Oral History of Judge Douglas H. Ginsburg
Eighth Interview
January 14, 2014

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, January 14, 2014. This is the eighth interview.

DANIEL MARCUS: This is Daniel Marcus interviewing Judge Ginsburg on January 14th, 2014. Judge Ginsburg, in this interview I'd like to discuss a couple of your recent decisions in major cases. And the first one of those is the case that has become known as *Heller II*, I guess, after the Supreme Court in the *Heller* case several years ago held that there was an individual right to keep and bear arms under the Second Amendment, and that the D.C. law more or less banning the possession of handguns—not completely but pretty much—in the home for self-defense was unconstitutional. D.C. then revised its law in an effort to comply with the Supreme Court decision, and Mr. Heller along with some other plaintiffs challenged the revised law. And you wrote a very important opinion upholding the law in part and sending the case back to the district court for reconsideration of the validity of other parts of the law under the standards set forth in your opinion.

And I guess the major issue that you dealt with in that case, and that you had a debate with Judge Kavanaugh in his concurring and dissenting opinion, was what the correct standard for reviewing the constitutionality of a regulation of guns by D.C. or anybody else should be, an issue on which the Supreme Court in its *Heller* decision had not given much guidance. You came down in favor of intermediate scrutiny. Why don't you just tell us how you approached this case and how you wrestled with the problem of how to decide what level of scrutiny should apply or what the test should be.

JUDGE GINSBURG: There were two problems associated with resolving this case at all, in any way. The first is, as you implied, the Supreme Court's *Heller* decision was not very informative about not only the standard of review but the substantive contours of the Second Amendment. The Supreme Court's opinion seemed to be drafted, and probably was drafted, in such a way as to resolve as few matters as possible—that's not unusual of course in the Supreme Court—but to avoid clarity on issues that it did resolve. And so it expressly ducked the standard of review question. But in terms of the substantive contours of the right, it told us really only that this is an individual right, as opposed to the right of the states or militia, and that that right extends to weapons in common use for self-defense and other

purposes, particularly sporting. So sport guns and guns for self-defense. And it really told us very little more than that. There's a lot of verbiage about the history and rationale.

Oh, it did say one other matter, that notwithstanding the fundamental right of an individual to possess a handgun for self-defense, at least in the home, and long guns for sporting weapons or sporting purposes, that right was qualified insofar as there were longstanding regulations limiting the exercise of those rights. The theory seeming to be that, if the regulations were longstanding, they therefore had not been challenged as unconstitutional by members of the public and that must be because they are reasonable, and reasonable regulations are not being unhorsed by the Supreme Court's decision. So they mentioned as examples the ban on possession of such weapons by a convicted felon, or a person who's been judged mentally incapable.

Well, that all introduced a lot of complexities. It meant we had to deal with the standard of review, as you mentioned, what regulations were longstanding, and we did have a long historical treatment of that. Also, of what types of weapons are in common use in contemporary society for those two purposes, self-protection, particularly in the home, and sport.

DANIEL MARCUS: That's right. And unfortunately Justice Scalia in his opinion for the Court, gave these examples of reasonable regulations that would be okay, but none of them involved the regulations at issue in *Heller II*.

JUDGE GINSBURG: Well, that's right. *Heller II* involved promulgation by the D.C. Council after *Heller I* of a revised statute that piled on limitations, one after the other, seemingly throwing as many things at the wall as they could in the hope that something would stick in their effort to frustrate gun possession and ownership within the District. We were therefore required to deal with whether any of the regulations promulgated by D.C. were of a longstanding nature, looking to other states and the history of gun control. And we were tasked also with looking at novel regulations to see whether they were facially reasonable. These included such things as licensing requirements that paralleled those requirements for driving a motor vehicle or having a driver's license. So getting the license, being fingerprinted, photographed, reporting one's address and vehicle, or in this case gun, periodic re-registration in order to make sure your eyesight is adequate. All these things, some of which were taken from, or at least are the same as those that have historically been used to regulate drivers of motor vehicles, and some that were used to regulate registration for voting. And it seemed that those would be analogous to longstanding gun regulations in that they have been upheld, they have not been held to be intrusions on the fundamental right to travel.

DANIEL MARCUS: The driver's license.

JUDGE GINSBURG: Yes, all these little things. Some of them were more onerous, such as requiring at least four hours of classroom instruction, an hour of shooting range experience. On the other hand, you cannot get a driver's license without taking a driver's test, so there was a close analogy there.

Well, with all of the complexities and open questions that brought on those complexities, the second problem facing the court was that we got almost no help whatsoever from either of the parties. The briefing in this case was among the worst briefing, and the record among the most inadequate records, that I've ever seen for a case of any significance, almost the worst I've ever seen for a case that wasn't *pro se*. And I say that on both sides: the District's brief and the plaintiff's briefs were execrable. They had not bothered—the plaintiffs in particular had not bothered to introduce much evidence. They had evidence, valuable useful evidence, about the common usage of certain weapons, AR-15s and cartridges, magazines with more than ten rounds, but not adequate in the latter regard to resolve the matter. The District was just as unhelpful. They had something of a record, because the City Council had held hearings, so there was some testimony and a study put into the record that had come from the Brady Center. So one would have thought the plaintiffs would have tried to rebut this kind of evidence, but they didn't do much of a job.

So at the end of the day it was necessary to remand a lot of questions for the district court to resolve. We were able to narrow the case somewhat because the plaintiffs' pleadings were much broader in the complaint than in the appeal, and so they seemed to have dropped some of their challenges, thank goodness. But it really required—you couldn't make a sensible constitutional resolution without supplementing the record, giving the parties an opportunity to supplement the record. One could say, "Well, if the record's inadequate the plaintiffs should lose, right? They didn't make out their case." But the problem—part of the problem was that the District hadn't made out its case either. We were just in a limbo. And the Supreme Court in one prior case, I think it was *Turner Broadcasting*, because there was a constitutional right at stake, rather than resolve it on an inadequate record did send the case back to the district court for the parties to supplement the record.

