph or as much as a couple of pages, and then a discussion about the opinion that has come to me and how we will structure it; and in what sequence and whether there are things that needn't be addressed because of that sequencing, or should be addressed and, therefore, shouldn't, even if it requires altering the sequencing, things of that nature, so how we'll handle various issues.

The clerk then produces, eventually, a first draft. I then do a second draft in the form of an extensively and delineated mark-up of the first draft. The clerk then does the third draft, which incorporates my changes, and such changes as the clerk makes based on my instructions or questions in the margin of the first draft.

A few years ago I tracked this and determined that we were averaging somewhere around seven or eight drafts per opinion, but in a normal distribution over the course of a year, there was nothing less than four, and that was about a four-page opinion, and there was nothing more than 19 drafts. However, I had a case a few years ago – what became the *Jones* case in the Supreme Court, about whether a warrant is required before the police attach a GPS device to a person's automobile – that went 31 drafts.

DANIEL MARCUS: Wow.

JUDGE GINSBURG: In addition to two memoranda of about ten pages each to the panel dealing with specific issues as they arose, and those went through several drafts.

That was the extreme end of the distribution. The four-page one– there was no other even close to that - was an interesting opinion. That was done by long distance. I was at the U.S. Courthouse in Boston, using someone's chambers on a Saturday, and my clerk was here – my clerk who has since gone on to teach law in Chicago for many years now, who was one of the best writers I have ever had, and who has written a book on legal writing, taught the subject for a few years. We got that down to a four-page opinion that cited no cases. (Chuckles) It was an achievement of sorts.

As we get to the later drafts, typically, less and less is being changed. Occasionally, a whole section will blow up because of something that I came to realize only as I refined the writing more and more. And that process of refinement is a way of digging down further into a record and

into the arguments. Perhaps, on draft seven or eight, all of a sudden, the whole section is up for grabs on how we're going to deal with something. That is not typical and not desirable, but it happens with some regularity, anyway. The last couple of drafts may be primarily technical corrections, where a second clerk changes everything again, including every quotation and all of that – everything.

DANIEL MARCUS: So the complete law review, cite-checking process?

JUDGE GINSBURG: Absolutely, absolutely. And if there are any changes in the works, then that will happen yet again. And it sometimes has happened three times, because the standard for the opinion going to the panel is zero tolerance for mistakes. I'm very upset and disappointed when there is something in an opinion that is wrong. I know things will be arguable, debatable. I'm very tolerant of suggestions for checks that I think make the opinion less good rather than better, but are reasonable and are…

DANIEL MARCUS: …To accommodate a colleague?

JUDGE GINSBURG: To accommodate a colleague and are not substantively important. But my view is that it should go out of here perfect, in perfect condition. If there is a mistake in it, then it is really a failing of the process. It happens very rarely, I must say. And there are other judges whose work, similarly, is almost unfailingly perfect from a technical perspective. Judge Randolph is the best example. And there are others where that is not the case.

When we get feedback from the panel, it may be as little as a sentence on being "happy to concur"; it may be a few pages of suggestions – three or four, perhaps of some significance, and others more a matter of word choice. We deal with those, as I said, indulgently but I don't accept them all automatically, by any means. The process is, when it comes to a rest, which is usually quite quickly after circulation to the panel, the opinion then goes to the full Court, where it lies on the table for a week before it can be released, except in an emergency.

DANIEL MARCUS: A couple of questions on that process – one, is the internal panel process of commenting on your draft opinion – is it generally completely a written process, or is there some oral communication? How often does a judge come by your chambers or pick up the phone and say, "I want to discuss this?"

JUDGE GINSBURG: Virtually everything moves on paper. And I think that is because a bilateral discussion between two judges on the panel means excluding the third judge. It is just not a collegial thing to do. The panel can either reconvene if it is really important, but that is quite rare, or you can put it in writing.

I've had only a few conversations about an opinion. I had a visit from Judge Mikva, who came down to talk, genuinely uncertain about the whole approach I was taking in a case. I'm not even sure if he was on the panel. It was an important case. It concerned immunity from prosecution for one of the Iran-Contra figures. And I think he wanted to make sure he understood it, and so we discussed it. I don't think he was on the panel, but I don't remember. Anyway, that is extremely rare.

DANIEL MARCUS: And the process for comment by judges not on the panel is also a written process?

JUDGE GINSBURG: That is not only written but also extremely rare. For a judge to look at the work that three colleagues have signed off on - maybe it is two with a separate opinion – who has not read the record, who probably has not read the briefs, to have something to say about a circulating opinion or the proposed opinion is an extraordinary event.

And when it has happened, it has been typically to call attention to something important that the panel is apparently unaware of--another case before another panel, a recent development in another circuit, maybe an observation about the substance of the opinion, if it is something of great importance. It is just extremely rare. I would guess it happens once every several terms that I receive a comment from a judge not on the panel. But, when it happens, it can be very important. There were two panels coming to diametrically opposed positions in a criminal case. By the way, that is a failure of the process. The clerk's office almost always catches that and informs the panels so that their work can be coordinated. For instance, I just had a case this term in which several of the arguments were raised by the same appellant in another case that was argued a month or so before my argument, so we were made aware of that probably by the clerk's office, maybe by the interaction of the law clerks in the corridors, and so my panel simply held up that issue – prepared an opinion that didn't deal with those issues. We knew that the other panel was coming out and treated that as a binding precedent, and dealt only with the remaining issues. In another instance some years ago, two panels were coming to diametrically opposed conclusions, and so the decision that we made was to issue them simultaneously, to hold up one for the other to be ready, issue them simultaneously, the obvious implication of which would be there would be two petitions for rehearing en banc, which we then granted, and the full Court sorted the matter out. (Chuckles)

DANIEL MARCUS: Let me ask you this – when another judge on the panel is drafting the opinion, do you handle the commenting on his or her opinion yourself, or do you involve your law clerks with that?

JUDGE GINSBURG: I have the law clerk read the opinion when it comes in and do a memorandum to me on every conceivable point in the proposed opinion

that might be improved by altering the wording, or that would be more accurate in light of the record, and a separate list of technical errors. I will then go through that list. It is in memorandum form, and it will say, "Page 12, first full paragraph, line two." "The statement here does not fully reflect what happened in the District Court, in the following way." So I will sort through those and will end up with a polished memorandum to the authoring judge raising any matter of substance. Oh, and, first, I will read the opinion after getting this. I will read it with my clerk's comments in hand and will strike those comments if I disagree with them or if I think the opinion is adequate in that respect. And those that I don't strike will become a memorandum to the authoring judge with a copy to the third judge. That is a process in which the law clerk, at least for the first half of the year, can play only a diminished role because it is essentially a diplomatic mission.

Getting things changed, getting an author to change things that may not be actually wrong requires a great deal of delicacy. It means being selective. You can't do everything. It means knowing that judge. For instance, I had a colleague – maybe I should name a name. You tell me after I've told you this--who exhibited no pride of authorship and would jettison an entire section of the opinion if it was pointed out that it was all dicta, it was unnecessary, or what have you, and I think that is because she was not, in any true sense, the author of the opinion. I've had a couple of colleagues like that. In a way, it is an advantage for those of us on the panel. (Chuckles) If it is a highly responsible judge who has sweated through the wording – and thinks it is perfect when it goes out—he or she is less likely to… (Chuckles)

DANIEL MARCUS: A judge like you. (Chuckles)

JUDGE GINSBURG: A judge like me and most of my colleagues. We're less likely but still try to be accommodating. So those suggestions - which are usually phrased in terms of, "Please consider - " or, "You might alter - ," or, "This could be captured by - ," or something along those lines –will invariably elicit a response, almost always incorporating some, often all of the changes, certainly many of them. And, sometimes, the third judge on the panel will have already beaten me to circulation, getting out a memorandum of suggestions, which is a great relief because there is almost invariably some overlap, and I can therefore diminish the number that I'm adding, sometimes having to add a further gloss on what the other judge has said or to disagree with it. We have an internal protocol of responding to an opinion from another chambers within a week; or, if you are going to write separately, giving notification within that week and doing the separate opinion within three weeks.

DANIEL MARCUS: Sometimes, I suppose, the notice of writing separately occurs at the conference stage.

