Justice Ruth Bader Ginsburg

September 3, 1997

Dr. Maeva Marcus,
interviewer

Q: At the end of the interview last year, we were discussing your colleagues on the Court of Appeals. By my count, you served with twenty-two other judges while you were there. Would you care to comment on any of them? I know that we talked about Judge McGowan the last time around, and you had a few comments about the others, but you said you would think about interesting stories over this year, if you can think of any.

Justice Ginsburg: I spoke about Skelly Wright and about Ed Tamm, they were the closest friends on the Court in the years I was there. I don't recall any particular stories. I just had a letter from Malcolm Wilkey, who was my next-door neighbor at the D.C. Circuit for some years.

I think I commented that the biggest surprise for people who were not close to the Court would be that friendships did not divide on party lines, that the Republican appointees were not particularly close, and some of the Democrat appointees were not particularly close.

Q: That's interesting, because I had a couple of questions that I wanted to ask you about politics, which is that you do hear--I've always heard, since I've been in Washington--about the

political factions on the Court of Appeals. I remembered you telling me last time that friendships didn't divide along political lines, but was there a division, were there factions in terms of voting blocks, I guess, in terms of working relationships, rather than friendships? Are the stories that we always used to hear about the Court, the D.C. Circuit, true?

Justice Ginsburg: More so perhaps in my later years there than the early years. Skelly Wright, for example, was known as a great liberal judge, and yet if you looked only at his decisions in the criminal law area, you would come to a quite different conclusion. Perhaps that reflects his background as a U.S. Attorney when he was a relatively young man.

Q: Do you find that these kinds of factions, as they developed over the years that you were there, created a lot of conflict on the Court or not?

Justice Ginsburg: No. Think of the period when Bob Bork and Nino Scalia were on the D.C. Circuit together. One notable opinion, it was the Evans and Novak case, a suit for libel brought by Bertil Ollman --

Q: I remember, from Maryland.

Justice Ginsburg: Yes. He was proposed to be the head of the--was it the history department or the political science department?

Q: Yes.

Justice Ginsburg: Political science department. They wrote a column about him, and he said it was defamatory. Bob Bork wrote a concurring opinion in favor of Evans and Novak that is the most pro-press opinion anyone could have written. Scalia was on the other side; he said that there was liability for libel in the days when the Constitution was new, and so there is today. And Bork said, yes, there were libel judgments in those days, but not of the size, not of the damage potential of today's judgments. So the First Amendment value, to be sufficiently protected, needs to be kept in tune with our times and not the times of two centuries ago. It's just a gem of an opinion. I joined it; no one else did. But one would not expect that to be Bob Bork's position when there was such a clear position for the "conservative" on the other side.

Q: I think that's a very, very interesting point. When you talk about these other judges, can you categorize any of them by sort of styles of judging, whether they're loners or that they always disagree or they try to negotiate an opinion for the Court? Are there particular styles that these people have?

Justice Ginsburg: There wasn't much negotiation and not too much exchange about the content of an opinion. There were notable exceptions. It was always a pleasure to be on a panel with Carl McGowan, because he was willing to talk for a long time about the case, to give you comments on an opinion draft if you asked. But in the D.C. Circuit more than in this Court, people tended to prefer their own opinions and did not want too much in the way of comment from other people.

Q: I didn't know that. I have a couple of questions--

Justice Ginsburg: In fact, I will tell you one story.

Q: Okay.

Justice Ginsburg: There was an opinion circulated by Ed Tamm's chambers. It was a time when he had been ill, it wasn't a very good opinion. I rewrote it. He was furious! He said, "No one appointed you to be my editor."

I was distressed that I had upset him. I wrote him a note, then went to talk to him and said, "I read this opinion, I knew it wasn't you. I knew you had been ill. It looked to me like a typical law clerk's product. So I regarded myself as doing what I know you would have done with that draft if you were well."

He didn't say anything. Then a few days later, he came to my chambers and just shook my hand. That was his way of saying he forgave me.

Q: That was nice. That's good. When you got to the D.C. Circuit, did you feel that new judges were treated differently from more senior judges?

Justice Ginsburg: Four new judges came on very close in time, (Wald, Mikva, Edwards, Ginsburg) and I didn't have the sense we were treated differently. As I said last time, Judge Bazelon was elated with the four newcomers. He regarded us, in a way, as his grandchildren. But there was no apprenticeship and no endeavor to give us the lightest assignments.

Q: Are there jobs for a junior judge on the D.C. Circuit, the way there is a job here with for the junior justice?

Justice Ginsburg: No. The only special thing about being junior is where you sat. The newest judge sat to the left of the presiding judge, and the other judge sat to the right.

Q: When you had a conference, was there any pecking order in terms of speaking?

Justice Ginsburg: Only when we had an *en banc* case, and then we would go around in seniority order. But the panel, the three-judge panel, was a much less formal arrangement. The presiding judge sometimes spoke first, sometimes the newest judge, sometimes the one in between. There was really no formula for those conferences.

Q: Are there any unwritten rules that you have to follow in order go be respected and considered a team player on the D.C. Circuit?

Justice Ginsburg: There really wasn't a team. Getting your work done promptly was helpful. But the D.C. Circuit, in the 1980s, tended to be slower than some of the other circuits. It did not have the kind of esprit that existed in the Second Circuit, where there was not too much time between argument and decision.

The D.C. Circuit's hardest working judge took the longest to get out opinions, and that was Spottswood Robinson, who was a perfectionist. He would keep opinions not for months, but for years in some instances. We created a rule--we called it the September Rule--to deal with that, and it was, if September comes and you have three or more decisions assigned to you six or more months ago, then you cannot sit until you become current. The idea was that there would be peer pressure to work faster. The only judge to whom that rule was ever applied was Spottswood Robinson, and the way he works the rule, just wasn't effective.

This was a man who literally worked around the clock. There were nights when he never left his chambers. But he was meticulous and he couldn't let an opinion go until he felt that it was perfect.

Q: So in his case you didn't adhere to the rule? He was permitted to sit during the year, even if his opinions were--

Justice Ginsburg: No, we instituted the rule for him, and we invoked it on a couple of occasions.

Q: But it didn't spur him on to getting the opinions out?

Justice Ginsburg: No, it's just the way he was. I think he had been that way as a lawyer and he was that way as a judge. His opinions are treasure troves because he would cite every opinion in point. He had enormous string citations. His style and mine were quite different, because I tried to pick out the best case to illustrate the point, and not supply a treatise. So opinion-writing styles were quite varied on the D.C. Circuit, and there was no interchange among the law clerks the way there is here, as a result of the *cert* pool at this Court. The law clerks tended to work only in and for a particular judge's chambers.

