

## 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, May 20, 2014. This is the sixth interview.

MS. FEIGIN: Good morning.

MR. KOPP: Good morning.

MS. FEIGIN: We left off at the end of the turbulent 1960s, and a lot was going on. Do you want to fill us in on how it looked from the Justice Department?

MR. KOPP: Sure. In 1969, of course, Richard Nixon was sworn in as President, and I was a career employee of the Department in the Civil Division. With Nixon's election, I was pleased that there didn't seem to be any concern among my colleagues as to the fact that there had been a change from a Democratic to a Republican administration. Everybody was confident that the Civil Division, which had a strong tradition of being non-political, would continue quite as before. Indeed Lyndon Johnson's Solicitor General was Erwin Griswold, former Dean of Harvard Law School, and Griswold continued in his role as Solicitor General.

So the transition, insofar as the Civil Division was concerned, appeared to be a pretty smooth one. As a relatively new attorney, I had not had much contact with the senior Department officials. I didn't work that much with people in our front office or the higher levels of the Solicitor General's Office, but with my old professor Erwin Griswold in a high place, I thought I knew a bit more about them. I had had Griswold as a law professor at Harvard, and he had taught taxation there to me. As I said before, my taxation course was not terribly successful, and of course I didn't become a tax attorney. In any event, with the change to the Nixon

administration, I started paying quite a bit of attention to what was going on in terms of major appointments in the Department. Eventually, in the Civil Division, President Nixon appointed William Ruckelshaus as the Assistant Attorney General. Ruckelshaus was a very intelligent person who had good rapport with everybody who saw him. He quickly came across to the career people in the Civil Division as a really fine appointment. Unfortunately, after a little over a year, he left the Civil Division to become the first Administrator of the Environmental Protection Agency.

Ruckelshaus's replacement was L. Patrick Gray, a former Navy combat captain. I was still not senior enough to have that much to do with him personally, but I didn't see anything in him which caused me any concern. As a Navy man, he was known to be a bit stiff, but he seemed to be quite dedicated to running his job properly, and moreover, Gray made some very good appointments in my view for his assistants.

At the time Gray came on board, my officemate was Barbara Herwig, a bright, young Honors Program attorney out of Stanford, and in our office she got off to a very fine start as an appellate attorney. Gray, when he came in, appointed her as one of his assistants. Gray also appointed as another assistant Daniel Armstrong, who had been a classmate of mine at Harvard, and I was very pleased that Gray had made that selection because I knew Daniel would be a very fine young attorney.

However Gray did not stay too long as Assistant Attorney General because Nixon made him the Acting Director of the FBI to replace J. Edgar

Hoover. Gray moved over to the FBI with the rest of the people from his front office, including Barbara Herwig. In that move, Barbara became Gray's Special Assistant, and she occupied what was then the highest post in the FBI ever occupied by a woman. Of course, the idea when Gray moved over to the FBI was that he would become the Director of the FBI, but at that time Watergate was starting to become a serious problem for the administration, and Gray had the misfortune to be involved in it, particularly in an unfortunate incident involving destruction of certain materials. Gray, of course, never became Director of the FBI. Daniel Armstrong has done an oral history, and I found his description of Watergate and Pat Gray's sad story to be quite gripping.

Gray's replacement was Harlington Wood, and I participated in a number of meetings with Wood. He always struck me as a very intelligent, friendly person, and I, and I think most people, were very happy to have him running the Division. In 1973, he was nominated to be a district court judge, and eventually he was appointed to the Seventh Circuit. The Civil Division's career attorneys apparently made a great impression on Judge Wood because after he left the Department and became a judge, when he would come back to Washington to attend meetings, he would always make a point of stopping by at the offices of his former colleagues, like me, and he would pop his head in and say hello. He was just a very friendly, impressive person.

