Oral History of Judge Douglas H. Ginsburg
Sixth Interview
December 5, 2013

This interview is being conducted on behalf of the Oral History Project of the Historical Society of the District of Columbia Circuit. The interviewer is Daniel Marcus, Esquire, and the interviewee is Judge Douglas H. Ginsburg. The interview took place on Tuesday, December 5, 2013. This is the sixth interview.

DANIEL MARCUS: This is Daniel Marcus interviewing Judge Ginsburg on December 5th, 2013. Today we're going to discuss sort of the heart of the D.C. Circuit's judicial role in most people's minds, which is the review of decisions by administrative agencies, particularly in rule-making cases.

And you, Judge Ginsburg, came to your job as a judge with a fair amount of background in that area from your experiences both in teaching and at OMB during the Reagan administration. I'd like to ask you if you could talk a little about your approach to review of the record in these major agency rule-making cases and how you approached the application of the arbitrary and capricious standard of review.

JUDGE GINSBURG: In a major rule-making proceeding before one of the administrative agencies, the record can be tens of thousands of pages. The agency is required under the APA to seek public comment, and that becomes the occasion for every interested party, any interest that's going to be affected or might be affected by the rule, to submit comments to the commission and submit the results of various studies, and in some cases, to marshal letter writing campaigns by large numbers of people; union members in some instances, trade association members and others. And so the record may contain an enormous amount of material that the agency, under the APA, is charged with considering.

Now, that they receive a thousand identical postcards from consumers or trade union members doesn't really and shouldn't affect their judgment about how to proceed. But when they receive an academic study or a commissioned, commercially-done study in support of some interest, they are supposed to take account of that and to answer any significant objections that are raised in those submissions. It may at first strike one as dismaying, but it's not uncommon for the agencies to contract out to a consulting firm, a so-called Beltway Bandit, the task of sifting through and analyzing these submissions. But at the end of the day, the agency has to formulate a response to any significant objections and either alter its proposal in keeping with that or explain why it doesn't need to.

This whole procedure is quite unlike what was envisioned when the Congress in 1946 passed the Administrative Procedure Act. It became elaborated through a long series of decisions, primarily from this court in the 1960s and 1970s, and I might even say primarily under the stewardship and guidance of Judge Leventhal, although of course the majority of the court was required to accomplish this.

But the result was a process which is, on the one hand, much more informative and informed and transparent than might have been contemplated by the framers of the APA. And on the other, much more elaborate, costly, and time-consuming than anything that they could possibly have contemplated.

But I think it was an entirely salutary development, because it ameliorated, to some extent, the consequences of broad congressional delegations of authority to rule-making agencies under statutes that in many instances, particularly in environmental cases, dealt with complex scientific materials with which the agencies, at their founding, were really inexpert. And although they developed expertise over the years, they were I think better off, as was the country, for their being subject to the kind of check that is imposed when they have to explain themselves fully and respond to any significant objections that were raised. Ideally, it's really quite an admirable way of doing government, but it is costly and slow.

DANIEL MARCUS: And I guess that process was further developed as a result of the executive branch actions of the Office of Information and Regulatory Affairs and the executive orders that were issued by presidents in the 1970s and '80s and '90s.

JUDGE GINSBURG: Well, the role of the Executive Office of the President and of executive branch review before agencies propose or finally adopt a rule was a bit late in coming to the issue. The first executive order was President Reagan's in February of 1981. Prior to that, the practice was informal and infrequent, developing from a few instances during the Nixon administration and Ford to something more recognizable as what became the modern process under President Carter; his Executive Office referred perhaps 25 rules in a year, or I shouldn't say referred, but received perhaps 25 rules in a year from the agencies.

President Reagan's executive order in 1981, the basic framework of which has been retained by every president since, subjects to pre-issuance scrutiny a vastly greater number of rules coming from the executive departments. It also exempts a great number of rules, for instance, tax regulations, personnel matters, internal agency procedures, and tries to

focus on those that are of public import and have a very substantial cost, that is to say, $100 million or more.

DANIEL MARCUS: I guess my point or question is perhaps that the executive order process led the agencies to become more diligent and more sophisticated maybe in their economic analysis and cost benefit analysis and analysis of scientific materials.

JUDGE GINSBURG: Well, I have no doubt about it. Bear in mind that the executive orders do not apply to the so-called independent agencies, but only to the purely executive departments. An illustration of the way in which the executive order affected internal agency procedures and I think the quality of their rule-makings came to me from Milt Russell, who was the PhD economist, who had come from Resources for the Future to the Environmental Protection Agency as the head of their Office of Policy and Planning. He said the executive order was the best thing that ever happened to his office because now, before the agency issued rules coming from, say, the air office or the water office, they wanted to get his input, because basically he was going to ask the same kind of questions that OIRA was going to ask. And so rather than send it over to OIRA to have them point out some fairly obvious analytical errors, they had their own capacity in-house and now they started to use it for the first time in this way.

