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 at the offices of JAMS, 555 13th Street, N.W., in Washington, D.C., on November 15, 2006. This is the fifth interview.

MS. ALLEN: Judge Robertson, you were talking about Judge Oliver Gasch and George Washington night school.

MR. ROBERTSON: Judge Gasch. As I think I've said elsewhere, what we had in common was that we had both gone to Princeton and had both been night students at GW law school. I had known Judge Gasch slightly because he came over and talked at the law school either shortly before or shortly after he was appointed to the bench. A former associate of his was an associate of mine on the Law Review and we got connected in that way. For some reason, Judge Gasch was kind enough to pay attention to me. In fact, I use Judge Gasch as an example a lot when I talk to young lawyers today about mentors, because in a very real sense, Judge Gasch was a mentor of mine. Not a day-to-day mentor. I didn't go to him for advice about much, but I tried to stay in touch with him a little bit. I tried a couple of cases before him, so we knew each other in that way, and so Judge Gasch paid attention.

I think it was Judge Gasch – in fact, I know it was Judge Gasch – who put me up for membership in the American College of Trial Lawyers, which was a huge benefit to me and a great thing he did. He didn't have to do that. He was just looking out for the next generation. That's the

kind of fellow he was. Gasch kept track of me when I went off to Mississippi. I would hear from people that Judge Gasch had asked about me. He asked somebody, "What's a nice fellow like him doing in a place like that?" [Laughter].

At any rate, back to the night school. At some point, and I don't remember exactly when it was, I think it was after I had left the Lawyers' Committee and was back at Wilmer Cutler Pickering, the dean of the GW Law School got the idea of getting rid of the night school. He felt that night school was beneath the dignity of George Washington University Law School, and he thought that you couldn't be a great law school if you had a night school. A lot of the faculty thought that was right. They wanted to upgrade the law school by getting rid of the night school. Judge Gasch went to the barricades and solicited support from former night students, including myself. We went to a couple of meetings, and I wrote a letter. Judge Gasch did most of the work. I wasn't literally at the barricades with him – it was he who went to faculty meetings and did the work. But ever after, Judge Gasch was grateful to me for my support, and I was an admirer of his for making the effort.

I don't know whether I previously said this in this interview, but at least in my day, the night school had more committed, substantive students than the regular school. Why? Because in the mid-1960s, many of the day students – I won't say all of them; obviously, I don't want to characterize them – but many of the day students were there not so much

for the law school as for the draft deferment. The night students were there because they really wanted to be lawyers. They had incentives. They had to work during the day and go to law school at night. It was a tough slog, but they were focused and committed people. And, my view then, and it may have just been chauvinistic because I was a night student myself, but my view then was that the night school was a much better, much better, venue than the day school.

MS. ALLEN: I think you said you transferred over to the day school. When did you make that transfer?

MR. ROBERTSON: I spent two years at night school, and then I got out of the Navy and finished up my third year of law school as a day student. I was also editor-in-chief of the law review, and frankly, I spent most of my time in the law review office. That's just the way it was.

MS. ALLEN: Right. So you didn't really see the classroom that much?

MR. ROBERTSON: Not much, not from the Law Review I didn't. I didn't have that study group experience that everybody talks about that happens mostly in the first two years.

MS. ALLEN: Right. I hadn't thought of that difference. You wouldn't have an opportunity to be in a study group.

MR. ROBERTSON: You go from work to law school then home. And if you're lucky enough, as I was lucky enough, to be married, you'd go home, your wife would have dinner for you, and you'd start studying until you had to go to sleep.

And that was five days a week. It was a rough deal. But it was purposeful, really purposeful. And, I think that made a big difference.

So that was Judge Gasch. And then I think we were also talking the about D.C. Bar.

MS. ALLEN: We were. And the formation of the D.C. Bar and your election as president.

MR. ROBERTSON: Well, there are two threads of that. I think the formation of the D.C. Bar occurred really just about the time that I was in Mississippi. I wasn't present at the creation of the D.C. Bar. It was all of a piece with the reorganization of the District of Columbia courts in 1970. Other people who had done oral histories have commented more knowledgeably or extensively than I will or could comment on that period of time. But, suffice it to say, the D.C. Bar was mandated by the Reorganization Act. The Bar was to be an organ of the District of Columbia Court of Appeals, formed under orders of the District of Columbia Court of Appeals. It was to be a so-called "integrated bar." That has some irony in the District of Columbia. In bar speak, an "integrated bar" is a bar that everybody has to join, a mandatory bar. But in the District of Columbia, it had historic resonance because the Bar Association that existed before the D.C. Bar – the old original Bar Association of the District of Columbia – was decidedly not an integrated bar. It was open only to white lawyers. The Bar Association of the District of Columbia maintained the library that was in the Federal Courthouse, the old bar library.

There was a time when black lawyers were not welcome to use that library. Other oral histories by Judge Bryant, by Judge Aubrey Robinson, and probably by John Pickering will tell that story. Aubrey Robinson integrated the bar library by going in and sitting down. It was almost like a sit-in or like a lunch counter sit-in. He wasn't a judge then, he was a lawyer. And that ended the segregation of the bar library.

When the time came for the D.C. Superior Court to establish the integrated bar, the mandatory bar, the old bar association wanted to be that bar. It wanted to phase itself in and become the institution that was recognized by the D.C. Courts as the official bar. But a number of bar leaders like John Pickering – that's the one I know most about, but there are a number of others probably all of whose oral histories have been recorded here – put their feet down and said, "No way is that Bar Association going to be an integrated bar. We'll start a new one." That was the beginning of what is now the District of Columbia Bar, not to be confused with the Bar Association of the District of Columbia. The District of Columbia Bar now I think has something like 60,000 or 70,000 members. It's a huge bar. It's very well-established, very well-run. In its early days, it was kind of a hotbed of disputatiousness among various elements of the bar who were fighting about what shape this bar association – not an association, I don't want to use that word – what shape this mandatory bar would take.

