S.B.: Oh, I see. I'm worried about your doctor's appointment. Do you still have it?

L.F.O.: Pardon?

S.B.: Don't you have a doctor's appointment?

L.F.O.: No. I cancelled that, but I do have to excuse myself for other reasons. I want to catch a plane.

S.B.: Okay. Do you want to stop, or do you want to continue?

L.F.O.: I think we had better stop.

S.B.: Okay.

L.F.O.: There is a lot more we can talk about. It's up to you. I would be pleased to meet again, if you want to.

S.B.: Oh, certainly.

L.F.O.: All right.

* * * * * * * *

S.B.: It is Friday, the 13th. It's our third session with Judge Oberdorfer. Judge, when we last left off before you went skiing, I think we had gotten you to the point where you were on the bench, and you discussed how you had gotten appointed. I guess what I would like to do now is talk about your experiences on the bench. Why don't you describe what you think it's like to be a trial judge and whether or not it has met your expectations or turned out to be different from your expectations.

L.F.O.: Well, that's several questions. The job has changed a great deal in the years that I have been here. When I first came to the bench, we had relatively few criminal cases. Our docket was dominated by civil cases. Also, at that time District Judges were invited fairly frequently to sit with the Court of Appeals. They were somewhat short-handed, I think; and, also, I believe that the Court of Appeals, as it was then constituted, was reaching out to establish a relationship with judges on the District Court.

Those two characteristics of the work have now been completely reversed. For the month of March, except for three days, I am sitting in criminal cases, and all of them are drug cases, one hardly distinguishable from the next. I tried a Title VII case in February. I believe that was the only civil case I've tried in 1992, and this is now March 13th. The Court of Appeals does not invite us to participate any more. Maybe they are no longer short-handed. In any event, the job is quite different in those respects.

S.B.: I take it that that is a negative kind of event?

L.F.O.: Yes; oh, yes. I think the entire Federal Judiciary is very restive about the saturation of our docket with criminal drug cases. In this district it is particularly acute, and the judges, including myself, are especially restive because the drug

cases that come to the Federal Court are really street-crime cases that should be tried in the local Superior Court. The United States Attorney brings them here in order to have imposed the excessive sentences that are now required by the mandatory-minimum sentencing statutes and the Federal Sentencing Guidelines.

S.B.: Is this happening in other District Courts around the country?

L.F.O.: I think not as grossly as here; that is, I think that the dockets of other Federal District Courts are not saturated with what are basically street crimes, as ours is. I think they have more serious, heavy drug cases. There have been a few here, but the run-of-the-mine are small crack cases.

S.B.: What is the difference in this district and others? Is it the nature of the U. S. Attorney's Office?

L.F.O.: Well, the biggest difference is that the United States Attorney here is also the prosecuting attorney in the local court, and he has the call. He can bring any criminal case here that is actionable under federal law; whereas, in the 50 states there is a state prosecuting apparatus to which the local police bring their cases. Here, the cases are brought by the local police to the United States Attorney, and then he makes the choice. We never see a federal law enforcement officer in these drug cases.

They are always officers from the Metropolitan Police Department, except that they bring in chemists from the Drug Enforcement Administration to prove that the substance is crack.

S.B.: If you could change the system, how would you change it?

L.F.O.: Oh, I would change it very drastically. I would relegate local drug crimes to the local courts. I would eliminate mandatory-minimum sentences for drug cases. I would eliminate the guideline minimums for drug cases. I would greatly enhance the facilities in prisons and outpatient for the treatment of addicts, and I would authorize what we used to call split sentences, namely: imposing a sentence of incarceration and suspending a portion of it on condition that, while in prison, the defendant effectively uses the opportunity for treatment and is committed to remaining drug-free and in treatment for a long period of probation or supervised release.

S.B.: Do we not have such a program, or is it that we just don't have enough treatment centers?

L.F.O.: We don't have enough treatment centers, and we are not authorized to give split sentences. The guidelines and the statutes require these sentences to be served without parole.

S.B.: Do you think any of your proposals might come about?

L.F.O.: I have no idea.

S.B.: Would you have accepted the job today if it were portrayed to you this way?

L.F.O.: No.

S.B.: Do you think that is affecting other people's willingness to take this job?

L.F.O.: I don't know if anyone is unwilling to take it. I think that there is a great attraction to the job here for the people in the Superior Court. I think, you know, the question is: Compared to what? We have here a very congenial group of judges who are remarkably collegial on the District Court. It wasn't this way when I came here, but it is now, and that's the other side of it.

I find that across the political spectrum, across the age spectrum, and across the social spectrum, this is a very congenial group. Now, it may be that it's sort of like being in a foxhole together.

Excuse me. I'm going to have to take a verdict in a criminal case.

(Brief recess.)

L.F.O.: We have been interrupted by the return of a verdict. Professor Bloch went into the courtroom and observed what is the

grist for our mill right now. A young black man was tried for possession of a large quantity, more than 50 grams, of crack/cocaine. The police broke into an apartment occupied by him at 3:00 o'clock in the morning, while he was making love to his girlfriend. He was arrested in the altogether. The tryst was on the living-room couch.

Drugs were found on the kitchen table and in a kitchen cabinet, and under the bed in the bedroom were two guns. The jury found the defendant guilty of the possession of the drugs, which would have been more or less right before his eyes in the kitchen, but found him not guilty of possession of the guns.

He's probably exposed to a sentence of ten years. If the jury had found him guilty of the gun offense, his sentence would have been 20 years. The young man is 22-years-old. When the jury announced its verdict, his head went down as if he were in an electric chair.

