

## ORAL HISTORY OF ROBERT KAPP

This is the second interview session of Robert Kapp on behalf of the Oral History Project of the U.S. Circuit Court of the District of Columbia. The interviewer is Irv Nathan. The interview is being conducted at Mr. Kapp's office at Hogan Lovells in Washington, DC on Monday, March 20, 2017, at 3:00 p.m.

MR. NATHAN: Okay, Bob, at the end of our last interview we talked about issues during your childhood and the school you went to, and I thought you might want to amplify on what you said last time.

Mr. KAPP: Yes. Well I think where we left off is during the period when I was at the Stone School.

MR. NATHAN: Which was your elementary school?

MR. KAPP: Elementary school. From the time I was ten years old to thirteen years old. I was released from school at 2:45 in the afternoon, technically maybe 3:00, and I immediately wanted to head out to the ball field to play baseball or football depending on the season. But, the problem was that my parents had signed me up at the local synagogue for Hebrew lessons which went on for four days a week -- Monday through Thursday -- and it started at 4:30 in the afternoon. And it was about a half hour walk from my school. So generally in the middle of a game I had to pick up and leave and I was a very, very unhappy camper. And particularly because my father had insisted that I do this and my father himself was not a religious person at all but he thought that I should be I guess. And in any event that was a childhood problem that's in some funny way stuck with

me until now.

MR. NATHAN: And did you have a Bar Mitzvah?

MR. KAPP: I did have a Bar Mitzvah when I was thirteen. And that was really the last time that I took any active part in any kind of religious involvement.

MR. NATHAN: And you think that your Hebrew training had any impact on the values that you've exhibited in your career?

MR. KAPP: I suppose discipline. (laughs)

MR. NATHAN: (laughs) And also the fact that you are not a professional athlete.

MR. KAPP: Yes, well, otherwise I would probably be out there in the field today.

MR. NATHAN: So we finished up when you had graduated from law school I think last time and I wanted to ask you about the recruiting by law firms and the Department of Justice in your last year of law school.

MR. KAPP: Yes, in my third year of law school I interviewed a number of law firms. Large New York and Chicago law firms primarily and I also interviewed with the Department of Justice. The problem with large New York and Chicago law firms, the most prominent ones, is at that time, which was in 1958, those firms did not have or invite any Jewish lawyers. So while there were some opportunities in some smaller firms, among the firms that I thought I would be most interested in there was really no opportunity at all. And then I was interviewed by the Assistant Attorney General for the Lands Division

at Justice who was a gentleman by the name of Morton. And he made a very good impression on me and I think I mentioned in our last session that I had made two trips to Washington when I was in high school and was kind of enthralled by the idea of coming to Washington. And in fact, one of my professors at Michigan, my antitrust professor – Professor Oppenheimer – had encouraged the idea of public service and he had been at one point in the Antitrust Division at Justice. And so the combination of those two or three things led me to be interested in coming to the Department of Justice and they did extend an offer for what was then and still may be the Attorney General’s Honors Program. And I accepted the position, went back to Chicago to take the Illinois bar exam during the summer, and then at the end of August I came to Washington and took the position with the Department of Justice.

MR. NATHAN: And at the Department did you have a choice of what division to join?

MR. KAPP: They asked for two priorities -- two preferences -- and I selected the Tax Division as one choice and the Antitrust Division as my other choice. They determined to assign me to the Tax Division and that’s where I spent the entire time that I was at Justice.

MR. NATHAN: Do you recall what the salary comparisons were at the time in law firms and the Department of Justice?

MR. KAPP: I do remember what my salary was. I think it was \$3,700 until I passed the bar at which time it became about \$5,000 dollars. Then I think law firms at that time were not terribly higher than that. I think they were maybe in the six or seven thousand dollar range; very different then from today.

MR. NATHAN: I assume that the salary comparison didn't play into your decision.

MR. KAPP: That was not a factor, no.

MR. NATHAN: Did you give any consideration to clerking for a judge?

MR. KAPP: I did not. We're talking about clerkships?

