ORAL HISTORY OF ROBERT KOPP

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 Judy Feigin, and the interviewee is Robert Kopp. The interview took place at the home of Robert Kopp in Bethesda, Maryland, on Tuesday, April 1, 2014. This is the fifth interview.

MS. FEIGIN: Good morning.

MR. KOPP: Good morning.

MS. FEIGIN: Before we continue with a discussion of some of the cases that you handled, we talked a little bit last time about Judge Chambers in the Ninth Circuit, and there was another story that you wanted to add to that.

MR. KOPP: Judge Chambers was for me a character from a different era. We had – this was in the mid-1970s – a case where one of our attorneys was going out to argue in the Ninth Circuit. He was an Orthodox Jew, which meant that he couldn't travel on Saturdays. He got a notice of oral argument, and the oral argument was set for a Friday in the Ninth Circuit. I think it was San Francisco, and that meant that after the argument, he would have to be traveling on the Sabbath.

MS. FEIGIN: We should say that Sabbath for a Jew begins after sundown on Friday.

MR. KOPP: Right. So the attorney contacted the Clerk's office in the Ninth Circuit and asked whether it was possible to move the argument date. Apparently the judge got extremely upset and wrote a short little opinion, a paragraph or two, where he denied the request and said some unpleasant things about a Mr. K – the attorney involved. Like me, he had a last name that begins with K. It's the type of thing that today hardly any judge would think was at all within judicial ethics to do something like that, but this was in the mid-1970s, and it was a different era, but I think it was out of order even for that period.

MS. FEIGIN: Was that order published?

MR. KOPP: It was a written order, and I'm told that it was set to be published but that the Attorney General requested that the Ninth Circuit not publish it.

MS. FEIGIN: That West not publish it?

MR. KOPP: That West not publish it. It would have been a huge embarrassment. If people would have found out what was behind it, it would have become a very big deal, I'm sure, at some point in time.

MS. FEIGIN: From what you're saying, and I've read the order myself, is it fair to say that it appeared anti-Semitic?

MR. KOPP: Some might construe it that way. It certainly, in modern eyes, would seem to be a violation of basic respect for religious rights.

MS. FEIGIN: Back to your cases. Do you want to continue on with the next series of cases that you think were significant to your career?

MR. KOPP: Yes. The cases that we handled in our office typically were cases that were of broad significance, but sometimes we handled cases on behalf of individuals where Congress had given them rights under the veterans' statute, and the cases by governmental standards were very small. But we regarded them as very important cases because we were representing veterans, and Congress had determined that the United States should be assuring that veterans get their reemployment rights after they came back from military service.

MS. FEIGIN: We should say for historical context that the mid-1970s, which is when I think you're talking about, was a time when the whole issue of veterans was very

emotional. Vietnam was happening and there was a lot of anger against veterans in general by the anti-war movement. Is that fair to say?

MR. KOPP: That's correct. I believe that the actual statutes here were a reaction to World War II and meant that an employer couldn't deprive a veteran of seniority rights just because he had been in military service. So in our office we had a good number of these cases, and although the stakes were not typically large, they were the type of case where, at least I certainly liked handling them, because we were representing plaintiffs who had significant grievances against their employers in terms of rights that Congress had said they were entitled to and the employers weren't giving them.

The case that I remember most was one of that series that didn't work out terribly well. It was an unreported case that was in the Tenth Circuit. I was representing a veteran who was suing his employer to obtain some seniority credits for the time that he had been in military service, but the dollar amount of the suit could be measured in the hundreds of dollars. So it was a very tiny case, certainly by government standards and even by private practice standards. I went out to the Tenth Circuit to argue the case, and I felt that we had a very strong argument, but when I got up to argue, I got a lecture by the presiding judge, Judge Breitenstein, who basically said, "Don't you ever come to this court with such a tiny case. We are a very, very busy court, and the small sums that are at stake in this case are really not the type of thing that we should be bothering with." I tried to say that there's a statutory scheme and Congress had intended the United States represent the veteran and the United States should do it even though there are

small amounts at stake, and he just wouldn't listen to me. It was just a very unpleasant argument, and we lost the case.

MS. FEIGIN: So he convinced another judge?

MR. KOPP: So he convinced another judge. They just didn't get the point that this was a scheme that Congress had intended.