DANIEL MARCUS: So did you as a judge see improvement in the quality of executive branch agency rule-making records over the years, or not?

JUDGE GINSBURG: I think that there has been improvement, but I'm not ready to attribute it all to OIRA's pre-review. In, fact, I'd be more inclined to attribute it to some rejections in this court; that caused some of the agencies to pull up their socks and do a better job. And, I should say, over the last 27 years that I've been here, I have seen a growing internal body of experience and expertise within some of the agencies, and particularly the EPA.

The EPA was handed the most difficult set of problems of any federal agency. And starting from not quite ground zero - because it was formed by consolidating some preexisting authorities from around the government. But starting close to zero because it was handed these extraordinarily complex mandates from the Congress only after it came together as an agency in the Nixon administration.

The Clean Water Act, particularly from the first round of amendments going forward; the Clean Air Act from its inception; and RCRA, Resource, Conservation and Recovery Act - that deals with superfund sites of highly polluted ground conditions. These are extraordinarily complex.

Plus, they intersect with a scientific and biological medical information base about the effects of pollutants on human health and the environment as to which there's been an enormous growth in knowledge and in the number of studies performed. And by the way, it's the EPA that maintains the authoritative database on carcinogenesis for the world.

Now, these studies were done by academics, very few of them commissioned by the agency. But the vast majority are academic research, much of which was being done anyway before the agency came into existence and would continue, and more of which would have been done if the agency had never come into existence, but which are then, in a way, conscripted by the agency as a source, an important source, of policy guidance.

A perpetual problem in my view is that the research is done in the scientific tradition that rarely leads to firm conclusions upon which policy can confidently be based. Any given study is but a contribution to a continuing flow of studies, and very few scientists conclude their study with a claim to have shown a firm causal relationship between, for instance, exposure to some substance and carcinogenicity or mutagenicity or any other adverse human health or mammalian health consequences.

But the agency doesn't have that luxury; under the statute, it has to draw conclusions and make policy decisions that have enormous implications for the economy as well as for the health of the public, and that puts it in a perpetually somewhat awkward position of drawing inferences from studies that don't themselves draw those inferences.

DANIEL MARCUS: And of course, the agency also has to deal in these different statutes with an array of different decisional standards that Congress gives it, some of which are exclusively health-oriented, some of which require judgments about practicality, some of which require a weighing of costs and benefits, and that makes their job even more difficult, I suppose.

JUDGE GINSBURG: Well, it does, because if they're required to set a standard that conforms to or takes advantage of the best available technology or the best available and affordable technology or some other formulation, then the back end of their analysis is an entirely different proposition than the one at the front end dealing with environmental consequences, so that calls for yet another set of disciplines to be brought to bear.

And all of this is done on a scale that is not just challenging but almost insurmountable, because, with few exceptions, the agency's mandate runs nationwide. And they deal with things that really do not have any interstate significance, and most of which, in the light of experience,

would more properly have been left in the hands of the states or left unregulated because their contribution to the aggregate output of any given pollutant is trivial. Whereas the vast majority of the emissions of any given type come from a much smaller subset of point sources, the regulation of which would have been fully adequate to the task and much more efficient, much less complex, and much less distorting of the economy.

But we have these statutes, and almost everybody who's really familiar with the field I think tends to agree that they're quite outdated and need revamping of one sort or another. There's disagreement, of course, among people on how exactly they should be changed. But further complexity is not being recommended, and almost everybody I think would agree that the task could be accomplished more effectively if the concern were focused on large contributors.

DANIEL MARCUS: The problem that the agencies have in dealing with very general congressional standards in their statutes was illustrated by a celebrated case in the late 1990s called *American Trucking Association*, which involved a major EPA Clean Air Act regulation of air quality standards for particular pollutants. And that was a case in which Judge Williams and you wrote - Judge Williams is the author of the opinion - wrote an opinion that seemed to breathe new life into an old doctrine, the nondelegation doctrine. You were faced with an agency regulation, an EPA regulation, which had selected a limit on emissions. I may be getting that wrong, but had adopted a level, under an air quality standard, that the court found had not been adequately explained as to why that particular limit had been selected.