MR. NATHAN: Yes. Clerkships.

MR. KAPP: I'm sorry. I did not and again that was not a very common practice at the time. One of my classmates, who was the chief editor of The Law Review, did clerk in the Supreme Court but there were not the district court clerkships and the appeals court clerkships at least in the volume that they are today.

MR. NATHAN: And none of the professors at Michigan suggested clerkship to you?

MR. KAPP: They did not. No.

MR. NATHAN: When you made the decision to go to the Department of Justice did you have any long-range goals in mind with respect to your professional career?

MR. KAPP: Yes. I thought at that time that I was likely to want to practice tax law and I certainly had the idea that I would not make the

government my lifetime career. That I would eventually try to join a law firm. And what I had in mind was that I'd spend several years in the Department of Justice and then go back to Chicago. That's where I had grown up and that was my target. My thinking changed very much as I spent time in Washington and I decided that if the opportunity presented itself to practice in Washington then I'd like to do that.

MR. NATHAN: What was happening in the political world when you joined the Department of Justice? What were the issues that were in the forefront?

MR. KAPP: It was a fairly quiet time actually. I joined the Department during a Republican administration; during the Eisenhower administration. The Assistant Attorney General for tax was a gentleman by the name of Charles Rice and I believe . . .

MR. NATHAN: Was Herbert Brownell the Attorney General?

MR. KAPP: No. Herbert Brownell had stepped down by the time that I got there and I think, and I'm not sure of this, but I think it was William Rogers who was the Attorney General at that point. It was, politically, a fairly quiet time and the truth be known I was not very much attuned to political matters in those days. During the time that I was at Justice, John Kennedy was elected President and Robert Kennedy became the Attorney General. And at that time I thought it

was a very poor choice but as time went on and I suppose we'll get to this later, I did become quite high on Robert Kennedy and worked in his presidential campaign. The first thing I recall after he came to Justice is that he invited underlings like myself in the Department to come up in groups of maybe ten or twelve and meet with him in his office. I remember sitting out in the anteroom and the door was cracked open a bit and I looked through the top and I saw there was a football going back and forth. It was Attorney General Kennedy and Whizzer White, who was his deputy, and who of course had been an all-American football player.

MR. NATHAN:

Why don't you describe your experiences at Justice?

MR. KAPP:

Yes. I was assigned at first to the Criminal Section of the Tax Division. The Internal Revenue Service made recommendations to the Department of Justice with regard to the criminal prosecution of various people involved in what they believed to be tax crimes; and our job was to evaluate those recommendations, analyze them and make a recommendation to the Assistant Attorney General for Tax as to whether a prosecution should go forward. He, in turn, made his recommendation to the Attorney General. And that was determinative. So I did that for about maybe ten or eleven weeks; then I was called up for basic training in the Air National Guard. So I went off for eleven weeks to Lackland Air Force Base in Texas for

my basic training and then when I came back in January, I was assigned to the Trial Section of the Tax Division. What we did is handle tax refund suits. They were suits in which the taxpayer had to pay the full tax assessment in advance and then sue for a refund. Taxpayers could sue either in the U.S. District Courts or in the U.S. Court of Claims. The other alternative for a taxpayer was to not pay the tax in advance and then initiate suit in the U.S. Tax Court but our responsibility was in the District Courts and the Court of Claims at the trial level.

MR. NATHAN: And did you get much training before you went into court?

MR. KAPP: I was in the Trial Section for three weeks when I was sent out on my first trial and I was sent out without any supervision at the trial itself.

MR. NATHAN: Were you the lead counsel in the . . .