On the other hand, I had some great times in terms of arguing some of these veteran cases. The Tenth Circuit case that I just discussed was one that we lost, but normally we did win these cases. One case in particular was a case in the Third Circuit,[7] and it presented an issue that was fairly tricky. We had lost the case in the District Court, and I was assigned the case to do an appeal memorandum, recommending for or against appeal. I tried very hard to figure out a theory on which to appeal the case because the veteran's situation seemed quite sympathetic, but I just couldn't figure out how to do it. So I reluctantly recommended against appeal. The Division accepted that recommendation and forwarded it to the Solicitor General's Office.

When the recommendation got to the Solicitor General's Office, the Solicitor General, as is their practice, assigned it to a staff attorney to prepare a recommendation. I remember we had a conference with the SG attorney and his supervisor, and we worked out a theory that sounded arguable as we discussed the case. So the SG's staff persuaded the Solicitor General, who I think was Erwin Griswold at the time, to determine in favor of appeal, and appeal was authorized. I then went forward and briefed the case, and as I briefed the case, I began to feel more comfortable with our position, and I went down to the Third Circuit and

[7] *Hoffman v. Bethlehem Steel*, 477 F.2d 860 (3d Cir., 1973).

argued the case, and we won.

I felt very good about that result and also about the procedural process at the Department of Justice. Not only had the rights of a deserving veteran been preserved, but the process by which we would do written recommendations to the SG, and then the Solicitor General's Office would look at the recommendations and come up with their own recommendations, had worked. The process had flushed out conflicting views and permitted discussion. It was a good example of the process working, and through the contributions of everybody involved, the theory that was worked out proved to be a successful theory. This is the way over the years that the process worked, and I think it's one of the great advantages that the federal government has in terms of its litigation practice that determines whether to appeal after a very studied and exhaustive process that often works out theories that may not be self-evident when you first look at a case.

MS. FEIGIN: You mentioned the Solicitor General being Erwin Griswold. Can you give us a sense of him and maybe other solicitors general during your tenure and how changes in the solicitors general changed things or not.

MR. KOPP: Griswold was very interesting because I actually dealt with him at very different stages in my career. The first time I dealt with him was as a student at Harvard when I took his tax course. His style of teaching was mostly a lecture style. There wasn't that much give-and-take with students, and since there wasn't give-and-take and he was talking about tax law which didn't inherently interest me at the time, I didn't find it a terribly exciting course. I didn't do very well in the course either (laughter). So my first impression of Griswold was not terribly

positive. Then he became Solicitor General. He was a Johnson appointee and was extended over into the Nixon administration for quite a while until eventually I think after three or four years there Nixon decided that he had to get rid of him because Griswold had a mind of his own.

I dealt with him a few times as a Solicitor General and he always seemed to me to be very intelligent. I also saw a couple of his arguments in the Supreme Court. His arguments were much more structured than most oral arguments are today. I think the best oral advocates today invite questions and the Court is active in addressing questions. When Griswold was arguing, he had this structured style, and the Court at that time was not normally terribly active in terms of its questioning. So his arguments, at least the few that I saw, bore some resemblance to the lectures from him when he had been a professor. Now that may be not true more generally because I saw only a few of his arguments, but that was my impression of the arguments that I saw.

Then I had contacts with Griswold much later on because I was at several judicial conferences where he attended. By that point he was retired and he had this wonderful wife that came with him who was a very lovely person. At that stage in his life, he was opening up. He was charming and witty. When I was a student at law school, he was the kind of person I'd be scared of, but he turned out to be a warm and friendly person, and a great person to sit next to at a dinner table and listen to his fascinating discussions and stories. So I really in my lifetime got three views of him, and I'm happy that the latest view was just terrifically positive of him.

MS. FEIGIN: For anyone who wants to hear about the end of his time as Solicitor General, they can look at Alan Rosenthal's oral history. He refers to certain events that he believes led to the end of Griswold's tenure as Solicitor General.

MR. KOPP: I read Alan's history on that. Griswold was somebody who had a lot of backbone, and when he decided something was right and something was wrong, he stuck to it.

MS. FEIGIN: Do you think that is unusual in a Solicitor General?

MR. KOPP: No. I think that's the way the system is supposed to be. The Solicitor General is in charge essentially of the government's litigation, and therefore normally has a client that is a governmental agency and, ultimately, in a sense, the President. There's always the question of how much weight do you give to the views of your client in terms of developing a position, and what do you do if you think your client is wrong, and how wrong becomes so wrong that it's just unethical and inappropriate to do what the client wants you to do. I think different Solicitors General drew lines in somewhat different fashion on that. I will probably never know exactly whether people made some really wrong decisions, but at least my impression was that the Solicitors General that I dealt with were very conscientious and viewed as part of their job at some point that they had to say no to their clients.