I was fairly uninvolved with the bar for quite some time. I did do some work with the Litigation Section, but there was a time early in the life of the Bar when lawyers of the big firms didn't pay any attention to it. When John Pickering became president of the D.C. Bar and had his inaugural dinner or investiture or whatever they called it, not a single lawyer from his own law firm was in attendance. It was a bitter moment for John Pickering, who never forgot it and never let me forget it when I became President of the Bar. It's as if the big firms had turned their noses up at it, like we didn't have to do this.

Well, I didn't feel that way about it. I thought that the Bar was an interesting organization, possibly an important organization, and one that I wanted to know more about. But I never really was very active until one day, almost out of the blue, I got a call from Ann Macrory. Ann was a member of the Board of Governors, and she probably was a member of the Nominating Committee that year. Ann and I had known each other for years because we had been involved together in the Lawyers' Committee for Civil Rights. Ann was this absolutely wonderful, gregarious lawyer. She's now married to Ralph Temple, and they live out in the northwest someplace.

MS. ALLEN: I remember her name. Did she work for the bar for a while or was she just active?

MR. ROBERTSON: You know, I can't remember that. I know she was active. She may have – it's coming back to me now. I think Ann did work for a segment of the

Bar. I think she had something to with the creation of a program called Open Door, which had to do with mediation. But I'm not too clear about that. At any rate, Ann called me and said, "How would you like to be president of the D.C. Bar?" I said, "What are you talking about? I've never been active in the D.C. Bar." She said, "Well, I think you'd make a good president of the D.C. Bar" [laughter]. I said, "Well, that's pretty flattering, Ann. If you think so, and if you think it's important to proceed, yeah, you could say that I would be interested." Well she called back a month or two later and said, "Uh, sorry, sorry," she said, "Bob Jordan is going to be the one that they consider." Well, Bob Jordan was supremely qualified to be president of the bar. Bob was older than I was and was much better established. He was a partner at Steptoe and Johnson. And I said, "Wonderful. Good luck to him." And she said, "But would you like to be a member of the Board of Governors?" And, I thought to myself, well that's a bait-and-switch [laughter]. But the long and short of it is --

MS. ALLEN: You said yes?

MR. ROBERTSON: I said "Yes," and became a candidate for the Board of Governors, and was elected, and served on the Board of Governors for several years. And then when I had gone through the chairs, at some point I was put up as a candidate for President. But what you and what historians need to understand about the D.C. Bar is that leadership in the D.C. Bar doesn't just happen because people decide to run for office. The leadership of the D.C. Bar, for at least the last twenty years, has been managed by the

Executive Director of the Bar, who is Katherine Mazzaferri, who is one of the great kingmakers of Washington. She will never acknowledge it, and never admit it, but it's Katherine Mazzaferri who basically picks the presidents of the D.C. Bar. That's an overstatement, of course, but not much of one. She is a very fine invisible hand. She makes people aware of opportunities and makes the opportunities aware of people, and somehow it all works out. Katherine sees to it that the right people get to be president of the D.C. Bar. It's quite fascinating to watch. And I was the beneficiary of that process. Katherine doesn't really select the president of the D.C. Bar, but she makes it happen.

The year I ran for President, my opponent was Jim Schaller, a wonderful guy and a wonderful lawyer. But Jim Schaller didn't have the big firm backing, and at that time, a lawyer from a big firm would win every time. There wasn't any campaigning. A letter would go out, signed by somebody like John Pickering. It was a little like high school. John Pickering would send a letter to Stanley Temko at Covington & Burling, and Bob Jordan at Steptoe and Johnson, and Stuart Land at Arnold & Porter and Dan Gribbon at Covington & Burling, and say, "My partner Jim Robertson is running for President of the Bar. If you can get some votes from your firm, it would be useful." And they would send memoranda around the firm. The big firms may have kept their distance from the Bar, but they voted as a block. It's different today. And that's

the way I got to be President of the D.C. Bar. It was quite simple, wonderful for me, and unfair to Jim Schaller.

MS. ALLEN: What years were you in office?

MR. ROBERTSON: I have the certificate around here somewhere. I was President 1991 to 1992. I was president-elect the year before that, and immediate past president the year after that. Now you will ask me why I did that.

MS. ALLEN: So why did you?

MR. ROBERTSON: I'll give you the idealist answer and then another answer. As Maureen Dowd of the *New York Times* reminds us, morality without realism is naiveté. Realism without morality is just cynicism [laughter]. So, there was an idealist reason to seek the presidency of the D.C. Bar. It was much more intense than practical. I was interested in the Bar. I thought the change in the practice in law over the then-twenty-five years that I had been in it was so dramatic, and there was so much going on in the life of lawyers, that I wanted to learn more about it. There were changes in concepts of ethics, in size of firms, and the way people related to their work and billable hours and all of these issues that have afflicted the legal profession over the last fifteen to twenty years. I wanted to kind of jump in and muck around and talk to other lawyers about it and think about it and have the occasion to work on issues involving lawyers. So I did it because I was interested in it. I also did it, frankly, because at some point in the late 1980s, I had concluded that it would not be any fun to grow old in a big law firm and that I'd like to be a judge some day. And if I was

going to be a judge, if I had any shot at being a judge, it would be enhanced by my having and demonstrating community involvement, and the Bar presidency would be a very, very good way to do that.

