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 Wednesday, July 30, 2014. This is the seventh interview.

MS. FEIGIN: Good morning.

MR. KOPP: Good morning.

MS. FEIGIN: We left off gripping our seats over Watergate (laughter) and then I assume things calmed down a little bit and you got back to a more normal pace.

MR. KOPP: Whether it was a more normal pace or a different pace, I guess one can debate. One of the underlying currents at the time was something which eventually would morph into a major field of litigation involving suits against government employees, and ultimately was to keep the Supreme Court workload at a significant level for decades to come. That happened as a result of a case called *Bivens v. Six Unknown Named Agents*,[16] which was decided by the Supreme Court in 1971. I wasn't involved in that litigation at all, but several of the attorneys in our office were involved in it. The government's position in that case, that government employees couldn't be sued as individuals, was rejected by the Supreme Court in a 5 to 4 decision, the Court holding that the plaintiffs did have a cause of action to sue the employees. I remember hearing our lawyers on the case talking about it and saying that the legal world as we know it has suddenly turned upside down with all these suits against government employees and this was going to be a major field of litigation for the future.

MS. FEIGIN: Was there worry that you attorneys could be liable?

[16] *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

MR. KOPP: I don't think that was the chief concern. I think the concern was that because government employees would be subject to suit and be called to be witnesses and the like that that would impact their behavior as employees. It would reinforce a tendency that one thinks is a characteristic sometimes of bureaucracies anyway, that people are too timid to act and take action that needs to be done. It was the type of thing that could have a lot of effect on government. Basically employees at all levels would be very hesitant to do something.

MS. FEIGIN: In terms of attorneys, I think in U.S. Attorneys' Offices attorneys were worried.

MR. KOPP: Over the years there has been a lot of interest and a lot of concern in this area. As I said, back in 1971 when the decision came down, the attorneys for the government who had been involved in the litigation – the Supreme Court's decision was 5 to 4 in favor of the plaintiff, the case could proceed – those attorneys just felt it was a really big decision. But from my viewpoint as a relatively new attorney at the time, I heard them talk about it and then it looked like nothing was happening. It took quite a few years before our office did see *Bivens*-type cases. In fact the first case in the area, at least that I paid attention to, was the Supreme Court's decision in *Scheuer v. Rhodes*[17] in 1974, which was not a U.S. government case. It was one of the cases arising out of the tragic shootings by the Ohio National Guard at Kent State.

MS. FEIGIN: Maybe we should say for people perhaps not familiar with the event, why the National Guard was shooting at Kent State.

MR. KOPP: There were anti-war demonstrations and the National Guard was called out. They weren't very sophisticated in terms of how to deal with demonstrators, and they

[17] *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

were shooting and students were killed. The case went up to the Supreme Court. The U.S. government often, even then, would participate as amicus in the Supreme Court to indicate what the federal government's view of the law was. But we didn't participate as amicus in the Kent State case. I think under the Solicitor General's practice today, the federal government would have had no choice but to participate because the federal government almost universally participates in major Supreme Court cases that have an impact on the government. But in those days there wasn't as strong an assumption as there is today that the government will participate as amicus, and we didn't participate. I don't recall that there was any formal decision that we would not participate as amicus. I think nobody ever asked us in Civil to do a memo, and at least my own view was the case was such an atrocious case that I was perfectly happy not to be involved in it. My guess is that maybe people above me viewed the case in the same light so the federal government didn't express its views.

But the decision in *Scheuer v. Rhodes* was, again in the context of state National Guard personnel, that government employees could be liable for violations of clearly established constitutional rights and that they were not protected by absolute immunity if there was such a violation. Once the decision came down, it was pretty apparent to a lot of us that even though that was a decision involving states, and our client was the federal government, it would be very difficult to confine the principle in *Scheuer v. Rhodes* to state officials and not to federal officials. However, for several years that was our litigating position.

In 1976, a couple of years after *Scheuer*, a libel case came up against the Smithsonian where one of its employees had criticized the plaintiff's abilities as an archaeologist. This was about as far removed from *Scheuer v. Rhodes* as one could get, just a completely different situation and also there wasn't any violation of constitutional rights in the case. A D.C. Circuit panel, however, which consisted of Judges Leventhal, Wilkey, and a visiting judge, when they first heard the case, felt that the case should be remanded to the District Court to develop some of the facts in the case, to give the plaintiff an opportunity to show that he had been the subject of libel by the employee. At this point, the Department of Justice became, at least from my perspective, very sensitive to suits against government employees and what they could mean for the government and its employees. We were concerned that if there was factual development on the record the door would be open to harassing suits against federal government employees and their behavior could well be affected. They might start being very timid in terms of actions that they take, or in this case, which was a libel case, of things that they said in dealing with fellow employees. So we filed in that case a petition for en banc review. The Court granted the petition, and I argued the case.

MS. FEIGIN: Was this your first en banc argument?

MR. KOPP: This was my first en banc argument. And we won.

MS. FEIGIN: Was it a lively argument?

