ORAL HISTORY OF ROBERT KOPP

This interview is being conducted on behalf of the Oral History Project of The Historical Society of the District of Columbia Circuit. The interviewer is Judy Feigin, and the interviewee is Robert Kopp. The interview took place at the home of Robert Kopp in Bethesda, Maryland, on Thursday, April 16, 2015. This is the ninth interview.

MS. FEIGIN: Good morning.

MR. KOPP: Good morning.

MS. FEIGIN: Last time we talked about life at the Justice Department, but we held off until today to discuss the amazing panoply of cases that you participated in either directly or as a reviewer. I know we won't be able to get through them all today, but we should make a good start. Probably the best way to do that is to divide it among topics, so let's start with the reason the Section first began, which was to protect the public fisc. Lots of cases on that. Want to tell us about some of the most interesting?

MR. KOPP: Yes. The Civil Division was originally set up as a Division to deal with monetary claims against the United States. With the passage of time the government has in an increasing number of statutory provisions waived its sovereign immunity with respect to suits over money, and the litigation load for the Division in this area has become more and more significant. In recent years, there have been suits handled by the Appellate Staff where the amounts of money at stake have been staggering, and they have also been very interesting suits. Sometimes they involve factual situations which someone who hasn't been immersed in government litigation might think were not terribly attractive, but with the sums that were involved – and you consider that the sums at stake came from the taxpayers of the country – the defense of these suits was extremely important in terms of defending the

government and protecting its budget. For instance, one of the cases that our office was involved in during the time that I was the Director was a case called *Quiban v. U.S. Veterans Administration*[29] which involved a suit brought by Philippine war veterans who had fought on the side of the United States in World War II, and their surviving spouses. They were seeking to receive from the United States some $2 billion in veterans' benefits to be paid annually to them. The Civil Division and our office defended against those suits because we felt that the statutes did not authorize that type of payment, notwithstanding that the veterans had been risking their lives on behalf of the United States during the war.

MS. FEIGIN: Was this disability for injuries incurred during the war?

MR. KOPP: Yes. Basically disability that results from the war and also survivor's benefits. It was not a terribly attractive position in terms of equities for us to be in, but the key thing about money coming from the federal fisc is that there's sovereign immunity that bars it from being spent unless authorized by Congress. So if the authority waiving sovereign immunity isn't there, the money can't be spent.

MS. FEIGIN: In cases like that where the facts are really difficult, is there thought about settling the case just because it's so ugly, or is the principal seen as the paramount issue?

MR. KOPP: It depends on what area you're in and what the relevant statute says. In this particular case, we felt the statutory authority simply wasn't there to make these payments. In fact, if you looked at the statute, there was one type of Philippine war veteran that did get payments because they were authorized by Congress, but other types were not. When the case got to the Court of Appeals, the D.C. Circuit, in an opinion by Judge Ruth Ginsburg, agreed with us that

[29] *Quiban v. U.S. Veterans administration*, 928 F.2d 1154 (D.C. Cir. 1991).

notwithstanding the sacrifices of these war veterans, the authority simply wasn't there to make the payments. In that situation, if you don't have the authority, there's nothing you can do about it. Eventually, Congress felt that something had to be done and changed the law and did permit at least some payments to these veterans.

Now talking about difficult situations, some of the worst cases that we had in terms of facts were those under the Federal Tort Claims Act where you had what we lawyers euphemistically call "damaged baby" cases, where there was an error by government medical personnel that caused serious and tragic damage to an infant, and the parents would sue the government. If you look at what happened, the government sometimes was not in the position of putting its best foot forward in terms of the facts of the case. A district judge in those circumstances could well be influenced by emotion and award damages far beyond what were any sensible limits. We would look closely at those cases in Appellate and make recommendations to the Solicitor General, and the bigger the sums were, the more we felt obliged to look very, very closely at them in terms of recommending appeal. Some of these cases involved really horrible facts where we succeeded in obtaining very significant reductions in the judgment. For instance, in a case called *Dickerson v. United States*,[30] which involved horrible damages to a baby, we reduced the judgment in favor of the family from $45 million to $20 million. Obviously $20 million is still a substantial award, and we just felt that on the facts, you couldn't justify the larger sum awarded by the District Court.

[30] *Dickerson v. United States*, 280 F.3d 470 (5th Cir. 2002).

