ORAL HISTORY OF JUDGE JAMES ROBERTSON

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 Ann Allen, and the interviewee is James Robertson. The interview took place at the Federal Courthouse on March 18, 2004. This is the second interview.

MS. ALLEN: Judge Robertson, at the end of the last interview we were talking about your return to the law firm of Wilmer, Cutler & Pickering in 1972 and the pro bono activities of the firm. Maybe you can expand a little bit on what legal practice in Washington was like in the early- and mid-1970s.

MR. ROBERTSON: I think I said the last time my return to Wilmer, Cutler & Pickering was, in my mind at least, not absolutely the first thing to do leaving the Lawyers' Committee because I thought of myself as going out and starting another law firm, but I didn't. I was self-aware enough to know that I probably didn't have, I don't know, the energy or something to go out and hustle up clients. That was never my strong point. Besides that, I knew that if I tried to start my own law firm, the economic reality of it would be that I really wouldn't have any time to keep doing what I had been doing at the Lawyers' Committee, which was civil rights work and some pro bono things as well.

So I went back to Wilmer Cutler thinking that I was going to help provide some leadership to the pro bono program, and I think over the years I did that. I certainly cannot and do not claim that I invented or was the leader of pro bono of Wilmer, Cutler & Pickering. Wilmer, Cutler & Pickering was already in the vanguard of the law firms that were doing a lot of pro bono work in the city and they were doing it through the real

leadership of people like Lloyd Cutler, John Pickering, and prominently at that time Louis Oberdorfer, as the very senior partners in the firm. Even they were not, I think, the inventors of the pro bono movement though, because the early 1970s particularly were a time of great ferment among law students and young lawyers who were still reverberating with the 1960s. We were still in Vietnam, and Nixon was still in the White House, and there was an enormous amount of talk among young lawyers and certainly among young liberal lawyers about changing the system through litigation and making a difference in American society through litigation and systemic reform through litigation. And not only that, but young lawyers were looking askance at some of their colleagues and some of the causes that law firms were representing. I remember Wilmer, Cutler & Pickering responded to that concern by declaring, I think quite publicly, that the firm would never have anything to do with representing the tobacco industry. You remember the film called *Never on Sunday* when Melina Mercouri played the role of a heart of gold Greek prostitute who didn't work on Sunday?

MS. ALLEN: I remember very vaguely.

MR. ROBERTSON: Well I, with my probably quite inappropriate sense of humor, called it Wilmer Cutler's "*Never on Sunday* Syndrome." But it was a heartfelt and serious position of the firm that they could not in good conscience take on the representation of the tobacco industry. As the 1970s wore on, Wilmer Cutler and everybody began to be convinced that a lawyer can't really

pick and choose clients on the grounds of the moral content of the client's causes, but that was the kind of issue that was afoot in those days. Is it moral for you to be representing this, that and the other thing? At any rate, law students began demanding of law firms, "Who are your clients? What is your practice? Why should I come to work for you? Do you have any pro bono work?" The law firms, particularly in Washington, DC, began responding, "Yes, we do do pro bono work." Wilmer, Cutler & Pickering was one of the first.

When I went back to the firm, I actually took some clients with me, although they were civil rights clients. One case I took back to the firm with me, or brought into the firm, involved some agents of the Drug Enforcement Administration who wanted to sue the Drug Enforcement Administration for racial discrimination. These were black agents who had not gotten promotions and were getting all the undercover assignments, and they were being discriminated against in a number of different ways. I think that case went on for 30 years before it finally got resolved. Maybe 25 years. The case went on forever and ever and ever.

MS. ALLEN: What was the outcome?

MR. ROBERTSON: There was a settlement eventually. It was a class action, and eventually the case was settled. I've forgotten the name of the case for that matter. Anyway, I went back to Wilmer, Cutler & Pickering and worked in general litigation. One of my standing jokes in the firm – people who knew me at the firm thought it was a standing joke. Before I left the firm

in 1969, I'd been working on a case for our client Bethlehem Steel Corporation. Grace Line had bought four banana boats from Bethlehem, and when they were delivered, they were too small. They didn't carry enough bananas. These ships were subsidized by the Maritime Administration, so it became a government contract issue in which the Maritime Administration was involved in some way. That case was one of these monumental big paper cases. By the way, I had been assigned to this case because I had a Navy background. "You know about ships. This is a banana boat. You could figure this out." Well, indeed I could figure it out. I did know something about ships, and I spent a lot of time at the Bethlehem Naval Shipyard poring over naval architects plans and talking to naval architects and studying the construction of the ship. Then I went off to Mississippi. When I came back three-plus years later, the case was still there in almost exactly the posture in which I had left it. It was as if somebody put it in the freezer and saved it for me when I returned.