DANIEL MARCUS: You did manage to decide that the record was adequate to resolve a couple of the questions.

JUDGE GINSBURG: Yes, yes.

DANIEL MARCUS: Including the basic registration requirement.

JUDGE GINSBURG: Right, right. Which seemed far from onerous. Was it *Turner*, the case to which I referred?

DANIEL MARCUS: Yes, I think so, yeah.

JUDGE GINSBURG: Yeah, okay. A First Amendment case. Now, on the standard of review the argumentation of the parties was a little better than the record. But the plaintiffs took a very wooden view that because this was a fundamental right strict scrutiny was involved, end of story. And the case law is not consistent with that. If the law in question had banned possession of a handgun, that might have been the correct standard of review, although it would have failed under the lesser standard anyway. But when you have things that impinge on a fundamental right, but don't make a central assault on it, such as time, place and manner regulations for speech, as opposed to content regulations for speech, intermediate scrutiny is what the Supreme Court has applied. And so that seemed to be what we were dealing with here, and we went with intermediate scrutiny.

The couple of other circuits that had dealt with post-*Heller I* gun regulations had also applied intermediate scrutiny. Those were the Ninth Circuit in a case that involved banning weapons from county property, and another circuit, perhaps the Seventh—

DANIEL MARCUS: I think it was the Seventh Circuit I think, yes.

JUDGE GINSBURG: —Seventh Circuit that dealt with filing off the serial numbers of guns. The regulation prohibiting that was upheld under intermediate scrutiny. So intermediate scrutiny seemed to be quite right. Rational basis review has become such an empty exercise. There have been only a couple of instances in the last 60 years in which a court of appeals has overturned a regulation for want of a rational basis, or at least an economic sort of regulation or a material regulation like this. And strict scrutiny is a death sentence for any law that's subjected to that kind of searching scrutiny.

DANIEL MARCUS: I take it that the plaintiffs did not argue for the standard that Judge Kavanaugh found implicit in the Supreme Court's opinion, which was sort of a special standard for the Second Amendment based almost entirely on the historical evidence at the time of the enactment of the amendment.

JUDGE GINSBURG: I think that's right. I think all of the judges were completely at sea in terms of getting any help from the parties.

DANIEL MARCUS: Yeah. Do you know where—did Judge Kavanaugh—where did he get that standard? I mean, I guess he would say he got it from the Supreme Court opinion. But was it floating around in the commentary, in the literature? I don't remember.

JUDGE GINSBURG: I don't think so, I think it was original with him. And it was very—there was not much commentary at that point. Now, the thing that mystifies me, and that may be just because I don't make an affirmative effort to keep up with it, but it's been two and a quarter years since we remanded this case

and I have not heard the single slightest suggestion that anything has happened since then.

DANIEL MARCUS: You know, I was going to ask you about that, because I haven't heard anything about it either, and I can't believe that the plaintiffs would have dropped their challenges to the remanded provisions. But you know what may have happened, perhaps the district revised its law further and amended it.

JUDGE GINSBURG: Well, I don't follow the local newspapers and so I don't know.

DANIEL MARCUS: I don't know either.

JUDGE GINSBURG: Judge Urbina, or the district judge, has retired between his rendering of the initial decision and the remand by the circuit. Either before then or immediately after he retired. So it had to be assigned to a new judge, and I'm sure that entails some delay with getting started again. But it was an open invitation to the plaintiffs to put in evidence. It would be surprising if they walked away from it, but I just haven't heard a word.

DANIEL MARCUS: Well, I'll make it my business to find out.

JUDGE GINSBURG: I'd be interested.

DANIEL MARCUS: I have a vague—it suddenly occurs to me that maybe D.C. revised the law to pull back on a couple of these things and the case was in essence informally settled. Maybe.

JUDGE GINSBURG: Well, that strikes me as surprising, simply because the District has been very determined to limit people's gun rights to the extent that they can lawfully do so.

DANIEL MARCUS: Sure. Sure. And they got four votes in the Supreme Court as to their ability to do so.

JUDGE GINSBURG: Right, right, exactly. So I just don't know what's going on there.

DANIEL MARCUS: I have one question about your selection of intermediate scrutiny as the proper standard of review. As I read your opinion, and your application of the *Turner* idea of intermediate scrutiny, you seem to be suggesting that within intermediate scrutiny there's sort of a sliding scale. That depending on the strength—the greater the strength of the governmental interest—that the stronger the governmental interest, the weaker the intrusion into the area of the protected right, the stronger the government's case. In other words—I'm not articulating this very well, and I probably ought to cancel this part of the question. But am I right in perceiving your concept of intermediate scrutiny that there's a little balancing going on of the weight of the interest and the intrusiveness of the burden? There's a sentence

where you say, "A regulation that imposes a strong burden upon the core right of self-defense must have a strong justification, whereas a regulation that imposes a less substantial burden should be proportionately easier to justify." Which is a logical thing. But when the Supreme Court announces these tests—and you cite *Turner* there, so *Turner* undoubtedly says that. But it's interesting, because there's been a debate in the literature about whether the Supreme Court ought to abandon all these levels and just do just exactly that for every case. Was that a conscious effort to establish a kind of range within intermediate scrutiny, or not?

JUDGE GINSBURG: I cannot reconstruct what my thought process was at the time, but I can tell you what I think now and what I have thought in another analogous context along these lines. The whole construct of these three tiers of scrutiny is fairly described as a sort of—well, as matters of degree, so that equal protection, the standard for equal protection in analysis, is with these three levels inherently a sliding scale. That there should be some slidingness, some room for sliding within each level, seems an almost unavoidable, logical corollary of having the three levels to begin with. And if it weren't made express, I think it would still be the case that courts would find it more difficult to uphold some matters than others, require more weighty justifications for some matters than others, within the same level of those three scrutinies. It would not make sense to do otherwise. The analogous situation is in my opinion in *Polygram*, the "Three Tenors" case, where I rehearsed the Supreme Court's series of fits and starts in its attempt to articulate different degrees of scrutiny required before one could reach a conclusion that a matter does not warrant full blown rule-of-reason treatment.