Now, I must say two things about this: If I hadn't spent four-and-a-half years in the Army, I could not do this kind of work, and the misuse of my training and experience on day after day of this is inappropriate. So let's talk about something else.

S.B.: It was not his apartment? Is that why --

L.F.O.: Well, it was complicated. The apartment was rented

by a school teacher who testified that she let him "oversee" the apartment, but he paid part of her rent. Some of his papers were found there, and, of course, he had a key to the apartment. There was a conflict in the testimony as to whether anybody else had a key.

There was also testimony that he had another residence with his father. His father got on the stand and testified that he didn't allow any sex in his house, so that's where that was, in terms of the testimony.

S.B.: Well, it was a graphic illustration of everything that you --

L.F.O.: Did you find that jolting?

S.B.: I did. It was very moving; I was very troubled. He looked like the sort of person who could be rehabilitated, assuming that --

L.F.O.: Yes, but that's not permitted. The pain that he showed just from being told what lies ahead of him indicates to me, as it has over and over again in the past, that there are people out there who are -- obviously, there are some insensitive killers, but there are also some very sensitive people who could, and would, respond to an appropriate prison environment and be restored to a useful life. We have just imposed a life sentence on this man.

It is unlikely that he will survive ten years in prison.

S.B.: Really?

L.F.O.: In my view.

S.B.: Do you think he will die or just come out more --

L.F.O.: Well, what survives won't be worth having. He'll either die as a result of something that happens to him in prison, or he will come out a hardened criminal.

S.B.: It's hard to go on from that.

L.F.O.: Right.

S.B.: What is your view of the jury system?

L.F.O.: I'm very impressed with the jury system. I am. Of course, I come by that from my experience with Justice Black, who worshipped the jury system. If he had any God in heaven, it was a jury. I have found them to be incredibly astute and careful, as I said just now to the jury that I excused. It consisted of 11 blacks and one white. Two of the jurors were black males. Confronting drugs and crime in a way that we don't, they know what it is doing to their lives and their children's lives, but they also are sensitive to the cruelties in the system.

They deliberated on this case from 10:00 o'clock yesterday until nearly 11:00 o'clock today. The indictment had three counts. They found the defendant guilty on two counts and

not guilty on one count. They asked for instructions on the definition of "possession with intent to distribute" three times. It is a very tricky subject. They have to learn the meaning of the term "constructive possession" and distinguish it from "actual possession."

This is a particular case; but, generally across the board, when you take six or 12 people out of their ordinary lives, many of which are probably humdrum and boring, if not outright unpleasant, and put them in a serious environment, they respond. We tell them that they are judges, and that they are charged with a grave public responsibility. They listen; they hear you; they hear the judge. You can see them making their judgments of the lawyers and the witnesses, and I don't think they have made what I would consider a mistake in five percent of the cases that I have had over 15 years, civil and criminal.

Sometimes they go a little wild in calculating damages, and I did have the unusual situation fairly recently, when I was hearing a case with an advisory jury, where we disagreed. Under the new Civil Rights Act, there is ambiguity as to whether a claim for damages in violation of Title VII that occurred before the effective date of this act should be tried to a court or to a jury. In the one civil case that I tried this year that I recall,

I treated it as a bench trial, but convened an advisory jury. I made findings, and the jury rendered a verdict. I made findings in favor of the defendant; they rendered a verdict for the plaintiff.

I'm a little leery about how the jury system is going to play out as a District of Columbia jury becomes the Office of Personnel Management for the Federal Government. I'm not sure whether people's experiences in the work place will be translated into something of a loose cannon on a jury. But, apart from that and the calculation of damages, and without considering the complex, commercial types of cases that we don't have, I have been thoroughly and convincingly confirmed in my original assumption that, as Justice Black said, jury trials and the jury system are one of the real cornerstones of liberty.

S.B.: There were a few times that I was on jury duty. I never got to sit, but I was very impressed by how seriously everyone takes that responsibility.

L.F.O.: And there is a chemistry about leaving the decision to a group who will discuss it and thrash it out and knock each other around without any rules; that is, without any rules in terms of how they go about doing what they are doing. It is somewhat similar to the way countries make sausages and laws; you don't

really want to know. But in the case of juries, in my view, it comes out better than sausages and laws.

S.B.: Do you think the jury is ever afraid of retaliation from the defendants?

L.F.O.: Well, I haven't seen that. I have interrogated a jury, again this year. I had a jury which -- by the way, we have had in this district, as a result of the misguided policies of the United States Attorney, a really dramatic number of acquittals. In 1992, 44 percent of the criminal cases that went to trial in this district ended in acquittal. That is a percentage of all of those that went to trial. As I recall, about 50 percent of the cases indicted ended in guilty pleas; so that would mean that 22 percent of the total number of cases indicted resulted in acquittals, which is still an extraordinary number of acquittals.

I have a criminal case that is set for a retrial next week. Originally, there were two defendants. One was acquitted by the previous jury, and, with respect to the other, they were unable to reach a verdict. It is that defendant who is being retried.

After the trial, I asked the jury whether they wanted to speak to me about the case, and they said they did. So I took them into the jury room with the Assistant United States Attorney

and the defense counsel, where several of them -- not just the foreman -- explained to me and to counsel that the government simply did not come forward with sufficient proof to make them feel comfortable about taking away a big part of somebody's life for what the government said they did. If the defendants had done what the government alleged, they should have gone to jail, but the government didn't prove it.