These suits over damages are brought under statutes like the Federal Tort Claims Act, and the Tort Claims Act is a waiver of sovereign immunity which is restricted by the time limits which are written into the law. If you are a plaintiff's lawyer, you have to be very careful to bring a suit on behalf of your client within the statutory time limits, which in general are either two years to bring suit or six months after denial of an administrative claim, and if the suit isn't brought within the statutory time, you're just out of luck.

One of the most well-known series of cases involving statutes of limitations we were involved in were the cases that arose out of the activities of what is loosely known as the Whitey Bulger gang in Boston. That was a gang that was in existence for over thirty years. Bulger worked his way up to eventually become head of the gang and was assisted by a corrupt FBI agent who ended up in jail prior to Bulger's capture and conviction. There were a good number of people who claimed damages because of activities of the gang in conjunction with what plaintiffs alleged was support for the gang by the FBI, but many of them were very slow in bringing suit. Thus as government lawyers, we felt it our duty to raise the statute of limitations as the defense, and in a number of cases, we were successful.

MS. FEIGIN: You say they suffered injury. Some people were murdered.

MR. KOPP: Yes. The thrust of these cases was what was the FBI's role, and as I say, there was one person from the FBI office in particular whose conduct essentially moved from being a government agent to being a co-conspirator with the gang. But not all of the people who were suing ended up being barred by the statute of

limitations, and some of these cases were to prove quite costly to the government. Perhaps the worst of them was a case called *Limone v. U.S.*[31] which arose out of facts from the 1970s but which was eventually decided by the federal courts in 2009. It involved four people who had been involved in a relatively minor role in various petty criminal activities. Prosecution against them for murder was brought by the state of Massachusetts. These four people were initially convicted. They served some thirty years' time in prison. Two of them died while in prison. Eventually it was figured out that they had wrongfully been convicted. The FBI admitted it had not disclosed critical evidence concerning a key witness. The survivors were released and of course they and their family members sued the federal government. The District Court entered a judgment in excess of $100 million, and we just felt we had to appeal, notwithstanding that the facts were so bad. The First Circuit affirmed. The only consolation was that the First Circuit did say that it thought that the District Court judgment was more than the plaintiffs deserve but the First Circuit was an appellate court and the District Court had broad discretion in determining the amount of damages that were owed.

It was typical of these Boston gang cases that the underlying facts were extremely unattractive. For example, there were a number of cases involving two young women whom Bulger grossly killed.[32] Again it was a situation where we felt we were obliged to defend, and while the sums were not in the $100 million range, they were significant. Notwithstanding the bad facts, we were responsible

[31] *Limone v. United States*, 579 F.3d 79 (CA 1, 2009).
[32] *Davis v. United States*, 670 F.3d 48, (1st Cir. 2012).

for defending the public fisc and we felt we had a duty to pursue the cases through the Court of Appeals.

Our litigation in defending the public fisc was not confined to tort cases. For instance, the Tucker Act was a waiver of sovereign immunity permitting suits for contractual damages in the Court of Federal Claims and then appeal to the Federal Circuit. One of the biggest cases involved the cancellation of the A12 aircraft, which was a multi-billion dollar project, and the cancellation led to years of appellate litigation. We worked very closely with the trial team when the case reached the Court of Appeals. The government lost in the trial court, and we obtained a reversal and a remand in the Court of Appeals for the Federal Circuit.[33] Because we had been faced with a multi-billion dollar judgment, our reversal of the Claims Court judgment changed the momentum of the litigation and eventually the case was settled for a much more reasonable sum than the multi-billion dollar judgment that had been entered by the trial court.

There were cases that had larger financial stakes than the A12 litigation. One of them was a case called *Schism v. U.S.*,[34] which involved people who had served in the military during World War II and afterwards. The plaintiffs in *Schism* alleged that when they signed up for military service, the recruiters had promised them that they would be provided with free medical care for life and they would be provided that medical care in military facilities when they left the military service. They brought suit, and a panel of the Federal Circuit agreed with the plaintiffs, that since the recruiters had promised them lifetime medical care for

[33] *McDonnell Douglas v. United States*, 182 F.3d 1319 (Fed. Cir. 1999).
[34] *Schism v. United States*, 316 F.3d 1259 (Fed. Cir. 2002 *en banc*).

free in government facilities, they were entitled to it. However, we went for en banc, and Roy Hawkens and Barbara Biddle of our office convinced the full court that the recruiters had no authority to contract away the government's money. That was something that had to be determined by Congress. If you were a recruiter, you just couldn't go out and make a promise that would be binding on the government when there wasn't statutory authorization for it. The en banc Federal Circuit agreed with us. It was I think easier for the court to agree with our position because over the years after World War II, Congress had been focused on issues like that and had enacted a series of laws which became much more specific in terms of what the rules were for when people who served in the military could get medical service in military facilities. So we won the case in the Federal Circuit. Had the litigation come out the other way, the cost to the federal government might have in fact been as high as $15 billion. Money was really something that was at stake in our litigation.