MS. ALLEN: And it was yours.

MR. ROBERTSON: It was mine. I did general litigation at Wilmer, Cutler & Pickering. I was made a partner effective the year after I got back, on January 1, 1973. 1973 was a very bad year for the economy and particularly for law firm economies. 1973, you remember, was the year of the great gasoline crisis, and we had lines half a mile long. It was the oil embargo, the long gas lines, the even and odd license plates. That was a troubled year in a whole lot of ways, but I'd just become a partner, and Wilmer, Cutler & Pickering

was struggling that year. I remember my first partnership meeting. I was no longer being paid a salary. I was now going to be paid a share of the firm's profits, and I had a serious thought that first year that I might wind up getting paid less than I had been as an associate. The firm's finances in that year were such that one joke in the firm was, "Well the way we'll solve this problem is, we'll just make all the associates partners." Of course it was a short-lived problem, and Wilmer, Cutler & Pickering went on to grow and prosper quite dramatically over the years. That was my return to law practice here. I'd opted for the big bucks and there weren't any [laughter].

MS. ALLEN: Had you always enjoyed litigation? How did you become a litigator? Is it kind of a natural thing, or at some point did you have to make a conscious decision and choice?

MR. ROBERTSON: The way law practice was organized in the late 1960s and early 1970s when I started, litigation was not the strong point of the big firms. The big firms were more solicitors than they were barristers. The big firms were interested in doing mergers and acquisitions and giving tax advice and corporate advice and trusts and estates advice. In Washington, the practice had a lot to do with advising corporate clients, sort of translating the government to private corporations and corporations to government. There was a lot of that. It was helping government teach the private sector what government was about and helping private industry teach government what private industry was all about, but not an awful lot of

litigation. Litigation was a little bit, I don't want to say tacky, but it was a little bit beneath the dignity of some of the big white shoe firms.

I'm not sure where my own interest in litigation came from. Maybe it was boredom with office practice. Quite recently I've had occasion to think about that. The last few weeks here in my chambers have been very quiet. I've had no trials, not even any really serious contested motions. I'd go into court for a couple hours in the morning and do sentencing, and that's about it. The rest of the day I'd spend in my chambers working on motions, and I have had occasion to think good grief, this must be what it's like to be in the court of appeals. You go in and sit down, they hand you a pile of briefs and they close the door and they say "Have a good day," and there you are with your briefs all day long. I was getting cabin fever. I hope I have a healthy scholarly interest in the law, but I am not fundamentally an office person. I need the action of the courtroom, and maybe that's what drove me to be interested in litigation, or maybe it's just a certain combativeness, or I'm not sure why. But I do remember that when I was first at Wilmer, Cutler & Pickering, I was looking for litigation work to do and there wasn't an awful lot of it. I also remember that the chance to do trial work was one of the reasons, not a particularly altruistic reason, but one of the reasons why I left and went to Mississippi. I knew I would be thrust right into the courtroom and be able to try cases.

When I came back to the firm from Mississippi, I kept looking for opportunities to get into the courtroom, but the firm didn't have an established trial practice. There weren't then and there aren't now too many law firms in Washington, D.C. that one regards as primarily "trial firms." It was at about that time I think that a number of lawyers broke off from Hogan & Hartson and formed the Williams & Connolly law firm. Ed Williams and Dave Webster and couple of other people started it. It was conceived as a barrister firm. They were going to be trial lawyers, to the exclusion of everything else. They were trial lawyers, and that was a very exciting idea. Hogan & Hartson had a good deal of trial work because they represented D.C. Transit. And D.C. Transit had all kinds of buses hitting people or people hitting buses, or that sort of thing, and there was insurance defense and trial work there. Wilmer wasn't all that big then, but it was growing, and it had aspirations to be a big firm. The day-to-day work of the trial courts was not being done by the big firms, and still isn't being done by those big firms. The question for me was how do I support myself as a litigator and then how can we get more litigation into this firm so that the younger lawyers can get their hands dirty and go into court and make mistakes and learn how to talk to judges and so forth.

