Oral History of Justice Ruth Bader Ginsburg

This interview is being conducted on behalf of the Oral History Project of The Historical Society of the District of Columbia Circuit. The interviewer is Maeva Marcus, and the interviewee is Justice Ruth Bader Ginsburg. The interview took place in Justice Ginsburg's Supreme Court Chambers on August 5, 2014. This is the eighth interview.

MS. MARCUS: This is about the Clinton papers that are now being read.

JUSTICE GINSBURG: There is a memo from Joel Klein to Bernie Nussbaum. Joel was assisting the White House in the nomination process, and Bernie was White House counsel. Joel wrote a memorandum comparing me to Judge Breyer, now Justice Breyer. He said nothing uncomplimentary about Justice Breyer, then Judge Breyer. The memo was done so skillfully; it was designed to appeal to Clinton's interest in appointing someone with a big heart. It was a beautiful piece of work.

Some others in the White House were not as helpful as Joel. Ron Klain wanted me to disassociate myself from some of the positions the ACLU had taken in the 1970s. That was a non-starter. I was proud of my ACLU association and would do nothing to tarnish it.

MS. MARCUS: I think there was some talk about the part that Marty played in getting your nomination going.

JUSTICE GINSBURG: He was my campaign manager. Marty treated it like a tax problem.

MS. MARCUS: I remember you saying when we did the last oral history interview, every time you got asked to do something, you had to turn in a ton of papers, that Marty was there to help you with everything, but he must have done more than that.

JUSTICE GINSBURG: He certainly did. From the time Justice White announced he was retiring, Marty kept a little book of all the people he thought had some clout in the Democratic Party world, and he was in touch with them. When I reflect on it now, I think maybe Marty wanted me to have this good job so if he predeceased me, I would have something to consume my days and nights. For Marty, it was a challenged like Ross Perot and the class of preferred stock Marty created in the General Motors deal. It worked out very well for Ross Perot. Marty approached my nomination very much the same way. How many husbands would think their wives should be on the Supreme Court.

MS. MARCUS: Very few. And in most cases the husbands would prefer to do it.

JUSTICE GINSBURG: Yes.

MS. MARCUS: When we ended the last seven interviews, we did talk about the nomination for a while, and we decided that this first hour, we would talk about the Supreme Court from a personal perspective rather than discussing cases. So I wonder just from your point of view, how is being a Justice different from being a judge on the Court of Appeals? Your own routine, how you organized your life in terms of the day, the summers. It's a whole different rhythm, I'm sure, than what the Court of Appeals does.

JUSTICE GINSBURG: One enormous difference is the cert process. Cases come to Courts of Appeals as a matter of right. The judges have no say in what they're obliged to decide. Here, our jurisdiction is almost entirely

discretionary. So the Court spends a lot of time deciding what it's going to decide. The cert process was new to me.

Also new to me, death penalty cases. An execution is scheduled for tonight, and we have received a request to stay the execution. The process will go on at least until midnight, maybe longer. The whole routine, being part of the process of passing on death row applications, was upsetting. And then mastering this Court's – how should I put it? – rather dense jurisprudence in death cases. The first two matters I had to get a handle on quickly, death cases and the cert process.

The other major difference from the Court of Appeals, we sit en banc all the time. It's always all nine of us. When one is sitting on a three-judge bench - - it's much easier to persuade one colleague than four.

Another difference is that here, seniority really counts. We do everything by seniority. In the D.C. Circuit, the most senior judge presides, but when we divided up who will write what opinion, it was more or less by consensus. The most senior judge did not say, I want this one, you take that one. Here, the Chief makes the assignments whenever he's in the majority. When he's not in the majority, the most senior Justice in the majority makes the assignment. So I would say the principal differences are the Supreme Court's jurisdiction is discretionary, the Court is the last stop in every death case, and seniority order is followed.

The mail flood is enormous. It has gotten worse since the advent of email. People write requests for all kinds of things. One category, people want me to sign baseballs. Another, "I've admired you all my life, won't you please give me your signature." If you respond, chances are you will find the signature on eBay. The mail flood is something my secretaries didn't have to deal with on the D.C. Circuit. Every Justice gets all kinds of requests from all kinds of people to do all kinds of things.

