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 Thursday, February 6, 2014. This is the fourth interview.

MS. FEIGIN: Good morning.

MR. KOPP: Good morning, Judy.

MS. FEIGIN: When we left, you had just been hired to work in the Civil Division, Appellate Section. What was life like at that point in time?

MR. KOPP: When I started my employment, I knew that the Civil Division attracts lawyers who wanted to be litigation lawyers, and I also knew that there were strong similarities between what I would do in my job and what my law school classmates at private law firms would be doing at theirs. We had all been hired because of our potential abilities to be litigation lawyers, not because of our views on public policy.

MS. FEIGIN: Let me just interrupt you for a second. Was there any question at any point in the interview process as to where you stood politically?

MR. KOPP: No. One of the things that was a very strong factor in how the office operated was that it was a non-political office, and actually what I found interesting as I was there with the passage of time is that I generally didn't have any great sense with most people of whether they were Republicans or Democrats. We had a few members of our office who eventually became judges, and it was only when they were appointed and knowing which administration appointed them could I figure out what party they belonged to. Sometimes people who I thought might be Republicans turned out to be Democrats, and sometimes it was the opposite way.

I think one of the things about the office was that we really were a very non-political office.

MS. FEIGIN: How was a new attorney assigned cases?

MR. KOPP: Basically they would start you off with preparing memos to the Solicitor General recommending for or against appeal in cases where the government had lost in the District Court. This was a basic part of our process. The Solicitor General was the official in the Department of Justice who had the responsibility for deciding whether the government would proceed with appeal or, if the case had been lost in the Court of Appeals, proceed to the Supreme Court. So new attorneys were started off with easy memos to the Solicitor General giving recommendations. These recommendations were done after soliciting views from the trial attorneys and the agencies and offices that were impacted by the decision. This was a basic Department process that has continued forth to this very day.

MS. FEIGIN: Let me get a sense of the setup of the office. Did you have officemates? How did it work?

MR. KOPP: The office when I arrived for work was on the third floor of the Main Justice building. I was assigned to an office that had a very nice view of Pennsylvania Avenue and somewhat dilapidated buildings on the opposite side of the street. The FBI building had not been built at that time, and there were shops and restaurants. I remember there was a camera store on the block that was eventually torn down to build the FBI building. I also remember that it was very controversial whether the FBI building should be built there. There was a big debate in Washington as to whether the Kennedy Center should be built there or

along the river. Rumor has it that J. Edgar Hoover put his foot down and said the FBI headquarters is going to be built here in the center of the city, and the Kennedy Center can't have this property (laughter). At the time I know a lot of people thought it was outrageous because the Kennedy Center belonged right in the heart of downtown Washington.

MS. FEIGIN: I don't think you discussed this previously, but the FBI was in the Justice Department at the time, right?

MR. KOPP: The FBI fit in the Justice Department at that time. J. Edgar Hoover's offices were on the 5th floor of the building. They are now occupied by the Civil Rights Division. The Assistant Attorney General for Civil Rights sits down the hall from the Solicitor General's office and has one of the greatest views in the city.

MS. FEIGIN: Was the lab in the building as well?

MR. KOPP: I don't know about the FBI lab, but that sounds right to me because there is in the basement of the Main Justice building a warren of offices. It would make a great place for there to be a lab and also there was a shooting range down in the basement at that time, which I had nothing to do with of course (laughter).

MS. FEIGIN: So now there's an entire building for the FBI plus of course Quantico.

MR. KOPP: That's right (laughter). And the Department of Justice today extends across many buildings in Washington, in the city and the suburbs.

MS. FEIGIN: But at the time you came, it was entirely housed in that one building?

MR. KOPP: I'm not sure it was entirely housed there, but the Civil Division was housed in that building and only gradually through the years as the Division expanded did the bulk of it move out into neighboring buildings.

MS. FEIGIN: When you arrived, did you have an office of your own?

MR. KOPP: No. I was in an office where I had an officemate and also a secretary in the office with us as well. In the office next door to me, there were three attorneys and a secretary.

MS. FEIGIN: Maybe we should explain for people down the road who won't really know what a secretary did for an attorney in those days.

