Ruth Bader Ginsburg

Maeva Marcus,
interviewer
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Ginsburg: It's much more complicated than last time.

Marcus: I know. It's supposed to be a terrific digital set. And you know what? The Supreme Court Historical Society bought it for the use of the Federal Judicial Center when it was doing interviews of retired Supreme Court Justices, and there were only four interviews, I think, done, and that's the end of it. They're not doing it anymore. And I don't even think all four interviews are usable. So they took back their quarters. So we're beneficiaries of this state-of-the-art recording, and it is better, because I've listened to the tapes that we've done before, and you get most of it, but there are certain words that--at least, I listened to it in the car. I'm sure a person with earphones could hear it, but it's very hard to catch, and I've just listened to the test on this. It seemed very much better; you don't have to shout. So it's a good thing. And the tape goes; you don't have to turn it over, which is another advantage. It goes forth, you'll be pleased to hear, two hours. We don't have to go for two hours if you don't want to, but it does go for two hours.

When we ended last time, we were talking about your work on the D.C. Circuit in general, and we stopped not quite at the end.

So I have a few general questions, and then we're going to turn to the cases that you gave me. I was curious to know if you had a set routine as a judge and whether on the Court of Appeals it differed in any way from this Court.

Ginsburg: The basic routine of preparing for the oral arguments, listening to the arguments, going back and writing opinions, gearing up for the next set of sittings, that's very much the same. What's different is that this Court is constant in its composition. At the D.C. Circuit you sat with different people all the time.

What's also different, we pick the issues we want briefed and argued, where in the D.C. Circuit one of the major problems was to wade through all the junk to get at what was really at issue, genuinely at issue in the case.

Marcus: So would you say it was more work, total, do you think?

Ginsburg: No.

Marcus: No?

Ginsburg: This job is the most consuming one I've ever had, because everything matters. In a high percentage of the cases in the D.C. Circuit, affirmance was clear and there was no doubt that the panel would agree on it, and many of those cases came to

be decided eventually without even oral argument. But even in the argued cases, in many of them, there was a right answer.

Here, we generally don't take cases unless there's division of authority, so that the issues here tend to be constantly challenging, and there are few cases about which you can say, "Well, this one we will all agree on, it's a clear affirmance." The percentage of affirmances of the District Court was very high. I don't remember the precise percent, but probably somewhere between 70 and 80 percent of the cases coming to the D.C. Circuit from the District Court were affirmed.

Marcus: That is certainly interesting, in view of the cases that you've chosen.

Ginsburg: Well, of course I chose the cases where there was controversy.

Marcus: Yes, that's true. I just want to ask you a couple of last questions on your law clerks. Do you have any different criteria here from the ones you used to choose them on the D.C. Circuit?

Ginsburg: No. I continue to choose a candidate who is highly recommended to me by someone I trust, whose writing sample is one I think would work for me, a person with whom I have a certain chemistry. That means I would like having that person around my chambers for a year.

What's different is just this: At the Supreme Court, I don't take people directly out of law school. In selecting my current clerks I have the benefit of the judgment of a good judge, a district judge or court of appeals judge, and that person's judgment is usually reliable. So I have an additional check here that I didn't have on the D.C. Circuit, when I tended to take people straight out of law school.

Marcus: And I don't know if you'll be upset by this question but it always comes up.: Does political persuasion play any role in choosing law clerks?

Ginsburg: Speaking for myself, no, it doesn't. Maybe it does for some law clerks. Some law clerks in my D.C. Circuit days would apply only to the Carter four or only to the Reagan-Bush people. I think it's the same here. Most applicants will apply to all of us, but some will not apply to, say, the Clinton appointees, and will apply to the others. Some put Federalist Society on their resume as sort of a notice or warning. I tend to ignore that if someone applies to me and I'm told by a person whose judgment I trust that this clerk will do well for me. One of my favorite law clerks of all time, a Yale Law School graduate, had Federalist Society on his resume. As it turned out, he was at least as "liberal" as I was, but he probably thought the identification might work to his benefit in other

places. And he did come to me from Alex Kozinski, who might have been impressed by that membership.

Marcus: That's interesting. This is just a curious question because I always liked this when I read about Justice Brandeis and the advice he gave to his law clerks after they finished a year with him. Do you know about this?

Ginsburg: No.

Marcus: He told them to leave Washington, they should not work in Washington. So I was curious if you give your law clerks any advice.

Ginsburg: No, I could hardly repeat Brandeis' advice because I like this town so much. My daughter had said that if I had come to D.C. in my thirties instead of my forties, I might not have enjoyed it as much. The town is less bustling, less hectic, there's less going on than in New York. On the other hand, things are more accessible here. The pace of life is a little slower because it's a Southern city. The only frustration for me is driving. Having learned to drive in New York traffic, the notion that you stop when the light is yellow, instead of speeding ahead, is new. [Laughter]

Marcus: Well, you haven't been driving, I know, probably. This changed dramatically.

Ginsburg: I still drive myself back and forth to the Court every day.

Marcus: Do you?

Ginsburg: Yes. The police take me if I'm going to some function to give a speech or--and this is the biggest aid--to an airport.

Marcus: No, I was thinking Martin might drive you instead of you driving yourself at home.

Ginsburg: Only when he's in the car.

Marcus: But I will advise you, if you like that kind of driving, to go to Naples and Palermo, where I was this summer, where lights mean nothing.

Ginsburg: Yes, I know. Paris, too.

Marcus: Are you at all disturbed by the increasingly conservative outlook of the D.C. Circuit? I guess since you began it's changed quite a bit.

Ginsburg: It's hard to say "disturbed." We do get to review the D.C. Circuit's decisions. I'm not disturbed by outcomes as much as the tone of some of the opinions, the unnecessary nastiness in some of the opinions. The almost haughty tone is off-putting. But that style of writing is not a monopoly of any particular end of the political spectrum. On this court I would think the jazziest writers are Stevens and Scalia, and one would not put them on the same side of the political fence. But the tone of D.C. Circuit opinions can be disturbing. That certainly isn't true of all of that court's opinions, but in some cases, opinions have a tone that seems to me injudicious.

Marcus: Did you ever sit on other courts of appeal?

Ginsburg: No, I couldn't because by the time I was appointed, Chief Justice Burger had installed a borrower-lender rule. If your circuit was a borrower, that is, if you borrowed judges from other circuits, no judge of your court could leave to sit anyplace else except a senior judge.

Marcus: I didn't know that.

Ginsburg: Burger was determined to contain the extent to which judges were using federal money to fly from one place to another. His thought was that if a court needed to borrow judges from elsewhere, then that court couldn't afford to give up any of its judges to judge cases in another circuit. I considered it an

unfortunate policy, because I think we learn from what other circuits are doing, from their approaches to common problems. But in any event, I didn't have that opportunity, because judges in regular active service could not sit in another circuit during my years on the D.C. Circuit.

Marcus: So I take it that you enjoyed sitting on a panel with a judge who was visiting from another circuit. I saw Judge Palmieri [phonetic] sat with you.

Ginsburg: Yes, twice. And Judge Pollack from the Southern District. And even Judge Lumbard sat with us. I enjoyed the visitors and regret that I could not sit in other circuits.

Marcus: Have senior judges played an important role on the D.C. Circuit?

Ginsburg: Yes. As in most circuits, as the business increased, the circuit could not get along without the seniors. So the senior judges, now more than ever, are performing an invaluable service. They don't have to sit, they could draw their salary for life and do nothing, and yet most of them will give their time, will take two-thirds of a regular load, just to help the circuit stay current.