MR. KAPP: I was the lead counsel. But before I left, Arthur Biggins, who was a senior lawyer in the Tax Division, took me through the process of examining what would be the key witness in the case which I guess would be the taxpayer. And I spent much of a day with him going through the steps that I would take at trial. Then I packed my bag and off I went and conducted the trial. And it was an example of the approach that the Department took in the training of lawyers; at least in the Tax Division, maybe otherwise in other divisions. But the thought was that it was on-the-job training; that you would learn by

doing. It was in great contrast to what I've seen in major law firms where young lawyers in litigation spend long periods of time taking depositions and then go out with a senior partner, maybe two. Eventually, they would get to examine a witness. So what I found when I later got to Hogan & Hartson that surprisingly although I was recruited to go into the Tax Department of the firm, I probably had more in-court trial experience than most of the associates and even the younger partners in the litigation practice of the firm. This is not necessarily the most ideal training program and you probably don't end up with a product that is as good as these major law firms end up with but it was certainly a lot more fun.

MR. NATHAN: How'd you do on the first case?

MR. KAPP: I don't actually remember how I did on the first case. I would say I won most of my cases though not exclusively.

MR. NATHAN: Was there discovery before you went to trial?

MR. KAPP: There was discovery. It tended to be fairly modest. Mostly, interrogatories and requests for admission. The cases tended to be fairly small cases, with one or two significant exceptions. One case which I tried in Philadelphia involved a tax refund suit by Kraft Foods. The counsel on the other side was George Cleary, the senior partner of the firm Cleary, Gottlieb. I expected him to come up with a whole army of associates and, much to my surprise, as I was



standing on the outside of the courthouse, there was this elderly man coming up the steps and it was George Cleary carrying his own bag. We tried that case; I actually won that case. He was quite a gentleman.

MR. NATHAN: Were these cases in the District Court; Federal District Court for the most part?

MR. KAPP: For the most part they were in Federal District Court. We handled cases all over the country, except for New York, the Southern District of New York, and the Southern District of California (Los Angeles). .

MR. NATHAN: Central district.

MR. KAPP: Central district is it. Yes. It excluded San Francisco as well. As I said, we tried cases all over the country except in those two jurisdictions where the U.S. Attorney handled the tax cases. So I tried cases in Philadelphia; Louisville, Kentucky; Oxford, Mississippi; Akron, Ohio; I think Lexington, Kentucky; just all over the place and . . .

MR. NATHAN: Were these jury trials?

MR. KAPP: They were not. I never had a jury trial. They were all judge trials.

MR. NATHAN: Did the taxpayer have the right to ask . . .

MR. KAPP: The taxpayer did have the right to ask for a jury trial.

MR. NATHAN: But they all waived the right to a jury trial?

MR. KAPP: They waived it; yes.

MR. NATHAN: And I take it there's no jury in the Court of Claims?

MR. KAPP: No. And I did try one or two cases in the Court of Claims which was located here in Washington.

MR. NATHAN: Were any of the cases in the Federal District Court here in DC?

MR. KAPP: No. They were not.

MR. NATHAN: Did you detect any hostility being from Washington, DC and going out into places like Oxford, Mississippi and the other places where you tried cases?

MR. KAPP: I really did not. I thought most of the counsel were really quite friendly and courteous. Treated us as fellow professionals.

MR. NATHAN: I was referring more to the judges.

MR. KAPP: The judges. No I didn't really think so. The one interesting example I think was the case that I handled in Oxford, Mississippi. We ended up settling the case. I flew into Memphis and then I took a bus from Memphis to Oxford and one of the things that I observed on the way as we got off the bus midway and there was a cafe there which was called the colored cafe. I thought it was like McDonald's.

MR. NATHAN: Like a rainbow.

MR. KAPP: It turned out it was in fact a racially restricted cafe. And then I got down to Oxford and, interestingly enough, the federal district judge on the first Friday night that I was down there sponsored a fish fry for the people at the U.S. Attorney's office and, as a visiting attorney, I

was invited to go along. It turned out that he had set up in a still on the outskirts of the area that the barbecue was taking place and you'd go to the still and he'd be there doling out the product.

MR. NATHAN: From the still? (laughs)

MR. KAPP: He was quite friendly. (laughs)

MR. NATHAN: While you were at the Department of Justice did you have any involvement with the bar in DC or civic involvement in DC?

MR. KAPP: I did not. I really didn't.

MR. NATHAN: How long were you at Justice?