The legal profession had changed so dramatically. My own law firm, which from the time I'd been a partner beginning in 1973 until the late 1980s, had been one of these completely egalitarian, one-for-all, all-for-one, everybody makes the same amount of money, we're all in this together kind of a place. It was in the process of becoming quite a different kind of a place. I wasn't quite eager to change, but there was much, much more emphasis being placed on business-getting and who was the top dog and that sort of thing. That was not an environment that I thought I was going to continue to thrive in. So I said, well, if I can be President of the Bar, that's a good thing all by itself. It'll add something to the firm, and it will enhance my own chances if there's ever – if a Democrat ever gets elected again.

MS. ALLEN: At this point, the Carter Administration was a thing of the far past?

MR. ROBERTSON: At this point, it had been ten or eleven years since there was a Democrat in the White House. The Reagan-Bush judicial appointment thing was intensely political. No Democrat need apply, that was very clear. So there was this great pent-up demand among Democrats who might be interested in the bench. I don't know whether I said this already, but I had never really thought I wanted to be a judge because I didn't think I could afford it.

MS. ALLEN: I think you may have mentioned that.

MR. ROBERTSON: But some time around the mid-1980s, judges were given a very substantial pay raise, up to a point where it made some sense, some economic sense, if you were to consider being a judge. That probably was the last major pay raise the judiciary ever got [laughter].

MS. ALLEN: Was the law firm supportive of your running for the presidency of the D.C. Bar? Had large-firm attitudes changed towards the bar?

MR. ROBERTSON: Yes. Well, I realized that as I was talking about large firm attitudes towards the bar, I wasn't being quite clear. It was actually more subtle than that. It wasn't that the big firms didn't support the bar. They did support the bar and actually wanted to control it. It was just that it was the kind of support you give to a charity or something. You want to be known as supporting the bar, but most of the lawyers in the firm had nothing to do with it. So the firm was very proud of the fact that we already had two presidents in the bar by the time I was president. John Pickering and Louis Oberdorfer had both been presidents. The firm was proud of that, and proud of the fact that I was going to run for President and very supportive of me and completely understanding of the fact that I billed about half as many hours that year as I ordinarily would have because of the Bar. But it wasn't as if thirty members of the firm were really anxious to get involved with me. It was, well, that's Jim's thing. It's good for us and I'm glad he's doing it. He's doing it, but we don't need to do it [laughter]. And the D.C. Bar, then and now I think, probably has 300

really active members. People who are really into it. "Bar junkies," as I call them, or "bar groupies."

MS. ALLEN: It's a small percent, a very small percent.

MR. ROBERTSON: It's like any institution. A few people make it go. Just like very few people vote in this country and make the decisions, very few people run the D.C. Bar. They're active in it, and they're interested it, and they're interested in the American Bar Association, and they go to meetings and they go to conventions. But it's not the daily fare of most lawyers. And for me, I spent three years, maybe five years, on the Board of Governors, and then three more for the presidency. I got really into Bar issues. But as soon as you leave, you're gone. You forget about the Bar. I read the magazine every month. I'm glad to know what's going on, but it's out there now. I'm not involved in it. In fact, I can't even vote. As a judge, I can't vote on Bar elections.

MS. ALLEN: Does the D.C. Bar have much interaction with the judges? Do they come to you?

MR. ROBERTSON: They would like to have more. The D.C. Bar has always had a weaker relationship with the federal courts than it would like to have. It is, after all, a creature of the local courts. I mean, part of my duty when I was President of the Bar was to go over periodically and make reports and have meetings with the bench. My wife and I went to see Helen Mirren in *The Queen* last night.

MS. ALLEN: I saw it a couple of weeks ago.

MR. ROBERTSON: When I saw Tony Blair going to meet the Queen, for some reason, my first thought was of my meetings with Judith Rogers when I was President of the Bar and she was Chief Judge of the D.C. Court of Appeals. It was something like that kind of relationship [laughter].

So there is that formal relationship with the local courts. But a relationship with the federal courts is something the Bar would like to have more of, and our court, and the Court of Appeals always sort of brushed it off. We do get asked to serve on panels occasionally and get invited to meetings of sections. The president of the D.C. Bar is an ex-officio member of the Circuit Judicial Conference and attends its annual meetings. There was a time when the president-elect of the D.C. Bar was a member of the Arrangements Committee for the Judicial Conference and was given the privilege of selecting or helping to select or at least having an important role in selecting who would be invited to the Judicial Conference meeting. That lasted for some years, maybe ten years. I don't think it happens any more. A different group of people took over the Court of Appeals and said, "We don't need this anymore," so the Bar no longer had a role to play.

MS. ALLEN: Which sounds like not that great a role.

MR. ROBERTSON: Not that great a role. But you know, oddly enough, it had its uses. It meant that the Bar had – being invited to the Judicial Conference is a big deal for lawyers.

MS. ALLEN: I know.

MR. ROBERTSON: To give the Bar that role, being chief inviter, added a cache to the Bar with the people the conference attracted.

MS. ALLEN: I want to ask you about the *Hamdan* decision, both your decision and the opinion, and what happened. Since you issued that, it's now been a year.

MR. ROBERTSON: Yes. Well, the problem with talking about a case like *Hamdan* is that it is now being recognized by some scholars as an important case. It's been studied and re-studied and counter-studied, and there's a lot of really authoritative information about it. And of course there is the actual record of the case, which I don't have before me, so I'm not going to talk about the details of the case. What you're getting here is memory impressions, which should all be taken with a grain of salt unless you have the actual record before you. But here's my take on the *Hamdan* case.