And what this court did, as you recall, was to say that in the absence of an intelligible standard for selecting the limit by the EPA, the regulation had to be set aside and sent back because there was a violation of the nondelegation doctrine that the court found. That decision was reversed by the Supreme Court. Let me just ask you about that case and what your thinking was, you and your colleague's thinking was, in using the nondelegation doctrine, and what your reaction was to the Supreme Court's reversal of your opinion.

JUDGE GINSBURG: The standard for the constitutionality of a delegation from the Congress to an administrative agency has long been that there must be an "intelligible principle" by which the agency can be guided, and that's to be found in the statute.

But the Supreme Court has only, on two occasions, the most significant being the *Schechter Poultry* case and the National Industrial Recovery

Act, held that a statute, an Act of Congress, did not contain an intelligible principle for the delegee to follow. There have been only a few other cases in which the matter was raised, and in those cases the Supreme Court always said there was an intelligible principle.

In the case before us, which came to us as *American Trucking Association v. EPA* and came out of the Supreme Court as *ATA v. Whitman*, referring to the Administrator of the EPA, the agency adopted a National Ambient Air Quality Standard, or two of them, one for ozone and one for particulate matter. Both standards represented a tightening of a preexisting NAAQs in terms of the amount of the permissible concentration of these pollutants in any given area.

The agency was basically unable to explain why it chose the stopping point that it chose; it made the point that the more stringent standard would have beneficial health effects, which is undeniably true, because in each case the pollutants in question were characterized by the agency as being non-threshold pollutants. That is to say that there was no safe level of exposure.

Now, this is a construct that is I think largely a matter of convenience, not a matter of any scientific certainty. In fact, it reflects scientific uncertainty. It's impossible to say that a small exposure is harmless simply because the epidemiological evidence for that is not available. And the experimental evidence to show that sort of relationship by exposing laboratory animals to small doses would require, in some cases, millions of laboratory animals over three generations simply because one would be looking for such small differences of degree, so it's totally impractical.

So the agency adopts what's called a linear dose-response assumption, in which it assumes that the greater the exposure, the greater the toxicity, and therefore, the morbidity and mortality, for lack of any better assumption. Now, there are competing approaches one could adopt, but this is the one the agencies adopted.

It's axiomatic that less exposure, therefore, is better, and the question arises, well, how little is little enough? Under a 1979 case in our court, this court had told the agency that in setting the NAAQs, the National Ambient Air Quality Standards, it could not take cost into account; it was a case called *National Lead Industries*. And so the obvious metric for determining how much is enough or is too much was disallowed, and that left the agency really at sea as to by what criterion it could find a stopping point.

And the decision that we reached in the ATA case was simply that the agency had not identified any such rationale for a stopping point, it had not gone to zero tolerance, but it could not really explain why it had stopped where it had, and the question was whether it could find such a stopping point. And we've suggested one possibility as an example that it might consider, but we were not mandating that.

So the argument had been made by the people challenging the regulation that it was an unconstitutional delegation of legislative authority to the agency without an intelligible principle, and that seemed to be an almost irresistible conclusion since the agency had not produced an intelligible principle and there was none that we or they could discern on the face of the statute.

DANIEL MARCUS: And if I can interrupt. The statutory standard was something like set it at a level requisite to protect the public health.

JUDGE GINSBURG: Requisite to protect human health and the environment, I believe. So requisite is not really a very discriminating term. If they could have considered cost, then they could have told us what was requisite.

I was familiar with a case brought in this district before a three-judge district court challenging the wage and price controls imposed by President Nixon. And Judge Leventhal wrote an opinion upholding the delegation of emergency authority to the president to control all aspects of the economy, including wages and prices, under broadly defined circumstances. This is really giving him discretion to declare the emergency, and that was not judicially reviewable. And the regulations that accompanied the statute in question really didn't give the president any guidance or controls.

But there was experience under the Korean War and World War II price controls that would have informed any intelligent implementation of the statute. And I thought Judge Leventhal quite creatively but correctly said, well, the statute is enacted against this background with which everyone is familiar, and the agency can be expected to do as its predecessors did, what is necessary to confine its own discretion within constitutional limits.

That seemed to fit the bill perfectly here, and I brought it to Judge Williams' attention. Therefore, rather than striking down the statute as unintelligible, we thought it would make a great deal more sense to let the agency, now that it's on notice of this problem, try to deal with it. And when you consider that since 1984, in the *Chevron* case, the agency has had final interpretative authority to say what a statute means, within reason, it seemed doubly appropriate to let the agency do that.

In subsequent years this issue has arisen as follows, really a related issue. I think the case that most typifies it is *Brand X* in the Supreme Court. Suppose the court interprets a statute to mean A, and then later on, post-*Chevron*, the agency interprets it to mean B, and that's challenged as inconsistent with the precedent set by the court. Well, is the court to say *Chevron* applies and the agency can effectively overrule the court's prior statement of what the statute means? Or alternatively, is it that that was the authoritative interpretation and *Chevron* doesn't affect that?