MR. KOPP: (Laughter). It really is very interesting because of the great shift caused by technology. I've seen it happen before my eyes at a very gradual pace in the 45 years I was in the Department. In those days we were an office that had between 15 to 20 attorneys, and basically every two attorneys shared a secretary. Sometimes when we had vacancies in the secretaries, it was a 3:1 ratio, but at its core, the idea was that it was one secretary for two attorneys. The secretary was very important because only a few attorneys typed their own drafts, and the rest of them handwrote them, so the secretary was really essential.

My officemate was Bob Zener, who was a brilliant attorney who had been in the office for about four or five years at the time, and he strongly suggested that I should start typing my draft briefs, that that was a much more efficient way of doing it. So I took his advice and began to type my briefs, but I really wasn't very good at it and made a lot of mistakes, and I was very pleased that I had easy access to a secretary. What I would usually do is make a stab at typing my own draft, and if I made a typo at the beginning of the page, I just took the piece of paper out of the typewriter and started over. But as I got down toward the bottom of the page, if I made a mistake, I was essentially stuck with it. It was just too

much work to have to go back and retype the whole page because of typos at the bottom.

MS. FEIGIN: We should make clear, because I think there will be people who may not be able to fathom this, that this was the day of manual typewriters and carbon copies, correct?

MR. KOPP: Yes. This was the time of manual typewriters and carbon paper. And of course when you were using carbon paper and you made a mistake, you had to throw away about five or six pieces of paper and start over again on a particular page. Secretaries really were important because, like my secretary, Clara Greenberg, they just were very, very good, and there was no way I could do any of the things that they could do and use my time efficiently as well.

MS. FEIGIN: They also answered phones, didn't they?

MR. KOPP: Yes. They were very good at answering phones. We didn't have voicemail or anything like that.

MS. FEIGIN: Your secretary, and I don't think she was unique, she actually, as I understand it, had been trained as a lawyer?

MR. KOPP: Yes. I didn't know that when I was there, but it didn't surprise me when I learned that because there were a lot of women in the Department at the time who had come into the workforce during World War II and they stayed on and a lot of them became secretaries even though some of them had the type of educational background where today one would think they would have the potential to be very competent in the professional workplace.

MS. FEIGIN: Before we get to what it was like when you were there, there's a fabulous story about what the Section was like in its early incarnation when David Kreeger was the head of it. I wonder if you can share that story with us.

MR. KOPP: Sure. In the 1940s, during World War II, the office, which was then known as the Supreme Court Section, was a small office of about five or six people. In some sense it was very similar to the type of office that my stepfather was familiar with when he was in the Tax Division, where they had also very small offices. What would happen would be that the Solicitor General's Office, which was itself a small office of about five or six attorneys, would turn to the relevant offices in the Divisions and have them assist in the preparation of Supreme Court briefs. So the section that David Kreeger headed, the Supreme Court Section in the Civil Division, was an office of five or six people, and the bulk of their work was preparing draft briefs for the Solicitor General's Office, and every now and then they would do a Court of Appeals brief as well.

David Kreeger, who eventually became one of the great philanthropists in the Washington area after he left the office, was a very hard worker and became the head of the Supreme Court Section. This was during World War II, and one evening he was working at his desk very late at night on a brief, I think it was a Court of Appeals brief, but I could be wrong on that. Anyway, he was working on a brief that related to the war, and he got a call on his phone and it was President Roosevelt (laughter). Apparently a copy of the draft that Kreeger had been working on had gone to the President, and he had read it over and had some questions, and he got into a discussion with Kreeger about the brief. As Kreeger

would tell the story, he convinced the President that the way the brief had been drafted was the correct way to do it, and the President agreed with his take on the case.

MS. FEIGIN: In all your years at the Section, and you ultimately became head of the Section, do you think presidents got copies of your briefs?

MR. KOPP: Not often, but once in a while they did. Of course, as the Department became a bigger place, when I say a copy of our brief would get to the President, the brief would get to the White House by going through a lot of other people before it would ever leave the Department. So with respect to the DOMA [Defense of Marriage Act] litigation or healthcare litigation, I'm pretty sure those briefs did get to the President or certainly to someone very close to him. They would be briefs that would have gone through many, many people in the editing process. While in the time of David Lloyd Kreeger, I think the brief that got to Roosevelt sounded like it was actually the brief that Kreeger had written.

MS. FEIGIN: Did you have many times that the White House, maybe not through the President but through a subordinate, would get back to you about changing things?

