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 offices of JAMS, 555 13th Street, N.W., in Washington, D.C., on June 10, 2015. This is the sixth interview.

MS. ALLEN: Judge Robertson, I'm going to turn this over to you. I think you and I agreed that you would talk about the FISA Court and perhaps a few other related issues this morning. Thank you.

MR. ROBERTSON: Okay. That's what I call a softball question [laughter].

MS. ALLEN: Very softball.

MR. ROBERTSON: It has been a long time since we were doing this together, and I alone am responsible for the delay, and I appreciate your returning to continue this process.

I don't remember when the last time was that we talked, but I think it was either at or near the time that I resigned from the FISA Court. My resignation from the FISA Court was a subject that I declined to talk about at all when I was still on the bench. But now that I have retired, I feel perfectly justified – not justified, that's not the right word. The right word is, I think it's appropriate for me to tell the story of why I resigned from the FISA CourtTo do that, I should back up just a little bit and explain what the FISA Courtis and what my relationship to it has been.

The FISA Court is the Foreign Intelligence Surveillance Court established way back, I think in 1978, with the enactment of the Foreign Intelligence Surveillance Act – a specialized court established in the wake

of the work of the Church Committee and its revelations about secret spying on Americans by the FBI and the CIA. The FISA Court was established as a secret court to review and approve, if appropriate, surveillance warrants for electronic surveillance of people believed to be agents of a foreign power. Electronic surveillance has serious constitutional implications, and the thought was at the time that a secret court could be shown secret materials. These materials were classified almost entirely because of the sources and methods that were employed to do electronic surveillance. These were not the kind of warrant applications that could just be handed to any judge at any place in the country because of their sensitivity.

At the time of my appointment to the Court in 2002, eleven judges from circuits all over the country. One judge at a time had FISA Court duty for one week. That judge would fly to Washington if he or she was from outside the city. They'd spend a week here, hear warrant applications, issue warrants, and go home.

The business of the FISA Court was conducted in what's called a SCIF, a special compartmentalized intelligence or information facility, within the Justice Department, a big lead-lined box. You would go in there and the door would close. It was like being in a safe. FBI agents and Justice Department lawyers would come in and present warrant applications to us, we'd read them, we'd almost always approve them, we'd sign them, and that would be the work of the FISA Court. After

9/11, the work of the FISA court became much, much more intense. There was, of course, a lot more surveillance going on. It was in May of the year after 9/11 – that is, May 2002 – that I was appointed to the Court. I was appointed for a stub term because before me there had only been nine judges, and the Patriot Act increased the number to eleven, and I was one of the other two. For reasons that had to do with phasing people in and out, I only got a four- or maybe a five-year term. I began sitting one week out of every eleven over at the Justice Department in that SCIF, reading and signing FISA warrants. The presiding judge at the time was Judge Colleen Kollar-Kotelly of this Court. She had been preceded by Judge Royce Lamberth of this court. By "this court," I mean the United States District Court for the District of Columbia, on which I no longer sit. Judge Lamberth and Judge Kotelly were presiding judges because the statute said the presiding judge had to be here to deal with emergencies that had to be handled locally by hand service of documents and so on.

The FISA Court was an important, but not all that exciting, assignment. The truth is that these surveillance warrants and the applications for them were very detailed, very carefully done, fastidiously prepared by the FBI, the CIA or the NSA people who wanted the warrants issued, carefully reviewed by the Justice Department people. It was all perfectly ordinary and correct, and after a while, maybe a little boring, although we learned some things about suspected terrorism that were a little bit scary. There were no real hot button emergencies, at least on my

watch, until December of 2005, when *The New York Times*, in a front-page article written by Eric Lichtblau and another *Times* journalist, James Risen, disclosed for the first time – although some people say it had been known publicly before that – what has since come to be called the NSA metadata, mass data collection program.

Now this program had different formats over time, and I'm not being very precise about what exactly was being collected, but whatever it was, I'd never heard about it before. I became instantly and irrevocably irritated by this because it was clear to me that the Bush administration had been deliberately bypassing the FISA Court and going about this data collection without the permission from the FISA Court which I believe that they had to have as a matter of law. So I resigned. I resigned with a one-line letter to the Chief Justice of the United States stating no reason. The letter was made public, and frankly I forget exactly how it was made public. I suppose I knew that it was going to be made public, and in some way made sure that happened, but I wasn't going to explain why or point fingers or make a big ruckus out of it. I was going to let people make up their own mind about what they thought about it. For some months after that, I was sought out by a lot of people who wanted me to explain myself. My resignation, to use a term that became part of the lingua franca of our nation afterwards but was not known at the time, my resignation went viral. I think I was on the front page of every newspaper in the United States, or at least my name was. I may have said this earlier, when I gave

earlier versions, earlier segments of this oral history, Andy Warhol said that every American should have 15 minutes of fame, and my 15 minutes came after my resignation from the FISA Court.

I remember that one snowy morning in December, one cold morning a week or so after my resignation, I opened the door – I lived in Georgetown – I opened the door kind of in my skivvies to pick up my newspaper from the step, and there was a CBS cameraman out there with his camera pointed at me. I said, "Please go away." I said, "I'll tell you what, I'll make a deal with you, it's a cold morning, go get a cup of coffee, let me get dressed and I'll come out the front door dressed properly and I promise you I won't sneak out the back door." I hoped that if he did go away to get a cup of coffee, he'd decide that the coffee and the warmth was better than standing in the cold, or that he would get another call to go film someone else, but no, he was waiting when I went out the front door and insisted on filming me walking from the front door of my house to get in my car.

My former partner, David Westin, who was then the president of ABC News, contacted me and wanted me to be on *ABC News*. I had a request from *60 Minutes* that I appear on the show. Newspaper reporters called me, and called me, and called me, and I just simply didn't answer any questions at all. But now that I am retired, and now that ten years have passed since this event, and now that the Congress has finally acted to limit the mass data collection of the NSA – that happened just a few

days ago – I feel perfectly comfortable in saying plainly that I quit for one simple reason and that was because of the unlawful activity of the Bush administration in avoiding, end running, ignoring, outflanking, whatever word you want, whatever verb you want, the FISA Court.