In *ATA* we weren't stuck with a prior interpretation, except *National Lead* ruling out economic cost, but it did seem consistent to me with the theory behind *Chevron*-- i.e., that the Congress delegated interpretive authority to the agency--that we ought to let the agency interpret the statute in such a way as to make it constitutional if it can before we say it's unconstitutional. Well, the Supreme Court didn't get to that stage because they stopped at the threshold question of whether the statute was, on its face, lacking an intelligible principle and therefore unconstitutional. And they found in the statute that the standard to which you alluded, requisite to protect human health and the environment, was indeed an intelligible principle.

Now, saying that it's intelligible and making it intelligible are two different things. And so I take that not to mean that the statute is intelligible; I think that stupid and nonsensical. I take it to mean that the courts are not to apply the standard of intelligible principle because it's without content and is no longer a constraint on legislative delegation, which would mean that tomorrow the Congress could say all departments and agencies are hereby delegated authority to do what they think is in the public interest and we're going home and adjourning for the remainder of the term, and all future Congresses may do the same. It's a complete abdication of judicial responsibility for the proper workings of the relationship among the branches.

DANIEL MARCUS: That's right. So essentially in your mind, the Supreme Court in the *Whitman* case reversing your decision in *American Trucking* was essentially abandoning or virtually abandoning an important separation of powers principle.

JUDGE GINSBURG: Yes. It was a memo to all departments and agencies:henceforth, you're on your own, don't worry about the courts.

DANIEL MARCUS: This may be a dumb question, but can't your basic arbitrary and capricious review authority perform some of the same function of forcing agencies to develop intelligible standards for applying vague statutory principles? In

other words, in this case, couldn't you have just said, gee, the agency hasn't explained adequately why it chose this particular level, what the basis is for that? It hasn't explained how much is too much, to use the colorful phrase in the opinion, and send it back for explanation.

JUDGE GINSBURG: Well, there's certainly many an instance in which that's exactly what happens, before this case and after this case. The problem is rarely presented of an unconstitutional delegation, or the claim or the argument. In fact, when I was clerking for Judge McGowan, he said once to a lawyer in oral argument, "Well, Counsel, isn't there a delegation problem here?" And the lawyer said, "Oh, Judge, we don't argue that anymore." So surely, as you'd suggest, a lot of the product produced by an agency unguided by an intelligible principle may be inexplicable, or at least inadequately explained and sent back. But if you send it back to an agency, –saying that you haven't adequately explained yourself in terms that resonate with the statute, and the agency comes back as saying either, well, that can't be done, or more likely - or here's another try and it's equally untethered to the statute, there's no end in sight as a solution.

DANIEL MARCUS: Yeah. Well, you adverted, of course, to the agency's broad authority under the Supreme Court's *Chevron* decision to define, to elaborate on and define statutory terms to interpret, to interpret its statutory mandate. You've seen the application of the Chevron case over 25 years now and the various variations that have come out of other Supreme Court decisions in recent years. What's your view as to whether the *Chevron* decision--now that we have all this experience with it--does it strike the right balance between the role of the courts and the role of the agencies in interpreting statutes? And if you were the king, what would you do?

JUDGE GINSBURG: Well, I think it does correct an excessive use of legislative history which was indulged by this court to reject agency interpretations of the statutes they administer. That was only part of the court's microscopic review and policy intrusions into agency policymaking, that really long predated *Chevron*. It first surfaced in the *Vermont Yankee* case in which the Supreme Court said, again I think correctly to this court, you may not write into the APA procedural requirements that are not in the APA.

Now, that doesn't mean it didn't make a dent in the requirements for an explanation of the rulemaking. And the APA requires the agency's final rule to be accompanied by a "concise general statement of basis of purpose." As things have evolved, concise has come to mean its opposite. That has not drawn fire from the Supreme Court or elsewhere, but the mix-up had some academic commentary about agency petrification.

But it really did put this court back on its heels after a long period of ever-greater supervision of the agencies, and I think on the substantive interpretive front, that *Chevron* performed the same corrective function.

In 1985, when I was at OIRA, I gave a talk in January to the Administrative Law section of the American Association of Law Schools, which was meeting in Washington, and I referred to "the arrogant and intrusive D.C. Circuit." And there was an audible gasp among the administrative law professors who loved what the court was doing and gave them much fodder for their apparatus. But I think that was a fair characterization: arrogant and intrusive. And it took at least those two, and there may be a third less famous Supreme Court decision, to have changed that.

