Oral History of Judge Douglas H. Ginsburg

Fourth Interview
July 3, 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 Wednesday, July 3, 2013. This is the fourth interview.

DANIEL MARCUS: This is Daniel Marcus interviewing Judge Ginsburg on July 3, 2013. Judge Ginsburg, I'd like to start by talking about the en banc practice of the Court and how it has changed – if it has changed at all – in the 25 years that you've been here.

JUDGE GINSBURG: Well, I came on the Court late in 1986 and, at that time, the Court was hearing perhaps five or six cases en banc, each year, and that aroused my curiosity about the practice, because it was a curious practice.

It is extremely resource-intensive, three judges already having devoted themselves to the resolution of a case, then followed by, at that time, I think, 11 judges sitting en banc, which is inherently an unwieldy bench. In fact, the prospect – the idea that the Supreme Court sits en banc all the time strikes me as horrifying now that I understand fully the implications. One implication is that you're likely to get two or more opinions, as we see with the Supreme Court and is true with us.

In some instances – and this is not inherent in the process, but in some instances--a non-trivial number, the resolution en banc was no resolution at all, because there either wasn't a majority for a single position or the resolution that could be pieced together by adding the number of judges on the various opinions still left a lot of ambiguity. It was not a very satisfying practice. And I should say also that it both reflected and exacerbated the factiousness of the Court as it then stood. When I was clerking here in 1973 and 1974, the Court had relatively distinct groupings among the judges

There were three very liberal judges, three quite conservative judges. I was pleased – most pleased to clerk for Carl McGowan who was in neither of those camps but straight down the middle, and who made common cause often with Judge Leventhal and Judge Wilkey. The conservatives were Tamm, MacKinnon, and Robb. That is right. So it was Wilkey, Leventhal, and McGowan, who occupied the center, and Wilkey was a Republican appointee; the other two were Democrat appointees. They were all very, very capable judges, all three of them. Leventhal was maybe either the smartest man to serve on the Court or at least the one who gave

the impression of being the smartest man to serve on the Court. Judge McGowan was one of the great gentlemen of the time, along with Lewis Powell – very gracious and never one to give cause for recrimination. So these three wings of the Court, as it were, flew very awkwardly. Any three-winged creature (Chuckles) would fly awkwardly.

When I came on the Court in 1986 the lines had been drawn somewhat differently. Basically, there were several new judges who'd been appointed by President Reagan, and then there was everyone else, several of whom had been appointed by President Carter.

So Judge Wald, Judge Mikva, Judge Edwards – at least those three. Was there another Carter appointee?

DANIEL MARCUS: Judge Ginsburg…

JUDGE GINSBURG: Judge Ruth Ginsburg is four right there. And the new appointees, Scalia had come and gone by the time I got here, but we had Judge Bork and myself, and Judge Sentelle followed me within a year, and Judge Henderson not much after he came on. But when I arrived in '86, there were Judge Silberman and Judge Williams. So those were the Reagan appointees when I got here; Sentelle and Henderson came later.

And they had a very distinct, different outlook on the way the Court should function, really on what the proper role of the Court is, which was considerably more modest than that of the previous era, where Judge Bazelon on the left and Judge Leventhal in the center both had a very capacious view of the Court's role in relation, particularly to the administrative agencies whose work constitutes so much of our docket. And so the fractiousness was there but the fault line had been redrawn. And so the propensity to hear five or six cases a year – rehear en banc, both reflected and, as I say, exacerbated that division. Not every case heard en banc resonated with that division.

There were – there was one case I recall very clearly, in which the panel, through Judge Bork, wrote an opinion adhering to a precedent of the Circuit, but suggested the precedent might be ripe for re-examination. It was an EPA case, I think with General Motors, and the Court agreed that we should revisit that precedent. Peculiarly, it came out at oral argument en banc, through something that counsel for the company said, that Judge Bork seized upon –that the petitioner didn't have standing, after all of that. So there were – that was not typical, but about, I think, 20 percent – I wrote an article on this – of the cases reheard en banc were totally inconclusive, unproductive.

A few years after coming on the Court - early in the '90s, I guess - I did a study of all of the en banc decisions in the 1980s, which was published in

the *George Washington Law Review*, and ten years later I did a similar study of the cases decided in the '90s, documenting how resource-intensive they are, how unproductive they are as a use of our resources, and – not to suggest that that had any influence but I think, more likely, the passage of time, the mellowing of the judges in the various factions, and then, in the '90s, the leadership of Judge Edwards changed all of this. In the 1990's, we heard, on average, three cases a year en banc. And I might add that, in the first ten years of the 2000s, it has been one case per year en banc. I think that reflects the collegiality in the Court, the mutual trust that has been built up and that didn't exist in the '70s when I was clerking, or in the '80s when the Court was going through this philosophical transition, which was not unique to this Court or even to the courts; it was a broad reconsideration in academia, in political science as well as in the courts on the proper role of the Court.

In 1984, when I was working at the White House on the Regulatory Review Program, I gave a talk to the Administrative Law section of the American Association of Law Schools. The audience of perhaps 50 or 60 were basically teachers of administrative law, and at that point, I had never given a thought to being on the Court – on the D.C. Circuit, but I did refer to the D.C. Circuit as "the arrogant and intrusive D.C. Circuit." There was an audible gasp from the audience.