MR. KOPP: Yes. The D.C. Circuit was very well known to be one of the most active courts in the country in terms of questioning. I go in there for an en banc argument and, as I expected, I did get lots of questions. At the end, when the opinion was written,

the Court largely agreed with the government's position and ruled that since the employee was acting within the ambit of his discretion he could not be sued.[18] However the Court also stressed that the case was not a constitutional case and left that issue and the question of what happens when there is a violation of constitutional rights, very much open. This was a wise thing for the D.C. Circuit to do because the question of what happens under allegations of violation of constitutional rights turned out to be one of the trickiest issues for the Supreme Court in subsequent years. And indeed I was soon involved in a key Supreme Court case. There was a case in the Southern District of New York that was handled by the U.S. Attorney there.

MS. FEIGIN: Of course (laughter by both).

MR. KOPP: It was called *Butz v. Economou*. The Second Circuit held that the plaintiff suing government employees could proceed to develop the facts in that case where the plaintiff was alleging that he had been improperly prosecuted for violation of his constitutional rights. The Solicitor General authorized the government to seek en banc. However, the petition was unsuccessful.

MS. FEIGIN: Unsuccessful in that they didn't hear it en banc or that they lost it en banc?

MR. KOPP: Our petition wasn't granted. The Solicitor General then authorized cert and the Supreme Court by a 5 to 4 decision rejected the government's position. [19] To some extent *Butz v. Economou* was the federal government counterpart of *Scheuer v. Rhodes* in the sense of starting down the road towards there being significant litigation against federal employees that the Supreme Court had to straighten out

[18] *Expeditions Unlimited v. Smithsonian Institution*, 566 F.2d 289 (D.C. Cir. 1977).
[19] *Butz v. Economou*, 438 U.S. 478 (1978).

time and time again. The principle that stood out to me from the decision in *Butz v. Economou* was the Court's reliance on the *Scheuer v. Rhodes* case involving state employees. The Supreme Court in *Butz* said there should not be different rules of immunity for state and federal officials, and so where we had not participated in *Scheuer*, we now in *Butz* had the consequences perhaps of our not participating in *Scheuer* and coming up with some theory that would have protected federal government employees. The Court didn't see any difference between federal and state employees in *Butz*, and that ruling stimulated a significant number of suits and appeals involving federal government employees.

After *Butz*, we were in a situation where it was very difficult to figure out qualified immunity for government employees. The Supreme Court every couple of years has had to take one or two of these cases to clarify the law. The Supreme Court just recently [in 2014] decided a qualified immunity case which actually was kicking around when I was still in the office and involved the Secret Service.[20] I should add that although the law on qualified immunity has produced lots and lots of opinions and litigation, at least from my experience involving the federal government, there are very few cases where the plaintiff actually has attained a favorable judgment. It's often the type of litigation that goes on, takes time, takes effort, but at some point the plaintiff typically loses. Once in a while there's a settlement. Once in an even more rare situation, there might be a judgment for the plaintiff, but the number of litigations where a plaintiff is successful is very, very rare in terms of the amount of time and effort that is put into that litigation.

[20] *Wood v. Moss*, 134 S.Ct. 2056 (2014).

MS. FEIGIN: There have been some cases where Attorneys General have been worried about this, I believe.

MR. KOPP: That's right, and I know that at least one of the Attorneys General went out and hired his own private counsel basically to monitor the cases that were being handled within the Civil Division that were being brought against him. The Attorney General was sufficiently concerned since it was his own personal liability and he wanted to have his own lawyer at least plugged into and knowing what was going on. It turned out with respect to that Attorney General that there was no cause for concern. He was at no risk whatsoever from the cases that were brought against him.

MS. FEIGIN: Do you want to share with us who that was?

MR. KOPP: I think it might be protected.

MS. FEIGIN: Okay. It has also led to the whole field of government attorney insurance.

MR. KOPP: That's right. Most of the attorneys that I knew and worked with didn't go out and in fact buy attorney insurance, but I did. I felt that since I was going to be involved in doing work in that area, it was a wise thing to get the essential malpractice insurance even though the risk was de minimus. In fact, I never was sued until just about a couple of months before I retired. There was an extraordinarily frivolous suit that was brought against me and a lot of people above me who were much more distinguished than I was (laughter). Nothing ever happened.

MS. FEIGIN: What was the issue?

MR. KOPP: I don't even remember. It was utterly frivolous. But I figured that it was good that I had that insurance. The suit wouldn't have bothered me anyway, but having spent the money, I felt at least I was getting some comfort from having spent it for all those years (laughter).

One of the fascinating things about *Butz v. Economou* for me personally had nothing to do with the subject matter of the case. *Butz* gave me what was probably the worst day in my entire legal career. This occurred when we were dealing with the U.S. Attorneys' Office in the Southern District and trying to get the Solicitor General to authorize the filing of a petition for rehearing en banc in the Second Circuit. The U.S. Attorney could do that only if the petition was authorized by the Solicitor General, and the Solicitor General gives that authorization only after receiving the views of the affected government agencies. Those views would be collected by the Appellate Section, and the Appellate Section would do its own memorandum to the Solicitor General, and then we would get the package approved by our Assistant Attorney General and it would be forwarded to the Solicitor General who would then make his decision. For reasons that escape me now, we were quite late in getting our memo to the Solicitor General. In fact it only got to the Solicitor General about three days before the petition for rehearing en banc was due in the Second Circuit, and indeed two of those three days were part of a weekend (laughter).