I was also quite upset to learn later that the administration had given some form of notice, I don't know exactly what, to Judge Lamberth and to Judge Kollar-Kotelly, the two presiding judges. Lamberth had been presiding judge, his term ended when my term began, and Kollar-Kotelly after that. They both knew about what was going on, or knew something about what was going on, but both had been instructed – my word is co-opted – by the administration not to tell anybody else. So here we were, we thought we were brethren in the FISA Court, but we were not being told what was going on, and the cases were not being brought to us. I objected to that then, and I still object to it. I have no judgments to pass on Judge Lamberth or Judge Kollar-Kotelly. They were and are fabulous judges. It's not them that I blame, it's the administration for co-opting them and giving them orders which they felt they could not disobey or ignore.

So that's my FISA Court story, and if you have any questions about it, I'll answer them, but that's it in a nutshell.

MS. ALLEN: Do you think that your resignation had any impact on the FISA Court procedures?

MR. ROBERTSON: Not immediately. To be honest about this, as I hope I'm being honest about everything I'm saying, I had some hope in the back of my mind that other judges on the FISA Court would understand what I had done and why I had done it and join me. I thought that if that happened, it would have a real impact. As it turned out, none did. I did not think it was appropriate for me to proselytize or reach out or to argue to other judges that they should do what I'd done, and I didn't. And because only one judge resigned and not the others, I think the fame did last about 15 minutes. There was a big splash, but nothing much happened to it after that.

But over time, I think the resignation did have some effect. I was taken to lunch in the Senate dining room by Senator Arlen Specter some months after my resignation. Specter wanted me to testify on Capitol Hill about my resignation, and he was very complimentary. He called me a hero actually. But I wasn't about to testify about this, didn't want to, declined respectfully, had some good navy bean soup in the Senate dining room, and went about my business and he went about his. I was called upon over time and asked about my FISA Court experience because actually I was the only judge who had retired or who was able to talk about his FISA Court experience, and I appeared on many symposia and panels and discussions, and I always said the same thing. I always said that I was a fan of the FISA process, that I had volunteered for the FISA Court because I wanted to find out what it was up to, that I was pleased to

witness the care and precision and fastidiousness of all the players in the FISA court, that the judges, the lawyers, the staff, the FBI agents involved with the process were all almost perfectionists in getting it right.

When it came time for – when a few years ago, probably after the Snowden disclosures – when the subject became politically active and the amendment of the FISA Act became a serious subject, I was, I think one of the first people to recommend that the FISA process be amended by the addition of an adversary when the court was dealing with programs or with new legal issues. And that's another whole story, but that recommendation finally became law the other day, and I think the fact that I was listened to when I made the recommendation was because of my resignation. I was perceived as a critic of the FISA court.

That's a very complicated answer to your question, but it's the best one I can think of at the moment.

MS. ALLEN: It's a very interesting discussion and revisiting of the situation. Thank you for sharing it.

MR. ROBERTSON: I want to augment the FISA adversary story a little bit. I mentioned that I spoke at seminars and symposiums and so forth, but I think that the first time I clearly and publicly asserted what I thought was the need for an adversary process within the FISA court, was at the first public hearing of the PCLOB. I think it stands for Public Civil Liberties Oversight Board. No excuse me, Privacy and Civil Liberties Oversight Board, a new board that was established at the order of the President and wasn't staffed for

years and years and years until very recently. And then it was staffed finally. Judge Pat Wald is a member of it. The chair is a fellow named Medine. It has bipartisan membership and they conducted their first public hearing, I don't remember exactly when, but I was invited to speak, and that is when I first articulated the need for an adversary in the FISA process. I was quite clear then, and I think I have been since then, that you don't need an adversary every time a warrant application is filed before the FISA Court. Because in the exercise of its quotidian warrant-issuing function, the FISA Court acts like a magistrate judge. Everything is ex parte, and there is no reason, no occasion, to have a defense lawyer there arguing that the warrant should not be issued. But when the FISA court is asked, as it was after the enactment of the Patriot Act, to approve not only individual warrants but also surveillance programs that would be carried on without a warrant, then the FISA Court was acting I thought like a court reviewing the work of an administrative agency. And when courts review the work of administrative agencies, they do it in an adversary context with somebody arguing the other side. I said to the PCLOB that a judge who hears one side of an argument may think that's a pretty good argument until he hears the other side of the argument. Our system depends entirely on somebody pushing back and arguing the other side of any proposition. And I said that without that, courts are going to make mistakes. That proposition has now morphed through the process of negotiation and compromise. Believe it or not, Congress did compromise

on this – into a provision in the new USA Freedom Act which calls for the appointment of a panel of five lawyers who can be cleared for this duty who will be amici, or friends, of the court, called upon by the court to offer their views or to present adversary views when the court thinks it needs them. There are a lot of people who think that's not enough. I think it is enough. I think the FISA Court will reach out and ask for help whenever it needs it in the future because now it has the mechanism for doing it.

MS. ALLEN: Thank you very much. Next I would like to turn to Guantanamo and litigation related to people who were interned there – a very open-ended question.

MR. ROBERTSON: One of my other 15 minutes of fame – and there weren't many – came as a result of a decision in a case called *Hamdan*. Hamdan was captured in Afghanistan or Pakistan – I don't know exactly – brought to Guantanamo Bay after 9/11, detained there, charged with war crimes, and was about to become the first Guantanamo Bay detainee actually tried under the military commission rules that had been established at Guantanamo Bay. And by the luck of the draw, that case had been assigned to me and I was presented with an application for a writ of habeas corpus.