After Guantanamo Bay, after the government began taking hundreds of people over to Guantanamo Bay, habeas corpus petitions began to be filed in this court and in other courts around the country, and for a long time, there was uncertainty about how we were going to deal with them. Most of the petitions were being filed in this court, so the judges of this court came together to try to decide whether one judge should handle all these cases. Fifteen judges handing down fifteen different kinds of opinions on essentially the same case was silly, and we all knew it was silly. And besides that, it would be much more efficient if one judge handled all of these opinions. Well, I should say here that the actual lineup of events I'm a little uncertain about, but I think that the

Supreme Court had just decided the two cases of *Hamdi* and *Rasul*. Those cases were decided in June of 2004, I think.

MS. ALLEN: Right. They were.

MR. ROBERTSON: In one of those cases, *Hamdi*, the Supreme Court said yes, there is jurisdiction in federal district courts to deal with habeas petitions from Guantanamo Bay. Guantanamo Bay may be outside the territory of the United States, but it's land that is controlled by the United States. *Rasul* said the government can hold detainees at Guantanamo Bay indefinitely, or it implied that they could be held indefinitely, but not without doing a combatant status review – what became known as a CSRT, or Combatant Status Review Tribunal – to determine that these people are unlawful enemy aliens or alien combatants. Those two decisions left a huge number of unknowns. And they also left hundreds of detainees at Guantanamo Bay with rights to sue for habeas corpus – rights not to be held there unless they had been found to be unlawful combatants by CSRTs.

It was after that that we began to be flooded by these petitions. And it was after that that this court decided that we would find a judge to turn over all of our cases to, and that judge was Joyce Hens Green, who had retired, although she was in a status called inactive senior status. The Chief Judge invited her back, and she accepted the assignment. All the judges except one decided that they would transfer their cases to Judge Green for uniform handling. But I had already been assigned the *Hamdan*

case, and *Hamdan* was not like the other cases. The other cases were all either challenging detention without yet having had the Combatant Status Review Tribunals, or they were challenging the findings of the Combatant Status Review Tribunal, which had been held, or they were challenging something else, like conditions of their detention or they didn't have a Koran, or something else about their detention. *Hamdan,* unlike all the rest of them, had already had his combatant status review and was being teed up for the first trial before the Military Commission. The Military Commission that had been cobbled together by the president without asking for Congressional approval.

Judge Green and I had a discussion about *Hamdan*. She said, "I know you'd like to do this one yourself, wouldn't you?" And I said, "Yes, frankly, I would." So Judge Green, really quite generously, said, "Well that's an interesting case, it's a different case, it's a special case, you do that one. I don't need to do that one." Then she took all the rest of the cases – except one. The one that she didn't take was assigned to Judge Leon. Judge Leon, exercising his Article III independence, declined to transfer the case to Judge Green. Judge Leon and Judge Green wound up issuing two diametrically opposed decisions on what powers they had over the detainees at Guantanamo. Judge Leon said, "I have no constitutional power to do anything with them." Judge Green said, "I do have the constitutional power, and I will exercise it here." Both of those cases were appealed to the Court of Appeals on the question of whether there was

jurisdiction in this court to do anything. That was the internecine dispute that eventually led to the Supreme Court's *Boumediene* decision.

MS. ALLEN: What do I do after I have the habeas petition?

MR. ROBERTSON: What can we do after, that's right. Now, set those two cases aside for a moment. The *Hamdan* case had been filed originally in the District of Oregon. A very good judge in the District of Oregon had been instructed by the Ninth Circuit that all these cases belonged in Washington, D.C. So with understandable reluctance, he transferred the case to Washington, D.C., and it wound up on my desk. It got here in September, late August or early September, of 2004. I had two brand new law clerks. They both pitched in on this case, and we had a decision on, I think around November 7.

The threshold question that I confronted in *Hamdan* was, did the President have the power to have these people tried before a military commission at Guantanamo Bay. And for me, the case was primarily, almost exclusively, about the allocation of powers between Congress and the Presidency. There were sensational amicus briefs filed in this case. You don't normally see amicus briefs in district court, but they were filed in this case. An amicus brief filed on behalf of a hundred members of the British Parliament. There were a number of other amicus briefs, but the most influential amicus brief, the one that I paid the most attention to, was one filed on behalf of nine or twelve retired general and flag officers in the Armed Services, who argued that these military commissions were in

violation of the Geneva Conventions, and if we permit people to be tried under these conditions by military commission, we will have no right to expect our own military people to be treated any differently if they are captured on enemy battlefields. That brief had a profound impact on me.

The petitioner was represented by Lieutenant Commander Swift, the Navy JAG lawyer now assigned the case of representing Hamdan, and [laughter] who I read not long ago is not going to be promoted to Commander. I was not surprised. He will end his military career and probably make a lot of money as a private lawyer. He was nothing if not dashing. And by Neal Katyal of Georgetown University, a very gifted young professor, who was the constitutional brains in petitioner's camp. The case was argued before me by a young Justice Department lawyer named Jonathan Marcus. Jonathan is the son of my former partner, Dan Marcus. It's a small world [laughter]. I remember Jonathan as a very tiny baby, and here he was arguing the government's position before me, and arguing it powerfully and very well. You're not supposed to pay attention to things like this when you're a judge, but I did that day. The courtroom was full of people, the case was already famous. On one side of the courtroom, there must have been twenty or thirty military officers in uniform. I assumed, and as far as I could tell by looking at them sitting there, that they were all JAG officers from the various branches of the service. Every time the petitioner's – Hamdan's – lawyers, made some point, they would be nodding their heads. And when Jonathan Marcus

was making points, they were shaking their heads no [laughter]. I had spent five years in the military. I knew something about the military mind. I knew, or thought I knew, that a lot of what was happening at Guantanamo Bay was being done over the objection of the military, and so these officers were more or less demonstrating. A very, very quiet, subtle demonstration, but a demonstration nonetheless.

