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 May 6, 2004. This is the third interview.

MS. ALLEN: What I'd like to do today is talk more about your judgeship, getting appointed to the bench, how the nomination worked and what that experience was like, and then just talk about your years on the court, which is little bit open-ended. We can start with your appointment or talk about private practice in the early part of the 1990s leading up to the appointment.

MR. ROBERTSON: The appointment process is of intense interest to every judge who's ever gone through it. Whether it's of any historical interest to anybody except that individual judge is another question. I found when we went to the so-called "baby judge school," which is the week of orientation that new judges have after they are appointed, we were all very excited to tell our stories, and no two stories were anything remotely alike. It was quite remarkable.

MS. ALLEN: These were all Clinton appointees?

MR. ROBERTSON: Yes. These were all Clinton appointees.

MS. ALLEN: You might expect some homogeneity.

MR. ROBERTSON: I'll try to put the appointment and confirmation story in a nutshell, but it may be a pretty big nutshell. The thing that's important to know about the Clinton appointees to our court is that after President Clinton was elected – or maybe before he was elected, maybe he was worried that he wouldn't

draw enough votes in the District of Columbia. In any event, Eleanor Holmes Norton, our non-voting Delegate to the House of Representatives, persuaded the President to give her the functional equivalent of senatorial privilege in the appointment of district judges, the United States Marshal, and the United States Attorney.

MS. ALLEN: She can be persuasive.

MR. ROBERTSON: As you know, in every judicial district except this one, there are two United States Senators and they somehow work out between themselves who will have the right to give the nod to the next person whose name will be sent to the White House for a judgeship. In the District of Columbia, where we have no vote, no senator, and no voting Congressperson, for Ms. Norton to get that authority was really quite remarkable. But she did. And to her considerable credit, she immediately appointed a commission, I think it was a 17-member commission, to collect, review, vet, and interview applicants for judgeships, and to submit recommended names to her. As I recall, the Commission was going to give her three names for each opening, and she was to send one of those names to the White House. Or maybe she initially thought she was going to send three names to the White House. But as a practical matter, what she wound up doing was choosing the name she would send to the White House. This Commission turned out to have a number of members I knew pretty well. Its chair was Pauline Schneider and maybe still is. That Commission may still exist, at least in name. I don't think President Bush has given the time of day to

Eleanor Holmes Norton on judicial appointments, although she maintains that she has something like the same deal with President Bush.

Pauline was a President of the District of Columbia Bar two or three years after me. I had worked with her on the Board of Governors. Mark Tuohey, I believe, was on the Commission. Mark had also been a President of the DC Bar. Judy Lichtman was a member of the Committee. It was Judy and Elliott who persuaded me to go to Mississippi back in 1969, so I had known Judy for a long time. There were three or four more members I happened to know.

Now I deny that who you know plays a dominant role in American life, but it certainly didn't hurt my chances that I knew these people and that they knew me and that I at least had some credibility going into the process. There were some obvious and terrific potential candidates for judgeship. I thought then and still think that anyone's chances of being appointed to the federal bench was roughly the same as being struck by lightning. You cannot run for that office and think you'll fall on your sword if you don't get it. You just can't do that because there are so many imponderables in the process. At this particular time, there were four vacancies. Everybody thought that this being the Clinton presidency, and Clinton being very, very devoted to diversity as a principle, indeed in the early days of the Clinton Administration the deal was you couldn't appoint anybody to anything unless you presented a slate that included at least a minority candidate and a female candidate. So at any rate, diversity was a

big deal. There were lots of great people lined up for the appointments, and it was pretty well understood in the community that it was high time we had a Latino judge on this court, and everybody loved Ricardo Urbina, so one of those appointments was going to go to him. It was pretty well understood by everybody in the community that Gladys Kessler, because of her tremendous work at Superior Court and the national reputation she had obtained for herself, was going to get one of those appointments. It was pretty clear in the community that one of the four appointees was going to be an African American. So that left one white male slot. The potential candidates included people like Chuck Ruff – the late, lamented Chuck Ruff – Fred Weisberg, this fabulous judge over in Superior Court who might be interested, but turned out he wasn't, Paul Friedman who had been President of the DC Bar before me, who had clerked on this court and clerked on the Court of Appeals and had all kinds of wonderful credentials for the job. But I threw my hat in the ring anyway.

I put my name in the hopper and had a good interview with Eleanor. By the way, I lived in North Bethesda, Maryland at that time, out near White Flint and Montgomery Mall, and had been living there for 30 years. Eleanor made it pretty clear that she wanted her appointees to be residents of the District of Columbia. She said, "I know there is no legal requirement that judges in this district live in the District of Columbia, but neither is there a legal requirement that I send anyone's name to the White House."

MS. ALLEN: She said that?

MR. ROBERTSON: Pretty much. She was a District of Columbia politician and held all the cards. That was her deal, and I took it. I said, "I have a 50% share of the house that I live in, I have half the vote." "This is going to be difficult for my wife, but I will tell you that it is my intent to try to persuade her to move, and I will do that." And she seemed to accept that. But the first four seats went to Ricardo Urbina, Gladys Kessler, Emmet Sullivan, and Paul Friedman.

MS. ALLEN: Okay.

MR. ROBERTSON: Eleanor called me and said, "You're a great candidate, but I'm sorry, I can't appoint you." I said, fine, thank you, and retired to lick my wounds. One of my partners at Wilmer, Cutler & Pickering, a wonderful computer visionary by the name of David Johnson, said, "Don't worry, Jim. "You don't really need to sit on that Court. We're going to need new judges in the new Court of Cyberspace." He also said, "You wouldn't have to wear a robe," but he was dead serious. He thought that a court system would develop with specific jurisdiction over cyberspace.

MS. ALLEN: Sort of like a tax court or separate jurisdiction?

MR. ROBERTSON: Sort of like a tax court. But the analogy that he or somebody drew fascinatingly was to the law that developed in the Hanseatic League back in the 13th and 14th centuries when commerce was getting started in Northern Europe and there wasn't any system for it. The system developed itself. It was Hanseatic League. So the theory was that

something like that will develop in cyberspace. Well, then there was an unfortunate death on this Court. It was George Revercomb, a wonderful judge who died unfortunately of cancer. Because there was now another open slot, I started to put my name in again. Then, I got a call from a good friend who was a FOB, as we called him in those days, who said, "This seat has been promised to someone else."

