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 August 19, 2004. This is the fourth interview.

MS. ALLEN: This is a continuation of the oral history of Judge James Robertson.

MR. ROBERTSON: Well, Ann, I told you before we started today that I had made a note of two things I wanted to be sure I covered because they are two of my favorite stories from my career, such as it is. I call them the Diva of Divorce story and the Claibourne Hardware story.

The Diva of Divorce story goes like this. In January 1993, just after Bill Clinton had been inaugurated, he was trying to fill out his cabinet, and you remember the flap that he had about the woman he appointed Attorney General who had not paid her nanny social security.

MS. ALLEN: This was Zoe Baird?

MR. ROBERTSON: It was Zoe Baird, and she had to withdraw, and all of a sudden it became very important to get nominees up for attorney general immediately. Well, I was part of an effort that was organized and orchestrated by Jim Hamilton, who was at Swidler & Berlin then, to get teams of Washington lawyers who would vet candidates for cabinet positions. I had a team of five or six lawyers, and other team leaders had teams of five or six lawyers, and I was given the task on very short notice for vetting a candidate for attorney general. Marna Tucker was another team leader and was given the same job. Because it was such a big job on such a short notice, Marna's team and my team went to work together.

MS. ALLEN: On this one candidate?

MR. ROBERTSON: On the same candidate. And it meant interviewing the candidate and calling people and running down leads and reading things that the candidate had written, and it was a labor-intensive process of amassing the record of this candidate. Actually, now that I think of it, there were two candidates. Marna and I had two candidates that we were working on and we had to get reports together. At any rate, we were asked to deliver our reports to the White House on Sunday morning at 11:00. The reports were to be delivered to the President's White House counsel, whose name was Bernie Nussbaum.

We met in a big conference room at Wilmer, Cutler & Pickering before we went over there, her whole team and my whole team, about 10 or 15 people. That morning's *Washington Post Magazine* had a big picture of Marna Tucker on the cover, under the headline "Diva of Divorce." Marna is a very, very well-known and well-established family law divorce lawyer. She had the most enviable divorce practice in the District, so the *Post* singled her out for coverage. Marna also was an FOB. She was a legitimate FOB. She and her husband Larry Baskir had been going to these Renaissance Weekends for years and had gotten to know Bill and Hillary Clinton, and their kids had gotten to know Chelsea, and they were close. Marna said at this meeting, "You know Jim, when we finish this meeting with Nussbaum, the President says he wants to see me." I said, "That's cool." So, only Marna and I went to the White

House. All the rest of them had to stay back because only two of us would be cleared in.

We went to the West Wing, to the office of Bernie Nussbaum, and there we met Bernie Nussbaum and Vince Foster. Now these people had been in the White House I think for less than a week. This may indeed have been the first Sunday after the inauguration. Marna said to Nussbaum, "The President wants to see me when we're finished here." He gave her a fishy look like 'Who are you, lady?' He picked up the phone and called somebody, and in a minute, his phone rang. He picked it up and listened, and then he looked at Marna with a quite a different look on his face. He said, "Okay, we'll go see the President when we are finished."

Marna and I delivered our reports on these candidates, which took about ten minutes, and then Nussbaum said, "Let's go." He and Vince Foster and Marna and I went upstairs to the Oval Office. Foster had never been there before. In the Oval Office were President , dressed in a lumberjack shirt and corduroys – I remember this like it was yesterday. It's a Sunday morning at 11:00. Hillary Clinton looked like a Wellesley girl in a sweater and a plaid skirt. Paul Begala was there with his baseball cap turned backwards and sneakers on. The other guy, the fellow with the shaved head, the raging Cajun, Carville. Carville and Begala were both up there, and Mack McLarty, you remember, was the Chief of Staff. Only Mack McLarty was dressed formally. He looked like one of these cut-out

posters that you see near the White House, gray suit, red tie. Well, we walked into the Oval Office and Clinton gave Marna Tucker this big bear hug, and he was very warm to me. He had never met me before, but he obviously knew Marna. He said, "Come on, I want to show you around." He showed us around the West Wing. He was like a kid with a new toy. He said, "Look, look at the pictures they tell me I can hang here. Look at this, and look at that, and look, this is historic, and that's historic," and he took us over and showed us the conference room across from the Oval Office where Nixon had installed a big flood light over the head of the table to make it look like something out of a science fiction movie or something. And he laughed at that, and he showed us around, and he was just marvelous. And then he said, "Come here, Marna," and walked over to the President's desk in the Oval Office, which was completely bare except for a copy of that morning's *Washington Post Magazine*. He said, "Marna, how do you get publicity like this? I'd like to know." And we all laughed. He said, "This is a good article." Marna said, "You haven't read it, you're the President of the United States." He said, "Yes I have. Ask me some questions." So she did, and it was clear that he had read and remembered every word of it. It was just amazing. And then he said, "Marna, I want you to do something for me." He pulled out a pen and he said, "I want you to autograph this for me."