MS. FEIGIN: Do you remember an example when you thought a Solicitor General did not show the strength that you think should be shown?

MR. KOPP: It's hard to say. I do remember when Charles Fried was Solicitor General. He was a Harvard Law professor whom I indirectly knew of at Harvard. At Harvard

he was regarded as a very distinguished professor with a very strong personality, but as Solicitor General he conveyed the impression of being a person under a lot of pressure. At least when I saw him he didn't seem to be enjoying his job. I began to suspect that in practice he had less independent authority than did his predecessors. I don't know for sure, since in that era I rarely saw a complete picture of the decision-making.

MS. FEIGIN: What administration was that?

MR. KOPP: This was in the Reagan administration.

MS. FEIGIN: Can you think of one or more examples of any Solicitor General who really stood up under pressure in the way that you admire?

MR. KOPP: As I said, we are learning things about Erwin Griswold where he said no to President Nixon. But most of those types of incidents did not become known to the career staff. The insulation of the career staff from the White House and also pressures from the White House became more significant after Watergate as the system adjusted to insulate us more. I mentioned earlier about how David Kreeger when he was head of my office in World War II was sitting at his desk and President Roosevelt called. That could never happen today for no other reason than there are directives all over the place that say the White House doesn't deal directly with career people. You have to go through a process of getting authorization and also the government has political appointees who are there to be consulted by the White House. So there usually isn't any need for White House people to talk directly to the career staff. The career staff on the whole is much better insulated from the political pressures, at least coming

directly from the White House, than they used to be when the government was smaller and more informal.

MS. FEIGIN: So back to you and your life. What was going on in your life? It was the mid-1970s. Where were you personally?

MR. KOPP: Personally, it was about the time when I started dating the woman who became my wife. I think I mentioned earlier that my mother had gone to Wellesley, and Wellesley has a very active alumni club in various cities, and the Washington Wellesley Club was one of the most active. One year in the early 1960s my mother hosted an annual Wellesley Club party which the club had each year for both alumni and Wellesley students. My mother agreed to host the party at her house, and the co-hostess was Barbara Kornblith who also had been to Wellesley and who lived in nearby Maryland. So my mother and Barbara Kornblith were hosting this party, and Barbara's daughter, Nancy, who was I think a sophomore at Wellesley at the time, came to the party. My mother introduced me to her, and she struck me as a nice person, but I didn't really pay much attention to her because it was sort of a signal for me that if my mother was introducing me to somebody, it was probably somebody I wouldn't be that interested in (laughter). However, I didn't forget her, and I guess it was three or four years later, I started dating her and one thing led to another, and in 1968 Nancy and I got engaged. We got married in May of 1969 and we settled down to live in Montgomery County, Maryland.

I don't want to go off and talk much about her life because if I did it would dominate this whole discussion, so I really just want to mention a few basic

things. When Nancy had been a student at Wellesley, she had participated in Wellesley's Washington summer program and had obtained through the program an internship working for Representative Edith Green of Oregon. Edith Green's chief of staff was Wesley Barthelmes. After Nancy married me, she maintained her interest in politics and got a job as a staffer working for the Montgomery County Council where she was working for the whole County Council. One day in 1974, she came home from work and told me that she had heard that there was a vacancy in the state legislature for somebody from our district. It would be an open seat in the election, and she said, "I'm probably not going to end up running, but I'm starting to think maybe I should consider that and maybe I'll go talk to Wesley Barthelmes and see what he thinks of it, but it sounds like a long shot and I probably won't do it." The way she said it, I didn't think too much about it because it certainly sounded to me like it was something that was a long shot and she would decide not to do. But a few days later she came back and she said she had had an interesting discussion with Barthelmes and he had encouraged her to run. So she decided to do that and she ran and she won and that started her legislative career. She ended up being in the Maryland House of Delegates for 27 years and served in a significant leadership position. She also had what I think of as a very remarkable place in history, although I don't know whether there are records to prove this, but it's my understanding that she was the first female legislator in the country – in 1976 – to have had a baby while she was in office.