JUDGE GINSBURG: Ninety-nine percent of the – well, 90 percent of the time. But, often, at the conference, the notice is "I may write separately, depending upon how this issue looks when you've fully developed it in the opinion," and that may help shape the opinion in an effort to have a unanimous opinion.

DANIEL MARCUS: What is your philosophy about writing concurring opinions?

JUDGE GINSBURG: I write very, very few separate opinions. When I was hearing a full boatload of cases, and we were at our peak, which is way down now - we're hearing 80 cases a year where we used to hear 112, and we're writing a lower percentage of opinions of those cases we hear argued because we're hearing argument in cases we would have handled summarily some years ago. We have not enough cases – too many judges, not enough cases. Anyway, I would write – in a year, when we heard 112 cases, I wrote 30 to 33 opinions. I would probably write one dissent, sometimes none.

Instead, I would make every effort to work with the authoring judge or, as author, to avoid generating a dissent. A concurrence – a little more frequently but not that often. Really, what is the point of a dissent or a concurrence? As Norval Morris said when I was a first-year law student in his criminal law class, "It may be only to advertise that you could not get even one of your colleagues to agree with you." Or, as he said, the presiding judge of the King's Bench for many years didn't allow dissenting opinions - I don't know how that worked - on the ground that it was hard enough on the prisoner's family that the conviction was affirmed. That it be affirmed two to one was insupportable. (Chuckles)

DANIEL MARCUS: (Chuckles) That is a good one. Well, some of your colleagues haven't gotten the message.

JUDGE GINSBURG: No, everyone has his or her own view on this. Concurrences are, I think, most appropriate where I really disagree with the ground on which the Court is resolving the matter but concur in the judgment and, perhaps, part of the opinion but not all of it or have a different view in coming to the same conclusion as to part of it. I would say my concurrences are almost as rare as my dissents. As a court, the last time we did the numbers a couple of years ago, eight percent of our published opinions had a separate opinion. Most of those are concurrences and were published opinions. And now we're down to about 50 percent of our argued cases, so that is four percent of the cases in which there is a separate opinion, and most of those are concurrences. This Court works to make that happen. It didn't always, but it has for us – it is now 20 years.

DANIEL MARCUS: Do you ever refrain from noting a dissent or writing a dissenting opinion where you're in the minority, obviously, because you feel the issue is not important enough to note a dissent or to write a dissent?

JUDGE GINSBURG: Yes, certainly. I mean, there are some things that I wouldn't want to be associated with but, really, all the issues on which this Court opines are, for the most part, regulatory, somewhat technical matters, and it just doesn't warrant, as I said, advertising that you couldn't convince even one of your colleagues.

I've written dissents which are straightforward letters to the Supreme Court, saying that, "This case needs your attention." In one case, I wrote a 17-page opinion drawing heavily on classified information, and only about two pages of it were released publicly. And, to dramatize that, the slip opinion had the 17 pages blacked out for most of them, with about two pages of print, dissenting from a judgment. I was sitting with Judge Mikva and someone else, and here is what happened: the plaintiff sued the United States, claiming that her late husband, who had been a member of the Communist Party of the United States, was the victim of intentional torts at the hands of the United States.

He had been thrown out of the Communist Party and served the remainder of his miserable life as a clerk in a radical bookstore. The widow's complaint, which was filed many years after the fact because of information having come to light in some newspaper that gave her this idea, claimed he was thrown out of the party because he was deemed an FBI informant and that, in fact, this was a set-up by the FBI to make him appear to be an informant when he was not really an informant. He and she had allegedly suffered emotional distress and all sorts of other harms and indignities.

The United States filed in camera with the district judge a document stating that the United States could not answer this complaint, even as to some of the most seemingly innocuous passages, for reasons of national security.

DANIEL MARCUS: A state secret document?

JUDGE GINSBURG: State secrets that were explained to the Court. And the district judge rejected that proffer and demanded an answer, and, I believe, defaulted the Government. I'm not sure of that. Maybe it was an interlocutory appeal. I guess it was interlocutory appeal, so there hadn't been a judgment.

This may have been a $1-million claim. The Court of Appeals affirmed the decision of the district judge and remanded the matter for trial - for further proceedings, I should say, so that the United States was put to the requirement of filing an answer or being defaulted. My separate dissenting

opinion laid out the reasons the United States gave, and it was basically a letter to Justice Rehnquist hoping that he would issue a stay as our Circuit Justice, immediately, which is exactly what he did. This was over the summer. When the Supreme Court reconvened in October, on the eve of the first conference, the *Washington Post* reported that the government had settled the case for $700,000 rather than answer that question. And that is fine. The important thing was that they get a stay or at least an opportunity to address the Supreme Court. So sometimes a separate opinion is necessary, though usually not written in "classified" form, in order to call the Court's attention to something urgently in need of further review.

Sometimes, a separate opinion is the worst possible thing one could do. In the *Microsoft* case, we heard that from the beginning. There were only seven qualified judges because of recusals, and I think it was extremely important--Judge Edwards, who was Chief Judge, was correct in thinking--we should hear it en banc from the beginning, and should issue a per curiam and, if possible, there should be no separate opinions. No one had an instinct to write a separate opinion, as I recall. But it is a case that would have been very ill-served by a division of the Court. This was 2001. The one in which Judge Jackson was taken off the case. There was a subsequent one on the remedy, which went through a three judge panel. I was on that panel. But, in the *Microsoft* case, the record was 70,000 pages. It was extremely difficult and technical. It was unfit for Supreme Court review, totally unfit. Any separate opinions suggesting the Supreme Court should look at it would have been ill-considered.

DANIEL MARCUS: Well, when we discuss your antitrust experience on this Court, I'll ask you for – about your role in that per curiam opinion.

JUDGE GINSBURG: OK.

DANIEL MARCUS: Can you think of anything else that you wanted to say about the opinion-writing process and about the clerks?

JUDGE GINSBURG: Yes. In addition to the roles I have described involving bench memoranda, opinion writing, commenting on other opinions, there is a diplomatic role that I think is very important for the clerks, and it is part of my selection criteria. A number of things are accomplished by clerk-to-clerk communication. When I was here as a law clerk, a particular judge's concerns--maybe they were raised at conference, maybe they were not; maybe the authoring judge relayed them to the clerk, maybe not - but a concern that might be related to the authoring judge's clerk might avert the need to have comments or disagreements later on.

I think I probably was the first on the Court to institute a regular practice– I may be the only one, I don't know – a regular practice of having my

clerks talk to the other clerks working on the same case before oral argument. I tell my clerks, "There are only six people in this building who are going to be really immersed in this case, and to think that you and I have figured everything out is a mistake. So you talk to the other clerks before oral argument." One of our judges doesn't allow his clerk to talk to anyone before oral argument. The others seem to be fine with it. Maybe they even have their clerks initiate it - I don't know - but I always have my clerks make the effort.

DANIEL MARCUS: And you have the advantage here of all the judges and all of the clerks being in the same building, which the other circuits don't have.

JUDGE GINSBURG: It is a tremendous advantage. The other circuits that come close are the First and the Seventh, which have only one place of hearing cases. But until the oral argument week, the judges are dispersed and they come together only for that week. So it is definitely an advantage. Being in this Courthouse is an advantage for clerks beyond that, by far.As Owen Fiss said when he was telling us, as students at Chicago, clerking in what he called a "judicial center" has an advantage. We have not only all of our circuit judges here, but our one District Court is in this building. The whole state court system of the District of Columbia is across the street. The Court of Federal Claims and the Federal Circuit are here in town. Although I think too few of the clerks take advantage of that, some do and they meet people from those courts, and they sometimes go sit in on a case; I encourage my clerks to do that. Certainly, my clerks from time to time, on their own initiative, invariably find occasions to go down to the District Court when there is some high-profile or particularly interesting case, and sit in the public gallery. Sometimes, they'll go up to the Supreme Court and do that.

DANIEL MARCUS: OK, one, perhaps final, question about law clerks is, how would you summarize your relationship with your law clerks after they leave you? I think judges vary a lot in terms of the extent to which they maintain contacts with former law clerks or have reunions, that kind of thing.