MS. ALLEN: That's a great story.

MR. ROBERTSON: That's my Diva of Divorce story.

MS. ALLEN: That's Clinton, new to the White House.

MR. ROBERTSON: That's Clinton, brand new to the White House. Brand new. He was just delighted to be there. "Look what they are going to give me to hang here," and that sort of thing. That's the Diva story.

The other one is the Claibourne Hardware story. When I was in Mississippi, in fact, the first day I was in Mississippi in 1969, I was driven over to the little town of Port Gibson, Mississippi, down on the Natchez Trace, west of Jackson, and down near Natchez, Mississippi. The policemen in Port Gibson wore a badge on their shoulder that said "The Town Too Beautiful to Burn." That was what General Grant reportedly said in 1863 when he passed through on his way to the siege of Vicksburg. The town was burning anyway in a sense because they had this deep, deep racial problem there. The black citizens of Port Gibson had started a very effective boycott of the local merchants in town. It was a little bit like the bus boycott that we all heard about in Alabama. The issues were really old-fashioned, basic civil rights issues. There weren't any blacks who were clerks in any of the stores. Black people were referred to by their first name and given no courtesy titles. And other issues, but basically that was it. The black citizens of the town said, "We have money to spend here, but we aren't going to spend it unless you shape up." The merchants, of course being Mississippians in 1969, didn't want any part of that and didn't go along with any of it and wouldn't sit down and meet with the black people.

So the boycott went on and it became quite effective. It also got a little rough, as boycotts do sometimes. And, as I say, my first day in Mississippi was observing that and talking to some of the people involved with it. The state highway patrol and the National Guard were called in on that particular day, and they went away, and the boycott went on. After eight or ten months, literally eight or ten months, I think the merchants of Port Gibson, led by a lead plaintiff, Port Gibson Hardware, filed suit against the NAACP for damages arising out of the boycott alleging that the NAACP was responsible for it, that it was an unlawful boycott, that they were losing money and they wanted damages from the NAACP. That suit went to trial after I had left Jackson. By that time I was Director up here at the National Committee. It was tried in the Chancery Court of Hinds County, Mississippi. Mississippi at that time still had a law side and a Chancery side, and I suppose the plaintiffs wanted to avoid a jury, which would have been integrated. The trial went on for months, and a big judgment was rendered against the NAACP. It had to be appealed, but Mississippi had a requirement that in order to perfect an appeal of a civil judgment, the appellant had to post a supersedeas bond in the amount of, I believe, one-and-a-half times the judgment, which in this case would have been millions of dollars. The NAACP didn't have that kind of money.

By the time the judgment had been rendered, I was no longer with the Lawyers' Committee. I was back at Wilmer, Cutler & Pickering. And David Tatel wasn't with the Lawyers' Committee anymore either. He was

at Hogan & Hartson. Tatel and I, both Lawyers Committee loyalists, agreed to help. We decided that we would go in two directions. Tatel would go into federal court and seek to enjoin or stay the supersedeas bond requirement as unconstitutional. I would go to the Mississippi Supreme Court and try to get the judgment reversed on merits. Wilmer, Cutler & Pickering wrote a brief on the merits. The Mississippi Supreme Court at that time had a page limitation of 35 pages on briefs. Our team of avid young lawyers wrote a 90-page brief and moved for leave to exceed the page limitation. The motion was denied a few days before the filing deadline, and we had to squeeze a 90-page brief into 35 pages. It was a much better brief when we finished, but I'm not sure anyone read it.

I went down to Jackson and argued before the Mississippi Supreme Court. There were seven judges on that Court. They all sat and stared at me. I thought they were all made out of wax. Nobody said a word or asked a single question during the entire oral argument. It was a very strange experience.

MS. ALLEN: What were the grounds for your argument, because this wasn't an appeal?

MR. ROBERTSON: This was an appeal.

MS. ALLEN: So somehow the NAACP got the money for the bond, or could that be waived?

MR. ROBERTSON: No. Excuse me. I omitted an important piece of this story. During this whole bonding exercise, the NAACP reached out all over the country for enough money to meet the supersedeas requirement. Money was coming

in from churches in shoe boxes. It was quite amazing. I didn't actually see the shoe boxes, but I heard about it. The NAACP raised an enormous amount from around the country, but it was not enough. David Tatel went to federal court in the Northern District of Mississippi and got an order from one of the judges from the Northern District – I think it was Judge Orma Smith, also known as "Hack" Smith – enjoining the operation of the supersedeas bond requirement.