At the time of the Nixon administration, I had been in the Office about four or five years or so and I began to think about leaving the Appellate Section. The general expectation among the attorneys in the office was that a job in the

Appellate Section was the type of job that one stayed in for three or four years, but after that, it was time to move on. The office was a good starting point for a career, but very few people then thought of it as the place for a long-term career. And indeed there had been much turnover in the office. When I joined in 1966, the number of attorneys in the office had been about 18 or 20 or so. I think at its maximum, it rose to 20, and then it dropped down to 13. And then eventually it started to rise some, but turnover was a significant concern within the office. Nonetheless, I figured it was time for me to start looking around since that seemed to be what everybody else did at this stage in their career.

I didn't make any serious job applications, but I had interviews at a couple of law firms and several government law offices just to figure out what would be involved if I did make a move. I distinctly remember that one of the interviewers asked me why I was contemplating a change in jobs since my job seemed to be much more interesting than any job that his office had to offer. After I finished the interview, I began mulling that statement over. I decided that he was right, and not only about the jobs in his office, but about any of the other jobs I had been exploring. So I went to see Mort Hollander, and I told him that while I had been looking at some other jobs, I now realized how good a job I had in the Appellate Section and that I planned on staying for the long term. He said he was overjoyed, and it wasn't too many years after that that I was promoted to become a supervisor.

In these early days in the Department of Justice, it was a very good time for me personally. But for the country, these were times that were quite difficult

and very troubling. I remember in particular April of 1968 when Martin Luther King was assassinated, and days of rioting followed in Washington. Buildings were set on fire, federal troops were called out. I remember one beautiful spring day when I was going to work, the flowers were in bloom, the cherry blossoms were out, forsythia were out, and over in the distance, you saw smoke on the horizon from buildings that were burning. It was really a very disturbing time.

After several days of the riots, we in the Civil Division were called in by our Assistant Attorney General who at the time was Ed Weisl, and he explained that even though most of us in the Civil Division knew nothing about criminal law, we were going to be assigned to various spots in the city, including police stations, to be observers. The thought was that having neutral observers of police would cool passions on all sides. When Weisl spoke to us, he was obviously very nervous, and his unease and concern came across in the way that his voice sort of crumbled as he said these things. It was an experience that none of us had ever gone through before, and Weisl was clearly disturbed by the situation. He admitted he didn't really know how things were going to turn out, and we could only hope for the best. I was given one of the assignments that was handed out, but I must admit that it was probably the most insignificant one in the entire city. I was assigned to be in a police station in Georgetown, and I spent a large part of a Saturday night there. Not only was there no questionable conduct that occurred by either the police or anybody brought into the station, but essentially nobody was brought into the police station at all.

There was, several years later, another very memorable event which also was a reflection of the turmoil that was in the country at the time, and this was May Day in 1971. I remember the day before May Day I was home that evening after having been on vacation for a while, and I got a call from Len Schaitman. Hollander had set up a telephone tree so that if events came to a certain point, he would be able to call all the people in the office through the telephone tree. Len Schaitman called and said that our instructions were to get to the office by 6:00 a.m. in the morning because there was expected to be disruptions of traffic, and if you didn't get in early, you wouldn't be able to get in. So I duly came in at 6:00 a.m. in the morning. By the time it was lunch time, I decided to go out to lunch, and there were massive numbers of anti-war demonstrators surrounding the Department of Justice building. The Department of Justice building was a huge focal point for the demonstrations.

MS. FEIGIN: We should say for people reading this years hence that in those days, there was no Internet, so, of course, no email and no cell phones. A telephone tree was a way to get a message out relatively quickly. There was a list of names and telephone numbers. The first person dialed the second, the second called the third, and so on until the end of the list. But back to the events of May 1971. Did you have any trouble getting through? Were you frightened?

MR. KOPP: No, I wasn't frightened. There was nothing personal about this. But when I returned from lunch, it was very difficult to get back into the building because there was almost no room on the sidewalk, and the last thing you wanted to do was be in a situation where you bumped into people or worse stepped on

somebody, so you had to be very careful. Some of the demonstrators did sort of leave room to get into the door, so I was able to get back in, but it was an unsettling experience.