Q: Do you think--I have a whole bunch of questions about law clerks, but do you think that the *cert* pool tends to make these law clerks approach things more uniformly in all of their tasks?

Justice Ginsburg: I think it tends to make them more careful, because they know that what they are doing will be looked at by their peers in other chambers, by justices in other chambers. The law clerks get to know each other through that *cert* pool, in addition to their happy hours on Thursday afternoon.

Q: And there wasn't at all that kind of happy hour at the Court of Appeals?

Justice Ginsburg: No.

Q: Nothing at all?

Justice Ginsburg: The clerks who had some sense of togetherness were the ones who worked for the chief staff counsel. They were originally called court law clerks and now they're called staff attorneys, or at least when I left they were called staff attorneys. They dealt originally with all the motions. Then later they also dealt with the cases that could be disposed of summarily.

Over the years on the D.C. Circuit, that operation became larger and larger. More cases were decided without argument. My

early years there, almost any case, with the exception of a prisoner's petition, could be argued orally if the lawyers so chose, as they invariably did. But later, even the D.C. Circuit had to restrict the argument calendar and have a procedure for weeding out the clear cases where there was plainly one right answer.

Q: Did it take you a long time to feel comfortable as an appellate judge?

Justice Ginsburg: Less time than I thought. The only area I had real concern about, as I mentioned last time, was administrative law and the blockbuster cases the D.C. Circuit has. But in the other cases, I had no large adjustment because, as I said before, law teaching and appellate judging are so much alike, the exercise of preparing, picking out your position, stating it in writing.

Q: The fact that you now were going to have an effect on real people, you weren't just teaching a law class, did that make you think in a different way?

Justice Ginsburg: It encouraged me to be as clear as I could be, but in judging, as in everything else, it's your judgment compared to what? And I could look at my colleagues and say, with no false modesty, I think my judgment is at least as sound

as theirs. It's a job that needs doing, and I am as well equipped to do it as most people in that job.

Q: So you really did settle in very quickly.

Justice Ginsburg: Yes.

Q: Was it different working under different chief judges?

Justice Ginsburg: Yes. We were all concerned when Spotts (Spottswood Robinson) became chief, and we encouraged him to take half a load during that time. He didn't restrict the panels on which he sat. He was a less effective chief than, say, Pat Wald, who was a wonderful chief. She's super efficient, very diligent, so things really got done and done right in the years she was the chief. It was great to have Carl McGowan as our chief, but it lasted for such a short time.

Q: What kinds of things do the chief judges do that affect you in your work?

Justice Ginsburg: The chief judge is mostly an administrator. The chief has no more power than the other judges, but is responsible for making sure that the clerk's office is running efficiently, that the chief staff counsel's operation is running

as it should, that all the things that facilitate the judges' work are done properly.

One of Pat's major projects when she was chief was to improve the quality of the cafeteria, so people would feel they were in a pleasant place and not in a dungeon. The art collection, posters that she and her husband selected, brightened it up. The quality in the food, while not great, was better than it had been before. So it's all the amenities. It's seeing that the facilities are there for the judges to concentrate on the job of judging, and that personnel problems are nipped in the bud. That's what the chief judge did primarily. But there was no more assigning power than any presiding judge, except for the *en banc* procedure, and the chief--if the chief is in the majority--would make the assignment. Many more things are chief matters here (at the Supreme Court) than on the circuit court.

Q: What do you think is the most important task of an appellate judge?

Justice Ginsburg: That's a hard question to answer, because it's really a process. It's having an appreciation of what a judge is in a legal system, not a legislator and not an academic, but someone who is a major participant in the sound evolution and development of the law, in making the rules both reactive to the people whose problems are governed and clear enough to be comprehensible to others who have to work with those rules. It's

a process of coming to a sound decision and then explaining it in a way that will be best understood and implemented in future cases.

Q: On the D.C. Circuit, are civil and criminal cases handled differently?

Justice Ginsburg: No, not in my early years. The D.C. Circuit had relatively few criminal cases. I think well under 20 percent of the cases were criminal appeals. And the reason was that the U.S. Attorney for that circuit is also the chief prosecutor for the local courts, so many crimes could be indicted under either the D.C. Code and tried in the Superior Court or the U.S. Code and brought to the District Court.

The garden-variety cases, criminal cases, tended to be brought in the Superior Court. Sometime around my middle years on the D.C. Circuit, that changed for two reasons. One is the "get tough on drugs" notion so cases that would have been local cases became federal cases. The other is the federal sentencing guidelines under which sentences became harsher in the federal court than in the D.C. Superior Court.

The prosecutor used the difference in the penalties as a bargaining chip with the defendant to say, "This is what we propose as a plea bargain in the case we have pending against you in D.C. Superior Court. Now, if you don't like it, there is the possibility that we can reindict you in the U.S. District Court,

where, under the sentencing guidelines, you will end up with a much more severe sentence." That kind of power in the hands of the U.S. Attorney was peculiar to the District of Columbia because there's no other place where the state prosecutor and the U.S. Attorney are one and the same person.

As a result of the "get tough on drugs" notion and the federal sentencing guidelines, the D.C. Circuit began to get more and more criminal cases. It was much harder on the District Court than it was on the Court of Appeals. The District Court judges began to see one-at-a-time, single-defendant cases, drug courier cases, the same pattern again and again. Someone was picked up at Union Station or the bus terminal, found with X amount of crack. It was disillusioning for trial judges. They thought they were there to preside over important federal cases, and instead they're feeling like police court judges.

The Court of Appeals could handle those cases by putting them on a fast track, by disposing of them without oral argument, so even though the numbers of criminal cases went up in the circuit, the drain on the appellate judges' time didn't begin to compare with the toll on the district judges.

Q: You bring up the point about oral arguments. You mentioned before, too, that the staff attorneys can decide certain cases that will be disposed of without any argument where they thought there was clearly a right answer; they didn't think it worthy of oral argument. But is there any other procedure for deciding

which case will have oral argument and for how long? Is there a set time?

Justice Ginsburg: Yes, there is a procedure, and I may not remember it in all its detail. I should clarify that the staff counsel made proposals, and what they would do in these easy cases is they'd present to us the packet of the briefs, along with a proposed disposition. I don't think I ever approved a proposed disposition without reading the underlying papers, and very often, even though I agreed with the bottom line, I changed the way the memorandum was written.