I should back up a little bit and explain the way the Guantanamo cases were handled. All of the Guantanamo Bay detainee cases came to the District of Columbia – to our court in the District of Columbia – and that was by operation of a decision rendered by – I've actually forgotten

why that happened. Either our Court of Appeals or the Ninth Circuit or somebody decided that these cases all had to come to the District of Columbia, and so they did. And our court all of a sudden found itself with, I think, a couple of hundred habeas corpus cases brought by detainees at Guantanamo Bay. It was going to overwhelm our court. The Chief Judge at the time was Tom Hogan, and Hogan invited Judge Joyce Green, who was in a state called inactive retirement – she'd left the court but subject to recall – to come back and coordinate the handling of these Guantanamo Bay cases so that they would all be – at least the administration handling of them – would all be in one judge's hands and we wouldn't be tripping all over each other and issuing different kinds of orders. But Judge Green knew that the *Hamdan* case was considerably more advanced than the others and knew that I was actually on the brink of dealing with the merits of the *Hamdan* case, and I thought graciously and generously asked me if I would like to keep the *Hamdan* case, even though all the other cases were going to be taken under her wing and dealt with administratively. I thanked her and I said yes, that I thought the *Hamdan* case was ready for some action and I wanted to do it. And I wanted to keep the case and so I did.

The application for a writ of habeas corpus had been filed in the Federal District Court in the State of Washington by a Navy Lieutenant Commander by the name of Swift who was a zealous advocate for his client, although he worked for the government. The case was transferred,

because all cases were coming to the District of Columbia, to our court. I got the case, conducted hearings, listened to arguments, read briefs. The arguments before me were handled by Commander Swift and by Neal Katyal, who was then a young law professor at Georgetown who has gone on to be Solicitor General. He is a spectacularly good lawyer. I issued an order enjoining the proceedings at Guantanamo Bay. It wasn't exactly a habeas corpus order. It was an order forbidding the trial to continue because the rules of the Military Commission had not been approved by Congress and because I believed that Hamdan should have been accorded prisoner of war status under the Geneva Convention. Shutting down the trial at Guantanamo Bay was another one of those front page events, but this one didn't last very long because the Court of Appeals reversed me quickly and without much hesitation in an opinion written by Judge Randolph. It is a mystery to those of us on the District Court, by the way, how it was that Judge Randolph wound up with so many of the Guantanamo Bay habeas decisions. I am sure they assigned their cases randomly and on the wheel just the way we do in the District Court, but we were all stunned at the odds that Judge Randolph would get yet another one of these cases. I was reversed by the Court of Appeals and then the Supreme Court reversed the Court of Appeals. It doesn't get any better than that for a trial judge. It happened to me twice when I was on the bench. The *Hamdan* case was one. The other one was the *Webster Hubbell* case. I forget whether I mentioned the *Hubbell* case at the earlier

chapters of this history, years and years ago, but the *Hubbell* case. Do you remember Ann whether I talked about *Hubbell*?

MS. ALLEN: You did. But I can't remember whether you talked about the Supreme Court reversing the Court of Appeals.

MR. ROBERTSON: Well I'll just touch on it lightly again because I don't want to leave this out.

MS. ALLEN: Okay.

MR. ROBERTSON: This is a complete diversion from Guantanamo Bay, but I'm going to do it anyway. Webster Hubbell was either the Deputy or Associate Attorney General under President Clinton. He had been a law partner of Hillary Clinton's in the Rose law firm in Little Rock, Arkansas. He was implicated, along with other members of the Rose law firm, in issues relating to the Whitewater case – fee padding. I've forgotten all of the issues, but Hubbell was in the process of being charged by Ken Starr's special prosecutor machine. The issue had to do with a subpoena that had been issued to him for documents that he had turned over under a grant of immunity. He was indicted on the basis of information that was in those documents. I heard a motion to dismiss the *Hubbell* case. I remember being surprised by the revelation that he had been granted immunity and that they were trying to charge him with what they learned from the documents that he had turned over under a grant of immunity.

MS. ALLEN: Right.

MR. ROBERTSON: Something popped out of my mouth from the bench. I think I said, "That's scary," and that was widely quoted by critics of mine. But the truth is that it really kind of took me by surprise when I realized what the government was doing. And there's a lesson there for lawyers and judges. Sometimes important things happen in courts without anybody planning it or realizing how important they are. Because to me the whole thing was scary, but I reacted, I think shortly thereafter, by dismissing the indictment, which gave me – I've still got it in the closet someplace – this headline in the *New York Post* the next day: "Hubbell Outta Trouble." Which I thought was right up there with the headline written by the guy who died yesterday. Did you see the *Times* this morning?

MS. ALLEN: No.

MR. ROBERTSON: A front page obituary of a guy who wrote the best headline ever written: "Headless Body in Topless Bar." At any rate, "Hubbell Out of Trouble" was my nominee for the best headline ever written. I was reversed on that one too by the Court of Appeals, unceremoniously. And the Court of Appeals was reversed by the Supreme Court. So that's twice, once with *Hubbell* and once with *Hamdan*.

MS. ALLEN: That's an excellent record.

MR. ROBERTSON: So back to *Hamdan*. My beef with the *Hamdan* case was that Congress had not approved these Commission rules. I rejected the notion that the rules could be adopted by the President because the Geneva Convention required a tribunal to approve them, and I said the President is not a

tribunal. As I said, the Court of Appeals reversed that, and the Supreme Court reversed them. Congress then did act to amend and approve the rules for the Military Commission at Guantanamo Bay. The next step of the *Hamdan* case was that Hamdan came back and asked to enjoin the trial again, but I was satisfied that the rules that Congress had adopted were satisfactory and I declined. Shortly after that, Hamdan either pleaded guilty or was found guilty and was sentenced to time served and was sent home to Yemen. End of the *Hamdan* case.

MS. ALLEN: And the second time when you were asked for an injunction was the last?