MR. KOPP: That was extremely rare, and part of the reason that was rare was – I forget whether it was in the Reagan administration or the first Bush administration, or maybe the Carter administration – but at some point there was concern about the White House dealing directly with career attorneys. So there was a rule that went into effect that career attorneys couldn't be in touch with the White House directly. They had to get authorization before that could be done. It was basically designed to protect career attorneys from White House influence without it going

through the proper political leadership. So it turned out to be very rare that attorneys in our office dealt with the White House directly.

MS. FEIGIN: It sounds like it had been a problem, maybe not for your office, but it had been a problem or they wouldn't have instituted the rule.

MR. KOPP: I don't know whether it was Watergate or things subsequent to Watergate but there were periodic, not scandals, but periodic questions raised about the influence of White House people, so this rule was promulgated. It made it more cumbersome if you were dealing with a case where you really did need to consult with the White House. We had cases involving the use of White House computers, for instance, and the Freedom of Information Act where the White House really was our client and you'd have to get authorization before you could deal directly with them. But in general, I think most people were quite happy that they had this layer of protection from having to deal directly with the White House.

MS. FEIGIN: For anyone interested in having an example, they can look at Alan Rosenthal's history because he talks about John Dean in the Nixon White House trying to influence the way a case was handled. So that's at least one time that it affected your Section.

MR. KOPP: I think the rule made it more cumbersome for us, but I think as career people, we really all, for the most part, were very appreciative of the layer of protection. Thinking back to John Dean and how the White House operated at that time, it's easy to understand why as a career lawyer that type of protection is beneficial.

MS. FEIGIN: Getting back to your arrival at Justice, how diverse was the office that you entered?

MR. KOPP: By the standards of the time, I think it was more diverse than most of the offices in the Department of Justice. For instance, we not only had women in the office, we had a supervisor, Katherine Baldwin, who was a woman, and Mort Hollander, the head of the office, had fought long and hard to get her promoted to be a supervisor. This was at the time when Bea Rosenberg had become head of the Appellate Section of the Criminal Division, and of course that, I think – although I don't know this personally – I'm sure that that must have helped Mort in terms of getting Katherine Baldwin promoted to become a supervisor. So we had, and this was in an office of 15 to 20 attorneys, a woman supervisor, and there also were several women attorneys in the office as well when I arrived. We also had a black attorney, Fred Abramson, who was a Yale graduate, and he was absolutely one of the nicest people, as well as being an extraordinarily smart person, that anyone would ever want to meet. He was in the office for about three or four years, which in those days was sort of the normal time that people stayed in the office. He left to work at AT&T and had a very distinguished career. He became president of the DC Bar, and then unfortunately he got AIDS and died of AIDS, which to everyone who knew him was a terribly sad event because Fred was such a wonderful person.

The office also when I arrived was very interesting because we had an office that ranged in diversity from people who were very conservative to people who were very liberal, and you sort of didn't know this when you came into the

office. This was in the day when in the DC Circuit there was the Bazelon court, and of course the Supreme Court was presided over by Chief Justice Warren. Both courts produced decisions which were quite controversial among attorneys, and you after a while in the office began to have a sense that some of our people were very conservative because of their reactions to these decisions, and other people were quite liberal because of their reactions to these decisions. So while you never really had a sense of who was a Republican and who was a Democrat, you had a sense that there was a broad diversity in terms of people's legal thinking, which made the office a very interesting place. When you'd go down to the cafeteria for lunch, you sometimes would get into very interesting discussions.

MS. FEIGIN: Since the office recommended whether a case should be appealed, what cases did the office personally handle as opposed to the U.S. Attorney's Offices from whence they came?

MR. KOPP: The office had the authority to handle cases in the Courts of Appeals, and in those days, we could handle probably over 50% of the civil cases that made their way from the District Court to the Court of Appeals, which is very different from when I left the office when probably the percentage of cases the office had the capacity to handle was something well below 10% or 15%.

MS. FEIGIN: Just to understand this better, the office had burgeoned, so the office by the time you left was how much larger than at the time you came?

MR. KOPP: When I left the office, it was an office of 60. When I came, it was an office of 20.

MS. FEIGIN: So three times as large and yet it's handling a fifth, because there's so much more litigation?