As is well known, the demonstrations that day in Washington led to thousands of arrests. The demonstrators were detained in places like stadiums, and thousands of people were arrested, and the number of people who were arrested was so large that one of the attorneys in our office was drafted to help process the demonstrators. He had no expertise in criminal law, but the Department was desperate that people who weren't criminal attorneys were called in to help with the demonstrators. Our attorney, Mike Stein, returned from that assignment very discouraged about the chaos and the processing procedures that were followed, and, if I recall correctly, that led to years of litigation. Eventually very few of the demonstrators actually were convicted of anything.

MS. FEIGIN: Considering the Mike Stein incident, his wife I believe worked then as an attorney in the Civil Rights Division. Do you know whether when he responded to the call for help, did it come through the Civil Division, or was he responding, as I believe she did, to a call through Civil Rights?

MR. KOPP: I don't know. It could well be that because she was in Civil Rights that they asked him as well.

MS. FEIGIN: They may have asked for volunteers, and he may have responded to the general Civil Rights request.

There must have been a lot of interesting litigation during the Nixon years, and given your position and the fact that you were becoming more involved in

significant cases, I suspect you had a role in some historic litigation. Can you tell us about that?

MR. KOPP: Sure. The first thing that relates to this was that in the Spring of 1973, Mort Hollander called me into his office and said that he was going to promote me to become an Assistant Chief in the office, and the job of an Assistant Chief in the Appellate Section included reviewing draft briefs done by staff attorneys and arguing some of the biggest cases in the office.

MS. FEIGIN: Couldn't have been a better time (laughter).

MR. KOPP: No, it couldn't have been a better time, and I was both flattered and overwhelmed by the new responsibilities. And it wasn't too long before I was assigned an extremely controversial case to supervise. Those who were around at the time may recall that the question of the authority of the President to impound funding Congress had required to be spent was one of the big issues of the day. The argument was often framed in constitutional terms. Congress had the power to appropriate funds, but the President had full discretion whether to spend them, even if the statutory authority was framed in mandatory terms. And when Nixon was being examined for the possibility of impeachment, the House committee drafting the Articles of Impeachment explored his conduct with respect to the impoundment issue, although the Articles of Impeachment that were passed did not include the impoundment issue. However, while the Civil Division got involved in the impoundment litigation, it turned out that the cases which we actually litigated did not so starkly present the question of the President's constitutional authority.

MS. FEIGIN: You said earlier that post-Watergate there were walls set up so the White House couldn't speak directly with you on these issues, but this was earlier than that.

Were these cases that you were feeling political pressure on?

MR. KOPP: I don't know what would have happened if we hadn't found that we had a decent theory on which to argue the case. When I first learned that we were going to be involved in the impoundment litigation, I was a little bit worried because I had only been reading about the impoundment issue in the newspapers, and it looked to me like it might be very difficult if a statute said that in effect money must be spent and the President refused to spend it. There might not be a reasonable argument to present on behalf of the President. However, the case that I got into as a supervisor was a case called *Commonwealth of Pennsylvania v. Lynn*,<sup>13</sup> and it was a case where the Secretary of HUD had ordered the suspension of millions of dollars for federal housing subsidies and eventually terminated the programs. As I began to study that case, it became apparent that we actually did have reasonable arguments. The statutory authority was not so air tight that the Executive Branch had no discretion whatsoever and so it was possible for us to make an argument that in the circumstances there was authority for the Secretary of HUD not to go forward with spending the money.

I became convinced that we had quite a reasonable argument based on the statutory scheme. The District Court, Judge Richey, had concluded that the Secretary had violated the statute and unlawfully withheld the funds. The Solicitor General, who I think at the time was Robert Bork, authorized an appeal, and the Appellate Section wrote the brief in the Court of Appeals.

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<sup>13</sup> *Commonwealth of Pennsylvania v. Lynn*, 501 F.2d 548 (D.C. Cir. 1974).