MS. ALLEN: That's quite a victory.

MR. ROBERTSON: That case went from there to the Fifth Circuit, which affirmed. The seven waxed judges of the Mississippi Supreme Court affirmed the chancery judgment, and we filed a petition for certiorari in the Supreme Court. I led that effort, and John Payton of Wilmer, Cutler & Pickering, is still telling the story of how his decision to come to Wilmer, Cutler & Pickering was because he was given a chance to work on this case. He has been there ever since, thank goodness. We wrote the petition, and cert was granted.

I thought the correct and proper thing to do was to go to Lloyd Cutler and offer him the opportunity to argue this case in the Supreme Court, thinking, of course, that Lloyd would say, "Oh no, Jim, you did the motion, you do it." So I went to Lloyd and said, "Well, Lloyd, we just got cert granted in the Claibourne Hardware case, would you like to argue it?" He said, "Sure." I tried not to look too visibly disappointed. And then he looked at me for a moment and he said, "Boston Tea Party" and I said, "What?" He said, "Boston Tea Party." You know, we need to do some

research. I'll bet most of the signers of the Declaration of Independence were engaged in boycott activities themselves." He said, "I would bet you that there is a solid First Amendment kind of originalist argument that can be made out of the boycott activities of the Framers of the Constitution." I said, "Works for me."

So we went to work. There was an associate in the firm, a wonderful guy by the name of Jamie Kilbreth, who is now a partner in a big firm up in Maine. Jamie, John Payton, I think Bill Richardson, and I went to work on this, although John, Jamie, and Bill did most of the work. We went over to the Library of Congress, the Supreme Court library, and back to original documents, and wrote this fabulous brief about the signers of the original Constitution and the Declaration being people who understood what boycotts were and what their purposes were – the Stamp Act, the Boston Tea Party and all that – and it enabled Lloyd to stand up. Lloyd said, "The Chief is going to love this." The Chief was Warren Burger at the time, who was second, I think probably, only to Cutler in his Anglophilia, so he said the Chief's going to love this. Cutler stood up and said, "May it please the Court, 17 of the 35 signers of the Declaration, and 25 of the signers of the Constitution were engaged in boycott activity…" and proceeded to educate the Court on all this original history of the boycott activity of the Framers. Our case was called at about quarter to twelve. The Supreme Court recesses on the dot of 12:00 p.m., even in mid-sentence.

MS. ALLEN: But not this case?

MR. ROBERTSON: This case too. I looked up at the bench – in the Supreme Court you're close enough to the Justices that you could touch them. By the way, Nate Jones was on the brief with us in that case. Nathaniel Jones was then general counsel of the NAACP, but he went on to become a judge of the U.S. Court of Appeals for the Sixth Circuit. It was Nate Jones, Lloyd Cutler, and me at the counsel table. It was a big day for me. I didn't argue the case, but I got to sit at the counsel table with these two great Americans, and I looked up at the bench and there was Justice Burger with his eyes rolling back in his head like somebody who was going to sleep. Here's Lloyd going on and on about the boycott activities of the Framers of the Constitution. At 12:00 p.m., we're off to lunch. We go into this dining room that's just a few steps from the courtroom, and Lloyd said, "How about the Chief?" he said, "Was he following that?" I didn't have the heart to tell him that the Chief was asleep. Well, some months later we won that case in the Supreme Court by a vote of 8-0 (Justice Marshall recused).

MS. ALLEN: So maybe he was listening?

MR. ROBERTSON: Lloyd at the time, as was his wont in the summer months, was in Salzburg listening to opera. So I called him in Salzburg, and I said, "Good news, Lloyd. We won 8-0 in the Supreme Court." He said, "What did they say about the boycott, about the Boston Tea Party?" And I said, "Lloyd, I have to tell you, there's not a single word in this opinion about the

Framers." There's a lot of threads in that story, but to me it said a lot about Lloyd Cutler's original mind, the tenacity he had, and his determination to go ahead with things. It was quite a story.

The Claibourne Hardware opinion of the Supreme Court has not proven to be as useful in subsequent years as I thought it would be, but it basically stands for the proposition that a peaceful boycott in support of civil rights was protected by the First Amendment. All right, that's the end of the storytelling.

MS. ALLEN: Good storytelling. You would think it would have been a very important precedent for a lot of cases coming out of that era.

MR. ROBERTSON: You will remember some years later Texaco-Pennzoil.