MR. KOPP: Yes. There basically was a lot less that you could handle in terms of the proportion of the litigation than in theory you had authority to handle. The office had the authority to decide whether a case would be kept in the office or assigned back to the attorney who had handled it in the District Court. Attorneys who handled cases in the District Court often didn't want to give up their cases when the cases went to the Court of Appeals. Mort Hollander, the head of the office, was generally very successful in asserting his authority and pulling into our office cases that he thought we should handle in the Court of Appeals. However, there was one U.S. Attorney's Office, the U.S. Attorney's Office for the Southern District of New York, which would never agree to our office handling cases in the Court of Appeals when that office had handled a case in the District Court. That office had a very fine reputation, and it also had people who had been in their office who were Second Circuit judges who would tell people in Washington what a great office it was and they really expected to see people from the Southern District arguing before them. So the U.S. Attorney thought it was an important part of his job to make sure that the U.S. Attorney's Office continue to be able to argue cases before the Second Circuit. If our office gave any indication that it wanted to handle a case from Washington, the U.S. Attorney for the Southern District of New York was prepared to come down to Washington and argue to the Attorney General himself that the case should not be handled by attorneys in Washington and indeed the U.S. Attorney would resign (laughter) if this well-established tradition were to be set aside. Since the U.S. Attorneys from the Southern District were all very impressive people and the Attorney General

would never want them to resign, the Southern District had a very successful record in preventing our office from handling cases out of their office in the Second Circuit.

MS. FEIGIN: Maybe that's why they were, in my understanding, jocularly – or maybe not so jocularly – referred to as the Sovereign District of New York.

MR. KOPP: I suspect that's right (laughter). However, with other districts, Mort Hollander was much more successful in being able to decide himself whether a case should be handled by our office or remain in the trial office. With the passage of time, the number of cases that remained with the trial attorneys increased simply because our office, the Appellate Section, didn't have the capacity to handle more than a relatively small percentage of the cases that were going to the Courts of Appeals.

MS. FEIGIN: What kind of criteria went into this process? Was it cases that you thought were significant nationally? What made a case one that the Appellate Section would want to hold onto?

MR. KOPP: The first question, and now I'm jumping to the way things were when I left the office as opposed to the way they were when I came, because when I came basically there was a very strong presumption that any case in the court of appeals would be handled by our office except for a relatively small number of cases. When I left, we really had a very different situation.

When I left basically, and I'm talking about how I viewed the process as head of the Appellate Staff, the first thing I looked at was whether the government was the appellant or the appellee. If the government was the appellant, both

because the government had lost in the District Court and the Solicitor General had authorized an appeal, that presumptively meant the case was quite a significant case because normally if the case didn't have some significance, the Solicitor General wouldn't be authorizing appeal. So if the case was a government appeal, I viewed it as a very strong presumption that we would handle the case in the Court of Appeals, and usually that was the way things turned out. On the other hand, if the government was the appellee, that was because the government had won below. You had presumptively the benefit of a trial attorney who had done a good and successful job in the District Court plus a favorable District Court opinion and so again, presumptively, when I would make an assignment, I would start with the idea that there was no reason to change the handling of the case unless there was some special issue or principle at stake or need for coordination with other cases.

I don't have the statistics before me now, but I think if one examined the statistics, at least at the time that I left the office, one would find that well over 50% of the cases where the government was the appellant were handled by our office, while where the government was appellee, probably our office handled, and again I'm guessing at this point, probably 10% to 20%, but the numbers were such that one had to keep assignments within range of the capacity of the office. With the passage of time and the increase of the litigation case load, it was the appellee cases that more and more went back to the trial attorneys.

I should add that over the years our relationship with U.S. Attorneys' offices became much improved from my early days in the office. There was a lot

of mutual respect that developed between our office and the U.S. Attorneys – including the Southern District of New York – and significant assignment disputes became quite rare.

MS. FEIGIN: When you began, how often would you have a case where you'd be arguing in court? How many arguments per year would you say?

MR. KOPP: When a new attorney came, it would take a while to have any arguments because you had to write some briefs. Mort Hollander would always make a point of making sure that a new attorney in their first year would at least have one or two arguments, and that was something that always continued in the office. When I was head, we would make sure that our new attorneys would at least get several arguments in their first year, and even if they hadn't written briefs that had come up for argument, we'd find them spare arguments because getting an argument your first year was really an important part of the Appellate Section and Appellate Staff experience. So typically a new attorney might have as many as four arguments the first year, but sometimes less, and again we made it our business to make sure that they at least had a few in the first year.

