Oral History of Judge Douglas H. Ginsburg

Fifth Interview
September 4, 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, September 4, 2013, 2012. This is the fifth interview.

DANIEL MARCUS: This is Daniel Marcus interviewing Judge Ginsburg on September 4th, 2013. Judge Ginsburg I'd like to start by discussing with you your teaching and writing activities over the last 25 years as a judge. Let's talk about teaching first. I was struck when I began this project to see that you had remained an active academic throughout your judicial career, more so than almost any other judge, I imagine. So let me ask you what motivated you to do that and what role has that played in your professional life over the last 25 years?

JUDGE GINSBURG: Well before coming to Washington and immediately after clerking in this court and on the Supreme Court, I was teaching at Harvard as a full-time professor; first as an assistant professor and then as a full professor. And when I came to Washington it was with the expectation of being away from Harvard for only a year or possibly two. And I left not because of any disaffection with teaching, but I was really weary of the fractiousness of the Harvard faculty at the time and very much valued being away to do something that was related to my teaching. And so when the opportunity came up to be in the antitrust division of the Department of Justice, I regarded that as essentially an extension of my teaching.

And, in fact, my closest friend had also taken a leave of a year from the faculty. He taught international business transactions and after several years he went to the dean and he said, "I've learned everything I can about international business transactions from the library. I think I need to go do some." And that was my reasoning as well in taking a leave of absence from Harvard to go into the government. But those two years turned into three. I gave up my tenure with the expectation that if I wanted to come back at any time within a few years it would most likely not be difficult, based on my experience with others having left Harvard and come back. It was sort of a mutual benefit aspect of that. But the statutes of the university do not allow leaves of more than two years.

My wife asked me whether I couldn't get it extended and I said, "Well they didn't extend it for Pat Moynihan or Henry Kissinger, so I don't think I'll ask." When the time came that I was asked about whether I was interested in going on the D.C. Circuit, I had to decide what I would do if I didn't do

that. What would I do when I left the government? And even after three years the answer was - I finally came to the conclusion I would go back to Harvard. So now this made for an easy comparison.

And when I got to the court I realized early on that it would be useful for me to teach administrative law. I had learned in college that the best way to learn something is to teach it.

DANIEL MARCUS: And you had not taught it at Harvard?

JUDGE GINSBURG: I had not at that point taught it at Harvard. But when I was a freshman at Cornell I had a close friend who had been extremely kind and helpful to me. I was on crutches that whole spring semester. And as exams drew near - indeed when classes were over - he told me that he had not done anything to study for sociology and we were both in that course. So I tutored him for about three days and got the highest grade I ever got in college as a result.

So coming on the court I could see that teaching administrative law would be very helpful. And I came on the court in November '86 and arranged to teach administrative law at Columbia University starting in September of '87 and did do so for that fall semester. In January I taught administrative law again at Harvard during their three week January term and as a result I felt I got a great deal out of the experiences both at Columbia and at Harvard.

In 1988 Henry Manne was considering taking the deanship at George Mason University Law School. He was then teaching at Emory. Henry had been a friend of mine since I had attended his economic institute for law professors in the summer of '76, my first summer at Harvard. So he came to see me… Actually he came to see me when I was still at the Justice Department - I have the chronology wrong - about whether he should take this deanship, which I encouraged him to do and which he ultimately did and he began in '88. He asked me to teach at George Mason and I began teaching there that year.

I guess it was in the fall of '88 - after having taught at Columbia and Harvard - teaching antitrust and a seminar that I created, called Readings in Legal Thought, in which students basically read one book a month for six months, and wrote a short paper on each book, and we had a two hour discussion. And it was more or less in lieu of having been in a book club for ten years that had dissolved and I found myself not reading enough books. So at least I could read some law books. And we started out doing all classics. We read almost everything of Locke and Bentham and other founders of political theory. I continue to teach that seminar today. I've done it for about 25 years, I think, continuously. I don't think I've missed a year but it's evolved.

After a few years I had read all of the political philosophy and political theory of the founding period that I wanted to read, and I taught some of them twice, so I began to use the seminar instead as my current awareness reading, but for law books. I have a long list and shelves full of the books that we've read, and I try to keep them diverse across a spectrum of fields. I take primarily third year and up students because they've had more breadth of the curriculum than second year students. And we might in the course of a single academic year read various subfields--maybe one in the economic analysis of law, one in legal history, something on the profession if a good book can be found - they're not that frequently done - and so on. It's given me a breadth of reading and interests that I wouldn't otherwise have.

The antitrust teaching I gave up in 1992 or 1993, I believe, thanks to Griffin Bell. Griffin Bell was on or maybe chairman of the quadrennial pay commission, which made recommendations to the Congress for changes in compensation in all three branches. My understanding - second-hand from someone knowledgeable but nonetheless second-hand - is that Griffin Bell read a story which I know ran in the *Washington Post* on the day he was coming to Washington for a meeting of the commission and it reported that I was making $70,000 a year from teaching. And he thought that was a terrible distraction from the work of being a judge.