MS. ALLEN: Vaguely, yes.

MR. ROBERTSON: Pennzoil sued Texaco, and it was a famous breach of contract case. It all had to do with some handshake deal between the two companies. The lawyer for Texaco thought so little of the plaintiff's case that he refused to say anything to the jury about damages. That's what we all remembered it for, how you can't afford not to mention damages. The plaintiff asked for $60 trillion and basically got it. Texaco had this enormous multi-billion judgment and a supersedeas bond requirement. And Cutler was scratching around trying to figure out some way that we can help with getting that supersedeas bond requirement set aside on the strength of the Fifth Circuit decision that David Tatel won, but it didn't work because Texaco had no

First Amendment protection. It didn't have that constitutional veneer that you needed to avoid the supersedeas bond requirement.

MS. ALLEN: I guess I'm up to bat then. I want to talk with you about cases and how you handle a case procedurally before it gets to trial, how you decide motions, the role of the clerks, who does the research, different people's roles.

MR. ROBERTSON: Not long before I came to this Court, Congress enacted a very useful piece of legislation called the Civil Justice Reform Act. Paul Friedman, who was then still in private practice, chaired a committee that worked out a plan for the application of the Civil Justice Reform Act to this court. All courts had to have a CJRA plan. The Civil Justice Reform Act is the statute that requires us to report twice a year any motions that have been pending more than six months or any cases that are more than three years old. Every year you can see the lights in this Courthouse on very late the last few nights before March 31 and September 30, because judges are rushing around trying to get their numbers down as low as possible. Judges don't like it very much, but all of us I think have to acknowledge that it has really made a difference in the way courts in general deal with cases. It used to be that you would file a case and nobody had any control over it. The parties just sort of went off and did their thing.

I give a lot of credit to Friedman and his committee for setting up a process in this Courthouse, which is not mandatory but which came quite naturally to me. I would like to think that I would have done case

management this way anyway, but the whole Civil Justice Reform Act idea emphasizes taking control of cases early.

There are still courts in this country where a judge never becomes involved in a case at all until the day of trial. That doesn't make any sense at all. What happens in this court, at least in my chambers, is this: When a complaint is filed, I really very seldom pay any attention to it unless it is obviously high-profile and high-visibility. But as soon as the first response is filed – after summons has been served, which can take a long time – as soon as there is somebody else in the case, I tell my courtroom deputy clerk, "Get the parties in here for an initial scheduling conference." And that is the first real look I have in a case, and that is where thirty years of experience as a civil litigator has been helpful to me, because no two cases that walk in here are the same. Some of them need to go immediately off to mediation, and some of them are not ready for mediation. Some of them – in fact, there really isn't any reason to bring them in for an initial scheduling conference. I don't invariably do that. For example, if it is a Social Security appeal, everybody knows that the next step will be a motion to affirm by the government and a motion for relief by the claimant, and you just have to issue an order that sets a schedule. You don't have to have anybody in here for such a well-worn path. But in most cases, I have a scheduling conference right here where we are sitting now, off the record, no tape recorder, no court reporter, to try to get a sense of what the case is really about. And the lawyers have a

chance to tell me what they know about the case. It is actually pretty astonishing how often lawyers will come in here for their initial scheduling conference and don't know anything about their case.

MS. ALLEN: They've done no preparation for the conference?

MR**. ROBERTSON**: They've done no preparation for the conference. The defendant may not know anything about the case, and the plaintiff's counsel may not really know much about the case. He filed a complaint three months ago, so he's kind of forgotten it, he doesn't have his file with him, he doesn't remember, but at least we have some sort of a discussion regarding the case, and it then enables me to set a schedule. Usually I set a trial date at that very first meeting. Sometimes it's pretty clear the case will never go to trial, and I just issue a briefing schedule. Sometimes my guess is the case will never go to trial, but if they need some discovery before they go to mediation, I'll allow that. At any rate, this actual physically sitting down with the lawyers very early in the game sounds like a trivial thing, but it's an immensely important part of getting control of your docket.

Every judge has a different way of keeping track of his cases. I'm a computer nut, and I've got lots of computer systems that work for me and for my law clerks. But I try to keep on top of cases. There are little tricks. You never let the lawyers go from your courtroom or your chambers without setting another date on which they've got to do something. You've got to keep setting deadlines. I don't have to tell you that this is an unbelievably deadline-driven profession. Without deadlines,

nobody would ever do anything. So you have to keep deadlines, you have to keep some general pressure on, you have to remember that you are not god, that the lawyers have their cases to try, that they need to do it their own way within limits. But lawyers need to understand that I have to make a report every six months, and I want to keep my numbers down. I don't know if that's responsive to your question, but that's part of the whole case management process that judges go through.