There they started with two tiers, *per se* treatment and rule-of-reason treatment, and within rule of reason they quickly realized—not quickly, but they realized that they needed to have some further fine tuning, some further differentiation. And over a series of five or six cases—*California Dental*, *Broadcast Music*, and *NCAA*, they acknowledged that the world was not black and white *per se*, or rule of reason, and that some things warranted only a quick look to see whether there was an antitrust inquiry, because the rule of reason would be such an enormous undertaking that it shouldn't be done lightly. And so they were just being practical. And in *Polygram* I made an effort to line up all of their cases and show that there was a continuum of about five different stopping points at least within the rule-of-reason part of the dichotomy. And I think maybe a similar thing can be seen in the equal protection cases, because it just doesn't make sense to do it any other way.

DANIEL MARCUS: I think you're right, sometimes it's probably not done explicitly by courts, but they must be doing it. And I think what's interesting about your

opinion is that you explicitly say that this should be done and acknowledge that you're doing that.

JUDGE GINSBURG: Well, maybe it was my antitrust background coming to bear.

DANIEL MARCUS: One final question on this. I was struck by the fact that you have a nice rebuttal opinion to Judge Kavanaugh's dissent really on the standard, and on some other issues, which you attach as an appendix to your main opinion. And I was struck because that format is a little unusual. And I was wondering, many judges, and the Supreme Court often in majority opinions, rebut the dissent by having footnotes saying, you know, that the dissent is full of baloney on this question because of so and so. And why do you do it this way? Is it because you don't like footnotes?

JUDGE GINSBURG: There are two reasons. One of them is that I don't like footnotes, yeah. But the other is more general and applies to my response to separate opinions in the run of cases. When I do an opinion, I try to make it as cogent and well organized and readily understood as possible. And to break up the flow of that presentation with asides, even *sotto voce* in a footnote, is disruptive and derogates from the quality of the opinion. In almost all cases—this is one perhaps, maybe there is another exception—I do that not by changing the opinion—well, of course if I'm persuaded of a point I do change it or incorporate it, but if there's at the end of the day a disagreement, I try to do that by appending a footnote so as to minimize the disruption of the argument. It still has the problem of any footnote, that it distracts the reader. And if I haven't done so before, I refer you to Judge Mikva's article "Goodbye to Footnotes" in the *Colorado Law Review*; it's a minor classic.

So in this instance Judge Kavanaugh's critique was so central—or let me put it another way, went to the heart of my analysis and at so many different places that it would have required a boatload of footnotes to deal with it, and even then I don't think it would have done the dissent justice because it wouldn't have treated it as a coherent whole. So better to segregate the analysis, or the rebuttal of the dissenting opinion. And that could have been done in a section within the opinion. I did it as an appendix in order to make it seem a little less important. However, that was not to denigrate the dissent, but rather to preserve the integrity of the opinion for the Court. And as you may know, I never, ever when I'm writing separately, refer to the "majority" but always to the opinion of the Court.

DANIEL MARCUS: Okay, let's turn to another recent decision that proved to have a considerable influence in changing the law on a major constitutional issue, and that is your decision in the *Maynard* case, which is now known as the *Jones* case, because only Mr. Jones got certiorari in the Supreme Court. Or no, excuse me, the government got *certiorari* in the Supreme—

JUDGE GINSBURG: Yeah, that's right.

DANIEL MARCUS: The government was satisfied as to *Maynard*—

JUDGE GINSBURG: Right.

DANIEL MARCUS: —as to Mr. Maynard; they were not satisfied as to Mr. Jones. And what I was surprised to learn, which I had not known, is the government almost got rehearing en banc on your opinion in the *Maynard* case. But they didn't do so well in Supreme Court.

JUDGE GINSBURG: Which is to say they got no votes.

DANIEL MARCUS: Exactly. I guess the case was a challenging one for you because there was a Supreme Court precedent on which the government relied very heavily involving a beeper in a container, where the Supreme Court had said that was just fine and that you didn't need a warrant under the Fourth Amendment to place this beeper in a container in somebody's car to see—

JUDGE GINSBURG: Ah, but they didn't place it in his car.

DANIEL MARCUS: Oh, that's correct, they placed it in a container.

JUDGE GINSBURG: That was key. They placed it in a container at a store and the defendant purchased the container at the store and put it in his truck. So they had the connivance of the store owner, and it was a bit of a trick, but it did not involve the police trespassing, if you will, in Justice Scalia's terms, on the defendant's property.

DANIEL MARCUS: Right. So that was crucial for Justice Scalia. It wasn't as crucial for you, because you distinguish the case also, I guess, on the ground that this was following somebody for kind of a one-time thing and not following somebody for a whole month, right?

JUDGE GINSBURG: That was an important consideration, yes.

DANIEL MARCUS: Okay. So talk a little about the dynamics of this case. Because you also had a different view of the case—well, it wasn't on your panel, your panel was unanimous. But when the case got to the court of appeals, Judge Kavanaugh unveiled a sort of modest version of Justice Scalia's trespass opinion in the Supreme Court.

JUDGE GINSBURG: You're talking about the rehearing petition.

DANIEL MARCUS: The rehearing petition, yes, on the rehearing petition. Was the trespass theory argued before the panel?

JUDGE GINSBURG: Yes, here's the way the case was set up. Now, if you don't mind I'll just recite a bit of the facts. Jones, I guess it was, owned a nightclub in

Washington, which meant he had a lot of cash in his business. And when the police investigated whether he was involved in drug dealing they were unable to find him ever in possession of drugs or of an amount of cash that would defy his explanation that it was from his business. So they attached a GPS magnetic device to the undercarriage of his car, having gotten a warrant in the District of Columbia to do so. But they allowed the warrant to expire—it was 10 days, I believe, and they went several days over the expiration of the warrant—and then they attached the GPS to his vehicle when it was in Maryland, which was not authorized by the warrant. So when it came up the government stipulated they had no warrant. So it was a warrantless act on the part of the police by attaching this GPS to track the defendant's movements in order to see if they could implicate him and place him with the drugs and the dealing of the drugs.