Now what he didn't know and didn't apparently look into, and the *Post* didn't report, was that I was making $35,000 a year at George Mason for teaching antitrust and the seminar. But I switched from teaching antitrust in the fall to teaching it in the spring or the other way around. So I had it in the spring of one calendar year and in the fall of the same calendar year but they were two different academic years. So it came out as $70,000 instead of $35,000. Of course, the *Post* hadn't asked me, and Mason salaries are public record. No one had bothered, or at least Griffin Bell and the commission, didn't bother to check that out.

As a result they put into what became the significant pay raise legislation passed in '89 - I believe it was - that an Article III judge could not earn from outside activities, which as a practical matter means teaching, more than 15 percent of a district judge's salary. So that took all the fun out of teaching a big antitrust course and I stopped, and I just continued with the seminar.

I taught that seminar every year at Mason until about 2009, when I then offered the seminar for two years at Columbia Law School and then for two years at NYU. At NYU I had already taken senior status. I took senior status in the early fall of 2011 and began teaching my seminar at NYU immediately thereafter. I did that for two years.

And when I came back to George Mason as of the 2013/2014 academic year, I was asked if I would resume my seminar, because it had been well received, in addition to teaching antitrust, which I'm happily doing again. But I didn't teach antitrust for 20 years thanks to Griffin Bell. And I managed to deplete my financial resources over those 20 years by continuing on the bench while being paid only for my seminar at that 15 percent of a district judge's salary. I should say that I also had a relationship with New York Law School, which is different from NYU, for two years during which I came to visit the law school four times each year for at least two years and did two things on each visit. I usually stepped into someone else's class and either taught the class or co-taught the class. One time I would teach constitutional law, another time antitrust. Or if not teaching a class, giving a talk for the law review staff or the faculty workshop; two things on each visit, and that was also a nice opportunity to do different things.

DANIEL MARCUS: Can I infer from the fact that you switched - after a few years after you learned administrative law through teaching it - you switched to teaching antitrust law until Griffin Bell lowered the boom, that antitrust law's your first love in terms of teaching?

JUDGE GINSBURG: Yes, well, that and regulated industries. They are two sides of the same issue, how to deal with monopoly. At Harvard I was asked if there were things I wanted to teach. The usual drill for a new professor was to teach something the school needs, trying to match that, if possible, with what he is interested in, plus something that's more discretionary with the professor. They had a need in labor law when I arrived in 1975, and I had studied labor relations at Cornell and that thought would be interesting.

I taught that in the fall and in the spring a course that I created on what was then called Regulation of Broadcasting. In 1979 the teaching materials I developed for that purpose were published by West as a case book and came into use at about 40 law schools around the country. I kept that up with a supplement, and then a second edition with a co-author, and so on.

But after the Telecommunications Act of 1996 - I was already on the court, of course, and had been since '86 - it was not practical anymore to keep up with the field. I made a practice of trying to take FCC cases to write opinions because I continued to be interested in the subject matter, but it was just not practical to teach in that area. Labor law I found to be not as appealing as I had anticipated, but I did it for four years, I believe, because Harvard couldn't find other people to do it.

Archie Cox had stopped teaching labor law when he went off to Washington. When he came back from Washington he didn't pick it up. I asked him why he lost interest in it, and he said, "Well, it's become too

much like tax law. The big questions have been answered." I thought that was amusing and I once related it to Richard Epstein who after a hearty laugh said, "That's funny. The big questions weren't even being asked." But HLS had a succession of visitors who didn't work out, but I finally one way or another ended up getting out of teaching labor law.

I co-taught a course with my friend to whom I referred earlier, Hal Scott. We'd gone to high school together and to law school. And we wanted to teach something together so we created a course on regulation of financial institutions, which was providential as it turned out, and was great fun, and we had to develop the materials. Hal still teaches something closely related to that now.

I taught a course regularly called Economic Regulation of Business using Tom Morgan's case book. That was the successor to the old public utilities course, which was long since abandoned. I enjoyed that enormously because it allowed me to stay in touch with economic analysis of law. And then antitrust came open. I'm not exactly sure why. It might have been when Steve Breyer went on the First Circuit. So I started teaching that, which I found very rewarding. I started using my colleague, Phil Areeda's case book but ultimately switched to Posner and Easterbrook's book, which was much more expressly focused on the economics. Areeda was a great scholar but the case book did not reflect his strengths, whereas the treatise did.

So this cluster of courses, Regulation of Broadcasting, Regulation of Financial Institutions, Economic Regulation of Business, and Antitrust, formed a quite coherent package and I could teach two or three of those every year quite happily. Then when I came to the government two of my three years were in antitrust and one was in regulation. And I was brought together with people, some of whom I'd worked with at Harvard on the deregulation project at the Kennedy School, and so I was able to continue that focus in government and then in teaching at Mason.

But over the years since going on the court I've also remained quite active in the American Bar Association section of antitrust law. I served a term as the judicial liaison, a three year term. When that was up I was asked to serve another three year term which I agreed to only to then be told that the chairman of the section was advised by the big ABA that successive terms were impermissible. So I was laid off for three years and then came back and did a second term. But because of my writing, I've remained in the leadership of the section all these years. When I was liaison I was also a member of the governing council.