In order to decide *Hamdan* the way I did, it was kind of a thread the needle decision, because the first and one of the most powerful questions presented by the government was whether I should abstain. There was a long line of cases that say you have no business dealing with this case, let it go through the trial there, and then come with a habeas petition. Well, I decided for reasons set forth in my opinion that I would not abstain. Then there was the issue of whether the Geneva Conventions were self-executing or not, that is, whether or not they could be used as a basis for action in our court or whether they were simply something to be debated between governments. In other words was there any such thing as a right of action. I said yes, there was a right of action. Before I got to the Geneva Conventions, I had to deal with what I thought was the core of the case, which was the President's power and authority as Commander-in-Chief. And for that, I had to go back and deal with cases like *Yamashita* and *Quirin*.

I decided the President had not been given plenary power by Congress. Then I had to deal with the Geneva Conventions. Were they,

could they, provide a cause of action or not. I said yes. Or could they be the basis of a cause of action, and I said yes. And then there was a good deal of conflict here in chambers about whether I would add the last section dealing with the actual rules that had been adopted by the Defense Department in its trials.

The petitioners had attacked the rules across the board and wanted a lot of rulings about confrontation, cross examination, secrecy, rules of evidence, you name it. The whole structure of the Military Commission – appeal rights, who would be appointed to the commission, who would hear the appeals – it was all bad as far as they were concerned. My conclusion was that almost all of that I really should abstain from, but that one aspect of it in particular needed to be dealt with, and that was the provision of the Military Commission rules that the detainee would not be able to listen to some of the evidence against him, couldn't be in the courtroom when the evidence was put on. His lawyer could hear it, but he couldn't, and his lawyer would be told that the lawyer couldn't tell his client. That I found troubling, and I found it to be in violation of the Geneva Conventions and the laws of war and every other law I could think of. I was going to leave that part of it out, but one of the law clerks talked me into doing it.

I don't think I was quite prepared for the publicity that that opinion generated. It was huge. For the second time since I came on the bench, I was on the front page of every paper in the country for a day. I got calls

and letters from all over the country. It was quite a heady experience. But I knew that my decision had very little chance in the Court of Appeals [laughter]. How little a chance I didn't quite appreciate until I saw Judge Randolph's opinion. He just shot me down in an opinion written with typical Randolph sarcasm. He couldn't believe that I had not even mentioned the *Eisentrager* case, which he thought was pivotal. John Roberts, a new judge on our Court of Appeals, concurred. And that was that.

Katyal and Swift went to the Supreme Court, and to my surprise, cert was granted. The new Chief Justice of the United States recused himself, and the Court of Appeals was reversed five to three in an opinion by Justice Stevens that came about as close as a trial judge could ever dream of to a complete vindication of what I did.

I have to tell you. I had a call from a judge I know in Iowa who said, "G[expletive] it, Robertson," he said, "All I ever wanted out of this job was to make a decision, get reversed by the Court of Appeals, and get affirmed by the Supreme Court. Why can't I have that? Why can't I?" And it is true that for a trial judge there is no sweeter day than the day in which something you decided has been vindicated by the Supreme Court after being reversed by the Court of Appeals. It is a beautiful, beautiful day. And it's a sin to be so vainglorious about that, but I am a sinner.

MS. ALLEN: [Laughter] Were you really surprised that cert was granted?

MR. ROBERTSON: Yes. I was a little surprised that cert would be granted because as Mr. Dooley says, the Supreme Court reads the newspapers. And, I thought, I suppose naively, that the Supreme Court would say hey, we're in the middle of this war. The Supreme Court has done a lot of strange things in the middle of war, and they have refused to do things they should have done in the middle of a war. And I thought the Supreme Court would simply adopt one of the major premises of the Randolph opinion, which was abstention. Randolph didn't abstain. He didn't abstain because he wanted to write the opinion [laughter]. So he didn't want to stop with an abstention. He had a few things to say too. But I thought the Supreme Court might say now let's find out what happens after the trial. Because I thought abstention was a pretty powerful argument.

MS. ALLEN: You did?

MR. ROBERTSON: I did, which they continued to make in the Court of Appeals and in the Supreme Court. But, the Supreme Court jumped into it with both feet, and that ringing opinion by Justice Stevens is of course history now.

There is a program being put on by the American Constitutional Society tomorrow or the next day called, "The Fallout from *Hamdan*." And there has been some fallout. The Military Commission Act is fallout from *Hamdan*, a serious fallout. A couple of little asides if I may on the case. First, this was the second time that I have been vindicated by the Supreme Court. I can die now. The first time was the *Webster Hubbell*

decision, which I think I probably talked about at some point. The second time was this. Justice Stevens wrote both opinions. So he's my guy.

MS. ALLEN: He's your guy.

MR. ROBERTSON: He's my guy. Another thing about this *Hamdan* opinion is there was a little bit of a dissent in the Court of Appeals, and that was by Steve Williams, who said, "I don't think the Geneva Convention's article" – I've lost track of that. There were two Geneva Conventions at play here. The one that I relied on said that Hamdan had not been properly determined not to be a prisoner of war and that it was necessary to have a determination as to whether he should be treated as a prisoner of war. Until they had made the determination as to whether he should be a prisoner of war, he could not receive the military commission. That was shot down by the Court of Appeals.