MR. ROBERTSON: Last I had to do with it. Later on, much later on, I was presented with a habeas application of a detainee by the name of Salahi. Salahi was a very interesting case. He was, if memory serves, a Mauritanian who had gone to Afghanistan, as many had, to do jihad. He went to Afghanistan before 9/11, at a time when jihad was being carried out against the Russians, not the Americans. He did pledge, I've forgotten the Arabic word, but he pledged whatever the Arabic word is for fealty to Al Qaeda. All of this was before Al Qaeda was arrayed against the United States. After that, he fought there in Afghanistan for a while. All of this is of record, and people who are seriously interested can look up the *Salahi* case. But he went to Frankfurt, and the record shows, to the extent that they had a record in these cases --

By the way, the whole question of evidence in these Guantanamo cases is a very vexed subject because there aren't any real witnesses.

There are scraps of intelligence paper, there are cables, all kinds of hearsay is received and given whatever weight it deserves in these habeas cases. I believe the record fairly establishes that he lived in Frankfurt, and that while in Frankfurt, he offered a place to sleep or stay for a night or two to one or two of the people who ultimately flew airplanes into the World Trade Center or in Shanksville, Pennsylvania, or into the Pentagon on 9/11. The record tracks him to Canada where he lived, maybe in Montreal, maybe in Ottawa, someplace in Canada, and lived for a time with people who are under the watchful eye of Canadian and American intelligence. At least one of those people was apprehended at the Canadian border near Seattle, headed towards Los Angeles to bomb LAX.

MS. ALLEN: I remember that news story.

MR. ROBERTSON: On top of that, his uncle or his wife's uncle was close to Osama bin-Laden, and there was some issue about when he was back in North Africa trying to locate and perhaps acquire telecommunications equipment for his uncle or for someone in Al Qaeda. So there were all kinds of dots that could be connected if you used what the Court of Appeals called the mosaic theory or the mosaic approach. You have to wonder what the chances are that someone who is not an active member of Al Qaeda would be a host of people who would later fly airplanes into the World Trade Center, was connected with bad people in Canada, and was related to somebody close to Osama bin-Laden, who was involved with communications equipment.

But under the decisions of the Court of Appeals that had been rendered previously, I could not find that Salahi met the test for detention under the applicable Supreme Court rules. I didn't find that he engaged in any hostilities that had to do with 9/11 directly or that he was a member of Al Qaeda thereafter. And, on top of all that – and really the most important part of the *Salahi* case – Salahi had been brutally, brutally, handled after his apprehension. He had been subjected to – I don't know if he was subjected to waterboarding, but he was subjected to many, many "harsh interrogation techniques," including, I don't remember them all, but they were horrifying. They were sleep deprivation, physical harm. At one point I think he was taken in a boat out to sea and spun around and he didn't know where he was and wasn't told where he was. If I'm not mistaken he was told that his mother was going to be either raped or killed. What Salahi was subjected to was so terrible that the government had decided that there was no way that it could prosecute him, because none of the evidence they had gotten directly from him could be used. Salahi had been treated so badly that he was almost by definition unprosecutable. On top of that, he had become a very responsive and cooperative witness. He was a peaceful and cooperative prisoner. He was given special privileges. I think he was allowed to grow a little garden. He spoke and wrote fluent English, was clearly a civilized, and I thought, decent human being. I didn't think the rules permitted him to be detained

any longer, and I issued a habeas corpus order for his release which was – guess what – reversed. The Court of Appeals has never --

MS. ALLEN: By Judge Randolph.

MR. ROBERTSON: Well, I don't remember. I think this actually may have been my good friend Tatel. It was issued after I left the bench, or maybe it was just as I was retiring. The reversal was, I thought, quite respectful, as you would expect from Judge Tatel. What it said was, that since I had ruled the court had issued other opinions squarely adopting this mosaic theory and requiring a different result. Salahi is still at Guantanamo Bay, and it is likely that, unless they close Guantanamo Bay or unless there is some breakthrough, he will be there for the rest of his life. He has written a book which was published a few months ago, or a book was published a few months ago, I'm not sure you can say he wrote it, but the book consists largely of his own diary of what happened to him at Guantanamo Bay. It's been heavily redacted – there are pages of it – I mean it's photocopies of his own diary.

MS. ALLEN: So much of it has black lines?

MR. ROBERTSON: Much of it has black lines, but it is nevertheless a stunning record of his own detention at Guantanamo Bay. And somebody told me they are going to make a movie of this book which dwells at some length on his appearance before me and my ruling. And somebody suggested that the role of Judge Robertson should be played by George Clooney. I said that's great, that's perfect, but Clooney isn't old enough or dumb enough.

The Court of Appeals – I believe this is correct to say – has never sustained a Guantanamo writ of habeas corpus. Some of these that were issued were not appealed. So a few people have been released from Guantanamo Bay on writs of habeas corpus, because the government had no grounds for appeal. But in every single case of an appeal from a decision in our court, the Court of Appeals has reversed, and frankly nobody could understand it.

MS. ALLEN: I didn't realize that.

MR. ROBERTSON: But it is – let's just leave it that it's hard to understand.

MS. ALLEN: Now I'd like to turn to a very different subject, which is your retirement from the court and maybe starting off with the decision to retire, which I know was a difficult one to make.