As a member of a committee or task force I've been part of the leadership that meets four times a year. Once in Washington every fall, and then the big spring meeting in Washington, which draws over 3,000 people now,

and the post-annual meeting, following the big ABA meeting in August. I think there's a fourth. So in any event I've been very active in that, doing subcommittee work but mostly contributing ideas and presenting papers that are works in progress and getting feedback from a body of experts that couldn't be found anywhere else.

DANIEL MARCUS: Well, I noticed looking at the list of articles that you've written over the years that the focus has been increasingly antitrust and economics of regulation. Let me try a summary and see how it sounds to you. It sounds to me that in both your writing and teaching the focus has been very much on antitrust and regulated industries. And if I could make a bold extrapolation, I think that interest is reflected in the opinions you've written for the court in major regulatory cases which often have involved competition issues, and economic analysis, and cost benefit analysis. Is that a fair extrapolation?

JUDGE GINSBURG: It is. My judicial writing has been for about a dozen years now almost exclusively on antitrust. I made a foray into constitutional law when I gave the Simon lecture at Cato in about 2002 and one or two other matters apart from antitrust. But that's really been my focus because it interests me. There's synergy with my work at the ABA. Now that I'm teaching it again a little more so. About four years ago - after several years of effort, or at least looking out for the opportunity, I found a wonderful co-author, Joshua Wright, who was teaching at George Mason. He's a PhD economist as well as a lawyer, both degrees from UCLA. He studied with some of the greats, Armen Alchian, Harold Demsetz, Benjamin Klein, when UCLA's department was one of the best in the world and he's now Commissioner of the Federal Trade Commission.

We have, I think, four or five articles in print and about three or four in the pipeline. We enjoy collaborating enormously. He's extremely energetic. He's a good deal younger. Having a co-author has made me much more productive because we set internal deadlines and he does marvelous things that challenge me to do better things than I'd have done otherwise, and it's been a very rewarding relationship. But now that he's on the Commission - he's not teaching - but he's very keen to keep up writing. I think some of our pieces have been of more importance than things I did on my own.

As for the opinions… You're quite right. From the time I came here I always tried to get opinions assigned to me that dealt with regulated industries. A lot of the agency review work that we do does not involve economic regulation. A lot of it involves regulation that's more oriented towards risk, particularly environmental cases, OSHA cases, consumer product safety commission - although we haven't had many of those - and those are interesting, but I've really tried to get cases involving, ideally, competition issues. We get very few antitrust cases on the circuit. Of

course, it's hard because the District of Columbia is a commerce-free zone. But we get probably an equal or larger number of cases from regulatory agencies in which they are trying to manage competition in some way. And I continued when I came here to take labor cases because I felt I had some knowledge base that could be put to use.

If Judge Edwards was on the panel I would not get the labor case. He too taught labor. We were colleagues at Harvard for a while. Interestingly or coincidently, anyway, we both went to the same college at Cornell, which had only 100 graduates a year. We both taught labor law at Harvard simultaneously for the short period he was there. He was really a wonderful colleague there and here and still is. So I took labor cases when I could and the FCC cases, of course. As I gained seniority I could assign those to myself if I was presiding, and I was always presiding when I was chief judge.

DANIEL MARCUS: Well many of the FCC cases, particularly the telecom cases but the cable cases too, involved competition issues. I suppose you had a number of major EPA cases that you wrote that didn't involve competition per se but that often involved risk assessment, and they did also involve to some extent cost-benefit analysis.

JUDGE GINSBURG: To a limited extent… a few of those cases. In general, I would say if I got an EPA case it wasn't because I was fortunate or lucky. It was because I was unlucky. They can be very complicated, with very big records. It's highly technical in some instances, challenging in terms of statistics and science, and overwhelmingly we affirm the agency. So the act of writing the opinion is not nearly as engaging as it is with other agencies.

DANIEL MARCUS: I was struck in skimming a couple of them like the *American Trucking Association* case that the records in these cases are just huge. It requires an enormous amount of discipline I would think as a judge to really slog through all the arbitrary-and-capricious issues that are raised.

JUDGE GINSBURG: It does require a great deal of patience and attention to detail. When we get a joint appendix that's running into the astronomical length of 2,000 pages, I will have my clerks, who have read the briefs, go through and turn every one of those pages and tell me what I should be reading, which may be both under inclusive and over inclusive of what the parties are citing in their briefs. That might reduce a 2,000 page joint appendix to a few hundred pages that I really have to read and study. But that makes it, at least, humanly manageable.

DANIEL MARCUS: Well, I noticed another technique which I hadn't really been that aware of in a couple of the really big cases is that the panel decides to split up the opinion. And, I think, *American Trucking Association* is an example where, I think, you got the roughest assignment, the most onerous one.

Judge Williams wrote the interesting part of the case on the delegation doctrine--whether it should be quasi revived. And I think it was Judge Tatel, as I recall, who wrote an opinion on one part of the case. And you wrote a big hunk of the opinion on a bunch of arbitrary-and-capricious record kinds of issues, carefully going through all this and deciding some of them for the agency and some of them for the challengers. So is this a kind of judicial management practice on a panel?