There was also Common Article 3 of the Geneva Conventions, the earlier Geneva Conventions Article 3 which had said nothing about treatment of prisoners of war, but which simply provided that judgment should not be passed except by a "regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." That's all Common Article 3 says. Judge Williams agreed with me that Common Article 3 applied. That's all he agreed to at that time. But my opinion had said, it had turned almost completely on the other Geneva Convention, on the prisoner of war point. I believed that Common Article 3 applied, but I also thought that Common Article 3 did

not have specific enough normative content to use to evaluate these procedures at Guantanamo, so if Common Article 3 were applied, I would have abstained. I would have to abstain, until I saw the results.

MS. ALLEN: I see what you're getting at.

MR. ROBERTSON: Well, Justice Stevens jumped completely over the prisoner of war thing, completely over that, and went straight to Common Article 3. The Supreme Court decided that Common Article 3 was what they would hang their hat on. And they decided that it did have normative content and that the normative content made it unlawful, among other things, to have a trial in which people could not confront the evidence against them. So, I was vindicated, but not perfectly vindicated. The Supreme Court really had a quite interesting and different rationale ultimately than mine about which Geneva Convention applies and what it meant. Steve Williams was the only Court of Appeals judge who spotted that Common Article 3 point. Now he, like I, didn't think that anything would come of it.

MS. ALLEN: You certainly thought that there was an issue. You cited it.

MR. ROBERTSON: Oh yes. I thought it applied. I just didn't know what it meant.

MS. ALLEN: Right.

MR. ROBERTSON: I didn't know how to apply it, or what it would – and maybe having already decided that there's no war issue, I felt I didn't need to. But, the point is that, as vindicated as I felt, it wasn't perfect vindication – although I won't have to explain that to anybody but a historical writer [laughter].

MS. ALLEN: So *Hamdan* today is back to you?

MR. ROBERTSON: Back to me. Congress responded to *Hamdan* by enacting the Military Commission Act, which is exactly what I said in my opinion Congress needed to do. If Congress authorizes these things, then the president has the power to do them. If Congress doesn't, which it hadn't then, he doesn't. That was the thrust of my basic *Hamdan* decision. So, Congress basically did what I said they had to do, and what the Supreme Court always said they had to do, and passed this Military Commission Act. Now the matter is back before me because the Court of Appeals – the case came out of the Court of Appeals – remanded from the Supreme Court to the Court of Appeals. The Court of Appeals passed it off to me with no instructions. "Here, take it. Back to you." And there is now pending before me what I have deemed to be a motion to dismiss *Hamdan* on jurisdictional grounds. Even if this oral history is going to be locked up, I don't think I should say where it's coming out.

MS. ALLEN: Should this have gotten a lot of attention?

MR. ROBERTSON: It remains to be seen. The petitioner's brief is due next week, and the government will file a couple of weeks after that. I don't know if there's going to be a lot of amicus briefs this time around or not. I frankly rather doubt it. It's a much purer legal question today than it was then. And the Court of Appeals, who set aside the Green and Leon opinions, we talked about that, they set them aside. They are still pending before the court. The petitioner's brief will be filed within ten days or two weeks. The

Court of Appeals should decide that case before I get a chance to decide this one. They should decide the jurisdictional question.

MS. ALLEN: The Green-Leon jurisdictional question?

MR. ROBERTSON: The Green-Leon question, which has now morphed into a much different question because of the Military Commissions Act.

MS. ALLEN: Right. And the Military Commissions Act, I believe, says that the district courts don't have jurisdiction and they did it retroactively.

MR. ROBERTSON: Yes, ousts the district courts of all jurisdiction of any cases that have to do with detention at Guantanamo Bay. There is a huge fight about how constitutional that is. I expect that the Court of Appeals will hold that there is no jurisdiction in either one of those cases, either in the Green case or the Leon case. *Hamdan* would be a different situation because jurisdiction was already asserted and confirmed by the Supreme Court of the United States. The question is I suppose whether Congress can undo something the Supreme Court has done quite that directly. But I don't know. That's all that is up in the air. It'll be unfolding in the next couple of weeks.

MS. ALLEN: That's quite a case for new law clerks.

MR. ROBERTSON: Oh, man. Rob Ditzion and Mona Sahaf, brand new law clerks, did a good job. I got tickets for them to hear the argument at the Supreme Court. It was a real kick for them. I should have gone over to hear it myself actually. There is some dispute among judges about whether it's "done"

for judges to go to the Supreme Court and listen to argument in their cases.

MS. ALLEN: But some judges do go?

MR. ROBERTSON: I think some judges go.

MS. ALLEN: Have you ever gone?

MR. ROBERTSON: Never even in the Court of Appeals. I do set spies at the Court of Appeals. We all do that. I send my law clerks when they're arguing my cases. And they come back and handicap the results.

MS. ALLEN: Predictable?

MR. ROBERTSON: Absolutely predictable.

MS. ALLEN: So did your two clerks go to the argument in *Hamdan*? There was an argument I assume in the Court of Appeals.

MR. ROBERTSON: I can't remember.

MS. ALLEN: Might not have been?

MR. ROBERTSON: I can't remember whether they did or not. They must have. Oh, of course they did. The *Hamdan* Court of Appeals argument was held in the Ceremonial Courtroom. It was a packed house. I'm just trying to remember whether it was Rob and Mona or whether it was the next year's law clerks. I think it was the next year's law clerks. But whoever it was, they came back and said, "You're toast" [laughter]. This is not good. This isn't going to last long.