MS. ALLEN: Will you have a clerk in on that first scheduling conference?

MR. ROBERTSON: One of my so-called elbow clerks is always in here. They keep running notes in a little notebook of what happens, just little informal notes, not a transcript and not a docket sheet, but informal notes of what's going on, and that's what I refer to when I come back to the courtroom the next time.

MS. ALLEN: You talked earlier about most cases settling rather than going to trial. How far do you push litigants to settle? Do you size up cases fairly early on and just say directly to them that they should settle it?

MR. ROBERTSON: The answer is I don't do it very much. But I have to tell you another story. One of my favorite colleagues at Wilmer, Cutler & Pickering was a law clerk to Louis Oberdorfer before he came to Wilmer, Cutler. In fact, he had been a law clerk to Oberdorfer and then to Sandra Day O'Connor. And now he is the outgoing dean of the Vanderbilt law school. His name is Kent Syverud, an elegant guy and a wonderful lawyer. Syverud and I worked together on a case just about the time he was looking around for a

teaching job, and he got an invitation to go out and meet with the faculty of the Michigan Law School. Part of the deal is you have to give them a lecture so they can tell whether or not you know how to give a lecture. Well, Kent was too busy to prepare much of a lecture, but he cobbled together some anecdotal evidence and put together a lecture on the subject of settling cases. He came over here to the District Court and got some records – I don't know how he got them – and was able to make a comparison between the settlement rates of two different poles of judicial approaches to settlement. One was the famous Charles Richey, who was a self-professed head knocker and the classical "you people have to settle this" judge. He'd send people back to the jury room and say don't come out until you have settled this case, and he meant it. He would keep them in there for hours and hours and hours. Richey would dismiss cases as soon as they came in and tell the lawyers they had to try to settle before he would reinstate them. He was a very heavy-handed, flamboyant, I'm-going-to-make-you-settle-this-case, kind of a guy.

Syverud compared Richey's settlement numbers with the numbers of Aubrey Robinson, who was at the other pole. Robinson would say to lawyers "I'm here if you need me, and if you don't settle, I'll see you at the time of trial." He never interfered, never leaned on anybody, never pushed anybody. Syverud showed that the settlement rates of those two judges, there was not a dime's worth of a difference between them.

MS. ALLEN: Fascinating.

MR. ROBERTSON: And then he compared their settlement rates. I don't know how he measured settlement rates, but he compared them with settlement rates in the Eastern District of Virginia, the so-called rocket docket. There he found daylight. Cases settled a lot more over there than they did here. Now, some lawyers felt then and still feel – and I sort of feel myself – that pressuring lawyers under unreasonable time pressures to settle a case is a little unfair. But there's no question at all that it is a firm trial deadline that gets cases settled.

Now, back to your question. What do I do? I don't do anything the same all the time. I like to think that this is an art and that cases settle when they are going to settle. I am not high on the list of favorites of the people who run the Courthouse mediation program, and maybe you should probe that. I think if Nancy Stanley and Michael Terry were to tell you which judges are their favorite judges, they wouldn't list me, because I don't send many cases to them. I don't do it very often because my own view is that mediation is like psychiatry. If you're ready for it, it will work, and if you're not, it won't. It is, after all, a voluntary process by law, so sending people to go through mediation if they are going to do that with their fingers crossed behind their backs is hardly worth the effort. But I look for opportunities.

The other day I had a bench trial here, and it was a civil case between two owners of a pizzeria, I think on diversity grounds. It had been a jury trial, and then the plaintiff waived his right to a jury trial on

the first day, and so we began a bench trial. We tried it for one day, and at the end of the day, I said to the lawyers, "Here's how I see it so far." And the next day they came in and settled the case. Now, I did that on purpose, and it had the desired effect. Lawyers will settle cases once they get a sense of where they are, but they need to have that sense of where they are. Lawyers are the most risk-averse people around, so you need to give them information. That's why a case will often settle after summary judgment has been denied but before trial. So some cases I send to mediation, some case I don't. Some cases I ask a magistrate judge to try to settle, sometimes I bring the parties in here. Usually that's done quite spontaneously, usually if I have a status conference and I can sniff something in the air that the parties need a little help, and I'll say, "Why don't you guys come back to chambers, we'll talk about this."