The Assistant United States Attorney -- I think he meant it to be off the record, but I'm putting this down for history, and I'm certainly not going to identify him -- said to the group that they have to realize that in this city at this time the Chief of Police isn't interested in making cases. He's only interested in making arrests, and the U.S. Attorney's office has to take what he gives them and do the best they can with it.

That, of course, completely ignores the prosecutor's responsibility to exercise some discretion and decide not to bring a case that he doesn't think he can win. I was just outraged; I still am.

S.B.: Did you tell him?

L.F.O.: No.

S.B.: Really?

L.F.O.: No.

S.B.: Was it a young assistant? Was he educable? That is what I meant.

L.F.O.: No, that's not the way to handle it, not by picking on a young Assistant U. S. Attorney.

S.B.: In your years on the bench, what have been some of your favorite cases, or some of your most difficult cases?

L.F.O.: Well, let's see, favorite cases. I enjoyed very much working on the case involving the Japanese Americans who had been interned during World War II, Hohri v. United States. It was a claim on behalf of all of them, and it went all the way to the Supreme Court.

We were furnished with extensive documentation of the history of the decision-making back in 1941 under the leadership of the Commanding General on the West Coast, President Roosevelt, and the Department of Justice, the involvement of all of them. That included, from the perspective of the Department of Justice, the litigation of the Korematsu case in the Supreme Court.

I wrote a thorough factual, historical summary of the situation, or at least I thought I did, ending with the conclusion that the claim was not actionable under the Federal Tort Claims Act or the Constitution, but that it was a subject Congress should address.

The Court of Appeals reversed me and held that it was actionable, but the Supreme Court vacated the judgment of the Court of Appeals on the ground that this was a contract-type claim that was not reviewable in the Circuit Court of Appeals, but should have gone to the Federal Circuit. The Federal Circuit affirmed in a per curiam opinion, and then Congress, as you know, passed the statute. That was a very rewarding thing.

There have been some interesting First Amendment cases. For example, I've had a number of criminal cases, misdemeanor cases, involving the anti-nuclear street people who lived in Lafayette Park, a very appealing group. You've seen those people in the park. For a while, the White House and the Park Police just made war on them by hassling and harassing them. We kept trying to work out a modus vivendi for them to conduct their activities without violating the statute that proscribes camping in Lafayette Park.

In one of the cases the defendant was a woman, Ellen Thomas, who had been employed in a relatively high-level staff position by a public-interest environmental outfit here in town. She fell in love with, and eventually married, the leader of this anti-nuclear group, a guy who was living in the park. He was an educated man who had just taken to the streets, carrying signs

about atom bombs and things like that.

Well, apparently, one of their fellow demonstrators was arrested and detained at St. Elizabeths. They were holding him as mentally ill. This young woman, who had just become romantically involved with the leader of the group, was trying to get a lawyer to help their friend and hadn't been successful. She thought some attention from the media might help her efforts, so she climbed a tree, swung a hammock, and went on a fasting strike. After about a week the Park Police came along with a cherry-picker, took her out of there, and charged her with damaging a tree in a national park. I can't remember how it came out, but that was very interesting.

I also had the Kurtz v. Baker case involving various questions concerning the prayer in Congress. Among the issues was whether the invocation that has been part of the every-day routine up there was a violation of the Establishment Clause.

S.B.: Was that the case that went to the Supreme Court as Marsh?

L.F.O.: No, this was long after that. I don't think it went to the Supreme Court. I decided -- and I'm sure I was affirmed -- that this was something that was within the power of the rules of the House to determine, and I approved it.

I had another case where I didn't approve something they did and made them change it. I can't remember what that was.

I also had the case involving the impeachment of Judge Nixon of Mississippi, which is still pending. The issue before me was whether the procedure of the Senate for having the evidentiary hearing on an impeachment conducted by a committee, with the vote conducted on a record and oral argument, complied with the Constitution.

I wrote an opinion that made all of the arguments against it, but then said that, again, this was a matter within the province of the Senate to determine by a rule. Now that issue is in the Supreme Court.

The case that has, if any case has, dominated my career here was the one involving the crash of an Air Force C5A cargo plane manufactured by Lockheed. I inherited it from my predecessor. At the time I was appointed, I had heard that the judges over here were aware of the fact that my nomination was a possibility, or was in the works, and whatnot; and that they had put a lot of pressure on Griffin Bell to speed it up. Although I never said this to any of them, I often thought that they wanted me over here as quickly as possible because Judge Jones was sick; this case was festering; and it was a beast.

S.B.: Which one was that?

L.F.O.: This was the case involving the claim on behalf of a class of Vietnamese orphans who were allegedly injured and the estates of deceased Vietnamese orphans who were killed when an Air Force C5A cargo plane crashed near Saigon about a week before the war ended. Do you know anything about it?

S.B.: I remember it now.

L.F.O.: The plane had taken off from Saigon with 150 infants strapped two to a seat in the 75-seat troop compartment, and another hundred or so were in the cargo deck on pallets up against the walls of the plane. Some of them had seatbelts; some did not. There were also adult escorts in both the troop compartment and the cargo deck. When the plane reached the altitude of about 20,000 feet, the rear cargo door blew off and severed all of the controls to the rear rudder and the ailerons. The pilot did a remarkable job of steering the plane with the wing flaps and throttling to almost a mile from the airfield before crash-landing.

S.B.: Why was it so difficult?

L.F.O.: Well, it was complicated by its nature. It was a very difficult case, particularly the claims on behalf of the deceased infants. They were orphans less than a year old who were en route to the United States for adoption, but had not been

adopted.