MS. ALLEN: The great legal prediction, you're toast.

MR. ROBERTSON: Toast [laughter].

MS. ALLEN: Wow. What a satisfying Supreme Court ruling.

MR. ROBERTSON: Yes. It's stunning really. Just stunning.

MS. ALLEN: Any more comments on *Hamdan* or follow-up questions? If not I'd like to ask you about the FISA Court, resignation from that, if that's something you think you could talk about.

MR. ROBERTSON: Yes. I am going to talk about this. I was trying to think if there's anything more that I had to say about *Hamdan*. I feel very good about *Hamdan* to be honest with you. I feel like I made some real contribution to the issue of presidential authority. And a lot of my interest in this job has to do with separation of powers and checks and balances and balance of powers between the President and Congress. And I am appalled really at how weak Congress has become in the American constitutional balance. The chief executive of a company or the chief executive of the nation or the chief magistrate as the Constitution calls the President of the United States, doesn't have to be power hungry in reaching for power. But it's kind of in the nature of the beast to reach out for as much power as you can get. And that's what our presidents have done, particularly in the last fifty years. Congress has become more and more and more complacent and less and less willing to take him on. But the Supreme Court's opinion in *Hamdan* really awakened a lot of people in Congress and a lot of scholars to believe that Congress has to assert itself. So I feel like I'm part of history. It's great fun.

MS. ALLEN: Was it a hard opinion to reason through and then set down on paper in the order that you did? I don't have it in front of me, but it seemed very logical and very, very carefully thought out, reduced to a clear logical explanation.

MR. ROBERTSON: Well, I hope it was clear and logical. I sort of pride myself on that. I pride myself on writing as short and succinctly as I can. But I have to tell you that, as I think I said earlier, I felt like I was threading a needle. I knew what I wanted to do in *Hamdan*. The question was could I do it. Would the law permit me to do it.

MS. ALLEN: Right.

MR. ROBERTSON: And I had to get over abstention and whether the Geneva Conventions provided a cause of action, specifically those two questions. They were serious obstacles to any ruling. Now, of course, we have a third problem, which is jurisdiction.

MS. ALLEN: Right.

MR. ROBERTSON: And yes, it was hard to write, and I struggled with whether I had the power to do it. But I kept remembering something Bill Bryant said. He said, "You know, we're just judges, and we can't go out gunning for whatever we want to gun for. We can't go out gunning for cases." He says, "It's more like we're a stationary cannon sitting on the mountain overlooking the harbor. Every once in a while something comes within range, and, boom! You pull the trigger." I thought that was such a beautiful metaphor for the role that a judge plays. You can't call that

activist. I mean, I didn't go looking for this case. It wound up on my docket. It presented itself. I didn't go looking for it, but it came within range [laughter].

MS. ALLEN: That was the boom.

MR. ROBERTSON: So, enough about *Hamdan*.

FISA?

MS. ALLEN: FISA.

MR. ROBERTSON: What I'm about to tell you I've never told anybody outside my family and my law clerks. But I think I can tell it to you, for whatever historical value it may have. Some time in December of 2005, I think it was, I woke up in the morning and read in the newspaper that the President had been for years authorizing NSA surveillance of telephone calls, both inside and outside the country, and didn't do any of it with a FISA warrant. Within 24 hours, I had resigned from FISA Court. My resignation from FISA Court took the form of a letter to the Chief Justice, whose predecessor had appointed me to the FISA Court. I said, "I hereby tender my resignation from the FISA Court." I didn't say why, didn't add any of the old grace notes, like, "I have been honored to serve, blah blah blah." I just resigned. Never got an acknowledgment, never got an acceptance, it was just done.

Before I resigned, I sought the advice of two of the judges in this Courthouse, whom I don't think even for the historical record I'm going to name, who are people I'm close to and people I respect, and told them the story. I told them I think I have to resign, what do you think? And one of

them said do it. And the other one said, "How is anybody going to know why?" I said, "I don't think it's appropriate for me to explain." He said, "Well why don't you find somebody who could tell the press what they think your reasons are." I said, "Well that's a good idea." And so I called Jamie Gorelick. And then when the reporters got wind of the resignation, I wouldn't talk. I've got a file that thick of telephone messages, letters, emails, faxes, asking me for interviews, to go on "Sixty Minutes," to every major news outlet, "Nightline," – people wanted to talk to me about it. I didn't choose to talk to any of them.

The only person who ever talked to anybody who knew anything about it was when Carol Leonnig, I think with *The Washington Post*, somebody told her Jamie Gorelick might know. In fact, one of these two judges I told you about is the person that told Carol that Jamie Gorelick might know. And Jamie did know. And what Jamie said was that the resignation was in protest of what the President did and also because the judge felt like he was being compromised into a position in which he didn't think he could do his job properly. And that's all the press ever got.

Well, I walked out the door of my house in Georgetown the next morning and there was a CBS cameraman with his camera in my face. He followed me all the way to the car, and that was on the evening news. The next morning, I looked out the window. It was cold. It was December, I think. I looked out the window and there was another cameraman on the sidewalk. I said to my wife, "Would you go out and get the newspaper?"

She said, "Get the newspaper yourself." So I, in my slippers, opened the front door and went out and this camera came at me. He looked at me, he took one look at me, and said, "I can't do this to you." I said thank you. I said, "I'll make a deal with you. It's cold. It's 7:00. I'm not going to leave here until a little before 9:00. There's no point in you standing out here on the sidewalk for two hours. I promise you, I will not go out the back door. Why don't you go and get a cup of coffee and be back here about a quarter to nine, if you still want to film me." He said, "Okay." I was hoping he'd get another call and have to go someplace else, but he didn't. He was there at a quarter to nine.