In 2002, there was a vacancy for the position of State Treasurer for the State of Maryland. That's a position in Maryland that is elected by the legislature,

and so she decided to put her hat in the ring for that position and the legislature elected her as State Treasurer and she has been reelected since then four times, and at least as of this discussion, which is in 2014, she has been there 12 straight years. I'm not going to get more into her career if for no other reason than it will probably be a lot more interesting than this oral history, so she can deal with that herself (laughter).

MS. FEIGIN: It is an astonishing career. Let me just ask something about that career that intersects with yours in a way that I think is significant. When she served in the legislature, the legislature is in Annapolis, and I believe there was a period of time that you actually commuted from Annapolis. Is that right?

MR. KOPP: That's right. In those days, a lot of members of the legislature during the legislative session, which was 90 days, would rent apartments in Annapolis. We got a very good babysitter who actually ended up staying with us for more than ten years. While Emily, our first child, was a baby, Nancy and I and the baby moved to Annapolis and our babysitter came with us and also lived in Annapolis, and things worked out very well. Eventually, after several years, life got too complicated so I didn't any longer commute from Annapolis. I stayed here at home. But there were about three or four years, when Emily was young, that I was basically operating out of Annapolis. At that time, they had bus service from Annapolis to downtown Washington so it wasn't as hard to commute as it is today.

MS. FEIGIN: I bring it up because there is a sense that that experience may have shaped some of the decisions you made as head of the Appellate Section. In particular, I'm

talking about how supportive you were in many instances of alternative work schedules and things that accommodated dual career families. I wonder if, it's a little tangential, but this is a good point to mention it, if you could discuss your view on that and how you handled that within the office.

MR. KOPP: Some of my reactions to the role of women and family members in the government workplace were just that I thought there should be room for everyone to work. But much of my reaction was also just practical. We did a very good job of attracting some really wonderful people to the office. The salary scale of the government meant that it paid its lawyers a lot less compared to what those same lawyers could get in private practice. So we had an office where just about anybody in the office, if they found the workplace an unattractive place, could get up and leave and double their salary and do even better in the long run. As somebody who wanted to keep our attorneys for as long a time as we could, I realized that part of my job was to do what we could do other than pay them more money – which we couldn't do – to keep them in the workplace so that they would want to stay. They would find that it had attractive advantages for them that they couldn't get in private practice. Now, one of the advantages that we did have is we did a lot of absolutely fascinating work, of the type that most private law firms don't regularly do, so we did have the advantage of really attractive and significant work. But I also thought we had to do what could be done so that working parents could feel comfortable working in a place like ours. Fortunately this was at a time when people higher up in the Justice Department had already

started figuring this out and there were efforts at government-run daycare centers --

MS. FEIGIN: What administration are we talking about when this happened?

MR. KOPP: I don't remember whether this was under the Ford administration or the Reagan administration. I think it happened before the Clinton administration. Just Us Kids was the key daycare center. I know it became very important to people working in the Justice Department and the only complaint I think people ever had about it is it became too popular. At the time I left, that was a real problem, the lack of adequate daycare downtown.

We would permit people to take leave when they had child issues. A lot of our work, if you came in at 10:00 instead of 9:00, it didn't matter, so people could make some adjustments in their hours on a day-to-day basis if that was necessary. So our office had more flexibility in terms of running the workplace than some of the other offices in the Department.

MS. FEIGIN: I don't know if you were the first, maybe you would know, but you were early on in letting people do telecommuting.

MR. KOPP: Yes. Telecommuting was something that we permitted. We weren't the first, but we did permit telecommuting fairly early on compared to most offices. I remember what was sort of a big development in terms of telecommunicating for us was when there was a huge rainstorm, I think it was at some point in the 1990s. The Main Justice building flooded and was declared unusable for about six months, so we all had to move out. We were moved into quarters at the building that the Justice Department was leasing at 11th and L, I think it was called the

L Street Building at the time. The only problem was there wasn't enough room for everybody. Only about half the office could be present at any one time. So suddenly telecommuting became something that *had* to be done because there was no place for people. By that point, the technology had gotten to a point where telecommuting had become feasible. So for about six months, we were in that situation, and once Main Justice was cleaned up and we moved back in, telecommuting really had become a permanent part of our work environment.

MS. FEIGIN: I understand, and I believe this is under your tenure, that some people actually were not even in D.C. People moved to points far away and were allowed to remain part of the Section. Is that true?