S.B.: Who was suing?

L.F.O.: Well, the suit was brought by an outfit called the Friends for All Children, which had operated an orphanage in Vietnam. The officers and personnel of that organization were quite a noble bunch of people, by the way. Of course, their legal status with respect to the deceased orphans, for whom they had not been appointed guardians anywhere, was very fuzzy; and, as difficult as that aspect was, the survivors had no clear signs or symptoms of injury. They had been in the troop compartment of this huge C5A when it belly-landed, and the crash had just torn up the lower cargo deck of the plane. According to the defendants, Lockheed and the Air Force, as the plane skidded around on the ground, the troop compartment sort of floated away from the cargo deck, as it was designed to do.

Then there were all kinds of arguments about the level of the G-forces during the crash and the damage, if any, that these children in the troop compartment suffered. We had a battle of psychologists and psychiatrists over the diagnosis of, and prognosis for, each of the surviving orphans. The plaintiffs' experts came up with the diagnosis of minimal brain dysfunction, which was just garbage, I'm sure, to a hard-headed sort of person,

and the defendants defended these cases as if they were involved in the Battle of the Marne.

S.B.: Were they accused of negligence or faulty design?

L.F.O.: Well, it was a design-defect charge. The defendants agreed not to contest liability, and, as part of the quid pro quo, the plaintiffs dropped their claim for punitive damages.

Able counsel representing the estates of the deceased infants settled their claims rather early on with the defendants, who then went on to dispute the damages claimed by the orphans who survived the crash. The defendants based their entire defense on the contention that these infants suffered no damages. Well, this thing went on for eight or nine years.

An anecdote: The defense lawyers did not endear themselves. My law clerk at the time went out to lunch one rainy, cold day, when it was hovering between freezing and not freezing. When he came back after lunch, he said to me rather sheepishly, "Judge, I let you down."

I asked, "What do you mean, you let me down?"

He replied, "I was driving down Pennsylvania Avenue a few minutes ago. Mr. So-and-so (one of the defense lawyers) jumped out in front of me, and I put on the brakes."

S.B.: What was the final verdict?

L.F.O.: Well, several of them were tried as sort of bellwether cases in order to establish a basis for settlement and a precedent for simplified trials of those that did not settle. Instead of going along with that and using the jury as an advisory jury after there were three verdicts against them that were fairly large, the defendants appealed, as was their right. On May 16, 1981, "a day that will live in infamy," the Court of Appeals determined that I had admitted an Exhibit 109, which was prejudicial to the defense to the point of reversible error and reversed those cases.

Now, there were 150 cases, and all of them had to be tried individually. My colleagues, each of them, had taken on five or ten and were in the process of trying them within the parameters of a comprehensive pretrial order that I had entered. However, the Court of Appeals reversed the bellwether decisions, and the participating judges had to start all of the cases over again.

S.B.: Eventually, the children, I take it, got the money?

L.F.O.: Well, I went to some considerable trouble to resolve that matter. The settlements were multi-million-dollar things. I mean megabucks, and, incidentally, we had a terrible time settling the fees. The attorneys representing the surviving orphans had not

kept their time charges in any businesslike way and had not kept good track of their expenses. I had to get two volunteer lawyers, one from Arnold and Porter and one from another senior firm, to be Special Masters and sort out the fee claim.

We also created two trusts for the surviving children: one for those who lived in the United States and one for those who lived in Europe. There were several score who had been adopted in Europe. There wasn't enough money to give everybody a pro-rata share and take care of the ones who were really sick, and that was the terrible difficulty of the case. These trusts were designed to permit the respective trustees to select out the children who, over time, showed that these theoretical symptoms were real symptoms, and there weren't too many of them.

At the time of the trial, these children were maybe four or five years old, and the medical testimony was that these symptoms -- a lot of it is hyperactivity -- don't mature in terms of problems with behavioral control and other, observable difficulties until early adolescence, and, therefore, the idea of the trusts. Now, there were some predictions as to how many of the children would eventually require treatment, and the reason for creating the trusts was to keep the funds together, invest them -- and, of course, at the time there was a big boom in the stock

market; they did very well -- and then to disburse the funds when the facts and medical conditions had clarified.

The trust for the survivors in the United States has been terminated now. After the children were about ten years old, an amount of money was fixed on the six or eight -- no, there weren't that many -- on the two or three who really needed long-term care, and the rest was distributed per capita.

The trust for the foreign children is still in place. It has $2 million to $3 million in it, and the trustee pays out amounts on request from these foreign adoptive parents for special schooling and things like that. There is, as I recall, one foreign child who requires serious attention and is getting that.

S.B.: Were you involved in the cases of Operation Rescue? Did you have those in your court?

L.F.O.: Oh, yes, the one in this district is my case.

S.B.: What was your view on that one?

L.F.O.: Well, that's still in process. I entered the injunction here to enjoin the defendants from physically blocking in this particular jurisdiction, as I put it, the movement in interstate commerce of people coming from Virginia and Maryland into the District of Columbia for medical services. That matter is on appeal; my decision is on appeal; and, of course, the decision

of the District Judge in Virginia is in the Supreme Court.

All three of those cases, that is, the Maryland case, the Virginia case, and the case in the District, were originally filed with me; and I dismissed without prejudice the claims on account of threatened activities in Maryland and Virginia. So they proceeded independently.

S.B.: And now you're waiting for the Supreme Court?

L.F.O.: Well, literally, for the Court of Appeals, but I'm sure the answer will come from the Supreme Court.