MS. MARCUS: On the D.C. Circuit, did you have your summer off?

JUSTICE GINSBURG: I did. We broke at a certain time, I don't remember when it was. We were not sitting in the summer. It may be different now. Even then, there were some circuits in which a judge could choose when he or she wanted to have an eight-week stretch. Some prefer the winter to the summer, but in the D.C. Circuit, formal sittings ended in June.

MS. MARCUS: I know that isn't true in all the circuits.

JUSTICE GINSBURG: No. And I don't know how the D.C. Circuit operates nowadays.

MS. MARCUS: I don't know that they sit in the summer.

JUSTICE GINSBURG: But we did not sit in July or August.

MS. MARCUS: So you had your summers off then too? You could do all the things you do now?

JUSTICE GINSBURG: Yes. Some of the same things. Some added. I don't know how long I've been going to Cooperstown for summer opera. I didn't start going to Santa Fe until 1995, when I was already on this Court.

Another thing, on the D.C. Circuit, you got a certain number of invitations, but many more now – I have my pick of many places abroad to teach in the summer. Having the summer off, it's not entirely off. Death cases follow us around the world wherever we are. And I don't like cert petitions to accumulate so that I have a massive stack in September, so I review them currently.

MS. MARCUS: Do you read them yourself?

JUSTICE GINSBURG: In four categories. Most of the petitions are clearly not cert-worthy. I ask my clerks to give me the memos on cases in these categories: Any time there's a deep split, courts disagreeing on an issue of federal law, because that's the number one reason for review. Two, every death case because I want to make sure there isn't a good reason to stop the execution. Every Solicitor General petition. Whenever the government wants to have a decision reviewed, I think we owe it to the government to carefully consider that request. And then any time a state is petitioning for review. In those categories, the clerks will give me the pool memo and, if need be, I will check the underlying papers - - the petition for certiorari and the brief in opposition. If there should be another case that doesn't fit within those categories, my clerks can of course call it to my attention, but that would be rare. Most cases in which I might be interested in proposing a grant would fall in those categories. Deep split, death cases, SG on top, state on top.

MS. MARCUS: That's time-consuming.

JUSTICE GINSBURG: Yes. The way the cert pool operates, we pool all the clerks, the clerks serve as clerks for the entire court. The Chief's aide circulates the cert petition and the brief in opposition whenever the case is ready to have a pool memo written. The petitions and briefs in opposition are circulated evenly to all the chambers, with the exception of Justice Alito who is not in the cert pool with the rest of us. I like the idea that, in this process, the law clerks see themselves as serving the entire court, not just their particular Justice. Reviewing cert petitions takes up I'd say at least one-third of our law clerks' time.

MS. MARCUS: So you are busy during the summer with some of this work, not only enjoying operas or teaching?

JUSTICE GINSBURG: Yes. The usual routine is you're preparing for the next sitting, and in the meantime you're writing opinions for the sitting that just ended, so the last two sittings, in March and April are really intense. You have the opinions still pending from prior sittings, you have the current assignment, and everything has to be finished in June. That's another thing about this Court. All majority opinions are due June 1, all dissents June 15. I've been here now 21 years, I have never seen those deadlines missed. It's amazing how a colleague can be pondering an opinion for weeks, but when it comes to the end of the term, somehow all the opinions come out. That's why we have no fixed date for the summer recess. This year I was expecting that it would be June 26, so I went to Castleton on the 28th and 29th. I had to come back because we

remained in session until the 30th. I was completing my last opinion, my dissent in *Hobby Lobby*, during that weekend on the way to and back from Castleton.

MS. MARCUS: Did you see Lorin Maazel there?

JUSTICE GINSBURG: I had lunch with him. I was there on the 28th for the opening of *Butterfly*. On the 29th, in the morning, I was the entertainment. I gave my spiel, and my award for that morning's presentation was to have lunch with Lorin Maazel at his home.

MS. MARCUS: Was he able to speak?