The screening judge--every three-judge panel has a screening judge--sends around a screening memo for the cases that will be argued, and recommends that this case have fifteen minutes for oral argument, that case, twenty minutes. The standard time was fifteen minutes. If the case were a bit more complicated, maybe twenty. If it was an easy case, ten. We never had, as the Second Circuit sometimes does, five minutes. The allotted time went from ten minutes to twenty minutes, except for these off-the-chart complex cases, for which we sometimes reserved the whole morning or whole afternoon for oral argument.

Those time limits weren't rigid, because in the D.C. Circuit, if any judge were interested in a question, in pursuing the inquiry further, that judge would be indulged. Not as at the Supreme Court where, when the red light goes on, that's it, whether it's the Justice speaking or the lawyer. But in the D.C.

Circuit, a case could be marked for, say, ten minutes and end up taking a half hour a side.

Q: Something you said brings up my whole next series of questions, which is, how are the panels in your court made up, and what exactly are their tasks? You sort of alluded to it in the sense that do you get a set number of cases which that particular panel then decides on how that case will be treated? I mean, you don't get a set number of cases that are going to be argued orally; it's the panel's decision to say yes or no, how long, how short.

Justice Ginsburg: Yes. Concerning the cases that were not going to be argued, in my early years on the D.C. Circuit, everything would come to the panel, and the panel would decide. The screening judge would make the recommendation. Later, as the numbers went up and as the criminal appeals increased, the staff counsel weeded out, before they would ever go to a panel, the cases that would be disposed of without oral argument, always subject to a check by the panel sitting in motions. Those easy cases were then taken off the regular track and referred to the motions panel. We were assigned to motions panels for a month at a time. We would have regular sittings also during that month, so motions were not an exclusive diet. You had the same responsibility for panel service during the month you were in

motions. I have no idea how the D.C. Circuit is operating these days.

The screener on the panel made the time allotment for the cases placed on the argument calendar. How were those calendars put together? It was all done in the clerk's office, and it was done in such a way that it was not possible for any judge to pick a case or any lawyers to pick a judge. The calendars were filled many months in advance, then the panels were assigned, but it was done in a way that no judge could select the case or an area for that judge's sitting.

Q: Is it the panel alone that decides whether a case receives the full opinion-writing treatment or is issued *per curium* or any of the other forms that judgments are disseminated?

Justice Ginsburg: Yes. The D.C. Circuit panel conferred immediately after oral argument. So if we sat for a morning, we could go to conference without even a break for lunch. We discussed the cases; we discussed which ones need opinions, which ones could be disposed of without opinions; whether by a judgment order, sometimes with a one or two sentence explanation, or by a judgment supplemented by a one- to five-page memorandum explaining the decision. Those dispositions without full opinion were for the benefit of the parties, they were not treated as precedent.

Q: Do you think that too many cases are resolved by order? Or maybe too few, I don't know. [Chuckles]

Justice Ginsburg: In an ideal world, you would have a full statement of reasons in every case, but then we would have a backlog, and there's no question which is more important. The court has got to stay current, because you can have the most beautiful opinion in the world, if it's twelve years late, it doesn't mean anything; the world has gone on. So the court has to decide cases in a reasonable amount of time. Of course, there are so many more cases as Congress creates new federal crimes or civil claims for relief, it's necessary to have this fast track.

I think that the discipline of writing out one's reasons is tremendously important. Sometimes the expression is used "It won't write." There are opinions that you think, after the oral argument, will write, and it turns out when you dig in a little deeper, that the preliminary judgment was wrong and the case may even turn around 180 degrees. More than minor adjustments will be made.

So, unless Congress takes seriously what many federal judges have urged, that federal jurisdiction ought to be cut back--not on political grounds as in the days when there were proposals not to let the federal courts hear anything about school prayer, busing, abortion--but cases that could be handled well in the state system, that don't require, in addition, a federal forum.

There is no reason for the tremendous drug business Congress has given to the federal courts. These are cases that for years were handled by states only. But one of the things Congress does when people get upset about car theft, for example, is to create a federal crime. It looks good, it looks like the legislators are tough on crime, and it doesn't cost any money. It just throws more cases into the system. The result is that in our lower federal courts, more and more things are being done by people other than the judges. It is, I think, an unhealthy situation.

Now, this Court (the Supreme Court) is immune from all that, because we have almost total control of our cases and we make sure that we don't have too many decisions to write. But the lower courts don't have that luxury, and they can receive aid from only one source, from Congress, to take out some of the cases that don't need to be federal cases.

Q: This is jumping ahead a little bit in my questions, but I had it here. Did you ever advise Congress on substantive issues like jurisdiction?

Justice Ginsburg: The only time I did, I testified on the bill to create an intercircuit panel that was supposed to relieve this Court (the Supreme Court) of an excessive burden by deciding some of the cases on which the circuits were divided. I testified against that because it was, first of all, looking to the one

court that didn't really need any help. If this Court has too many cases, it's a self-inflicted wound.

What Congress should have done--and did do--was to do away with most of this court's mandatory jurisdiction and turn almost everything into petitions for *certiorari*, that is, discretionary review. Once Congress did that in 1988, there was no longer any problem of excessive cases here. But what Congress continued to do to the lower courts was to create more federal crimes. I mentioned car theft. There are so many more, so many cases have been put into the federal court, so the legislators can go back to their constituents and say, "Look what we did. We've taken this bothersome thing and made it a federal crime."

Q: Do you think judges advising Congress is a proper thing to do?

Justice Ginsburg: It depends on what the advice is on. Technical questions like the structure of the federal court system, like what should the limits of federal court jurisdiction be, so that the federal courts will do the business they were created to do effectively, yes, I think that's a proper role for a judge. These are nonpolitical questions. They concern the court's processes, the load that the courts can successfully handle.

Procedural rules in the federal system come out under the aegis of the U.S. Judicial Conference, and then Congress can

reject or uphold them, but Congress doesn't generate those rules. The courts make their own rules of procedure. And something else that courts can do.

Congress turns out many more statutes today than it once did and they are often dense. Circuits may interpret them differently. That was the problem Chief Justice Burger had in mind when he proposed an intercircuit panel to deal with circuit splits. Much more sensible, it seems to me, is a mechanism that gets these splits before Congress, before the committee in whose domain the law falls, so that the committee can see how the courts are divided. Court A said, "Congress meant X," and Court B said, "Congress meant Y." The committee can then say, "Now we see what the problem is in implementing this law that we passed, and it's our responsibility to say which is the proper reading." Is the First Circuit right, say, or the Tenth Circuit? Instead of having these conflicts resolved by the U.S. Supreme Court, Congress ought to adjust the laws when the circuits are divided.