Coming from the perspective within the Executive Branch, it seemed to me that is exactly what it was. When I was here clerking, it didn't seem that way. To an insider, it doesn't seem that way, but step outside and try to administer a government when three relative naïfs are telling the Environmental Protection Agency that it doesn't understand statistics, and you will regard it as "an arrogant and intrusive court." (Chuckles)

DANIEL MARCUS: So was there much internal discussion in the Court of the en banc policy? Did you lead a crusade within the Court to consciously change the practice, or did it just evolve?

JUDGE GINSBURG: I think that, over the years – the first five or so years that I was here, there was a good deal of evolution, not because of a campaign on my part or anyone else's. First of all, it became self-evident that we had had a lot of unsuccessful - unproductive en bancs; everyone saw that. Maybe they read my article – I don't know – I did send it to all of my colleagues. But I think, more than anything else, what changed was Judge Edwards' leadership in 1993 when he became Chief Judge. Judge Mikva had been a member of the state legislature in Illinois, and a member of the House of Representatives in the Congress, although not for a long time - I think, perhaps three terms – and had acquired a political outlook that did not sit well or even properly in the Court. Unlike any other judge with whom I've served – and there have now, with Sri Srinivasan, been 25 – Judge Mikva

alone, I would say metaphorically, prowled the halls looking for votes, but literally did solicit votes and talked to judges after, or occasionally before oral argument, in the hope of putting together, convincing a majority to partake of his particular view. That is unheard of before or since; well, certainly since.

DANIEL MARCUS: I think, before, Judge Bazelon did a little of that when I was a law clerk here.

JUDGE GINSBURG: Yeah, that may well have been; I didn't notice it or see it, though. Judge Mikva left in 1993, true to his, I think, real interests – left the Court to become Counsel to President Clinton, which he did for only about a year before returning to Chicago. But his influence was more divisive than even the vote-counting function that he was performing, because pursuant to then and pre-existing policy, the Chief Judge would invite visiting judges to sit with us. Judge Mikva's practice was to invite judges – friends of his, basically – from the Seventh Circuit, from Chicago - Luther Swygert being an outstanding example – who were not a part of the culture of this Court, who didn't really internalize our standards of review, and who thereby exacerbated the tendency of the Court to be overzealous in reviewing agency matters, in particular. I think we heard a disproportionate number of cases en banc that had been decided by a panel including a visitor from outside and perhaps Judge Mikva, as well; although, I've not sat down to document that. But I know of one particular year where it was Judges Swygert and Mikva who created the en banc problem.

On the other hand, not every visitor was like that, not even every visitor from the Seventh Circuit. I sat with a very fine, distinguished district judge from Illinois Northern, and although he, too, had a more aggressive attitude than fit well in this Court, he was very smart and readily grasped what was going on. In fact, I had one of his clerks working for me for a year. He circulated an opinion that resolved some matters unnecessarily. When I called to his attention that it was not our practice to do that, he had no problem with deleting that.

But it was enough of an irritant that at what I believe was the very first administrative meeting of the Court which we used to do once a month and now do once every other month, after Mikva left, that Chief Judge Edwards proposed that we have a policy on visitors, and that policy – I don't know if he proposed it at that meeting or we agreed that we should have one and subsequently approved it and it is in effect today – says that we avoid having visitors if at all possible, and when we have a visitor, we will prefer our own district judges because it helps us as well as them if they see things from the other end of the telescope. After all, a lot of administrative matters *do* start in the district court. Secondarily, we would

invite only circuit judges from other courts, not district judges from other courts.

In fact, however, since 1993, we have not had a single visitor. If I'm wrong, it may have been Danny Friedman from the Federal Circuit, but that could have been before '93; I don't recall. And that was a great improvement, immediately.

DANIEL MARCUS: …Under Judge Edwards' leadership?

JUDGE GINSBURG: Chief Judge Edwards, yes. It was one of the many things he did to bring the Court together, but it was – with respect to en bancs, that is what he did. And so that source of irritation, that – to the extent it was a contribution to the number of en bancs, that was ended.

Think of it this way – imagine yourself, a judge who was not on the panel that decided the case. Perhaps the case was decided two to one with a dissent. Both the opinion of the Court and the opinion of the dissenting judge most likely lay out the two possible positions in a manner even better than the briefs that they received. One can read that slip opinion and think, "Well, one side has clearly got the better of the argument," and if you think it is the dissent then the temptation is to vote to rehear it en banc. On the other hand, all three of those judges were totally immersed in the record and spent scores of hours on their opinions.

To cast doubt on the outcome because it is two to one, if it is, without doing at least due diligence to look into the briefs and take seriously the way the case was presented by the parties and will be re-presented to the en banc court, would be irresponsible. So if the case seems to have been decided in a way that is responsible and coherent, then the objections raised by the dissent would have to be extremely powerful in order to justify, even doing that due diligence let alone coming to the conclusion that we should rehear it. Some cases are matters of convention, in which it is important to have a rule but less important to have it one way or the other. In other cases you might think the dissent has the better of the argument, but the panel may have joined a pre-existing conflict among the circuits. The Supreme Court will sort that out; there is no reason for us all to weight in. Another circuit has taken a different view. The Supreme Court has the benefit of both views, and if it is important, they will resolve it. (Chuckles)

DANIEL MARCUS: You just answered my next question, which was, there *are* some very important cases – for example, a year or two ago, a panel of this Circuit upheld the constitutionality of Section Five of the Voting Rights Act.