After *Hubbell* and *Hamdan*, that was my third fifteen minutes of fame. And this one was really intense. I suppose the reason it was so sensational for the press was that nobody would tell about what the story was. They all had to write it off *The Post*'s story because nobody had any other confirmation of the reason that I had resigned. Oh my God, I got hate mail. It was just amazing the stuff that poured in. Just amazing.

MS. ALLEN: Just from members of the public?

MR. ROBERTSON: Oh yes. Members of the public from all over the country. There were about 200 or 300 letters. I said I had hate mail, but frankly, I think the mail was ninety-five percent favorable. Now, here's the real scoop. This NSA surveillance program had been going on for three or four years. The Administration had briefed the presiding judge of FISA Court, who had been Royce Lamberth until May of 2002 and then Colleen Kollar-Kotelly

after that, and had instructed them that they couldn't tell anybody else. So they were in the compromised position of having the information, but being forbidden to tell the other judges on the FISA Court. That was completely unacceptable to me. It was unacceptable to me first of all that they had put Judge Lamberth and Judge Kollar-Kotelly in that position. It was unacceptable to me that either of those judges had accepted being put in that position. And it was unacceptable to me that we were being presented with FISA warrant applications that may have contained information that came from those, that surveillance program, without our knowing about it.

The basic FISA warrant process involves the presentation to the FISA judge of a warrant application. Sometimes it's 50, 60, 70 pages long, a lot of which is boilerplate, but which also contains the recitation of facts that the applicant for the warrant thinks gives rise to probable cause to believe that the target of the proposed surveillance is an agent of an enemy power and that they, whatever is going to be surveilled, is of interest to the intelligence community. Those statements of facts are annotated with footnotes that explain where the information came from. When it comes from a confidential informant, we're told, it comes from a person who has himself been under surveillance or has a criminal record or something like that or it comes under circumstances that are questionable so we can evaluate that information and decide whether probable cause has been properly established. If I'm reading one of those

applications and it has information in it that was obtained by NSA, by warrantless NSA surveillance of telephone calls under a special program that I've never heard of and don't know about, there's no way for me to ask the questions I need to ask in order to make an informed evaluation of whether probable cause exists. And so I decided that I was being denied the tools I needed to do the job and that the only correct thing to do was to resign. That's the whole story, it's as simple as that. Again, I had no idea what kind of a bombshell that was going to be.

MS. ALLEN: Were you ever inclined to give a reason, to claim publicly and make people think about the ramifications of the eavesdropping program?

MR. ROBERTSON: I think I got wrapped up in the "Judges don't talk" mythology. There are a lot of reasons why judges don't choose to talk. For one thing, if you talk but don't answer questions, then you don't give satisfaction to the press or anybody else who wants to listen. If you start to answer questions, there's no end to the questions you're going to be asked. We are not by training, by tradition, by culture, by any other measure you can think of, equipped to talk to the press. Judges don't do it. Some, a few.

MS. ALLEN: Right, they don't.

MR. ROBERTSON: They just don't do it. When Senator Specter started putting legislation together to turn this NSA surveillance program over to the FISA Court, he wanted me to come testify up on Capitol Hill. I said, "No." "Oh, yes, come up and have lunch with me in the Senate Dining Room." So, I went up and I have great respect for Senator Specter, a very nice guy. I said to

him, "Senator, you don't really want me to testify up on Capitol Hill about this because it would be kind of a feeding frenzy because the press has been after me, and I would become the story and not your bill and that's not what you want." By the way, an enormous number of people think what I resigned was my judgeship. My God, how principled could you be to resign your judgeship.

MS. ALLEN: They think you resigned the federal judgeship?

MR. ROBERTSON: I hope I'm principled, but I'm not stupid. Lately I've taken to answering people's questions about the FISA Court. I've done this a few times in the last few weeks, and people kind of walk away shaking their heads. I tell them this. I say, "I've never told anybody why I quit the FISA Court." I say, "Do you read poetry?" "Well, sometimes." "How about Emily Dickinson?" "Well, I don't—." "Well, here's an Emily Dickinson thought. Here's my complete answer to your question. *"The thought beneath so slight a film is more distinctly seen, as laces just reveal the surge, or mists the Appenine."* Then people walk away and shake their heads and say that's interesting.

MS. ALLEN: And my reaction is I need to get a copy of the poem and ponder it [laughter].

MR. ROBERTSON: I think you can ponder it. It is beautiful. I think I gave Jamie the Potemkin village language for this. Do you know what a Potemkin village was? I'm not sure I have these historical facts quite accurate, but Potemkin was Catherine the Great's prime minister, who in order to

convince the empress that he had the country under control, that everything was going well in the country, built this whole village on the banks of the Dnieper River. It was nothing but facades. And there were cheerful peasants walking their animals and carrying milk and doing their daily chores and waving gaily as the empress rode by on her boat out on the river. And part of the whole nuance of this FISA thing was, the FISA Court is a Potemkin Village, being held up to show everybody what a great system we have protecting everybody's civil liberties, but it's being ignored when the President wants to ignore it.

MS. ALLEN: I think the attention that it got revealed people's heightened sensitivity to privacy interests. Well, thank you very much. I don't think I have any further questions.

MR. ROBERTSON: I don't think I have any further answers.

MS. ALLEN: Thank you sir.

Except poetry, oral history.