They left the GPS on the car for 28 days, and during that time they found several instances—a few instances anyway—in which he drove to the house where his accused confederate was making the transactions and dealing drugs. The evidence against him consisted of the GPS evidence of his locations and the testimony of the person who operated in the house saying that Jones indeed was part of the scheme and that he came there to supervise, or what have you. So it was quite clear that without the GPS evidence this would have been a close case, and this was not harmless error to introduce this evidence, if error at all. The appellant made two arguments, two completely independent arguments. One said this was a search of his vehicle, the other is that it was a seizure of his vehicle.

Now, the Seventh Circuit had decided in a case through Judge Posner that attaching a GPS to a car was not a seizure of the vehicle because it didn't interfere materially with the owner's use of the vehicle, and they had authority for that standard of material interference from a Supreme Court case. The Ninth Circuit had decided the matter with Judge Kleinman writing separately, and I believe he was saying it was a seizure, but the majority said not. So we were faced with two possibilities: if we thought it was a seizure we would be creating a circuit split; if we thought it was a search we would not be, there was no contrary authority, but there was the Supreme Court's *Knotts* opinion to which we referred.

And so we looked at search first to see whether we could decide the matter on that basis. Had our resolution been that there was no search we would then have had to deal with the seizure matter. So we took up search first. And by "we" I really do mean the three judges on the panel, Judge Tatel, and myself, and who was the third?

DANIEL MARCUS: I have the case. Judge Griffith.

JUDGE GINSBURG: And Judge Griffith, right, exactly. So the way in which we addressed the search question was to look at the Supreme Court's cases on not just

Knotts but other cases involving intrusions with the same privacy interests at stake where they were upheld for a variety of reasons, such as searching a trash bag in front of someone's home put out for collection was held not a search because the person had abandoned the property. And there's a series of cases, each one with its own particular spin on this. *Knotts* was clearly the closest case in point. And we looked at state law as well. Because several state supreme courts had decided this issue and there was a conflict among the states.

DANIEL MARCUS: On the GPS issue?

JUDGE GINSBURG: On the GPS issue, as to whether it was a search. California had enacted a statute defining it as a search. Now, we got into all of that because the Supreme Court's meta-standard is, ask whether the defendant had a reasonable expectation of privacy. So does he have a reasonable expectation of privacy in the garbage that's been put out by the curb, or in his backyard, or field, where that's observed from an airplane? All of these involved that standard that had been set out by the Supreme Court in the *Katz* case in I think 1968. *Katz* was itself a departure from the historical common law tradition in which a physical trespass was required for a search—or at least for a search that was unreasonable without a warrant under the Fourth Amendment. And *Katz* said, well, this man's talking in a phone booth, he has a reasonable expectation of privacy. It turns out the phone was bugged, because he was under surveillance, and the court overturned that conviction. So there were now from *Katz* forward two lines of cases, the physical intrusion cases, which go back to medieval England and right up to the present day well after *Katz*, and the *Katz* line of cases, somewhat parallel, in which the argument is that the search, although not a trespass, involved an intrusion on someone's reasonable expectation of privacy.

The *Katz* standard is circular: Whether one has a reasonable expectation of privacy more or less depends on prior case law, and to say in any given case, "he didn't have a reasonable expectation of privacy," even though that had never been so held before, is something of an *ipse dixit*. So in order to answer the question, did Jones have a reasonable expectation of privacy, we looked at, as I say, case law from everywhere and treated this as a common law evolution, if you will, bounded by the *Knotts* decision of the Supreme Court. And some of the privacy cases were quite illuminating. The case of the photographer who followed Mrs. Onassis around everywhere ended in her getting an injunction in the New York courts because of the intrusion on her privacy. There was no physical trespass on her property.

In this instance the expectation of privacy that was implicated was the privacy that one enjoys about your own movements--where you go, who

you see, what you do. In *Knotts* the Supreme Court had said, well, they've put this container—or the defendant put the container himself in his truck, drove it from somewhere in Minnesota to a rural location in Wisconsin, and until he turned off the road in Wisconsin into a driveway he was on a public thoroughfare and had no expectation of privacy. The police could follow him, they could see him, there was nothing special about there being a beeper except that it made their job somewhat easier to do. But if the police followed someone, as they did with Jones for 28 days, they're learning not just whether he is going to some place to commit a crime or do something nefarious that might enhance suspicion that he is involved in criminal activity; they are basically recording his every movement, by vehicle anyway, for a month. As we recited in the opinion, that potentially reveals a great deal of information about an individual unrelated to any potential criminality. Whether they go to a psychiatrist, or Alcoholics Anonymous meetings, or gay bars, or abortion clinics, or what have you, it's all there, and that's a very substantial intrusion on privacy, much more so than was at stake in *Knotts*, even if it all takes place on the public way.

But a person, after *Knotts*, could not have a reasonable expectation when they're making a trip from one place to another place on the public highway for the purpose of committing a crime. They might still and would still have a reasonable expectation of privacy that their movements for a month, 99-plus percent of which have nothing to do with criminal conduct, would remain private, if and only because it would have been until this moment in history utterly impossible for a police department to surveil someone 24 hours a day for 28 days. There are instances in history where it's happened, involving more espionage than ordinary crime, but it would be extraordinary and no one could have expected that they were subject to this.

Okay, so the panel was not just unanimous but all of us were in strong agreement that this was an impermissible search, unreasonable under the *Katz* standard. To have looked at the common law—trespass standard, it also would have been very difficult to distinguish from seizure, but they're not mutually exclusive, they both apply everywhere. And if we had said that the attachment of the GPS constituted a seizure—which was unconvincing I'm afraid, and also would have been in tension with the Seventh Circuit's case.