MR. KAPP: I was there just under three years.

MR. NATHAN: So shortly after Kennedy came in you left?

MR. KAPP: About a year after he came in.

MR. NATHAN: You said that your views changed. Did they change while you were there or only after you left the Department?

MR. KAPP: About?

MR. NATHAN: About Robert Kennedy.

MR. KAPP: They changed in a big way later than that. I would say in the mid-sixties. I saw that he . . .

MR. NATHAN: This is when he was a senator now?

MR. KAPP: He was a senator and he was advancing programs of social change that I really cared about. He had a very strong civil rights stand. A very strong anti-poverty stand. He had gone to South Africa to make

a speech at the University of Cape Town taking on the whole subject of apartheid there. I was very strongly drawn to him.

MR. NATHAN: What led you to leave the Department of Justice?

MR. KAPP: I knew that I wasn't going to stay permanently and I knew that I was interested in staying in Washington if the opportunity presented itself. I got a call one day from Barrett Prettyman who was a partner at Hogan. He told me that he had been to the University of Michigan to interview law students . . . second and third year law students -- and that he had talked to several professors there about the perceived need at Hogan & Hartson for a younger lawyer in the Tax Department. These two professors, L. Hart Wright, who had been my tax professor, and Professor Oppenheimer suggested that he talk to me. So he called me and asked me whether I would be willing to come over and interview and I did. I met Seymour Mintz, who was the head of the tax group at that point, and I also interviewed with Nelson Hartson who was the senior most partner in the firm.

MR. NATHAN: Did you look at other firms at that time?

MR. KAPP: I did not. I did not.

MR. NATHAN: And did you decide not to go back to Illinois and what led you to stay in DC?

MR. KAPP: Well, I was married. My wife Jean was interested in staying. I had at that point two children and we decided we really were interested in

staying here in Washington. That was pretty much determinative along with the fact that I knew something about Hogan & Hartson and, although I knew it to be basically a local Washington, DC law firm, Seymour Mintz, who was head of the tax group, was a very prominent tax lawyer who had a national reputation and a national practice as did one of the other partners, Tom Plumb. So I saw the combination of staying here in Washington and being able to work with them as a real opportunity.

MR. NATHAN: When you say the firm was a local firm at that time was that mostly local businesses that it represented?

MR. KAPP: There was some national practice. Seymour Mintz had a national tax practice. He represented Republic Steel and Howard Hughes and Libbey-Owens-Ford, the glass manufacturer, and Armour and Company, among others. He had a true national practice.

MR. NATHAN: It was a tax practice?

MR. KAPP: A true national tax practice. There was a little bit of a national practice in the communications area as well. Other than that the firm basically represented local clients but they were the major commercial factors in Washington. The firm represented Woodward & Lothrop and Garfinckels and Riggs Bank and the Evening Star newspaper and the DC transit system public utility. That was the meat of the practice and in fact much of it was litigation

oriented.

MR. NATHAN: How big was the firm at this time?

MR. KAPP: I was the 43<sup>rd</sup> lawyer in the firm and at one point, when I was at the firm, it was as small as 37.

MR. NATHAN: And how did that compare with other firms in the city at that time?

MR. KAPP: I think that there were no massive firms. At that point, I think that Arnold & Porter and Wilmer, Cutler and Steptoe and Johnson were all about the same size. Covington, I think was a little bit larger. I would be surprised if any of these firms were over a hundred lawyers at that point.

MR. NATHAN: Why don't you describe your practice at Hogan & Hartson from the time you started as an associate and how it developed?

MR. KAPP: Yes. I started as basically a general tax practitioner and, in fact again, unlike today there were really no specialties except for estate planning within the tax area. So I worked on all manner of tax problems and I worked a lot with Seymour Mintz on many of the clients that I mentioned earlier that were basically his clients. I had some of my own clients. I represented a whole group of tennis players which included Arthur Ashe and Stan Smith which came to me through Donald Dell who had been at the firm at one point. I represented Amnesty International, The University of Pennsylvania National Public Radios and the Government of American Samoa.