S.B.: Can you tell us something about how you prepare for a trial and how you use your clerk? Is there some sort of a general way in which you decide cases?

L.F.O.: I explain this, or at least part of it, to applicants for a clerkship every year. I rely very heavily on my clerks. When a case comes in, the files are distributed to the two clerks on an odd/even basis. One of the clerks is given the cases with even numbers; and the other, the cases with odd numbers. I do look at every complaint that comes in before it is distributed, primarily to identify possible disqualifications; for example, all Wilmer, Cutler cases and, obviously, those involving companies in which my wife and I have stock. I disqualified myself the other day in a case brought, I believe, by the Defenders of Wildlife with

respect to the wolves in Yellowstone, because my wife is a contributor to, and very active in, that particular issue, and we were just about to go to Yellowstone.

When the answer is filed, there is an automated process by which we set a status call, and at the status call I schedule the proceeding and enter what I call a pretrial order. That order schedules the discovery, including the cut-off date for discovery; a briefing schedule, if there are to be dispositive motions; and I fix a trial date. The pretrial order sets the schedule within which the lawyers do their work.

When a motion comes in -- now, this is on the civil side -- the clerks give me some kind of a memo, and they often don't have much time to do it. Then, on the weekend before the argument, or the night before the argument, or sometimes on the morning of the argument, I get to read their memo, whatever it is, and I read through the briefs. After I've heard the argument, ideally, I come back here to my chambers and, with the clerk present, either dictate to my secretary or block out to the clerk, if my secretary is tied up, my first impression of what we ought to do and why.

These drafts are not very polished. I take some of them home on weekends and work on them. The clerks edit my drafts

very carefully. They also write drafts, and I edit their drafts very carefully. It becomes really quite a collegial enterprise between the clerks and myself. In some years I have more rapport with them and probably do better work than I do in other years when they are really not quite up to the same speed or we just don't resonate in the same way.

Then, when the case gets ready for trial, if it does, I make a big effort to try to interest the parties in our mediation process, which has been very helpful. It has been a lifesaver for us, with our criminal docket being what it is. I try to encourage and persuade them to settle. Of course, there are limits to what a judge can do with respect to settlement when he is actually going to try the case. Title VII cases almost never settle, particularly with the emotions involved.

S.B.: Do they mediate some of them?

L.F.O.: No. In a bench trial where I have to make findings of fact and the matter is relatively straightforward or simple, I might make them from the bench. If the issues are more complex, I often ask the parties, as I did, for instance, in Operation Rescue, to submit proposed findings. Then I will either go through those and block out my own or ask the clerk to do a draft.

There is really less of a role for the clerk in a

criminal case. In the drug cases, really, I can recite the instructions from memory, but the clerks do assist me. Each party is supposed to give me proposed instructions and questions for voir dire, and the clerks put together what is called a trial notebook. In criminal cases they just give me a list and make a smorgasbord of the proposed voir dire questions. They give me a notebook so that I just have a trot.

I like to write, but I don't do as much as I would like to do, or as I used to do. I find that I'm not fit for very much after a day of these trials. I used to be able to work at night, and I think I still would, if I weren't so consumed as I am, and physically pinned down and drained, by the kinds of things you just saw.

S.B.: It's the emotional drain, as well as the physical?

L.F.O.: Well, it's physical, also. I mean just to have to be there and worry about whether the defendant shows up and the lawyers show up and whether the jurors are comfortable and whether somebody is sick. It's not the highest and best use of the assets.

S.B.: Is the court overloaded, the docket, in any way apart from the imbalance of criminal cases?

L.F.O.: Oh, we don't do many things other than criminal cases, or almost never.

S.B.: What's happening with the civil cases? Where are they?

L.F.O.: You push them along. I have a civil case involving a claim of police brutality. It was scheduled for trial on March 31st, but I have since had to set a criminal trial on that date. Yesterday, I ruled on the suppression motion in that criminal case, and the only trial date that I had open for it between now and the end of April, under the Speedy Trial Act, was March 31st.

So I had the people involved in the civil case come in this morning, and I went through a pretrial conference with them. They are coming back at 2:30, at which time I'm going to tell them that I can't try their case. Meanwhile, I have urged them to settle. I said, "There is a very serious risk that I won't be able to try your case on March 31st." I didn't want to say right there that I wouldn't, because you never know what will happen. But I asked them to consider whether they would submit to mediation, or whether they would agree to have the case tried to a Magistrate, or whether they would settle it.

This is a case that had been originally prosecuted by the plaintiff pro se, and, as a pro se, he attempted mediation. At that time it did not work out. Well, he has a lawyer now, and I thought that, possibly with the lawyer in the mediation process, it might be more effective.

S.B.: What do you mean: you won't try it?

L.F.O.: I mean that I won't try it on the 31st.

S.B.: Oh, I see. You won't try it on the 31st.

L.F.O.: That's right.

S.B.: But, so far, all you've told them is that you may not be able to try it, and they would have to wait for your next available date?

L.F.O.: There is always a possibility that the criminal case scheduled for the 31st would end in a plea before it starts, but we're just sort of juggling the civil docket, and the lawyers are suffering. There is no question about that. I'm sure the bar must be up in arms about this.

S.B.: And the only solution that you see is for Congress to take away the --

L.F.O.: The mandatory-minimum sentences.

S.B.: Or to remove the discretion of the U. S. Attorney to bring the cases?

L.F.O.: Well, that would be two things.

S.B.: Right.