DANIEL MARCUS: And had the case been argued mainly on the reasonable expectation of privacy standard? Do you remember?

JUDGE GINSBURG: Well, both were briefed. So I don't know about the oral argument, but both were briefed.

DANIEL MARCUS: You were not tempted by the trespass standard.

JUDGE GINSBURG: Well, I'm sorry, I'm not sure that the trespass standard of search was argued. Seizure was argued. And search was argued, but I think perhaps only in *Katz* terms, I'm not positive.

DANIEL MARCUS: And certainly the Supreme Court, while both standards are still alive, has been using the reasonable-expectation-of-privacy standard to a large extent in its decisions since *Katz*.

JUDGE GINSBURG: Right. So I should say that in writing the case I was at great pains to make it comprehensive and persuasive. And this opinion went through more drafts than anything I've ever done on or off the court, 32 drafts. Not only that, but in the course of writing drafts, there were two memoranda to the panel which were very extensive, and probably each went through ten drafts. So we had about 52 drafts of paperwork in there. One of the passages that is probably the most quoted was actually contributed by Judge Tatel, and I thought it perfectly captured what we wanted in that section. It was about the things that are revealed by 28 days of surveillance, which I mentioned a moment ago, and I gratefully inserted it in the opinion.

DANIEL MARCUS: And as I recall it was paralleled in Justice Alito's opinion concurring opinion in the Supreme Court—

JUDGE GINSBURG: Yes, that's right. That's right.

DANIEL MARCUS: —which must have been inspired by your opinion.

JUDGE GINSBURG: Well yes, it clearly was. So the case went to the Supreme Court, and as you know was decided 9-zip. But in an opinion written by Scalia, for five justices saying this was an easy case, because there was a physical trespass on the man's property—so I guess it would be trespass on the case—and that's right at the historical heart of the Fourth Amendment. That made for a much narrower decision.

DANIEL MARCUS: And much narrower decision, but in one sense went further than your opinion would because it would mean that attaching the GPS even for one trip would have been a search requiring a warrant.

JUDGE GINSBURG: That's right, that's right. And it avoided therefore the line drawing associated with the long trip, a point on which Orin Kerr from GW took the court to task in, I don't know, a blog post or an article or something. So yes, it had the virtue of avoiding that line drawing, and of simple application, the hallmark of Justice Scalia's jurisprudence.

The four led by Justice Alito who wrote separately tracked our opinion quite closely, not in terms of words but analytically, and were I think express in saying that this required a broader resolution than just the trespass-type point that Scalia was making. The Supreme Court itself in a

case involving an employee's use—I think a police department employee's use—of the employer's computer being monitored by the employer, through Justice Kennedy I believe, had upheld the employer's position—it must have been a civil case—but cautioned the courts that in this new era, with the intersection of the Fourth Amendment and contemporary digital technology, we should go cautiously and narrowly. And so the opinion for the five in *Jones* really in one sense doesn't do that because it applies across the board. But that's fine.

DANIEL MARCUS: Were you influenced by the fact that, while this was a trespass, it wasn't much of a trespass, just putting this little thing in—

JUDGE GINSBURG: As I say, I think on the search point that it was the *Katz* argument that was made. And I would say that as a trespass it's a technical trespass. I would not have predicted that the Supreme Court would have said that, because I think—I would have expected if they were going to go the trespass route that they would have borrowed from their seizure case and said there was no material interference with the owner's use of his property, as had Judge Posner in the Seventh Circuit.

DANIEL MARCUS: What did you make of Justice Sotomayor's concurring opinion? She joined Justice Scalia's opinion for the majority, but she wrote separately. I couldn't tell whether she was really torn between the two opinions and almost joined Justice Alito or not. Did you have a reaction to her opinion?

JUDGE GINSBURG: She seemed to be sympathetic to Justice Alito's position and to be almost just thinking out loud, but saying that we're going to be facing these problems and we have to deal with them.

DANIEL MARCUS: Yes. I think that's why she wrote separately. But I agree with you that she seemed to be—she certainly agreed with Justice Alito.

JUDGE GINSBURG: Yes, right. But insofar as she was saying that this is something we're going to have to continue to deal with, prescience was not long in being vindicated. After the Supreme Court's decision— I should say by way of background, before the case came to us Jones and Maynard had been tried and got a hung jury. So the case that came to us was from a retrial. And after the Supreme Court's decision the department—or maybe it was the U.S. Attorney here—announced that they would try Jones a third time without using the GPS evidence and would introduce instead cell phone location evidence. Which would mean that this case could be the vehicle yet again for a very difficult and pathbreaking question about technology and the Fourth Amendment.

DANIEL MARCUS: Well, and he was tried again and convicted.

JUDGE GINSBURG: So it's on its way here.

DANIEL MARCUS: So it's on its way. But I don't know—I assume they used the cell phone evidence.

JUDGE GINSBURG: I don't see how they could have convicted him otherwise really.

DANIEL MARCUS: Well, they had the testimony of that—

JUDGE GINSBURG: That's all they had.

DANIEL MARCUS: That's all they had. And I assume that the defense—

JUDGE GINSBURG: No money, no drugs—

DANIEL MARCUS: Yes, yes.

JUDGE GINSBURG: —just this one accomplice witness.

DANIEL MARCUS: It'll be interesting to see when that case comes up here and to the Supreme Court again.

JUDGE GINSBURG: Well, if it comes up here, as I presume it will, the appellants will no doubt argue that it's a related case and seek the same panel.

DANIEL MARCUS: Yeah. That's a dangerous thing after this case in New York involving the stop and frisk policy.

JUDGE GINSBURG: Yes, but the panel didn't invite this, I assure you. Unlike the district judge in New York.

DANIEL MARCUS: So this is a case where you really did have it—this case was essentially a case of first impression on the issue of the use of a GPS in this fashion, and if Justice Alito had gotten one more vote you would have had a Supreme Court decision adopting your reasoning.

JUDGE GINSBURG: Well, that may come.

DANIEL MARCUS: It was still pretty satisfying, I suppose.