The pro bono program at Wilmer, Cutler & Pickering and at other law firms was in substantial measure designed to give young lawyers opportunities to get into court, which is another reason why I worked on it

and tried to get the firm doing more pro bono work. But I digress [laughter].

MS. ALLEN: Other than pro bono litigation, what kind of cases did you handle? Was it mostly in the District of Columbia, or were you litigating around the country?

MR. ROBERTSON: Well, it was not mostly in the District of Columbia. Litigation then was considered, and maybe to some extent these days still is considered, kind of a service that firms did for their big clients. For example, one of the firm's big clients was the Monsanto Chemical Company. In some year, that I could pin down if I had to but I frankly can't remember what year it was, an employee of Monsanto who was a toxicologist was indicted in Chicago for things that happened before he got to Monsanto, things that happened in another company he worked for, and Monsanto asked if we would undertake his representation. I wound up representing this guy. I wound up representing him in the investigation stage and at the time of the indictment, and we defended him in trial, and we represented him on appeal. Monsanto picked up the tab for the whole thing, which is quite remarkable, because he was then an employee of Monsanto but what he did happened before he got to Monsanto. I never figured out why Monsanto was so generous as to pay for this defense, but they did and that was a huge matter. There were four defendants. It was a seven-month-long trial in Chicago.

I took with me a young associate by the name of Pat Douglass who was involved with me in every step of this case. The case went on so long that all three of Pat's children were born while she was working on this case. I have to tell you about this. She was pregnant with her first child just before our client was indicted. Pat and I flew out to Chicago to make one last effort to convince the U.S. Attorney not to indict. Pat was very pregnant, very pregnant at that time, and I said "Pat, you can't go," and she said "I'm going to go." So she went with me and met with the United States Attorney, who I think was Dan Webb. He turned us down, and as we went to the airport – in those days, they were quite leery about letting a very, very pregnant woman get on an airplane – Pat sort of covered herself with a raincoat and walked behind me so nobody would notice her and went and sat down in the plane. The plane had no sooner taken off than she said, "Oh." She had some twinges. I thought 'God, this is terrible.' Well, it was a false alarm, but I did take her directly from National Airport to Columbia Hospital for Women that night, and her baby was born a few days later. That was baby number one.

The case then went to trial and Pat was with me in court every day. It was a seven-month trial, and you really get to know the jury in a seven-month trial. They get to know you, and after about the third month, Pat was showing this pregnancy, and I noticed the jury was kind of giving her dirty looks. One day I figured out that Pat was not in the habit of wearing her wedding ring in court. I said, "Pat, would you please put your

wedding ring on," so she did and the jury was all smiles after that. The second baby was born within a couple of weeks after the guilty verdict. Pat was very pregnant with her third child when she went down to argue the appeal in the 7th Circuit. So all three of Pat's children were involved with that case.

I did a lot of work with the securities enforcement part of the law firm. Wilmer, Cutler & Pickering had a very busy and successful SEC practice. The firm had brought Manny Cohen in from the SEC, and then Manny Cohen brought Art Matthews in from the SEC, and later Art Matthews brought Ted Levine in from the SEC. Cohen had been the Chairman of the SEC, Matthews had been the Director of Enforcement, and Levine had been I think either his deputy or also Director of Enforcement. So the firm got quite a toehold in securities enforcement and in SEC fraud cases.

I did a great deal of work over the years in SEC civil fraud cases, either investigations from the SEC or lawsuits between companies or by investors against companies arising out of SEC fraud. Those cases were in New York, in Denver, in Detroit. I'm still answering your question whether I was litigating in the District of Columbia or all over the country. The answer is, all over the country. Commercial litigation, SEC litigation.

I think I told you the last time that before I went to Mississippi, I was doing a lot of auto safety work, but I was involved then in the regulatory phase in helping the Automobile Manufacturers Association

work with or against the government in the formulation of auto safety regulations. When I returned to the firm, we were in the litigation phase of auto safety, and indeed I had quite a career working on auto safety litigation between probably the early 1970s when I returned and the late 1970s when it all disappeared in a puff of smoke, and if I may I'll kind of spin that out for you.