L.F.O.: But if they remove the mandatory-minimum sentences, there wouldn't be any incentive for the United States Attorney to bring them over here. He brings them over here because he thinks

he can put these people away for a longer period of time. For instance, if he tried this young man in the Superior Court, he would probably get a year. Now, he's going to get ten years.

S.B.: How do you feel about getting reversed? Do you think about it ahead of time? How do you feel when it happens?

L.F.O.: Oh, I'm very conscious of the risk. I used to be more concerned about it than I am now. They have often identified mistakes that I've made. I've seen, from what they said about what I did, where I went wrong. There are also a number of cases where I know that the reversal was not correct, and, as a fiduciary of the judicial process -- not personally -- I cringe.

S.B.: Is there anything you can do about it?

L.F.O.: No. There was a series of cases involving the so-called interdiction squad of the Metropolitan Police Department. The interdiction squad, which may or may not still be extant, patrolled Union Station and the bus station, purporting to be able to spot couriers, or so-called "mules," a term of art in the drug trade.

They developed a rather diabolical technique for making an arrest without either a warrant or probable cause. Two of them would approach a target, one overtly and the other hovering nearby, both in plain clothes, and the former would start a

conversation with the targeted individual:

"Where are you coming from?"

"I'm coming from New York."

"Can I see your ticket?"

The person would hand over the ticket.

"Where did you buy this? Did you pay cash for it?"

There is a litany that they go through in a very calm way, and at some point they ask:

"Do you have any drugs? Drugs are a big problem in this town now, and we're a drug-interdiction squad, and we're looking for drugs. Do you have any?"

"No."

"Do you mind if I look in your bag?"

A surprising number of these people, the ones they bring in here, agree to that, or at least the police say they agree to it. Then they search the bag and find the drugs, and the police officer behind the target, who has been there all the time, comes up and clamps it, and they take him off.

I have taken the position that in those circumstances the particular people they pick on, knowing that the undercover guy is a cop and, therefore, armed -- and he later identifies himself as a cop -- have no idea that they are free to leave.

The Court of Appeals has taken the position that:

If within a 360-degree circle of the target there is a route by which that individual could leave, and the officer doesn't display any weapon so that the individual does not know that he is armed (which presupposes that there is somebody out there who doesn't know that an undercover officer carries a gun, particularly somebody from the street), and the officer speaks in a calm, unthreatening tone of voice -- and he will invariably testify that he did -- the conversation leading to the request to search is not a Terry stop;

It's not an arrest; and,

When the person agrees, or the officer testifies that he agreed, to the opening of the bag, that is consent. Therefore, there is no Fourth Amendment violation.

Gesell and Sporkin have written opinions in which they expressed their dismay at the erosion of Fourth Amendment rights that was being countenanced in these cases. About a year ago, the Court of Appeals reversed them in a single opinion. Now, these were distinctive cases; as I remember, the officer stood in the aisle of the bus in one of them. Do you know the case?

S.B.: That was Bostick in the Supreme Court?

L.F.O.: Well, that was the ultimate denouement, but even that was different. I can't remember the distinction now, but it is distinguishable. At any rate, each of them, Sporkin and Gesell, separately reminded the reader of Samuel Adams and writs of assistance and totalitarian abuse of searches, and a Court of Appeals judge reversed them and made fun of their failure to discriminate between that major tyranny and what the appellate judge viewed as a petty thing that Sporkin and Gesell were blowing all out of proportion by invoking Adams and the writs of assistance. I agree with Sporkin and Gesell that ancient and honorable Fourth Amendment rights are being trampled on in this War on Drugs.

That reversal happened at about the time I had one of these cases, and I wrote what would have been a dissenting opinion. I stated in my opinion that if I were free to write the way I wanted, I would, of course, have found that these street people, confronted in a strange town by a police officer whom they know is armed and having seen people beaten up by the police in certain circumstances, do not have the option that the Court of Appeals found as a fact was available to them: refusing to consent and walking away.

I further wrote that I couldn't refrain from expressing my dismay over the fact that the Court of Appeals would disparage the expression of concern by Judges Gesell and Sporkin, both of whom were experienced in law enforcement and in life in a way that qualified them to make these kinds of judgments. Then I put in a footnote with a little precis of Sporkin's biography as head of enforcement at SEC and Chief Counsel at the CIA and Gesell's experience as the Assistant Chief Counsel of the Pearl Harbor investigation and an SEC investigator and antitrust trial lawyer.

I heard that my opinion was circulated by one of the judges up there to the rest of them in the course of the dispute or the debate about this issue, but that is the nearest I have come to it since.

S.B.: Who was the Court of Appeals judge who wrote the opinion chastising Gesell and Sporkin?

L.F.O.: It was Judge Buckley, a public matter.[1]

S.B.: That's right. That's why I felt comfortable asking. The Court of Appeals has obviously changed over the years. How has

[1]Gentleman that he is, when Judge Buckley learned of my dismay at his disparagement of Judges Gesell and Sporkin, he wrote a most gracious letter of "sincere apology." (Letter from Buckley to Gesell, dated March 11, 1991.)

that affected you, or let me first ask: Has it affected you?

L.F.O.: Yes. First of all, personally, Skelly Wright and Carl McGowan, in particular, were close friends. I used to have lunch with them several times a week, and their wives and my wife were social friends. I've known Skelly Wright, as I think I told you, since the first time I appeared in the District Court in New Orleans. He was a very close friend of Justice Black. He was part of Black's family of clerks and always showed up at the parties for the clerks.