I should add a couple of big money cases which were unique. For instance, the government after World War II had all these military bases that it was operating, and over the years it was very expensive to operate these bases. Meanwhile, the government was owning land that was becoming more and more valuable for other uses. Starting in 1988, Congress adopted legislation for a procedure by which military bases could be closed. Essentially that procedure was to provide that under a very tight time schedule, there would be a recommendation from a Base Closing Commission to the President. The President would then decide whether to accept or reject the recommendation of

the Commission, and Congress then had a limited period of time in which to set aside the President's decision. As one might expect, the closing of just about any military base could cause much opposition in a particular community, and these base-closing determinations led to a lot of litigation. The litigation typically would come up under very tight time tables because the statute had very tight time limits written into it, and so our attorneys, who were experienced people like Doug Letter and Scott McIntosh, would find themselves being presented with a new appellate case on a very short timeframe. They only would have a couple of days to prepare their brief in the case, file it and argue it. We were very successful in the litigation in the courts of appeals. One of our cases, however, did go to the Supreme Court. In a case called *Dalton v. Specter*,[35] we succeeded in having the Supreme Court rule that Congress had intended a process where the courts would not be involved in reviewing the President's decision. That was quite a significant ruling and saved the government many billions of dollars.

MS. FEIGIN: I would note that Doug Letter now has your old job as head of the Appellate Staff. His oral history is being taken for the Society, so for anybody looking at your oral history who wants to follow up on some of these cases that you've said he's involved in, he may have discussed them in his oral history as well.

MR. KOPP: That's very good because as I go through this, you may find situations where Doug knows a lot more than I do on some of these matters.

In relatively recent years, by which I mean the 21st century, perhaps one of our biggest, if not the biggest, case over money was the litigation which was brought in *Cobell v. Norton*. That was a suit that was instituted in 1996 when a

[35] *Dalton v. Specter*, 511 U.S. 462 (1994).

class of over 300,000 Indians alleged that for essentially a century there had been an error by the federal government in terms of accounting for funds held in trust for them. The suit was initially handled by the Environment Division, which is the traditional Division for handling cases that are relating to Indians. On an interlocutory appeal from a District Court ruling by Judge Lamberth in the District Court here, the D.C. Circuit in 2001 generally affirmed the Court's ruling that the government had failed on a massive scale in performing its trust obligations to the Indians and remanded the case for further proceedings.

MS. FEIGIN: Before you go on, you said this was one of the biggest cases financially. Do you have any sense how much money we're talking about?

MR. KOPP: Eventually, and I'll get to it in a moment, the case was settled for over $3 billion.[36]

MS. FEIGIN: So we know it was more to start with. And I should also say that I believe Judge Lamberth's oral history will be taken. I suspect this case will be a part of his story as well since it was major litigation.

MR. KOPP: As an aside, since Judge Lamberth is obviously at the center of this, I should add that when he was an Assistant U.S. Attorney, I worked very closely with him, and when he became a judge, I thought it was a very good appointment. I've always respected him, but that doesn't mean that we didn't take a good number of appeals from his rulings (laughter). Basically what happened in *Cobell* was that after the D.C. Circuit affirmed Judge Lamberth's decision in 2001, he became

[36] *Cobell* cases in the Court of Appeals for the D.C. Circuit during Robert Kopp's tenure: *Cobell v. Norton*, 240 F.3d 1081 (2001); *Cobell v. Norton*, 334 F.3d 1128 (2003); *In re Brooks*, 383 F.3d 1036 (2004); *Cobell v. Norton*, 391 F.3d 251 (2004); *Cobell v. Norton*, 392 F.3d 461 (2004); *Cobell v. Norton*, 428 F.3d 1070 (2005); *In Re Kempthorne*, 449 F.3d 1265 (2006); *Cobell v. Kempthorne*, 455 F.3d 301 (2006); *Cobell v. Kempthorne*, 455 F.3d 317 (2006); *Cobell v. Salazar*, 573 F.3d 808 (2009).

very unhappy with what he felt were the government's actions in implementing the rulings, and he eventually, on the remand from the 2001 ruling, found that the government was not successfully moving towards an appropriate accounting, and he found the Secretary of Interior to be an unfit trustee and in contempt. Up to that point, the case had been an Environment Division case, but the Civil Division had started in the District Court to work with the Environment Division on the case.