MS. ALLEN: Please do.

MR. ROBERTSON: The National Highway Traffic Safety Administration (NHTSA) (which we called "nittsa"; they hated to be called "nahtsa") was the regulatory agency that was to enforce auto safety regulations, and I think beginning with Carter in 1976 is when they began to get really proactive. I'm trying to think of the name of the director.

MS. ALLEN: Is that when Joan Claybrook was there?

MR. ROBERTSON: Yes. I think that may have been Claybrook's time. She of course being a former Nader person, and depending on which side you were on, I think the industry probably thought of Joan Claybrook as the fox in the hen house, and the activists thought they finally had somebody in there who could really make something happen. NHTSA brought a series of cases. Actually, the cases arose this way: NHTSA finds something in an automobile they think is a defect, they tell the car company there is a defect, and the car company disagrees. The agency studies it, investigates it and finally issues an order to the car company to recall the cars and fix the defect. The car company objects, and then the government sues for an

injunction to require the car company to recall the car. General Motors' pitman arms, Ford windshield wipers, Buick carburetors, and one or two other defects were all cases that I worked on. This was my stuff. I was a young partner, and I was in charge of these cases and they were mine to run with.

The most memorable of them was the General Motors pitman arms case. The 1959 Cadillac had a piece in the steering linkage that connects the steering wheel with the thing that makes the wheels actually turn called the drag link, and this connection between the steering column and drag link was called the pitman arm. In fact, I've got a bunch of them around here, they're paperweights. The pitman arm in the 1959 Cadillac was a cast metal thingamajigger which had a metallurgical defect. It would break if there was too much pressure put on it. Well, I won't bore the historians with the details of this case, but of course when you are in the middle of litigation nothing is boring. This was a huge case, because it was a test case for both the agency and General Motors on what was meant by the statutory term "unreasonable risk of accident injury and death."

We had to litigate first what is a defect, and second what is an unreasonable risk. These cars at the time we dealt with this case were already 15 years old, and one of the arguments we were able to make was that the defect that they are talking about as most metallurgical defects will only happen in the first few months of the life of any product. It's

called, believe it or not, infant mortality, things that are going to go wrong will go wrong quick or not at all. That was argument number one. Argument number two, and the one that I always thought was most fun, was that you can't put enough pressure on a pitman arm to break it unless the steering wheel is turned all the way to the left or all the way to the right putting a maximum amount of pressure on it. When can you do that? Only when you are parking the car. And when you are parking the car, it's not moving very fast, if at all, and so there is no unreasonable risk of accident injury or death, even though it can be quite startling to have the steering wheel spin completely free in your hands.

MS. ALLEN: Which is what happens when it breaks?

MR. ROBERTSON: Well, Michael Burack, who was then an associate in the firm, worked the case with me. Burack found and we developed and put on an absolutely world-class expert witness. His name was Alan Tetelman. Tetelman had three degrees from Yale, culminating in a Ph.D. in metallurgy. He was at Stanford University teaching, and he was putting together a new consulting firm on risk evaluation. Tetelman was one of the first people to be deeply involved in the kind of actuarial, mathematical notion of what risk really is. We tried this case ultimately before Judge Oliver Gasch here in this Courthouse and put Tetelman on the stand. Gasch later told me that Tetelman was the best expert witness he'd ever heard anywhere. Alan Tetelman convinced Judge Gasch that whatever risks were posed by this potential pitman arm failure – because none of them had happened for

years, since the first infant mortality phase – was not an unreasonable risk of accident, injury or death. Well, I was at the top of the GM charts until the Court of Appeals got hold of it, and it took the Court of Appeals about ten minutes to reverse. The Court of Appeals said it was clearly an unreasonable risk. The Court of Appeals never paid any attention to the details of the risk analysis, but then this comes under the category of 'say no more' about the Court of Appeals.

A footnote to the Alan Tetelman story. Some years later, Tetelman was hired to do a safety analysis of the San Diego airport, which was then perceived as being not a very safe place to land. He was going to San Diego for his engagement when a PSA airplane, and you may remember the two PSA airplanes collided over the San Diego airport and everybody was killed.

MS. ALLEN: He was in one of them?