JUDGE GINSBURG: Mm-hmm, a divided panel.

DANIEL MARCUS: A divided panel. And I don't know whether there was a petition for rehearing; maybe there wasn't, because people figured it would go to the Supreme Court anyway. But do you – in deciding for yourself whether to vote for rehearing en banc, I take it from what you've said, you're very reluctant to vote for rehearing en banc even if you disagree with the panel decision on an important matter of law. But do you take into account the likelihood of a Supreme Court review in any event?

JUDGE GINSBURG: Yes. I'd say the importance of that is a matter of degree. If it is terribly important, then I think you would have to consider seriously whether to rehear it en banc. But the likelihood of a Supreme Court review is surely a factor, because rehearing en banc will only delay that. If it is a matter of speculation as to whether the Supreme Court would take it, that is really not much of a reason to hesitate.

But if it is of virtual certainty that the Court will take it because of a circuit split on a matter of some importance, or because of the centrality of the issue to governance, as in a separation of powers case, it *is* a virtual certainty that the Supreme Court will take it. And if the divided panel has laid out both views, and able counsel will present reasons for the Supreme Court to take it, then there is no reason for us to pursue it. There are some areas that the Supreme Court probably will not take, but where this Court has a special responsibility, and we have to get it right. This is basically the principal court for the Freedom of Information Act, because government documents are here, those cases are more often filed here, and, certainly, many important ones are filed here.

And so we took a disproportionate number of Freedom of Information Act cases - it would seem disproportionate until you realize that that is something for which we have a special responsibility. Things affecting the bar, the local bar, also, such as attorney's fees or something that, if we don't straighten it out, the Supreme Court is not going to take, it is basically a trust that has been handed to us.

DANIEL MARCUS: Occasionally, this Court, like other courts of appeals, elects to hear a case en banc from the outset. I think you mentioned in one of our earlier interviews the *Microsoft* case. How does that happen? And how often has it happened? And is it a good idea?

That is a lot of questions.

JUDGE GINSBURG: The two instances of which I'm aware that happened were the *Microsoft* case, which we resolved - it was argued in 2000 and resolved in 2001 - and the *Watergate* tapes case, and perhaps some related *Watergate* cases in 1973 and '74. Now, there is some speculation abroad in the land about how the Court came to hear the tapes case en banc from the outset. Indeed, I had an inquiry from, an academic who was writing an article and wanted

to talk about this very subject, which, of course, I declined to do, and I don't have any direct information or recollection from my time as a clerk here as to how that came about.

But we did not do it again from 1973 until 2000 – 27 years. When the matter came up in 2000, I believe there was a motion from one of the parties…

DANIEL MARCUS: I see.

JUDGE GINSBURG: ….But I'm not positive of that, and it doesn't matter. There were two reasons to hear that case en banc, one good and one bad. Some people voted – I would say most people voted for the bad reason – or at least agreed with the bad reason; they may have agreed with the good reason, as well. The bad reason is that it is a case of exceptional importance. The *Watergate* tapes case meets that standard without question. However, if the *Microsoft* case passes that standard then so, too, do many other cases.

And we do get petitions a few times each year from someone asking that the Court hear something en banc from the outset, and we never do it. The good reason for hearing *Microsoft* en banc, I believe, is this – and I made this argument to the judges – we were a Court of 11, but there were only seven judges who were not recused. And the rule on rehearing en banc at that time was that a petition for rehearing en banc could be granted only by an affirmative vote of a majority of the active judges without regard to recusal. So it would have required six votes out of 11; it may have been six out of ten – I'm not sure – but it would have required six votes to rehear that case en banc

If a panel of three took one view of the matter, then that would leave only four non-panelists who could vote – which would be not enough to overturn the panel or to rehear the panel's decision. Even if the panel divided – worse yet, two to one – that would still be only five judges, the dissenter and the other four. There would not be enough votes, even with a dissenter, to rehear it en banc. And it strikes me that – and the argument I made is that it would be – in a case that is admittedly of great importance, it would be a mistake to depute three randomly drawn judges to resolve this case with no possibility of review by either the full Court or the Supreme Court

And I say "or the Supreme Court" because the case was not in a condition that would have been practical for the Court to hear. There was a 70,000-page record. There were a huge number of issues. It was a matter of complexity that could invite problems if the Supreme Court were to hear it, and it is inconceivable to me that they would ever have agreed to hear it, so whatever those three judges did would be the end of it. Now, that is not so terrible in the sense that that is true of almost all our cases because

of a lot of mutual trust and mutual respect among the judges, but I don't think it is a good thing for anybody to be making a decision, knowing when they make it that it is beyond the reach of any corrective entity. The Supreme Court has to do that every day, but it is a misfortune. And most of what they do can be corrected by the Congress. (Chuckles)

DANIEL MARCUS: You've referred a number of times to the collegiality of this Court and the respect that the judges have for each other - which other people have commented on, also, I think - other judges and commentators have remarked on it - even though the Court has, to some extent, had liberal and conservative wings throughout its whole modern history. Did the Edwards Chief Judgeship mark a turning point in that regard? And what would you say about the relationship among judges during the time you've been a judge?