Marcus: So they have, indeed, played an important role on yours and every other circuit.

Ginsburg: Yes. And, as I said, now more than ever for two reasons. One, the increasing caseload, and the other is the slow pace of the appointment process. The circuit I serve as Circuit Justice, for example, the Second Circuit, a relatively small circuit, until just this summer, had five vacancies. Ralph Winter, the chief judge, was going hither and yon trying to persuade people to visit to fill out the panels, to persuade busy district judges to take a turn on the Court of Appeals. Now I think they've reduced the vacancies by one, but they still have four vacancies out of, what, a total of twelve or thirteen.

Marcus: That's a very difficult situation, I think. I was going to ask, before your own appointment to the Supreme Court, three of your colleagues on the D.C. Circuit were nominated: Scalia, Bork, and Thomas. Did these nominations affect the D.C. Circuit, the whole process, I mean, not just the fact that they--

Ginsburg: And one almost-nomination, Douglas Ginsburg.

Marcus: That's right. I forgot that one.

Ginsburg: Scalia was the first, then Bork, then right on the heels of that failed nomination, the almost-nomination of Douglas Ginsburg, and then Clarence Thomas. I think the court was proud that so many nominees were coming from the D.C. Circuit. It

confirmed the view of some people that next to this Court, the D.C. Circuit is the most important court in the land.

Marcus: But did it affect your work in any way?

Ginsburg: Only to this extent: when the justices [redacted] the two who achieved confirmation [redacted] left, some reassignments were necessary. That is, some opinions the elevated judges were assigned to write hadn't been produced by the time they took their seat on this Court. That put something of a burden on the remaining judges. We had to distribute among us the decisions that had not yet come down, the opinions originally assigned to the departing judges.

Marcus: Did you or any of your colleagues ever get involved in the confirmation process of one of the other judges?

Ginsburg: No, just to congratulate them, wish them well, and in the cases of Scalia and Thomas, there was a celebratory reception at the Courthouse when it was clear that the nomination would go through. A similarly reception was held for me.

Marcus: But nobody ever asked for your assessment of their performance on the court, an official asking on the point of someone in the Senate, for example?

Ginsburg: Asking me about--

Marcus: Or any other judge on the D.C. Circuit.

Ginsburg: No.

Marcus: It just was a hands-off policy?

Ginsburg: I think so.

Marcus: Because I'd never come across anything, but I wondered if they ever did that.

Ginsburg: No.

Marcus: From a comment you made, I'm not sure you agree with this, when you said that this confirmed in people's mind that the D.C. Circuit was the most important court next to the Supreme Court. Do you think that the D.C. Circuit is at least different from the other circuits?

Ginsburg: There's no doubt that it is. Just look at the character of the cases the D.C. Circuit handles. The D.C. Circuit is mainly the government's court. Something like 70 percent of the cases involve the U.S., an officer of the United States or a United States agency on one side or another. On the

other hand, the D.C. Circuit does not have a great many straight commercial, private law cases, as other circuits do. So it has a distinct caseload. That's why the D.C. Circuit is a circuit unto itself, even though its territorial base is a small city as opposed to, say, the Ninth Circuit, which has the vast Western part of the United States in its domain. The D.C. Circuit heard relatively few of the ordinary garden-variety tort, contract, property cases. Most of its cases were administrative law cases. Many cases came to the D.C. Circuit not from the District Court, but directly from an agency, review of an agency decision or an agency rulemaking. So it had a distinctive caseload and, for me, frankly, a more interesting one than the circuits with more commercial litigation.

Marcus: I heard a comment recently--I won't say from where--about the quality of agency lawyers as opposed to Department of Justice lawyers. Did you have any opinion about that while you served on the D.C. Circuit?

Ginsburg: It varied. Some agencies were better than others. Some were terrific. When a lawyer from such an agency came into court, you knew you would get a straight, complete view. Others, offered us less than the best lawyering. All agencies were not alike. The difference in the Department of Justice is they are at least good, where the agency, it very much depended on who was in charge at that particular agency and the quality of the

lawyers selected to work on the legal staff. "Uneven" is the right word to describe the agency performance.

Marcus: Do you think that Congress pays more attention to the D.C. Circuit?

Ginsburg: Probably, because it's right here, and the *Washington Post* covers the D.C. Circuit. So, yes, I think so, for that reason and another one, too. In the other circuits, judges are drawn from that geographical region. The D.C. Circuit (and since its creation in the 1980s, also the Federal Circuit) is the only one where the judges are drawn from a nationwide arena. So the individual senators have less to say about D.C. Circuit nominees than they do nominees from the various regional circuits.

Marcus: Did you, when you were on the Court of Appeals, have a relationship with people in the Executive Branch or Congress?

Ginsburg: I don't know that you would call it a relationship. I did testify, along with Pat Wald and Harry Edwards, when Chief Justice Burger proposed introducing another tier, an intercircuit conflict resolver. I testified against that proposal and said I did not think it healthy for the system to have yet another tier.

But allied to that is a project that's still ongoing, that Bob Katzmann, who taught at Georgetown, both at the college and

the law school, had under his wing. Much judicial business is caused by statutes that are unclear, that leave gaps. Congress sometimes inadvertently, sometimes knowingly, passes the buck to the judiciary, and then we are presented with hard questions of interpretation.

The idea Bob had, one I supported fully, was that there ought to be a mechanism to call statutory interpretation cases declared divergently by the circuits to the attention of the relevant committee of Congress. Without any editorial comment, the transmission would effectively say, "Here's a statute," it's vague, there's a gap, the court tried to fill it, another court made a different guess. Why don't you take a look at it and tell the judiciary what it means. Numerous controversies about statutory interpretation have little to do with grand philosophies; they entail the way Congress writes statutes, leaving much room for arguments lawyers make on legislative meaning.

Now, if every time one of those cases came up or even half the time, Congress would say, "We now understand where we were inadequate, and we will promptly amend the statute so the judges will know what the law we intended is." For the most part, Congress doesn't do that. People who complain about the activism of the courts often fail to comprehend that Congress provokes judicial activity by writing statutes that can mean six different things.

Marcus: Did you have any personal relationship, not a business relationship, with members of the Executive Branch or Congress? I've just been struck, as a historian, how rules have changed in terms of the kinds of things judges did in the 1790s. They were very close. Judges advised Presidents, they advised Congress, on an individual level anytime that the person felt like it or was asked. They felt no qualms about that kind of thing, and they socialized with these people, and that was fine. I take it it's somewhat different today.

Ginsburg: Yes. As far as advice is concerned, no one in the Executive Branch asks me to give advice on any issue. But social engagements, people who have been your friends, you don't give them up on becoming a judge. You just have to be very careful to remember, for example, which decisions came out, which ones are still in the works, so that you're not speaking of things still confidential.

Marcus: What about attorneys who appeared before you? Are there any in your memory who were very special, very good, bad?

Ginsburg: Yes, as I recall, some were very good and some were not so good in my D.C. Circuit days. For example, Sally Katzen and her husband Tim Dyk were stand-outs in the D.C. Circuit, both extraordinarily able lawyers. I don't remember the not-so-good lawyers as well.

Marcus: Do you think that the quality of briefs or oral argument differs in the D.C. Circuit from here?