JUDGE GINSBURG: Well, I'm genuinely fond of my former law clerks, and there are some to whom I'm quite close. For many years, I had a Christmas party here in chambers, just a reception, and the Washington area clerks would come, and they would often bring their children and spouses.

I will do that again this year. I didn't do it last year because we had a portrait event – a portrait hanging in October. I think the year before we missed for some reason but, in most years, I've done that for a long time, and there is a very good turnout from among the Washington clerks. When I go to New York, at least once a year in recent years, one of the clerks there will organize a dinner for all of the New York clerks – and I think there are seven of them – and their spouses. When I go to Chicago – my

family is there, now just my brother, and I've taught there for most of the last 25 years – I will have a lunch downtown with all of the former clerks, and, usually, everyone makes it.

Last year, my wife and I had lunch with the five law clerks in San Francisco. Often, we'll hear from a law clerk who is going to be in Washington on business or for one reason or another, and will let me know in advance, and will come to my chambers. I've stayed in the home of one of my law clerks as a visitor in San Francisco, and have had some law clerks stay with us when they're in town. So it is a very close-knit community. And what pleases me greatly is how much the law clerks have stayed in touch with each other socially and referred to work to each other, which I think is great. They know their co-clerks. They know the people who came before them and immediately after them.

I had reunions, I think, every year for a while, but then the group got big, and we went to every few years and, I think, then eventually every five years. But we've made the reunion a bigger event. It was a black tie dinner-dance the most recent time. At the portrait-hanging, we had 44 clerks and spouses for a dinner, following the portrait-hanging ceremony. The night before, my wife and I had a dinner for the four clerks and their wives, who had formed the committee that got this thing organized, with my family and my wife's family in attendance, and those clerks. I mean, I've treated them as part of the family.

But, with all that said, there are a few clerks who have drifted away. There is a clerk from the very early days, in one of my first two or three years, who I've heard from, I think, twice apart from having come to an early reunion, and, in each case, it was to solicit some career advice. He is somebody who left the law. He is in business. There is another clerk who teaches and has taught for 20 years, probably, and with whom my only contact, I think, was that I got him invited to a conference I was attending, that was in his subject area a few years after he clerked for me, and I don't think I've heard from him again since. But those are our outliers. There are seven of my law clerks at one law firm - Kellogg Huber here. They know each other and they bring each other onboard.

DANIEL MARCUS: Yeah, isn't that terrific.

JUDGE GINSBURG: I think when there were 28 lawyers at that firm, six were from my chambers. Seven now, and it is a slightly larger firm.

Oral History of Judge Douglas H. Ginsburg
Third Interview
June 18, 2013

This interview is being conducted on behalf of the Oral History Project of the Historical Society of the District of Columbia Circuit. The interviewer is Daniel Marcus, Esquire, and the interviewee is Judge Douglas H. Ginsburg. The interview took place on Tuesday, June 28, 2013. This is the third interview.

DANIEL MARCUS: This is Daniel Marcus interviewing Judge Ginsburg on June 18, 2013. Judge Ginsburg, today, we're going to discuss court judicial process and administration issues, and I thought I'd start with your thoughts, your approach, and whether it changed over the years, to hiring and working with law clerks. You've had a lot of law clerks over the last 25 years. How did you select your law clerks, and what was your approach to working with them?

JUDGE GINSBURG: Well, the task of selecting law clerks descends upon a new judge immediately.

Indeed, yesterday, Judge Srinivasan was sworn in, and mentioned that he was inundated with applications before he had even taken the oath, and was in the process of trying to sort through them. I was confirmed in, I think, late October and sworn in on November 10 of 1986. Starting shortly prior to my being sworn in, I started to receive a small number of applications, really in the form of – more informally received than they are today.

Of course, it was an odd time of year in terms of the annual term of the court and the annual cycle for new clerks to begin, which is quite often the case for a new judge. So I was not receiving applications from third-year law students, because they were not available to begin right away; although, I must say, I spent the better part of the first several weeks of my time on the court selecting law clerks to begin immediately, to begin the following fall, and to begin the fall after that, because, in those days, we were hiring law students in the fall of their second year, so I had to hire nine law clerks over a short period of time.

And each of the first three who came to me came, therefore, through a distinctive, indeed, unique route. The first clerk that I hired was James Swanson, who has since gone on to have a marvelous career as an historian and an author of books about President Lincoln, including, most prominently, *Manhunt*, but also several others that were excellent, as well. James was then working as an attorney advisor, I think it is called, for Susan Liebeler at the International Trade Commission. He had attended UCLA Law School and the University of Chicago for college; that is

where he – he grew up in Chicago and he attended the U of C for college, then to UCLA for law school, where he was noticed by Wesley Liebeler.

Wesley Liebeler taught antitrust and some other topics at UCLA and was someone of whom it could be said most truly that he suffered no fools. And so he sent James to work for his wife when she went on the International Trade Commission. And I knew Susan somewhat and was contacted, I believe, initially by a letter from James. I talked to Susan Liebeler, and she gave him a good send-off. I met with him, and I thought he was utterly charming and interesting in ways that are only tangentially related to legal skills, but I take transcripts as the best indication of legal skills.

And so I hired him to begin immediately. I'm not sure who was second or third, but the other two hires were Steve Aitken, who was a lawyer in the Office of the General Counsel at the Office of Management and Budget. I knew Steve somewhat and I knew his work somewhat from there, and I liked him. And he brought with him, even at that time, several years of government legal experience. He has remained in the same service and had a career at OMB and is one of the small coterie of people who make up the institutional memory of the Executive Office of the President.

Steve was available to start right away or almost right away. The third clerk was Robert Gordon, who was then clerking for Judge Kaufman on the Second Circuit. And Kaufman went through five or six clerks per year. He was tyrannical, abusive, and paranoid. Of course, there was a conspiracy of silence among the clerks who clerked for him when he was hiring new clerks, and so his reputation had not quite preceded him. Robert had been a student at Harvard Law School, and went directly to clerk for Kaufman. By November, it had become clear to him that this was a very unhealthful situation, and he had the gumption to call Dean Vorenberg at the Harvard Law School to discuss the situation with him, and with Jim Vorenberg's concurrence, he applied for a clerkship with me.

I found it really admirable on his part to take the position he did about the Kaufman clerkship, and really good judgment on his part to have called the Dean before deciding exactly what to do. I talked to Vorenberg, who gave him a great send-off, and so he came to clerk for me, again, on very short notice. That completed the chambers. Well, I should say I brought my secretary over from Justice – Mary Rose Udstuen. She had been with me at OMB before that. She had worked for my predecessor - Chris DeMuth - and I brought her and my special assistant – Nell Minow – who has also gone on to do great things – with me from OMB to Justice, and then Mary Rose came with me to the Court.

DANIEL MARCUS: Well, it is interesting that your background and connections in the academic world and at OMB were the secret to getting really good law clerks right away, in the middle of the season.

JUDGE GINSBURG: Yes, that is correct. It is a good observation. Well, of course, both my position at Justice and at my position at OMB were owing to classmates from law school. And classmates from law school have been among my closest friends ever since then and have been, in some instances, extraordinarily helpful to me.

DANIEL MARCUS: Well, how – after that first group of law clerks, which you had to hire right away, what was your approach after that, to the hiring of law clerks in terms of law schools, professors that you relied on the process and whether it changed over the years?

JUDGE GINSBURG: Well, I've had about 80 law clerks - 26 years, three clerks every year, and two or three years when I had a fourth law clerk. That fourth clerk is something that I resisted long after my colleagues had succumbed… When I took senior status, my complement shrunk.

For many, many years, I was able to evaluate many applicants, in part, on the basis of recommendation letters from people that I knew personally, not just people who taught at Harvard but people who taught at various law schools around the country - the University of Chicago, where I knew the faculty; Harvard, where I knew the faculty; and, to a lesser extent, Columbia and Berkeley, other schools - because faculty people move around.

Over the years, that connection to academia has become more narrowed simply because so many of the people that I knew or know have retired or moved on, or passed away, and most of the applicant letters of recommendation come from people that I do not know, with the exception of those from a few law schools where I still know a fair number of members of the faculty, where I've taught as an adjunct - at the University of Chicago, for most of the last 20-some years, and I spent the last two years at NYU full-time and, before that, two years part-time at Columbia.