The very best trial lawyers are people that you feel lucky to see in your courtroom, and you don't see them enough. Every judge will tell you that. The truth is, we see a lot of trial lawyers who are here all the time and they are perfectly good. I have actually no complaint about the trial lawyers in this town. I think they do a good, solid, workmanlike job, but there is a notch up that you get occasionally, and it's a real pleasure when that happens. Just to give you a couple of names, I'm not going to mention names of anybody I think is just a journeyman, but I don't mean to omit anybody by giving couple of names. Just for an example, Bill Jeffress is a fabulous trial lawyer, was involved in a piece of the *Hubbell*

case. Bill Jeffress has two children that I know of, one is Amy and the other is John. Amy is now the Deputy Chief of the Criminal Division of the U.S. Attorney's Office, and John has just signed on with the Federal Public Defender's Office here. John clerked for Tom Hogan, Amy for Gerry Gesell. They were law clerks, so that's a real lawyers family. Bill Jeffress is the gold standard as far as I am concerned of trial lawyers.

There are lots of others. John Nields was in my courtroom for an important case, and he is just a remarkably good lawyer. But we don't see those guys enough. You wish you could spend all day listening to the Bill Jeffresses and the John Nieldses of this world making their cases, but that's not the way it works. That's a treat. It's a real treat when those people come in here.

MS. ALLEN: This may sound like a silly question, but can you generalize the sort of changes in the type of quality in trial practice in the ten years you've been on the bench?

MR. ROBERTSON: Maybe somewhat. I wasn't on the bench in the times that the other older judges refer to as the good old days. What do they say, the good old days aren't what they used to be? As a historical matter, the trial practice in this court underwent an enormous change in 1970, shortly after I was admitted to practice here, with the Court Reorganization Act which established the Superior Court across the street. Until 1970, this Court, the District Court, handled all serious crimes in the District of Columbia. All serious civil matters, any civil matter that involved title or real

property, came here. Judges in this Court signed adoption papers. It was a completely different kind of court until 1970 when all of that local jurisdiction just got sucked out of here and went across the street. What is left here is very little commercial litigation, which is a lot of what I did in private practice; a great deal of employment discrimination litigation, which has changed in ways that I will report to you in a minute; a lot of guns and drugs, routine criminal litigation, which has not changed much, except it ebbs and flows depending on the United States Attorney and how much of it he brings in this court. A considerable amount of agency Administrative Procedure Act cases like what I'm working on right now, was it proper for the Corps of Engineers to give a 44(b) dredging fill permit to somebody who wants to operate a limestone mine in Florida in the middle of panther habitat? Was it proper for the Department of the Interior to count farm salmon when they are deciding whether salmon are an endangered species? That sort of thing. A lot of those cases. A lot of Freedom of Information Act cases which are dreadful, and a lot of prisoner cases.

The changes that have come about since I have been here are, first, the prisoner cases. We used to have to do a lot of *pro se* prisoner work. We don't do much of it anymore because of two things. First, we now have an in-house staff of *pro se* attorneys who are highly expert and who take most of that stuff off of our hands. They are in effect our law clerks for those cases. We didn't used to give these cases to our law clerks

because (a) they were tedious, and (b) it took a certain amount of expertise to get up to a level where we could handle them, and a judge could handle them easier than a law clerk. But now we don't have to do it at all. The *pro se*'s do it and give us the papers and we almost always agree with them. There's also been some legislation that makes it harder for prisoners to file cases in federal courts. So the prisoners cases, at least our involvement with them, is down.

Title VII cases, when I first came to this Court, the word was you can never grant summary judgment in a Title VII case. The Court of Appeals would throw it out. Not anymore. The Court of Appeals has changed. It's become, I won't say defense-minded, but the Court of Appeals has a different view of Title VII cases, so more Title VII cases go off on summary judgment than used to, and there are fewer trials of Title VII cases. I can't say that there are any other real changes.

MS. ALLEN: One subject that we haven't talked about that I wanted to cover today is opinion writing and how you go about it, how the clerks are involved, and what you do and what they do.

MR. ROBERTSON: The typical opinion comes about either after an oral argument or before. If there is no oral argument, I'll talk to a law clerk and I'll say, "Look, I think the plaintiff wins or the defendant wins. It seems to me A, B and C," and I'll just give a rough outline of the way I see the case. The law clerk then goes off and produces a draft, and I start chopping on the draft. I am a very, very heavy editor. I insist on writing it the way I want to