We got our memo to the Solicitor General on a Friday, and the petition was due I'm not sure if it was Monday or Tuesday, but anyway it was really tight. Frank Easterbrook – the Deputy Solicitor General at the time – as soon as the

package got to him, set up a meeting for the next day which happened to be a Saturday morning. The staff attorney in Appellate and I went to the meeting that Saturday morning. The first part of the meeting was very productive. We discussed the case and Easterbrook indicated that he would agree with us. It was a very rational and civilized meeting. And then when that part of the meeting was over, Easterbrook – and he's now been a Seventh Circuit judge for many, many years – stood up. He's a very tall individual. I would guess he is about 6' 4" or so. My staff attorney and I were sitting there in our chairs. He stood up and he absolutely towered over us. Then in a very controlled fashion, he started screaming at us. The thrust of what he was saying was basically, "Don't you ever do this again. This is not the way this office expects you to operate. We are not just a rubber stamp and we have to have time."

I must admit that the lecture made quite an impression on me. I can't say that during the rest of my career our office was never late in getting a memorandum to the Solicitor General. I had always known that we had to be aggressive about getting memos to the Solicitor General, but after that meeting – which occurred when I was by then a supervisor – I made it a point to do whatever we could in Civil to get our memos to the Solicitor General on time so that at least it wouldn't be our fault that the Solicitor General didn't have the time that he needed. Eventually our office and the Solicitor General's Office developed a series of protocols which greatly improved the process.

I should add that over the years I began to notice that while Civil Division sometimes was at fault in terms of when a delay occurred, the Solicitor General's

Office also was just as often the cause of delay in the process which helped, I think, make everybody mutually try to do what they could on both sides of the Solicitor General's Office and our office to improve the process. I think, at least by the time I left, the process had been very significantly improved in terms of timeliness and efficiency from the way it was when I was a young supervisor.

MS. FEIGIN: When you're talking about their being recalcitrant, you mean they didn't give you enough time after they authorized appeal? You wanted more time to write the brief?

MR. KOPP: Yes. There was delay over the years in the Solicitor General's Office in getting back to us. There's nothing like a meeting like that with Easterbrook (laughter) to make you both sensitive of your own delay and also to delay from anyone else in the process.

MS. FEIGIN: Have you since argued before Judge Easterbrook?

MR. KOPP: I argued before him I think at least once, maybe twice. At the time I recall we had strong positions and I didn't get any flak from him whatsoever. An opponent, however, who wasn't an experienced appellate advocate, got quite a bit of flak from him. Easterbrook was one of these judges of the school that encourages good lawyering in the courts of appeals. About your only way of encouraging that was to be nasty to lawyers that weren't prepared or weren't competent and discourage them from appearing in the court of appeals again. Easterbrook, I think, at least the few times I saw him, fit into that mold. I should add that I eventually for seven years was on the Federal Appellate Rules Committee working with a group of judges which included Judge Easterbrook, who was a

significant member of that committee. Working with him in that context, he was a pleasure to work with. Quite an impressive person.

MS. FEIGIN: So you learned your lesson and moved on (laughter).

At this point you were not arguing many cases, or fewer cases I suppose because you were a supervisor, but you did get to do a case in the Supreme Court. Would you tell us about that?

MR. KOPP: That's right. When Mort Hollander had been younger, he had gotten a number of cases that the Solicitor General's Office had assigned to him to argue in the Supreme Court, and he always viewed that as a very significant part of his job, understandably. With the passage of time, the practice of the Solicitor General's Office of assigning arguments to attorneys in the Divisions died out. Eventually, after the argument that I had, there were just a couple of other cases that came down to our office for argument, and then about 30 years ago the practice completely died out. The reason why there was this evolution was because in the 1960s and going into maybe the beginning of the 1970s, the Supreme Court had been taking an increasingly large number of cases. It then started taking a much smaller number where it granted cert. So there was a significant decrease over time in the number of cases where the Supreme Court was holding argument. The Solicitor General's Office function was to present briefs and arguments to the Supreme Court, and of course attorneys were attracted to that office in significant part by the fact that they would be arguing in the Supreme Court. As the number of cases that the Supreme Court was taking for argument began to diminish, the Solicitor General's Office became very protective of the number of arguments

that would go to its own attorneys. This meant that the number of arguments that would be assigned to be handled outside of that office, such as in the Divisions, became fewer and fewer. In the mid-1970s, there were very few cases that were assigned to the Divisions. But every now and then fate would intervene.