In the second year, an attorney could have perhaps the largest number of arguments that they might have in their time on the Appellate Staff because at that point they would have written a good number of briefs, and those briefs would have reached the point where they would be coming up for argument, and again, since you're talking about a new attorney, these wouldn't necessarily be the most complicated cases in the office, so they could handle a significant number of arguments. So you might get anywhere from four to eight arguments in your

second year. And then the number of arguments you'd get would probably go down some as the difficulty of the cases and the amount of time that you need to spend doing a brief would go up. So later on in your career on the Appellate Staff, the number of arguments you might present would probably range, for most attorneys, from three to six. Sometimes attorneys had bad luck and the number over a particular year would drop way down, and sometimes on the other hand, you'd have a bunch of cases being clustered in terms of how the courts took the cases up for argument at certain times and then an attorney might have to give up arguments in some cases because he or she just couldn't handle them all. So I think for most attorneys who have been there a while, you'd have, as I say, sometimes four arguments, sometimes a little bit more, sometimes a little bit less. There's a certain unpredictability, but one of the reasons people liked the office and eventually stayed for longer and longer periods, was that they found oral argument one of the most satisfying parts of their job.

MS. FEIGIN: We should say they went to all the circuits but back in those days there were only ten circuits, and now there are eleven. This leads me to ask you, because you have perspective on this, a wide view that most of us wouldn't be able to have, about the split of the Fifth Circuit into two circuits. There has been talk many times about a split of the Ninth Circuit. Do you have any thoughts about whether that would be a good idea?

MR. KOPP: Also, there's the Federal Circuit. There's actually in the Civil Division an office which handles, for the most part, litigation in the Federal Circuit. Our office from time to time does handle cases in the Federal Circuit as well.

I'm curious whether you think the split was successful and whether you think it should happen in the Ninth Circuit.

MR. KOPP: That's a very difficult question because on the one hand, my experience with the Ninth Circuit is that it's very hard for a court of that size to operate effectively. The judges have such a large caseload and they're spread over such a large geographic area that it's very hard for the judges even to know a large number of their colleagues and certainly to know them well. I think by not knowing your colleagues well as people, as opposed to just judges, there's something that gets lost in the quality of the court. I think the courts where the judges see each other a lot, that promotes interaction and it probably promotes better decision making.

In the Ninth Circuit there is a very real problem that results from the very large size of the court. But the question is how do you split up the Circuit in a way that makes things better. The basic problem there is California is just so huge that to split the Circuit you either have to split California, which has a lot of downsides, or make California basically a circuit by itself or a circuit with some small state, which isn't going to want to be a little state in a circuit that is dominated by California. In my professional lifetime, people always started out with the idea that the Ninth Circuit was too big and had to be split, but they could never figure out a way to do it.

I should mention, by the way, that in addition to the eleven circuits, there is also the Federal Circuit. There's actually in the Civil Division an office which handles, for the most part, litigation in the Federal Circuit. Our office handles a significant number of cases in the Federal Circuit as well.

MS. FEIGIN: Let's go back to your early years. As you said, the cases in the beginning were simple so they probably weren't the most interesting of your career, but at least in one specific area, your career started in one way and ended in a very different way, and I wonder if you could tell us about that.

MR. KOPP: When I joined the office, the way you got assignments is they would start you off with cases that were basically routine cases. We had many issues in the office that were reoccurring types of issues. For instance, we had suits under the Federal Tort Claims Act, we had some admiralty cases, we had suits where people would seek some form of injunctive relief to stop the government from doing something that either they felt was injurious to them or kept them from doing something they felt they should be able to do, and among the types of suits, litigation, that we had were cases involving government employees where there was some type of disciplinary action taken against them that was then reviewed by the Civil Service Commission. If the government employee didn't like the decision of the Civil Service Commission, they would seek judicial review in the courts.