So I still have good connections in some corners of academia. I receive an enormous number of applications every year. It has grown from year to year, and, in the last few years, topped out at about 950 applications for three slots – three or four slots; and, thank goodness, most of them now arrive electronically. So I gave my current clerks the criteria for selecting from the applicant pool the applications that I would want to look at. And I'm sure these criteria were refined over the years, but I can't unravel the process in hindsight.

I can say that, for almost all of the 26, almost 27 years now, I have taken the following approach:

First of all, I should say that there is a much larger number of fully qualified applicants than one could possibly even interview let alone hire for three slots, and so knowing that there are all of these highly qualified, for the most part young people who have done everything right in their lives from the time that they started secondary school through college, through law school, it is a difficult matter to sort them out. But it does not make much sense to put effort into finding the three absolutely most outstanding candidates in terms of their qualifications for the job narrowly conceived to be analytic ability, writing skill, and general devotion to and learning in the law. For most of the 26 years, I have spent more time with each of my clerks than I do with all of my family, and so it is extremely important to me to have clerks with whom I want to spend time.

And so, from among the pool that seem to be highly qualified, the question to my mind was which ones would be the most interesting associates to have in a fairly intimate professional relationship for a year. Therefore, I would have my clerks cull from the applicant pool everyone that I thought would be almost certainly qualified, and that meant different things at different law schools. I came to know the grading systems of many of the law schools, and I could say to them, "I want anyone with an average of 80 or, later, 180 or more at the University of Chicago; anyone who is a double-Kent at Columbia; anyone who had – I forget the cut-off point, but I had a cut-off point, also, for Harvard and for Yale in terms of on the number of honors versus pass grades, and, at Michigan, which also had reliable grading, and at Berkeley – in each case because I actually knew that there would be somewhere between zero and five or six people at the top of the class, who would – who might be in my applicant pool, and who would be almost certainly very qualified. In addition, I told them to bring me the application of anyone who finished first or second in his or her class anywhere, any law school. That same person might have finished first or second had they gone to Chicago or Harvard; you don't know. So I didn't want to overlook them just because they didn't go to Chicago or Harvard. And, indeed I had some very interesting interviews with people, a woman who went to Brooklyn Law School, who was a ballet dancer, as well, or had been; and a man who went to the University of Missouri in Kansas City Law School, who was a member of the City Council and a mid-life student, who really had a family and connections, and could not leave Kansas City when he decided to go to law school. So that would give me a pile of 50 or 60 in the later years, perhaps fewer in the earlier years – applications that I would look at very thoroughly. And I would look at whether they had experience other than going to school, which increasingly became the case; how their letters of recommendations read; and what they listed as their interests.

There were people who were qualified in every respect but whose interests, reflected not only in a statement of listing their hobbies but also in the courses they elected to take, had virtually no overlap with my interests because they had done things involving all criminal law or mental health and the law, or things that were clearly preparing them to do something in the criminal justice system, which is a very small portion of the work that we do here.

And then, at the same time, there were people who had studied economics in college, and maybe had done some economic analysis of law in law school, and were interested in regulation, and who were clearly on a path toward a Washington practice, and those were the people that I would more likely find of interest – not necessarily but more likely. And, indeed, a very high percentage of my clerks are in practice in Washington. Of 80 or 85 clerks, I think that there are six or seven in New York City. There are the same number – six in Chicago and five or six in San Francisco, and I think maybe three in Los Angeles. The overwhelming group and, certainly, the plurality and, I think, the majority are here in Washington, and that reflects my selection criteria. Very few of them are in academia, unlike some of my colleagues' clerks. My colleague Steve Williams has a roster of former clerks that would make up probably the single best law school in the country if they were all put together. (Chuckles) I wasn't disfavoring people with academic ambitions, but I wanted people who really wanted to practice law. And some of them have gone on to teach at good schools; but I'd say there are only about six in that category. And I'd say as many – about an equal number have left the law to do various things, including teaching high school, teaching test preparation, investment banking in two cases, and some other thing – business – high-tech business unrelated to the law. Of course, that person is the wealthiest of my alumni.

So I would then schedule interviews, having culled the 50 or 60 down to ten or 12. And I would schedule interviews for ten or 12 people to fill three or, in a few years, four slots. As it would happen, if I schedule ten or 12 interviews, I might actually see six or eight people, because some of them would never get out of New Haven or, more likely, out of New York on their way down here – or out of Boston if they were interviewing on the First Circuit. Six or eight interviews would probably be typical, and they would occur over the course of one morning, at least in recent years, because we've had this hiring plan by which there is a certain date at which the judges agreed they would first extend offers of interviews, and another date by which they would first have the interviews, and they could make the offers on the spot.

That system prevailed for – I don't know how long – ten or 15 years and has just recently fallen apart. I would see these applicants for anywhere

from 30 to 60 minutes, depending on how interesting our conversation was, and ask them to spend about 30 minutes with my clerks as a group, and I would typically, then, compare notes with my clerks before the applicant left. There were a few instances in which that was unnecessary because I knew that there was no way I was going to hire this person and, actually, a few in which I didn't wait to consult my clerks because the case was so clear, and I wanted to communicate that to the applicant – my enthusiasm for that person.

DANIEL MARCUS: I see, yes.

JUDGE GINSBURG: There were people I interviewed that I knew I wasn't going to hire when we said "hello." Although, I always gave them the courtesy of at least 30 minutes of discussion. I can remember one person who went to a top-15 law school, who was admirable in every respect. He was the first person in his family from a small town in Illinois to have gone to college, let alone law school; finished right at the top of his class – extraordinary record – but whom I knew immediately I would not be hiring. He was just awkward, ill at ease, and that didn't change over the course of the 30 minutes that we talked.

We never talked much about the law. I would sometimes ask a student about his or her law review note or some other aspect of law school, but I wasn't interested in testing them on the law; their faculties had done that. I was interested in, again, whether I'd want to spend time with them, and so we talked about opera, if that was their interest, or drama, or fiction, or whatever it was that animated that person.

I hired a clerk a few weeks ago to begin with me in January of 2015, because I'm on a calendar year cycle right now and have been just for the last two years. So she is going to be graduated from New York University Law School in 2014.

DANIEL MARCUS: A year from now.

JUDGE GINSBURG: Yes, and will clerk with me, and we'll have a six-month break during which she'll do something creative, I'm sure, and then will join me in January. When I was teaching at NYU, I made an appointment to meet with her. Oh, actually, I'll say my current clerk is from NYU. He is absolutely outstanding in very possible way. He is one of the best clerks I've had, and he came to me because the Dean called me and said, "If you're still looking for a clerk, I hope you will meet with Zander." Through a quirk of timing, he didn't get a clerkship on the day of the land rush when there are all of these interviews packed into the morning, and I think it had to do with a scheduling mishap. So, based on that, I sent the Dean an e-mail, and I said, "If you have another one like Zander, send him or her to me." So he took about a week but he did. And I asked this

woman to meet with me at 9:30 one morning, when I was at NYU. I came in around 9:15, and she was already waiting there, and I thought that maybe I'd made a mistake but, in fact, she was just early. We went into my office and sat down and talked.

And I said, "Well, this has been very interesting and a pleasure to chat with you, but I know you have a class at ten, so you probably ought to be on your way." She said, "It is 20 of 11." I said, "Well, why don't you just take this clerkship?"

DANIEL MARCUS: Yeah, that is nice. Well, it sounds like your method has proved pretty trustworthy over the years. Judges I've talked to have said that every once in a while, just however careful you think you're going to be, there is a clerk who doesn't work out. Have – has that happened to you very often, if at all, over the years?

JUDGE GINSBURG: I would say it has never happened that there was a clerk who didn't work out. There was never a clerk who didn't complete his or her term, and for whom I could not give a favorable recommendation.

There were probably a few clerks out of the group that required more of my attention to their work than others. And there were – it was about a normal distribution, because there were about a similar number who were so extraordinary in their writing ability and in their ability to see things as I would see them, to anticipate my questions and so on. But the distribution looks quite normal, I would say.

DANIEL MARCUS: Well, why don't we turn to how you work with your law clerks in terms of preparation for argument and research and writing opinions, and whether that changed over the years?