During all my years in the Hogan Tax Department, a substantial part of my practice consisted of handling tax litigation. I tried a number of cases in the United States Tax Court which sits in Washington, DC. I also handled appeals in those cases which took place in the various United States Circuit Courts. I argued appeals in the First Circuit and the Third Circuit, possibly others.

In addition, I performed many administrative tasks for the firm over the years. I served two terms on the firm's Executive Committee and served as chair of the Diversity Committee.

After about 20 years, the firm took on the representation of the U.S. Government in the takeover of the major northeastern railroads; the principal one of which was the Penn Central. They took them over in something in the nature of an eminent domain type proceeding. Through congressional legislation there was established a special court to handle that litigation. And that special court would sit in the Prettyman Courthouse and was headed by Henry Friendly who was a 2<sup>nd</sup> Circuit Court of Appeals judge. We represented the government's interest but we shared that representation with Wilmer, Cutler and Steptoe and Johnson. This was a major valuation litigation in which the Penn Central was claiming I think, an eighteen billion dollar recovery. There were all kinds of expert valuation witnesses. I had over the years developed some expertise in the

valuation area. In any event, I was asked to manage the firm's part of the representation. I did so for the next maybe two or three years. I spent very near full time on that representation. There was ultimately a settlement. There had been roughly 25 lawyers at Hogan working on the case and they were suddenly unemployed. So I went back to the tax group. By that time I had developed an interest . . .

MR. NATHAN: What year are we talking about now?

MR. KAPP: It must have been . . .

MR. NATHAN: Early 80s?

MR. KAPP: Yes. Early 80s. I had developed an interest in not-for-profit organizations; the various kinds. Universities, major hospitals, academic medical centers, private foundations, a whole range of organizations and while I continued with a fairly wide range of tax practice I was increasingly involved in the not-for-profit sector and a larger and larger portion of my time was devoted to that.

MR. NATHAN: And how did that come about that you became interested in non-profits?

MR. KAPP: I guess it had to do with something of an interest in what they were doing. This included educational institutions and Amnesty International was a major human rights organization. I had sat on the board of a number of different not-for-profit organizations and I felt very comfortable in that environment.



MR. NATHAN: Did you have some clients that were non-profits that led to this interest?

MR. KAPP: Yes.

MR. NATHAN: You mentioned Howard Hughes.

MR. KAPP: Yes. But we also represented a number of universities. We represented Harvard. We represented Yale. We represented the University of Minnesota in a major matter and also the Howard Hughes Medical Institute for which we had obtained a tax exemption against some very strong political pressure. And a number of major medical centers. Montefiore in New York and we represented Georgetown University and Georgetown Hospital. So then I spent a lot of time on those things.

MR. NATHAN: And this occurred well after you had made partner at the firm?

MR. KAPP: Yes.

MR. NATHAN: When did you make partner?

MR. KAPP: Yes. I came to the firm in 1961 and I became a partner in December of 1965.

MR. NATHAN: After about four years?

MR. KAPP: About four years with the firm, yes.

MR. NATHAN: While you were both an associate and then a young partner at the firm did you participate in the bar or other civic activities in DC?

MR. KAPP: I did. I first became involved in the early 60's. I became interested

in what the American Civil Liberties Union was doing. And I decided that I wanted to take on one or more ACLU cases on a pro bono basis. There was really no history at the firm of people taking on pro bono work other than some things that Barrett Prettyman had done. And the firm was at that time a very conservative institution. And while people were engaged in certain kinds of civic activities they were not engaged in social change kind of activities. I was concerned about how the firm would react to my request to take on ACLU cases, which I made through Seymour Mintz up to Nelson Hartson. I was pleasantly surprised that they felt that if that was something that I felt strongly about and wanted to do they were going to give me the opportunity to do that. That led over the years to a number of like matters where I engaged in various kinds of civic-related activity and the firm tended to support that in a way for which I have always been grateful.

MR. NATHAN: What were the first matters for the ACLU that you were involved in that you needed firm permission to do?