There was a whole range of conduct that employees might do that would result in disciplinary action against them or discharge. Among that was that if you were gay and involved in what at the time was commonly characterized as lewd conduct, that was something that you could be discharged for. When I came into the office, one of the types of cases that was a very common type were people suing to get a determination that they should not be disciplined or fired because of their conduct for being someone who had been involved in seeking a companion of the same sex. These cases for the most part were quite cut-and-dry,

and the courts, at least at the time I arrived at the office, pretty universally accepted the fact that if you were involved in solicitation for gay sex, that was something that you could be fired for. There were a number of those cases that made their way to our office, and they were pretty much viewed by everyone as cut-and-dry. The attorneys who represented the plaintiffs often themselves bought into that notion and didn't get much into the conduct that their client had been involved in but instead presented their cases based on various technical points, such as the Civil Service Commission had failed to do such and such in terms of reviewing the case or had overlooked some procedure. There was a lot of emphasis in some of these arguments by the plaintiffs' attorneys on very technical issues that permitted them to avoid a challenge to the prevailing principal that if you were involved in gay solicitation, that that was lewd, immoral conduct for which you could be fired. That was just accepted at the time.

MS. FEIGIN: Can you tell us about a case you had in the Ninth Circuit. You also had a case in the D.C. Circuit on that issue, and they went differently. Can you tell us a little about them?

MR. KOPP: As I say, at the time these cases were basically viewed as very much cut-and-dry, and there were always a few of them that were in the office and they were essentially assigned to new attorneys as more or less of a training vehicle. At the early stage of my career, I ended up handling a few of them, and one of the first arguments I had was in a case where somebody who was gay was fired by the government. The Civil Service Commission upheld the firing, and the plaintiff appealed. I did the brief and the case was in the Ninth Circuit. I went out and

argued the case. The presiding judge was Chief Judge Chambers, who had, before he became a judge, a career in the Navy, and at the oral argument he spent a large part of the time cracking jokes and telling old Navy stories, and didn't really seem to be very interested in the arguments, certainly not the argument by the plaintiff, and not that much interested in my argument either. Then the case came down and it was an easy win for the government. This was in 1968. That was sort of an extreme instance I think of the attitude of the courts and the government.

MS. FEIGIN: Were his comments crude?

MR. KOPP: Yes. For somebody on the bench, they were unusual comments to say the least. Several years later, I had another case involving someone who was gay, and this was in the D.C. Circuit. I prepared the brief, and the argument came up at a time when the Johnson administration was ending, and there were some people who were working in the Assistant Attorney General's Office who because the administration was ending didn't have that much to do. They were interested before they left the Department in having an oral argument in the court of appeals. So one of the really nice bright attorneys who had been working for Assistant Attorney General Ed Weisl came down to see me and asked whether he could do an argument in a case I had briefed called *Norton v. Macy*. I said I'll check with my supervisors, but I'm not opposed to your doing the argument. So I checked, and contrary to the way they normally would react – because the office generally jealously would protect its oral arguments in cases that it had briefed – they didn't have any objections to this attorney arguing the case. We told him sure, he could

go ahead and argue the case. It was just another simple case involving a Civil Service Commission decision upholding the discharge of someone who was gay. So the front office attorney ended up arguing the case.

He did a fine job on the argument. However, he drew a panel that consisted of Chief Judge Bazelon, Judge Wright, and Judge Tamm, and it resulted in a 2 to 1 decision in favor of the employee. The majority decision caught something that we hadn't picked up on in our brief, which was that the person who made the decision to discharge the employee said the employee actually was doing a perfectly fine job in his work but he still had to fire him. The court picked up on this and said the standard for firing government employees is when their conduct impairs the efficiency of the service. The work that this employee was doing was conceded by the firing official to be fine so the firing can't stand because it doesn't impair the efficiency of the service. At the time in our office we were very surprised by the decision and the Solicitor General authorized rehearing en banc. It was denied, and at first we just thought the decision would stand as sort of a fluke, but in fact it became one of the very important decisions in terms of the advancement of gay rights, and a few years later, the Carter administration basically changed the policy with respect to discharges of someone because they were gay and made it clear that there had to be impairment of the work relationship. That really was a major step in terms of the advancement of gay rights.

At the very end of my career, I ended up in the Obama administration working on the *DOMA* case where we argued that the Defense of Marriage Act,

which defines marriage as being between a man and a woman, was unconstitutional with respect to federal statutory law. I kept thinking back. I had started off my career arguing one way and now here I am doing something that is on the other side. It showed the evolution that has happened in terms of how we look at gay rights in terms of the law. Add to this the Clinton administration and gays in the military, which was an important intermediary step in terms of the advancement of gay rights even though at the time it was a compromise policy designed basically to limit gay people in terms of their ability to be in the military. That's a story we will want to talk about later.