JUDGE GINSBURG: There is a separate track for cases that are designated "complex" when they first arrive in the court. The staff attorneys who look at each of the cases as they come in will identify cases that, because of the multiplicity of parties, issues, or both, are likely to consume as much of those panels' time as would three cases on a day. And so typically a complex case is heard on a day in lieu of three or four regular cases. And it doesn't always turn out to be as complex as it seems. Sometimes it's possible because of the way in which some threshold issue is resolved that the opinion doesn't need to grapple with all of the things that were argued. That's obviously true if there's a standing problem or something like that.

But when it pans out that the case is just as complex as the staff thought it was, that the judges on preparing for it agree it is, then it becomes, I would say, more the norm to divide up the opinion with either two or more commonly all three judges taking a part of it. And this was done with a *Microsoft* case by the way. There were seven judges and every judge wrote some portion of that case. The proportions differed in scale or centrality but Chief Judge Edwards was conscientious about making sure that everyone had something to contribute to the opinion.

DANIEL MARCUS: Before we get into the opinions there was one other issue I wanted to cover on out-of-court activities and that is the controversy that arose with respect to a number of judges, including yourself, attending conferences sponsored by outside non-profit organizations and serving on the boards of some of those organizations. In your case it was this Foundation for Research on Economics and the Environment. First, if you could just say how attending these academic gatherings and institutes of various kinds fit with your intellectual activities as a judge.

JUDGE GINSBURG: Well I started on the Harvard faculty July 1 of 1975, and sometime not long thereafter I was invited to attend the Economic Institute for Law Professors that was being offered by the Law and Economic Center, which was then at University of Miami Law School. The dean of that law school was Soia Mentschikoff and she had come from Chicago; she had been my instructor in my first quarter for Elements of the Law. Henry Manne has started this enterprise, I think, before Soia got there and was running economic institutes for judges and for law professors and also seminars on

law for economists. The idea was to encourage collaboration and to develop this field of economic analysis of law.

I attended and I frankly don't recall whether it was the summer of '76 or '77, but it was one of the first two summers after I started teaching. And I think they'd gotten my name probably from just a mailing list. I don't know. I didn't know Henry Manne before that. So that was the first thing I did of that nature and although it turned out that it was more review than new material for me because of my three years at Chicago, I found it nonetheless useful to have that review.

Thereafter, I think, the only organization whose seminars I attended were on a few occasions in the 80's run by the Liberty Fund. Liberty Fund is an endowment created by Pierre Goodrich, who was a successful banker in Indiana and left his estate to carry on the work of the Liberty Fund, which does publishing and runs seminars. At one point I remember they were doing 185 seminars a year, every one of which is entitled Liberty and blank. It could be Liberty and Beethoven. It could be Liberty and Military Justice. It could be anything.

Each such colloquium, as they were called, was chaired by an academic and had 14 participants. There were substantial readings assigned and the chairing academic ran a discussion program that was rigorously constructed, not constraining, but well organized with attention to formalities such as beginning exactly on time, ending on time, everyone attending all meals and functions for usually a two or three-day period or not getting reimbursed if they missed something. I found those were really useful. I was typically the only judge, sometimes the only lawyer.

DANIEL MARCUS: Were the participants other academics or who were the participants?

JUDGE GINSBURG: Principally academics, depending upon the subject. I believe the first one was the one I attended in Seattle held at the Battelle Institute in 1990. I don't know whether between '76 and 1990 I'd done any others. I'm not sure. This one was chaired by John Baden, who was then teaching at the University of Washington School of Business and was teaching natural resource management issues. And it was an extraordinarily stimulating program. It was on the policies and the enduring effect of the progressive movement/progressive era on natural resources management.

We read about Gifford Pinchot as the first director of the Forest Service and a host of other pieces. I was the only lawyer. There were political science professors and other academics. But what really struck me was that I had never read or even heard of any of the authors whose work we read, and there were at least a dozen pieces that are really classics in the literature of the environment. Books like *Beyond the 100th Parallel*. The author's so well known--I can't think of his name just now - about the role

of aridity in shaping the West, about the homesteading movement, all these things. Every word of this was new to me and it was intellectually very stimulating.

The next year, 1991, John Baden was hosting a regional meeting of the Mont Pelerin Society. I had never heard of the Mont Pelerin Society, a gaping hole in my knowledge of the immediate terrain. And he was hosting it at Big Sky Ski Resort just south of Bozeman, Montana. And he invited me. Now how I got on the list for Battelle I will never know. John Baden, I don't think, would've thought to invite me. Somebody at the Liberty Fund did. They have a bunch of program officers and one attends every one of these seminars, not as a participant but as an observer, and is responsible for the planning and the inviting, and so forth.

So the Mont Pelerin Society was meeting… Should I explain what that is?

DANIEL MARCUS: Yes.

JUDGE GINSBURG: The Mont Pelerin Society is - I would briefly describe it as the world-wide conspiracy of free market economists. It was founded in 1947 by Friedrich Hayek and about 25 or 27 economists from around Europe and a few Americans, who met at Mont Pelerin in Switzerland to see what they could do about the seeming inevitability of socialism. And the organization evolved to - when I last looked - 485 members around the world. There's a global meeting every second year, and members and their home institutions may sponsor a regional meeting. There may be anywhere from one or zero, to three or four of those between global meetings. And those will involve a few of the members of the society and a large number of people in the region of the world who they think would benefit from participating in this two-or-three-day discussion.