Ginsburg: There's probably a greater variety here. The D.C. Circuit had many repeat players. That is, with 70 percent or so of the cases involving the United States on one side or another, one side was commonly represented either by agency lawyers or U.S. Attorney's office lawyers or Department of Justice lawyers, and those lawyers were at least competent.

Here you run the gamut from the very, very best to lawyers not familiar with any appellate forum, no less this one. There's a greater variety, I think, in the Supreme Court than there was in the D.C. Circuit.

Marcus: And is there any problem with socializing with lawyers who appear before you, either on the D.C. Circuit--

Ginsburg: I hope not.

Marcus: [unclear] the whole town. [Laughter]

Ginsburg: This is a company town, and the company is the United States Government. It's a town filled with lawyers.

Marcus: That is difficult. Well, now I would like to turn to cases and sort of general questions about judging. Just to start

off, I know you gave me a list of favorites, but do you have a view of what was the most important case that you decided on the Court of Appeals?

Ginsburg: I couldn't single out one as being *the* most important. I can just say you remember your first year more than others. Two cases we talked about, cases I listed, one was *Wright against Regan*, were from the first year. [unclear].

Marcus: This was the next one.

Ginsburg: Those cases illustrate that no one who assigned opinions on the D.C. Circuit was in the business of going easy on the newcomer. My first year I wrote the opinion in *Wright against Regan*, and I also wrote for the *en banc* court in the paper bag case, the *Ross* case. I was assigned an *en banc* decision by the then-Chief, Skelly Wright, my very first year on the court. *Wright against Regan* turned out to be an important case, even though the decision itself was reversed by this Court. It was the case responsible for keeping the *Bob Jones* case alive.

Marcus: We will get to talk about *Wright v. Regan* in much more detail. Do you remember any cases being the more difficult?
Ginsburg: Many of the blockbuster agency cases, the rulemaking cases, were hard cases. The D.C. Circuit put those cases off the

regular track. They were labeled complex cases, and were assigned to a panel from the beginning. We tried to control the appeal by announcing what issues we wanted briefed. We were fairly well acquainted with the case by the time it reached the oral argument stage. We generally divided those opinions three ways so one person wouldn't be saddled with the entire writing burden.

One such case involved the regulation of surface mining. It was a monster case, with umpteen issues. This shows the deceptive of statistics that treat all cases alike. A criminal case with a single defendant, a jury trial and verdict, no dispute about the law, presenting questions like the sufficiency of the evidence, those cases take very little judge time. Contrast them with the three-cornered agency suits, in which a rulemaking that may have taken years in development is published. The agency, defending its position, is challenged on one side by, say, environmentalists, who think the rules are too lax, and by industrialists on the other side, who say the rules are too stringent. That kind of lawsuit could be very difficult. First, you had to have some understanding of the technology involved, and then try to come to a correct decision in face of the sharply conflicting views presented. Those cases were the hardest ones, the reviews, not of trials, not of hearings at the agency, but of rulemakings.

Marcus: When you did decide in those cases, did you feel when the moment of decision came that you had really learned enough about the problem to make a decision like that?

Ginsburg: Yes. In the beginning you are more than a little frightened, fearful how you will ever master the case. Then, after weeks and weeks, you begin to feel comfortable, at least with your understanding of that small corner of the industry, so that you can deal with it intelligently and fairly. Then, within a few months, almost all that learning will be gone from your head as you go on to the next big case.

Marcus: When you think back on all of the cases, and you've had so many, can you think of certain opinions of yours that will have a significant impact over the ages?

Ginsburg: I would not point to any one decision. I'd rather point to my approach, which I hope is recognizable. It reflects my way of thinking about what judges should be doing, what is the art of a judge, what are the limits of judging.

Marcus: That's in line with a question I have, because if someone were to summarize your jurisprudence on the Court of Appeals, do you think that person would get it right? Because there are many judges who say every case is separate, it's impossible to draw any kind of common thread, common conclusions,

from the corpus of a judge's work. Do you agree with that or disagree?

Ginsburg: Well, I disagree, but I also disagree with the people quick to type judges as either soft on crime or hard on crime. One of the things said over and over during my nomination to this Court was, "Despite her ACLU years, she's very tough on defendants, criminal defendants." I look back on the record, I think, for example, of the paper bag case first year on the D.C. Circuit, and several others, and I wonder how people came to that conclusion. It may be that I have not been on the same side as Judge Mikva or Judge Wald in one case or another, and people say, "Oh, well, that was a criminal case, and Ginsburg dissented, so therefore she's tough on crime. Otherwise she would be with them."

But if you look at some of the criminal cases for which I've written opinions for the panel ▒ the most notable yet characteristic example, I think, is the *Ross* case my first year. The decision I wrote for the *en banc* court was reversed by the Supreme Court. But part of my reasoning was followed by Justice Stewart. I said there had to be a rule, and he agreed, but the rule he picked was the one that favored the police, and mine would have favored the suspects. Typing people as ▒ liberal▒ or ▒ conservative▒ is not terribly useful, I've found and the labels are often inaccurate.

Marcus: One of the things that you read now is that the traditional conservative/liberal split on criminal issues is sort of reversing itself and that, in fact, those judges typed "liberal" are being harder on criminal defendants. Do you see any of that?

Ginsburg: No. If you look at the lineups on this Court, you will see how questionable that kind of characterization is. One of my favorite cases from this term is the *Muscarella* case, where Justice Breyer wrote for a majority a pro-prosecution decision. I wrote for the dissent. The statute was ambiguous. I called it for the suspect, for the defendant, and my fellow dissenters were the Chief, Justice Scalia, and Justice Souter. That alignment should give people who try to type us cause to pause. It's obvious that the Chief assigned the dissent for that group to me. We would have held for the defendant. The majority, led by Justice Breyer, held for the government. In many criminal cases our lineups defy easy labeling.

Why were Scalia and I together? Because the statute left us at sea as to what Congress meant, so we followed the rule of lenity. Under that rule, if Congress isn't clear, you read the ambiguity in favor of the defendant, not against the defendant.

Marcus: Well, people just choose not to pay attention to certain things like that when they want to use these labels, I guess.

According to the summaries you gave me--you may remember at the very beginning of this--you have participated in 406 cases on the D.C. Circuit, which is a lot of cases, and we can't discuss all of them or even a good number, but you gave me a list of twenty of your favorite cases, and I was just wondering what criteria you used to establish your favorite cases. Why these twenty?

Ginsburg: Maybe the correct label would be "most memorable" cases. Obviously, for me, *Murray against Buchanan* [phonetic] is memorable because there was a unanimous resolution of the House of Representatives condemning the decision. That doesn't happen every day. And *Wright against Regan* is memorable because it was the case that allowed *Bob Jones* to go forward in the Supreme Court. Others on the list, I'm sure I had a reason for putting them on. They are not necessarily my favorite cases, but they are memorable cases.

Marcus: Well, let's turn to *Wright v. Regan*. You've indicated that you chose it because it enabled another case to go forward to the Supreme Court. Just glancing at it, I think a normal person would be surprised that you would choose--I take it--was this your first opinion that you wrote for the Court?

Ginsburg: Oh, no. My first opinion came out in October an administrative law case. *Wright v. Regan* was calendared for the fifth or sixth sitting that first term.

Marcus: You said that the Supreme Court did reverse.

Ginsburg: Yes.

Marcus: Let me put it this way. Since you said you were happy that it kept *Bob Jones* alive, were you aware of that while you were deciding the case? Was that in the background?