JUDGE GINSBURG: When I came on the Court in '86, there was already reportedly bad blood between Judge Mikva and Judge Silberman; newspapers, both before and after I came on the Court, were saying that. I think Judge Edwards turned that situation around almost on a dime when he became Chief. I mentioned the policy against having visitors. There were a number of things that he did, small when viewed in isolation but collectively important in an institution that is composed of a small number of individuals in, basically, an indissoluble marriage. He instituted the Annual Dinner at the beginning of the term. He sent birthday gifts to every judge each year--small things, but if the birthday gifts he sent me were representative, his insight in choosing them was astounding. (Chuckles) I mean, it was just right on target. It was perfect – a book, a disc or tapes, whatever – that was just perfectly calculated. He just made it a point to be himself, personally collegial. As he mentioned at my portrait ceremony, at my invitation he came out to the Point-to-Point Races in the country and spent the day out there with us.

And it turned out to be a muddy, rainy day and not the most pleasant, but that was typical of his reaching out, his willingness to do things with the other judges. That was not unusual for Judge Edwards because, before he became Chief, he was cordial and had good friends on the Court. He and a couple of the other judges – Judge Ginsburg, I think – no, no, Judge Wald and Judge Mikva played golf together from time to time – but he just set a tone that was quite different from the outset. When I became Chief, I realized I could not continue the birthday gift tradition that he had established.

But I did institute a custom at the end of the calendar year in December and at the end of the term in May, when the last hearings had been held, of inviting all of the judges into Chambers for a champagne toast and some little hors d'oeuvres to celebrate the occasion, and I continued the Annual

Dinner. Judge Sentelle has continued both the Annual Dinner and the two periodic toasts and added his own contribution. I also, as Chief, used the Circuit Conference as an opportunity to bring the Court together.

Some of the Circuit Conference meetings, which were annual when Judge Edwards was Chief, were still occasions for divisiveness, not among the judges but within the group at the meeting, which included the judges and the bar. There were times when the topics either lent themselves to, or the people invited lent themselves to, unseemly exchanges.

DANIEL MARCUS: About Court practices and policies?

JUDGE GINSBURG: About Court practices and policies – yes, I would say that is right.

The nature of the occasion, getting all of the judges from both the Court of Appeals and the District Court, and a large number of ex officio invitees from the Administration, and then the discretionary invitees--three or four invited by each judge – creates a model built on that of the Court but writ large, with a bunch of strangers, who are not constrained as the judges are in what they say, and who don't give a fig for collegiality within the Court. As a result those were sometimes occasions for reintroducing some strife into the life of the Court. And attendance was mandatory by statute. Unless a judge had a medical reason, one was expected to be there.

When I became Chief Judge, I decided to make the occasion more academic. Working with the Law and Economic Center at George Mason University, we put together a program of deep intellectual content, particularly when we went to the system, with the Congressional authorization, of having the Bench and Bar Conference every other year, and we would have the Bench Only Conference in the off year. So there we were, just the judges – and this just wasn't possible earlier, so it was my opportunity to do this – just the judges cabined together in some location within a couple hours' drive of Washington, for two and a half days, perhaps, and what could we do?

Well, when we did it under Judge Mikva, we went to a place in Irvington in the tide-water of Virginia, and it became an occasion for recrimination between the district judges and the appellate judges, in which the district judges aired their grievances – not very useful. Judge Edwards had already put that practice to bed. We weren't doing that, but…

DANIEL MARCUS: How could he stop the district judges…?

JUDGE GINSBURG: He just arranged the program in such a way that we didn't have a gripe session.

DANIEL MARCUS: I see.

JUDGE GINSBURG: You don't have a session where the judges all sit around with an agenda that invites that. You have an agenda for the judges' meeting, which is businesslike, and then fill all the great majority of the time with programs that are of interest to people. When I became Chief, I called Steve Breyer. I became Chief in July of 2001. I called Steve and said, "Can I come up and talk to you about this?" So he invited me up for lunch in his chambers. I sat down at the lunch table as Steve paced around the office, dictating fragmentary notes on how to run a judicial conference. That guidance got me through the first one without difficulty, but, after that, I introduced this academic component using George Mason. Mason had been running programs for the benefit of judges on a wide variety of things when Frank Buckley was the Director, much broader than just economics, a lot of things on American history, philosophy, political science, statistics, scientific method, et cetera.

He had a whole stable of speakers who had done this for groups of 20 judges and he had weeded out those who didn't resonate well with the judges or relate well to them. So he had a roster of proven talent and was willing to pay the expenses – because we didn't have any money for this, to pay the speakers. I think we paid their travel expenses. We had – we had a panel on empirical legal studies. We had Cass Sunstein, who was doing a jury project at the time. We were supposed to have Vernon Smith, but he got trapped in Alaska, and so I think it was maybe Tyler Cowen, who was Chairman of the Economics Department, who stepped in on his behalf.