Carl was a good friend long before I came up here, and I had been very involved with Harold Leventhal. I was in a case with him in the 1940s and had known him ever since. As a matter of fact, now that I think about it, Leventhal was general counsel of the Democratic National Committee during the 1960 campaign, and I made a contribution through him. When I was appointed to the Federal Bench, Harold called me up and said, "I just have one piece of advice for you. When you get your robe, make sure they put pockets in it."

I had that kind of a relationship with the three of them. I sat with them; I could talk to them; and I felt like I was part of the whole courthouse. I don't now, and that's the difference.

S.B.: Is it principally that these individuals who were your friends are no longer there, or is it because the Court has --

L.F.O.: Well, it's certainly both.

S.B.: (Continuing) -- changed?

L.F.O.: I mean you cannot distinguish the two: that the people who are there are not my friends, and I do disagree with them about a lot of things. Right deep down, I disagree.

S.B.: Are you friends with the more liberal members?

L.F.O.: Well, I am friends with some who are not so liberal. I've known Pat Wald a long, long time; and I've known her husband, particularly. I'm friendly with Dave Sentelle, and I like Jim Buckley. He and I worked together on a proposal to ameliorate the law-clerk-hiring situation. I don't know if I have discussed that with you.

S.B.: No. I'd like to hear your views on that. Is it a question of the acceleration of the dates?

L.F.O.: My former law clerk and I have an article coming out in the next issue of the Yale Law Journal on the question of law-clerk hiring, which is a response to Judge Kozinski. We are advocating the adoption by the judiciary of the system used by hospitals to recruit interns and residents, the matching system.

S.B.: How would that work?

L.F.O.: Well, I think quite simply, in theory and in practice. In practice, the interview process would proceed as it does, hopefully, in the fall of the third year, instead of the fall of --

S.B.: Kindergarten.

L.F.O.: (Continuing) -- the second year. Several of the judges in this circuit hired their 1993 clerks in December of 1991.

S.B.: I know. I was appalled at that.

L.F.O.: The entire circuit hired its clerks by February 18, 1992, for 1994. I hired mine before the end of January, for 1994.

S.B.: Oh, you did, too? It wasn't just the appellate level?

L.F.O.: No. I think that I've been competitive with them in hiring. I figured I might as well play as if I were in the big leagues. In any event, the matching system contemplates that the interview season, which could be infinite, would be scheduled as judges and potential clerks wished and, hopefully, to some degree, during the summer. At that time, at least in Washington, many of the potential clerks are here in jobs in any event so that their travel plans can be made consistent with their scholastic obligations. At the end of the interview season, the applicants would list the judges by whom they have been interviewed in order

of preference.

S.B.: All of them, no matter --

L.F.O.: Well, they would list in order of preference the judges that they would prefer to clerk for, and the judges would list the applicants in order of preference. These two rank-order lists would be filed in a central place, and at a point in time they would be matched. If a judge picked a particular applicant as his or her No. 1 choice and the applicant selected that judge as No. 1, that's a match. Then the matching system would send out letters to the clerks and judges announcing whom they have hired, just as the universities send out letters.

We've consulted with the man who runs the match for the Canadian Medical Society and the Toronto Bar Association, which has an apprentice system operating on a matching basis. He has a computer that is programmed to do this. Our article reflects his work, and, of course, we have given him a lot of credit for the help he has given us. The complications -- without going into them -- are reconcilable by hand. It is just that the computer is faster.

S.B.: Would the judge become aware of what the clerk's preferences had been? For example, if you find that you're going to have John Jones and John Jones is high on your list, would there

be some way you would know that John Jones actually had you down as eleventh on his list?

S.B.: Well, that's obviously going to happen in some cases, but it's not going to happen in some, too.

S.B.: But would you know it?

L.F.O.: Well, it depends. If you call up a kid and ask him if he ranked you No. 1, I don't think he's going to lie to you. Now, a judge might.

S.B.: You mean you would ask him afterwards? When would you ask him?

L.F.O.: Well, you would ask before the lists were filed, if you wanted to cheat.

S.B.: Right.

L.F.O.: One would call the other and say, "Look, I'm about to file my rank-order list. If you put me down as No. 1, I will put you down as No. 1."

S.B.: That was my other question: How often do you think that would happen?

L.F.O.: I have no idea. We would have to try it and see.

S.B.: But you would view that as undermining the system?

L.F.O.: Well, that is not the way it is supposed to work. Now, whether it would work as well that way, I don't know.

S.B.: Assume that that didn't happen: that you don't consult. Then, when you learn who your clerk will be, is there any way for you to determine where you stood on that clerk's list? That would worry me. I would hope that would not happen.

L.F.O.: We don't know now. When we call them up and make an offer, they may have two in the wings, and the poor kid has to decide whether he wants to take the offer in hand. Now they'll ask us to give them some time to respond to the offer. I do, but other judges don't.

S.B.: How much time do you usually give them?

L.F.O.: This year it was January. I couldn't be in any hurry. I think I gave one kid two weeks, or I didn't give him any specific time. I just asked him when he could let me know, and he said in two weeks. I was really quite relaxed about this year, partly because I am seriously considering, and am probably on the verge of taking, senior status, so I wasn't too uptight about it. Also, I realized that I probably have 400 applicants, and if a clerk doesn't show up between now and whenever it is, June of 1993, I ought to be able to find somebody willing to come in here.

S.B.: You say that you might take senior status. What does that entail? What would that be?

L.F.O.: Well, you know what "senior status" is. You make

your place available for another appointee, but you keep your commission and your privilege to keep your chambers and your staff so long as you do 25 percent of the work of an active judge.