JUSTICE GINSBURG: He was frail, but he knew totally what he was doing. He was urging Judy Hope, he was pressing her with the fact that he couldn't continue to put in so much of his own resources. More money was needed to keep Castleton going. He was very effective in making that pitch. He showed up for the opening night of *Butterfly*. It's a great thing he was doing there. So many young people in the orchestra he conducted.

MS. MARCUS: I hope that it can continue. I went there a couple of years when he was there. I also remember seeing Lorin Maazel at the Met the first night he conducted. I was a graduate student at Columbia. He was 31, I think. He conducted Don Giovanni.

Your court routine is very different from what it was on the Court of Appeals. I also wondered how you relate to the other Justices. Is it very different from speaking to judges on the Court of Appeals?

JUSTICE GINSBURG: The routine is very much the same. You're preparing for the sitting, the sitting takes place, you meet with your colleagues, the difference being nine versus three. Then you go back to chambers and write opinions. As I said, the difference is that, to write for the Court, four other minds must agree with you instead of just one. But the basic life of an appellate judge is the same on this Court as it is in state courts, and federal courts of appeals. You are preparing for the sitting, the sitting goes on, you're writing opinions, and preparing for the next sitting.

MS. MARCUS: Is there much place for discussion other than in conference?

JUSTICE GINSBURG: It's up to the Justices. There can be as much or as little as they want. The conference is concise. Let me explain the difference between when we get together and when we don't. The dissenters had no time to get together in *Bush* v. *Gore*, so there were four separate dissents, vastly confusing to the press. In the Affordable Care Act case and the Voting Rights Act case, we had time to meet together and discuss what the dissenting opinion should include. After the discussion, I asked my colleagues on the dissent side if they had anything they particularly wanted me to cover, please send me a memo. It's not often that that will happen for the majority opinion, because people agree on the main lines of the opinion at conference. But yes. Discussion continues after the conference. When a draft opinion is circulated, the Justices are more active than court of appeals judges in suggesting changes. Whoever circulates the first opinion in October knows that her colleagues will

weigh in on it, sometimes heavily. But by April, people are so busy with the opinions they're writing themselves, they have less time to comment on a colleague's opinion. The chances of having your opinion released just as you wrote it are much better in April than in October.

MS. MARCUS: If you get to assign the opinion, you can override such a thing?

JUSTICE GINSBURG: I have never assigned a majority opinion. Now I've succeeded to Justice Stevens' job in assigning dissenting opinions. He assigned most of them to himself. The other dissenters agreed that in the healthcare case and *Hobby Lobby*, as the senior of the four of us, I should write the dissent.

MS. MARCUS: We're glad that you did. Do you see any difference in the life on the Court under different Chief Justices?

JUSTICE GINSBURG: Our current Chief was a law clerk to the old Chief. The current Chief is a little more indulgent both at oral argument and at conference. He doesn't stop counsel in midsentence when the white light appears. He'll allow more cross-table conversation at conference than Rehnquist did. He's an able presider at the conferences. As to outcomes, it's what tax lawyers would call a like kind exchange. I think Roberts' opinions are the same as the decisions the old Chief would have reached with the possible exception of *Hobby Lobby*. The old Chief was coming to understand the problem the case presented better, having written the Family and Medical Leave Act decision. The big loss for

the Court was Justice O'Connor. That year, the year that she left us, in every five to four decision in which I was one of four, I would have been one of five if she had remained on the Court. Justice O'Connor's departure was a huge loss. Now, Justice Kennedy is the swing vote. Before there were two in the middle and Sandra more often shared my opinion.

MS. MARCUS: One of the other questions I have is about being the second woman on the Court and how things changed when you became the lone woman on the Court, and now there are three, and whether that has made any difference? Obviously it makes some difference.