Ginsburg: No. The case presented an important standing question, whether black parents could complain to a court about the government giving 501(c)(3) status--that is, charitable status--to schools plaintiffs alleged were "white flight" schools. The IRS, according to the complaint, was approving schools to receive charitable donations which would be deductible by the donor, tax deductible by the donor, and these schools were discriminating on the basis of race.

One answer to the lawsuit was, "Black parents, you are intermeddlers. This is not your concern. This is for the government to administer. You are not hurt in the legal sense."

The black parents' point was something the Supreme Court, when it reversed, did not fully grasp. That is, they didn't want their children to attend these schools. They weren't suing the

Secretary of the Treasury so that their children could go to these schools. What they were saying is, "The United States is putting its stamp of approval, its imprimatur, on institutions that discriminate invidiously on the basis of race, and having those institutions in the communities where we live stigmatizes us, so we don't want the United States to put its stamp of approval on these schools."

Incidentally, I'm sure they recognized that if the school didn't have the benefit of 501(c)(3) status, not many people would volunteer money to keep the school going. But the injury they were alleging was a stigmatic one, that their government, by allowing charitable contributions to be made to organizations that said black people were inferior, by that action, the government was stigmatizing the members of the black community. That was their position. I thought it was a powerful one.

And even though the Supreme Court for some years before *Wright against Regan* had been tightening up on what it takes to qualify for standing, as I pointed out in the opinion, one could see two lines of decisions. One line was composed of cases that didn't involve race, cases that involved welfare, and the other line presented in combination race plus education. Whenever that combination was present, race and education, the Court always found standing, because the elimination of race discrimination was such an important value.

I pointed that out, and said, "Yes, there are inconsistent lines of opinions. There are cases concluding that standing

requirements were not met. But other decisions concluded that there was standing. What is different about the cases in which the Supreme Court found standing? Race plus education.

It was a very simple case looked at that way, and this Court's opinion never really faced up to the fact that the Court was reversing its course on what up till then had been a very solid position. That is, people who were complaining about racial discrimination in education, people who belonged to the group that has been discriminated against, have standing to complain in court, to challenge their government's action.

It was an important decision from that point of view, and I tried to write the opinion for the D.C. Circuit to say to the Supreme Court, "You can continue in the direction you have been going up to now, recognizing that race in the educational context is special." But the Court did not choose to follow that route. It was an important precedent. I still think it's unfortunate that the Supreme Court did not affirm the D.C. Circuit's decision.

[Begin Tape 1, Side 2]

Ginsburg: The Supreme Court's decision is today a leading precedent on the question of standing to sue. It was a turning point, I think, in the Supreme Court's jurisprudence on questions of standing. Although I've said *Wright against Regan* is

memorable because it saved *Bob Jones*, it is also an important case in its own right.

Marcus: I'd like to look at two things. Can you explain how it saved *Bob Jones*?

Ginsburg: Bob Jones and Goldsboro [phonetic] were two schools that discriminated on the basis of race. Their discrimination was admitted. It was tied into their religious beliefs. The government had taken away their tax-exempt status, and the two schools sued to get it reinstated. They said, the schools said, "We qualify for charitable status." The government won that case in the District Court and it won it in the Court of Appeals. Bob Jones and Goldsboro then sought this Court's review.

In between the government's victory in the Fourth Circuit and the Bob Jones and Goldsboro's petitions to this Court, the government changed its position and said, in effect, "We're going to walk away from our winner. We are going to give the tax exemption to Bob Jones and Goldsboro."

At that point, if the government had acted and granted the exemption, there would have been no litigant in the picture to challenge the government's switch. The government had been the successful defendant in that case. By giving the plaintiff schools the relief they wanted, the tax-exempt status, the government would have made the case moot. So the lawyers in *Wright v. Regan* said, "If the government goes ahead and gives

tax-exempt status to Bob Jones and Goldsboro, that will jeopardize the relief we have obtained in this case, because if those schools get tax-exempt status, then taking it away from the schools we're challenging would be inconsistent. So in order to preserve the judgment we've gotten from the D.C. Circuit, that we have standing to litigate this matter, we must make sure there's something left to litigate. Therefore, we would like the D.C. Circuit to issue a stop order to stop the IRS from giving tax-exempt status to Bob Jones and Goldsboro."

They presented that somewhat strained position to us. The panel was the then-Chief Judge Skelly Wright, Ed Tamm, and I was the third judge. We got the papers, and the three of us knew immediately what the plaintiffs in *Wright v. Regan* were trying to do. Even though Judge Tamm had dissented in *Wright v. Regan*, we were unanimous in deciding to issue the stop order so that the tax-exempt status which would have been granted that day was not given and the *Bob Jones* case could go forward in the Supreme Court. I think almost everyone involved breathed a great sigh of relief when that happened.

So we issued a temporary stay. We invited briefing on the question whether we should continue the stay. At that point, Judge Tamm broke from Chief Judge Wright and from me. We said, essentially, "It is a serious question whether we have authority to do anything relating to the *Bob Jones* case. Having taken time out to decide whether we had power to decide, we've now concluded that the question is so unusual, we ought not resolve the matter

in the first instance." We remanded the case to the District Court for that court's consideration whether the federal judiciary had authority to keep the IRS at bay while the Supreme Court heard and decided the *Bob Jones* case.

So the matter went back to the District Court, and eventually the Supreme Court decided the *Bob Jones* case. That made it unnecessary, indeed improper, for the District Court to rule, because the question had become academic.

What was most memorable for me, at the critical moment, all of us, whether you label us conservative or liberal, Judge Tamm along with Judge Wright and me, said, "Yes, we should. This is a serious enough matter for us to issue a stop order and not shy away and say, 'We will let the executive do what it's planning to do.'" All three judges, no matter where they were on the question presented in *Wright v. Regan*, joined in that stop order. I will never forget the conversation I had with Skelly Wright and Ed Tamm when we decided to do what we did.

Marcus: In what way?

Ginsburg: Just to say, "Do you know what they're asking us to do?" Yes. Everyone understood exactly what was at stake. I drafted the order, it was very brief, after talking to both of them about what the order should convey.

Marcus: And, of course, when you read the opinion in *Wright v. Regan*, you don't have any idea.

Ginsburg: Because this came after.

Marcus: Right. After. But, I mean, that's why this is very interesting to do, so that you get that information that you wouldn't have ordinarily. When you had oral argument on *Wright v. Regan*, did the lawyers use *Bob Jones* to influence you in any way?

Ginsburg: No. In fact, I found the briefs and oral argument in *Wright v. Regan* disappointing. The lawyers probably thought they did a great job, but my opinion did not derive much from the briefs. The race plus education cases on one side, the other standing cases on the other side, that clear picture was not drawn in the briefs. I worked very hard on the opinion because I couldn't accept the arguments made by plaintiffs in their briefs.

Marcus: What was their argument?

Ginsburg: I can't recall it with any clarity now. Like most lawyers, they placed several different strands of argument in their briefs. They didn't home in on the two lines of decisions as I have just described them.