We had Marcia Angell, who was the editor of the *New England Journal*, talk about the breast implant fiasco under the FDA, about which she had just then written a book. We had an historian from Harvard – an emeritus historian – talking about the historical background underlying the current configuration of the Middle East. We had Jim Trefil, a science writer and teacher from George Mason, who was great at teaching judges how scientists think and how legal and scientific thinking differ.

These programs attracted big audiences and were very well received. When we had the judges only at one time, no one had to come to that. We had it at the Homestead, and the topic was "Mill's *On Liberty*." And everyone who came presumably read *On Liberty*, and we had Akhil Amar from Yale and another person lead us in a symposium for a day and a half. We had two professors – one from Gettysburg College, both of whom are leading Lincoln scholars, who assigned some reading and then came and conducted a day-and-a-half symposium on that. This really brings the Court together. This is for the District Court, as well. And it puts us all back in the classroom, all as equals, renewing the spirit of intellectual inquiry.

DANIEL MARCUS: So one of the chief innovations of yours as Chief Judge was to change the nature of the Judicial Conference to make it a real intellectual, academically oriented event.

JUDGE GINSBURG: Yes. I couldn't have everything be academically oriented. On the years when we had to have the Bench and the Bar we would have a panel on legal education, for instance. We did that, and we had the dean of one of the local law schools, and that fellow who founded the new law school in California, and a third person. That was a pretty lively panel, as you can imagine it would be. In my seven years, I think I had four conferences to plan and three of them I turned to that purpose.

Judge Sentelle, since then, has had his own approach to this. Even on the social side of it. When I came in as Chief Judge Tommy Hogan became Chief of the District Court, and he is a wonderful man lovely to get along with, and was quite happy to see this direction taken, because it is a conference of the whole Circuit, and the Chief Judge of the District Court is an important part of that. Likewise, within months of my stepping down, and Judge Sentelle becoming Chief, in the District Court, Royce Lamberth became Chief. And they are a very good fit. At our Circuit Conferences now, we have served both Texas barbeque and North Carolina barbeque, and voted on which is the better. I mean, it is a whimsical touch, but it reflects the chief judges, and it is all done in a spirit of good times.

DANIEL MARCUS: You've adverted to the – there is a certain amount of inherent tension, perhaps, between the district judges and the Court of Appeals because district judges get reversed by the Court of Appeals – not all the time but sometimes. And district judges tend to think that Court of Appeals judges don't know much about how to try a case and the problems of district judges. But I take it that that wasn't a big issue when you were Chief Judge.

JUDGE GINSBURG: I don't know what percentage of district court decisions are appealed. I think it is a fairly modest proportion.

DANIEL MARCUS: Right.

JUDGE GINSBURG: But of those that *are* appealed, the last time I looked, only 20 percent were reversed.

We are all here in the same building. This Circuit is unique. All our judges at every level – our bankruptcy judge, our three magistrates, our District Court, and our Circuit Court are all here in this building, and that is an inherent advantage in that the clerks get to know each other. Indeed, they run a speakers' program - the clerks, on their own – and invite very prominent people who are happy to come because they're now in big law

firms, (Chuckles) and it is regarded as a good recruiting tool, I think. That is an advantage for the clerks, and it builds esprit – vertical esprit, if you will, between the clerks of the two courts. But an easily overlooked contribution to collegiality among the judges of the two courts is, again, attributable to Judge Edwards, and that is in the design of the new Annex. In 1973 when I came here to clerk, there was a functioning judges' dining room on the sixth floor. There was a waiter who'd provide table service. It was used pretty frequently by judges of both courts. That fell into desuetude for budgetary reasons, among others. It devolved into a situation where a judge could, in the morning, order a sandwich and it would be up there waiting at lunchtime. The pattern was, when I got here in '86, that a significant number of district judges – six or eight – would eat there every day.

But there were only two or three Courts of Appeals judges who would show up, ever, and with regularity but hardly anyone other than those three. In the design of the new building, we created – and this was in the planning state, so, really, Judge Edwards gets the credit –a suite of three dining rooms: one is judges only; one is a place where a judge can bring a guest; and the third is a small room that can be reserved by a judge who has outsiders or insiders for a committee meeting, or former clerks who come by, what have you. In the dining room for the judges only, it is understood, and there is a sign that says, "No words spoken here will ever be repeated outside," and I think that has done a lot to bring the circuit and district judges together on a more regular basis.

I make a point of eating there perhaps once every fortnight and, when I was Chief Judge, once or twice every week. Our new Chief Judge Garland is doing that, as well. Judge Sentelle, both as Chief and since, is an even more regular attendee. There are some circuit judges who don't go, and in one instance I know, bring a brown-bag lunch from home and don't go anywhere for lunch. But there are probably a slim majority of this Court who are regulars – not daily but regulars there and, on any given day, there are going to be between four and nine or ten district judges.

Of course, we can't talk about cases that might come up from the District Court, but there are a lot of things people *do* talk about, things unrelated to the Court – the Nationals baseball team; the news on potential nominees to this Court; the news of the day, in general; certain lawyers that are in the news; or high-profile cases that are not in our District Court – and that is, I think, very successful. We also provide space for a couple of other judges from outside of our circuit, who reside here.

DANIEL MARCUS: Oh, really? I didn't know that.