There are politically hot questions on which Congress deliberately passes the buck, issues on which Congress is deliberately vague. But I have seen a great number of cases where Congress has just been a little careless, where it would be easy to make the law clear. So my recommendation, instead of an intercircuit panel, was that Congress ought to pay attention to these circuit splits, not just to decisions of the Supreme Court. The judges can help create that kind of mechanism. In fact, they have. Judge Coffin, on the First Circuit, was instrumental

in Bob Katzmann's project at Brookings, to try to get Congress to focus on these dense, ambiguous laws.

Q: I think this is a good place to stop and turn the tape over.

[Begin Tape 1, Side 2]

Q: Before we got off talking about Congress, we were talking about panels in the D.C. Circuit. I want to know if the panel also decides on publication. Is that a panel's prerogative to say whether an opinion will be published or not?

Justice Ginsburg: Yes. Nowadays, published or not published is meaningless, because everything is published. Everything was always public. The court doesn't issue any judgments that aren't public. But in the days before computers, "public" meant it was in the court's file, and you had to come down to the court to see it. Now everything is on Lexis and Westlaw instantly. So everything is published. It may not be in the *Federal Reporters*, but it's published someplace. It's available to readers without coming down to the clerk's office and checking the file.

The difference is that opinions not put in the official *Reporters* ▒ not put in *Federal Third* ▒ may not be cited as precedent. For some reason the Courts of Appeals, at least the D.C. Circuit, was very attached to its no-citation rule. A decision not printed in the official *Reporter* doesn't count as

precedent and lawyers can't cite to the court a so-called unpublished disposition.

Now, I never saw any merit in that no-citation rule. It seems to me that a lawyer should be able to cite anything a court decides. The panel will know, if this is a decision that a prior panel has chosen not to publish in the *Federal Reporter*, that the prior panel thought the decision created no new law, no elaboration on prior law, that it's just an explanation to the parties of clear and certain law. So it's similar to the situation you may have in a trial before a judge. You won't have the rigid evidence rules application that you will have if you're trying a case to a jury. The judge may say, "Well, I'll take it for whatever it's worth." And that's how I would regard a so-called unpublished disposition. You can take it for what it's worth. What it's worth is affected by the prior panel's judgment that the panel was not doing anything at all new or different.

Q: Do you make that decision before the case is argued or after the opinion is written? At what point?

Justice Ginsburg: The decision for the cases that are screened out for decision without oral argument will be made initially by the staff counsel operation, always subject to review by the judge. Then, when a case is put down for oral argument, it's going to be on the regular calendar. The panel will make the decision about the character of the disposition at the conference

immediately after the oral argument. So for the cases that are screened out from oral argument in the beginning, those cases will not be decided by a so-called published opinion. But the cases that are argued before the panel, some of them will be decided by a published opinion, some will be decided by simple judgment or judgment and accompanying memorandum. That decision is made by the panel of three judges immediately after the oral argument.

Q: When you receive your panel assignment, what do you do first? You get a list of cases. In your chambers, how do you treat this list of cases? How do you prepare?

Justice Ginsburg: We're talking about the D.C. Circuit?

Q: The D.C. Circuit, yes.

Justice Ginsburg: They would bring in huge carts all the briefs for the sitting, and the records, and they weren't neat and tidy, the way they are here at the Supreme Court. I would do the easy cases. When we prepare for a sitting, the law clerks start with the heavies, and I take the lights, and we meet in between. For the heavy cases, the law clerks prepared a bench memorandum, not to tell me how I should decide the case, but to give me a road map that will help me speed-read the papers I must read. So in all of the heavy administrative law cases, I had a law clerk's

bench memorandum as my guide. But for the easier cases, I would read them and then I might have a question or two that I wanted the law clerk to run down. And we would meet somewhere in the middle of the sitting.

The law clerks, I let them divide up the heavy cases among themselves so if one got hit harder than another, they had only themselves to blame and not me. So I didn't assign the cases to the law clerks; they did it for themselves. In the cases that had a lot of *amici* brief, I did there just what I do here, I asked the law clerks to make piles: "read," "skim," and "skip."

The first thing I always read before any law clerk's bench memo was the decision I was reviewing, whether the district court's decision or agency decision, I always started with that before I read any brief, before I read any law clerk memorandum.

Q: What do you hope for in a brief?

Justice Ginsburg: Something that's honest and clear, that doesn't slant things so that you know you can't trust anything it says, a brief that cites a case so that when you go to check will say, "Yes, this supports that statement." That's what I hope for. I hope for a brief that could be used as a basis for an opinion. It is very rare that you get such a brief, because most lawyers adopt a fiercely adversarial mode, they don't think of writing something less partisan.

The most important thing is that the brief be honest, especially in a court like the D.C. Circuit, where you get repeat players. That court is really a United States court. A large number of the cases involve the United States or an officer of the United States on one side or the other, so we tended to get the same lawyers from the agencies, and from the U.S. Attorney's office. And there are specialized for those agency cases--the communications bar, for example.

So we've got the same lawyers coming back to the court, and a lawyer will have a reputation. When a lawyer submits a brief with citations that don't fit, the judge will remember that. The judge will remember the frustration of recognizing, "This doesn't hold what the lawyer told me it held." The judge may then resolve, "I'm not going to trust anything else this lawyer presents to me." So the most important thing in a brief is that it be honest.

Q: Did you notice any difference between government briefs and private attorneys' briefs?

Justice Ginsburg: Yes. Most of the government briefs were at least good. We had a number of very good U.S. Attorneys in the years I was on the D.C. Circuit. I remember how impressed I was with Chuck Ruff when he was the U.S. Attorney. He set a very high standard, a standard to be followed by the people who worked on his staff. I remember how impressed I was with the

truthworthiness of the briefs that came out of the U.S. Attorney's office in that period.

Q: What about the Justice Department?

Justice Ginsburg: For the most part, they were good. There was sometimes an overuse of procedural hurdles. Some government briefs I thought pulled out every preliminary threshold objection one could make, reasonable or unreasonable. In the old days when there was still an amount-in-controversy requirement for federal question cases, they would trot that one out routinely. A good U.S. Attorney will raise the important questions. If there's a real standing question, the good government attorney will raise it, but will drop those issues that just clutter up the brief and will annoy a busy judge.