MR. KAPP: I think the first case that I took from the ACLU was... I represented Abbie Hoffman. (laughs)

MR. NATHAN: (laughs) One of the Chicago Eight.

MR. KAPP: One of the Chicago Eight and as I recall it was in a flag burning case. At that time, and for whatever reason, the government decided not to

pursue him on that. They had plenty of other things to pursue him on. So that was the first representation and then there were a number of other civil liberties type cases that I took. In addition, I sat on the screening committee of the ACLU which decided which cases the organization would take.

MR. NATHAN: This sounds like the first time you were involved with civil liberties. You hadn't been involved in college or earlier in your life. What led you to the civil liberties issues at that time?

MR. KAPP: I went all the way through college and I guess all the way through law school without any sense of great civic obligation of any kind or particular interest in that. I had a rather conventional kind of experience particularly at undergraduate school. I think I mentioned the other day that I spent much of my activity at undergraduate school in fraternity activity. But things were beginning to happen in the 60's that really caught my attention and it caught my interest and I was looking for ways to become involved and I remember talking to one or two different organizations and finally catching on with the ACLU.

MR. NATHAN: You also mentioned earlier that you had been involved in the Kennedy campaign which I think was in 1968.

MR. KAPP: Right.

MR. NATHAN: What was your involvement?

MR. KAPP: Yes. In '68 political campaigns were run very differently than they are today. Rather than major advertising campaigns with a compensated staff of people to run the campaign there were various citizen volunteer organizations. There was a major Robert Kennedy organization; it was denominated Citizens for Kennedy and was operated out of a local office.

MR. NATHAN: In DC?

MR. KAPP: In DC. Peter Edelman was a major factor in running the organization; he had worked for Robert Kennedy. The situation was that Senator Eugene McCarthy had decided to challenge Lyndon Johnson and he had done very well in the first primary; I think it was New Hampshire. In any event after that Robert Kennedy decided to get into the fray and this Citizens for Kennedy group formed. Then there was a Lawyers for Kennedy component which was headed by Bob Wald. They recruited 10 lawyers to send to California to work on the campaign. Kennedy had won primaries in Indiana and South Dakota and the last of the major campaigns was to take place in California. So I went out there for three weeks. I took off from the firm and at that point I thought I was taking off for a much longer period of time.

MR. NATHAN: You took a leave of absence from the firm?

MR. KAPP: I took a leave of absence from the firm and I worked on a range of

things for the campaign. Organizing university professors, campaigning in Orange County and also in Hispanic areas of the city. I did that for these three weeks and I left California on the day of the election. We were done and I headed back home and my plan was that I would continue on with the campaign, particularly if he won California. And, of course, we all know what happened. I got a call at 4:00 or 5:00 in the morning, something like that, from Arthur Rothkopf, who had gone out to California with me, telling me what had happened and that was the end of it.

MR. NATHAN: And you went back to the firm?

MR. KAPP: I then went back to the firm, yes.

MR. NATHAN: I want to ask you about the practice of the firm at that time. Was there much emphasis on rainmaking and acquiring clients and billing clients?

MR. KAPP: There was a lot less than there is today. (Laughter) The firm had a group of established clients; a number of rainmakers in the firm but the business was pretty much shared around. There was some, as time grew on, reward for those people who attracted business. The firm began keeping records of who attracted clients. The emphasis on business production grew exponentially over a period of time to where it became, a very big factor in how people were treated and how they were compensated.

MR. NATHAN: And did you feel any pressure at any point to be a rainmaker enough to obtain new clients?

MR. KAPP: I did, I did, yes. You couldn't live in that environment without feeling a certain amount of pressure to do that.

MR. NATHAN: And when did that take place, was it ...

MR. KAPP: That was, let's see, I would say that began maybe in the mid-80s, maybe a little before that.

MR. NATHAN: And can you describe the metamorphosis of the firm because it started as a, representing mainly local businesses, and now it is a national, international firm?