MS. ALLEN: Did you know him?

MR. ROBERTSON: Oh yes, I knew him very well. He said this seat's been promised to someone else. I said "Oh." He said it's been promised to somebody who is a friend of Hillary's, and if you really want to be a team player, don't apply for this one because your face will be on the radar screen. Everybody knows you and you'll get the next appointment, but this one has been promised to someone. Well, I knew who that person was and checked it out and thought about it and checked out how close a friend of Hillary that person really was and made my own analysis of the situation. Then I said to myself, life is too short, and I'm not getting any younger, and I'm going to go for it anyway. And I did, and that appointment I got.

The appointment process itself is amazing. You have to fill out a form that is 70 or 80 pages long. It's like an FBI clearance form squared. You have to collect the names of all the cases you've tried, the judges you have appeared before, and the attorneys you've appeared against, and you basically have to recap your whole history. In fact, if I really were doing

this oral history properly, I'd have that in front of me because I did that quite seriously for this whole judicial confirmation process.

MS. ALLEN: Did you have to do that first time?

MR. ROBERTSON: No. The White House begins this process and they wouldn't have known about me unless Eleanor had sent my name up to them. And Eleanor didn't send my name the first time around.

MS. ALLEN: So you didn't have to fill out these forms before you got to meet Eleanor?

MR. ROBERTSON: No. Well, actually that's not true because she had her own form. I had to fill out forms for her first, for the Commission first, and then another set for the White House and then another set for the Senate. It went on and on.

The clearance process is quite amazing. There were a lot of people who were very helpful to me, and at this stage, when your name goes to the White House, you begin to get a little proactive. You begin to muster the friends who know you, who you think might have some clout up there. I had very nice letters and recommendations from all kinds of people, from former partners of mine, partners who put me in touch with senators from Maryland where I then lived who were kind enough to write letters. Vernon Jordon wrote a nice letter for me. I thought he had some connection with the White House. A wonderful guy from Denver who was a very close Friend of Bill's, so to speak, Jim Lyons, was very helpful. Lyons had been the author of the famous Lyons Report, which was the first Whitewater Report.

There were lots and lots of people who were very helpful to me in this process, but to make a long story short, it was now September of 1994 and the White House satisfied itself that I would be okay, and the President sent my name up to the Senate with his nomination. Then I had to get through the Senate.

Let me back up for a minute, because there are two other parts of this that I thought were kind of funny. If you remember early in Clinton's presidency, there were some flaps about disqualifying issues. There was Zoe Baird's Social Security for her nanny, there were people who belonged to clubs that were not considered open enough, there were all kinds of issues like that. We scrambled around, my wife and I, to make sure that we had done what we should do with any nanny concerns. We didn't have any nannies. Our kids were long raised, but we did have cleaning women in the house from time to time, and the question was if they were independent contractors or not, were there records that could be produced. We got ready to answer the questions, but nobody asked. We were clean, but nobody asked the question. The only question I was asked was in the category of, "Does the country club you belong to permit women to play golf on Wednesday afternoons?"

MS. ALLEN: What was your answer?

MR. ROBERTSON: My answer was "yes." I belonged at that time to the Columbia Country Club and to the Metropolitan Club, and I was required to get from both clubs statements and by-laws to establish that they were not racially

discriminatory or exclusive, which neither of them was. But that golf thing kind of blew me away. It goes back to the days when all the doctors and dentists (not the lawyers!) took Wednesday afternoon off and played golf and didn't want women on the golf course. I didn't even play golf.

The other thing they wanted to know, I thought to their considerable credit, and I got a lot of feedback from people who had been approached about this, one thing the Clinton White House was very interested in was whether its judicial appointees would have the proper judicial temperament. Would they be respectful of litigants before them? Would they be prone to the disease that judges sometimes call "robe-itis?" Would they become marionettes on the bench? They wanted to know if I had any judges that I thought were models that I would try to emulate, and I said yes and named two. I named Judge Fred Motz up in Baltimore who was then a young judge and I thought just a model of dignity and decorum and respect and simplicity in a judge. And a wonderful judge out in Springfield, Missouri named Russell Clark, who I thought was the Harry Truman of the federal bench. He just called it as he saw it, no nonsense, plain, simple "I'm from Missouri" kind of guy. It was Russell Clark who desegregated the Kansas City public schools and required them to bring in funding from the suburbs. He was reversed on that, but it was a real act of courage on his part. In any event, the White House was interested in my judicial temperament, and I liked that. I thought that was the right question – and never mind golf on Wednesday afternoon.

MS. ALLEN: White House staff asked you questions about that, or the Senate?

MR. ROBERTSON: Frankly, at some point it becomes a blur. The White House is interested in this, but they really delegate this part of it to the Justice Department. There was in the Justice Department in the Clinton years a woman named Eleanor D. Acheson, who was the head of the Office of Legal something or other. It doesn't sound like they are judge picking, but that's what they were doing. It was her people who actually did the vetting.

Once I got through that process, then the nomination formally went up to the Senate. Then you've got to get a hearing. It's late September, early October of 1994. Congress is getting ready to adjourn, and there's an election coming up. The senators all wanted to go home and campaign. There hadn't been all that many judges confirmed, and there was a great rush to get a whole bunch of them through. Day after day, week after week, I was being told "Gee, I don't know if we can get a hearing for you, they only take five or six at a time in the Senate Judiciary Committee." About three days before the Senate was to adjourn, I got a call from somebody in the White House who said, "Mr. Robertson, we are very sorry, but I just don't think we are going to be able to get a hearing for you this time. We'll just have to carry you over to the next term." I said "right." The handwriting was on the wall. Control of the Senate was going to change, or if it didn't change, it was going to become much more contentious.