MS. FEIGIN: You're welcome to talk about it now if you'd like.

MR. KOPP: We can wait, or you can splice it together when we get to it later on (laughter).

MS. FEIGIN: Let me go back one minute because you talked about the Ninth Circuit and Judge Chambers. There's a story about Judge Chambers and the Appellate Section involving Neil Koslowe. Can you tell us that story?

MR. KOPP: Neil Koslowe was one of my colleagues and an Orthodox Jew, and by the time he was in the office, I was a supervisor. He had an oral argument in a case that we had briefed set for the Ninth Circuit and it was set to be argued on a day which was a Jewish holiday. I'm not sure in terms of the timing, let me check it and we can discuss it later on.

MS. FEIGIN: Okay, we'll do that next time. Let's see if we can begin to talk about when your career started to kick into high gear and you started getting more high visibility cases, although actually the gay case in retrospect had more visibility than expected. But when you got cases that you knew were high visibility.

MR. KOPP: The first high visibility case that I handled was a case under the Federal Tort Claims Act which was not your routine tort case. At this point I had had a few routine cases under the Federal Tort Claims Act. The Tort Claims Act was a basic source of a lot of the litigation that was in the office. But this case was very different because it involved a large test by the government which involved supersonic flights over Oklahoma. The flights had caused sonic booms which had startled the residents of Oklahoma City and then people began to get very upset about the sonic booms. Some of them noticed cracks in their houses which they thought had been caused by the sonic booms. More than 70 residents of the Oklahoma City area brought suit against the government under the Federal Tort Claims Act claiming that the sonic booms had damaged their homes. The District Court there set up a number of test cases to adjudicate in those cases the liability issues with the idea that then the other cases would use those cases as models and hopefully there wouldn't have to be additional litigation, just settlement. But in any event, the idea was to start off with some test cases.

In these test cases, the District Court ruled in favor of the plaintiffs and awarded them damages based on the cost of repairing the cracks in their homes. The case generated a lot of publicity, particularly in Oklahoma, and when I was assigned the case, I was very excited because Mort Hollander, the head of the office, and the supervisor on the case, Alan Rosenthal, both stressed to me how important the case was and how they felt confident that I was the right person to handle this. For a young attorney, this was the type of thing that was very exciting to hear. So I went to work on the case and wrote an appeal memo. The

Solicitor General authorized the appeal and then I began writing the brief.

As I wrote the brief, I did what should happen when you write a brief. You convince yourself that your position is absolutely right and I became more and more convinced that we were right. I noticed that there was evidence that said that people have cracks in their houses all the time and typically they don't notice them and then suddenly something happens and all of a sudden they look around their house and they do see cracks. I went home and looked around my house and saw cracks I had never seen before and thought, hey, there's a lot to that. So I very eagerly wrote the brief for the appellant in the case and went out to the Tenth Circuit after having an extensive moot court in the office.

A moot court is a practice that our office always had before arguments. I had the moot court and I felt that I really knew the case and I was very excited to be doing the argument. At the argument, it was hard to read the court because the Tenth Circuit in those days didn't ask too many questions, but for me, the fact that the court wasn't asking a lot of questions and we were the appellant, I interpreted as a good sign. I figured that since our position would probably be unpopular with people in that part of the country that there would be a lot of hostile questions. When I didn't get that hostile questioning, I felt that was a good sign. So I went back to Washington very excited about the argument and I was even more excited when I got a copy of the Oklahoma City newspaper and there was a big write up on the case. It was the first time I had ever seen an argument that I had presented in the newspaper. I actually thought we might win the case. However, a few months later, the decision came down and the court noticed that

this was an appeal that turned ultimately on questions of fact, and the decision of the District Court was not clearly erroneous and that was the end of the matter. Since the decision of the District Court judge turned on factual questions, the clearly erroneous rule was dispositive.

MS. FEIGIN: That often works for the government (laughter).