I forget exactly what the circumstances were in 1975 when fate intervened and sent an argument down to the Civil Division. I'm not sure whether it was the attorney who was on the case in the Solicitor General's Office had left or it may have been that he broke his foot or something like that, but there was some type of incident which meant that the Solicitor General's staff attorney couldn't present the case. There was this case, *United States v. United Continental Tuna*,[21] an extremely technical case involving the intersection of the Suits in Admiralty Act and the Public Vessels Act that needed to be assigned, and so they offered the case to the Civil Division for argument. Mort Hollander just leapt at the opportunity for his office to argue the case because he had really been upset about the fact that the Supreme Court arguments for the office had been disappearing. He called me into his office. I was the supervisor who had been working in the Appellate Section on the draft brief in *United States v. United Continental Tuna* with Neil Koslowe, our staff attorney. Hollander called me in and he asked me whether I wanted to argue the case. The whole thing came out of the blue to me. It was the first I had heard that an oral argument was going to be available so I was totally surprised when he called me in.

The case was a very technical case. When I had been reviewing the draft brief I had found the case a very difficult case to review because of the

[21] *U.S. v. United Continental Tuna*, 425 U.S. 164 (1976).

complexity of what was involved. However, I knew there was only one answer to Hollander's question, and I quickly said yes, of course I would argue it. I just insisted that I have enough time to prepare for the argument without being interrupted by any other duties – a luxury by the way that when I was Director of the Appellate Staff I would not have agreed to if any of my attorneys came in and said I only want to work on preparing for oral argument uninterrupted for two weeks (laughter). But Hollander said yes, which was a good thing because I'm not like many of the attorneys in the office who tend to be natural oral advocates. My style was that in preparing for oral argument I felt I just had to know everything I could know about the case, relevant or not, and only when I had that type of knowledge in me did I feel that I had the confidence to present a good argument. So I spent tons of time in preparing for this argument, much more so than I had done in any other case including the impoundment case involving HUD a few years earlier.

All during the time I was preparing, I had this nagging feeling that this was really wasted time. I was just wasting government time doing this because the case was so technical that the Supreme Court just wouldn't be asking any questions. This was at a time when the Supreme Court often didn't ask much in the way of questions at oral argument and I felt that the odds of few questions were terribly high. I was doing all this work on government time, and it would come to naught because I might get one or two general questions. But when I got to court and started to talk – as I said, this case was in a complex area and if I tried to explain it to anybody today it would probably be incomprehensible both

to me in terms of my own memory (laughter) and to my listener – the Court just came alive. I started getting all these questions. It was just like what happens at oral arguments today where the Court is a very hot court and asks tons and tons of questions.

What I think may have happened was they may have sensed that I knew what I was doing and the Court wanted help in terms of thinking through this case, figuring out what it was about. Reading the transcript later, it seems to me that they asked all sorts of good questions; I must have been answering them in a way which encouraged them to ask more questions because they were just sort of thinking out loud and trying to work their way through this very complex case. After the argument I felt that I had provided a useful service to the Court, and, sure enough, when the decision came down a few months later, the government won 8 to 1, and I could see that my argument had in fact given them some help in how to think through the case. The opinion was written by Justice Marshall.

MS. FEIGIN: Did you buy a morning coat for this argument?

MR. KOPP: I rented a morning coat. Given the rarity of Supreme Court arguments trickling down to our office, I didn't think necessarily that there would be a second time, and there wasn't. Doug Letter in the office did get a Supreme Court argument, maybe even two, in the 1980s, but after that, the practice just dried up completely. It dried up for us, it dried up for the other Divisions. It also meant that the SG's Office couldn't expand in size to deal with its own workload; it needed the attraction for its junior attorneys that they would get at least one argument a term or the SG's Office felt that the quality of the people who it was recruiting would

diminish. Over the years it was sort of interesting to watch that process as it evolved.

MS. FEIGIN: So now we're in the Carter era.

MR. KOPP: So now it's the 1976 election and Carter won. One of the priorities that he had was to return the Panama Canal to Panama. As one might expect, a decision like that was very controversial. The Canal was scheduled to be returned to Panama in 1978, and the Senate was in the process of considering and ratifying treaties which would do that. Sixteen members of Congress brought suit at that time to enjoin the return of the canal to Panama, arguing that it could not be disposed of by treaty. It had to be disposed of by statute which would involve the House of Representatives in the process. So the Congressmen brought suit in the District of Columbia. Relief was denied by the District Court.[22] The plaintiffs appealed on an emergency basis, and the government sought summary affirmance. This all occurred shortly before everyone expected that the treaties would be approved and it would be time to turn the canal over to Panama. So the Court of Appeals quickly scheduled the case for oral argument.

The papers that the government filed were basically the papers that had been worked out in the District Court. I was assigned the case to argue, and in my very short preparation time for the argument, I worked closely with the Federal Programs attorney, Steve Frank, and his supervisor Brook Hedge. Steve later became an attorney in our office, and Brook Hedge became a judge on the D.C. Superior Court. I educated myself on the case and went in and presented argument. We won, 2 to 1, with the result that the Panama Canal was turned

[22] *Edwards v. Carter*, 445 F. Supp. 1279 (D.D.C. 1978).

over to Panama.