So I said all right and began to lick my wounds again, and then I got a call from somebody in the Justice Department. This was Susan Liss, who worked in Acheson's outfit. Susan Liss said, "We are not going to give up on this yet." She said to call Lloyd Cutler. Cutler was back at the firm, having been White House counsel for a while, but he was no longer White House counsel. I called Cutler and carried out my instructions, which were "Ask Cutler to call Hatch." I reached Lloyd at home. This was 8:00 at night. Lloyd, who had recused himself in this process while he was still in the White House but he was no longer in the White House, called Orrin Hatch. He called me back about 15 minutes later and said, "Hatch says tell DOJ to tell Biden Hatch says Robertson is okay." Next thing I knew, I got a call from the Justice Department saying my hearing is tomorrow morning at 9:00. I think it was the very next day. I may be telescoping this, but I think it was the very next day. So I went up there and had a hearing. The only reason there was a hearing at all was that Senator Metzenbaum had a protégé from Ohio by the name of Kate O'Malley who had been nominated for the Northern District of Ohio, and Metzenbaum really wanted her to be confirmed. So Metzenbaum agreed to sit in the chair. That's all you need for the Committee is one member sitting in the chair. He agreed to hold a hearing for five or six judicial appointees, in addition to O'Malley, and I was one of them. The hearing was hilarious. Kate O'Malley showed up with – I think she has four children and a couple of nieces and nephews – a bunch of little kids.

Metzenbaum put them all up with him in the Committee chairs and said, "Now, children, what do you think? Will your mother make a good judge?" "Yes, I think my mother will make a good judge." "Well, do you think she'll be fair?" "Oh, I think she'll be fair." "Is she fair with you all the time." "Well, most of the time." So, that was the show, and when it got around to me, they asked me about two or three questions, and Orrin Hatch appeared in the Committee Room. He had been sick with the flu the night before and he was still sick, but you know, Senator Hatch always looks like he stepped out of a band box. He walked in and he said "Mr. Robertson, I understand from some sources that you've been quite politically active on the liberal side of the aisle." I didn't confirm or deny that. The truth is, I'd never been all that politically active, but I didn't bother to quarrel with him about it. He said, "If you are confirmed as a judge, do you think you'll be able to decide the cases before you on the law and the facts without regard to your political beliefs?" It was a tough question. I said, "Senator, I will." He asked if I had any agenda going to the bench. I said the only agenda I have is to try to make litigation work faster and more inexpensively for people. That seemed to be the right answer, and I was confirmed – rather, I was voted out of that Committee that night, and confirmed two or three days later as I think the very last item of business.

It was sooner than I thought, October 11, 1994. This is from the Congressional Record, I think from the very last few minutes, Executive

Calendar. At any rate, I was confirmed on the last day of the 103rd Congress at about midnight, and the Congress adjourned sine die a few minutes after that. And the next time Congress adjourned, it was the Newt Gingrich Congress, and I don't think I would ever have been confirmed under those circumstances.

MS. ALLEN: It was the next Senate where you started having the great delays?

MR. ROBERTSON: The Republicans slowed down the Clinton appointees from the very beginning. This business of slowdown began long before that. It began really after Bork and Thomas. It began back in the 1980s. Now of course it has gone nuts.

The day that I was confirmed, I was out on the Eastern Shore, our place on the Eastern Shore of Maryland, with an old friend who couldn't believe I went to sleep that night before knowing what had happened. The phone rang at 2:00 in the morning, and he woke me up so that I could go answer the phone to see if I had been confirmed. The next day he took a picture of me standing on my dock holding a stupid little crab hanging onto a wire. I didn't even think about it. About two months later, a completely anonymous envelope appeared, and in it was the photograph and an anonymous card that read, "For immediate release from the Office of the Speaker, House of Representatives" – who was Newt Gingrich at that time – "as an example of misguided liberal Democratic party thinking, recently appointed U.S. District Judge James Robertson is shown holding what he thinks are the scales of justice."

MS. ALLEN: [Laughter]. That's great! It's really a pathetic little crab.

MR. ROBERTSON: That's the appointment story. It wasn't a nutshell, I know, it's a long story.

MS. ALLEN: And worth telling.

MR. ROBERTSON: And here is one more piece of the story. Before I went to sleep on the Eastern Shore the night my nomination was confirmed, I had a call from an associate at Wilmer Cutler whose wife worked on Capitol Hill. "There's a blue slip in your nomination," he said. "Who put it there," I asked. He did not know. It's amazing that I was able to sleep after that, because the news of a blue slip, which was a privileged Senatorial "hold" on a nomination, immediately put me in mind of my role in the Robert Bork nomination battle in 1987. I was then one of two co-chairmen of the Lawyers' Committee for Civil Rights Under Law, serving a two-year term that had begun in 1986, I believe. The other one was Harold "Ace" Tyler, of the Patterson, Belknap firm in New York, a Republican, a former federal District Judge, head of the Civil Rights Division under Eisenhower, Deputy Attorney General under Ford, and, in 1987, chair of the ABA judge-vetting committee – a seriously distinguished lawyer.

The Lawyers' Committee was determinedly nonpartisan, and so was the ABA's judge-vetting process, but I was not. I was very upset by the Bork nomination. Moreover, I was asked by a group of associates in our law firm to head up a decidedly less nonpartisan effort to collect and

analyze Judge Bork's writings – a form, I suppose, of opposition research. I decided that I could not do that and retain my chairmanship of the nonpartisan Lawyers' Committee, so I resigned that position before my two years were up, and I went to work on the Bork research.

Lloyd Cutler, the super-lawyer and head of my firm, was a devoted Yale alumnus, as was Judge Bork, and was way out front in support of the nomination, (this is a bit of a detour) and there was a serious, formal debate within our law firm as to whether the two of us could be publicly associated with opposing positions on the nomination. We resolved that dispute, sensibly, by decided that each of us was free to do our own thing. Later (detour upon detour), when Bork was defeated and Douglas Ginsburg was nominated – briefly – in his place, Cutler appeared in my office. I don't think he had ever set foot in my office before that. "Are you happy now?" he asked.

Our Bork research found its way into what proved to be important and devastating testimony by Dean Erwin Griswold before the Senate Judiciary Committee, and Bork's nomination was defeated. When I was nominated to the District Court seven years later, my involvement in the Bork matter never came up. I did nothing to cover my tracks, but nobody ever asked about it. When I heard about the blue slip that night on the Eastern Shore, however, I will admit that I was a bit nervous.