As was the standard practice, we circulated the draft brief to our agency clients. At the time, HUD was one of the most difficult agencies for us to deal with because they had a tradition of wanting to do things in litigation their own way. We spent a lot of time haggling with them over the brief and in particular haggling with them over the language of the brief. The main problem was that they would have written the brief to use a lot of their technical language, but for people who weren't totally immersed in HUD's culture it would make the brief incomprehensible. HUD attorneys used very technical language to talk to other people in the agency, and no one outside the agency who was not terribly familiar with this language really could understand what they were saying.

As Justice Department lawyers, we viewed our job as framing a brief which took the points that HUD wanted to make but articulating them to the judges – who after all were generalists like ourselves – in a way in which they could understand what the agency was doing and didn't have to make a translation of technical language to figure out what the government's point was. So eventually we reached an agreement with our clients on the language in the brief, and we went ahead and filed it.

When the time came for oral argument, Mort Hollander made it clear to HUD and everyone else that I would be the one arguing the case. I went through a very intense period of preparing for the oral argument. I also spent a day at HUD where they tried to explain to me all the very fine points of the program so that I would be prepared for any question that came from the court. I found my visit to HUD to be quite a painful experience because the HUD people kept

talking in their technical language and I had to strain very hard to figure out what they were saying. Nonetheless, it was a good experience for me because, by the end of the day, I felt that I had not only mastered their language, at least insofar as relevant to the case, but I could also explain to the court in non-technical terms what HUD's point was.

I then proceeded to make our argument in December 1973 to a panel of the D.C. Circuit consisting of Judges McGowan, Tamm, and Leventhal, and in July 1974, the decision came down unanimously in the government's favor. In a carefully constructed opinion by Judge McGowan, the court concluded that the statute gave the Secretary sufficient discretion to terminate the programs when they were not operating to achieve Congress's purposes, and further the court felt that the Secretary had reasonably concluded that the programs were not achieving those purposes.

MS. FEIGIN: Was it a lively argument?

MR. KOPP: Yes. In the D.C. Circuit with judges like McGowan, Tamm, and Leventhal, it's quite a very hot bench in terms of argument, very similar to the way D.C. Circuit arguments are today. That wasn't always the case with other courts of appeals. There were a number of circuits out there where you would go to present argument and if you got two to three questions, you considered yourself lucky.

Meanwhile, President Nixon won reelection in 1972, but no sooner had he won than the Watergate scandal began to warp everything else that was happening.

MS. FEIGIN: Before we get into everything that happened after the election, John Mitchell, who was in the midst of the Watergate scandal, had been Attorney General. Did you have any sense of him as Attorney General and how he was perceived?

MR. KOPP: No. The thing about many Attorneys General, not all of them, was that there was sort of a disconnect between attorneys in the Civil Division and the Attorney General because the Attorney General didn't seem to have much to do with the work that Civil Division people were normally involved in. The Civil Division rarely, at least in the work I was involved in, had work that involved the Attorney General. The important people for us in Appellate were the Solicitor General and sometimes the person the Solicitor General reported to, who at the time was the Deputy Attorney General. Eventually when the position of Associate Attorney General was created, the Associate Attorney General in major cases was sometimes involved. The Attorney General was somebody who was at the top of the Department but, at least to us Civil Appellate litigators, seemed to be somebody who had no direct influence on the Division.

MS. FEIGIN: Did Mitchell have a reputation as being a good Attorney General?

MR. KOPP: I think people were wary of him, particularly once we got into Watergate. People became very nervous about him for reasons which history has shown as correct. As everyone knows, in June of 1972, before the election, there had been a very strange break-in in Democratic Party headquarters in the Watergate building, and Woodward and Bernstein of *The Washington Post* and other reporters began exploring what had happened. Bit by bit, news began to trickle out as to what had happened at Watergate and then proceedings before Judge Sirica began, and

by the time we got into the period after the November election, there began to be a significant trickle of news about Watergate. For the next 18 months or so, the trickle began to be worse and worse in terms of what the public was learning and eventually this led to impeachment proceedings against President Nixon and his resignation in August of 1974. But of course in 1972 and 1973, very few of us thought that this was actually going to become so bad that the President would have to resign.