Marcus: This interests me, because one of my questions is, I read the opinion and I got the two divergent lines of cases, but what I would like to know in terms of the art of judging, now, you said this wasn't presented in the brief. Now, what makes you, as a judge, both look for this elsewhere--I mean, is it a predisposition to a certain--

Ginsburg: I shouldn't convey the impression that the lawyers failed to cite the relevant cases. They did. Their presentation just hadn't been packaged in the same way. The thinking reflected in the opinion owes something to the Hart and Sacks legal method materials I studied as a law student, and later, as a law teacher. One chapter in those materials concerned two divergent lines of cases in Massachusetts. The candid and I would call it conservative reasoning reflected in the D.C. Circuit opinion ▒ it doesn't wave any political flag, it takes the approach of a jurist bound by Supreme Court decisions and trying, as a good common-law lawyer would, to figure out what is the theme behind them.

Marcus: But of course, Judge Tamm, in his dissent, which was very strong, I think--

Ginsburg: Yes.

Marcus: --took great issue with your sort of plucking the meaning for "standing" out of the line of cases you chose to follow, rather than--what is the other one called--*Eastern Kentucky*.

Ginsburg: Yes. *Eastern Kentucky* was a case about a hospital that decided to cut back its services to the poor, and the question was whether the Internal Revenue Service could allow it to keep its tax-exempt status despite the cut back. The Eastern Kentucky Welfare Rights Organization alleged that welfare recipients would get less health care if the hospital retained tax-exempt status without satisfying the requirement that it serve the poor.

The Court said, "Eastern Kentucky Welfare Rights Organization, you have no standing to bring this challenge, because who knows? If the hospital didn't have tax-exempt status, it still might decide not to give extensive services to the poor. So what you're arguing is speculative. We can't tell whether the relief you're asking for denying the hospital tax exempt status ▒ would do you any good." That was *Eastern Kentucky*.

My point in *Wright against Regan* was that the relief those plaintiffs requested ▒ removal of the government's sign of approval for ▒ white flight▒ schools ▒ was just what they wanted, nothing more. They did not want their government to bless these schools. They weren't anticipating increased

services or any other economic gain. They just said, "Keep your imprimatur off this, government." So for me it was quite a different matter than the economic argument relied on in the *Eastern Kentucky* case.

Marcus: And I know in one of the cases, I think it's called *Norwood*--

Ginsburg: Yes. It's a textbook case.

Marcus: --where Chief Justice Burger wrote, and you took a quotation from that case which seemed to me exactly on point here to support you, and yet he joined the majority when the Supreme Court reversed on this point.

Ginsburg: Yes. They very silently passed over that point, they didn't say anything about it.

Marcus: I found that very striking as I read this. So I always wonder, when you see that, what is driving the majority opinion? They're looking further down the road at a possible different question?

Ginsburg: Well, this is just my speculation. In the time between the D.C. Circuit's decision and the Supreme Court decision, a new member joined the D.C. Circuit, Bob Bork, who had

strongly restrictive ideas about standing, very much like the ideas reflected in the Supreme Court's decision in *Allen v. Wright*, which reversed *Wright v. Regan*. *Allen v. Wright* was an O'Connor decision, but by that time the Bork view of standing was well known in the D.C. Circuit. The view expressed by the Supreme Court in *Allen v. Wright* seems to me altogether in accord with thinking mapped out by Judge Bork on the D.C. Circuit. (Perhaps it is not coincidental that one of Judge Bork's first law clerks, Richard Taranto, served Justice O'Connor the next term, the term *Allen v. Wright* was decided.)

Marcus: When you were assigned this case and Judge Wright would have been--was he the presiding judge then?

Ginsburg: Yes.

Marcus: Was he very or none or in any way influential in the way that you shaped the case?

Ginsburg: No.

Marcus: Not at all?

Ginsburg: No. I don't think I had any comments from him except a very quick join when I circulated the opinion.

Marcus: And when you issued, when the Court issued this opinion, and this was in your first year, right?

Ginsburg: Yes.

Marcus: I know you don't like the labels, but did this sort of tag you as a Bazelon-Wright liberal?

Ginsburg: Perhaps, but I was certainly considered to fall to the right of Carter's first two appointees to the Circuit. There were some cases, probably even that first term, in which I did not stand together with Mikva or Wald. I tended in those years to be closer to Judge Edwards in the way we thought and came out than to either Wald or Mikva.

Marcus: Now, I know we'll be discussing other cases that have standing issues as we talk about your favorites, but as a general matter, have your views on standing changed over the years?

Ginsburg: No. Of course, I live with the precedent my Court makes, but what I said in *Wright against Regan* is what I think about standing. The United States jurisprudence is narrower on standing questions than one encounters elsewhere in the world. To take another basically common-law system, Israel, for example, their Supreme Court takes a more generous approach to standing than we do. In constitutional courts abroad that decide

questions not cases ▓ abstract questions get referred to them ▓ their dispositions don't have any standing ingredient at all.

Standing is part of our case or controversy requirement. We don't allow anyone to come to court saying simply, "Here's an issue I'd like the court to decide." Litigants must have a personal stake in the case. But is there any doubt that black parents have a stake in whether white-flight schools get tax-exempt status? I don't think there is. One should use a little common sense, too, in approaching these issues. One can tell the difference between a political dissident who would like Congress to pass a certain law or doesn't like a law that Congress did pass and just says, "I want to challenge in court that legislative action or nonaction." We can't have people, simply because they're citizens and voters, bringing whatever they will into court. We require litigants to have a genuine stake that distinguishes them from the rest of the world. That's what you look for. That's what I look for in deciding a standing question: is this person or group distinct from the general public in the impact of this matter on that individual or that group?

Marcus: So over the years on the court, you weren't affected by some of your colleagues on this circuit, like you mentioned Judge Bork or Judge Scalia or Silberman?

Ginsburg: Well, I understood Bob's position on standing. I thought he had it worked out very well, and as I said, his reasoning is reflected in the Supreme Court's *Allen v. Wright* decision. I disagree with it, though I understand its appeal.

Marcus: And you still do, is what--

Ginsburg: Yes.

Marcus: The Supreme Court reversed your opinion on standing, but you did discuss other issues in *Wright v. Regan*.

Ginsburg: Yes, but those didn't go up to the Supreme Court. The Court just dealt with standing.

Marcus: So are those still good law, do you know?

Ginsburg: I think they're academic, because if you can't cross the standing threshold, the rest of them don't come up.

Marcus: Because certainly there were some interesting questions in there, like--well, that must come up constantly, congressional appropriations riders--

Ginsburg: Yes.

Marcus: --on bills saying the IRS initiative, things like that.

Ginsburg: My "decision" would have only persuasive value on those questions because the Supreme Court reversal of the decision leaves my resolution of those issues with no anchor. So it's comparable to a Law Review article, whatever I said on the other issues.

Marcus: Well, they were interesting to read.

Ginsburg: Yes.

Marcus: Definitely. I thought there was much to be taken from them, and I'm glad they're there.

Ginsburg: They're there, unlike *Murray against Buchanan*, where the panel decision never made it to the bound *Federal Reporter* volume. It's just not there. You have to get it off Lexis or Westlaw.

Marcus: We're going to turn to *Murray v. Buchanan* now, actually, and that, of course, is my first question. Why wasn't it published?

Ginsburg: It was published. It was published in the advance sheets, the paperback F2d, but when the court granted rehearing

en banc, the case was put on hold. The court then vacated the panel decision, so the opinion was pulled from bound volume publication. That can happen in the D.C. Circuit when the *en banc* decision is made early enough to stop publication of an overturned panel opinion. Sometimes the interval is longer so the panel opinion, though later overturned, ends up in the bound volume. In this case, the decision was vacated before West came out with the bound volume. So it's not there.

Marcus: Given that the decision is not available easily, I would like to hear very much more about it, because I found it fascinating in reading it.