Mont Pelerin was meeting at Big Sky under John's auspices. He was then at Montana State University. He commuted back between the University of Washington and Montana State.

DANIEL MARCUS: This is John Baden?

JUDGE GINSBURG: John Baden. And that was an extraordinarily interesting meeting. I can't at this time, having attending several of his meetings, tell you what was the theme of it. But at the end of it he approached me and Danny Boggs - both of whom were at the meeting - Danny was a judge on the Sixth Circuit - and said, "What would you think of having a seminar for federal judges on the economics of the environment?"

John had already started this Foundation for Research on Economics and the Environment. And they had done some publishing, they sponsored some meetings that did not involve lawyers or judges but rather western writers and poets, journalists to talk about natural resource issues on the

romance side of the divide between romance and sludge. Sludge being water pollution and so on.

DANIEL MARCUS: Or clean air.

JUDGE GINSBURG: Or clean air and things like that. Romance being wilderness, forest, Indian territory, things of that sort.

DANIEL MARCUS: Unfortunately on this court you get more of the sludge.

JUDGE GINSBURG: We get the sludge. As a matter of fact at one of the meetings Judge Reena Raggi, who was then a district judge and is now on the Second Circuit, actually invented that dichotomy saying, "this is all very nice but I deal with sludge. Here you're dealing with trees."

So Danny and I each thought it would be a terrific idea and we agreed to come back in '92 and be part of such a meeting and to encourage colleagues to go. But that turned into a series of annual--sometimes two or three in a summer--congregations of judges, usually 18 or so, at various places in and around Bozeman, Montana, where John lives. And the last round of the last meeting for federal judges, I think, occurred in 2011. And that was the 20th anniversary of the founding.

In the meantime John has started a series for religious leaders. It turns out that every sect and major denomination in the United States has an environmental office. Some of them have publications and they are typically populated by individuals who want to do the right thing but have never thought rigorously about the trade-offs involved.

So I attended the meetings every year and starting in '91 went on the board of the foundation. And then gradually I would say, six, or seven, maybe eight or ten judges…

DANIEL MARCUS: Were on the board.

JUDGE GINSBURG: Along with, I think, a lawyer for the foundation and maybe a CPA, or maybe he gave a report. So there were a few non-judges and a few people from the foundation itself, which is quite small. The staff was probably never more than seven or eight.

DANIEL MARCUS: So the judges made up the majority of the board then?

JUDGE GINSBURG: Yep. And the judges can't do fundraising, so John undertook to do all of that. And he had quite a diversity of other foundations supporting FREE. He had a policy he wouldn't take money from government or from any corporation. But he would take money from a corporate foundation or from dead people. That was it.

The speakers at these meetings were absolutely terrific. Tom Schelling the Nobel Laureate at the Kennedy School at Harvard, started coming, I would say, about 1994 or 1995 and returned every year since and spends several weeks out there. He became scholar in residence for a few summers and has had a profound influence on many of the judges coming through there in terms of their thinking about strategic matters. He wrote *The Strategy of Conflict*, he's the author of the term "mutual assured destruction." He's also heralded as the father of arms control in both the United States - by arms control I mean nuclear arms safety precautions - in both the United States and in the Soviet Union--indirectly there.

But the speakers were of very high caliber; mostly academics and environmental groups. Pete Emerson from the Environmental Defense Fund would come regularly. They did great work on tradable quotas for fisheries management. And their design has really helped revise and restore three or four fisheries in the United States, one in Alaska, one in the gulf, and one in New England, and it's been picked up and used other places around the world.

Occasionally someone from an agri-business but usually it would be environmental groups and academics who were the speakers. Montana State University is in Bozeman and often the president of the university would do a dinner talk. For a long time the president was a demographer who would give very interesting talks about the demography of Montana. We would go to the Museum of the Rockies for dinner among the dinosaurs. So these were wonderful experiences intellectually and collegially. Federal judges do not know the judges of other circuits unless they happen to serve on a committee of the Judicial Conference. And each committee is made up of one person from each circuit and that person might be a magistrate, or a bankruptcy judge, or circuit judge, or a district judge. And outside of that there are very few occasions.

Chief Judges meet twice a year through the governing body, the Judicial Conference. There is a, I think, quadrennial, maybe it's triennial, national colloquium in Washington for circuit judges and perhaps two-thirds of them attend for just a couple of days. But they really just don't get to meet each other otherwise. Most of us don't know many people on other circuits. And a district judge is, I think, even more constrained.

So it was a very good opportunity as well for the judges just at mealtime to trade experiences and talk about problems that they're encountering, not cases, but management problems, workflow problems, things of that sort.

So I went on the board in 1991 and I stayed on the board until 2005.

DANIEL MARCUS: And what other judges do you recall were on the board as well as attending conferences? Judge Boggs I know…

JUDGE GINSBURG: Boggs was on the board.

DANIEL MARCUS: Was Judge Davis on the board?