MR. ROBERTSON: Let me again back up a little bit and talk about how this retirement thing works. The Federal Judiciary, Article III judges – that is to say district judges and circuit judges, are appointed for life or for their good behavior. There is a joke about the Tennessee politician who was appointed to the district court. His friends came to see him in his chambers and saw the certificate on his wall and got up close to it and read it and it says, "It says here Bob that you've been appointed for your good behavior. What's that mean?" Bob said, "Well it means I don't steal money from widows or do bad things to little boys." And the politician said, "I don't know, Bob, if it were me I'd rather have ten years certain." So, unless we are impeached, an appointment is for life. When a judge has accumulated a number that is

the equal to his or her age, plus his or her years of service that equals 80, then – if he or she is at least 65 – that judge can retire, resign, or take senior status. And whichever he does, or she does, he continues to get paid. It is quite a spectacularly great deal. Many, many judges, indeed I would say most judges, when they fulfill the so-called Rule of 80, or soon thereafter, will take senior status. Senior status means that you're still on the bench, you're still wearing a robe, you've still got chambers, you've still got a courtroom, you've still got a caseload, but not as heavy a caseload you still have law clerks, and you still have your full salary, as long as you want to do it. I did that almost the moment it became possible for me to do that for the reason that many judges do it. It's just money. When you take senior status, you stop paying into the FICA program a percentage of your salary, I don't know, $7,000 or $8,000 a year that you don't have to pay into the Social Security program. And at the rate judges were being paid when I retired, $7,000 or $8,000 was not a lot of money, but it was worth taking senior status for because there was no downside.

MS. ALLEN: Right.

MR. ROBERTSON: Judges on the court of appeals often postpone senior status longer than other judges because on the court of appeals, if you are a senior judge, you won't sit with the court en banc – when all of them sit together. And those are the big important cases and nobody wants to be excluded from them. But in the district court – it varies district by district – but in our district, there's absolutely no downside of becoming senior judge and you

can take yourself off the wheel of particular kinds of cases you don't want to handle any more. You can shape your own caseload, you can reduce your caseload, and it's a great deal. Retirement is a different thing entirely. Retirement means you are no longer a judge. You are a retired judge. You don't have chambers.

I'll digress here for a moment. I was asked to do the wedding of two of my law clerks who were marrying each other shortly after I retired. I said, "I'm sorry, retired judges don't have any power to do it anymore." I said, "You can get married by the clerk and I can do a reenactment, but I have no power." "Isn't there something you can do?" they asked. "Yes, I can become an ordained minister in the Universal Life church."

MS. ALLEN: You can probably do it online, too.

MR. ROBERTSON: You can do it online in five minutes, and it costs nothing. It's bizarre. Now I actually am Reverend Robertson in the Universal Life church. And I did this wedding in that capacity. I felt like a fraud, but I did it, and it was lawful. But if you retire, you're gone, you leave the court.

I had taken senior status as soon as I was eligible to do that, and I think that was in 2008. I decided to retire and go into private mediation and arbitration, which I have done. I did that in June of 2010. The decision to do it was not easy. I know that a number of people whom I know and love and respect and who supported me as judge were disappointed that I did that. I know that there are some judges – and frankly I may have been one of them myself at one point – who sort of lift

an eyebrow at the notion of a life-tenure appointed judge leaving the bench and perhaps attracting business and clientele from the private sector because of his or her previous judicial standing. That's worth thinking about, and I did think about it, a lot.

At the time I retired, the judges of the U.S. District Court had not had a pay raise in something like 12 years. There was a promise made to the judiciary about that long ago that judges would get cost of living increases the same as those other federal employees. That promise was ritually broken year after year by Congress. There were some, and I was one of them, who thought, well, there are still people lining up to be appointed to be judges, so what's the big deal? I mean if people still want to be judges knowing they will be underpaid, that's fine. But the truth is that if you are a federal judge living in one of the high cost of living parts of the country, and I'm talking Boston, New York, Philadelphia, Washington, maybe Miami, certainly San Francisco, Los Angeles on the coasts, it's pretty hard to keep it all together on what a federal judge was then paid. And yes, you could criticize my standard of living. I suppose that's reasonable. But for many of us, being a federal judge is or was a negative cash flow proposition. On top of that, I had family reasons why I needed not to invade capital too much. There are reasons that are private to me and have nothing to do with this history why I really didn't want to die broke. So I began to rationalize, and my joke about my retirement was

that I had reduced the whole rationale to two words – and the words were estate planning. So I did retire.

I had been approached by this organization called JAMS (it used to be known as the Judicial Arbitration and Mediation Service) which thought I might be a good mediator and arbitrator, and I had been talking to the people at JAMS about it for a year or two. And I got a call one day from Abner Mikva. Now Ab Mikva had also retired. He never came back to the bench after his White House stint, and he was out in Chicago. He was with JAMS, and he was appointed by one of the parties as an arbitrator in a huge arbitration that involved the tobacco industry and their liabilities under the settlement of the tobacco litigation. He and another judge were looking for a third judge to chair that arbitration, and he told me I would be terrific as chair of that arbitration. I thought, whoa, that would be a pretty good way to start my new life as an arbitrator. He said, "Well, the problem is, Jim, that you're still sitting on the bench. If we put your name forward as a possible chair of this arbitration and the parties turn it down, everyone will be embarrassed. It's a little difficult for people to turn down somebody who's a sitting judge. Are you going to retire?" I said, "Yes, I've been thinking about retiring for some time." He said, "Well, now might be the time to do it." So I said okay, that's fine. So I put my papers in and retired some time in June of 2010. Shortly thereafter, I was told that somebody else had been selected as chair of the tobacco arbitration, so I did not start my JAMS career with a big bang at

the tobacco arbitration. The only tangible result of that whole exercise was that, when the Circuit Judicial Conference took place later that month, I was retired and no longer subsidized by the government, so I had to pay my own way! But I took a couple of months off and then I came over to JAMS and signed up, and I must say that I have never looked back. I mean, I miss the court, I miss the people on the court, I miss the sense of being part of the Courthouse family, and it is a family at the Courthouse. When I came to the court in 1995, the beginning of 1995, I promised myself that I was not going to get hooked by the honorifics of being a judge – the bowing and scraping, the Your Honor this and Your Honor that. I did get used to the parking space, but I didn't, I really never got, if I say so myself, I never became afflicted with what sometimes has been called robe-itis. People still call me judge, and I still answer to it, but I'm not a judge anymore, and I know that, and I'm comfortable with it. I do miss the occasional, the very occasional, case of real public importance, like *Hamdan*, like *Hubble*, like *Salahi*, like two or three other cases that I handled when I was on the court. But there are not that many of those.