And just to put a cap on this story, I will say that today I regret giving support to the anti-Bork effort. I was a minuscule part of that

effort, to be sure, but I feel that I bear some part of responsibility for a campaign that started what has now – in 2016 – been thirty years of feuding about judicial nominations. Bork was certainly qualified to sit on the Supreme Court. He was defeated only because his would have been a swing vote, as Justice Kennedy's votes indeed have turned out to be. If Bork had been nominated before Scalia, before the swing vote was in play, he would have been confirmed – and the genial, personable, clean-shaven Scalia would have sailed through, too.

Okay, so where are we?

MS. ALLEN: You just got appointed, so we are in the middle of October. You're appointed, and what comes next? How much time do you have to get out of your private practice and appear in court?

MR. ROBERTSON: You have actually as much time as you want, but it was important to me for tidiness reasons, and to make sure that I got the year-end distribution, to stay at Wilmer, Cutler & Pickering until the end of the year. So I formally resigned the partnership and was sworn into this Court on December 31, 1994. Chief Judge Penn was the chief at the time and very kindly offered to swear me in at his house. My wife and I and my twin sister and her husband all went to Jack Penn's house, and he had a bottle of champagne and swore me in at his house on New Year's Eve 1994, and then I came to work.

Coming to work in a federal courthouse when you've never been a judge is kind of a surreal experience. They try to give you a little

orientation, but you don't understand a lot of what they are saying. They drop a bunch of files on your desk and say these are your cases. What happens in this Courthouse is when a new judge is appointed, every other judge gives cases to the new judge to balance everybody's case load, but the cases are not selected by that judge. They are selected in random by the Clerk's office. That's a very useful idea. It avoids judges dumping their old dogs on the new judge, which they used to do here, but they don't do that anymore. So I found myself with 200 cases, all with deadlines. I had to find law clerks. My secretary, Marlene Taylor, came with me from Wilmer, Cutler & Pickering, thank goodness.

My first two law clerks were Michael Yeager, a brand new law graduate who had grown up across the street in Bethesda and who was my younger son's good friend, and Claudia Serringer, who had been an intern for Judge Urbina for a few months. Urbina preceded me by maybe three or four months there. So four people walked in and tried to figure out how to do this job.

MS. ALLEN: You said there had been a vacancy created by a death on the court, but there weren't clerks for that judge who stayed on and kind of managed the office?

MR. ROBERTSON: No.

MS. ALLEN: So everybody was new? Were you assigned cases at all different stages of litigation so you had some that weren't ready for trial, and some that were?

MR. ROBERTSON: The ground rules for the assignment of cases were that the only criminal cases you would get would be new ones because they moved much faster. You can't pick up a criminal case that's about to go to trial if you don't know anything about it. So we only got new criminal cases and we got civil cases that were not more than two years old. I disposed of most cases in less than a year. A case that is 12 or 14 months, or a case that's two years old, is already an old case. You weren't supposed to get any cases assigned to you that had been set for trial, but some of them are ready to be set for trial. Mostly what you get is cases with pending motions that haven't been decided and you have to dig into them, read the motion papers, and begin to nibble away at them and somehow you find your way through. I was very, very lucky to have assigned to me as a courtroom deputy clerk a guy by the name of Joe Burgess who had clerked for Judge Charles Richey for 14 years. Richey was, to put it mildly, a very demanding judge of everybody. Burgess had about burned himself out and was looking for I think a softer touch. He taught me an enormous amount about how this court works, about how the dockets work, about the paper flow, and about almost literally how to do everything. So the nuts and bolts of being a judge are not all that complicated, but somebody's got to show you how to do it. You don't just invent that, and Burgess led me by the hand. Having Joe Burgess as a courtroom deputy clerk was a little bit like being a young lieutenant in the army and having an old master sergeant who knows the ropes and can show you around.

Now I'm a lot older than Joe Burgess was then, and still am, but he was a lot more experienced in this Courthouse.

MS. ALLEN: Did he stay on in that capacity for a number of years?

MR. ROBERTSON: He did for a number of years, maybe four or five years, and then he got promoted in the clerk's office. Joe and I got to be quite computer savvy, and when the court began its journey into electronic case filing about four years ago, Joe was promoted because he was computer-adept and was interested in doing that, so they gave him a job as one of the supervisors of the whole electronic case filing. I suppose that my epitaph in the court system is going to have more to do with technology than anything else. A significant piece of my experience on the bench has had to do with technology, so here's that story. It's another big nutshell.

MS. ALLEN: Just to preface this, you mentioned before that someone said you'll be judge of the cyber court, so you had interest in technology in the past.

MR. ROBERTSON: Wilmer, Cutler & Pickering was one of the very early adapters in the use of personal computers in law firms. They were in the vanguard, and I can date it pretty precisely to around 1986-1987. This whole revolution hasn't been out of the box that long. The firm had tried all kinds of ways to centralize and make more efficient the business of dictation and word processing and none of it had ever taken. When the IBM PC came out – IBM, by the way, was a big client of ours – whoever was the managing partner of the firm at that time, I think maybe it was P.J. Mode, really had a quite a brilliant approach to how to get people to start using it. He

remembered the old story about how Tom Sawyer got Huck Finn to paint the fence. You remember the story. Tom is painting, and Huck comes along and asks, 'what are you doing, Tom,' and Tom says, 'I'm painting the fence,' and Huck asks, "can I help?" and Tom says, "No, you don't qualify." Huck says, "Yeah, but I could get qualified." And Tom says, "I don't know." It's a long story of course, but Huck wants to do it and is told he can't do it and so his competitive juices flow and he finally gets a paint brush and when he starts painting the fence, Tom sort of goes fishing. Well, that's the way computers were introduced to Wilmer, Cutler & Pickering. "We're buying 50 of them, and only those people who have a real need for them will get them." Well, of course, the competitive juices started flowing and everybody had to have them.

I got interested in the computer not as a techie, but simply because it's such a perfect tool for lawyers. It just made so much sense. It helped you organize things, it helped you keep things where they ought to be, it helped you remember things, it was just a fabulous tool. So when I got to the Courthouse, I knew about computers, and how to use them, and what to do with them.