JUDGE GINSBURG: Andre Davis, who was then a district judge in Baltimore and is now on the Fourth Circuit, was on the board. I believe Edith Jones and Joy Clement were on the board, from the Sixth Circuit. Alice Batchelder from the Fifth Circuit later on.

DANIEL MARCUS: Well, John Baden had lots of activities and various organizations. I think the focus of this was the conferences for judges; a focus of FREE.

JUDGE GINSBURG: That became his major activity. We still did other things.

DANIEL MARCUS: Through FREE?

JUDGE GINSBURG: Through FREE. Yes.

DANIEL MARCUS: You mentioned the religious leaders.

JUDGE GINSBURG: Yes. That started about five, six years ago. He's now contemplating a program for newly named editors of environmental law reviews.

One year, 2001, the board as a group took a float trip through the Missouri Breaks from Fort Benton to Port Judith, camping for a couple of nights on the way. And the purpose of this was to think about the problems that were going to occur in 2003 with the bicentennial of the Louis and Clark expedition. We were worried that the Missouri Breaks would be overrun by tourists. And the Secretary of the Interior, Bruce Babbitt, made an idiotic proposal to make it a national park, which would have assured its destruction. Twenty-five outfitters… There had been about five outfitters and all of a sudden there were 25 as people opened businesses in anticipation of this rush, which ultimately did not materialize. It was not a significant visitation. It was just too remote, and too rugged, with very limited capacity.

But we did this with an eye to whether we could come up with some way to save the area from this imminent destruction that we thought was coming. And actually we did come up with a proposal. I proposed this and we adopted it--that we run a worldwide competition on the Internet for suggestions on how to manage this resource. We chose two very similar proposals as winners. We invited them the next year to meetings, I believe, and I think John or somebody testified in Congress about the ideas. So that was another activity of the foundation.

DANIEL MARCUS: Does the foundation acronym and its ancestry with the Mont Pelerin Society reflect also a sort of free market approach to environmental issues?

JUDGE GINSBURG: Yes. Free market environmentalism has emerged as an intellectual movement that is better represented, I think, by PERC, which used to be a different name - same acronym - but I think it's now the Property and Environment Resource Center in Bozeman, with which Baden was affiliated before he broke off and founded FREE because FREE's attitude is that pollution problems essentially always involve the absence of a well-defined or well-functioning property rights system. Nobody owns the air so it's free to pollute. The same with some waters; not all. Angling rights on streams in England are owned and they don't have a problem with pollution as a result.

But we have a lot of environmental resources that are not owned or if owned encounter such obstacles to trading and exploitation that they end up being nobody's property and being ruined as a result. Very much what happens under socialism or communism. I mean nobody washes a rental car and in the Soviet Union all profit making activity was grey market or black market so everything went to hell. Well we don't have anything that extreme as our problem, thank goodness, but where we have these situations of poorly-defined property rights problems arise. So you don't get property rights just out of thin air. They either arise through a common law process or through legislation. And as Ronald Coase taught - I was a student of his at Chicago - he died yesterday as you may know at 102 - and so the question is what works and what doesn't. And we can look around us and see things that are not working. The National Park system in the West has been dysfunctional for a long time.

We took trips into Yellowstone and saw that everything below the browse had been eaten; everything. The browse line is about seven or eight feet high where moose, and elk, and mule deer can reach. And so the whole ecology and the topography of the ground was changed. There were whole species that couldn't really exist without low foliage. And brucellosis was a problem in the park. Deer coming in carrying brucellosis to the point that the three surrounding states set up - I don't remember if it was a bounty system or state employees - shooting animals that came out of the park because they have grazing cattle in those states and the park service wasn't dealing with the brucellosis problem.

All the receipts at the gate at Yellowstone went to the Treasury. They didn't go to the park. The park manager, the ranger in charge of the park didn't have any incentive to even collect monies at the gate. So when they were busy they were taking people off the gates and having them do other things in the park. The budget process of the Congress every year determined the budget of the park. And what drove that? The number of attendees. So it paid to maximize the number of attendees, not to preserve the park. And this is a pathology of government budgeting. That's correctable. That is a correctable system.

To take an extreme example, extreme but sensible, is what you could do is gift the park or sell it to the Disney Corporation or someone else who would manage it with a time horizon that exceeds the budget cycle, that would try to make it last and be a resource for the long term. The Missouri Breaks winning idea's about setting up a trust to do that with representation from the state, the county, and surrounding land owners - the various land owners are a very important part of this - and let them manage it. Anyway, that's the kind of thing that we were dealing with.

DANIEL MARCUS: So you at some point in, I guess, about 10 to 15 years ago this group got interested in FREE and it's activities. This group called the Community Rights Counsel I guess, but I forget the name of the guy…

JUDGE GINSBURG: Douglas Kendall.

DANIEL MARCUS: Douglas Kendall, yes. Who got, it's fair to say, a bee in his bonnet about the…

JUDGE GINSBURG: Well Kendall has a problem with the truth and it's followed him wherever he's gone. He's a creature of George Soros, as was the Community Rights Counsel. Kendall now runs some other organization that Soros funds, and he is a mendacious and untrustworthy person.