The panel consisted of Judge Fahy, Judge McGowan, and Judge MacKinnon. As people who argued before Judge MacKinnon know, he sometimes liked to ask questions that were a bit off the legal topic at issue. During the course of my argument, he began asking me about the Battle of San Juan Hill in Cuba (laughter). When I drew a blank, he then began explaining to me about the Battle of San Juan Hill (laughter) and some other military matters. It was really very hard for me to figure out how to answer his questions on this interesting but totally irrelevant topic. When the decision came down 2 to 1 in favor of the government's position so that the Canal could be turned over to Panama, Judge MacKinnon wrote a 50-page dissent.[23]

MS. FEIGIN: Did it involve San Juan Hill?

MR. KOPP: No, it didn't (laughter). Speaking of history, I noticed a common judicial practice of the pre-computer era while I was preparing for our meeting. I had gone back and pulled from my files the copy of the opinion that had been circulated from the D.C. Circuit, not the one that appears in the Federal Reporter or other reporters but the actual opinion that came from the Court. The opinion consists of different typescripts, basically being Xeroxed and pasted together, and that was the way that the Court at the time handled cases that were on an emergency basis in terms of the technology. An opinion would be cut and paste and issued before it was cleaned up and typed.

MS. FEIGIN: Cut and paste from what? From briefs?

[23] *Edwards v. Carter*, 580 F.2d 1055 (D.C. Cir. 1978).

MR. KOPP: Judges basically had different typewriters and different Xerox machines and when they were deciding quickly – I can show you afterwards, this isn't television so I can't show it to the record (laughter) – and opinions had to be put together quickly, the court's opinions were often cut and pasted together from different items. You noticed for instance that the majority and dissent here were different typefaces and the like. I think I recall this happening in other situations. That was just the practice in terms of the Court taking advantage of the technology but it's obviously not modern technology.

MS. FEIGIN: We will make a copy of some of the pages and put it on file with the D.C. Court Historical Society because people might find it interesting to see.

So you can take some credit for the Panama Canal being turned over. You also got involved in some other controversial litigation during the Carter administration.

MR. KOPP: Yes. What's interesting is when Carter was elected of course he had a lot of support from the liberal side of the country, but during his administration, and certainly in the litigation that I was involved in, we ended up taking some positions which I think did not go over well with people looking at the government from the liberal side. Our office became immersed in some huge cases involving the intersection of national security and the First Amendment, some of which one might say foreshadowed some of the huge discussions and controversies that we've had here in the 21st century concerning the balance between national security and the First Amendment.

One of the cases was *United States v. Snepp*.[24] As tersely summarized by the Court of Appeals, "The United States sued a former employee of the Central Intelligence Agency (CIA) alleging that defendant breached a secrecy agreement with the CIA by publishing a book about the activities of the CIA in South Vietnam and elsewhere without the prior permission and approval of the CIA. The CIA does not assert that the book disclosed classified information or information that defendant had no right to publish." The Civil Division sought to enforce the agreement and to prevent further breaches and to impose a constructive trust on profits. While the Civil Division was headed by an Assistant Attorney General at the time who was quite liberal, as far as I knew there was no question about the Division coming in and vigorously litigating the case. We strongly defended the CIA procedure in the District Court and prevailed.

MS. FEIGIN: Since this involved sensitive material, was it difficult to write the brief or was it difficult to make arguments, because you couldn't say or write certain things? Was it submitted under seal?

MR. KOPP: The book had already been published, and the government litigated on the basis that the book didn't need to involve classified material. Rather, the suit was about the fact that Snepp had signed an agreement that the book would be cleared and then hadn't followed through and had breached the agreement. The government was seeking an injunction against breaches of the agreement and also to impose a constructive trust so that the profits from the book would come to the government.

In the Court of Appeals, I supervised the preparation of the brief in the case. We worked in close cooperation with the trial attorneys, and then I argued

[24] *United States v. Snepp*, 595 F.2d 926 (CA4, 1979).

the case. This was in the Fourth Circuit, and the Court upheld our position that the agreement was valid and that the government could enforce it, although the Court of Appeals also said that, at least in the circumstances, the government could not impose a constructive trust on the existing profits.

MS. FEIGIN: So he would keep all the money?

MR. KOPP: He would keep the profits from the sales of the book. The Fourth Circuit decision was nonetheless a substantial victory for the government. Snepp, therefore, sought certiorari. He filed his petition and the government then, to protect its position on the constructive trust, filed a conditional cross-petition. At this point, usual Supreme Court practice would be that the Court would grant certiorari and set the case down for briefing and argument. But the Court simply took the remarkable step of just taking the case and deciding it without full briefing or argument. It completely ruled for the government, not simply upholding the Fourth Circuit's decision on the validity of the agreement, but also upholding the remedy of the constructive trust which would take away Snepp's profits from the book. The vote was 6 to 3 with the three dissenters strongly criticizing the process of deciding the case without full consideration.[25]

MS. FEIGIN: Do you have a theory as to why it was handled this way?