Q: What about oral argument? What do you expect from the attorneys who appear before you, government or private?

Justice Ginsburg: Again, trustworthiness and then willingness to engage in a conversation with the court, appreciation that the oral argument session is a conversation and not an occasion for a lecture. It's a very concentrated episode. We rely principally on the writings. But oral argument is the moment when the lawyer can give a case his or her best shot, face the decision-maker in the eye and try to dispose the court in that side's favor.

There's no point in trying to douse the court with all the law on the issue. You don't have time to do that. You have to keep it simple, keep it clear and simple, and present it in such a way that the court will want to decide in your favor, and will go back to chambers to make sure that it can. But the best one can do at oral argument is to lead the court say, "If the law checks out, I think that side has the better case."

Q: Do you remember any particular case while you were on the D.C. Circuit, where a lawyer changed your opinion, how you thought you might decide the case?

Justice Ginsburg: I remember a couple of cases, but it was rare. It was, most of the time, nuances. You would adjust your views based on what you heard in the argument, but it was rare the party you anticipated would be a loser turned into a winner.

One such case in the D.C. Circuit involved a search of a house. The picture presented at oral argument was so clear and persuasive. The brief wasn't very good, the brief of the complainant. The case was one in which the police had a warrant, but went to the wrong house. The street had row houses; they all looked alike. The house number was hanging upside down. The police broke into the place at night. They woke people up, and were abusive. The question was whether they had probable cause to believe that they were in the right house. It was only the clarifications that came out of oral argument that made it clear

that they lacked the requisite cause, that it was extremely sloppy police work.

Q: When oral argument is over, you say you immediately go into conference on the cases of that day.

Justice Ginsburg: Yes.

Q: Do you ever confer with your fellow judges before the oral argument?

Justice Ginsburg: It was not done. I tried on a few occasions. One of the reasons it wasn't done, many people are not prepared, fully prepared, until the evening before or maybe even the morning set for the argument. They're still reading briefs, they're still checking cases. So it was not considered the thing to do, to try to engage the panel before. It was also thought that this is a collegial process with three judges, so there should not be any conversation between two judges. It's a panel decision and all of the discussion should go on among the three, without any anticipatory discussion.

The D.C. Circuit also never had the practice that the Second Circuit did, of circulating a memo expressing your tentative views before the panel met. Gerry Gunther, in his book on Learned Hand, makes very good use of those memoranda, and Hand's memoranda sparkle in comparison to some of the preliminary views

of his colleagues. But the D.C. Circuit didn't put anything in writing before the panel met, it was another mind-set. The idea was, if you put something down in writing, you might be wedded to it in a way you would not be if you stated it in conversation that wasn't recorded. The assumption was that you would be more receptive to your colleagues' views if there was no written advance indication of your position.

Q: Once you got into the conference, I assume it was the senior judge--

Justice Ginsburg: Formally, yes, but because we were only three, it worked out by consensus. We sat together for a week. At the end of the week, the presider would check whether there was an even division, a more or less even division of writing responsibility. If one person ended up too heavy, that person might pass a case on to someone else. So although in form the presiding judge did the assigning, more often it was kind of a consensus, who would write what.

Q: Did you discuss the case before you took a vote, or didn't you really take a vote? Did you sort of go through--

Justice Ginsburg: Yes, we discussed the case, and as a result of the discussion there was no need for a formal--

Q: For a vote.

Justice Ginsburg: And the discussion was longer with some panelists than it was with others. If I were sitting with Ed Tamm and Roger Robb [phonetic], we would be out in fifteen minutes. If I was sitting with Carl McGowan, say, and--who else? Harry Edwards. We could go on. Well, I remember once with Carl and Harry, we sat a whole afternoon just talking about one case. So there was a tremendous variation from one panel to the other, how much discussion went on. In some panels, hardly any. In others, more extensive.

Q: When you came to a view of sort of how each person would vote, how at that moment did you decide who would do the opinion?

Justice Ginsburg: A tentative assignment would be made or someone might say, "I'll write that one," and the others would say, "Okay, you write it." There was no formality to it. But what I always did on the D.C. Circuit, as I do here, is I came back after a conference and put down on paper what my colleagues said they thought about the case, because sometimes what appears on your desk months later doesn't conform to what was said at the conference. So it's always good to have that record made when the discussion is fresh in your mind.

Q: Did you try to persuade your colleagues in the conference?

Justice Ginsburg: Oh, yes. Yes, especially in cases where I thought it was important to the sound development of the law. There are cases that the D.C. Circuit got, even cases that this Court takes, where what you need is an answer, a clear answer, and it really doesn't matter too much whether the plaintiff wins or the defendant wins, but you have to have a clear rule and then everybody adjusts to it and life goes on. But there are other cases where there is, in my judgment, a right answer, and in those cases I certainly try to influence my colleagues.

Q: Did you have the feeling that a unanimous opinion of a three-judge court was a much stronger opinion than someone dissenting? Was that an active search to get people to agree?

Justice Ginsburg: I don't think there was an attempt to get someone who had a firm position to suppress it. I've seen more of that here. Someone may circulate either a dissenting opinion or a separately concurring opinion that never sees the light of day because the opinion author is willing to accommodate that different position. A number of written-out opinions here are eventually dropped. That didn't really go on in the D.C. Circuit. If you wrote out an opinion, you were going to use it. You were not going to suppress it. So maybe because there were more cases, maybe it's a question of an esprit that the court

builds does or doesn't build up, but the dissenters were not inclined to let go, as I remember.

Q: Did a large percentage of cases have dissents?

Justice Ginsburg: No, I don't think so. Remember that so much of an appellate court's work, when review is a matter of right, really is not controversial. Consider, for example, cases where the appellant complains that there was insufficient evidence to support the trial court's judgment. On such questions we defer heavily to the district court. I think that the affirmance rate was much higher than reversal rate. That's the difference between a court that hears appeals as a matter of right--where there will be many cases that are simply affirmed--and this Court that generally takes cases only when there's a division of opinion among other courts about what the law is. So there was a great deal of unanimity because there were many cases where there was no genuine dispute about how it should come out.

Q: Were there any particular kinds of cases that you disliked being assigned?

Justice Ginsburg: I was so pleased when the Federal Circuit was created and took away all the patent appeals. Those were tough cases if you had no background in the technology. I didn't particularly love some of the three-cornered agency cases, the

attacks on rulemakings where you had the agency in the middle, the environmentalists on one side, the industry on the other side. Some of those had fascinating issues in them, questions of standing, for example, but the lawyers could have used more in the way of pre-appeal conference. I remember one of those heavy cases. It concerned the regulation of surface mining and had 122 issues. The lawyers involved could have gotten together and said, "We shouldn't burden the court with this one or that one."