I have been telling anyone who will listen that since I came to JAMS and started mediating and arbitrating complex commercial cases, the work that I am doing in the private sector is the equivalent in terms of interest value, complexity, certainly dollar value, and quality of lawyers, of the top 30 or 40 percent of what I was doing on the bench.

The cases I've worked on have virtually no public importance, because they are all private. I mean you don't get public policy cases in the private sector and that part I do miss, I will tell you. But I'm not going to die poor, and I've had a good time with the cases I've done here. I've been quite busy and I have no reason to regret what I have done, except leaving behind some of my good friends in the Courthouse. I mean, when I retired, I left behind two of my closest friends in the Courthouse, Louis Oberdorfer and David Tatel. The three of us had been very close friends for years and years and we were all tied together with the Lawyers' Committee for Civil Rights back in the 1960s and 1970s. We and our wives and several other couples had been together in a book club for 25 or 30 years.

MS. ALLEN: It still continues I hope.

MR. ROBERTSON: Well, actually I will get to that in a minute. The death of Louis Oberdorfer a couple of years ago pretty well scotched that, and John Nolan has become quite unwell and is unable to participate. So we've kind of lost our leaders and our spirit in the book club. But leaving behind Tatel and Oberdorfer and my secretary of many, many years Marlene Taylor, was hard. Actually I waited to retire until Marlene could retire. And she retired shortly after I did, although she came back for a while and worked for another judge, a brand new judge. Now Marlene is retired. You know I have very good friends on that court, Paul Friedman, Ellen Huvelle and many others, Rosemary Collyer, Reggie Walton, John Bates,

John Facciola. Great people on that court, and I miss them all. I miss the regular lunches that I enjoyed with them when I was in the court. But I've turned the page.

MS. ALLEN: It sounds as though you are the exception if you retire. Very few judges do retire. They move into senior status and continue.

MR. ROBERTSON: That is true, although at the time I retired, there was beginning to be something of a wave of retirements. Jay Plager, who I think may now be a senior, but was a judge from the Court of Appeals for the Federal Circuit, took it on himself to do a study of why judges were retiring. And there was a period of time back in 2008, 2009, 2010, 2011, 2012, right around there, when lots of judges couldn't deal any longer with the failure to get a pay raise. And there were judges retiring all over the country. It wasn't exactly in droves. It definitely is still the exception, definitely the exception. But then about two years ago a case called *Beer* was filed. The name of the case was *Beer*, but it really was filed by Larry Silberman. Silberman had kept his eye on Congress's failure to raise pay for a long time and finally concluded that the time was right to renew a litigation approach to the problem and to seek judicial relief from Congress's repeated breaches of its promise to give us cost of living increases. It was intolerable. I was actually one of the named plaintiffs in the *Beer* case. This is interesting. Silberman wanted to put together a group of plaintiffs in the case who were Republicans and Democrats, new judges, old judges, northern judges, southern judges, a representative group of judges, and

asked me if I would join him in the lawsuit. I said sure. Silberman and Hogan and I were all plaintiffs in the original *Beer* case. I've forgotten where Judge Beer was from, but Judge Beer was the first name alphabetically, and so it became the *Beer* case. When I retired and told Ab Mikva that I was going to clear the decks so that I could be the chair of this big tobacco arbitration, one of the things I also had to do was to withdraw from the *Beer* case, because the lawyers representing us were also the lawyers representing one of the parties in the tobacco case. So for that reason, I withdrew from the *Beer* case and am no longer a plaintiff. It didn't matter, because when the case was decided, all judges who had been made the promise of the COLA and didn't get it were ultimately given relief. So some time, either last year or the year before, I got a big back pay check from the government, and my retirement pay was raised from something like $165,000 a year to something like $195,000 a year. If that pay raise had come five years earlier, I might never have retired. I might never have retired.

MS. ALLEN: Well, you're retired, but here you are at JAMS, working hard.

MR. ROBERTSON: I was telling you this morning when I got here I was in Oklahoma City yesterday and took a plane home from Oklahoma City and got home at midnight last night, so I'm a little ragged out this morning.

MS. ALLEN: And that was for an arbitration or for a mediation?

MR. ROBERTSON: It was for a mediation that has been going on for some time.

MS. ALLEN: Just pursuing your interest in arbitration and mediation, I think somewhere early on you talked about mediation quite a bit and how you didn't necessarily push parties to go for mediation. Sometimes you would, sometimes you wouldn't.

MR. ROBERTSON: It won't surprise you to hear me say that where you stand depends on where you sit. Yes, I had a different view of mediation when I was on the bench. But my view of the whole ADR (alternate dispute resolution) process in general when I was a judge was one of something like alarm.

MS. ALLEN: Oh really?

MR. ROBERTSON: I used to, and it was kind of joke-ish alarm, but I used to tell people you know these ADR people are eating into our market share. They are taking all of our interesting cases away from us. Well now, I am on the other side of that fence, and I'm saying bring it on. But to be quite serious about it, I have now been involved in all three phases of this judicial process – of this dispute resolution process. For 30 years I was a trial lawyer, I was an advocate, I was hard-wired into the American adversary system, doing my best to beat other people or to persuade other people that I would beat them so that I could achieve an adequate settlement in litigation. Because that's what I was – I was a litigator. And then for 16 years I was on the other side of that fence. It's a lot easier to be a judge than a litigator. A lot easier because a litigator is always trying to make his case better than he knows it is.

MS. ALLEN: Right.

MR. ROBERTSON: And make the best he can out of whatever he is given. But the judge hears from both sides and just has to find the right answer. And the right answer is usually not all that hard to find. Now, there are cases that are very close, there are cases in which the right answer is elusive. There are cases that make you scratch your head, and there are cases in which the court of appeals reverses you. But by and large in most litigation cases there isn't an awful lot of doubt about the outcome –at least in the mind of this judge.