MR. KOPP: I don't think it's quite fair to say it was my idea. It was the type of thing that every now and then there'd be somebody who wanted or needed to leave the office because maybe a spouse had a job elsewhere and it occurred to a couple of them to ask for the ability to work from a different location and periodically come down to Washington at their expense. Those requests, I actually had somewhat mixed feelings about them, particularly the initial ones, but we raised that with our administrative office and we got approval to go ahead and do that. At first we did have a mixed experience with that type of situation. Not all of it was good. But eventually it became something that there were often one or two people who were doing that and that did seem to work out.

MS. FEIGIN: What changed? What made it go from not-so-good to okay?

MR. KOPP: I don't know. I think the people who wanted to do that, it requires the person's willingness to be flexible, to come down to Washington when you need to, and I

think the first people who did that, it was a little, everyone was sort of figuring out their way and what they had to do to make it work. As I say, at the beginning, it didn't actually work that well, but I think everybody began to understand the flexibility that it took, particularly the flexibility of the person who was working outside the office. Also the technology was improving.

When we first started, the technology, use of emails and things like that, weren't what they are today in terms of ease of use, and as the technology improved, it became a lot easier to work offsite. I know after I left, the office went through this period when they were in this long hiring freeze and there were people in the office who, because of their own situation, just couldn't stay in the Washington area. They had to leave and I think by that time there had been enough experience with people working offsite in the Division that they were able to get authorization to have a number of people work offsite. I think that helped the Division very much get through things like an extended hiring freeze. Again, I should add that there were other components of the Division that probably in terms of permitting people to work offsite were a step ahead of us. Federal Programs and maybe the Office of Immigration Law, I think, experimented more with it earlier than we did.

MS. FEIGIN: So back to your cases. There's Nancy in a political position. Did that impact you work-wise?

MR. KOPP: Actually that was sort of interesting because one of the areas that I had had cases in involved the Hatch Act which is a statute which restricts government employees from participating in political activities. At the time, it was

significantly more restrictive than the laws are today. Before Nancy indicated her interest in politics, I had worked on some cases involving the Hatch Act and had been defending the Hatch Act against constitutional challenges. One of our cases went to the Supreme Court, and in a 1973 decision, the Supreme Court reaffirmed the constitutionality of the Hatch Act.[8] So I had some experience in knowing where the line was for what government employees could and could not do in terms of political activity. I knew that when Nancy went into a political career there were severe limits on what I could do. But I thought that was actually quite fine. She could be the one in our family who was the politician and engaged in politics, and I could be the spouse who was barred by law from participating in politics, and I thought that was fine (laughter).

MS. FEIGIN: You didn't have to do fundraisers.

MR. KOPP: I didn't have to do fundraisers, and there were all sorts of things I could beg off having to go to, so I thought it was a good resolution (laughter). And it made it very easy to just draw a clear line down the middle in our family.

MS. FEIGIN: Moving along in time, are there any other cases that developed for you that you think are worth discussing now?

MR. KOPP: Yes. I think in this particular period that we're talking about, which is the early 1970s, it was a time when I began to notice that my assignments in the office were becoming more and more of consequence. I mentioned the Hatch Act litigation and the fact that we had been defending the Hatch Act in the Court of Appeals and the Supreme Court, but there were other significant cases that just seemed to come more frequently.

[8] *Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 538 (1973).

One day I had just returned from a period of leave, and I found a new assignment on my desk. This was in the middle of the time period of the war in Vietnam, and of course the war was a hugely divisive issue in the country. There on my desk was this case called *Commonwealth of Massachusetts v. Laird* where the Commonwealth of Massachusetts was seeking to get the Supreme Court to decide that the war in Vietnam was unconstitutional because there hadn't been the proper declaration of war. When I saw this case, and again it was in the early 1970s, it just seemed to me about the most important case I had ever heard of. As I said, the Commonwealth had done the unusual thing of bringing its suit in the first instance in the Supreme Court. They did that by filing a motion to file a bill of complaint because it was permissive whether the Court would permit them to proceed. The case was assigned to the Civil Division and our office so we could prepare the initial draft of what the Solicitor General would file in the Supreme Court.