MR. ROBERTSON: He was in one of them. And Mike Burack and I, over the years, every time we get together, we talk about Alan Tetelman and we can both see him now standing on a cloud saying to us, "I told you guys there is no such thing as a risk-free society, no such thing as zero risk." That was the proposition he stood for.

Anyway, I tried another case in this court before Judge John Lewis Smith on the subject of windshield wipers that flew off Ford cars. He thought that was pretty risky. I tried another case before Judge June Green of this Court, and that was memorable. When I say I tried, actually that

case went off on summary judgment. This case had to do with carburetors that burst into flames. We said, well, maybe they burst into flames occasionally, but that's not an unreasonable risk of accident injury or death. Why not? Because the carburetor is up in the engine compartment, separated from the passenger compartment by something called a firewall. That's what the original firewall was, it had nothing to do with computers. The original firewall is the wall between the engine compartment and the passenger compartment of an automobile.

MS. ALLEN: I didn't know that. I always thought it was a construction term for houses.

MR. ROBERTSON: It may also be that.

MS. ALLEN: There is one in a car?

MR. ROBERTSON: There is one. And nobody in the whole history of this car had ever been injured at all by one of these burning carburetors. Everybody had always been able to stop their car, get out of the car, get away from the car. Defect? Yes. Unreasonable risk of accident injury and death? No. I was making that argument to Judge June Green, who everybody who knew her will remember as a rather regal woman, and I have this visual picture in my mind to this day. Here I am making this perfectly rational argument about a perfectly rational subject and statistics, and she sat up straight in her chair at the bench and leaned over with that white bow she had above her robe, and she looked over and she said, "Mr. Robertson, do you expect this Court to wait until someone is burnt to a crisp before we take any

action in this case?" And while I was stammering with a reply, she said, "The Government's motion will be granted." That was it.

MS. ALLEN: Right from the bench.

MR. ROBERTSON: Summary judgment in the middle of the argument. Well, that was pretty much the end of my career as a litigator of the auto safety cases. But I spent a lot of my time on them between the time I returned from Mississippi and the late 1970s. I'm just pulling these books to look at them. The pitman arms case actually went to the Supreme Court in 1977. I think the Supreme Court question had to do with a penalty and whether a penalty was proper.

MS. ALLEN: Did you argue the case before the Supreme Court?

MR. ROBERTSON: Actually, I think cert. was denied. Oh, that was the issue. The question presented was whether in applying the key definitional provision of the National Traffic and Motor Vehicle Safety Act requiring that a manufacturer recall automobiles containing defect which poses an "unreasonable risk" of accident, injury and death the Court of Appeals disregarded the intent of Congress by adopting a preset rule which precludes introduction of evidence on the existence and degree of risk. Cert denied. End of auto safety career. I think many people who were litigators in Washington in the 1970s and 1980s, which, you will recall by the way, was the high tide, or at least the most energetic part of the tide, of what came to be known as "deregulation" – lawyers who had dined out for years on regulation of some industry or another had to be reprogrammed

to do something else because the regulatory practice didn't exist anymore in many sectors.

MS. ALLEN: So it made a difference to your practice?

MR. ROBERTSON: You bet! We'll probably have to come back and do this again because just the discussion of it helps me to sort out the timeline. First, banana boats to deal with, but after banana boats, auto safety for five, six, seven years, and I think after that was when I got involved in the securities fraud issues. The criminal case from Monsanto was one-off. I didn't really do much criminal work. The firm continued to do an awful lot of SEC work. I never did much of the SEC regulatory work, but I was defending companies in SEC fraud class actions. That work I did for maybe another ten years during the 1980s. And then in the first half of the 1990s, before I came on the bench, I was doing completely different kind of litigation. I was doing what was then called "insurance coverage litigation."

MS. ALLEN: Representing insurance companies?

MR. ROBERTSON: Yes. Representing insurance companies. The typical insurance coverage case is by a manufacturer against an insurance company for refusing to pay on a policy. In that period of time, the coverage cases we were working on involved what was known as the "long-tailed tort problems." Asbestos, plastic piping, those were two particularly vexing cases, just to describe some.