Obviously, the White House knew what was going on, and as we went into 1973, the White House became concerned about what Americans were thinking about them and made some personnel changes at the top. In May of 1973, Elliot Richardson, who had only been appointed as Secretary of Defense a few months earlier, was appointed to become Attorney General, and William Ruckelshaus, who had been the head of the Civil Division a while ago, was appointed as Deputy Attorney General. President Kennedy's former Solicitor General, Archibald Cox, was picked by Elliot Richardson to become a Special Prosecutor for the events arising out of the Watergate break-in. And like just about everybody else in the Department, we thought that these appointments were outstanding appointments and it seemed to look at the time like the administration was going on the right course.

However, a few months later, everything exploded as we went through one of the most disturbing events about Watergate, the so-called Saturday Night Massacre. What happened was – and this is obviously well known – Special Prosecutor Cox learned that the White House had secret tapes and he sought

access to them. President Nixon, on Saturday, October 20, 1973, directed Attorney General Richardson to fire Cox. Richardson refused and instead resigned. The President then directed the next-highest person in the Department, Deputy Attorney General Ruckelshaus, to fire Cox, and Ruckelshaus refused and also resigned. Then the third-highest DOJ official, Solicitor General Bork, did fire the special prosecutor, and this all occurred on Saturday.

On Monday, October 22, 1973, everybody who came to work in the Department that day was not in a position to think about anything related to their work. They were all thinking about the events of the weekend, and everybody was shocked and disturbed over what had happened. I remember that about 11:00 in the morning, we heard that Richardson and Ruckelshaus would be speaking in a few minutes in the Great Hall. My office was only a few doors away from the balcony part of the Great Hall, so I promptly walked down there to see if I could find a seat, but even though I walked down quite quickly after I heard that Ruckelshaus and Richardson were going to speak, I couldn't find a seat anywhere. Not only was the Great Hall itself completely filled, but the seats in the balcony were filled too. However, there were a few file cabinets about six feet high or so in the corner of the balcony, and there were several of these file cabinets, and I figured out, and several other attorneys figured out the same thing, that if you climbed on a chair, you could then climb on top of the file cabinets and have a good seat to watch the speakers below. So I climbed up and watched from the top of a file cabinet as Richardson and Ruckelshaus talked. They explained what their disagreement with the President was in very eloquent terms, and at the end,

everyone in the audience was just very emotional and they gave Richardson and Ruckelshaus a long standing ovation. Those of us who were precariously perched on top of the file cabinets did not join in the standing part of the ovation, but we applauded loudly but very carefully from the top of the file cabinets.

MS. FEIGIN: Were you around for the announcement when Agnew resigned?

MR. KOPP: I was, but Agnew is somebody who just didn't seem to have any connection with the Civil Division and our work.

MS. FEIGIN: Was the announcement made at the Justice Department?

MR. KOPP: I don't know. It just didn't have any of the impact on me that the firing of the Special Prosecutor did. Some of it was that Archibald Cox was a person of the highest reputation, and when Nixon had appointed Richardson, and Richardson had appointed Cox as the Special Prosecutor, it looked like the administration really was serious in terms of investigating Watergate. It was such a shock to everyone when Cox was fired. The Agnew matter didn't involve people that at least I had any connection to; it was just one of these shocking things that you read in the newspaper. What was shocking for us, people who lived in Maryland at the time, about Agnew, of course, was that Agnew, before he became Vice President, had been our Governor. Although he was a Republican, and it was then very unusual for there to be a serious Republican candidate in Maryland, just about all of us Democrats voted for Agnew when he was running for Governor because his opponent was an outright, very expressed, racist. Agnew being indicted and resigning was in a very different way than Watergate an unfortunate

surprise to us, but it was something that just didn't have the same impact on me as Watergate, which involved people you knew directly.

MS. FEIGIN: Was there a sense of pride at the Justice Department because your leaders had stood up to this or was there a sense of dejection because your former Attorney General was so involved in this? What was the mood at Justice?