JUDGE GINSBURG: Jane Roth from the Third Circuit, who now lives in Washington, has space in this building and joins us regularly at lunch - another good feature, I

think. And we have a district judge –Barbara Rothstein, who came from Washington State to Washington, D.C. to run the Federal Judicial Center, and has stayed on and hears cases in our District Court. Although, they might be cases filed in Seattle; I'm not sure where her docket comes from, but she sits here.

By the way, I know when I was Chief – I don't know what others have done – I provided space for other judges as need be. When Judge Alito was nominated, he was spending a lot of time in Washington, and I gave him office space here. Judge Bybee from the Ninth Circuit spent some time here before his chambers were ready, and he was living here at the time. That is a courtesy that a Chief can extend, but I think it is good for the other judges to bring someone in from outside.

DANIEL MARCUS: Going back to the Judicial Conference, I guess this is by statute, but do you think there is any useful purpose served by the every-other-year conference with members of the bar, who are invited?

I went to some of those as a young lawyer, and they were fun to go to, but what do you think?

JUDGE GINSBURG: Well, I've been to one other circuit's conference – the Fourth Circuit – which is an entirely different scheme because, in the Fourth Circuit, a member of the bar who has been invited and attended twice becomes a member of the Conference and is therefore invited thereafter, permanently. So people die out of the Conference and new people are invited to join; it is really more like a club – kind of a more Southern tradition, not appropriate for us but perhaps appropriate where it seems to work in the Fourth. I saw the contribution that the Circuit Conference made to the work of that Circuit, because those judges come from all over their circuit.

I mean, there are district judges – I don't know, 80, maybe, district judges sitting in several different states who would not see each other otherwise, and who may be sitting at a place where the Circuit never meets. I think it is excellent for them to get to know each other through the Circuit Conference. It is very important. That function has no place here. It makes no contribution here except to the extent that we could get away from our place of business and, as I said, engage in some intellectual pursuit – a joint intellectual pursuit, which, I think, is healthy. But in terms of bringing the bar in, I think it does provide some utility, again, if the Conference is inherently interesting.

Because we have a lot of repeat players and a lot of government agency counsel, and I think it is good that they get to see the judges, out of robes, have some informal discussion, are able to raise concerns that they may have, which are not going to get resolved at the Circuit Conference, but

perhaps a judge will – after having talked with the general counsel of some agency – come back and, at a meeting of the Court, say, "There is a situation that has been brought to my attention. Maybe we should think about how we do things."

DANIEL MARCUS: How often does your Court – when you were Chief Judge or otherwise – have business meetings of the judges – the active judges on the Court to discuss administrative stuff?

JUDGE GINSBURG: Well, the senior judges are invited, as well.

DANIEL MARCUS: Oh, they are?

JUDGE GINSBURG: We met every month, at least through Judge Mikva's term, and, at some point while Judge Edwards was presiding, we went to every other month. The meetings under Judge Edwards – this really exemplifies, probably – again, the change. For one thing, he didn't propose meeting every other month immediately, but it became quite clear that the attitude among the judges after Judge Edwards had been Chief for a while –was that he would present an issue, and somebody, usually Judge Silberman, would suggest a motion that the Chief Judge be authorized to resolve it as he sees best. Not if it was not something that needed to be resolved right then and there but a situation that was unfolding, and it was a vote of confidence, just, "You've told us about it, we see how you understand it, so you resolve it when the time comes." So the meetings became much less the occasion for any debate and much more a consultation. I think Judge Mikva enjoyed having these meetings. I think this was of a piece with how he liked to do business. But there wasn't enough business to warrant it, at least once we started to delegate things much more to the Chief Judge because of our confidence in him.

Multiple meetings meant only more time invested and more opportunity for somebody to disagree about something. There was just no reason to be getting together every month. We still get the monthly report, the statistics, and the outstanding case list for everybody, but it is purely for information until the next meeting occurs--and they've become shorter. Those meetings rarely – they were always scheduled for two hours, and they would sometimes go over with Judge Mikva; they rarely go over an hour or an hour and a quarter now. As I said, the senior judges are invited to those. They're not expected to attend as religiously as the active judges are. Did you have some other aspects of that…?

DANIEL MARCUS: Yeah, just one more question on the Chief Judgeship. What – how much time – what would you estimate in a typical week, or how much time you would spend on court administrative stuff dealing with the clerk or the circuit executive on that kind of stuff?

JUDGE GINSBURG: OK, well, I mentioned the bimonthly meetings of the Court, for which some preparation is often necessary because issues will be presented. There is a report each month, if warranted, by the Clerk of the Court and by the Circuit Executive about either issues that need to be resolved in their domain or briefing on matters that will be coming up, either for them to resolve or for the Court to resolve.

Working with the managers in preparation for that meeting, depending upon how many issues are going to be raised, can take some time. In my time as Chief Judge, I operated as follows. And, by the way, we were building the Annex building so my time was atypical in that I was Chief Judge from before the groundbreaking until after the dedication.

DANIEL MARCUS: Oh, boy.

JUDGE GINSBURG: Organizing those two events was time-consuming. Now, they were four or five years apart, but each one was a major event.