JUDGE GINSBURG: My style of writing opinions definitely changed - my style and that of my colleagues, I think. I clerked, as you know, for Judge McGowan in 1973 to '74, and that was at a time when the opinions coming from this Court were much longer than those coming from other courts; went into great detail on matters of some complexity in regulatory cases; were larded with, sometimes, over 100 footnotes; really each one was a magnum opus.

Judge Leventhal, as you know, was a leader in this style of opinion writing, but it was emulated by most members of the Court. I think Judge Tamm may have been the major exception in that respect. He was very direct. His opinions were short, and they were unburdened with many footnotes. When I came to the Court in 1986, only a dozen years after having left here as a clerk, I simply picked up where I left off in terms of the style of opinion with which I was familiar and comfortable. A little bit – there had been some gravitation away from that on the Court but not a dramatic amount of it.

Judge Robinson was still practicing that extreme – in his case, extreme form of elaboration, particularly with regard to the number of footnotes, but most of the judges were still working to some degree in that tradition.

DANIEL MARCUS: Judge Wald certainly did.

JUDGE GINSBURG: Judge Wald was, for sure. There were, over the years, people who had carved out exceptions – individualized exceptions from that mold; the most outstanding being Jim Buckley, who was the best stylist with whom I've served. I've worked with – with Sri now onboard, with 25 different judges. But I haven't worked with him yet, but I've worked with 24 different judges on this Court, and a few visitors that we had until 1993, and I have never encountered a person who was as elegant a writer as Jim Buckley. Janice Rogers Brown is incapable of writing an ungracious or awkward sentence. She is extraordinarily good, also. And this extends to brief memoranda, personal handwritten notes; everything that she does is done with elegance and style. I gravitated away from that 1970s style, in part, by following examples set in the opinions of Judge Posner and Judge Mikva.

Judge Mikva wrote a little article called "Goodbye to Footnotes." It is a very brief article. I think it is in *University of Colorado Law Review*. And it is really extremely well done and ends with a chuckle. Judge Posner had already begun to write without any footnotes, incorporating references into the text and doing so only where a reference or citation was clearly called for. He also made his opinions much more straightforward and, indeed, almost conversational; although, conversation at Dick Posner's level is somewhat more like that of the great English diarist…

DANIEL MARCUS: Um, not Pepys, no…

JUDGE GINSBURG: No – I'm sorry, no. Boswell. And my classmate Frank Easterbrook, also, who went on the Seventh Circuit before I– came here. I read his opinions with enthusiasm and regularly from the time he went on the Court, and he, too, has a much more straightforward presentation than I was making. And so I tried consciously to change my style. I did omit almost all footnotes. My clerks are under an injunction never to present me with a proposed footnote, and I then make exceptions as I think are necessary. But I always use a star instead of a number because, if there is more than one per page, I will rethink the footnote.

DANIEL MARCUS: And does your injunction applies to citations as well as textual footnotes?

JUDGE GINSBURG: Citations go in the text or onto the cutting room floor. It is annoying, really, when you come to focus on it, to read an opinion full of footnotes. I have not made my opinions as conversational as Posner or Easterbrook have done, although, I still read their work with admiration.

I think I'm just more comfortable being slightly more formal in my diction and rhetoric than they are. I don't allow contractions, for instance. I don't write long, discursive passages about matters not presented. I remember having a good chuckle on an airplane, reading a slip opinion by Judge Posner, and the two facing pages as I opened the slip opinion began with, "The appellants do not argue – comma - and with good reason – comma – that 'such and such'." He then spent those two pages saying why that would have been a fruitless argument. (Chuckles) So I don't indulge that. I have many a thought that has not been published.

DANIEL MARCUS: Since we're talking about opinions, let's talk about your law clerks' role in drafting opinions.

JUDGE GINSBURG: Judge McGowan's practice was to have the clerks do a first draft of most of the opinions but for him to do the first draft of opinions dealing with subject matter with which he had such a clear comparative advantage; which, at the time, meant certain regulatory cases, particularly regarding railroads, where he was an aficionado, and some other subjects – economic regulation - and I thought I would adopt that practice when I came in.

In fact, however, the press of time was such that I found it – and I must say that I find a blank page very uninspiring; I'm much more comfortable editing extensively than drafting. So my practice quickly evolved into one of getting the first draft from the clerk.

Now, by way of background, before that, as we prepare for the case, except in the simplest of matters, I have the clerk do a bench memorandum with a limited page allocation, a page constraint. And that bench memorandum becomes the subject of a discussion between us. The law clerk will do a bench memorandum, which I will read prior to reading the briefs. As I instruct the law clerks, the purpose of the bench memorandum is not to give me more material to read; it is to save me time in that there are some things that I will not need to read and, in any event, I will read the briefs with a better understanding the first time through if I have their bench memorandum. The prototypical example of the benefit of this is a situation in which there is an argument presented in the appellant's brief, or the petitioner's brief – the topside brief – which the respondent makes clear was not preserved in the District Court or before the agency.

There may be a response to that, a reply to that in the reply brief, but sometimes there is not, or the reply may be inadequate, and it may be perfectly clear that an argument really was not presented. I don't want to read that argument. It is a complete waste of time. There are other instances where an argument is being made, but it is only to preserve the question for cert., because there is a precedent in the Circuit that is binding

on the panel, and we have no real choice in the matter. It is fine for the argument to be preserved, but there is no need for me to study it in detail, so knowing that in advance is helpful.

There are arguments that, although not foreclosed by a precedent, are, for one reason or another, without any possibility of success because of some adverse fact in the record or what have you and, again, I want to read the briefs or perhaps read the briefs only in part because I know that in advance. I always invite the clerks to give their opinions in the bench memorandum of the arguments and what should happen, because I think it is more satisfying for them to do so and, secondly, I don't want to read something that is nominally neutral only to find out that they really have a point of view that is affecting what they've written. I've had to cap these bench memoranda to 20 pages because, in some of the larger cases, they could easily run over and occasionally will do so with permission. On the other hand, there are cases that could be dispatched with a ten- or 12-page bench memorandum, as well. Oh, and I should also say that the bench memorandum ends every section with the relevant pages of all three of the briefs, any amicus or intervener briefs, and the joint appendix that pertain to this argument, so that, as I'm reading it, I can go quickly to those.

Some cases, the shorter ones, I read horizontally; that is to say, I read through the blue brief, then through the red brief, then through the gray brief. For more complicated cases, it is more efficient to read vertically: read the first argument of the blue brief, the first argument of the red brief, the first argument of the reply brief, and then I go back and do the second one. So these references in the bench memorandum are important. The bench memorandum ends with a chart or summary laying out all of those pages and reading recommendations--what cases I should be sure to read, that are not optional, and those cases are attached and highlighted. This makes my work on the case go faster even though it accumulates a lot of paper and a lot of reading. It is the nature of the job.

Usually, when I've read the brief but sometimes after I've read only the bench memo I will have a first discussion with the clerk. If the bench memorandum raises questions in my mind that I'd like to see addressed or like to kick around with the clerk before reading the briefs, I will have a first discussion before reading the briefs. But after having read the briefs, we will in any event have a discussion, and it may lead to a supplemental memorandum on the things that are of concern to me; it may involve sitting down together and closely parsing relevant precedents or the exact way the argument is put, and may culminate in preparation of specific written questions that I want to raise in oral argument.

DANIEL MARCUS: And is this typically – well, it is not always, I guess, on the eve of oral argument because you may want to have additional work done.

JUDGE GINSBURG: I ask for the bench memoranda to come to me one week apart, the last one coming a week before the day of argument. Now, that doesn't mean that I will deal with them as they come in; I will often fall behind and sometimes have to deal with three cases in the week before oral argument, although I try not to do that. That creates a peak load problem for me and for the clerk, particularly if I need supplemental materials.

Under the case management plan that was in place when I arrived and for a few years before that – and that was pioneered by, or shaped by Judge Edwards – each of us would sit for one week a month, from September through May, the exception being that December and January were treated as one month, so there were eight sitting periods; and in that month each judge would sit on a consecutive Friday, Monday, Tuesday, and Thursday, hear four cases on Friday, four cases on Monday, three on Tuesday, and three on Thursday. And there would always be at least one week of separation between two sittings, so if you sat in the fourth week of September then you would not sit again until at least the second week of October, and even that would be quite a difficult sitting schedule.