The third one that I'm thinking of actually has a lot in common with *Whitman v. ATA,* or *ATA v. Whitman*, and that was *Beach Communications*. There, the question was whether the FCC had a rational basis for a regulation that determined that an antenna placed on the top of a building and bringing television signals into the building for its residents was not a cable system for purposes of federal jurisdiction and was entirely a municipal proposition. Whereas if the wires crossed the street and brought the same signals even to a co-owned building and its residents, then it was a cable system within the federal jurisdiction.

That was challenged, and we asked the lawyer for the FCC what the rationale was for that because it wasn't really apparent in the briefs. And the answer was "A district judge in North Dakota or somewhere made us do it." So we said, "Well, that's not a reason, an explanation geared to the statute." So we sent it back to the agency to come forth with another explanation, and they couldn't. They said basically they didn't really like the regulation they put out, but they put it out under compulsion, and so again they came back with no defense of it. And so we held - Judge Edwards wrote that opinion. I joined; Judge Mikva dissented. We held there was no rational basis for the decision.

In researching that, I think there were at the time - I found only two appellate decisions rendered in the 40- or 50-year period since the Supreme Court had imposed the rational basis standard, that had found something did not have a rational basis; this would have been the third.

It went to the Supreme Court, and Justice Thomas wrote the unanimous opinion for the court, the gist of which was that the courts are not to determine that anything is irrational for another generation. Why? Well, I believe - I know one of the rationales advanced I think by Judge Mikva was that, well, this stupid regulation would spur innovation to circumvent

it; that's a rationale?. Well, Supreme Court didn't endorse that nonsense. But it did say - I believe it said - it may not be presented by the agency, but if the court can imagine a rationale for it, then it has to affirm under rational basis review, and it came up with something tissue-thin to that effect.

So the Supreme Court has put the judiciary out of the business of reviewing agency economic regulations, basically, for rationality. They still have to meet the standards of the Administrative Procedure Act, but they're not constitutionally infirm for lack of rationality under the equal protection clause. Just as under the *Whitman* case, the statutes are not constitutionally infirm for want of an intelligible principle. And so that the regulatory state is gobbling up what's left of the economy is not too surprising.

DANIEL MARCUS: But you don't have the same criticism of *Chevron*; that it's led to the agency's supplanting the courts as the interpreters of the law.

JUDGE GINSBURG: I think it was a useful corrective, but perhaps more so than ideal. And so the question is whether there's a happier medium than *Chevron* itself prescribes. And I think the Supreme Court, and to some degree the lower courts, have equilibrated the contending forces and tried to reach a more reasonable accommodation.

DANIEL MARCUS: So the Supreme Court is gradually moving a little more back toward the role of the courts.

JUDGE GINSBURG: Ten thousand questions; everything had to be reexamined, plus new questions that were raised. And the court itself has recognized that the broad mandate of *Chevron* - that the opinion in *Chevron* has to be tempered somewhat. And one of the, I think, influential points was made by Cass Sunstein in an article entitled "*Chevron* Step Zero." You know, at what point do we even get into *Chevron*? So the court said, at Step One of *Chevron*, using the customary tools of statutory interpretation, determine whether the Congress has addressed the specific question at hand. Well, it's not that often that the Congress has addressed the specific question at hand, and very few cases are resolved at Step One. Some are, but a far greater number go on to *Chevron* Step Two.

And particularly with legislative history having fallen into desuetude and distrust, Step One is not as manipulable as it might have been in the past, or pre-*Chevron*, because legislative history could be used to say that Congress considered everything under the sun, in some cases anyway.

So we get very frequently into *Chevron* Step Two, as to whether the interpretation is reasonable, and that's not materially different in temper from the APA approach. It's a different question, but it's asked in the same spirit of indulgence for the agencies. I may have mentioned at a previous time coming into a conference after argument in a Federal Energy Regulatory Commission case, a colleague of mine saying - well, by way of suggesting we deny the petition for review - saying, "Well, I don't see here anything other than the ordinary lunacy."

And, you know, there is a standard that you could put that way. The ordinary lunacy passes muster and it's the extraordinary lunacy that we catch.

DANIEL MARCUS: Yes, although I think you told me that - in an earlier interview - that FERC had gotten better over the years.

JUDGE GINSBURG: No question.

DANIEL MARCUS: And they're now doing a pretty good job.

JUDGE GINSBURG: No question.