I was assigned the job of drafting our filing, and I got deeply into the issues and quickly learned that there really were significant hurdles for Massachusetts. One is that they were suing the United States on behalf of their citizens, but the citizens of Massachusetts were also citizens of the United States, and there was a doctrine called *parens patriae* which basically meant that you couldn't have both the State and the United States suing on behalf of its citizens at the same time, that if citizens of the state were also citizens of the United States and if the United States was involved, the United States was the dominant player and the state couldn't sue on behalf of its citizens. At least there were some

relatively old Supreme Court decisions that said so. So I developed the argument based on *parens patriae* that Massachusetts could not sue on behalf of its citizens in this context.

Then there also was a very significant political question argument presented, that this was the type of issue that was inappropriate for the courts to decide. Thus, we argued in the draft brief that I wrote that the suit couldn't be maintained because Massachusetts couldn't bring the suit on behalf of its citizens and because the case presented a political question that was beyond the capacity of the courts. I put a lot of effort into that draft brief, and Bob Zener, my reviewer, put a lot of effort into it, and when we sent that draft to the Solicitor General's Office, I felt it was the best legal document I had ever done.

When it got to the Solicitor General's Office, it was assigned to a staff attorney there who was Bradford Reynolds. I knew that he would be getting heavily into editing the brief because it was obviously an extraordinarily important brief, but I didn't have that much experience in terms of working with the Solicitor General's Office on major Supreme Court cases so I didn't have a sense of how deeply they would get into the case and how freely they felt they could just take a draft that came from the Division and rewrite the whole thing from the very beginning. So when I saw Reynolds's revision of the brief, which had basically used our draft more as a thought piece (laughter) rather than as something that you edit, I was shocked and at the time I'll admit I was not totally convinced that the changes were improvements. However, Solicitor General Griswold approved the brief and filed it and the Supreme Court did what it asked,

which was that Massachusetts be denied leave to file the complaint. The vote was 6 to 3, and Justice Douglas wrote an opinion in dissent.[9]

As a footnote, I should note that Brad Reynolds, during the Reagan administration, became the head of the Civil Rights Division and had a very controversial tenure there. One of the interesting things about working with the Solicitor General's Office was that it was such a professionally run office in terms of everybody there viewing themselves as government lawyers with a particular job of looking at cases as litigation lawyers look at them. Like us in the Civil Division, the Solicitor General's staff normally wouldn't be involved themselves in making policy. Thus, when you work with people in the SG's office, you don't necessarily have any idea how they would be in a policy position. From my working with Reynolds, I knew that he was a very good lawyer. I wished he hadn't edited my work as much as he did (laughter), but I did know he was a very good lawyer. But I had no idea that he would in a different position become such a controversial figure. The Solicitor General's Office, in my entire experience, has been such a very professional office.

MS. FEIGIN: Someone reading this who doesn't know who he is will be curious, so maybe we should give a sense of what the controversy was about him when he went to the Civil Rights Division.

MR. KOPP: When he went to Civil Rights in the Reagan administration, the Civil Rights Division since the early 1960s had viewed its mission as the expansion of civil rights, particularly for minorities, but had also begun to think of expanding civil rights more generally. Today the Civil Rights Division deals with disability rights

[9] *Commonwealth of Massachusetts v. Laird*, 400 U.S. 886 (1970).

and there's been homosexual rights, so with time, historically, the mission of the Civil Rights Division has been expanding. When Reynolds was head of Civil Rights, I think he felt that in some areas the expansion had gone too far and he began to adjust some of the positions of the Division in a way that was cutting back on positions that the preceding administrations had taken, and this caused a lot of turmoil, both in the Division and more broadly. There was a lot of controversy connected with Reynolds's changes. I was watching this from afar so I can't really give you specifics at this point, but I know that this generated an awful lot of controversy, and in the Clinton years I think there was significant undoing of what Reynolds had tried to do.

MS. FEIGIN: So back to you and the cases that you were doing. Now you're in the thick of the biggest political issue there is, the war. Were there other cases of similar stature coming your way?

MR. KOPP: Not necessarily cases of similar stature. It's interesting because *Commonwealth of Massachusetts v. Laird* did not produce a Supreme Court opinion. As I said, Douglas wrote a dissent but it actually didn't produce a Supreme Court opinion, so it's one of those tremendously important cases that is largely lost to history because there's no opinion. But if the dissenters, the three justices that would have voted to permit the complaint to proceed, had had two more votes, it would have been one of the really major, major decisions in our history. None of the other cases that I handled in this era I think were in this league, but some of them were of considerable significance.