MS. ALLEN: Was the court using computers very much?

MR. ROBERTSON: The court's use of computers was in a very embryonic stage. Judges had just gotten computers, but nobody was using them. I actually knew how to send and receive e-mails and was in the habit of doing it a lot at Wilmer, Cutler & Pickering, so much so that I had to impose rules on

myself about how many times a day I would look at my e-mails. But here, I turn on my machine and I get two e-mails in a whole day.

As the old saying goes, in the land of the blind, the one-eyed man is king. I was soon tapped to be a member of the court's information technology committee, and then because Royce Lamberth's time was up on the Judicial Conference Committee on Automation and Technology, or CAT, I was appointed to his seat. I have been on that Judicial Conference Committee for almost eight years now, even though you're supposed to be on it for only six years, two three-year terms. I was re-appointed for an extra year, and then when the chair of that Committee, Ed Nelson, tragically died a couple of years ago, I was asked to become chair. So for eight years, I have been involved with the Judiciary's information technology effort. That will probably be my epitaph. On my watch, probably the biggest change in the judiciary since the Federal Rules on Civil Procedure I think has been the introduction of electronic case filing, which we now have 100% in this Court

MS. ALLEN: Was this one of the first courts to use this?

MR. ROBERTSON: This was one of the first courts, yes. Not all courts have it yet. It's still being rolled out nationwide. About half the district courts have it, and almost all the bankruptcy courts have it, and it has really changed our lives, changed the way we deal with cases, making it so much easier and so much less paper and so many fewer moving parts in the whole judicial process. Anyway I've spent a lot of time on this.

MS. ALLEN: Did you become involved in the IT endeavor early on, as soon as you started in early 1995?

MR. ROBERTSON: Almost as soon as I started. The chair of the CAT Committee at that time was a judge named Owen Forrester from Atlanta. And he, it's fair to say, was a visionary. He had the "vision thing" about IT in the judiciary, and he probably is as responsible as anybody for pushing and jumpstarting this electronic case filing system. He asked for volunteers, for people that would be, as he put it, "the coaches" of the IT projects. For electronic case filing, he wanted a volunteer to chair a subcommittee that would supervise the design and installation and run-out the project. I volunteered, and he said fine, you've got it. So I really was involved at the very early stages.

The Administrative Office had built its own system experimentally to handle a huge number of asbestos cases in Cleveland. There were hundreds of cases, or maybe thousands of cases, and they needed help badly because they couldn't docket all the material. They cobbled together this internet-based system and it seemed to work pretty well. Forrester got hold of that and decided he was going to make this a national product. Well, the Administrative Office of the U.S. Courts doesn't do anything quickly or easily. They had to have study groups and working groups and project meetings and analysis and requirement sessions. I think we came up with something like 2,000 requirements for this system and then put it out for bids and then tried to find out if there was anybody

in the private sector who already had something else like this or would make something like this for the judiciary. When the answer was "no," the judiciary went on, completed designing and adapting its own program. And that program evolved into what we now know as CM-ECF, or Case Management and Electronic Case Filing.

MS. ALLEN: It did it internally with its own employees?

MR. ROBERTSON: Own employees, did it internally. And I'm sure it's not a simple system, but in concept it isn't that difficult. In concept, a lawyer now prepares a pleading or a motion or something on his own typewriter or on his own computer in his own office, and then connects to the internet and goes to the website of the court. He logs on and the court recognizes him and his case and gives him a menu to select what he wants to do. He says he wants to file a motion and is asked the name of the motion. He types in the name of the motion, he's invited to attach the computer file of the motion that he has just created, he attaches it, he pushes a button, and bingo, it's filed. And not only is it filed, but it is now also served on all the other lawyers who automatically get e-mails that tell them something has been filed and here's a hot link. Click on it, and you can read what's just been filed. So, the lawyer is now filing the document electronically without any paper, creating the docket entry, electronically serving all the other parties in the case. They are getting notice electronically. I'm getting a notice on my computer when something has been filed.

In the old days, before CM-ECF, the process would be that the lawyer would send a messenger down to the court with two copies and another messenger over to the office of the other lawyer or mail copies to the other lawyers. He'd have to make copies and put them in envelopes and stamp them and address them and mail them, or have them sent by messenger, sent to the Courthouse, and once they are in the Courthouse, the Clerk's office had to stamp them, file them, log them, and bring them up to my secretary who would stamp, file, and log them and then bring to me. And all that is done now in a nanosecond. It's quite amazing.

MS. ALLEN: All the old issues of proper service have evaporated.

MR. ROBERTSON: You got it right. Totally evaporated.

MS. ALLEN: Was there resistance in the court to switching to an electronic system? Was it hard to get it implemented?

MR. ROBERTSON: Yes. Yes to all the above. But the resistance wasn't uniform. When we first conceived of this system – I don't mean to say I first conceived it – but when I came on board in this process, there were concerns that the Clerk's office would resist this. The thought was the clerk controls the docket, and now you are turning over control of the docket to lawyers who are creating their own docket entries. And the concern was, don't sell this to people on how you are going to save manpower because clerks get paid in accordance with how many people work for them. So we expected resistance from the Clerk's offices. We expected resistance from judges who are generally perceived to be Neanderthals where technology is

concerned. We expected resistance from the small practitioners who, we feared, wouldn't be able to afford all the computers and all the software and so forth that were necessary to make this work. We expected resistance from Clerk's office personnel who resist any change in their job descriptions. We were wrong about almost all of that. The Clerks loved this system because it cuts down the amount of work they have to do. It really, really reduces the amount of work they have to do.

In the old days, clerks used to have to copy and mail out all copies of judges' opinions and orders. Now that's all done by my secretary from her desk with one stroke of the key. And they had to file things in the file rooms, and now they are filing less and less. They still file sealed materials, and they still file papers in criminal cases. We haven't gone completely electronic there yet, but the Clerks' Office loves it.

MS. ALLEN: People didn't lose jobs?