DANIEL MARCUS: Maybe a useful segue into an agency that you had a lot of experience with as a teacher and now as a judge, as a teacher and a case book writer, and that's the Federal Communications Commission, which your opinions that I've seen, including some fairly recent ones, suggest that you think maybe isn't doing as good a job as it could be in rulemaking proceedings, applying statutes with very general standards like public interest and so on, but… Well, let me just ask you the FCC is dealing with these big issues of competition and markets. And am I right in thinking that your opinions reflect a view that they haven't always been handling those issues very well?

JUDGE GINSBURG: From the inception of the FCC, and particularly from the inception of the television licensing era, the Federal Communications Commission has been - their performance with some notable exceptions could best be captured in a single word which I will delete from the transcript.

It has been an agency that has a confusing and conflicting mandate from the Congress, captured by extremely well-organized interest groups; its analytical capacity has varied from excellent to very poor over time, with no consistent direction of improvement or deterioration; it just varies. And a mentality that was so frozen in the earlier era that the Congress has had multiple occasions to intervene and to point it toward the modern world. It has been, throughout its history, a troubled and largely inept agency.

The post-war era begins with a moratorium on television licensing while the FCC figured out what it was going to do that set us back seven years. Another moratorium on the introduction of color television until it selected a system from whoever lobbied it most effectively; there were two competing systems. A complete lack of imagination. An exercise in futility, and ultimately corruption, in the licensing of television stations throughout the 1950s and into the '60s.

Now, I say that because the agency held extraordinarily prolonged, detailed, and futile comparative hearings, trying to choose among applicants for licenses on the basis of a large number of criteria that it promulgated. The initial decisions of its administrative law judges were reversed by the commission about 50 percent of the time.

The award of television stations without exception followed whether the newspaper applicants - which the agency favored on the ground that they had the news gathering capacity - without exception, followed the pattern of editorial endorsement of President Eisenhower or not. And of course, it culminated in the famous vicuña coat that brought down Sherman Adams.

It was a mess. The comparative hearings were a complete waste of everyone's time. There's a recorded incident in which a member of the commission, I think a chairman, said - a former member of the commission said to a then present member of the commission, on the question of abolishing the comparative hearings, he was out practicing law again: "You know, you're going to have children to put through college, too."

It's really a scandal in every sense of the word. The cable television industry emerged from the community antenna television industry. It comprised operators who erected an antenna in areas of mountains and areas that otherwise were unable to receive over-the-air television station signals and distributed them by wire to people's homes.

In Ithaca, New York, that was somebody who was trying to sell television sets in a store, and so put up an antenna to do this so that people would buy television sets. That evolved into the cable industry; that is to say, operating in places where television over the air was readily available.

And in 1972 the agency promulgated the cable television report and order, which so burdened the cable industry as to be quite obviously an intentional homicide, or whatever you'd call the murder of an industry, basically doing the bidding of the broadcasters who were its constituents.

And it wasn't until the early 1980s that that was repudiated, and of course cable television came quickly to be what it is, and then broadcast satellites joined the fray. And now telco is delivering fiber optical service, and we have a horn of plenty, delivering a wealth of signals that the FCC never could have imagined, never encouraged, and would have stifled. The reorganization of the telephone industry was something completely beyond the FCC's capabilities. And they're not entirely to blame there, because Judge Greene had a hand in it and the Justice Department, although Judge Greene carries much more of the blame, I should say, for his changes to what had been agreed between AT&T and the government.

And the attempt to introduce competition by the FCC, to introduce competition among the regional Bell companies, fell entirely flat. Instead they encouraged the leasing of selected facilities to competitive carriers. So that as a practical matter what happened was that no one had an incentive to build a competing system; they just leased facilities from the incumbent system and set up small rivals to try to cherry-pick some of the traffic. The Congress blew that away in 1996 with the Telecommunications Act. Well, actually that didn't solve the problem either; the market solved the problem. It was an extremely difficult problem, I have to say, this transition. But the FCC did nothing to facilitate it.

DANIEL MARCUS: Although the FCC did take some deregulatory actions on its own in the broadcast area in the 1980s and 1990s.

JUDGE GINSBURG: Yes. When Mark Fowler became chairman, in the first Reagan term, he was set on deregulating as much as possible and set in motion, although I'm sure it didn't happen on his watch, the repeal of the Fairness Doctrine.

DANIEL MARCUS: Right.

JUDGE GINSBURG: In my view it was unconstitutional to begin with, and the Supreme Court never reconciled *Red Lion* with its *Miami Herald* decision because they're irreconcilable. The scarcity rationale on which the Fairness Doctrine had been predicated had long since disappeared with this cornucopia of programming options.

So we have a world that is created largely in spite of the FCC. Now, the allocation of spectrum, again I think under the direction of the Congress, has been put on a reasonable basis because it's auctioned off, and that has brought billions of dollars into the federal coffers; billions more were foregone by the crazy old licensing scheme, but the Congress had mandated that, too.