MR. KOPP: The mood at Justice again was when Richardson and Ruckelshaus came in and Cox was appointed, everybody thought that events were on the right track. People felt the system was working in the way it was supposed to, and then with the Saturday Night Massacre, I think people's attitude went to the exact opposite; really something terribly unfortunate and unsettling had occurred and suddenly it no longer looked like the President was doing the right thing. At the time, I don't think most people thought Nixon was implicated, but people became very concerned and said, "My goodness, how high up does this scandal go?"

MS. FEIGIN: So back to your part of the Justice Department. At this point, there's been a lot of movement. Who's now head of the Civil Division?

MR. KOPP: Harlington Wood had left just before Watergate. He was our Assistant Attorney General, and then he had been appointed to become a district court judge. It took a while before he was replaced so we were under the control of an Acting Assistant Attorney General, who was Irving Jaffe, who was a long-term career employee. He served five or six months or so until early in 1974 when Carla Hills was appointed as Assistant Attorney General, and she was a terrific selection. She was an extremely intelligent person, and she of course was just starting what became a very distinguished career in high public positions,

particularly in the Republican administration. Her appointment began to give us, people in Civil, confidence that maybe the government was getting on the right track again, and we felt very fortunate to be working with her. She also was somebody who in all her contacts with us career people, she gave us a lot of respect and she was just a wonderful person to deal with. By this time, I now dealt much more with the front office than I had before I had become a supervisor, so it was important to me to be having somebody in the front office who was the type of person I wanted to work with.

MS. FEIGIN: Was the Appellate Section involved in any of the Watergate litigation?

MR. KOPP: We gradually ended up in it. As you know, at the time Congress was getting heavily into Watergate and eventually impeachment charges would be instituted at the end of July of 1974 against President Nixon. I initially had the sense that we were being appropriately kept out of doing anything in terms of the various litigations that were starting so that we would avoid doing politically-influenced filings in support of Nixon. However, there was one Watergate filing which occurred early in 1974, and it happened during a time when Carla Hills wasn't on board, or at least she wasn't on board in a way where she was responsible for the case I'm going to talk about.

We were headed only by our career Acting Assistant Attorney General and we did get involved in making a filing that can be criticized as being a pure political filing. That was in a case brought by the Senate Select Committee headed by Senator Ervin.<sup>14</sup> As you, of course, remember, the Senate Select

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<sup>14</sup> *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974).

Committee issued a subpoena to President Nixon requiring him to produce the tapes of five taped conversations between the President and John Dean.

MS. FEIGIN: We should say John Dean was counsel to the President.

MR. KOPP: Right. For those under a certain age (laughter). The President asserted executive privilege and refused to turn over the materials to the Senate Select Committee. At this time the District Court had recently ordered disclosure of the tapes to the Special Prosecutor, but the court declined to order disclosure to the Senate Committee, finding that the Committee's need for the tapes did not override the need to safeguard pending criminal prosecutions which was the task that the Special Prosecutor was looking into. The Senate Select Committee took an appeal from that ruling and the D.C. Circuit considered the appeal en banc, with Chief Judge Bazelon presiding.

MS. FEIGIN: En banc from the get go?

MR. KOPP: En banc from the get go.

MS. FEIGIN: That's unusual.

MR. KOPP: Watergate was an unusual time (laughter). The Department of Justice had not participated in the case in the District Court, but we did file an amicus brief in the Court of Appeals, and the brief had on it the names of Acting Assistant Attorney General Irving Jaffe, myself, Tom Wilson, my staff attorney, and very unusually, the name of the Attorney General himself, William Saxbe. Today it's not totally clear to me how we got to the place where an amicus brief was authorized.