MR. KAPP: International. Over time things began to change. Because I remember early on, shortly after I became a partner, there was a proposal to open an office in Rockville, Maryland. It got shot down on the grounds that it was just too risky to open an office out of Washington. Then slowly but surely things began to change. We opened an office in Baltimore and then made what was then a fairly big move to merge with a firm in New York which had about 200 lawyers and then the ball kept rolling and ultimately Hogan & Hartson had about 1,200 lawyers. Thereafter, they merged with the UK firm Lovells which had about an equal number of lawyers and so today they have 2,400 lawyers, with offices in 45 cities. It's a very different place than when I came with 42 lawyers.

MR. NATHAN: And it wasn't the game plan when you joined the firm that that was how the firm was going to develop?

MR. KAPP: I don't think they really had a game plan.

MR. NATHAN: There was a major case that you were involved in dealing with the tax exemptions. When did that occur and what was the background?

MR. KAPP: Yes, that was again in the 80s, early 80s I think.

MR. NATHAN: After the Penn Central matter?

MR. KAPP: It was after the Penn Central matter. Yes. I'd say it must have been the mid-80s, maybe '87 when we finally got to the Supreme Court. After the *Brown v. Board of Education* case, and the efforts to desegregate the schools in the South, a number of what were characterized as white flight academies organized. These were private schools that were established in various public school districts and drew off the white students; leaving the public schools primarily housing African American students. The effect was to continue school segregation. Those white flight academies had a federal tax exemption which was a critical factor in their financial soundness. We were recruited by the NAACP Legal Defense Fund to challenge the tax exempt status of these white academies on the ground that they were discriminating on the basis of race and we took the case. We developed our complaint, knowing that the major obstacle was likely to be the standing of our clients -- the parents of children of

black public school students -- to sue. We thought we had a pretty good complaint developed to withstand a challenge on that ground. We got to the U.S. Court of Appeals in the District and I argued that case. Now Justice Ginsburg was on that panel and ultimately wrote the court's opinion. They held that the parents had standing to sue and the government appealed the case and obtained certiorari in the Supreme Court. I argued the case in the Supreme Court. We lost on a 5 to 3 decision on standing grounds. Justice Marshall was ill and did not participate in the hearing. The government was represented by Rex Lee who was the Solicitor General at the time. That was the only time in my career that I appeared before the Supreme Court and I found it a daunting experience in every way. As I look back on it, I don't think I prepared for it in most effective ways. There were probably 300 standing opinions and I thought I didn't want to get caught up on being asked about a particular decision and not knowing anything about it. So I spent *much* too much time reviewing standing cases when I should have spent more time on moot courts.

MR. NATHAN:

Did you have a moot court?

MR. KAPP:

I had only one moot court. I probably should have had three or four moot courts. I now know that there has developed a group of professional Supreme Court advocates who regularly appear before the Court. It is now somewhat unusual for lawyers who don't



practice regularly before the Court to present cases there, certainly in significant cases. I look back on that, and reflect on that, I think that's probably right. I believe I lost Justice White in the course of the argument and Justice O'Connor was opposed from the outset. I'm not sure that I handled her that well. So it was a great learning experience for me. After it was over, and we lost on standing grounds, we did go back to the Internal Revenue Service and persuaded them to withdraw the tax exemption of those white flight academies and that, to this day, it is the case.

MR. NATHAN: On what ground did you persuade the IRS?

MR. KAPP: I think there was a certain amount of feeling within the Internal Revenue Service that these schools were discriminatory and ought not to qualify for tax exemption.

MR. NATHAN: And with respect to your argument in the Court of Appeals, do you recall who the panel was and do you recall what that experience was like?

MR. KAPP: Yes, it was a very good experience. I don't remember the makeup of the panel but I surely remember Justice Ginsburg who took a very active role in the case. She was very very helpful to me. She wrote the opinion. It was a good solid opinion.

MR. NATHAN: Was it a unanimous opinion?

MR. KAPP: It was a unanimous opinion.

MR. NATHAN: I want to ask you about balancing your personal life with your professional life at the time that you were a partner at this stage, 20 years after making partner at your firm. How did you balance those things?