That plan is still basically in effect, but we've had to depart from it in that we have a lot of senior judges, and some of the senior judges will say, "I want to hear cases September through March." I would say, typically, most of the senior judges do not want to hear cases at the end of the term because they want to be finished with their work and their opinions in time to have a real summer break. The active judges, who may sit as late as the middle of May – and I sat until the sixteenth last year, in May this year - may finish as late as the middle of May and may not have their opinions out by our informal term deadline of June 30. But there is a lot of incentive and peer pressure – not pressure but expectation to do that - to get the opinions out by June 30. For a judge such as myself or one of my colleagues, who would typically be somewhat late with at least a couple of opinions, we would end up sending the opinions to the other two judges on the panel when they are otherwise free of case obligations and do not welcome the necessity to review the opinion while on vacation. So there is some desire to get everything out by June 30. Going back to the bench memoranda, the preparation for argument, we then go into argument with a very thorough understanding of the case, the arguments on the record, and some questions that I'd like to see addressed. And, frankly, however they do it – and we really don't discuss these matters among ourselves - all of the judges come to that oral argument equally and thoroughly immersed in the record. It is really impressive. I've never seen it fail with the exception of a couple of instances, in judges who were about to retire in their '80s.

If we hear four cases or three cases, there are likely to be three opinions to go around; sometimes, it is two. Nowadays, in particular, we are hearing

fewer cases. For many years – 20, 21 years – under the case management plan, those 14 cases per sitting – four, four, three, and three – done eight times a year, yielded 112 cases for each active judge, not counting en banc, specially complex cases which were on a separate wheel, three-judge District Court cases, and some other matters including motions practice.

Those 112 argued cases would probably give rise to between 90 and 100 published opinions. Every year for 20 or 21 years, I wrote between 30 and 33 opinions for publication. My practice is never to write a per curiam opinion, because I think it is important for the authoring judge to take responsibility. Not everyone agrees with that, and I respect the point that not every opinion justifies quite as much input and effort as one would feel compelled to do if you sign it but I disagree with that. I've almost never authored a per curiam, and it is only when there is some unusual circumstance such as a per curiam that all of the judges join and then separate opinions by two or three of the judges.

Of the four cases or three cases that my clerk and I will have prepared in the manner I described, one of them will come back to us for an opinion. When I was presiding on the panel, being the judge with the most seniority among the active judges, I would do a disposition memorandum for each case, reflecting the conference. The conference occurs immediately after the day's arguments. Very rarely is it postponed or sometimes continued because we haven't been able to finish our deliberations. And so the notes of the conference become the basis for a disposition memorandum, which the presiding judge typically circulates either that day or at the end of the sitting week.

I would sometimes ask another judge who was going to write the opinion to do the disposition memorandum, usually because there would be some open matter, something on which we really could not make a decision and needed some additional input, and that judge who was going to author the opinion would do the additional research and circulate a disposition memorandum that reflected that; and then, of course, if someone disagreed with it, then we would have to reconsider, perhaps even reconvene. But, basically, I would come back from oral argument with one opinion assignment and, if I was presiding, perhaps several disposition memoranda to do.

DANIEL MARCUS: If I could interrupt to ask a question I've never known the answer to, is the practice on deciding who writes the opinion in the conference pretty informal, or is it more set like the Supreme Court practice, where the Chief Justice or the senior judge in the majority decides who is going to write the opinions?

JUDGE GINSBURG: Well, the presiding judge decides the assignment – makes the assignments.

DANIEL MARCUS: So it is similar in that sense?

JUDGE GINSBURG: But I have never known a presiding judge not to try to accommodate a colleague who says or just has, through the course of oral argument expressed a deep interest in a particular cases, or, alternatively, says, "I have a clerk who is way behind who worked on this case, and I'd rather not take this one." Or, alternatively, again, "I have a clerk who is in danger of having idle hands that do the devil's work, so I would appreciate having an assignment of this particular case." And the presiding judges have always been very accommodating. When I was presiding, I treated our senior judges, if we had a senior judge on the panel – because he is basically a volunteer, as entitled to special consideration in terms of what he or she might want to write.

I was new on the Court – it was within the first couple of years – when I was not unexpectedly assigned a FERC case – Federal Energy Regulatory Commission opinion. These were regarded as somewhat of a burden because they are often very complicated and rarely very interesting, except to Judge Williams who taught oil and gas law at the University of Colorado, and who came to write an extraordinary number of opinions on this agency's work.

I really didn't mind – I really never disliked them. In fact, I came to take quite an interest in FERC matters but, at this point, that hadn't gelled, and I was assigned a FERC case. I started to work on the case, and notwithstanding all of the preparation that went into the case before oral argument, I came to the conclusion early in the writing process that a principal argument had not been preserved. I called the presiding judge and said, "Here is what I found, so I don't think that the issue was preserved, so I guess you're going to want to reassign the opinion." He said, "No, we assign the work so that it comes out as an equal burden on each of the judges. If you don't agree with what we all decided, then you can dissent, but you still write the opinion."

DANIEL MARCUS: (Chuckles) For the majority?

JUDGE GINSBURG: For the Court.

DANIEL MARCUS: Oh, my goodness.

JUDGE GINSBURG: And so I wrote the opinion for the Court--as a per curiam, and then I wrote a separate opinion – I forget if it was concurring or dissenting, but taking the position that this important argument had not been preserved.

DANIEL MARCUS: That is remarkable. That is not the general practice, is it?

JUDGE GINSBURG: (Chuckles) In my 26 years, it never happened again.

So the opinion-writing process, then, begins with the clerk and I having another discussion about what will go in the disposition memorandum. And, in that respect, I may want to put in more or less detail depending upon who is writing the opinion, particularly whether I'm writing it or someone else is writing it (Chuckles), because more or less detail means less or more flexibility. The discussion that leads to a disposition memorandum– which is very carefully crafted even though it might be as little as a paragraph or as much as a couple of pages, and then a discussion about the opinion that has come to me and how we will structure it; and in what sequence and whether there are things that needn't be addressed because of that sequencing, or should be addressed and, therefore, shouldn't, even if it requires altering the sequencing, things of that nature, so how we'll handle various issues.

The clerk then produces, eventually, a first draft. I then do a second draft in the form of an extensively and delineated mark-up of the first draft. The clerk then does the third draft, which incorporates my changes, and such changes as the clerk makes based on my instructions or questions in the margin of the first draft.

A few years ago I tracked this and determined that we were averaging somewhere around seven or eight drafts per opinion, but in a normal distribution over the course of a year, there was nothing less than four, and that was about a four-page opinion, and there was nothing more than 19 drafts. However, I had a case a few years ago – what became the *Jones* case in the Supreme Court, about whether a warrant is required before the police attach a GPS device to a person's automobile – that went 31 drafts.

DANIEL MARCUS: Wow.

JUDGE GINSBURG: In addition to two memoranda of about ten pages each to the panel dealing

That was the extreme end of the distribution. The four-page one– there was no other even close to that - was an interesting opinion. That was done by long distance. I was at the U.S. Courthouse in Boston, using someone's chambers on a Saturday, and my clerk was here – my clerk who has since gone on to teach law in Chicago for many years now, who was one of the best writers I have ever had, and who has written a book on legal writing, taught the subject for a few years. We got that down to a four-page opinion that cited no cases. (Chuckles) It was an achievement of sorts.

As we get to the later drafts, typically, less and less is being changed. Occasionally, a whole section will blow up because of something that I came to realize only as I refined the writing more and more. And that process of refinement is a way of digging down further into a record and into the arguments. Perhaps, on draft seven or eight, all of a sudden, the

whole section is up for grabs on how we're going to deal with something. That is not typical and not desirable, but it happens with some regularity, anyway. The last couple of drafts may be primarily technical corrections, where a second clerk changes everything again, including every quotation and all of that – everything.

DANIEL MARCUS: So the complete law review, cite-checking process?

JUDGE GINSBURG: Absolutely, absolutely. And if there are any changes in the works, then that will happen yet again. And it sometimes has happened three times, because the standard for the opinion going to the panel is zero tolerance for mistakes. I'm very upset and disappointed when there is something in an opinion that is wrong. I know things will be arguable, debatable. I'm very tolerant of suggestions for checks that I think make the opinion less good rather than better, but are reasonable and are…

DANIEL MARCUS: …To accommodate a colleague?