MR. KOPP: That's right. That often works for the government as well. And actually, not long afterward, I had a case where that was exactly what happened. This was a very tragic case where a pilot had been taking his family on a trip in a small private airplane, and the plane had crashed, killing his wife and daughter, but the pilot survived. The pilot, thinking the crash had occurred because of negligence not by him but by the air traffic controllers, brought suit against the government. I prepared the appellee's brief which, of course, clearly reminded the court of appeals of the clearly erroneous rule because the government had won the case in the District Court. We argued that the case was factual and since the government had won the case in the District Court, the District Court having found that the accident was the plaintiff's fault, that that decision should be affirmed as not clearly erroneous. The argument was in Chicago, and I went out to Chicago to argue the case. As I was sitting in the courtroom waiting just before the judges came in, opposing counsel came by and introduced himself and then said to me, "I'd like to introduce you to my client," and the client, of course, was the pilot of the airplane that had crashed, killing the pilot's wife and daughter. I was taken aback by the fact that here I was about to present an oral argument where somebody had been killed and I was being introduced to the plaintiff in the case.

So I said hello to the plaintiff and I said I was very sorry about what happened to his family, and then I had to refocus myself to think about presenting the argument.

When the case was called, I presented our argument, reminding the Court of Appeals of the clearly erroneous rule, and I pointed out the District Court had found that the cause of the crash was the negligence of the pilot, the man who, I didn't point him out, but the man who I knew was sitting in the back of the room probably very upset with what I was saying. My argument was that this gentleman had done all sorts of things which were negligent, and the District Court was not clearly erroneous in finding that the accident was his fault. A few months later, the decision came down and the court did find that the District Court ruling wasn't clearly erroneous and that the accident was the pilot's fault. I thought that was the right result, but I still felt sorry for this gentleman. It brought home to me that even though as an appellate lawyer you tend to look at cases abstractly and in terms of legal principles and what's in the record, you're still litigating cases that involve people and their lives and often their tragedies and that litigation ultimately is all about human beings, not just abstract principles.

MS. FEIGIN: Before we close out today's session, let me ask you a couple of follow up questions to the stories you just told. You said what happened when you did the case with the cracks in the ceiling is what should happen, which is that you convince yourself that you're right, but there must have been times, or were there times, when you were unable to convince yourself that you were right, and if so, how did you handle that?

MR. KOPP: One of the big advantages the government has in the litigation process is the procedure by which we prepare memoranda for the Solicitor General that recommend for or against appeal. This is a process where we solicit recommendations from the trial attorneys, from the agencies that are involved, and from trial litigation sections in the Civil Division, and we prepare a memorandum to the Solicitor General recommending for or against appeal. That memo goes through the Assistant Attorney General who usually, but not always, accepts our recommendation. It goes to the Solicitor General's Office and the Solicitor General's Office then assigns one of its staff attorneys to the case who does a short memo of his or her own, and that memo then goes to a Deputy Solicitor General who makes a recommendation to the Solicitor General. This is a process which I think is very effective in terms of weeding out weak cases. As a result of it, in the government appeals that I handled I never had a case which I felt uncomfortable arguing because the process helps wash out cases that are really weak. It doesn't mean that you can't appreciate how others can look at the case differently, but it does mean that you can latch onto an approach to the case that is arguable and a reasonable argument.

MS. FEIGIN: But that's if you lost the case below. You could be an appellee who might think the case shouldn't have been won by the government. Has that ever happened to you?

MR. KOPP: Well let me again go back in terms of timeframes because as I mentioned, in later years, this was when I was a supervisor and then head of the office, the number of appellee cases that we ended up handling in our office went down because we

didn't have the resources. So we would handle in our office the appellee cases that had significance and we thought the government should win even though there might be a significant risk of losing. The appellee cases sort of became very much like the appellant cases. Also in these in later years the settlement process became more and more significant. The courts started having mediators and there were often ways that unattractive cases could be settled that in my early years in the office weren't there. The mediation process, in some cases, did make a big difference as the courts of appeals got more and more into that. As for my early years in the office as a staff attorney – in the appellee cases – there weren't any assigned to me that I thought weren't arguable, and my job as a lawyer was to find the angle on the case that I thought was the most attractive to the court.

Normally the government would win a very large percentage of the cases that it litigated in the Court of Appeals. In our office, we would win, depending on how you counted them, often well over 80% of the cases that we argued.

MS. FEIGIN: I know you argued a lot of big ones, so when we meet next, I look forward to hearing about those. Thank you very much for today's session.

MR. KOPP: Thank you.