DANIEL MARCUS: So let me try to state roughly his thesis. I guess his thesis was, here are all these federal judges who hear cases involving environmental regulation, and they are going to these conferences, and serving on the board of this organization that is committed to an antiregulatory approach to all these issues, and that creates a conflict of interest. I guess that is the theory.

JUDGE GINSBURG: Then so does reading a book on the subject.

DANIEL MARCUS: So he files a complaint with the Judicial Conference with respect to a number of judges who are on the board. And as I understand it the Judicial Conference issued a ruling saying that this created appearance issues under the Judicial Code of Ethics and, therefore, the judges shouldn't serve on the board. Is that what happened, because I can't quite tell by the documents?

JUDGE GINSBURG: Not entirely. He filed some sort of complaint and several of the judges, Andre Davis, myself, and one or two others simply resigned from the board - I'd been on the board 14 years; my wife was then on the board and remained on the board a couple more years - rather than deal with the process.

Danny Boggs did not resign. There was an initial ruling - not ruling but an advisory letter - along the lines of an appearance problem. Danny Boggs did not resign from the board. He pursued the process and the final ruling was that there was no appearance of a conflict.

DANIEL MARCUS: I saw that and I didn't understand the relationship between the two. I think it was assigned to a judge from the Eighth Circuit who issued a very strong ruling saying, “ridiculous.”

JUDGE GINSBURG: That's right. But there was some preliminary ruling that looked in the other direction. It was not binding. It was advisory.

DANIEL MARCUS: Are there any judges still on the board? Do you know?

JUDGE GINSBURG: I believe there are. I think Alice Batchelder is still on the board. I'm not sure. And I think maybe Edith Jones.

DANIEL MARCUS: So you decided to moot the issue by quitting?

JUDGE GINSBURG: Yes. In this town, with the *Washington Post* and all the Doug Kendalls around here, there's no point in contesting the matter only to be told that everything is fine - that doesn't get around very well.

---------- This portion of the oral history has been redacted. ----------

DANIEL MARCUS: I think there's no reason to think that Kendall's efforts had any lasting effect on your reputation or the reputation of the other judges.

JUDGE GINSBURG: I've never heard another reference, certainly not in recent years, I think, to that little brouhaha. It didn't stop Andre Davis from going up to the Fourth Circuit. So, no, it was really a tempest in a teacup, but it was based on some falsehoods of Kendall's and some speculation or inferences of a sort that, if they were given credibility, would really mean no one would qualify to be a judge because you wouldn't be able to read books, or talk to people, or have any ideas, or get any ideas. And, by the way, cases do not come up involving the question whether Yellowstone should be taken away from the government or the Missouri Breaks privatized.

DANIEL MARCUS: No, and as you say you tend to get the sludge cases not the wilderness cases.

JUDGE GINSBURG: Yes. One time I had to recuse myself in a case because of a misunderstanding. Baden had had a speaker from Caterpillar Corporation,

which was a very rare instance where it was not from a foundation or a university. He was from a company talking about some problems. As he got into it, much to Baden's shock and surprise, he started talking about a matter that was…

DANIEL MARCUS: Pending before you?

JUDGE GINSBURG: Well it was somewhere in the district court or something.

DANIEL MARCUS: I see. Probably innocently as well.

JUDGE GINSBURG: Well yeah. I don't think he knew he was creating a problem. It didn't serve his interest because I think I was the only one affected. But I was on the phone within minutes to my office to make sure I wasn't put on that case now that he told me there was such a case or was going to be a case.

DANIEL MARCUS: Well as I recall Kendall cited as an example of the problem something that… Let me just ask you for your comment on it because it involves a friendship or acquaintance kind of thing. He cited the fact that you sat on the *American Trucking Association* case which was argued before you by Ed Warren, who apparently - I don't know if he was on the board of FREE at the time, or had been on the board, or later was on the board or something like that.

JUDGE GINSBURG: I think he was at some point on the board. He had a house in Bozeman.

DANIEL MARCUS: And Kendall says, well Judge Ginsburg has this close connection with Warren, the lawyer for the industry in this case, and has this close connection with him on the FREE board and activities, and he should have told people about that. Do you recall that allegation?

JUDGE GINSBURG: Well not the "should have told" part because that's public record.

DANIEL MARCUS: Oh, I think his argument is you should have recused yourself or at least disclosed it in the case or something.

JUDGE GINSBURG: That's more likely. In Washington it is not possible to sit on this court without knowing the lawyers, the former clerks who appear here, and if a judge is not able to put that aside… Remember the standard is whether a reasonable observer, knowing all the facts, would think that the judge would not be impartial.

Ed Warren and I also simultaneously taught at the University of Chicago. I didn't mention my teaching there. And the three of us (he, Judge Mikva, and I) rode back on the airplane, the last plane to Washington, every Monday night for several years; one quarter a year for several years. Shared the taxi that the university provided for us. Our rule says any former clerks come and appear after the moratorium of a year or two,

whatever it is, come and appear in this court. It's just Washington. And, of course, in smaller communities, this is much more of a phenomenon. There's a judge from Pierre, South Dakota who was a leading figure in the legal community there, as is his wife, and he's been on the bench now for probably close to 20 years. And I don't know how many lawyers there are in Pierre, South Dakota, but there aren't very many who don't know all the others, and who didn't know him before he became a judge and vice versa. So this kind of stuff is… I know a man who worked in the justice ministry in Canada. I think he was a public defender. And they would send a plane up to the remote communities and the plane carried the prosecutor, the public defender, and the judges. They'd set up shop in the hotel room or whatever they got and had their cases…and have dinner together. That sort of thing simply isn't a problem because they all know the rules. That is our tradition.