MR. KOPP: One can only speculate. There were opinions, significant opinions, that were written by both the majority and the dissent. A major part of the dissent was criticizing the process by which the Court decided the case. I don't know whether the majority just felt it was an open-and-shut case and that there should quickly be

[25] *Snepp v. United States*, 444 U.S. 507 (1980).

a decision that resolves the situation. The dissent however had a completely different view and very great concerns about the process.

MS. FEIGIN: Was it a liberal/conservative divide, or how did that play?

MR. KOPP: The dissenters were Stevens, Brennan, and Marshall.

MS. FEIGIN: So it was.

MR. KOPP: Yes (laughter).

MS. FEIGIN: That wasn't even the most dramatic national security case you had during that era.

MR. KOPP: No. There was another one which was really quite extraordinary, *United States v. The Progressive*.[26] For those who weren't grown up at the time, *The Progressive* was a magazine and they had an article that they were going to publish about the H-Bomb, the hydrogen bomb. The article was entitled, "The H-Bomb Secret: How We Got It, Why We're Telling It." The government, when they learned of this, quickly went into District Court and obtained a preliminary injunction barring the magazine from publishing the article, and the magazine of course appealed. This occurred at a time when I was running the office, so I assigned our top litigation attorney to the case, Mike Hertz.

MS. FEIGIN: Did he or you have to get special clearance to work on this case?

MR. KOPP: I don't remember. I think by that time both Mike and I must have had a level of security clearance that was sufficiently high to work on the case. So I guess the answer to your question is, yes, we did have the appropriate level of clearance.

Mike was an absolutely remarkable attorney who could do anything you

[26] *United States v. The Progressive*, 467 F. Supp. 990; 486 F. Supp. 5 (W.D. Wis. 1979); appeals dismissed, 610 F.2d 819 (CA7). See also "National Security and the First Amendment: A Change in Perspective," an article by Thomas S. Martin, Deputy Assistant Attorney General in the Civil Division at the relevant time. American Bar Association Journal, June 1982, p. 680.

asked. He had a brilliant career, and he eventually became the Civil Division's top career official, my superior, operating out of the front office and often being the Acting Assistant Attorney General when we were in a period when we didn't have a political Assistant Attorney General. Mike was just a wonderful attorney. He prepared a brief which explained that notwithstanding that the First Amendment obviously was involved here, that this was just one of those extraordinarily rare cases where the government could get an injunction against publication of a news article; the First Amendment did not protect this type of disclosure. This was in the Seventh Circuit, and the Court set the case for argument, a public argument. This was at a time when, unlike today, courts weren't that sophisticated in terms of how you deal with cases that have classified material. So they had the case argued completely in public, which in a case like this limited greatly the amount of discussion which could take place at the oral argument. However, while the Court was preparing its decision, basically it happened, as can happen, it became apparent that the information involved was out there in public. The point of the government's position therefore became moot and the government dismissed the case.

MS. FEIGIN: "Out there" where?

MR. KOPP: It's unclear to me exactly what happened first. There was a government library where some information may have been public. There were also magazine articles that came out, and where they got their sources I haven't really researched. It can happen in a First Amendment case where someone is seeking

an injunction. It wasn't the last time that something like that happened or the first time either.

MS. FEIGIN: Was this a Department of Energy library?

MR. KOPP: There was a Department of Energy library that was involved.

MS. FEIGIN: That's pretty embarrassing.

MR. KOPP: Yes. As I say, this is what can happen.

MS. FEIGIN: So the suit got dismissed.

MR. KOPP: The government voluntarily dismissed the case.

MS. FEIGIN: One more thing that was going on at that time was another headline case involving Iran. Would you tell us about that case?

MR. KOPP: This was one of the most dramatic cases that I think I've ever been involved in. In 1979 the Shah of Iran was overthrown. Iran at that time was in a total state of turmoil and embarked down a road of great hostility to the United States, and today in 2014 our relationship with Iran is obviously still very much on edge.

After the Shah was overthrown and the hostilities between Iran and the United States began to ramp up, some militants in Iran, who described themselves as students, stormed the United States embassy on November 4, 1979, taking U.S. citizens hostage. In response, President Carter directed the Attorney General to reexamine all Iranian student visas in the United States and deport from the United States Iranian students whose visas had expired. Regulations were issued requiring Iranian students to report and provide the necessary information by December 14. Certain Iranian students and groups challenged the government's action and brought suit in the District Court in the District of Columbia. The

District Court judge, who was Judge Joyce Hens Green, concluded that the government's actions were unconstitutional because they were directed to a single nationality. So on December 11, 1979, she entered an injunction. The Solicitor General the same day, and I believe the Solicitor General at the time was Judge McCree, authorized an emergency appeal.

MS. FEIGIN: Does that mean that you didn't even get to write a memo?

MR. KOPP: That could be right. This just happened so quickly because of the need to act. I don't know whether a memo was done after the event or not. We were probably too busy to worry about things like that. The Solicitor General authorized an emergency appeal and seeking a stay the same day, and on December 14, three days later, the Court of Appeals granted the stay.