In the asbestos case, for example, shipyard workers would sue asbestos manufacturers for injury to their workers. The problem was that

there were eight or ten asbestos manufacturers and nobody knew whose asbestos had done the damage. So they sued them all and got judgments against them all or they settled them all. Then one of the asbestos manufacturers would then go and sue its insurance company, but it wouldn't just sue one insurance company because it had insurance policies with different carriers, year after year after year. So you had, let's say, arguably, ten asbestos companies suing fifteen or twenty insurance companies for policies that were in different years. It was a huge mess. The insurance companies all said it didn't happen during my policy, you have to prove it," and that "it comes within this exclusion or that exclusion of the insurance policy. So there were huge numbers of lawyers involved in these insurance coverage cases that went on for years and years. Huge numbers of lawyers.

I can remember going to a meeting of insurance company lawyers in Houston in one of these insurance coverage cases. I think this one had to do with plastic piping, PVC pipes that were used for house plumbing systems, and they leaked, causing incredible amounts of damages to builders all over the country. Builders sued the insurance companies, and there were, I don't know, 15 or 20 insurance companies, 15 or 20 years' worth of liability, and maybe double that number of lawyers in this law firm in Houston. I walked in and looked around and realized that almost everyone in that room was young enough to be my son or daughter. And I thought, 'I don't feel like I'm too old to be a trial lawyer, but maybe I am,

maybe they think I am.' Litigation is – and certainly the traveling and courtroom part of litigation is still – a young person's game.

The trial of a case is a real adrenalin producer. When I was in trial on a case I used to joke that I couldn't believe that clients were paying us to do this. We ought to be paying them for the opportunity to do it because it was such fun. But it was also unbelievably trying to the body and sleep deprivation and everything else. You work too hard when you try cases. While I didn't decide I was too old, that I had to quit, there was a point at which I said maybe I should be thinking about doing something else.

I think this interview also didn't cover some discussion I was having about another whole area of litigation that I did in this roughly 20-year period after Mississippi and before the bench. That is the vaccine litigation. Wilmer, Cutler & Pickering represented a major manufacturer of the DPT vaccine and polio vaccine. Diphtheria, pertussis and typhus vaccine – DPT. Whooping cough was pertussis. But the sad fact is that vaccines confer immunity on everybody only if everybody accepts the vaccine. Actually, it is literally called "herd immunity." All of the public health officials and all pediatricians will urge that every child receive the DPT vaccine because if every child doesn't receive the DPT vaccine, then the possibility of whooping cough spreading and becoming a wild virus again is a real possibility. So that's why kids have to have the vaccine. But if kids have to have the vaccine to go to school, it's also true that

some tiny, tiny percentage of children will have very bad reactions to it. And the reactions can become serious neurological deficits and retardation. All kinds of awful things happen to a very few kids. Those are the kids who bring the lawsuits, or their parents do. Those are very wrenching cases, but if you are defending them, you can't just say "Oh, you have a retarded child, well it must be the vaccine, we'll pay you." You need to insist on proof that the vaccine caused it or that there was enough of a temporal relationship that it's reasonable to conclude that the vaccine caused it. These were high-stakes cases. There were experts on both sides disputing whether the vaccine was at risk, why the vaccine was at risk, whether it was a defect or not. It was extremely complicated and also very emotional litigation. Eventually the federal government took over the issue by enacting a vaccine compensation act which essentially reduced most vaccine claims to a no-fault posture in which parents could get relief from the federal government if they could prove the injury, and that would be that. So, I got legislated out of the vaccine litigation practice.

At about the same time I was involved with vaccine compensation litigation, I took a side trip into a large but quirky piece of litigation involving an oil spill in Alaska and the claims of fishermen to be reimbursed for salmon they did not catch. Our client was the Trans-Alaska Pipeline Liability Fund, essentially a pot of money that was funded by the deposit of five cents for every barrel of crude that crossed the state

in the Trans-Alaska Pipeline. The Fund existed for the very purpose of providing compensation for damage caused by oil spills, but of course compensation for oil spills, like compensation for vaccine injuries, is not simply paid over on demand – pots of money are entitled to a defense – and so several of us – Steve Hut, myself and Alan Braverman, among others – became quite knowledgeable about the salmon fisheries of Alaska, the sushi markets of Japan, the Russian-speaking fishermen of the Kenai Peninsula, and several other fascinating subjects. One indelible visual memory of that case is of three Washington lawyers in blue suits looking for breakfast one March morning in Soldatna, tiptoeing in their tassel moccasins around pools of spring melt in the parking lot and then into a restaurant, where the bearded heads of about fifty big guys in overalls and plaid shirts turned in unison to check us out, and immediately swiveled back to their ham, eggs, biscuits, and gravy.