Under Department procedures, before the Department of Justice files an amicus brief, the relevant Division prepares a memorandum to the Solicitor

General, and the Solicitor General decides whether to authorize the filing of an amicus brief. I do not remember whether we actually did a memorandum for the Solicitor General in the case, but if the Civil Division did one, it wouldn't have been very meaningful in the context of a case with such enormous political consequences because Civil at the time had only a career official, Irving Jaffe, as its Acting Assistant Attorney General on the case. So as a practical matter, we would not have had any weight in the deliberations on a case with this huge political impact. Formally the decision had to be made by the Solicitor General, who at the time was Robert Bork, although in a case like this, he must have been consulting, obviously, with higher officials in the Department. It's somewhat unclear to me exactly who the higher officials were because this was a time of transition in the top levels of the Department because of the Saturday Night Massacre. Laurence Silberman, Judge Silberman, was confirmed as Deputy Attorney General on February 28, 1974, I believe, which was sort of in the middle of this and I don't know whether he actually personally played a role or not. Carla Hills was confirmed at the beginning of March, but on the brief that we filed, she apparently didn't participate, so the Assistant Attorney General on the case was Irving Jaffe, who was our career person, and he was on the brief as Acting Assistant Attorney General.

A beleaguered White House at this time was almost on a daily basis being shocked by bad news on Watergate. It was obvious that the White House desired some form of support from the Department in the context of the appeal by the Senate Committee to the D.C. Circuit.

What I do remember is that we attorneys in the Civil Division were given explicit instructions, probably they were delivered by Irv Jaffe, relaying instructions from either the SG's Office or the Deputy AG's Office, as to how to draft the brief. Defending the District Court's denial of the Senate Committee's subpoena, our brief included the point that there was an interest of the President in protecting the confidentiality of presidential communications, and in this case it outweighs the needs of the Senate Committee. As stated in the brief, the President must preserve a climate in which his staff can communicate freely with him. While asserting this delicate and important position, however, the brief was very limited in terms of any legal substance. The most amazing thing about the brief was that it was a five-page brief, and our legal discussion in the brief consisted of two pages.

MS. FEIGIN: For people who might be reading this history and are not lawyers, let's give a sense of how extraordinary that is. I think it's fair to say that in a normal brief the facts alone would generally be more than five pages. What would a typical brief length be?

MR. KOPP: Amicus briefs today can be thirty pages, and I think at that time they could also be that long. So there was plenty of unused space that was not used in the brief.

The en banc court came out issuing a very narrow fact-based decision against the Senate Select Committee, holding that they had not made out a case of sufficient need for the documents, particularly since by the time the Court of Appeals decided the case at the end of May, most of the information that the Senate Committee was seeking was available to the House Judiciary Committee.

In preparing for this talk with you, I pulled out the brief that we had done in the case, and looking at it some forty years later, I felt that it was really a very unusual brief that we filed. Normally, in all the other amicus briefs that I've ever been involved in, the key thing that the Department of Justice tries to do in the brief is discuss the legal issues, and here in this brief you might *say* we discussed them. But it was basically two pages in which we discussed them, the type of thing that might make a good summary of argument, but it certainly wasn't the type of legal discussion that a court would expect in a government amicus brief.

MS. FEIGIN: It sounds like you're a little uncomfortable with this brief that has your name on it. Is that fair to say?

MR. KOPP: Looking back at it, I am a little bit uncomfortable with it. I think at the time I actually had a different attitude because I personally was not terribly wild about getting into Watergate at all, and when we were given instructions and told that it was to be a very short brief, and you only had to put it together in a couple of days, I think I was personally pleased that we really weren't going to get that deep into Watergate. But as I say looking back, I find it a very strange brief. A five-page brief on extraordinarily important issues and citing only four cases in the brief.

The decision itself is a case which provides the government in future cases with some support and it's been cited by both Republican and Democratic administrations in litigation subsequent to Watergate. I should add that the position that we took in our two pages in the brief is something that most people would think is consistent with the type of position that you would expect in

government briefs. So it wasn't that what we said in this brief was necessarily controversial or the type of position one might say was out of place. Rather, the strange fact was that there were only two pages of argument in one of the most important Watergate briefs of its day.

Looking back at this brief from today's viewpoint, I am trying to think what was happening in that brief. Why in such an important case, where obviously the White House wanted to get something from the Department of Justice to support them, were we only coming up with this very cursory, short brief? Was it just the fact that the Court of Appeals had set the case on a very expedited briefing schedule, and given the short time, five pages was all that could be put together? In our office, we put together briefs in less than a week that are full fifty-page briefs.