Following the contempt proceeding, the case was transferred to the Civil Division. So we got into the case and we argued that the government had in fact started doing an appropriate task of accounting for what was owed to the Indians, but the District Court made a series of rulings that we found very troubling, and we felt that the court's rulings were improperly interfering with the agency's discretion to handle what was an incredibly complex task. Civil's arguments did not go over well in the District Court in terms of the Secretary's approach to how the accounting should be handled, and the District Court, in a series of rulings that had some very harsh language for the government, entered orders that we felt were not only interfering with what the government was trying to do to implement the accounting but were really counter-productive.

We took a series of appeals. Eventually, by 2006, we had taken eight appeals to the D.C. Circuit. On our eighth appeal, the Court noted that with respect to the eight appeals Civil had taken, each time the Court of Appeals had set aside the District Court order or other action against the government. Thus the

Court of Appeals at that point agreed that the case should be reassigned to a different trial judge.

MS. FEIGIN: These were obviously very harsh rulings by Judge Lamberth. He's shutting down the computers, and I assume a lot of it was personally directed toward the Secretary. Did you have any sense of the Secretary's personal response to all this?

MR. KOPP: I know that people in the Interior Department and elsewhere in the Executive Branch were very upset over what was happening. They felt that they were in good faith trying to achieve an appropriate accounting and that the rulings of the District Court – and you mentioned the fact that the judge at one point shut down the Department of Interior's computers – that these rulings were just making an incredibly difficult task to begin with much more difficult. As I say, after we took eight appeals, the court directed a reassignment to a different judge. After the shift, the case still had one more trip to the Court of Appeals on the merits, but that one Court of Appeals decision set guidelines that led to the parties negotiating a settlement. Under the settlement, slightly over $3 billion would be distributed to the Indians. That distribution eventually was implemented, and it brought to an end one of the most unfortunate histories in the government's relationship with the Indians.

MS. FEIGIN: Let me ask one more question about that case. I don't quite understand why it got shifted from Environment to Civil. There must be a reason.

MR. KOPP: I was not plugged into what was the precise reason, so I can only speculate as to why. One might be that the case had become such a complicated and difficult

case that the people high in the Department felt that it really needed new blood. Another might be that the people in the Environment Division wanted new blood to come in. Also, people felt that the subject matter in terms of exotic remedial orders was something that Civil Division had particular expertise in. I wasn't involved in the decision for it to come to Civil. I just knew that it came to Civil. The thing really was an extraordinarily challenging case. I felt looking back that we did very well because the basic eight appeals that we took set up the case in a way that, after the reassignment from Judge Lamberth, the case was placed in a posture where the District Court, the new judge, was able to analyze it in a way that set up the basis for one more Court of Appeals merits decision and eventually a settlement.

MS. FEIGIN: In all the cases you've talked about so far, you've been defending the public fisc, but I know you sometimes were on the other side, getting money for the government. Can you give us an example of that?

MR. KOPP: Yes. As you mentioned, the Civil Division principally was defending in terms of suits against the government for money, but it did have one component, in particular, which had the authority to bring suit as a plaintiff under the False Claims Act against people who were taking fraudulent actions against the government. The government was able under the statute, if it prevailed, to obtain treble damages. Over the years, thanks to people like Mike Hertz, who was head of the Frauds Unit and who had been in our office before he went to that position, the Frauds Unit became more and more successful in recovering large judgments. We handled some of their cases in the courts of appeals and were successful in

recovering some very large judgments, sometimes many millions of dollars. I must say that for an office that basically had the job of being the government's defense attorney, it was very refreshing to also have cases where the government was the plaintiff and the office was able to bring in money to the government as well.

MS. FEIGIN: I assume mostly in those cases you'd be wearing the white hat.

MR. KOPP: Businesses on the other side of course wouldn't agree to that, but in most of these cases we felt we were wearing the white hat. As I've mentioned, a lot of our cases did arise in facts that were not terribly attractive to outsiders, and it was nice to be in a case where we could win a judgment for millions and millions of dollars against a corporation where a court had found that it had been engaged in fraud against the government.

MS. FEIGIN: Does any one in particular stand out?