We had the Vice President at the ground-breaking outside – Vice President Cheney. We had the dedication inside with Senator Warner as our principal speaker. He turned out to do a wonderful job. But these were matters that involve hundreds of people and lots of arrangements. I took my cue from President Reagan and Attorney General Meese, and that is to get the right people in place and let them do their jobs. When I came in, we already had a Clerk of the Court, and he is still doing an excellent job, and I had no reason to displace him. Judge Edwards didn't have that luxury. He had to replace a Circuit Executive, I think twice – I'm trying to remember when Jill Sayenga left; I think he was still Chief.

The Librarian was the third position that reports directly, and that is important, also. And I did have to replace the Librarian. Our Librarian had been here since before I was a clerk and her time to retire had been waived for several times, and I did not extend it. I guess I extended it once but no more. So that is the Circuit Executive and the Librarian, and the Clerk of the Court. Delegating operational authority to them is essential if you're going to be a full-time judge at the same time. In some circuits, the Chief Judge does not take a full caseload; I think that is true in most circuits, certainly in the bigger ones.

But our tradition is that the Chief Judge keeps a full caseload with the exception of having the option, usually taken, to get out of the rotation for complex cases, which are separately handled, and motions, but, otherwise, to hear all of the ordinary complement of arguments. There came a time fairly early in my time as Chief when the Clerk of the Court told me he wanted to fire somebody, whom I knew because her role was not a back office role; I interacted with her regularly. She was fairly new, perhaps a year - maybe her probationary period was expiring or something. I had

said to him when I first came in – and he advised me he was going to hire somebody and had sent a resume over, and I said, "This is *your* shop. It is *your* call. It is *your* mistake to make. I don't want to second-guess you on this." He somewhat later advised me that he was going to discharge one of the courtroom deputies, and I said, "Give her time," and he did. I guess I said, "I suggest you give her time. I think you're acting too quickly." And she worked out and became a very valuable person in that role and does some other things, as well. But, basically, the hiring function maybe not the firing function--was entirely in the hands of the managers.

The Circuit Executive brings to the Chief the budget, and that takes some work. Although we've been blessed with very good managers and very good Circuit Executives in that respect, Jill Sayenga went on to be Deputy Director of the Administrative Office. Our current Circuit Executive has worked seamlessly and runs the place very well. So, in a way – and this is how I ran the Antitrust Division, too – I wanted a Chief Operating Officer to run the day-to-day things, to talk to me if there was a problem, and I would deal more with matters of policy. That inherently limited the amount of time required. But the budget takes time, and the preparation for the meetings takes time.

Working on the building – the design – once the building was underway, it was in the hands of GSA and the contractors--but there were still things to be worked on with the architect. Most of the heavy lifting on the design had been done by Judge Edwards and a small committee he put together, that included me in the anticipation that I would become Chief, and so most of that work had been accomplished. The one thing that was left to me in that regard was the implementation of the Art in Architecture Program, which is a set-aside of, I think, one percent of the budget. And we had about a $106-million budget– and one percent of the budget was for art in the building.

The natural thing to do would have been some statuary in the atrium. The new building doesn't have a lot of large wall space except where chambers are, and this was meant to be seen primarily by the public. There was a different committee for that. It included members or delegates from the Fine Arts Commission of the District of Columbia, the Pennsylvania Avenue Development Corporation, the National Gallery of Art – indeed, Rusty Powell himself, the Director – and several other official organizations. In the end, we didn't spend any of the money. Rusty Powell wouldn't have anything to do with figurative art, and although I have no absolute view about abstract art, having seen other things that were done in this area, I wasn't going to seriously entertain the kinds of things that were being proposed. Over at the Reagan Building, there is a sculpture that appears to be a 40- or 50-foot phallus, by a local artist who won a competition an execrable use of money and a disgrace to put it in front of

President Reagan's building. Of course, that whole building is a betrayal of his ideas. The committee then settled instead on doing inscriptions. And that was left pretty much to the judges on the Committee. But we couldn't agree on the inscriptions, and it wasn't worth fighting over. The building is a beautiful building as it is, and we saved the taxpayers some money. Michael Grave was the architect. When we told him this at the last minute, Michael designed a colorful pattern for the terrazzo floor in the atrium, to give it some vitality, and that is where it stands.

DANIEL MARCUS: So was Powell disappointed?

JUDGE GINSBURG: I don't know. We do have a statue of Blackstone in front of the building, which had been removed for the construction, and it was not controversial to have that put back. I think it is an appropriate thing to have Blackstone there.

DANIEL MARCUS: Well, the new building is a great success, I think.

JUDGE GINSBURG: I think so. From a mechanical point of view, there were some kinks at the outset. We had some odors from the cafeteria going through the ventilation system. We had a problem with fire egress, but it didn't take long to get that squared away, and I think the tenants are happy. I did not move into the new building. I had the first pick, but I did not move. The second pick went to Judge Sentelle, by seniority. He did not move. The third - to Judge Henderson, and she did not move. I think the fourth judge *also* didn't move. I think…

DANIEL MARCUS: How many Court of Appeals judges are over there?

JUDGE GINSBURG: There are eight circuit judge chambers, and I think they're all filled; I'm pretty sure they are. But the windows don't open. And the lavatory does not have a shower.