Now the ADR process is where I sit, and where I now stand is that I think ADR is good for every case. I really think there are very few cases that should not be settled. Or that cannot be settled or resolved by arbitration. And the trick is – and it is quite a trick frankly – to achieve the efficiencies in terms of time and money that arbitration has promised for so long, but hasn't really delivered. Arbitration is supposed to be cheap, fast, private and to some extent within the control of the parties because you can either select your own arbitrator or at least say who you don't want to have as an arbitrator. The privacy and selection of arbitrator parts are pretty well established. Cheap and fast are more elusive. And it's no secret or should be no secret to anyone that most of the reason why cheap and fast are so elusive is because lawyers – Well, I don't think there is a dark reason that lawyers do it. Lawyers are just – it's the risk aversion of lawyers. They want more discovery. Lawyers are not risk takers. Businessmen would like to get it over with. Let's decide, let's do it. Lawyers say well, you can do it, but there are these issues that have to be

resolved and after those issues have been resolved what if this, what if that, and how do I know that these documents don't show something. And so they want more discovery, more depositions, more motions. And the result is more complications, more time and more money.

I've been telling a small joke to lawyers, but I actually believe it. I tell them, you know what makes great lawyers? Great lawyers are the ones who do well in law school, and because they do well in law school, they get invited to big firms or the government and they go on to have good careers. The so-called best lawyers are usually the ones who do best in law school. And why did they do best in law school? Because law school examinations usually consist of a hypothetical question that is written by the professor. What he's looking for is the law student who finds the most issues in the question, who spots the most complications, who figures out all of the hidden traps and issues that can be teased out of this hypothetical. That's the guy who gets an "A" in law school. I think therefore the best lawyers by definition are complicators. They are trained and rewarded for finding more problems than anybody else finds.

MS. ALLEN: That's a bit of a discouraging way of looking at lawyers. I can't disagree with you.

MR. ROBERTSON: Well, I don't know if I'm discouraged by it or amazed by it, but it is the way the process works. Obviously I've overstated my point. The lawyer who can cut through everything and get to the chase and finds the one issue and resolves the case and gets it done will be the most successful

one. But the opinions we write are too long, the briefs we read are much too long. The contracts we write are too complicated. The more complicated the contract gets, the more likely it's going to be breached or there's going to be litigation about it.

MS. ALLEN: Right.

MR. ROBERTSON: We're complicators.

MS. ALLEN: But not always.

MR. ROBERTSON: Not always. We're also problem-solvers. Which leads me to this other general kind of proposition that I want to leave on this record. Since I left the bench and made the decision to retire and to some extent rationalized the decision to retire by the financial needs and the so-called estate planning issue that I talked about earlier, I have come to the realization that one of the reasons I like what I'm doing so much now is that I am not held back and dragged down and slowed down by all of the hoops and hurdles that a judge has to go through with a case in court. A district judge dealing with a new case has to go through many steps before ever getting to the merits of the case. We have to worry about jurisdiction and venue and the statute of limitations and justiciability and ripeness and standing and whether the complaint states a claim under Rule 12 and whether summary judgment has to be granted. And then we have to deal often with discovery disputes, and motions *in limine* – and all these things happen before you get to a trial. I'm not sure the statistic is true or not, but I heard it someplace and I prefer to believe it, that in the 15 or 16 years

that I was on the bench, the number of civil cases filed in this country nationwide that went all the way to verdict and judgment decreased by 50 percent. From 2 percent to 1 percent. It may not be true – most people instinctively use numbers like 10 to 5 percent. But the truth is that very, very few civil cases ever get to trial, and part of it has to do with the hoops and hurdles that have to be gone through and hopped over before you get there. There are so many barriers. At one point in my career we called them barriers to access to justice. But the truth is, I realize that I spent an enormous amount of my time as a judge throwing cases out instead of deciding them. It is refreshing, absolutely delightfully refreshing, to parachute into the merits of a case and be told we've got this problem, we want to resolve it. And in a day, sometimes a day, sometimes several meetings, sometimes more than several meetings, but in a very short period of time, the mediation process very often succeeds in resolving that case without worrying about jurisdiction, venue, statute of limitations, standing, ripeness, justiciability, etc. Just do it. You solve the problem.

MS. ALLEN: That's a real radical change for you.

MR. ROBERTSON: It is a radical change for me. And it is, it is, one of the reasons why I have never looked back and why I enjoy what I'm doing.

MS. ALLEN: Well, arbitration though you're still making decisions.

MR. ROBERTSON: Arbitration – that's a little dicier because arbitration is much more like court cases. In fact it's almost indistinguishable from court cases, except that the parties make their own rules and tell you what they want. So that,

for example, if I'm chairing an arbitration or a sole arbitrator on a case and I think the parties ought to get this thing to trial in three months and forget about all this discovery, the lawyers may say well, we want to do discovery. The arbitrator is in sort of a tight spot there. The arbitrator's instinct is to say no, you can't do the discovery, but he is being paid by the participants, and he who pays the piper calls the tune to some extent.

MS. ALLEN: What if both sides want discovery?

MR. ROBERTSON: If both sides want discovery, and, you know, the arbitrator – there is a good deal of angst among some arbitrators about how directive they should be. I'm way over on the "I used to be a judge, this is how we're going to do it" side of things. And by and large lawyers respect that and respond to it and really expect me to do that.

MS. ALLEN: Okay.

MR. ROBERTSON: They expect me to crack the whip and keep things moving. But the rap on arbitration is that there's no incentive for anybody to move quickly. Arbitrators can string it out, lawyers can string it out, and things take a long time. I'm doing a big international arbitration now.

MS. ALLEN: Oh really. In this country?

MR. ROBERTSON: Well, it is in this country, but it involves a party from another country. And the chair of the arbitration is from Europe. And I'm getting a glimpse of international arbitration which strikes me frankly as unbelievably cumbersome by American standards.

MS. ALLEN: Because of the procedural rules?