MR. ROBERTSON: People did not lose jobs, although we are in the middle of a huge budget crunch in the judiciary, and if we can't get a little more money pretty soon, the whole judiciary is going to be riffing people. The Clerk's office will survive because of the efficiencies that CM-ECF has allowed them to maintain. Small practitioners love it because for them it levels the playing field. They can get a big slick publication together and get it on file just as fast as any big firm can and they don't have to hire bicycle messengers to do it. They don't have to worry about service anymore. And it turns out the small firms are more agile and more adept at handling computers than

the big firms are. They have to be to survive in this day and age. So they love it. There are some Neanderthal judges, but they are not necessarily the old judges. Some of the younger judges are most resistant, but it just depends on whether you like computers or not. So, long story short, the resistance has been very slight, and almost every lawyer I've talked to who has used the system thinks it is the greatest thing since sliced bread.

MS. ALLEN: Is it an ongoing implementation? Are you making changes constantly?

MR. ROBERTSON: Oh yes. I mean in any computer program you're making changes constantly. We are about to roll out Version 2 which will have enhancements and then Version 3 and then probably in a few more years, there would be some entirely new system. It's constantly evolving and getting better. Now I'm making it sound as if I spend all of my time with technology. I don't.

MS. ALLEN: Actually that was a question I was going to ask you. What percentage of your time do you spend on technology?

MR. ROBERTSON: It's three or four percent of my time. It's not an enormous amount of my time. I think of it as what we used to call in the Navy a "collateral duty." In the Navy, I was the gunnery officer on a destroyer, but I was also the public information officer, the Protestant lay leader, and one or two other things. So I consider this IT Committee thing to be a kind of collateral duty. It's a lot of fun. The Committee consists of one representative of each judicial circuit, and we meet at exotic places twice a year. So we go to nice places and there are nice people to work with. It's a fun part of the

job. I enjoy it. I'm finished at the end of October, I think. My third term will be my last.

MS. ALLEN: Let me go back to your initial few months on the job. You said there was a training session for baby judges. Was that after you had been on the job for a while?

MR. ROBERTSON: No, not very long. In my case, it was within a month or two after I arrived. This one was in a hotel in Atlanta and it was a week. An experienced judge from Chicago came down to lead the enterprise. The orientation week consisted of training videos and discussion. That's what it was, talking heads and discussion. So, you'd get half a day on courtroom and jury management, nuts and bolts stuff. You might get half a day on employment discrimination cases, which is a big part of the judiciary work these days. We had almost two days on the sentencing guidelines, which is very complex and was then still a relatively new subject. Then we went to visit a prison. So that's part of what you do. I forget all the subjects, but just general overview subjects for judges. Care and feeding of law clerks and chambers staff. This is your job, this is how we suggest you might want to do it, but the wonderful thing about being an Article III judge, it's always a suggestion. Nobody ever *tells* an Article III judge how to do anything.

MS. ALLEN: They just suggest, even to each other?

MR. ROBERTSON: It's hilarious. Even to each other. When I first got here, lots of judges were very helpful and welcoming. "Please come to see me if you have

any questions at all. You'll see new things every day, things you never heard of. You may not know how to deal with them, give me a call, come to see me, I'd be delighted to talk to you." Well, I took a few of them up on it, but I always got the same answer. The answer was, you're an Article III judge, do whatever you want to do. And it's obvious that I am overstating that for effect, but that's the culture of the district court bench. You're basically running your own little enterprise.

MS. ALLEN: Is there much interaction with the other judges?

MR. ROBERTSON: Yes and no. In a very odd way, the atmosphere in the Courthouse has a lot to do with that. There is a kind of a critical mass of collegiality that has to exist before people start really relating to each other. As in any other walk of life, there are two or three judges on this court that I spend more time with than others. We have a very interesting institution called the judges dining room. In the old days, the judges' dining room was a place where there were cooks and waiters and servants who would bring food to the judges, and the judges could bring guests in. I actually ate in the judges' dining room years ago as a guest of Oliver Gasch, but either the money ran out or it was decided that it was little undemocratic for the judges to be eating like nobility, so the whole thing was downgraded significantly to a dining table. Basically we are served cafeteria food on real plates with real forks and glasses. We hire a person, a retired person – the current person is a retired gentleman who worked in dining cars on Amtrak for years and years. Lovely man. He works part-time. He comes in at about

11:00 in the morning, he picks up our food orders, goes to the cafeteria, gets the food, brings it up, puts it on real plates and serves it to us. It is really quite lovely. The judges pay his salary, it's not paid out of the public funds. It's kind of our little club.

MS. ALLEN: And this is every day?

MR. ROBERTSON: It's every day. We're charged a certain monthly fee for his services, and we are charged for whatever we eat. You never know who is going to be there. Some days there is a table full of people. A tableful is defined as 12 or 13 judges. And some days there are two or three judges, and most days somewhere in between. There are regulars, and there are not-so-regulars. There are judges who never eat there, and there are judges who always eat there. There is a lot of collegiality in that room. We don't often talk about cases, particularly since one of the regulars in that room sits on the Court of Appeals and there are lot of things we don't want to involve him in, discussion of cases that may come before him on an appeal. And like any table where people come and sit all the time, if we talk about politics, we do it very gingerly, and if we talk about religion, we do that very carefully, and nobody ever talks about sex. It's like the British Navy. It's a happy, daily form of contact with other judges.

Email has had a tremendous effect on the way judges work together, and it's becoming more and more common for one judge to send an email to all judges. I have this problem, does anybody have an answer. And then you'll get people chiming in with answers and opinions and

sometimes it goes on for two or three days. So it's sort of a virtual electronic collegiality that is useful.

MS. ALLEN: Which is relatively new, because you have to not only have facility with the computer, but to feel comfortable with communicating that way.

MR. ROBERTSON: That's right. Since this is history, one little piece of history that I think is interesting. I think it was when Judge Colleen Kollar-Kotelly was confirmed to our court. She was the seventh Clinton appointee, and somebody made a reference in one of the investiture speeches to a group of judges over in the Superior Court who had called themselves "the magnificent seven." There were now seven Clinton appointees here, and so shortly after that happened, we – the Clinton appointees – began every two months or so to take our brown bag lunches to the chambers of one or another of us. And for a while we called ourselves the magnificent seven, and then there were eight and then it was I don't know. Somehow, somebody got wind of the name that we had given ourselves, somebody I think in the Clerk's office began to let other judges, some of the Bush appointees or Reagan appointees, know about this. There was considerable paranoia around this Courthouse that the Clinton appointees had formed some sort of a cabal.