Ginsburg: Again, the case presented a standing question. Standing was the only question. And we said repeatedly ▒ I wrote for myself and Judge Bazelon--that we do not reach the merits, we intimate no view on the question whether the challenged expenditures for the chaplains' salaries violate the Establishment Clause. It was simply a question whether the atheists (the plaintiffs in the case) had standing to sue. There was a precedent directly in point, *Flast v. Cohen*. It is the one area where there is such a thing as taxpayer standing in federal court. *Flast* said there is taxpayer standing to challenge a federal expenditure as in conflict with the Establishment Clause. If the government spends money to establish a church, to take the most extreme case, that affects everyone the same way. No

group can claim a personal stake. It's not a situation in which one group rather than another can press the issue.

The Supreme Court decided in *Flast v. Cohen* that Establishment Clause challenges would be the exception to the main rule of no taxpayer standing. If you're challenging the government's spending to establish religion, you do have taxpayer standing, and that's all we held in *Murray against Buchanan*. The opinion noted that the parties stated at oral argument that they did not want us to go on to decide the merits. We asked, suppose we say the plaintiffs have standing or even, arguably, they have standing, why not then wrap up the whole case by deciding the merits of the constitutional question, does it violate the Establishment Clause to pay the chaplains? The litigants didn't want us to do that. They said, if we held there was standing to maintain the suit the case should go back to the District Court where they expected to develop a more complete record on the history of the challenge practice.

So we had no choice. We couldn't go on and decide the merits. They rightfully pointed out that we were a court of review, not first view, and they wanted to make their first presentation in the District Court. (The District Court had initially dismissed the case for lack of standing and/or on political question grounds.) We would have been glad to go on and decide the whole case. If we had decided it, we would have come out just the way the Supreme Court did in *Marsh v. Chambers*, the Nebraska Legislature's chaplain case. We would have said the

chaplains' offices were traditional, like "In God We Trust" on coins and the clerk or bailiff's cry, "God save the United States and this Honorable Court." But we didn't have that option.

So all we decided was that the atheists had standing to make the challenge. That modest decision so angered Congress that it provoked a unanimous resolution in the House of Representatives condemning the godless decision of the D.C. Circuit. Now the House is filled with lawyers who, if they'd read the opinion, would have seen that it trains precisely on the standing question and doesn't touch the merits. That's when I came to appreciate, before Fundamentalism was as pervasive as it is now in the country, when you touch that religion nerve, sparks are generated as in no other area.

Marcus: As a lawyer's question, can you skip over jurisdictional issues?

Ginsburg: Well, I think you sometimes can, but many of my colleagues disagree with me.

I spoke about a great judge on the D.C. Circuit many times, Carl McGowan. His view was, if you have an easy question on the merits and a really hard question of jurisdiction, standing, justiciability, why not say, "We'll assume for the sake of the argument that there is jurisdiction, and dispose of the case on the merits, because it's clear that the party asserting no jurisdiction would prevail on the merits." Carl thought that

was sound, so do I. But the Supreme Court has more recently held that jurisdiction must be decided first and definitively, because jurisdiction is a matter of power, and if the court doesn't have power to deal with the case, how can it say anything about the merits? Those are the two views. One is, you can assume arguendo that the court has power to deal with the case, and then say, "But the merits are so clear that the person who is asserting jurisdiction must in any case lose." You could use that approach only when the person who was invoking jurisdiction will lose on the merits.

I continue to believe that's a sound thing to do. It would not be sound if there really was controversy on the court about how the merits should come out. But the majority of the D.C. Circuit nowadays and the majority of this Court rejects that approach. They take a very, some might say rigid, others might say pure, view that first you decide the power question, and until you decide that the Court has power to proceed, you can't go on to any merits questions.

On today's Supreme Court, Justice Stevens shares the view that I take and that Judge McGowan took, that if you have a really tough jurisdictional question, leave that for a day when it matters, when the person who is invoking the power might prevail on the merits. But, as I said, that's currently a minority position.

Marcus: You mentioned that the lawyers in *Murray v. Buchanan*--do I take it on both sides or just on one side, they asked you not to--

Ginsburg: Both sides.

Marcus: Both sides.

Ginsburg: Both sides requested, if we decided there was standing, that we send it back to the District Court.

Marcus: Now, are you obliged to listen to them?

Ginsburg: It would be extraordinary that you would not do that, because we operate on the basis of party presentation. So if you're asking the question could we have said, "This is so easy we don't want to burden Judge Oberdorfer on the remand," could we have? Yes. Should we have? I think not. When the parties say, "Remember, you're the second instance, not the first, in the hierarchy, and we haven't heard from the court of first instance on this question," I think it would take a rare case for me not to honor that, to disregard that I am sitting on a court of review and not one of first view.

Marcus: Do you remember the oral argument well? Do you remember the attorneys who argued?

Ginsburg: I remember Mike Davidson argued very well for the Senate, and I don't have any clear memory of the other arguments, but I remember being struck by how well he presented that case for the Senate side.

Marcus: And I understand your comment about his wanting to develop the history, because I got involved in supplying--I didn't know. I knew Mike Davidson. I didn't know what he was working on particularly, but he was always looking for material. And I've never heard him argue. I just know him to talk to.

Ginsburg: He's very, very--

Marcus: And so he was very good. I do remember he showed me, subsequently, I think it was after *Marsh v. Chambers* was decided by the Supreme Court, but he had developed a historical record that was so thick on this question. I guess it came out on his side for this case, anyway, for *Murray v. Buchanan*.

Ginsburg: Yes.

Marcus: Now, your treatment of standing, which really, to me--and maybe this is wrong--didn't seem as serious a question here as the political question was in this case. I mean, I looked at it. It seemed very convincing to me what you said just

previously about *Flast v. Cohen* intervening between the famous [unclear].

Ginsburg: Right.

Marcus: And telling you specifically, it seemed sort of tailormade for this particular case, that exception. And yet, clearly, Judge MacKinnon was very upset about both, although he spent his time also, I gather, on political question. I also liked what may have been a small point, but the fact that the $80,000 sum for the chaplain's salary was not a large enough expenditure to trigger any of this.

Ginsburg: Yes. I said something about it being, I don't know how many times what was then the amount-in-controversy necessary to get into federal court, but I love George MacKinnon's opinion because if you analyze it, it's so clear that he did decide the merits. He decides the merits, and then he says--

Marcus: Oh, yes. He said it.

Ginsburg: --it's a political question. You said that maybe the political question issue was the harder one. Not for me, because I have been powerfully influenced by Lou Henkin's article in the *Yale Law Journal* asking , ▒ Is there a political question doctrine?▒ I think ninety-nine out of a hundred of the

political question decisions are really cases in which the Court is deciding the merits in this sense. The Court says the Constitution gives this decision to another decision-maker to resolve finally. Not that we can't touch it because it's a political question. Rather, the Constitution says this is business for Congress to decide or the President to decide. Impeachment is the clearest example of that. The judiciary is not the forum to either indict or try an impeachment case, as the Constitution explicitly gives the question to another authority.

The same analysis applies to questions exclusively in the Executive's domain. The Constitution commits certain decisions, like the pardon decision, not to the courts but to the President. Political question decisions, viewed in this light, are not threshold determinations that "we can't touch the matter." What really goes on, we've looked at the Constitution and are satisfied that the matter has been committed by that fundamental instrument of government to another branch for final decisionmaking, and not the Supreme Court. I am concerned about the notion that there is a loose political question doctrine, that truly is political, allowing courts to drop politically hot potatoes. Courts have been given no such discretion to decline to adjudicate.