JUDGE GINSBURG: To accommodate a colleague and are not substantively important. But my view is that it should go out of here perfect, in perfect condition. If there is a mistake in it, then it is really a failing of the process. It happens very rarely, I must say. And there are other judges whose work, similarly, is almost unfailingly perfect from a technical perspective. Judge Randolph is the best example. And there are others where that is not the case.

When we get feedback from the panel, it may be as little as a sentence on being "happy to concur"; it may be a few pages of suggestions – three or four, perhaps of some significance, and others more a matter of word choice. We deal with those, as I said, indulgently but I don't accept them all automatically, by any means. The process is, when it comes to a rest, which is usually quite quickly after circulation to the panel, the opinion then goes to the full Court, where it lies on the table for a week before it can be released, except in an emergency.

DANIEL MARCUS: A couple of questions on that process – one, is the internal panel process of commenting on your draft opinion – is it generally completely a written process, or is there some oral communication? How often does a judge come by your chambers or pick up the phone and say, "I want to discuss this?"

JUDGE GINSBURG: Virtually everything moves on paper. And I think that is because a bilateral discussion between two judges on the panel means excluding the third judge. It is just not a collegial thing to do. The panel can either reconvene if it is really important, but that is quite rare, or you can put it in writing.

I've had only a few conversations about an opinion. I had a visit from Judge Mikva, who came down to talk, genuinely uncertain about the

whole approach I was taking in a case. I'm not even sure if he was on the panel. It was an important case. It concerned immunity from prosecution for one of the Iran-Contra figures. And I think he wanted to make sure he understood it, and so we discussed it. I don't think he was on the panel, but I don't remember. Anyway, that is extremely rare.

DANIEL MARCUS: And the process for comment by judges not on the panel is also a written process?

JUDGE GINSBURG: That is not only written but also extremely rare. For a judge to look at the work that three colleagues have signed off on - maybe it is two with a separate opinion – who has not read the record, who probably has not read the briefs, to have something to say about a circulating opinion or the proposed opinion is an extraordinary event.

And when it has happened, it has been typically to call attention to something important that the panel is apparently unaware of--another case before another panel, a recent development in another circuit, maybe an observation about the substance of the opinion, if it is something of great importance. It is just extremely rare. I would guess it happens once every several terms that I receive a comment from a judge not on the panel. But, when it happens, it can be very important. There were two panels coming to diametrically opposed positions in a a criminal case. By the way, that is a failure of the process. The clerk's office almost always catches that and informs the panels so that their work can be coordinated. For instance, I just had a case this term in which several of the arguments were raised by the same appellant in another case that was argued a month or so before my argument, so we were made aware of that probably by the clerk's office, maybe by the interaction of the law clerks in the corridors, and so my panel simply held up that issue – prepared an opinion that didn't deal with those issues. We knew that the other panel was coming out and treated that as a binding precedent, and dealt only with the remaining issues. In another instance some years ago, two panels were coming to diametrically opposed conclusions, and so the decision that we made was to issue them simultaneously, to hold up one for the other to be ready, issue them simultaneously, the obvious implication of which would be there would be two petitions for rehearing en banc, which we then granted, and the full Court sorted the matter out. (Chuckles)

DANIEL MARCUS: Let me ask you this – when another judge on the panel is drafting the opinion, do you handle the commenting on his or her opinion yourself, or do you involve your law clerks with that?

JUDGE GINSBURG: I have the law clerk read the opinion when it comes in and do a memorandum to me on every conceivable point in the proposed opinion that might be improved by altering the wording, or that would be more accurate in light of the record, and a separate list of technical errors. I will

then go through that list. It is in memorandum form, and it will say, "Page 12, first full paragraph, line two." "The statement here does not fully reflect what happened in the District Court, in the following way." So I will sort through those and will end up with a polished memorandum to the authoring judge raising any matter of substance. Oh, and, first, I will read the opinion after getting this. I will read it with my clerk's comments in hand and will strike those comments if I disagree with them or if I think the opinion is adequate in that respect. And those that I don't strike will become a memorandum to the authoring judge with a copy to the third judge. That is a process in which the law clerk, at least for the first half of the year, can play only a diminished role because it is essentially a diplomatic mission.

Getting things changed, getting an author to change things that may not be actually wrong requires a great deal of delicacy. It means being selective. You can't do everything. It means knowing that judge. For instance, I had a colleague – maybe I should name a name. You tell me after I've told you this--who exhibited no pride of authorship and would jettison an entire section of the opinion if it was pointed out that it was all dicta, it was unnecessary, or what have you, and I think that is because she was not, in any true sense, the author of the opinion. I've had a couple of colleagues like that. In a way, it is an advantage for those of us on the panel. (Chuckles) If it is a highly responsible judge who has sweated through the wording – and thinks it is perfect when it goes out—he or she is less likely to… (Chuckles)

DANIEL MARCUS: A judge like you. (Chuckles)

JUDGE GINSBURG: A judge like me and most of my colleagues. We're less likely but still try to be accommodating. So those suggestions - which are usually phrased in terms of, "Please consider - " or, "You might alter - ," or, "This could be captured by - ," or something along those lines –will invariably elicit a response, almost always incorporating some, often all of the changes, certainly many of them. And, sometimes, the third judge on the panel will have already beaten me to circulation, getting out a memorandum of suggestions, which is a great relief because there is almost invariably some overlap, and I can therefore diminish the number that I'm adding, sometimes having to add a further gloss on what the other judge has said or to disagree with it. We have an internal protocol of responding to an opinion from another chambers within a week; or, if you are going to write separately, giving notification within that week and doing the separate opinion within three weeks.

DANIEL MARCUS: Sometimes, I suppose, the notice of writing separately occurs at the conference stage.

JUDGE GINSBURG: Ninety-nine percent of the – well, 90 percent of the time. But, often, at the conference, the notice is "I may write separately, depending upon how this issue looks when you've fully developed it in the opinion," and that may help shape the opinion in an effort to have a unanimous opinion.

DANIEL MARCUS: What is your philosophy about writing concurring opinions?

JUDGE GINSBURG: I write very, very few separate opinions. When I was hearing a full boatload of cases, and we were at our peak, which is way down now - we're hearing 80 cases a year where we used to hear 112, and we're writing a lower percentage of opinions of those cases we hear argued because we're hearing argument in cases we would have handled summarily some years ago. We have not enough cases – too many judges, not enough cases. Anyway, I would write – in a year, when we heard 112 cases, I wrote 30 to 33 opinions. I would probably write one dissent, sometimes none.

Instead, I would make every effort to work with the authoring judge or, as author, to avoid generating a dissent. A concurrence – a little more frequently but not that often. Really, what is the point of a dissent or a concurrence? As Norval Morris said when I was a first-year law student in his criminal law class, "It may be only to advertise that you could not get even one of your colleagues to agree with you." Or, as he said, the presiding judge of the King's Bench for many years didn't allow dissenting opinions - I don't know how that worked - on the ground that it was hard enough on the prisoner's family that the conviction was affirmed. That it be affirmed two to one was insupportable. (Chuckles)

DANIEL MARCUS: (Chuckles) That is a good one. Well, some of your colleagues haven't gotten the message.

JUDGE GINSBURG: No, everyone has his or her own view on this. Concurrences are, I think, most appropriate where I really disagree with the ground on which the Court is resolving the matter but concur in the judgment and, perhaps, part of the opinion but not all of it or have a different view in coming to the same conclusion as to part of it. I would say my concurrences are almost as rare as my dissents. As a court, the last time we did the numbers a couple of years ago, eight percent of our published opinions had a separate opinion. Most of those are concurrences and were published opinions. And now we're down to about 50 percent of our argued cases, so that is four percent of the cases in which there is a separate opinion, and most of those are concurrences. This Court works to make that happen. It didn't always, but it has for us – it is now 20 years.

DANIEL MARCUS: Do you ever refrain from noting a dissent or writing a dissenting opinion where you're in the minority, obviously, because you feel the issue is not important enough to note a dissent or to write a dissent?