That's, again, a difference, a large difference. In this Court we grant review on one or two issues. In the D.C. Circuit, the lawyers were free to bring up whatever they wished to bring up. Sometimes a good issue could get lost under the weight of issues that had no merit.

But I thought that the D.C. Circuit's case load was fascinating. As I said, it is a court for the government's business, and there was such a variety in the agencies that we were reviewing. You asked about counsel, but the decision-making before it came to the D.C. Circuit, the quality of the decision-making within the agencies, I found varied enormously. Some of them were terrific and others were very bad. I won't tell you which ones, but--

Q: You should. This is history. Come on!

Justice Ginsburg: When we got a case from a certain agency, I knew that I would have no help at all from the decision made in

that agency because they had very poor staff work. It was unlike the district judges. There was some variety among them, too, but not as much as in agency decision-making.

Q: Is the procedure different when you hear a case *en banc*?

Justice Ginsburg: It's different. First, to have an *en banc*, you had to have the majority of the active judges vote to hear the case that way, and then the chief judge will preside. You go around the table in seniority order. There's not much of an opportunity for cross-conversation. And they tended to be cases where the court was divided on more or less political lines, so they were not my favorites.

Q: Is opinion-writing much more difficult when you have an *en banc* case?

Justice Ginsburg: If you have a majority--I'm trying to think of the first case I wrote *en banc* for the D.C. Circuit. It was a search and seizure case. It wasn't as hard as some of the opinions I wrote for a three-judge panel. I had a good solid majority. It was my first year on the D.C. Circuit. The Supreme Court reversed the decision, but Justice Stewart did employ some of my reasoning.

Q: I was going to ask if it's hard to write an *en banc* opinion in the D.C. Circuit or a majority opinion here.

Justice Ginsburg: If it's a close case, if the Court divides five to four, then it's a real challenge to hold all five, especially if one is shaky. On the other hand, if you've got eight or seven, it's less challenging.

Q: Do you remember especially any *en banc* cases, not necessarily that you wrote the opinion for, but some that were particularly contentious in the time that you spent on the court?

Justice Ginsburg: The Evans and Novak case was one. It concerned an academic who claimed he had been defamed because Evans and Novak wrote, "What is Bertil Ollman? In his profession he's considered an activist, pure and simple," or something to that effect. These were the words: "He has no status in his profession. He's a pure and simple activist." Some of us who had been teachers said, "Well, what else is new? People not uncommonly say that kind of thing." Others reacted, "That's the worst insult you can hurl at an academic, he has no status in his profession." I found that amusing. Some of my colleagues viewed it as a highly contentious case.

The Tavoulareas libel case was another one. That was interesting because, among other features, Edward Bennett Williams argued the case and he argued it, from the point of view

of the bench, very poorly. He gave us no help at all. But on reflection, I came to see that he was not speaking to us. He could count, and he knew he had a majority to reverse the judgment of the District Court, so he was playing to the people behind him, Kay Graham and all the people from the *Washington Post*. That's what he was doing and he did it very successfully, thought he gave the court very little help in writing the opinion. I wrote a small separate opinion on a matter of procedure in that case.

The first case in which I wrote for an *en banc* court involved a defendant known as Bandit. The police had stopped his car and found, in the trunk, a leather purse. They thought it was leather; it was in fact naugahyde. Next to the purse was a paper bag. The pouch had money in it and the paper bag had crack or heroin. The panel had decided that the police needed a warrant to open the leather pouch, or the supposed leather pouch, but needed no warrant to open the paper bag. They were free to take off the tape and uncover whatever contraband it contained.

I said what the court appeared to be doing in these cases was to draw a luggage line. That is, if it was a nice green suitcase, green leather suitcase, a warrant would be required to open it. But what about a burlap bag? I brought to the conference the variety of containers I had at home, including jewelry pouches, bookbags, laundry bags, plastic bags thick and thin. I spread them out on the conference table and asked, "Are we going to expect police officers to make these fine judgments"

endeavoring to follow what I called "the worthier container rule"? "The one thing we cannot do," I urged, "is to tell the police you can open the paper bag without a warrant, but not the pouch. It's got to be, 'Police, if you find it in the trunk, you either can open it or you can't open it without a warrant.'"

In the D.C. Circuit, we decided that if you had to get a warrant for one item, you had to get it for all. The Supreme Court agreed that courts couldn't draw a luggage line, but the Justices decided that the trunk is fair game, whatever is in it. Both courts agreed to this extent, that the police officer on the spot should not be called on to make the judgment, is this a worthy or unworthy container. They've got to have rules they can live by. And our rule was, get a warrant. Once the vehicle--you've apprehended the defendant, he's not going to get away, the vehicle's not going to get away, you can keep the vehicle under your control, go to a magistrate and get a warrant before you open what's in it. That was our rule. The Supreme Court said, "If you have probable cause to stop the car, you can examine its contents." So we disagreed on the bottom line, but we did agree on the intermediate step: are we going to have some kind of a worthy container rule or should the police have a clear rule and be told either you can do this or you can't do it.

Q: Was your method unique? [Laughter]

Justice Ginsburg: I really astonished everybody. Colleagues said, "You're bringing in evidence that's not in the record." I said, "This is an exercise in common sense. Think of the police officer on the spot. How will he judge--this is a genuine leather suitcase. This one is plastic." And I had thin garbage bags and heavy garbage bags, and put them all out on the long conference table.

Q: This is really interesting, because one of my questions was whether you think male and female judges approach the decision-making task differently.

Justice Ginsburg: Well, in that decision in the D.C. Circuit, when I listed the string of items that we're not going to ask the police to differentiate, there were items that occurred to me because I'm a woman, items you might not have found in the opinion if it had been written by a man whose life experiences were different.

Q: Can you think of any other examples?

Justice Ginsburg: Well, that one is a real standout. I'm sure there were others.

Q: You can think of it another time.

Justice Ginsburg: None that hops into my mind at the moment.

Q: Let's go on to opinion-writing. How did you organize that in your chambers?

Justice Ginsburg: In some cases, my own pre-conference notes were a bare bones kind of opinion, and all I had to do was flesh that out. In other cases, I didn't have anything workable, ready at the time the assignment was made. So I reread the opinion below and the briefs, then made an outline. Sometimes I would then ask the law clerk to work from the outline. Other times, I would say, "I will do this section, you do that section, and then we'll exchange." We did it in different ways, but almost always, unless it was the simplest case, I gave a law clerk an outline to work with so that that clerk wouldn't waste his or her time or my time with something I could not use.