If the Constitution gives the judiciary the authority to decide a case, we must decide it no matter how hot politically it is. In my view, maybe there is no such thing as a genuine political question. Instead, so-called ▒ political-question▒

decisions can be explained as cases in which the court has analyzed the problem and concluded, "This is a matter that the Constitution left entirely to the judgment of another decisionmaker." In all the years I've been a judge, I have never called an issue a political question. There may be another threshold barrier to adjudication, but I've never come across a political question of a kind that stops courts from saying what the Constitution requires or means.

Marcus: Now, I noticed in the footnote where you cited Professor Henkin, and that article, it seemed fairly obvious. I mean, MacKinnon says you can't decide if it's a political question until you know the answer.

Ginsburg: Right. That's why those decisions are not altogether satisfying, because the court first decides the merits and then labels the question political. The decisions say, in effect, because the Constitution lets Congress do this, it's a political question. That is not very satisfactory reasoning. If I were in the classroom wanting to get across the artificiality of labeling a question political, *Murray v. Buchanan* would be the case I would use.

Marcus: Well, why don't you explain what the so-called political question was in this case, that the hiring of chaplains was something assigned to Congress in the Constitution.

Ginsburg: The judiciary, in the main, had nothing to do with the employment of officers of Congress. My favorite case in that line is the one about the salary paid to the woman who headed the cafeteria operations of the House of Representatives. *Walker v. Jones*, I think it was. One day the head of the Housekeeping Committee, Jones, a member of the House from, as I recall, Oklahoma, was reviewing the budget for food services, and he observed, "You're paying a woman $40,000 for that job, to run the cafeterias? That's too much to pay any woman." After she was fired, she sued, alleging that she was fired because she was a woman. The answer from the House was, "We're not going to engage in a fight with you about that. You have no right to sue, because your employment is a 'political question.' Judges may not address questions relating to the hiring or firing of people who work for members of Congress.

The D.C. Circuit held, I wrote the opinion, that the case did not present a political question. We said, yes, the judiciary would have no role to play if the employee were a legislative aide, a job where there is an intimate relationship between the member of Congress and the staff person. But there are certain things people do for the House and the Senate, like park cars, or run the gym -- I don't know if they have attendants in the bathroom -- those, what I called auxiliary services, had nothing to do with making legislation. So we drew a distinction. We said, not that the hiring of a legislative assistant was a

"political question," but that the Congress has the prerogative, each member, to hire and fire staff without anyone looking over the member's shoulder, because that's necessary for the way they work. But as far as the "auxiliary services" are concerned, there's no political question, and no immunity from judicial review.

There was no question, by the way, in *Murray v. Buchanan* about having Congress open with prayer. That was conceded to be okay. The only question was spending taxpayers' dollars on it.

Marcus: And that received--I assume Mike Davidson must have argued the side that said this was their own internal business and you had no--

Ginsburg: Right. Yes.

Marcus: The Court should not interfere, and I gather the District Court had not treated it as a separate issue.

Ginsburg: The District Court dismissed the atheists' suit on alternate grounds, political question and standing, and we had reversed the District Court.

Marcus: But apparently the District Court's analysis didn't separate them the way that you did.

Ginsburg: No, it didn't. That's right. It didn't. It sort of melded the two doctrines together.

Marcus: Without giving you the means to deal with the political question, and you used *Powell v. McCormick* as a very powerful precedent to say that this was indeed not a political question.

Ginsburg: Right.

Marcus: But you also went back to a case I have to admit that I never heard of, from 1892. You don't remember it either? [Laughter] Called *U.S. v. Ballin* [phonetic].

Ginsburg: Oh, yes. I remember that.

Marcus: That's a great quote.

Ginsburg: Yes. That's a great old case.

Marcus: And it said that, yes, the Constitution lets Congress select its officers and make its own rules, but it's subject to a limitation. That's from 1892.

Ginsburg: Yes.

Marcus: And the limitation was that you cannot ignore constitutional restraints or violate fundamental rights. I mean, that is something I have to say I haven't seen very much quotation of, and again, it seems very much on point. You do say in a footnote that if Congress--it's just suggestive, I think--that if Congress had paid no salaries to the chaplains, that the result might be different.

Ginsburg: Yes.

Marcus: Why would that be?

Ginsburg: One reason is a case called *Valley Forge v. Americans for Separation of Church and State*. In that case, this Court refused to extend the *Flast v. Cohen* precedent on standing to the Property Clause of the Constitution. *Valley Forge* involved the donation of surplus government property to a religious institution. The Court held that the *Flast v. Cohen* precedent applies only to dollars, not property. So it's only when dollars are involved that the *Flast* precedent on standing works.

Marcus: But would that be only with regard to the standing issue, not the political question issue? In other words, if they hadn't paid money.

Ginsburg: Right.

Marcus: In reading Judge MacKinnon's dissent, aside from the question we talked about, about going into the merits in order to decide the political question issue, and you suggested in your opinion that that might mean the end of the doctrine altogether, which made some sense--

[Begin Tape 2, Side 1]

Marcus: ...you come away thinking, even if he believes that you go into the merits to do this, that he has gone a bit far in arguing that the Constitution recognizes God and religion and somehow that decides this case.

Ginsburg: George was very fond of that decision--

Marcus: Was he? Really?

Ginsburg: So fond of it that he issued it a second time. See the *en banc*, which is published in F.2d. When George knew the three-judge panel decision would not be published in the bound volume, he attached his dissent from the panel decision to the *en banc* per curium disposition. I wrote the per curium. MacKinnon concurred separately. The per curiam just said, "It's all over. The Supreme Court has decided *Marsh v. Chambers*." George then reproduced his entire panel dissent, or almost the entire

dissent, ending with the same thought, that "Goodness knows Congress needs a prayer."

Marcus: Was he a former congressman?

Ginsburg: Yes.

Marcus: Well, that's what struck me. Do you think that this simply hit home, that he must really defend the prerogatives of Congress, as they say?

Ginsburg: Yes.

Marcus: He went to such lengths in that dissent to do that. It was very striking. Well, I was going to ask you to describe what happened to this case, because I didn't know, after you made your decision.

Ginsburg: There was a petition for rehearing and a request for rehearing *en banc*, which the D.C. Circuit decided to defer, pending the Supreme Court's hearing and decision in the *Marsh* case. Although I remain persuaded that the positions we took on standing and political question, that the positions are right, obviously several of my colleagues didn't agree, otherwise they would not have voted to *en banc* the case. But having done that,

we discussed the case at a conference and decided, let us sit this one out until the Supreme Court decides *Marsh v. Chambers*.

Before the per curiam came out, there was further discussion. Even though there was no issue on the merits anymore, some suggested, shouldn't we decide the standing and political question issues, shouldn't we say whether we ever had power to decide the merits? My argument was that there is a limit beyond which you cannot push the ▒ jurisdiction first▒ position. Is a court obliged to decide whether it has power to decide nothing, for there was nothing to decide once *Marsh v. Chambers* set the relevant precedent. It was not easy to persuade the full court to sign on to the per curiam. There was considerable support for dealing with the standing and political question issues. Eventually, thank goodness, the court decided it would go with the very brief per curiam.

There were many redrafts before the brief disposition issued. I settled for what I could get, and I doubt that we preserved any files showing the original draft of the per curiam.