MS. FEIGIN: Did you file the papers for the stay?

MR. KOPP: I don't recall the stay papers, but my guess is that we did. It was one of these things that happened so quickly. The Court on December 14 directed the parties to file simultaneous briefs by December 19, five days later, and the Court set the oral argument for December 20. So in this short period of time we put together a team of attorneys in Appellate. We must have been four or five attorneys working on the case, and we worked closely with Federal Programs obviously. We drafted a brief which I quickly reviewed as did our Assistant Attorney General, Alice Daniel, and we filed the brief on time.

I was assigned the argument and while all this was happening, I was trying to prepare myself for the argument. I then went and argued the case. The panel turned out to be a good panel for arguing a case like that. It was quite a

conservative panel. It consisted of Judge Robb, Judge Tamm, and Judge MacKinnon. At the argument the Court of Appeals appropriately asked lots of questions. They seemed satisfied with my answers. By the end of the argument, it was quite apparent that the government was going to prevail. The plaintiffs then sought en banc. The Court was a nine-member court. Plaintiffs got four votes for en banc, and the vote for en banc revealed a sharp liberal/conservative split. The four most liberal judges on the D.C. Circuit voted for en banc, Chief Judge Wright, Judge Mikva, Judge Wald, and Judge Robinson. They wrote that they were not necessarily of the view that the government's actions were unconstitutional, but they felt that the matter was one of exceptional importance which merited en banc review. The conservative side of the court – and I would put in that Judges MacKinnon, Robb, Tamm and Wilkey – voted against en banc review. Judge McGowan, who for those of us who remember litigating in the D.C. Circuit at that time, often was a swing vote on such splits like this, did not support en banc review, so the judgment in favor of the government stood. The case is *Narenji v. Civiletti*; the Supreme Court denied certiorari. [27]

MS. FEIGIN: We should probably not end this session without finishing out the Carter years with something that struck home, which was not a case in the court but the viability of the Section itself. Would you tell us about that?

MR. KOPP: While we were in this era doing quite well in the courts, during the Carter years, and this is really in the first half of the Carter years, the office ran into serious bureaucratic problems, and it almost disappeared as a result. At the time the Carter administration came into office, the organization of the Civil Division was

[27] *Narenji v. Civiletti*, 617 F.2d 745 (1979), certiorari denied, 446 U.S. 957 (1980).

something that had developed haphazardly. The Division was organized into about a dozen sections, some of which were quite small. There were a lot of overlaps where it wasn't clear what belonged to what, and also because there were small units, it was easy to have a situation where one unit was badly overworked and another unit didn't have as much work as the others. So the organization of the Division at the time the Carter administration came in was ripe for somebody to reorganize the Division.

I think in hindsight the fact that the incoming administration came in and decided it had to reorganize the Division was clearly a correct judgment. Most of the overlap occurred at the trial level, but even at the appellate level there was some overlap. There was a Special Litigation unit, for instance, that handled both trial and appellate cases. So when the new administration came in, the incoming Assistant Attorney General, Barbara Babcock, decided that there had to be a reorganization.

Reorganizations in government are typically the type of thing that, whoever is doing the reorganization may decide that it's best to not publicize the reorganization widely until it happens because reorganizations can generate all sorts of bitter internal struggles as soon as the news comes out. So we in the Appellate Section did not really have any idea of what was going on. There were rumors afloat that there might be a reorganization, but that was about the extent of our being plugged in to what was happening. And then the Assistant Attorney General announced that there would be a reorganization and that the reorganization would entail the dissolution of the Appellate Section. Attorneys

would be transferred to trial components, and those components would do both trial and appellate work, so attorneys with appellate backgrounds would still be able to handle some appeals, but they would be doing it out of trial offices.

As you might imagine, Mort Hollander was absolutely furious about this reorganization, and of course everyone in the office was extremely upset. We were very disheartened that even though the office had been very successful in handling appeals and attracted extraordinarily talented attorneys who specifically wanted to handle appeals, we would be dissolved. To talk about this reorganization, Hollander convened a meeting of his supervisors, but he held it off premises so it couldn't be said to be part of his government work. So I made my house available.

MS. FEIGIN: You were a conspirator (laughter).

MR. KOPP: Yes, I was in that sense a conspirator. With the supervisors one evening we met at my house to discuss the reorganization. A large part of the meeting was spent just venting our frustration and talking about how it made no sense. We never came to any conclusion as to what we should do, although Hollander did point out at the meeting that he knew that many of our alumni were aware of the reorganization and he said that some of them had contacted the Attorney General. Indeed long after the event I learned that it had in fact been true that alumni had been contacting the Attorney General's Office. I think Alan Rosenthal's oral history, which is part of the historical record of the Society as well, goes into this in more detail because I think Alan knew a lot more about what was going on than I did.