DANIEL MARCUS: And by the time you got on the court, the crazy old comparative hearing world was coming to an end pretty much.

JUDGE GINSBURG: Yes, I think so.

DANIEL MARCUS: And in fairness - I don't want to defend the FCC too much, but sometimes Congress - while Congress has pushed them in a deregulatory way and a pro-competitive way in some situations, in other situations, Congress has continued to protect the broadcasters with must-carry rules and so on.

JUDGE GINSBURG: I think they had a genuine public interest concern with must-carry. I do. I don't think it was purely a function of capture. But it's much harder to capture the Congress than the FCC.

DANIEL MARCUS: Yes. Well, with that background, let's turn briefly to a couple of your decisions reversing rule-making decisions by the FCC. The case I wanted to ask you about, Judge Ginsburg, because it's quite an important and unusual case, is the *Fox Television Stations* case in 2002 in which the Congress, as part of the Telecommunications Act of 1996, the big reform statute, had made a dent in some of the commission's ancient multiple ownership and cross-ownership rules, but had left some of the major rules, rather than repealing them itself, because they were being lobbied by various sides I'm sure Congress instructed the FCC to decide whether to repeal or modify particular rules, I guess the most important of which was the rule limiting the number of stations; the national ownership limit rule for owners of television stations.

And the FCC, after holding an inquiry and a proceeding, decided not to change the rule, and indeed, argued to you, I guess, when their decision not to eliminate the rule was challenged, that that wasn't really reviewable by you. You had no trouble finding it reviewable, and indeed then you held that it was arbitrary and capricious, the decision not to repeal or modify the national ownership limits was arbitrary and capricious, and you sent it back to the commission. It's unusual for the court to be reviewing a decision by an agency not to change a rule. How did you view this case, and what led you to write such a strong opinion?

JUDGE GINSBURG: The statutory mandate here made the case really *sui generis*. Well, that's not quite true. It created a generic, a new category of potential cases, but there had never been anything like this before. Ordinarily, the failure to repeal a rule comes to the court, if at all, and it does from time to time, by someone petitioning the agency for it to convene a rule-making for the purpose of repealing an existing rule. The agencies frequently denied -

ordinarily denied those, and occasionally when one will be denied, it will be the subject of a petition for review in this court.

But that implicates strongly the agency's allocation of its resources. To spend its resources repealing a rule rather than doing the things it deems more important is a decision that's very difficult for a court to second-guess, and we generally are very deferential to the agency's various decisions on the allocation of their resources. And so those petitions never or almost never prevail because the agency's burden of explanation is quite modest.

The Telecommunications Act did something new which was to say, "The commission shall review its rules adopted pursuant to this section and all of its ownership rules biannually as part of its regulatory reform review under Section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as a result of competition. The commission shall repeal or modify any regulation it determines to be no longer in the public interest." So the initial delegation is obviously to the agency to perform this exercise, but with a push, and a degree of deference, because the question is for it to determine whether a rule is still in the public interest. Well, that part is on a footing with most APA review. The agency determines a new regulation would be in the public interest and promulgates it. Here, the agency determines that an existing regulation is still in the public interest and it fails to repeal it or declines to repeal it or modify it. So by the time it gets to us it's on the same footing, unlike the ordinary petition for review of a decision not to revisit a rule.

DANIEL MARCUS: So it's more akin to a re-promulgation of a rule almost.

JUDGE GINSBURG: Yes, but with specific criteria laid down by the Congress. And so the agency did review or revisit its national television station ownership rule, which limited the number of stations that could be jointly owned and its cable system cross-ownership rule.

DANIEL MARCUS: Cable-broadcasting.

JUDGE GINSBURG: Broadcasting cross-ownership rule, which prohibited joint ownership of a cable system and an over-the-air broadcast station serving the same market, in any part of the same market really.

The commission had looked at the national television station ownership limit in the past; it had raised it from I think originally three to seven and then to twelve, and had done so on the basis of a study and an analysis of the industry; I think that was in 1984. The 1984 report was actually

blocked by the Congress, not implemented by it. The agency reconsidered the matter, and then its final decision was to prohibit ownership of stations if in the aggregate, they would reach more than 25 percent of the national audience; in any event, no more than 12 stations.

DANIEL MARCUS: I think isn't it 35 percent -

JUDGE GINSBURG: No, it was - definitely it was 25.

DANIEL MARCUS: Oh, I see. At that point it was 25 percent, yeah.