DANIEL MARCUS: During this period, 10, 15 years ago, I remember there was discussion of the issue of these conferences and so on. Did the Judicial Conference adopt any policy with respect to either attendance at these conferences or limiting honoraria, or reimbursements, or whatever?

JUDGE GINSBURG: Well the pay raise that came in 1991 from the quadrennial pay commission was part of the Ethics in Government Act, I believe. In any event, it provided that no member of the Congress or a judge, could take an honorarium for a speech, or an appearance, or what have you. Now the origin of that - I told you the origin of the cap on judicial earnings from outside teaching - the origin of that was that there was some scandals in the Congress about honoraria which were, I guess, disguised political contributions or disguised gifts really to the member. It didn't have to go towards the campaign or anything. And so when they wrote that they …

DANIEL MARCUS: Brought in the judges.

JUDGE GINSBURG: Yes. They do these things across the board because politically the Congress doesn't want the judges to have better treatment. There was one senator who told a colleague of mine most of that's "just envy," but they also use it as a way of saying we have to have a pay increase because the judges have to have a pay increase. Parity made me do it. So the honorarium ban - although there had never been an instance that anyone knows of from the judiciary - extended to judges and the Executive Branch. We had a couple cases in this circuit where it was applied to people in the EPA. One of them goes around on his own time and gives talks and he had a First Amendment case that he won. But we specifically said that for upper level employees it might be a different situation including, of course, having it apply to ourselves and Congress. We didn't say anything, but the most senior executives at EPA were not covered by

that ruling. This was a senior career woman. She has 15 years' experience with a great deal of expertise and something to say.

But at any rate - so yes - that came in. But what the Judicial Conference did was to issue some regulations. One of the regulations is that although a judge cannot accept an honorarium - and by the way there's a $2,000 limit on this - a judge can direct a contribution from the sponsoring organization to a registered charity. It never touches the judge's hands. And to the extent that a judge feels an obligation to make a donation anyway as an alumnus or what have you, it confers some benefit as a result. But it wasn't abused then and it's not abused now under this ruling.

There's one other aspect. The judiciary set up a disclosure system on the Internet. A sponsoring organization notifies the administrative office of the event and maybe who's speaking or who's appearing. And then any judges who attend report that as part of the financial disclosure process or parallel to it at the same time I think. They report on the Internet if they attended a sponsored event or a seminar.

DANIEL MARCUS: Is it required that the reimbursement for expenses or the costs get reported or not?

JUDGE GINSBURG: I think it is. And they can't be accepted if it's for - and this was always true - if it's for luxurious accommodations.

DANIEL MARCUS: Oh I see.

JUDGE GINSBURG: That's always been the case.

DANIEL MARCUS: Can't get the penthouse suite, huh?

JUDGE GINSBURG: No. So that system is in place. The Law and Economics Center at George Mason, originally at Miami, continues to have these programs for judges and complies and the judges comply with this reimbursement and disclosure policy. And the next one coming up is done in conjunction with the American Bar Association. Most of them are done unilaterally. Sometimes they co-sponsor an event. It's never been a problem.

DANIEL MARCUS: There was something you want to add, Judge Ginsburg.

JUDGE GINSBURG: I distracted myself and didn't fully answer your question about judges attending an antiregulatory seminar. Although I did say, I think, that a more accurate description is a practical seminar on what works, what doesn't work, what can be done to make things work.

We live in a world of scarce resources, and economics is the science or study of the trade-offs that have to be made. And those trade-offs are made every day by all of us in our daily lives, more self-consciously in making

commercial decisions, major purchases, and so on. They're made every day by government agencies, by the Congress, and they're going to be made in a more rational and self-conscious way if the decision makers have some understanding that there are no free goods, that there are only trade-offs, and that's what makes an informed decision a difficult one. Ignorant decisions are easy to make when you don't know much about what you're doing, but informed decisions are difficult.

And to the extent that people of all walks of life - I'd mention religious leaders as well, federal judges, and law review editors - understand that they're going to be more rational in their analysis of what they're doing. This court spends a great deal of our time asking agencies what we hope are probing questions about what they've done and counsel who raise objections to what they've done are doing the same thing. Some of those objections are ill-founded to the point of being silly and others are quite perceptive from an economic point of view. And the agencies try to respond in kind. If the judges didn't know what the two of them were talking about we'd be in a sorry pass. And if we know more than what they're talking about, so much the better.

Steve Shavell, an economist on the Harvard Law faculty, was an expert witness for the defense in the Agent Orange case in front of Judge Weinstein in Brooklyn. He said he got through his cross unscathed but then the judge started and that’s when it became really difficult for him. That’s the kind of person one should want on the bench.