JUSTICE GINSBURG: Three makes a difference. When there were just two of us, invariably one lawyer or another in the course of the term would call me Justice O'Connor. There was a woman on the Court and her name was Justice O'Connor. Sandra would sometimes say, "I'm Justice O'Connor, she's Justice Ginsburg." Then, when I was the lone woman, most people knew my name, but it was altogether the wrong picture. Eight rather well fed men and one rather slight woman. Now I sit toward the middle, with Justice Kagan on my left and Justice Sotomayor on my right. Women appear as a permanent part of the Court, here to stay. People who have observed arguments know that my newest colleagues are not shrinking violets. This last year, Sotomayor ran ahead of Scalia as the Justice who asked the most questions at oral argument. This year, Scalia regained his title, but Sotomayor remained very active in

posing questions. Justice Kagan asks great questions, and has a great sense of humor. So we are three. We are conspicuous. No one calls me Justice Kagan or Justice Sotomayor. When people ask, when will the number of women be enough? I reply, "When there are nine." After all, for all the years men numbered nine, no one raised an eyebrow. So why not nine women? Now we are three. In time, there will be more.

MS. MARCUS: I hope so. I wonder for yourself in the process of judging how that has changed, if it changed, because your decision is now final as opposed to the court of appeals?

JUSTICE GINSBURG: I suppose you are a little more careful. Something the courts of appeals do more and more as the number of cases increases. They designate an opinion as unpublished. Today all opinions are in fact published, but the designation unpublished means the decision doesn't count as precedent. The judgment is good for that case, but that case only. I remember saying more than once on the Court of Appeals, I'll go along if it's not published. That we can't do. We have to give reasons that stand up in every case and that's a real discipline, giving reasons to defend your position. If the case is controversial, you will have to contend with a dissenting opinion. People ask me, Scalia is sometimes so nasty in his dissents, how can you live with that? I reply, if I could pick my dissenter, I would want it to be Justice Scalia because he's so smart, he will zero in on the soft spots in your opinion. Then you can improve what you wrote.

MS. MARCUS: That brings us to the other thing, writing opinions. Do you do things differently here than you did at the Court of Appeals?

JUSTICE GINSBURG: My basic pattern is the same. That is, I will write a brief opening. I will write a detailed outline, give it to a law clerk to see if the law clerk can fill in the outline. Here I have four law clerks. A couple of terms I was lucky to have two who could write a draft I could turn around and make my own. Most years, just one. Sometimes none. It's a good pattern for me because when a law clerk gives me a draft I consider unsatisfactory, I understand that it's often in part my fault. The outline I wrote doesn't work and we have to do it another way.

I learned something very useful from Justice O'Connor. She had her law clerks circulate everything they write to their co-clerks, so what she got was a writing that had gone through the bright minds of all the clerks, not just one. I followed her lead in that respect.

MS. MARCUS: That's a good idea. Have you changed anything yourself over these 21 years?

JUSTICE GINSBURG: In my first year I allowed my law clerks to try a first draft with only spare instructions from me. I don't do that anymore. It's much better for me to give the clerks detailed marching orders on how a draft should be developed.

MS. MARCUS: Do you read law review articles?

JUSTICE GINSBURG: I wish I could read more but time is short.

MS. MARCUS: I was also curious as to whether you read many of the amicus briefs these days, because there are tons of them.

JUSTICE GINSBURG: Most of them are me-too briefs. My law clerks are obliged to read all of them and they tell me these you can skip because they don't say anything the parties haven't said, but this one has a novel argument on pages 8 to 20, or this one is much better than party's brief, so if you have time to read one, read this one. That's rare, but it happens. A friend of the court brief should be consulted when it states the case better than the parties have.

MS. MARCUS: Amicus briefs are important in that sense. If the law clerks read them, and get something out of them and pass it on to you.

JUSTICE GINSBURG: It would be so much better for us if friends on the same side would consolidate. I suppose their client wants them to deliver their separate brief.

MS. MARCUS: Talking about law clerks, do you choose them differently from the way you did at the Court of Appeals?

JUSTICE GINSBURG: Yes. I now have the Dean of Columbia Law School and the Dean of Harvard Law School choose; each one selects a clerk, subject to an interview with me to make sure that the chemistry works between us. Now that David Schizer, who was once my law clerk, is no longer dean at Columbia, I'm not sure I will keep up that arrangement. One of my best clerk producers was Elena Kagan during years she was Dean at Harvard. So that takes care of two. Then there are judges whose

judgment I trust. David Tatel is one. Merrick Garland is another. Bob Katzmann another. If any of them tell me I have a law clerk who would be just right for you, I will interview that person. I don't go through the piles of hundreds of applications. I don't ask my law clerk to go through them. Doing it this way, I can get at least two or three. This term I had a Harvard clerk, a Columbia clerk, one from Katzmann, and the other from a former law clerk who is now on the bench.