S.B.: And you keep two clerks?

L.F.O.: Yes, I think you can. At least that is the current situation. Now, you never can tell when the Congress will change that.

S.B.: So it wouldn't make a big change in your life. You would just have fewer cases.

L.F.O.: That's exactly right. My idea is to take 50 percent of the case load that I have now. I signed up to do that course at Georgetown with the assumption that at that time I would be on senior status. Therefore, I would have the time, and I could see whether I can occupy myself at this stage in my life with something self-started, as distinguished from just taking what is thrown at me.

S.B.: And you wouldn't have to do a lot of criminal cases that are all the same. Now, who are some of the best attorneys that have appeared before you?

L.F.O.: Well, that's hard. There's a young man who is trying these criminal cases right now who is the only pleasure in the business. You saw him in the courtroom today, the prosecutor, a

Norwegian fellow by the name of Per Ramfjord. He is a very able young man who prepares assiduously, is very attentive to details, and straight as an arrow. He never cuts corners ever, and he has never disappointed me.

Now, he has won some cases that I would rather he lost because of the unfortunate circumstances of the defendants, but, on cross-examination of these poor street people who come in with an alibi, he's absolutely brilliant. He just tears their alibi to ribbons. You really ought to see him on cross-examination. I guess he's as good as anybody I've had in here.

It's awfully hard to delineate. I remember Plato Cacheris in a case that he did very well. Stan Mortensen defended a case years ago extremely well. He's at Miller, Cassidy.

S.B.: How would you grade the quality of the bar, criminal and civil?

L.F.O.: They're not in the same league with my law firm.

S.B.: Both civil and criminal?

L.F.O.: It is just a different order of magnitude in terms of facilities, intellectual power, spoken and written language, ideas and imagination, care and preparation. There is just all the difference in the world. I think of the Cravath lawyers with whom I worked on those IBM cases. Now, I forget the difference from

time to time, but it's clear. It's clear in my head.

S.B.: Do you see a change, either for the better or the worse, since you got on the bench in 1977?

L.F.O.: Oh, I think there have always been several different spheres of legal skills, particularly in Washington.

S.B.: And that has not changed, in that people are not getting better or worse?

L.F.O.: For instance, I think that the Wilmer, Cutler people are much better litigators now than they once were because they have had more experience. Wilmer, Cutler was not originally very much on litigation. In my last years there, it clearly was developing, particularly with the addition of Steve Sachs, who is an awesome litigator.

S.B.: Do you think the law schools could do anything to improve what you see?

L.F.O.: Litigation?

S.B.: Yes.

L.F.O.: No. That's a matter of practice. Of course, there are some natural litigators, but, at the same time, I have to say that the kind of litigation that is done at Cravath or the litigation end of Wilmer, Cutler, for example, is not cost-effective. Now, maybe it shouldn't be made available to anybody,

but it couldn't be made available on a mass scale because the cost would be prohibitive.

There ought to be another order of magnitude whereby the efforts of highly skilled people are deployed on a less grand scale to get the same job done and then made generally available. That's an ideal. I haven't seen a case in my court that would support the kind of litigation effort that most major firms undertake in a case similar to what Tom Barr is now doing on antitrust for IBM, or work on the smog case, those kinds of things where you want to dot every "i" and cross every "t" and explore every possible avenue. More effort is expended there than would be justified or necessary. The public doesn't need it and can't afford it.

S.B.: Which judges on the District Court do you think are the most effective in leading the court?

L.F.O.: Well, in leading the court, Aubrey Robinson has been a magnificent leader of the court, first of all, in creating an environment of collegiality; then, by taking care of that environment, the housekeeping, and by running it in a businesslike way so that you know you are in a first-class, can-do outfit. He has created a very fine atmosphere.

S.B.: How long has he been Chief?

L.F.O.: Ten years. He hasn't been the doctrinal leader in any sense. I don't know whether there is one. That is one of the nice things and one of the great attractions about this job. I knocked the job coming in here, but one of the things that attracted me originally is that each of the judges here is in business for himself or herself. That is still an attraction, and it will continue to be the charm of it if I were to take senior status. If you gave this court the job of sitting on panels, the collegiality would go with the wind. At least there are elements here who would not take to a harness like that at all and would be very disruptive.

S.B.: How much sharing of ideas is there? How much do you discuss ideas?

L.F.O.: We have lunch together every day, and I'm due up there now. Most of us show up there now. There was a time when we didn't. That's one of the things that Aubrey has accomplished. He's gotten the dining room policed up and has secured some nice help for us. We have a good time at that table, and there is no rancor at all.

S.B.: Every day or every Friday?

L.F.O.: Well, there's lunch there every day, but not everybody goes every day. Many do, and there is a free-wheeling

discussion. You are not supposed to talk about it, and I won't; but there is a marketplace of ideas and innovation, sort of a show-and-tell. It's a very, very useful and pleasant addition to the life.

S.B.: Are there any women District Judges?

L.F.O.: Oh, yes.

S.B.: Who?

L.F.O.: Joyce Green.

S.B.: Oh, of course. All right.

L.F.O.: Norma Johnson, June Green. June and Joyce come every day.

S.B.: Okay.

L.F.O.: And they civilize it.

S.B.: Were they here when you got here?

L.F.O.: No. Joyce came shortly after I did, but June has been here since -- she was a Johnson appointee. I think we will have to suspend now.

S.B.: All right.

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S.B.: This is the fourth interview with Judge Oberdorfer, and it is April 23, 1992.

L.F.O.: Do you remember the cases we talked about last time?