JUDGE GINSBURG: Yes. And actually there was an article by someone on the University of Chicago faculty saying that the case was a model of common law reasoning. And that was nice to read.

DANIEL MARCUS: That was nice. And it'll be interesting to see whether Justice Scalia's—this property-oriented trespass view of the Fourth Amendment. I realize he wasn't excluding the *Katz* view also. But whether that becomes sort of revived more in the Supreme Court in Fourth Amendment jurisprudence.

JUDGE GINSBURG: Well, I think, not on the contrary, but differently, that it will be of no use in the oncoming technology cases.

DANIEL MARCUS: Because they don't involve a trespass.

JUDGE GINSBURG: Exactly. The cell phone locator evidence is not a trespass. And now these GPSs are being installed in new vehicles by the manufacturer.

DANIEL MARCUS: Right. So it's more like the container case, yeah.

JUDGE GINSBURG: Or the pen register case, *Smith v. Maryland*. The issue is before the court now in the NSA case—

DANIEL MARCUS: It's the NSA case in the district court.

JUDGE GINSBURG: The NSA case that was before Judge Leon.

DANIEL MARCUS: Before Judge Leon. And there's one in the Southern District also that was just decided.

JUDGE GINSBURG: Yes, the other way. And they were key—both opinions were key to whether *Smith v. Maryland* was controlling, and that's an expectation-of-privacy case.

DANIEL MARCUS: Yes, and that is an expectation-of-privacy case. And when it gets to the Supreme Court the interesting question will be, (a) whether it can be distinguished, but (b) whether the Supreme Court given all this new technology and the concerns about privacy will overrule *Smith v. Maryland*.

JUDGE GINSBURG: They're in a difficult position, I think, because the implications of anything that the Court decides remain necessarily unclear as the technology changes so quickly. So they're prudent to decide things narrowly, and it does mean that the lower courts and the parties are deprived of more guidance than they might otherwise get. But it's an extremely perilous area for the Court.

DANIEL MARCUS: One more question, or a couple of questions on *Maynard*/*Jones*. We skipped over what happened. In retrospect the government probably wishes they hadn't sought *certiorari* in this case.

JUDGE GINSBURG: I should think so.

DANIEL MARCUS: And they may have been encouraged by the fact that when they petitioned for rehearing *en banc* they almost got it. They got four votes for rehearing *en banc*, and they got two dissenting opinions from the denial of the rehearing *en banc*, which I discovered last night. I didn't know that.

JUDGE GINSBURG: But I think they needed six votes.

DANIEL MARCUS: No, there were nine—it was five to four.

JUDGE GINSBURG: There weren't ten judges?

DANIEL MARCUS: No, I don't think so.

JUDGE GINSBURG: No, okay.

DANIEL MARCUS: But in any event they got four votes, and Judge Sentelle wrote a dissent on the reasonable-expectation-of-privacy point and basically said *Knotts* was improperly distinguished. And Judge Kavanaugh wrote a sort of ambivalent dissent saying he wanted to rehear it *en banc* to get into this more, and it was such an important issue and he wasn't sure about it. But he raised the trespass issue as one that he thought ought to be briefed to the whole court and expressed some of the same kinds of things that Justice Scalia ended up saying. But the fact they got four votes may have encouraged them. To me, I was a little surprised in retrospect that they went to the Supreme Court, because this decision of yours doesn't hamstring them, they can go get a warrant. It's not such a problem to get a warrant on a showing of probable cause to think—they could have gotten a warrant in this case.

JUDGE GINSBURG: No, they had a warrant.

DANIEL MARCUS: They had a warrant.

JUDGE GINSBURG: They just didn't handle it properly.

DANIEL MARCUS: They didn't get it extended, yeah.

JUDGE GINSBURG: Wrong jurisdiction, wrong timing. Well, I of course don't know what their thinking was, but I do know from a former clerk who was an AUSA in New York Eastern that his office adopted a policy from the time this decision issued and maybe before of getting a warrant whenever they wanted to use a GPS because they didn't know how this was going to be resolved. I would think U.S. attorneys around the country probably had somewhat diverse, as usual, policies, so that may be why the department wanted it—

DANIEL MARCUS: I guess there were enough people in the U.S. attorneys' offices who thought this was important.

JUDGE GINSBURG: They must have said to Main Justice that they couldn't get a warrant in some of these cases.

DANIEL MARCUS: And perhaps the Solicitor General thought this was—looking down the road with all the new technology, that they ought to try to get the Supreme Court to say there was no—

JUDGE GINSBURG: Well, if the U.S. attorneys around the country, or enough of them, were saying that the warrant requirement was not just a minor annoyance but

they would be in fact unable to get a warrant in many of the cases where they use GPS—

DANIEL MARCUS: Since they didn't have probable cause.

JUDGE GINSBURG: Exactly. —that would suggest to me that there was a need for the Supreme Court to resolve it as it did.

DANIEL MARCUS: Yes, it certainly would. Okay, let me turn to one other interesting case from a long time ago in your long judicial career. It was certainly a case that got a lot of attention at the time, along with its companion case in the Iran-Contra affair. A number of government officials getting prosecuted, and among them were Oliver North, who had been a star witness at the Congressional hearings on Iran-Contra, and Admiral Poindexter, who had also testified before—I guess he was the National Security Advisor.

JUDGE GINSBURG: I think so.

DANIEL MARCUS: I believe, yes, and had testified before the committee. And they had gotten use immunity from the committee, and the government nonetheless tried to prosecute them and avoid the taint of the immunized testimony. And in both cases district judges conducted the kind of hearing required by the Supreme Court and found that the—I guess that neither the grand jury testimony nor the prospective trial testimony was tainted by the immunized Congressional testimony. And in both cases this court reversed the district judges. I think the *North* case was decided first.

JUDGE GINSBURG: Yes it was. Through Judge Silberman, I believe.