Q: If law clerks do drafts--and I gather that they do, for the most part in most chambers now, whether the D.C. Circuit or here or whatever--do you think that this has had an effect on the quality of opinions?

Justice Ginsburg: Sometimes it's gone up.

Q: Think so? [Laughter]

Justice Ginsburg: I shouldn't say that. But I don't think there was a judge on the D.C. Circuit, and certainly there's no judge here, that doesn't make the opinion his or her own at the end. Some do more personal writing, do more of the first drafts themselves than the others, but every judge goes over the opinion with care. Some judges have a style that is unmistakable, a style that no law clerk, no matter how good, can copy without making it seem like a parody.

So the law clerks who work for this court, law clerks in the Courts of Appeals and District Courts, they're very bright. My experience has been that some of them cannot write a draft that's usable, at least not usable for me. Others pick up my style in such a way that it's almost frightening. [Laughter] But that talent you cannot predict. You can't predict it on the basis of their writing samples, what their professors say. Most often they're tremendously valuable to me for the research they do, but they really can't construct or compose an opinion the way I would write it. When I have clerks who can do that, it makes my life that much easier. In D.C. Circuit, we each had three law clerks. Some years I went without any clerk who could manage a usable draft. A couple of years I had two clerks whose work I could easily edit and adopt. I never had three out of three who could do that.

Q: How many cases, on average, did you consider on the D.C. Circuit each year, and how many opinions were you assigned, on average?

Justice Ginsburg: How many? I can't remember back, but many, many more than on this Court. Somewhere around twenty-five full opinions, not so-called unpublished opinions. Something like that a year on the D.C. Circuit. Here, last year I wrote nine majority opinions. So at least twice as many, probably more than twice as many. But the opinions here take more time. The questions are more important. And also--

Q: It's over. Stop.

[Begin Tape 2, Side 1]

Q: You were talking about the opinions.

Justice Ginsburg: Part of giving the federal courts too many cases, one effect is that judges simply can't put the effort into opinions that they once did. Also, when you look at the large number and bulk of published opinions, a judge may get the sense, "Look. Nobody's going to read this, so I don't have to be too fancy about it. I don't have to be elaborate in my reasoning."

Steve Breyer, when he was on the First Circuit, wrote an article, I think it was in the *Suffolk Law Review*, in which he

said, "Lawyers, law teachers, law students, they read Supreme Court opinions, but they don't read our opinions." It wasn't that way when I graduated from law school in 1959. In those days, I read the *Federal Supplement* and *Federal Second* advance sheets, sometimes only the head notes, but I went through them and called my judge's attention to any decision, not just a Second Circuit decision--we got the slip sheets for those--but decisions of Courts of Appeals across the country, occasionally a District Court, that I thought were notable, and might be useful to him. But no law clerk can do that now; there's just too many, too many decisions.

Judges on the lower courts are getting the sense, "Nobody's going to read what I write, so why bother making it as clear and as crisp as I can? It's good enough to let the law clerk do the draft, I'll fix it up to see there are no big slips, and then let it out."

Q: I know you told me you were reading the John Marshall biography.

Justice Ginsburg: Yes.

Q: Didn't it astonish you that they sat for a month or six weeks or two months at the most and they decided from twenty to sixty cases in that period?

Justice Ginsburg: Yes.

Q: With quite elaborate opinions.

Justice Ginsburg: What's even more astonishing is that Marshall wrote, in the beginning, almost all of them, except when he was recused. The mind of that man, to be able to operate the way he did.

Q: The one thing that he did that I don't think was mentioned in the biography, but something that you said, reminded me, is that he did take his opinions sometimes almost wholesale from the argument, the oral argument.

Justice Ginsburg: Yes.

Q: Went on for six days and if it was his point of view, he took the language, everything, from what the attorney said out loud, because they didn't always hand in briefs in those days.

Justice Ginsburg: Well, there's nothing wrong about that. I have seen too many Supreme Court decisions that rewrite a fine Court of Appeals decision. I've seen too many Court of Appeals decisions that ignore an excellent brief in favor of a law clerk's dense prose. Maybe that's a down side of having too many law clerks, that a judge, left to his or her own devices, without

someone's assistance, will have to rely on the briefs or spend the time writing the prevailing argument himself or herself. There seems to be a view, unfortunate in my judgment, that everything has to be rewritten. I don't think it should be.

I recall once saying to my colleagues on a D.C. Circuit panel, "The District Judge, Aubrey Robinson has written a gem of an opinion. Let's adopt it as our opinion." We disagree about some preliminary questions and produced two opinions on those points, but on the merits we simply reproduced Judge Robinson's opinion. By placing it in *Federal Second*, we gave it more precedential value than it had when reported only in *Federal Supplement*. I think Courts of Appeal don't adequately appreciate the value of a good District Court decision, and this Court could, I think, profitably take more from a good Court of Appeals decision or even a good brief than it does.

Q: When you were writing a dissent in the D.C. Circuit, was the process different for you?

Justice Ginsburg: Not for me, and it isn't here either, because I don't wait to get the majority opinion. It's training that I had as a lawyer when I wrote the brief for the respondent or the appellee. I wrote it first and affirmatively. If you wait to get the other side's presentation, whether it's the majority opinion or the appellant's brief, there is a strong urge to answer back, to be reactive, to say, "Not so. Not so," instead

of leading from strength, stating your case as you would if you were writing the majority opinion. I try to have a rough draft of a dissent in hand before I look at the majority opinion. Then I can make adjustments.

A habit I carried over from the D.C. Circuit is to answer the majority in footnotes. I didn't disturb my pre-written dissent too much. I didn't think it my job to show how badly reasoned the majority opinion was, or to nit-pick my colleagues' opinions. Yes, I could do a little of that, as I said, generally in footnotes, but the main thing was to set out my reasoning as though I were making the decision.

Q: Do you think the purpose of dissent is the same in both courts or perhaps different?

Justice Ginsburg: It's the same to this extent. If you were writing a dissent in the D.C. Circuit, you were trying to influence--in many cases you were trying to influence other circuits that hadn't yet decided the question. That was another reason. You wanted to have the kind of opinion some other court could pick up and say, "This, we think, should be the majority opinion."

On rare occasions here you can pick up a fifth vote with a dissent. If the Court is closely divided, you may end up with a majority instead of a dissent.