One case that I handled in the early 1970s was a case called

Ralph Nader v. FAA.[10] I don't know if it was the first but it was one of the first cases involving a challenge with respect to smoking on airlines. Nader's theory was that smoking on airlines was so dangerous to people's health that it constituted an emergency.

MS. FEIGIN: Second-hand smoke?

MR. KOPP: Yes, this is second-hand smoke. Because you're in a confined area on a plane and the air conditioning system, of course, isn't adequate to sweep up all the smoke that a smoker may generate, so Nader's theory in this case was that smoking was such a threat to health that it constituted an emergency and the FAA should issue an immediate ban. The case was assigned to me and I defended the FAA's position that an emergency wasn't presented and that the relief for Nader should be denied, and the panel of the D.C. Circuit, which consisted of Judge Leventhal and Judge Robinson and a visiting judge, didn't have any problem with our position.

At the time I thought the case wasn't that difficult a case for us because Nader's suit was based on the theory that there was an emergency and the Agency's position was that it had acted reasonably in not declaring an emergency, and I thought that was a fairly easy position to defend. Of course today I think Nader's position was the opening gun in the litigation and administrative battles with respect to smoking on airplanes. We now know that Nader was right in terms of his evaluation of smoking, and eventually the government came around to agree with him and in much more recent years, the government has been on the side opposing tobacco companies in various types of litigation, and our office has

[10] 440 F.2d 292 (D.C. Cir. 1971).

been involved in litigation against the tobacco companies. So as you look at the passage of time, it's interesting to see how the policy side of some of the cases that we were involved in totally shifts to the opposite side of the policy spectrum.

MS. FEIGIN: As happened with gay rights.

MR. KOPP: That's right. There was also another case at the time, in the early 1970s, that I didn't think was that difficult a case, but looking back at it from the viewpoint of history and the development of the law, it's a case that I'm sure would be enormously controversial today and probably might have a very different result in the courts today. This was a case called *Two v. U.S.*,[11] and it was a case that we had in the Ninth Circuit. There was a statute with respect to the military that required the honorable discharge of female lieutenants who are not promoted within thirteen years, and the statute did not apply to men. There were different rules that applied to men. We filed a brief which argued that if the Navy concluded that it needed disproportionately more male than female officers at the next-higher rank, that that was the kind of military judgment that was constitutionally within its discretion.

You can imagine what controversy would happen if that was the government's position today in the courts. However, our brief also presented the less conceptually based argument that the plaintiff had not shown that the rule for women in practice was more adverse to the plaintiff than the counterpart rule for male officers, and since even accepting her position she hadn't therefor been able to show discrimination, that she should lose on that basis. That was the argument

[11] *Two v. U.S.*, 471 F.2d 287 (9th Cir. 1972).

that the Court of Appeals accepted. So once again another one of the areas where in history you see that over the years things change significantly.

MS. FEIGIN: I think we have time for one more case, so pick among your many.

MR. KOPP: There's another case that I handled in this era which was one of significance, particularly when you think what might have happened if it had come out the other way, a case called *Holmes v. Laird*[12] in the D.C. Circuit. There were two American soldiers who were stationed in Germany, and there were Status of Forces agreements between the United States and Germany and there were treaties which permitted German courts to try certain types of cases against American servicemen, and this was that type of case. While the German proceedings were going on, determining whether the two American soldiers should be criminally convicted, they left Germany without authorization and returned to the United States. The Army, in an effort to comply with the United States' obligations under treaty and the Status of Forces Agreement, attempted to return the servicemen to Germany, which at the time was West Germany. The soldiers brought an action in the District of Columbia to enjoin their return, and when the case got to the Court of Appeals, I briefed and argued the case. In an opinion that was written by Judge Spottswood Robinson, the Court held that the Constitution does not bar the United States from surrendering an American serviceman to a foreign country pursuant to international agreements between the United States and that country, even if the country does not provide all the criminal law safeguards that are afforded by the U.S. Constitution. The court also ruled that American courts have no power to

[12] *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir. 1972).

review the fairness of the German proceedings. And at least in that context, the case is a very significant precedent.

MS. FEIGIN: It is.

Well thank you very much. An amazing array of cases, and next time I'm sure there will be more. We have discussed some of the Solicitors General. Maybe next time we can discuss some of the Assistant Attorneys General, because you worked with a lot of people in that position. Thank you very much.

MR. KOPP: Thank you. It's a real pleasure.