There had not been a new appointee to this court in eight years, and it was clear that there were going to be a lot of us, and it was clear that within a few years the Clinton appointees would have a distinct majority in this court. The Republican appointees were looking over their

shoulders wondering who these guys were and what we were all about. The idea of a cabal among judges here was anathema to them. Some suggestion of this leaked out into one of the newspapers – Democratic Clinton appointees secretly meeting for lunch, or something like that. And there was a considerable amount of anxiety about it here. The truth is these judges liked each other, and we had something in common, and we simply were breaking bread together once in a while. There was no court business conducted, no cabal of any kind. But as soon as we heard about the anxiety of the other judges, we dropped it like a hot potato because we were headed towards a sort of your camp/my camp, distinctly non-collegial, orientation and nobody wanted that. So we stopped that immediately.

And then, right on top of that, or about the same time, there was what I will call the Norma Johnson special assignment flap. There was a rule in this court, a published formal rule, on case assignment that permitted the chief judge to select a judge to handle a large or complex piece of litigation. I don't know when the rule was adopted, but the theory was if everybody is busy and if a particularly complex or difficult piece of criminal litigation comes in to the Courthouse, the chief judge ought to have an opportunity to see who is in a position to take it and assign that case to that judge rather than random assignment, which in all other cases is the absolute, unshakeable rule here. Chief judges had been using this power for years, and making one, two, or three such appointments in a

year. Chief Judge Norma Johnson assigned Paul Friedman a complex, if politicized, case involving election law. She assigned to me a very high-profile criminal case involving Webster Hubbell. Somebody got the idea that she had made those appointments for political reasons, and giving voice to that idea was like throwing a match on some brush fire. That idea took hold and there was a lot of publicity about it, and there was a formal – the exact rubric of this escapes me – there was a name they gave, a charge of some sort was preferred against Norma Johnson by Larry Klayman or by Judicial Watch or one of these organizations.

MS. ALLEN: I saw quite a lot about it on the Internet when I was researching.

MR. ROBERTSON: Did you? It's still there?

MS. ALLEN: It's still there. It's not being updated, but it's still out there.

MR. ROBERTSON: There was a lot of sturm und drang about that. I think Paul Friedman is still quite bitter about it. There were some nasty op-ed pieces about Friedman and about Norma Johnson, and Norma Johnson had to hire a counsel. She hired Mike Madigan. Madigan by the way, was also a member of the judicial nomination commission that considered my name and he is another old friend. A law professor from the University of Illinois, who used to be an associate at Wilmer, Cutler & Pickering, wrote a particularly nasty and disingenuous piece in *The Wall Street Journal* about my handling of the Webster Hubbell case implying – no, alleging – that it was all political. It was an ugly time here. Those of us who were Clinton appointees were very upset about this because the story leaked

from someplace in this Courthouse to the press, otherwise nobody would have known about our completely innocent brown-bag lunches.

MS. ALLEN: The original story about the special assignment?

MR. ROBERTSON: That was a reference to the magnificent seven, but the story about the special assignments, yes. It leaked from someplace in the Courthouse. There was a lot of suspicion, and we would have been angry if we had known who to be angry at. The thought was Judge X talked to the press, but Judge X denied it, and Judge Y talked to the press, and Judge Y denied it, and Judge Z, and it's a little bit like Deep Throat. We all still have our opinions about how this was leaked to the press and why and when, but nobody knows. All of this happened in an atmosphere in which the chief judge of the court was herself not a collegial person at all. So there were a few years here that were really quite difficult on the collegiality front. Tom Hogan became Chief Judge when Judge Johnson stepped down, and it was as if the sun had come out. Hogan is not only collegial but open and friendly and mutually respectful and fosters an element of happiness here. Then, of course, Republicans have gotten four appointees on this court, so the imbalance or perceived imbalance is not anywhere near what it was. All of the new Republican appointees – I'm talking Walton, Bates, Leon and Collyer – are all wonderful people, and everybody loves them and happiness reigns around here again.

MS. ALLEN: Do you think Judge Hogan made particular efforts to try to restore collegiality, or was it just a difference of personality?

MR. ROBERTSON: It's both. But I'm sure he made specific efforts to do it. Norma Johnson I don't think ever in her life ate dinner in the judges dining room, but Tom Hogan eats there four or five times a week and is accessible and shares things with people. He is a terrific chief judge and it has made all the difference in the world to the whole collegiality in this place, and all of that paranoia in the past is forgotten.

MS. ALLEN: I should know this, but I don't. Are there vacancies on the court now?

MR. ROBERTSON: There are no vacancies right now. We are full strength for the first time in quite a long time.

MS. ALLEN: Do you see that in your workload having lessened at all?

MR. ROBERTSON: Actually our workload has increased, and the reason it has increased principally is because – this is not I think widely known – the judiciary relies very, very heavily on senior judges to help out. The way that works is when I am eligible for senior status, which will be in about 2-1/2 years, I have the option of quitting, continuing as I am, or taking senior status, which means that I will retain my chambers and my staff, but I will only have to do about half as much work. None of those three choices has any impact on my income. That's not quite true. The advantage of taking senior status is it will stop taking social security payments from me so it's worth something to take senior status, and of course, you don't have to work as hard. But, by the same token, you don't have a vote in all court matters. Most judges take senior status and keep working because they like keeping their hand in, they like to have something to do. Maybe they

like people bowing and scraping and calling them Your Honor all the time. Maybe their robes aren't quite worn out yet. Who knows. But judges do tend to stay on. When you take senior status, you create another vacancy so another judge can be appointed. So, it's like adding half a judge to the court. When I first came on the court, we had Senior Judges Lou Oberdorfer, June Green, Harold Greene, Aubrey Robinson, Oliver Gasch, William Bryant, John Pratt, Tom Flannery, and Chuck Richey. Shortly after I came on the court, Joyce Green took senior status. That's a lot of senior judges. Chuck Richey is dead, Tom Flannery is retired, John Pratt is dead; Bill Bryant at age 93 is still trying cases. God bless him.