I mention those two things for this reason: from 1993 until 2007, I lived on a farm 70 miles from Court, in the piedmont of the Blue Ridge Mountains. Before I became Chief, I would come to court the night before oral arguments, which is four nights a month, and another night here and there before the monthly meeting of the Court, if I had appointments of some sort, for perhaps two nights a week, and I would sleep in chambers, so it was important to me to have the shower. But, also, we can't afford air conditioning in the shoulder season. We were paying $147,000 –I got deeply into this at one point (Chuckles). We saved $147,000, I believe it was, by cutting off air conditioning at 6 p.m. on weekdays and not having it on weekends, except in July and August. But, in July and August, what happens is that GSA finds it in its own economic interest to keep the air conditioning going because it is cheaper than cooling the building down in the morning. The budget was such - even back then, when we started to

move in, that we just couldn't afford it. To be sleeping in chambers with no windows that open, no air conditioning, and no lavatory was very uninviting. This was 2006; we had made this decision in 2005. In 2007, I got married, moved into my wife's house in McLean, and regretted, of course, that I hadn't moved and taken the view of the Capitol (Chuckles) in the new building.

DANIEL MARCUS: Maybe it is not too late.

JUDGE GINSBURG: Oh, it is too late. (Chuckles) In fact, I'm now at the bottom of the dog pile.

DANIEL MARCUS: That is right, because you're a senior judge.

JUDGE GINSBURG: Only Judge Randolph is junior to me.

DANIEL MARCUS: One final question on the Chief Judgeship – when you finished up your Chief Judgeship, as I recall, obviously, Judge Sentelle became the Chief Judge, but my recollection is that Judge Williams was next in line but didn't want to do it.

JUDGE GINSBURG: Judge Williams was already a senior judge. It was Judge Randolph who was next in line.

In any event, Judge Randolph called me and said he was not interested in being Chief. So I resigned as Chief Judge in February of 2008 rather than waiting until July, on the day before Judge Sentelle turned 65, so that he could be Chief Judge for five years until he turned 70. The statute provides a seven-year term going to the most senior judge who has not reached the age of 65, and ending when one reaches the age of 70. You're out after seven years or reaching 70, so that gave Judge Sentelle five years as Chief. Now, the precedent for that is quite clear. Judge Wald had stepped aside to let Judge Mikva be Chief specifically on the ground that they had come in close in time and that, if she had remained Chief, he would not have an opportunity to do so. And that was exactly our situation my situation with Judge Sentelle. We were nominated close in time, confirmed in successive years, and fit that pattern, directly.

The first thing I did when I became Chief Judge was – well, I should say that shortly after becoming Chief Judge in July, I received a delegation from the D.C. Bar. Two lawyers came to me – the President of the Bar, I guess, and somebody else – and said, "The Court has this practice in recent years of, from time to time, affirming a judgment of the District Court (quote) 'substantially for the reasons given by the District Court' (close quote)." And that leaves us entirely without guidance as to what the Circuit approved and what it didn't. I remember very specifically at a meeting of the judges that Judge Ruth Ginsburg had suggested that we adopt this practice rather than lash ourselves to the mast of every word in the District Court's opinion. We don't want to have to issue an opinion on

a matter that doesn't warrant it, that the District Court got it right, but let's not be bound by everything in there, so we adopted "substantially," and then several years later, when I became Chief, I got this delegation. Also that summer, there had arisen a situation in the Eighth Circuit in a tax case, in which one of the judges – Arnold – wrote a dissent from an en banc – I guess, from a panel that then became an en banc decision. And the question was whether – in this tax case, whether the taxpayer could rely upon an unpublished opinion of the Circuit that was squarely on point. Her position was indistinguishable from that of the taxpayer in the prior case, but the rule of the Circuit, reaffirmed by the Court en banc, was that an unpublished opinion is not the precedent of the Circuit, and Judge Arnold wrote a very vigorous dissent. At the first meeting of our Court in September, I raised two issues – getting rid of the "substantial" practice and adopting a resolution that we would not issue any opinion that was not reasoned. It could be the reasons of the District Court. It could be for the first reason given by the District Court, or the one in Section Two, but not without a reason.

When I was Chief, I saw all the orders coming out of the Motions Panel, and I would reject the ones that didn't have a reason in them; staff finally got to where they hardly ever did that. The other thing was I wanted to make every opinion precedent.

DANIEL MARCUS: Including unpublished opinions?

JUDGE GINSBURG: …Unpublished opinions precedent. The Court adopted a rule that wasn't quite everything I wanted; I think it wasn't retrospective, for one thing. But then the issue arose shortly thereafter, within a couple of years, in the Judicial Conference.

DANIEL MARCUS: I think I remember that.

JUDGE GINSBURG: And the chief judges of the Second and Ninth Circuits took the position that it was impractical for them because of the volume of work passing through. John Walker was Chief Judge of the Second Circuit. I had a side conversation with John and said, "If we made this prospective, gave you a year's grace, can you bring your Court into it?" and he said, "Yes," and we got it through the Conference that way.

DANIEL MARCUS: Oh, so – so, today, for all circuits, unpublished opinions are precedential?

JUDGE GINSBURG: There is still an exception. I think it is that the unpublished opinion is precedent for that circuit, but it is still the rule that an unpublished opinion from another – from a court *outside* the circuit is treated only as persuasive. I believe that is the current rule.

DANIEL MARCUS: OK. This is the end of the interview.