MR. ROBERTSON: Because of the formality and the deliberateness of the process. The international arbitration business is quite different from American arbitration, at least the ones I have been involved in which tend to be much more, let's do it, let's get it over with, let's move the ball. But it depends on the arbitrator, it depends on the parties, it depends on, it's like anything else, it depends on who the judge is. I mean I used to think that I was quicker than most judges in cases decided. I think I was. I wasn't the quickest, but I was quicker than some. Some people work that way and some people don't. That's human nature.

MS. ALLEN: So do you find it difficult to switch from being an arbitrator in some cases and a mediator in others?

MR. ROBERTSON: No. It's like playing baseball one day and football the next day. It's a completely different thing.

MS. ALLEN: Right. That's why I thought it might be hard, particularly having been a judge for so many years to switch to the mediator role.

MR. ROBERTSON: Mediation – you're a mediator Ann, you know about mediation. I'm sure you know a lot more about mediation than I do.

MS. ALLEN: I doubt it. But I keep learning all the time.

MR. ROBERTSON: I am. I have become a big fan of mediation.

MS. ALLEN: Good.

MR. ROBERTSON: I mean when I first came here to JAMS I said well, I know that mediation is about 70 percent of the ADR phenomenon. And so I thought to myself I'll have to do some mediation before I become a world famous arbitrator,

and the truth is, I never became a world famous arbitrator and I've done a lot of mediation. But I'm almost completely self-taught. I'm kind of an autodidact when it comes to mediation. I went to a certification course that the DC Bar offered years and years ago, and I've read a lot about it, but I've never really been a student of mediation. And there are lots of theories of mediation.

MS. ALLEN: There are. They can be confusing theories.

MR. ROBERTSON: There are theories. And I mean Linda Singer will hit me on the head, and she'll probably read this someday, because she and Michael [Lewis] are teachers and theoreticians and internationally famous for what they have done with mediation and God bless them. But I have to tell you that there's a sort of magical quality about mediation that I don't fully understand. The mere fact of having somebody in the space between two parties who communicates back and forth between them is what brings it about. And I know I'm oversimplifying this, and shame on me for doing it, but I see mediation simply as a process of listening and communicating.

MS. ALLEN: I definitely agree.

MR. ROBERTSON: Just listen carefully, understand what's really being said, try to get a sense of where the parties really need to go. Take some of the rough edges off what you've heard communicated in the other room. And it's just astonishing why it works. I don't know why it works or how it works. But every single one is different. There is no standard format for mediation in my view. It's a kind of a high wire act for the mediator. I

call mediation liars' poker because neither side will tell you what they really want.

MS. ALLEN: And people will surprise you.

MR. ROBERTSON: People surprise you. I never ask people in mediation what is your bottom line. Because they won't tell me and if they do tell me, I won't believe them.

MS. ALLEN: They won't really tell you.

MR. ROBERTSON: No. Sometimes.

MS. ALLEN: Sometimes you could say rather than what's your bottom line, what do you think about what the worst thing could be at trial.

MR. ROBERTSON: Yeah.

MS. ALLEN: It's hard to get anything, but sometimes that startles them and they get so caught up. It sounds as though the switch maybe wasn't so easy. But you're enjoying it.

MR. ROBERTSON: No. The switch wasn't easy. I think the worst part about it was the notion, or the fear or the belief, that I was letting people down. There aren't that many judgeships to go around. And when you accept one of these judgeships for a lifetime appointment, you are taking a big step and you are accepting an enormous vote of confidence and a big responsibility. And to walk away from that is not easy to do. And I didn't do it rashly or quickly. But the best thing about my leaving the court is the guy who took my seat.

MS. ALLEN: Okay, and that was?

MR. ROBERTSON: That was Robert Wilkins, who was such a great lawyer. And he occupies the seat that I occupied – or he did occupy the seat that I occupied, and within a very short time was recognized for the great judge he is and was promoted to the Court of Appeals. The first judge of our court to be promoted to the U.S. Court of Appeals since Spottsworth Robinson back in the 1960s.

MS. ALLEN: That's very surprising.

MR. ROBERTSON: Well, it is surprising. And it has disturbed us in the District of Columbia for a long time because in every other court in this country, every other circuit in this country, the natural process is that many district judges will move up to the court of appeals. And they'll move up because of their merit. Here, going way back to Kennedy and even before Kennedy, the Court of Appeals has always been seen as a place for appointments that are much more political and much less tied to the merits or demerits of district judges. I mean from the time that Skelly Wright was brought up here from Louisiana and put on the court to sort of escape from the calumny that was being heaped on him because of his school desegregation opinions in the South. Or Harold Leventhal was brought here from Chicago. I think he'd been a partner of Adlai Stevenson. And there are many, many examples like that. Judge Henderson was brought up from South Carolina because there was no seat on the Fourth Circuit for her and because Strom Thurmond or Jessie Helms wanted her on the Court of Appeals.

MS. ALLEN: Maybe this is a good place to end. You said Randy Moss.

MR. ROBERTSON: Oh. Complete the thought of my seat. So-called my seat. The seat that I occupied was occupied before me by George Revercomb, a much beloved guy who died much too young of cancer, who worked through an opinion on his death bed that he had to finish. He was very fondly remembered by everyone here. This legacy of passing a seat from judge to judge is no big deal, but we all sort of remember it. I had Revercomb's seat, Wilkins had my seat, and when Wilkins went to the Court of Appeals, Randy Moss took his seat, my seat, Revercomb's seat. Randy Moss is a former partner of mine at Wilmer, Cutler & Pickering, and I would say a spectacular young lawyer, except he's got as much gray hair as I do. And a very, very welcome addition to the court. So it feels pretty good to have your former partner occupy your old seat on the court and that's where Randy Moss is today. And I'll let you go now.

MS. ALLEN: Alright. Well, thank you very much. You have given a lot of your time to this effort, and I appreciate it.