Marcus: You should have preserved them. You're better than that.

Ginsburg: It was a very slim per curiam. My name isn't on it, but it was one of my great achievements, to keep the court from saying things that might have been unwise about standing and political question.

Marcus: Like what?

Ginsburg: It was surprising to me how strong the sentiment was for going ahead and deciding the preliminary questions. For even if you jumped those hurdles, there would be no question left on the merits, because the Supreme Court had decided it was okay to pay chaplains.

Marcus: And this was in a state legislation, Nebraska, as I remember.

Ginsburg: Yes. But in Chief Justice Burger's opinion, he referred to the practice since the beginning of the Nation, of having chaplains and paying chaplains in the U.S. Congress. So in establishing the propriety of Nebraska's doing this, he, in effect, said the federal Congress could engage chaplains. He used the federal practice to explain why it was all right for Nebraska's Legislature to engage a chaplain. It was tradition understood by the founding fathers to be compatible with the Establishment Clause, just like "God save the United States and this Honorable Court."

Marcus: Well, that's one that I have to take issue with. Chief Justice Burger came to me and told me that "God save this Honorable Court"--you know, I don't believe that anyone has

pinpointed when that began to be used. It was not at the beginning.

Ginsburg: I thought it came from England.

Marcus: It may have at some point been used in England, but to open the initial Supreme Court in the 1790s, the initial, there is no evidence whatsoever that this was used. So I don't really know, and I've asked a thousand times, you know, for the piece of paper that will show that this was used in the Supreme Court or in a circuit court.

And, in fact, this is a different question, the use of prayer before a court starting, a court session beginning, and there is evidence that in the circuit courts, not at all in the Supreme Court, but in the circuit courts in New England, Chief Justice Jay, when he rode circuit and anyone else when he rode circuit, permitted a clergyman to open the session, as they put it, "addressing the throne of grace." But it was not done in the South. It was not done in the Middle Circuit. It was only in New England, where it had been the tradition in their state courts.

Ginsburg: Yes. I imagine that it was--

Marcus: That's all it was. I mean, Jay, of all the founding fathers, really disliked any kind of invocation of religion at a

government function, the provincial congresses where he did not like it, but he felt it would really, you know, make the people in New England go up in arms if he actually took a stand and said, "No, we're not going to do this anymore." But they didn't do it in other courts, and I'm sure they didn't do it in the Supreme Court when he was the chief. So there's just no indication of any of this in any of the records. So it's very interesting. I'd like to find out where they found that particular piece of information, but I haven't yet done that.

Now, I take it that you were not at all surprised by the Supreme Court decision in *Marsh v. Chambers*.

Ginsburg: No. It was eminently predictable.

Marcus: And sensible.

Ginsburg: Yes.

Marcus: You said that you would use this case as your textbook case for--

Ginsburg: Political question.

Marcus: Political question rather than--

Ginsburg: Yes. To show that the analysis is artificial. Justiciability is supposed to concern whether you can decide the question. The question here was, can Congress do this. MacKinnon decides yes, Congress can do this, then labels the issue a political question. It's a misuse of the label. If you're going to decide the merits, so be it, but don't call it a justiciability decision. And that's why I think the political question label is largely confusing. We would probably be better off if we didn't have it.

Marcus: I also want to go back to one thing you said. This was with regard to the lawyers saying that they did not want you to decide the case on the merits, and it interested me because this came up, obviously a different context, in the steel seizure case, which I studied in depth, where the lawyers for the steel companies asked for a preliminary injunction, that's all, and I gather that on an equitable decision like that, you do not have to decide the merits.

You might consider the preponderance or the harm that's going to be done to the party, but you don't have to decide the merits. And the district judge said, "Well, if I want to, would you like me to do it?" And there were seven or eight different steel companies on the suit and all different lawyers, and I won't mention which ones.

The lead lawyer said, "No, no, we're quite content just to get the preliminary injunction." Only one other lawyer said, "Ha! We'll take the whole hog." And he went ahead and did it.

Ginsburg: But that's not so extraordinary, the idea of combining the decision on the motion for the preliminary injunction with the decision on the permanent injunction. It happens not infrequently in copyright cases. Whenever you're trying to get an immediate stop order, you say to the court, "I have enough here to show that I have a reasonable probability of success on the merits. Keep the status quo in the interim." The Court may sometimes say, "Well, what you presented to me seems so complete, why not just decide the permanent injunction now and pass by the preliminary stage."

That's a fairly well-established technique. After all, to get a preliminary injunction, you do a preview of what you would prove to establish entitlement to permanent injunctive relief, whereas justiciability questions are supposed to be discrete, not the same question as is the case with preliminary and permanent injunctions.

Marcus: But in this case, in *Murray v. Buchanan*, did you really think there was not a sufficient record for you to go ahead?

Ginsburg: No. I thought that there was enough already in the record. I thought that what we should do, if the parties agreed,

was to give them a chance to brief the merits, because they framed their briefs to address only the standing and political question issues.

There was already in the District Court record evidence of historical practices, not only the oath and "In God we trust" on coins. But the lawyers told us they had more evidence they wanted to put in. So we said, "All right." The potential loser wanted to present more to the court of first instance. When the potential loser says, "There's not enough currently in the record for me," then I think appellate courts must go with that. The plaintiffs in *Murray v. Buchanan* had been thrown out of the District Court. They were appealing. We said, "Is there enough here we can go on to decide the merits?" They said, "No. There are things we want to put before the District Court."

Marcus: So it was the plaintiffs who wanted to do that.

Ginsburg: Yes.

Marcus: Because I was wondering why in the world, because even though you don't decide the merits on the justiciability issue, I'm guessing that you had an idea what the answer might be.

Ginsburg: Yes.

Marcus: On the merits. And I couldn't see Mike Davidson [unclear].

Ginsburg: No.

Marcus: He was not objecting.

Ginsburg: No. The request came from the plaintiffs, and the defendants concurred in the view that there was more material to present to the District Court if that court were going to decide the merits. But it was the plaintiffs, now appellants, who were saying, "The only issues we are appealing now are these justiciability issues. We should have another chance on the merits before the District Court." It's a little different from a District Court, the court of first instance, saying, "Let's have the whole show right now instead of just the preview." It's the same court that's doing the decisionmaking. The Court of Appeals, as I've said before, has a place in the hierarchy. It's a court that reviews the decision of another court, not a court that makes decisions initially.

Marcus: Now, since *Chambers v. Morris*, or *Morris v. Chambers*, intervened, so you didn't have to say anything much on standing and justice--

Ginsburg: We said nothing about it.

Marcus: Yes. Well, what happens now, I mean, or what has happened to what you did say originally in the three-panel--

Ginsburg: It's not there. It's, again, comparable to a Law Review article, simply a position, not a precedent.

Marcus: It's gone.

Ginsburg: Right. The only thing that the D.C. Circuit ultimately ruled is, "The Supreme Court has given us an answer on the merits. Therefore, there's no real case left. So, goodbye. Dismiss the complaint."

Marcus: And have similar issues been litigated on the Establishment Clause issue with standing where this would be applicable?

Ginsburg: No. *Flast v. Cohen* remains the law for the nonce. If this Court were to have that very same question again, would it come out the same way it did in *Flast*?. I wouldn't bet on how it would come out today.

Marcus: Well, that's a good place to stop. We won't place any bets on anything. Thank you very much.

[End of interview]