JUDGE GINSBURG: Yes, certainly. I mean, there are some things that I wouldn't want to be associated with but, really, all the issues on which this Court opines are, for the most part, regulatory, somewhat technical matters, and it just doesn't warrant, as I said, advertising that you couldn't convince even one of your colleagues.

I've written dissents which are straightforward letters to the Supreme Court, saying that, "This case needs your attention." In one case, I wrote a 17-page opinion drawing heavily on classified information, and only about two pages of it were released publicly. And, to dramatize that, the slip opinion had the 17 pages blacked out for most of them, with about two pages of print, dissenting from a judgment. I was sitting with Judge Mikva and someone else, and here is what happened: the Plaintiff sued the United States, claiming that her late husband, who had been a member of the Communist Party of the United States, was the victim of intentional torts at the hands of the United States.

He had been thrown out of the Communist Party and served the remainder of his miserable life as a clerk in a radical bookstore. The widow's complaint, which was filed many years after the fact because of information having come to light in some newspaper that gave her this idea, claimed he was thrown out of the party because he was deemed an FBI informant and that, in fact, this was a set-up by the FBI to make him appear to be an informant when he was not really an informant. He and she had allegedly suffered emotional distress and all sorts of other harms and indignities.

The United States filed in camera with the district judge a document stating that the United States could not answer this complaint, even as to some of the most seemingly innocuous passages, for reasons of national security.

DANIEL MARCUS: A state secret document?

JUDGE GINSBURG: State secrets that were explained to the Court. And the district judge rejected that proffer and demanded an answer, and, I believe, defaulted the Government. I'm not sure of that. Maybe it was an interlocutory appeal. I guess it was interlocutory appeal, so there hadn't been a judgment.

This may have been a $1-million claim. The Court of Appeals affirmed the decision of the district judge and remanded the matter for trial - for further proceedings, I should say, so that the United States was put to the requirement of filing an answer or being defaulted. My separate dissenting opinion laid out the reasons the United States gave, and it was basically a letter to Justice Rehnquist hoping that he would issue a stay as our Circuit Justice, immediately, which is exactly what he did. This was over the summer. When the Supreme Court reconvened in October, on the eve of

the first conference, *The Washington Post* reported that the Government had settled the case for $700,000 rather than answer that question. And that is fine. The important thing was that they get a stay or at least an opportunity to address the Supreme Court. So sometimes a separate opinion is necessary, though usually not written in "classified" form, in order to call the Court's attention to something urgently in need of further review.

Sometimes, a separate opinion is the worst possible thing one could do. In the *Microsoft* case, we heard that from the beginning. There were only seven qualified judges because of recusals, and I think it was extremely important--Judge Edwards, who was Chief Judge, was correct in thinking--we should hear it en banc from the beginning, and should issue a per curiam and, if possible, there should be no separate opinions. No one had an instinct to write a separate opinion, as I recall. But it is a case that would have been very ill-served by a division of the Court. This was 2001. The one in which Judge Jackson was taken off the case. There was a subsequent one on the remedy, which went through a three judge panel. I was on that panel. But, in the *Microsoft* case, the record was 70,000 pages. It was extremely difficult and technical. It was unfit for Supreme Court review, totally unfit. Any separate opinions suggesting the Supreme Court should look at it would have been ill-considered.

DANIEL MARCUS: Well, when we discuss your antitrust experience on this Court, I'll ask you for – about your role in that per curiam opinion.

JUDGE GINSBURG: OK.

DANIEL MARCUS: Can you think of anything else that you wanted to say about the opinion-writing process and about the clerks?

JUDGE GINSBURG: Yes. In addition to the roles I have described involving bench memoranda, opinion writing, commenting on other opinions, there is a diplomatic role that I think is very important for the clerks, and it is part of my selection criteria. A number of things are accomplished by clerk-to-clerk communication. When I was here as a law clerk, a particular judge's concerns--maybe they were raised at conference, maybe they were not; maybe the authoring judge relayed them to the clerk, maybe not - but a concern that might be related to the authoring judge's clerk might avert the need to have comments or disagreements later on.

I think I probably was the first on the Court to institute a regular practice– I may be the only one, I don't know – a regular practice of having my clerks talk to the other clerks working on the same case before oral argument. I tell my clerks, "There are only six people in this building who are going to be really immersed in this case, and to think that you and I have figured everything out is a mistake. So you talk to the other clerks

before oral argument." One of our judges doesn't allow his clerk to talk to anyone before oral argument. The others seem to be fine with it. Maybe they even have their clerks initiate it - I don't know - but I always have my clerks make the effort.

DANIEL MARCUS: And you have the advantage here of all the judges and all of the clerks being in the same building, which the other circuits don't have.

JUDGE GINSBURG: It is a tremendous advantage. The other circuits that come close are the First and the Seventh, which have only one place of hearing cases. But until the oral argument week, the judges are dispersed and they come together only for that week. So it is definitely an advantage. Being in this Courthouse is an advantage for clerks beyond that, by far. As Owen Fiss said when he was telling us, as students at Chicago, clerking in what he called a "judicial center" has an advantage. We have not only all of our circuit judges here, but our one District Court is in this building. The whole state court system of the District of Columbia is across the street. The Court of Federal Claims and the Federal Circuit are here in town. Although I think too few of the clerks take advantage of that, some do and they meet people from those courts, and they sometimes go sit in on a case; I encourage my clerks to do that. Certainly, my clerks from time to time, on their own initiative, invariably find occasions to go down to the District Court when there is some high-profile or particularly interesting case, and sit in the public gallery. Sometimes, they'll go up to the Supreme Court and do that.

DANIEL MARCUS: OK, one, perhaps final, question about law clerks is, how would you summarize your relationship with your law clerks after they leave you? I think judges vary a lot in terms of the extent to which they maintain contacts with former law clerks or have reunions, that kind of thing.

JUDGE GINSBURG: Well, I'm genuinely fond of my former law clerks, and there are some to whom I'm quite close. For many years, I had a Christmas party here in chambers, just a reception, and the Washington area clerks would come, and they would often bring their children and spouses.

I will do that again this year. I didn't do it last year because we had a portrait event – a portrait hanging in October. I think the year before we missed for some reason but, in most years, I've done that for a long time, and there is a very good turnout from among the Washington clerks. When I go to New York, at least once a year in recent years, one of the clerks there will organize a dinner for all of the New York clerks – and I think there are seven of them – and their spouses. When I go to Chicago – my family is there, now just my brother, and I've taught there for most of the last 25 years – I will have a lunch downtown with all of the former clerks, and, usually, everyone makes it.

Last year, my wife and I had lunch with the five law clerks in San Francisco. Often, we'll hear from a law clerk who is going to be in Washington on business or for one reason or another, and will let me know in advance, and will come to my chambers. I've stayed in the home of one of my law clerks as a visitor in San Francisco, and have had some law clerks stay with us when they're in town. So it is a very close-knit community. And what pleases me greatly is how much the law clerks have stayed in touch with each other socially and referred to work to each other, which I think is great. They know their co-clerks. They know the people who came before them and immediately after them.

I had reunions, I think, every year for a while, but then the group got big, and we went to every few years and, I think, then eventually every five years. But we've made the reunion a bigger event. It was a black tie dinner-dance the most recent time. At the portrait-hanging, we had 44 clerks and spouses for a dinner, following the portrait-hanging ceremony. The night before, my wife and I had a dinner for the four clerks and their wives, who had formed the committee that got this thing organized, with my family and my wife's family in attendance, and those clerks. I mean, I've treated them as part of the family.

But, with all that said, there are a few clerks who have drifted away. There is a clerk from the very early days, in one of my first two or three years, who I've heard from, I think, twice apart from having come to an early reunion, and, in each case, it was to solicit some career advice. He is somebody who left the law. He is in business. There is another clerk who teaches and has taught for 20 years, probably, and with whom my only contact, I think, was that I got him invited to a conference I was attending, that was in his subject area a few years after he clerked for me, and I don't think I've heard from him again since. But those are our outliers. There are seven of my law clerks at one law firm - Kellogg Huber here. They know each other and they bring each other onboard.

DANIEL MARCUS: Yeah, isn't that terrific.

JUDGE GINSBURG: I think when there were 28 lawyers at that firm, six were from my chambers. Seven now, and it is a slightly larger firm.