If it's a question of statutory interpretation, the dissent might be pitched to Congress saying, in effect, "Look. The Court thinks you meant this. I think you meant, or at least you should have meant, that. If you agree with me, amend the law accordingly."

If it's a constitutional question, well, then you really are appealing to a later Court. You hope that eventually, when times are different, your dissenting position will become the Court's position.

Because we have statutory cases to a much greater extent, dissenters may often see Congress as their primary audience.

Q: What kinds of sources do you use for your opinion? Is any kind of information off limits?

Justice Ginsburg: Oh, yes. I can't call, say, Gerry Gunther, and convey "I really want you to spend time talking out this issue with me." The most I can do is say to one of my academic colleagues, "What is the best article on this topic?" I try to do that in a way that does not reveal what I'm writing. But I have the entire law library as my disposal. I can read what a professor wrote in a law review article. I can't call that person on the phone, but I can read anything that's published.

If I get something that's unpublished, and we do sometimes get galleys or page proof from law professors, I can't use that unless it has been given to both sides in advance of briefing.

Here, there's no writing after the oral argument. On the D.C. Circuit, if you think something is really important, you can flag it and request supplemental briefs. Here that seldom happens. So the limitations are, I can't have conversations the way I did when I was an academic, when I tried out ideas with people in the field whose opinions I respect. And I can't make use of unpublished material, material that was not accessible to the lawyers who argued the case.

Q: Do you think that you and your fellow judges are influenced by law review articles?

Justice Ginsburg: It varies. It may depend on who wrote the article. Many former law clerks are now in academe and they're writing articles. Some times their commentary shows up in their justice's opinion. But the variety is enormous, running from excellent to dreadful.

Q: Do you discuss with your colleagues, or did you discuss with your colleagues on the Court of Appeals, law review articles, theories put forth by--

Justice Ginsburg: Rarely. It depended on the panel. I mean, I could with Harry (Edwards), with Carl (McGowan). I certainly didn't with George MacKinnon and Roger Robb, or Ed Tamm. There was less discussion than I thought there would be on the D.C.

Circuit. I had been told that here the justices operate in separate chambers and rarely talk to each other, everything's on paper. It's just not so. We converse about cases not only at conference but often at the lunch table. We eat together every sitting and conference day. That's a serious lack on the D.C. Circuit. There was no place for, and no tradition of, having lunch together. I think I mentioned that last time.

Q: It's also in the Marshall biography, the fact of their living together and having to eat together made all the difference in the way they worked together.

Justice Ginsburg: Yes.

Q: I guess it's still true, that that might indeed make a difference. You might not want to live with the fellows, but it could make a difference. How large a part does precedent play in your decision-making?

Justice Ginsburg: A very large part in statutory cases.
[Telephone rings. Tape recorder turned off.]

Q: We were talking about how large a part does precedent play in your decision-making process.

Justice Ginsburg: In statutory cases, it plays a large part. As Brandeis said, some things are better settled than settled right, and there's not necessarily a right or a wrong answer, but you need a rule. In constitutional cases, less. But more for Courts of Appeals. In that respect, that job was easier than this one, because you were bound by Supreme Court precedent, like it or not, and it wasn't your job to twist or turn away from it. You could say, "I think the Court ought to reexamine this," but you could not decline to follow it. Otherwise, you were not doing the job you were appointed to do.

Q: Did you follow--I guess you don't have to follow it, but did you try to follow other circuits' decisions on these points?

Justice Ginsburg: Yes, they had persuasive value. We had a conference early in my service on the D.C. Circuit to discuss avoiding circuit splits. One of the things we decided was whenever there was a split, whenever a panel of the D.C. Circuit was going to put itself in opposition to another circuit, we should flag the split. Every opinion, before it was released, was circulated to the entire court. So circuit splits rarely went unnoticed.

As the number of opinions mounted, judges tended not to read them through, but I at least skimmed every D.C. Circuit opinion pre-release. Occasionally, I put a hold on circulating opinions

in tension with opinions still in the works, or I'd notice that another circuit had come out another way.

We had agreed, as I just said, to flag a circuit split we were creating. That agreement sometimes fell apart in practice, not because judges decided they didn't like it in the ideal, but what is a split? This case can be distinguished from that, so there's not a square split. Should the question be flagged nonetheless?

Some of the circuits went further and said that the panel, before creating a circuit split, not only had to circulate to the full court. In addition, a majority of all active members had to agree affirmatively that the circuit's position was so right it should put itself in opposition to another circuit. So there was a respect for the decisions of other Courts of Appeals, but obviously not the kind of respect, there had to be for decisions of the Supreme Court.

Q: Knowing that--this is as a Court of Appeals judge. Knowing that the Supreme Court could reverse you, did that have an effect, first, on the way you decided a case, and also, second, on how you wrote the opinion?

Justice Ginsburg: If you knew that the case was likely to go to the Supreme Court, you did try to write it in such a way that it would hold up, but there were a couple of times I knew there was no chance my opinion would survive when it was reviewed here. I

still wrote it the way I did, and I don't regret any decision of mine on the D.C. Circuit--there were several--that were reversed by this Court.

Q: I know that you said you learned not to take it personally.

Justice Ginsburg: Yes.

Q: When you finish writing your opinion, do you circulate it only to your panel in the Court of Appeals?

Justice Ginsburg: Yes.

Q: And the other judges never have an opportunity to see it?

Justice Ginsburg: They do. They do. But that's after. After the panel is done, we had a rule that the opinion would circulate in the full court for a week before it was released, and you could blow the whistle and say, "I don't want this released." You could say, "I don't want this released because I want the panel to consider this or that." Or, "I think this is the rare case where we should sit initially *en banc*. Don't let this panel opinion out. Set the case for re-argument before the full court." It wasn't often that a case would be stopped by a judge outside the panel, but it did happen.

That's why I worry about circuits that get too large, because there's just no way that, say, in the Ninth Circuit, all of the judges can read all of the opinions that come out from all of the panels. Inevitably, there will be cases where an opinion about to come out is not consistent with a draft that's on another judge's table. In the D.C. Circuit, the one-week circulation pre-release worked. A judge could say, "I have a case that decides the identical issue," or a very closely related issue, "and let's see what we can do to avoid collision."

So, the initial approval is from the panel, and when that's done, it's ready to go, except for this waiting period when another judge can say, "I want it held up," for this, that, or the other reason.

Q: I think this is a good time to close this interview, and we can continue another time.

[End of interview]