Or was the brief some form of compromise? Some in the leadership of the Department of Justice were very reluctant to get involved in the litigation but could accept a short filing consistent with traditional executive branch position? Was the brief some sort of compromise at a very high level in the Department? A brief which provided a vehicle to show the Attorney General supported the President in this context but the brief otherwise said little? Why was the support so little? Was that a signal that maybe the Department of Justice wasn't all that strong in its support? Looking at the brief from the perspective of history, there's a lot here that historians may want to go over at some point when they go back and explore once again Watergate because I think there are all sorts of things that were happening and we career attorneys had no idea what was going on.

In any event, the result was that we filed this short little brief which in a very narrow context supported the argument of the President and was also more or less consistent with what the Special Prosecutor was saying as well. The result was an affirmance of the District Court position, which was the side of the case that we were on. But the brief obviously didn't give Nixon what he needed. On July 24, 1974, the Supreme Court decided *United States v. Nixon*,<sup>15</sup> which was the Supreme Court decision involving the criminal proceedings brought by the Special Prosecutor against John Mitchell. The Court indicated that the tapes had to be turned over in the criminal proceedings, and shortly after that, of course, the House Judiciary Committee voted for impeachment, and at the beginning of August, Nixon resigned.

MS. FEIGIN: So did life return to normal?

MR. KOPP: Life turned to a different type of world. I think the post-Watergate world was not the same for anybody in government as the pre-Watergate world, and I think the world that we lived in and worked in was very much for the better after Watergate.

MS. FEIGIN: Do you want to describe what you mean by that in terms of DOJ?

MR. KOPP: To start with, we ended up with Ed Levy as our Attorney General. Ed Levy had been President of the University of Chicago. He was someone that not only had a great reputation, but he was not a political person. I think under Levy the reputation of the Department of Justice probably reached as high a point as it has ever reached. Of course President Ford took over for Nixon, and for the Civil Division this meant that Carla Hills was to leave the Civil Division to become

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<sup>15</sup> *United States v. Nixon*, 418 U.S. 683 (1974).

Secretary of HUD, and Rex Lee became our Assistant Attorney General. Rex was just a wonderful person. Everybody who worked with him liked him enormously. In the Reagan administration, he became Solicitor General, and unfortunately he got sick and died prematurely. His early and untimely death was really a great tragedy.

Most of the political people I worked with, while they were political appointees and involved in political issues, they interacted very well with career people and often I didn't have much of a sense of what their personal political views were. That was quite true with respect to Rex Lee. When I worked with him in Civil, I had no idea what were his political views. He was just a very good lawyer who took very reasonable litigating positions and was very highly respected by the career staff, and that was also true when he was Solicitor General. Obviously, particularly when he was Solicitor General, people came to figure out that he had some very conservative views, but he was just the consummate professional in terms of dealing with us and dealing with his job.

So the fallout from Watergate not only led to the departure of President Nixon under duress. It led to some wonderful people coming into the Department. The departure of Nixon and Attorney General Mitchell left the Department a much happier and successful place than it had been during the Watergate Era.

MS. FEIGIN: That's good. At this point, where were you in the hierarchy?

MR. KOPP: I became the Number 2 person in the office because the person who had been the Deputy to Mort Hollander left. The position was open for a while, and Hollander

then moved me into it. My predecessor left because he thought that the position would be upgraded to a GS-16 position which was a very high level in the government pay scale. But getting positions changed to higher levels is a very difficult proposition in the government, and Hollander wasn't able to get the position upgraded to a GS-16 while my predecessor was there; finally he got frustrated and left. Eventually the position in fact was upgraded to a 16, and I became a 16 as a result, and subsequently the position was converted into the new management system called the Senior Executive Service.

MS. FEIGIN: Well that's a happy note to end on I think. Thank you very much for another fascinating session.

MR. KOPP: Thank you.