MS. MARCUS: That's a good way to do it. I don't know if you see a difference, but advocacy in this court and the Court of Appeals, the quality of it?

JUSTICE GINSBURG: Because the SG is in so many cases, and the SG's aides are always at least good and sometimes excellent. One change I have seen, there are more boutique appellate advocacy firms. The Court once had more of a variety when lawyers were not representing the government. The span went from very bad to very good. Now with boutique firms and law school clinics doing a lot of the heavy lifting, the quality of advocacy is better. The two most frequently appearing clinical operations, one in Stanford with Jeff Fisher at the head, and one at Penn with Jim Feldman as leader. Many other law schools have Constitution litigation clinics. Firms like Paul Clement's, Kellogg Huber, the firm with Neil Katyal, and the one with Greg Garre, are repeat performers.

MS. MARCUS: How about Seth Waxman?

JUSTICE GINSBURG: Seth is a superb lawyer. He and Carter Phillips, of the lawyers who are not with the government, Carter and Seth Waxman, are the top along

with Paul Clement. For the government, Michael Dreeben and Edwin Kneedler are super advocates.

MS. MARCUS: Both my son and my son-in-law worked with Kneedler. That's a great office. What do you appreciate most in a brief or an oral argument?

JUSTICE GINSBURG: Candor and brevity. Lawyers tend to fill the space allowed, which is unfortunate because you can improve your chances of having your brief read by the judge if it's shorter rather than longer. And candor, honesty is tremendously important. The first time you catch a lawyer exaggerating a precedent, you begin to suspect the rest of the brief. And candor, a concession every once in a while may help you establish a good relationship with the Court. Some lawyers who've appeared before us, were afraid to answer "yes." Every question from the bench, they feared, must be a trick question. Justice Scalia told counsel every once in a while, "She's trying to help you."

MS. MARCUS: This is a different question entirely, how do you deal with being in the public eye constantly?

JUSTICE GINSBURG: Sometimes you wish you could be anonymous. Other times especially when you get to be my age, 81, you are amazed that so many people want to take their picture with you. Our police are terrific at sheltering me from people, for example, a guy following me around with a baseball he wanted me to sign. They take care of people like that in a politely firm way. When people want me to sign something, the police explain I can't do that because then everyone's going to ask.

Interviews afford me an opportunity to talk to the larger public. I'm going to the 92nd Street Y in October to have a conversation with Nina Totenberg. We had one last March, also with Rosie Abella, Justice of the Supreme Court of Canada.

MS. MARCUS: Rosie Abella did a lecture for me when I was President of the American Society for Legal History. She is a ball of fire.

JUSTICE GINSBURG: Rosie? You should see her chambers. It's kind of a parody on what a proper judge's chambers should be.

MS. MARCUS: Do you read the commentary on what you say in public? Justice Scalia always says he never opens a newspaper. I don't know that I believe him.

JUSTICE GINSBURG: I do read the newspaper. I read the *Times* and the *Post*, and then James, my son, will send me an email with something attached that he liked and he thinks I'd like, often Steve Colbert or John Stewart. Daughter Jane once in a while, but James regularly sends me commentary. Of course I know about the Notorious RBG. The book is an easy, amusing read.

MS. MARCUS: Well that's good you enjoyed it. Have you been able, I know you have been friends with Justice and Mrs. Scalia for so many years, are you able to keep that up on the court?

JUSTICE GINSBURG: There will be a play about him at Arena Stage this Spring.

MS. MARCUS: Didn't you go to a reading for it?

JUSTICE GINSBURG: No. We had a preview of Scalia/Ginsburg, the opera.

MS. MARCUS: Let me thank you for this hour.

Dated August 5, 2014.