MR. KAPP: I think it was really much easier to balance things in those days than it is now. I had four children -- that was a big part of my life. Then I had all of these outside interests that I wanted to pursue and the firm seemed very open to all of that. I worked very hard and I spent a lot of hours at the firm working on matters and there was a certain amount of family sacrifice in all of that. I think everybody who's practiced in a major law firm has experienced that and I certainly, I did too. But again the environment was much more conducive to that. I mean, I for many many years took a month off during the summer to travel with my family. Not every year but many, many years and that was never a major problem. I run into people now here and I talk to them and they feel great if they get a three day weekend. The pressure on these people to be productive is enormous. There were pressures in my day but they were much less than today.

MR. NATHAN: I just want to ask you about opportunities to do public service. I take it that you had some opportunities that they were presented over time.

MR. KAPP: Yes.

MR. NATHAN: What were they and what was your decision?

MR. KAPP: The first one was during the Carter administration. Bob Herzstein was the head of the trade component at the Department of Commerce and he asked me to come on in an assistant secretary role. I pursued that all along but the confirmation process moved at a glacial pace. By the time that they gave me the green light, there were about six months left in the Carter term. I thought it made no sense to go in at that point. I thought that if Carter were re-elected, and I knew that Bob planned to be staying on, I'd have a chance to join the administration. So I decided to wait. Of course Carter was defeated so that was the end of that. And then during the Clinton administration, the second half of it, I was recruited to be the general counsel of the Department of Agriculture. I pursued that all of the way up to the point where they had again given me the green light. And for reasons that are not entirely clear to me at this point, I decided not to go forward. I've always regretted that I didn't do at least one of those two things. But I didn't.

MR. NATHAN: Did you ever consider applying for a judgeship?

MR. KAPP: I did not.

MR. NATHAN: And apart from the ACLU, have you been active in the bar while you were a partner here at Hogan?

MR. KAPP: I was active in a number of public interest organizations. I served as chair of four different organizations, public interest organizations, at

different times. I was the chair of the local ACLU; I was the chair of the Washington Lawyers Committee for Civil Rights; I was co-chair of the National Lawyers' Committee for Civil Rights and I was the chair of what was then called the International Human Rights Law Group which became Global Rights. So I spent all, almost all of my free professional time in those particular areas. In addition, I took a sabbatical leave in 1978 and spent 6 months in Geneva, Switzerland working in the office of the International Commission of Jurists which is an international human rights organization.

MR. NATHAN:

What was your experience like in Geneva?

MR. KAPP:

I had a great experience in Geneva. I took, as I said, 6 months; I took my whole family with me. Three of my children came with me, one of my sons, my oldest child, was in his first year of college and did not come with me. My two youngest children, who were then, I guess about 9 and 7, we put in the French speaking public schools in Geneva. Neither of them spoke French but by the time we left they could carry on a simple conversation in French. And my eldest daughter, who did speak French, was placed in the College Calvin, which was equivalent to the third year of high school. I took French tutoring lessons along with my two younger kids; they did much better than I. As I said, I worked in the office of the International Commission of Jurists which had a full plate of interesting human

rights matters. I did a number of things around South African issues including working on the Stephen Biko inquest and some criminal justice issues. The head of the organization was a very well-known, very prominent human rights activist by the name of Niall McDermott. That was a great learning experience working along with him.

MR. NATHAN: And was that the beginning of your interest in international human rights affairs?

MR. KAPP: Actually my interest in international human rights grew out of the efforts of the National Lawyers' Committee to address the issue of apartheid in South Africa. The organization is basically a domestic civil rights organization but it did have a South Africa component. It funded lawyers in South Africa who represented members of the opposition to the apartheid government and also carried on protest movements in front of the South African embassy and elsewhere. I worked on the South Africa subcommittee of Lawyers Committee and became interested in the international human rights aspects of that effort. That was my first exposure to international human rights standards.

MR. NATHAN: I think that we'll stop at this point if that's okay. We'll resume here at our next session.

MR. KAPP: Okay.