I think I'll summarize by saying that in a time of deregulation and changing administrations, there really was in Washington something like litigation du jour. I did auto safety, and then I did securities class actions, and then I did vaccine compensation and TAP and Alaska salmon, and then I did insurance coverage defense. It was sort of one wave after another. All quite different types of litigation.

MS. ALLEN: But a lot of litigation. It was 1984 and you were invited to be a member of the American College of Trial Lawyers?

MR. ROBERTSON: I raised that because you asked me if many of my cases were jury trials, and I said no, not many. I think it's correct to say that I tried more jury cases in a year-and-a-half in Mississippi than I tried in almost all the years after that until I came on the bench. Some of the cases I was working on weren't really jury triable. Very few securities class actions have ever been tried by juries. They are almost all settled. The automobile safety cases were by statute not jury triable. They all went off on injunction actions by the government. The insurance coverage cases, again, those cases were too big to try, too complex to try. Nobody could figure out how to try them. Some insurance coverage cases are tried, but they are cases in which the jury essentially is asked to determine what the intent of the parties was when they adopted some exclusion in an insurance contract – how can the jury make that determination?

The white-collar criminal trial of the toxicologist I told you about earlier was certainly a long jury trial, and I tried a couple of jury cases out in Missouri for a company that was a distributor of propane gas. That was Empire Gas, a regional propane company that had all kinds of commercial disputes concerning the purchases and sales of companies. Except for those, there really weren't that many jury cases, which is why I was surprised and seriously flattered when I was invited to join the American College of Trial Lawyers. Up until some time in the 1980s, they wouldn't even think of admitting anybody to fellowship who didn't have a lot of jury trials under his belt. But they did and actually, it's interesting – I was

installed in the American College of Trial Lawyers in the same year as Thomas Penfield Jackson of this Court. Judge Jackson – not a judge then, or maybe he had just become a judge – was what I call a real trial lawyer. He was doing medical malpractice defense and insurance defense in the courts of the District of Columbia and Maryland. He was the kind of guy who was in court all the time trying cases.

MS. ALLEN: I didn't know that.

MR. ROBERTSON: Yes. He was. And he was a wonderful trial lawyer, and I felt very privileged to be recognized by an organization that honored that kind of trial experience. But the College was then waking up to the fact that there were a lot of good litigators around who didn't have the chance to actually try many cases but who at least were worth a look anyway.

MS. ALLEN: You cited some interesting recent statistics that the decrease in the number of cases that go to trial has continued. The chances of actually litigating a case to a jury trial now is a real rarity.

MR. ROBERTSON: Absolutely. There is a good deal of discussion going on in the judiciary today about the decreasing number of jury trials, of trials of many kinds, but jury trials is mostly what we do. Just in the time that I have been on the bench, the percentage of civil cases going to trial has dropped from something like 3 or 3 ½ percent to something like 1 or 1 ½ percent. The number of criminal cases going to trial has dropped from something like 4 percent to something like 2 percent. Why? Well, that's a matter of some dispute. Some people say that trials are too expensive. Other people

are saying they take too long. Still others say there are too many technicalities. But I think the judicial sense of it is that most people settle cases because the risks are too large. There's too much of a downside risk to going to trial if you are a defendant. And if you are faced with a claim for $10 million and you can settle for $500,000, at least you walk away with some money. So, it's risk analysis again that's driving most settlements. But the truth is that the work of the federal courts is many fewer trials than it used to be. Many fewer.

MS. ALLEN: And more motions?

MR. ROBERTSON: More motions. Yes. Simply that. More motions. I think that's a complete answer.

MS. ALLEN: I want to ask you about one more thing that didn't get on the last tape, and that's the interesting connection you had with Judge Gasch. Can you talk about that?

MR. ROBERTSON: Oliver Gasch and I had something in common. We both had gone to Princeton, and we were both night students at GW Law School. For some reason, I met Judge Gasch while I was still in law school. I think it's because he came over there to speak just after he'd gotten on the bench, and because a fellow I worked with on the law review, John Tansey, either knew Judge Gasch or [Something happened to the tape here. The recording stops, with a very faint, muffled sound].