JUDGE GINSBURG: And that was the rule from it going forward until the 1996 Act, when the Congress told it to eliminate that rule and to go to 35 percent.

DANIEL MARCUS: I see. Oh, Congress changed it to 35 percent.

JUDGE GINSBURG: Yes. So this was all the historical background against which it's telling the FCC to review every two years your existing rules on this topic, the remaining rules on this topic, and repeal them when they're no longer required by the public interest in diversity and competition. And the agency reviewed and retained both the cable broadcast cross-ownership rule and the national television station ownership rule.

But the reasons it gave really didn't stand up to scrutiny. It failed utterly to respond to some of the arguments that were being made, which is not a good sign for the health of a regulation.

DANIEL MARCUS: Does one attribute that just to incompetence, or that they didn't take this whole exercise seriously enough, or that they were motivated simply by the inter- and intra-industry political considerations?

JUDGE GINSBURG: Well, the only one of those suggestions I would rule out is incompetence, because the legal staff of the commission has always been pretty good.

DANIEL MARCUS: Yes. Yes, it has.

JUDGE GINSBURG: And in modern times, has been very good. So I doubt that's the explanation (Chuckling).

DANIEL MARCUS: But they failed to deal with the studies and so on.

JUDGE GINSBURG: Yes. I think some of the evidence on the record was so fatal, so incontrovertibly undermining the rule, that in some instances they made a feeble attempt at rebutting it, but in others, I think ignored some of the evidence. So when we got to the merits of this case, there were quite a

number of arguments on the table. And the industry did not prevail on all of them either, but on enough to undermine the rules.

Now, the conclusion here was that the agency hadn't adequately explained its decision to retain these rules; that it was arbitrary and capricious doing so on the record on which it was acting. And even so, the court remanded the television ownership rule for them to see whether they could come up with a defense.

DANIEL MARCUS: And why did you do that? Were you influenced by the fact that this was in a repeal situation, where vacating the decision would have been effectively forcing them to repeal a rule?

JUDGE GINSBURG: Well, vacating it would have ended the rule. But it was in part because the arguments used against the agency were in part that it was disregarding and contradicting findings it had made 20 years earlier. And the industry had put in evidence about further proliferation of competing sources of programming. Well, the agency - to quote the opinion, we said it's "by no means inconceivable," that they might be able to rebut this evidence. They hadn't dealt with it. I mean we just don't lightly say that this is gone and it's gone forever. Now, the cable-broadcasting cross-ownership rule we did vacate. That was a rule that the commission had had two chances already to defend. We had specifically sent it back at an earlier time with a specific concern, and the agency hadn't responded to that. That's my recollection anyway.

DANIEL MARCUS: So it wasn't based on a feeling that there were weightier potential concentration or antitrust concerns with respect to network ownership of stations and network power nationwide that might… When I read the opinion I thought perhaps it was related to some sense of the merits of the two rules; that it was a bigger deal to vacate the nationwide concentration rules than to effectively knock out the cable-broadcast local cross-ownership rule.

JUDGE GINSBURG: There is one difference in the consequences of vacating it. I'm not sure. I may have misspoken about whether this had been before us earlier. I may be confusing that with another case.

DANIEL MARCUS: There's another cable-broadcast rule, yeah.

[Gap in recording of interview.]

JUDGE GINSBURG: Technological innovation; these are all under the public interest rubric; technological innovation and universal service and service to every locality and diversity and so on. In any given case, those six or so criteria

are in conflict. There's always one which the agency can identify to justify what it's doing.

The proliferation of criteria means that there are no criteria; that there are no binding criteria. And then in the Securities and Exchange Commission case, *Business Roundtable*, where the Congress gave it a mandate to consider these three factors and didn't say that you had to do the thing that was most efficient on one or accomplished best one or two or three of those purposes, it can rely on - if the agency does its job properly, and if the court supervises at all, it can rely on the agency not to do things that it has revealed to be inefficient, anti-competitive, or discouraging of capital formation.

Now, it may have to make tradeoffs among those, if you have to consider these things and defend them rationally, you'll have a lot of discretion, but it's not unbounded. Just as no agency turns out a cost-benefit analysis that shows that the costs exceed the benefits but we're going ahead anyway. I think the SEC would do the right thing, too.

DANIEL MARCUS: Yeah. So it is - what you're saying, I take it, is if Congress says you've got to consider these factors, then the agency has to do more than say, "We've looked at these factors and we want…" And it has to explain why what it's doing is consistent with a consideration of those factors.

JUDGE GINSBURG: Well, that's because the Congress acts against the background of the APA.

DANIEL MARCUS: Yes.

JUDGE GINSBURG: Requiring the analysis, as you said.