write it, partly because I have the hubristic notion that I can write better than anybody, partly because my own belief is that you don't really get something right until you have deconstructed a sentence to make sure exactly what it says and put it back together again the way it makes sense to you, and partly because I'm going to sign it. The law clerk isn't going to sign it. I want to make sure that it's my work. I've challenged every law clerk I've had to be a better proofreader than I am, and I have never lost. I will put an opinion through sometimes six, eight, ten drafts before it goes out. Sometimes it's only three or four, but it's never fewer than that because I am kind of a perfectionist about writing, and I am an anti-footnote person. I'm a "less is more" person. I keep chopping and cutting and shortening and reducing, and then I sometimes look at it and say "God, I don't know what this says anymore, it's short, it's too brief," and I have to go back and add a little material back in. But the process of opinion writing is definitely an interactive process between me and the clerk. I send a draft back out, the clerk sends the draft back in, I send the draft back out, the draft comes back in. Sometimes we sit together and work it over, but really it's just sort of "here, take this, work it over again." I keep asking my law clerks to edit me the way I edit them. Unfortunately very few of them have the chutzpah to do that. Maybe it's because I am such a much better editor than they are, but I don't think so. I think it's because their instinct is, "Judge, however you want it."

MS. ALLEN: Do they get bolder towards the end?

MR. ROBERTSON: Absolutely. And indeed, the great moment in every clerkship – and it's happened with almost every clerk – when he or she presents to me, usually towards the end of a clerkship, with an order, sometimes it's a three-page order or a little opinion, that I just sign without changes. That's great for the clerks, and it's great for me.

MS. ALLEN: I don't really have any other questions on my list about the judgeship, per se, just some open-ended ones. Is being a federal judge what you thought it would be like, or have there been surprises?

MR. ROBERTSON: It's been much, much better than I thought it would be. Much better. I was more than a little concerned when I came over here, both that I didn't have enough experience with criminal law – I'd had to deal with criminal cases very little – and that I would be so overwhelmed by criminal law cases that I'd spend the rest of my life doing guns and drugs and wouldn't have time for any really complicated, intellectually satisfying stuff. Both of those fears proved to be completely unfounded. It doesn't take anything away from criminal lawyers to say this, but criminal law isn't all that complicated. It's pretty routinized. Most of these barns we've been around many, many, many times. Every motion to suppress evidence is different, but they are all the same, they are just slightly different, and it's just a matter of understanding exactly what the facts are. So in criminal law, the learning curve is steep and short. And as far as being overwhelmed by criminal law cases, it just hasn't happened.

As we discussed earlier, I've spent by far the majority of my time working on civil matters. Criminal cases, mostly of the Sentencing Guidelines kind, take care of themselves. Now, as I've just told you this afternoon, recently there have been more trials than there had been, but that's cyclical. If I were sitting in South Florida, I'd be doing nothing but trying criminal cases. Drug cases. Or if I were sitting in a border court in Texas, I'd be spending my entire time with immigration cases. But not here. Here, we do plenty of criminal cases, but it doesn't overwhelm us. When I came here, I don't think I could possibly have understood the satisfaction that there is in getting it right, in looking at opposing theories of the facts and in finding the right answer. Sometimes it's excruciatingly difficult, sometimes you don't know what the right answer is, and sometimes the Court of Appeals doesn't think you knew what the right answer was. But more often than not, it's not all that hard. It was harder in private practice to make up arguments why you should win even though you didn't think you were going to win, or it was harder to marshal facts and evidence towards a view when, if you allowed yourself to be fair-minded about it, you know the truth is somewhere between your view and the other guy's view. Well, as the judge, that's where you get to go, right there in the middle. Not that it's Solomonic, not that you split the baby or anything like that, but I find that it's not hard to sift the arguments, to throw out the ones that are weak, weigh the ones that are strong and come

out with the right decision. The hard part of it isn't finding the right decision, it's explaining the decision clearly and persuasively.

MS. ALLEN: Which is the opinion writing.

MR. ROBERTSON: Which is the opinion writing.

MS. ALLEN: Do you know what percentage of cases are appealed?

MR. ROBERTSON: I don't know, but I would think a fairly high percentage of cases are appealed. I've never taken the time to measure that, so I just don't have an answer to that question. It seems to me like a lot.

MS. ALLEN: You have the Court of Appeals lurking in the background as you're writing those opinions.

MR. ROBERTSON: That's another case of "don't get me started." There's a lot of back-and-forth carping between circuit judges and district judges. It is for the most part pretty good-natured. Lou Oberdorfer once told in public the story about how the district judges are the ones who slog their way through the mud like the Battle of the Marne, and the Court of Appeals judges are the ones who come down to the battlefield and shoot the wounded. We carp at them a lot. Just yesterday I got an opinion – and I have to laugh about this – in this little case called *JMM Corporation*, a guy who operated an adult video store and sued the District of Columbia saying the zoning regulations were unconstitutional. It was a difficult case, constitutional case, but I abstained on *Younger v. Harris*.