DANIEL MARCUS: Judge Silberman, with a dissent by Judge Wald. And then you wrote the opinion in the *Poindexter* case with a dissent by Judge Mikva. I have one question about the case itself, the decision. Judge Mikva's dissent basically—the central point of his dissent as I understood it was, "Gee whiz, the *North* decision by this court, which I didn't like very much…"—he wasn't on the panel on it—"…but I accept it. But the *North* decision by this court sort of tightened the requirements for what district judges have to do in addressing this issue. And it was decided after Judge Greene in the *Poindexter* case had tried the case and conducted the *Kastigar* hearing. And so what you should have done, Judge Ginsburg, and the majority in this case, instead of reversing the conviction, you should have remanded the case to Judge Greene to do it over, to do the *Kastigar* hearing over again with the gloss of the *North* decision by this court." So my question to you was—and you probably explained in the opinion why you're not doing this and I just don't remember what you said about it—but why wasn't that a logical way to deal with the inadequacy of the district court's treatment of the issue?

JUDGE GINSBURG: The last sentence is: "The case is remanded to the district court for such further proceedings on the indictment as the IC may pursue." But we had already said—that's after saying: "The independent counsel has failed to show that Poindexter's immunized testimony was not used against him at trial." So we reversed on all counts, and then went on to talk briefly about the counts that were also reversed on unconstitutional application. I think that's the corruptly...

DANIEL MARCUS: The corruptly issue, which he dissented on also.

JUDGE GINSBURG: Well, my recollection of the case is more than hazy, not as good as hazy, it's 23 years ago. But I do know that the independent counsel, Mr. Walsh, wrote a book after his service as independent counsel, and he basically said that he didn't have any quarrel with the court's failure to remand the case, the *Poindexter* case, because—well, first of all, the initial outcome was utterly foreshadowed and indeed controlled by *North*, that the use immunity was being transgressed. But he said in his book he hadn't made a record because he didn't have the benefit of the *North* decision and so there was no way he could have saved the case in *Poindexter* anyway.

DANIEL MARCUS: Oh, I see. I see the point. That in other words they had—because they didn't have the benefit of *North*, this court's *North* decision when they did the Poindexter case they stepped over the line too much, the *North* line too much.

JUDGE GINSBURG: That's exactly right.

DANIEL MARCUS: And you must have concluded the same thing.

JUDGE GINSBURG: Yes, we didn't see any reason to remand—there was no possibility.

DANIEL MARCUS: You looked at record and said, "Hey, it's tainted." The trial was tainted.

JUDGE GINSBURG: I don't recall whether they said, "Even if it's tainted…" in their brief, "…we should have an opportunity on remand," but in his memoirs he fully accepted that that would have been futile. And he also says in the memoirs that he tried to get the Department to seek cert, but I don't know if they ever did.

DANIEL MARCUS: I don't think so. I tried to check that last night Googling it and I found no evidence of it.

JUDGE GINSBURG: Well, I think it would have been noted here in the *West Reporter*, and it's not indicated.

DANIEL MARCUS: No, I don't think they sought *cert*.

JUDGE GINSBURG: So on the important question, which was the *Kastigar*—or the use immunity question, the case was hopeless. No need for a remand, no hope of cert.

DANIEL MARCUS: So the key decision of this court if there was any real controversy on this was the *North* decision, not your decision in the *Poindexter* case.

JUDGE GINSBURG: That's right. Now, I was on that panel.

DANIEL MARCUS: On the *North* panel?

JUDGE GINSBURG: I think so.

DANIEL MARCUS: I don't think so. I looked at the case. Were you on the panel?

JUDGE GINSBURG: Well, maybe it was another one of the *Watergate* cases, because I know—

DANIEL MARCUS: You mean the Iran-Contra cases.

JUDGE GINSBURG: I mean Iran-Contra cases, sorry. [laughter] In my earlier life I was involved in the *Watergate* cases as a law clerk. The reason I mistook that is that one time, in whatever case it was, we came off the bench, and I think it was Judge Silberman said something to me about Oliver North's appearance, physical appearance. And I said, "How do you know? I mean, what are you talking about?" And he said, "Well, didn't you see him in the courtroom? He was in the first row on the aisle seat." And I said, "No." I hadn't. I was so focused on the lawyers I had never noticed. [laughter] And he was in a dress uniform.

DANIEL MARCUS: Maybe he came to the *Poindexter* hearing.

JUDGE GINSBURG: Well, that's possible. Maybe that was it. No, Silberman wasn't on that Sentelle and Mikva.

DANIEL MARCUS: No, I mean maybe North came to the *Poindexter* hearing. But Silberman wouldn't have seen him, yeah. [laughter]

JUDGE GINSBURG: Or maybe it was Sentelle who said it, but that did happen in one of these cases.

DANIEL MARCUS: That is interesting. Well, my other question about these two cases, because there were strong dissents in both cases, and because particularly Oliver North became a sort of central public figure in this Iran-Contra controversy--he was a dazzling witness, and his lawyer made his famous potted plant—

JUDGE GINSBURG: Brendan Sullivan.

DANIEL MARCUS: —remark and became famous for that. And the Congressional hearings weren't handled very well. And, you know, it was just another reminder of why the Justice Department goes crazy when they have these Congressional hearings that are going to interfere with their prosecutions. But the whole Iran-Contra controversy was a very partisan—it became a very partisan political fight, and for a while looked like it was going to be a major political problem for President Reagan and the Reagan administration. It was for a while. And my question to you is whether the political battle raging across the street outside in Washington, in Congress, in the press and the public, sort of had an influence do you think on the court's— I don't mean a direct influence—

JUDGE GINSBURG: No, I understand.

DANIEL MARCUS: —but whether it created an atmosphere in the court that made things delicate and tense. There's my question.