MS. ALLEN: I actually had jury duty last summer and was on a panel in front of Judge Bryant.

MR. ROBERTSON: He tries more cases than any of us do. Oliver Gasch is dead, Aubrey Robinson is dead, June Green is dead, Harold Greene is dead. So now we have three senior judges left, Joyce Green, Oberdorfer and Bryant, instead of eight or nine. Oh, and Stanley Sporkin of course is gone, but he never took senior status. He just retired. Stan Harris took senior status and is now retired. So of the judges who were here when I came on the bench, only Sullivan, Friedman, Lamberth, Jackson, Hogan, Kessler and Urbina are still here. Turnover is more rapid than you think.

MS. ALLEN: That's a big turnover.

MR. ROBERTSON: Yes, that's a big turnover. So we have more cases than we did. Lot of things are happening in the whole caseload front. Criminal cases tend to

plead out much more frequently than they used to because of the sentencing guidelines, although in very recent years, more cases have been going to trial because District of Columbia juries are more inclined to acquit, particularly in gun possession cases.

MS. ALLEN: What percentage of your cases are criminal?

MR. ROBERTSON: If you do it strictly by the numbers, it would be on the order of 15-20%, but the numbers don't really mean anything because criminal cases and civil cases are handled so differently. I would say that I probably spend 20-30% of my time on criminal cases. If you are Royce Lamberth and have tried two huge gang capital murder cases back to back over the last 2-1/2 years, his answer would be he spends probably 80% of his time on criminal cases. But unless you have a huge trial like that to weigh down that side of the boat, the criminal practice in our court consists very largely of an arraignment, status conference, a motion hearing, usually a motion to suppress, a guilty plea, and a sentencing. Very few trials. Civil case loads are probably back to roughly where they were when I started. My current caseload is on the order of 190 cases, I think, civil cases.

MS. ALLEN: It sounds huge to me.

MR. ROBERTSON: It sounds huge, but you know something, it is one of the lowest, if not the lowest, per judge caseload in the whole country. There are border state courts, courts in northern New York State, courts in other parts of the country, that have 600 or 700 cases per judge.

MS. ALLEN: Does that include lot of immigration-related matters?

MR. ROBERTSON: It includes lots of immigration matters. And again, we maintain that the numbers don't mean anything. Of course, we maintain that we work as hard as any judge does, and we do, because work expands to fill time. But some of the districts that have huge caseloads have them because they have vacancies and there are political problems in getting the vacancies filled. That's a problem in some places. More likely, however, the courts that have huge caseloads have, for example, 200 Social Security claim cases, which may be handled entirely by magistrate judges but they are on the docket of the judge anyway. Or Indian reservation cases or immigration cases. The truth is, the caseloads in district courts in this country vary quite dramatically by size and subject matter, depending on where you are. In this jurisdiction, we do an unusual number of large complex administrative law cases involving the government in one way or another. Review of administrative decisions in environmental matters, review of Bureau of Indian Affairs decisions and Indian casino cases, review of all kinds of big record government cases, which is still only one case, but it's much, much more complicated than any individual Social Security case. Another 25 or 30% of our cases are employment discrimination cases. That is pretty standard.

MS. ALLEN: And that is standard throughout the country?

MR. ROBERTSON: Pretty standard. We do a lot of Freedom of Information Act cases in this jurisdiction, and we have some special jurisdiction cases that can only

come here. But at any rate, you want judicial history, you don't want administrative analysis of the workload.

MS. ALLEN: No. We want both. We want everything in this oral history. Do the employment cases actually go to trial or do they tend to settle?

MR. ROBERTSON: All cases tend to settle. Either they are dismissed on a motion for summary judgment, or a motion to dismiss, or for want of prosecution, or for some reason like that. Or, they settle. The system is supposed to work that way. The number of cases actually going to trial has reduced dramatically in the last ten years since I came on the bench. And now I think it's in the order of something like 2% of the cases that are filed that actually go to trial. Title VII cases are no different. They tend to settle too. They get dismissed, they get disposed of, but most of the civil trials we have are Title VII cases.

MS. ALLEN: It's very interesting, and my first reaction was strong cases will go to trial.

MR. ROBERTSON: Sometimes a strong case will go to trial because the plaintiff has an inflated notion of what he or she can get out of the trial, or sometimes a case will go to trial that maybe should have been settled because for one side or the other it's become a matter of principle.

MS. ALLEN: Do you see automobile accident cases in federal court?

MR. ROBERTSON: You do see them and they are rarely if ever tried. I just happened to see Judge Walton in the hallway today, and he says he is trying one of those cases right now. It didn't settle. We see them only because of diversity jurisdiction, that's the only time we ever get them. Occasionally, there

will be a Federal Tort Claims Act case involving a postal service truck ran into someone or something like that.

MS. ALLEN: I asked because the Superior Court it seems is inundated with automobile accident cases, and insurance companies aren't settling them.

MR. ROBERTSON: I've never tried an automobile accident case, and I haven't seen that many of them. Whether or not an automobile accident case is brought in federal court or not initially has to do with the calculation of the plaintiff's lawyer and whether he is going to get a favorable jury in one court or another, whether he is going to get as good a judge in one court or another, whether he can get a good trial as quickly in one court or another. And then the defense may try to remove a case from state court to federal court if the defendant feels that the jury panel isn't to his liking. In the District of Columbia, the truth is both Superior and the District Courts select from the same jury pool so there isn't any difference in the juries. There may be a difference in the speed with which you can get a case to trial. I can remember a time when the Superior Court was the last place you wanted to be if you were a plaintiff because things just didn't move over there. But since so-called Home Rule, since Superior Court became Superior Court and since that court has eaten up most of the growth in litigation in this town, Superior Court is perceived to be an excellent court. Plaintiffs are perfectly happy being there. They have no need or interest in coming over to this court, and unless there is total diversity, the manufacturer, if it is a manufacturer, or the other driver, doesn't have much of a chance.