MS. ALLEN: Which is?

MR. ROBERTSON: Which says district courts ought to stay out of the way and let local court processes work out. The District of Columbia was still in the process of deciding the case administratively, so I wrote I think a five- or six-page opinion dismissing the case because of the *Younger* doctrine. Well, the Court of Appeals got hold of it, and Judge Garland wrote a 17-page printed opinion with 24 footnotes because he got very interested in the question of whether the District of Columbia was a state for purposes of the *Younger* doctrine. So there's this long involved opinion about a subject on which I just wrote a footnote. I just wrote footnote 2, noting that no court has squarely held that the District of Columbia is a state for *Younger* purposes, but the court seems to assume that it is so I just let it go. Of course, Judge Garland had to answer the question. I'm kind of fascinated by the ratio of appellate pages to district court pages. In my case, it's got to be close to 5 or 6 to 1. They are not impelled the same way I am to brevity.

MS. ALLEN: Different function, different approach.

MR. ROBERTSON: Well, it is a different function. I'm not sure that I understood when I came here how different the two jobs are. I wrote an op-ed piece. Have we talked about my op-ed piece?

MS. ALLEN: No, we haven't.

MR. ROBERTSON: I wrote and published an op-ed piece in *The Post* about a year ago, right in the middle of the worst of the judicial filibuster thing, about the inability to get anybody confirmed. I wrote a piece saying I know how to take the

politics out of this process. The way to do it is to return to the way the courts were set up originally. It used to be there was one Supreme Court and then everybody else was the same – Article III judges. We are all Article III judges, and there should be just one category of Article III judges. We might sit as trial judges "nisi prius," or we might hear appeals, but if we were all just one kind, nobody would know whose confirmation to oppose. It would be like putting an X on every door. We wouldn't have these political battles. And, by the way, I wouldn't let any judge hear an appeal until he or she had been sitting in trial court for five years so that the political impetus to appoint ideologues on one side or the other would be absent. The President wouldn't be the President any longer by the time that person could decide appellate cases.

I began that article with frankly a rather snide reference to an even more snide comment in an opinion written by Karen Henderson. She sat with Dick Leon and Colleen Kotelly on that famous campaign finance case. You may remember that that case went up to the Supreme Court basically with three opinions. Karen Henderson was the dissenter. Kotelly and Leon agreed, for different reasons, that the campaign finance bill was constitutional, and Karen Henderson thought it wasn't (or maybe it was the other way around). At any rate, Judge Henderson, in a footnote, permitted herself the observation that lower court judges don't have the same skills for deciding cases on briefs and oral arguments as appellate judges do. Well, that ruffled a bunch of feathers, including mine, so I

began my op-ed piece with a reference to that statement, and said nonsense, we can perfectly well decide cases on briefs and oral arguments. That's what we do. But that's not to say that we have the same job. It really is a different job. For one thing, we only have to please one person – ourselves. And they have to constantly form coalitions to get at least one other vote. No appellate judge can do anything by himself or herself. They have to get somebody else to agree with them. We do it ourselves and then see if we get reversed. Stanley Sporkin told me when I came over here that this is a wonderful job. He said it's like you're running your own little mom-and-pop store. It's just you, and your secretary, and your law clerks, that's it. It's your own little business. You run it the way you want to run it. And that's the way most district judges do run it.

MS. ALLEN: You would agree with him?

MR. ROBERTSON: I think it's wonderful. Yes. I think we could all use a little more feedback than we get. The Council for Court Excellence has recently published a report on the district court judges based on feedback from community observers who look at how we're doing, and ranked us and rated us and scored us.

MS. ALLEN: So it's not from litigants or attorneys?

MR. ROBERTSON: As far as I know, they are volunteers who come over and sat in the courtroom and watch, and they issue reports. They are superficial and facile and not very helpful, but at least it's something. We after all are

community servants and we should have that feedback. Have we wandered enough around here?

MS. ALLEN: I think we've wandered around, but I think we've gotten a lot on the record. Is this a job that leaves you any time for hobbies? Do you ever get away from it completely and get on a sailboat or a tennis court?

MR. ROBERTSON: Well, at 5:00 this morning, I was in St. Michaels, Maryland. We have a place on the Eastern Shore. My wife was out there all week, so I went out there on Wednesday night just to say hello and came back this morning.

MS. ALLEN: It's a long drive.

MR. ROBERTSON: It is a long drive. I will do it once a week if she is out there for a whole week. That's my other life out there on the Eastern Shore.

MS. ALLEN: Anything else you want to add?

MR. ROBERTSON: Nothing I can think of right now. I probably will think of more stories.