JUDGE GINSBURG: Well, the alignment of the outcome—or the voting in these cases, *North*, *Poindexter*, and there may have been another one, looked as if it was partisan, because the people appointed by a Republican president and people appointed by a Democrat president divided consistently on whether these convictions should be overturned. But your question was whether the external atmosphere and controversies and so on could account for that or contributed to that. And I think the point of commonality here is more at the origin of the cases than at the other end of the telescope, the resolution of the cases. And that was also the subject of great controversy, but more among lawyers and officials, and that is the legitimacy of the independent counsel apparatus at large, and, more narrowly, the conduct of the independent counsel in this case. And as you may know, I think it was after this when our court decided *Morrison v. Olson* and held the independent counsel statute was unconstitutional. Was that before?

DANIEL MARCUS: I think it was before, yes.

JUDGE GINSBURG: Before? Okay. And through Judge Silberman—

DANIEL MARCUS: And then surprisingly got reversed by the Supreme Court.

JUDGE GINSBURG: Yes, yes. It seems that Justice Rehnquist led the court in the diplomatic direction. But I thought that Silberman's opinion here and the dissent in the Supreme Court, which I think was by Scalia—

DANIEL MARCUS: Yes.

JUDGE GINSBURG: —was utterly incontrovertible, and this was an excrescence on our constitutional system.

DANIEL MARCUS: And President Clinton agrees with you.

JUDGE GINSBURG: President Clinton agrees. So I think what happened, it's not that there's a bias of pre-judgment against the independent counsel, or this particular independent counsel, but rather that what went on in these cases, *North* and *Poindexter*, with regard to the immunity was sort of—it seemed blatant to us. I don't know how frankly it was smoothed over by those who disagree, by Judge Wald or—I don't remember how Judge Mikva dealt with it. But—

DANIEL MARCUS: Judge Mikva basically said, "Why don't we give Judge Greene another chance."

JUDGE GINSBURG: Oh, okay.

DANIEL MARCUS: Yeah. Judge Wald went to the trouble, amazingly, of reading the grand jury transcripts, and analyzing and concluding there wasn't any taint. I mean, she really went to a lot of trouble.

JUDGE GINSBURG: Well, we had to do that in the *Blackwater* case more recently. Well anyway, I think it's that these cases presented themselves, and were presented by able counsel, as the independent counsel overreaching in a very dramatic way. So it seems to me that in view of the, I think, clear justification for the judgments, it seems to me that it's Judge Mikva and Judge Wald who need more explanation of why they were trying to save these extremely ill-considered prosecutions.

DANIEL MARCUS: Did they seem to you—when they showed the problems with the independent counsel statute and institution, did they seem to you like prosecutions—I know you were head of the Antitrust Division of Justice, not the Criminal Division—but did they seem to you to be the kind of cases that the Justice Department Criminal Division, the Public Integrity section, would never have brought given the problem of the immunized testimony?

JUDGE GINSBURG: At the time I would have said absolutely. Absolutely. The independent counsel statute provided that the independent counsel was subject to and governed by the published policies of the Department. But they aren't so fine grained that you could say that one case—this case can't be brought. But I have no doubt that Public Integrity would not have brought this case. And I say that at the time for the following reason. When it came to light many years later in the case of Senator—I can't remember the last name.

DANIEL MARCUS: Stevens?

JUDGE GINSBURG: Stevens. When it first came to light in Judge Sullivan's courtroom that the Department had withheld *Brady* evidence and more, I saw this on the news hour on public television, and I turned to my wife and I said, "Gee, I thought Public Integrity was handling that case." It was inconceivable to me that that could have happened.

DANIEL MARCUS: Yeah. That's right. And Public Integrity was handling that case.

JUDGE GINSBURG: Yes! Yes!

DANIEL MARCUS: But in their partial defense—only partial defense—it had originated in the district court in Alaska, in the U.S. Attorney's office in Alaska, and they had done a lot of the work and they had a lot of the stuff. In other words, a lot of the discovery had been done there I think.

JUDGE GINSBURG: And not forwarded to Main Justice?

DANIEL MARCUS: Well, I don't know.

JUDGE GINSBURG: That'd be surprising. Considering the discipline that was taken against the lawyers who appeared in court.

DANIEL MARCUS: That's true in—

JUDGE GINSBURG: I think Judge Sullivan thought they had pretty dirty hands.

DANIEL MARCUS: He got pretty mad. And actually the Justice Department, it took them—I mean, it did get—the new attorney Eric Holder shortly after he became Attorney General did eventually do the right thing and asked the district court to dismiss the—I mean, it was unfortunately after the conviction but—

JUDGE GINSBURG: Right.

DANIEL MARCUS: Yeah.

JUDGE GINSBURG: And Stevens even so lost by only 5000 votes. He clearly would have died a senator.

DANIEL MARCUS: Yes.

JUDGE GINSBURG: Or maybe not died, he wouldn't have been in that plane if he were still a senator at the time.

DANIEL MARCUS: Well, no, he would have been in the plane because he was killed before the election. No, it was right after the election.

JUDGE GINSBURG: No, no. No, no. He lost the election by 5000 votes.

DANIEL MARCUS: Oh, that's correct. And then he was—

JUDGE GINSBURG: And then very shortly thereafter was killed in this plane trip.

DANIEL MARCUS: Yes, that's correct.

JUDGE GINSBURG: So anyway, that reminded me of a really— Oh yes. The *Brady* problem is really I think significant, probably severe, to this day. There was a study

done of criminal cases in the courts of appeals, and I believe it said 12% involved significant *Brady* issues.

DANIEL MARCUS: Wow.

JUDGE GINSBURG: The defendants didn't win them all, but those are the ones that came to light in time to be argued. It's very difficult I guess to get prosecutors to abide by *Brady*. And it seems to me that the only sensible policy is an open file policy, where the defense counsel has the right to go through the prosecution's file, with the exception—and the prosecutor has to take the initiative to make an exception before the court—where it would compromise an informant or endanger a witness or other person. That's done in Israel, it's done in some states and even in many U.S. Attorneys' offices, and in some U.S. attorneys' offices it's up to the individual lawyer. A former prosecutor from Virginia Eastern told me he always did that.

DANIEL MARCUS: Really? That's interesting. Okay, well, I think this is the end of this interview.