The Attorney General at the time was Griffin Bell. Griffin Bell was a very different person from Barbara Babcock. Bell was quite conservative. Our Assistant Attorney General was quite liberal. And apparently, according to Alan's oral history, nobody had mentioned to the Attorney General that there was this reorganization that was going on, and he got quite upset when alumni of the Appellate Section as well as some judges began contacting him to complain about the proposed dissolution. Apparently the Attorney General was irritated enough that our Assistant Attorney General decided that she should not pursue that part of the reorganization.

MS. FEIGIN: Do you think a factor in all of this was that Griffin Bell himself had been an appellate judge and therefore had a different perspective from Barbara Babcock?

MR. KOPP: That would only be speculation, but it certainly makes a lot of sense because one of the things that I consistently noticed over the years was that Court of Appeals judges were very concerned about the quality of advocacy in their courts. They were often subjected to arguments by people who were trial attorneys who didn't have experience or training in appellate advocacy. Their case that they handled at trial would go to the Court of Appeals and so they simply assumed that since they were a litigating lawyer they could handle a Court of Appeals argument as easily as a District Court trial. These kinds of lawyers were quite common in the Courts of Appeals, and I think Court of Appeals judges were quite sensitive to the fact that a lot of these attorneys didn't know that appellate argument was a very different thing from trial argument.

Court of Appeals judges were continually doing their own long-term advocacy; whenever off the bench they would talk or meet attorneys to get the point across that appellate advocacy really is a specialty. It probably didn't take much for Judge Bell, if my speculation is true, to be very sympathetic to having organizations like the Appellate Section. So what you mentioned is very good speculation. He was probably very unhappy to hear about dissolution of the Appellate Section because he was a former appellate judge and appellate judges are very sensitive to the quality of advocacy before them.

MS. FEIGIN: We should say he was on the Fifth Circuit so your office had argued before him.

MR. KOPP: That's right. Our office had argued before him many times. In later life, when I would go to some judicial conferences and hear panels of judges talking about appellate advocacy, they would almost always make the point that appellate advocacy is not trial advocacy. I remember one conference I went to where then-Judge Breyer of the First Circuit [now Justice Breyer] was speaking and that was one of the points that he was making. This was something that I think was a very common understanding among court of appeals judges.

MS. FEIGIN: I suppose the flip would be true too. If the reorganization had gone into effect, the appellate attorneys would be expected to be trial attorneys and that might not have been so good either.

MR. KOPP: That's certainly true. It certainly would have been true in my case (laughter), if I had been a trial attorney. What's interesting is none of this was happening in other Divisions. Each Division had an appellate section, and if we had been reorganized out of existence, we would have been the first. And of course later

on, it happened in private practice that you began having an increasing number of appellate boutiques and sections of law firms developing appellate specialties. The trend in private practice was in terms of having appellate specialists, so the idea of dissolving the Appellate Section really was an idea that I think in hindsight particularly was a bad idea, and it was a good thing that, maybe perhaps fortuitously, it got killed.

In other parts of the Division, though, I should add that the reorganization was at least in very significant parts successful because it created the Federal Programs branch out of a grouping of small litigation units that litigated about government programs. Whatever else you might say about Babcock's reorganization, I think the creation of Federal Programs was a tremendous step forward. From my viewpoint, there you have, sort of looking back objectively, a reorganization which what it was doing to Appellate was an extremely bad thing, but at the same time it was a tremendous step forward in terms of modernizing the Division at its trial level with respect to Federal Programs.

MS. FEIGIN: Any consequences for people in the office?

MR. KOPP: As you might expect with something like what happened, it caused a significant degree of bitterness. Mort Hollander realized that his relationship with Barbara Babcock was extremely strained and that he really didn't have any influence with her. Obviously she didn't look upon him as one of her favorites either. But by the time this all happened, the United States was now in this crisis with Iran, and the United States had been blocking the export of Iranian assets from the United States. There were many cases that the United States had an

interest in that were being brought in European courts with American companies making claims against Iran, and the Department of Justice needed someone responsible to monitor and coordinate that litigation. Hollander indicated to the front office that he had an interest in that litigation, and the front office felt that was a fine idea to move Hollander – after all Barbara Babcock still had respect for Hollander – to move him to London and put him in charge of monitoring and coordinating the Iran litigation in Europe. So he was there in London for the last two years of his very distinguished career, and I think he found his stay in London to be a very satisfying ending to his career. As far as I was concerned, miraculously all of this battle over the reorganization didn't seem to negatively impact my relationship with Barbara Babcock.

MS. FEIGIN: Maybe she never knew about the meeting at your house (laughter by both).

MR. KOPP: That could be, but you know there are no secrets when things like this happen. We in fact did retain a decent working relationship, and when the Senior Executive Service was set up, I became a charter member of the SES. And after Hollander left, I was Acting Director of the Appellate Staff. Barbara Babcock went back to Stanford as a professor, and over the years I began noticing that we were getting a lot of very good attorneys from Stanford applying to our office and almost all seemed to comment that Barbara Babcock encouraged them to apply to Appellate. So in the long run, from my vantage point, things worked out very well.

MS. FEIGIN: They did. And maybe that's a good note to end on, a very upbeat note. So thank you very much for another fascinating session.

MR. KOPP: That was fun.