MR. KOPP: There were a lot of cases. There was a case, for instance, *United States v. Rogan,*[37] where Doug Letter and Tom Bondy in our office obtained affirmance of a judgment of $64 million in favor of the government. You would have sums like that in these False Claims Act cases.

MS. FEIGIN: So beyond the fisc, you did other things (laughter).

MR. KOPP: Yes. We indeed did other things, and a good part of our job was simply defending actions taken by the Executive Branch and defending the authority of the Executive Branch to do those actions. For instance, one of the most important areas we were involved in was litigation concerning the census. As the end of a decade would approach, it would become very predictable that our office would

[37] *United States v. Rogan*, 517 F.3d 449 (7th Cir. 2008).

be involved in some way in significant litigation concerning the census. It was just very predictable that say in about 1978 or so somebody would be suing over the 1980 census. The pattern of suits starting in 1978 or 1979 or 1988 or 1989 was one that persisted through the decades. There were a significant number of these census cases. There still may be into the future a significant number of these cases, but maybe less serious ones in the future than there have been in the past because one of the most significant rulings that we were involved in was a census case that was decided in the 1990s which involved the enumeration of the census and the question of a statistical adjustment. The Supreme Court in that case – it was *Wisconsin v. City of New York*[38] – agreed with the government position that the method of how you calculate the enumeration of the census was basically committed to the discretion of the Executive Branch and upheld the decision of the Secretary of Commerce not to make a statistical adjustment to the 1990 census. Had the opposing view been accepted, it's very likely that future censuses would have been bogged down, at least for quite a while, in litigation over statistical adjustments and how you make them. Even so, there has been plenty of census litigation, and I'm sure that given the stakes, there probably will into the future be a significant amount of census litigation.

In a very different area involving the Executive Branch, we were involved in an interesting series of cases, appeals concerning the White House's management of its computer system. This was a series of cases called *Armstrong*

[38] *Wisconsin v. City of New York*, 517 U.S. 1 (1996).

v. Bush.[39] At the end of the Reagan administration, plaintiffs, led by a journalist by the name of Scott Armstrong, brought suit arguing that the White House was not in compliance with federal recordkeeping requirements in the way it was handling its computers and the backup tapes on the computers. The practice at the time was that the White House computer system did conduct backup tapes but normally after a few months they were then not preserved, and the tapes were reused so you couldn't say two years down the road go search for something and find what was on a backup tape. Armstrong was represented by some very fine attorneys, such as Alan Morrison, who I know many people in the D.C. Circuit and the District Court here are familiar with.

MS. FEIGIN: And I believe his history is also in the Society's repository.

MR. KOPP: I haven't looked at his history so I don't know what he's saying about this episode, but I will say if I can deviate a bit from the narrative, that Alan was an extremely good attorney. When I was at law school, he was in my law school class at Harvard, and we were in the same section. Harvard at that time had very large classes where you'd have 150 people or so in a class and most of us were absolutely terrified about talking out in class, but Alan was one of a small group who would talk in class, and he was just brilliant. I wouldn't say he was one of my idols, but he was certainly one of the people in law school whom I admired the most. While as a government attorney I always tended to be on the other side from him, I always thought it was a pleasure to be in litigation with counsel on the other side being somebody like Alan. Certainly in the White House computer

[39] *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991); *Armstrong v. Executive Office of the President*, 1 F.3d 1274 (1993); *Armstrong v. Executive Office of the President*, 90 F.3d 553 (D.C. Cir. 1996); *Armstrong v. Executive Office of the President*, 97 F.3d 575 (D.C. Cir.); *see also Public Citizen v. Carlin*, 184 F.3d 900 (D.C. Cir. 1999).

tapes litigation, we saw some very good lawyering from Morrison's side of the case.

The litigation over the White House tapes produced a number of appeals. What happened was eventually a mixed result. We were able to get a decision from the Court of Appeals indicating that the President under the Presidential Records Act could not be reviewed by a court, and we were also able to persuade the D.C. Circuit that the National Security Council was essentially an arm of the President and also not subject to review. But statutes like the Freedom of Information Act and Federal Records Act produced litigation that went on for years. Eventually the sides became more willing to work out settlements and agreements, and the litigation ultimately went away with both sides being able to point to accomplishments that made them think that they had been successful in the litigation. We felt that we had achieved good results with respect to the President. I think Alan's people felt that they had achieved good results with respect to the agencies that were involved.

One of the interesting things about the litigation was that one of the people who worked on our team in the case was Patricia Millett, who of course is now a judge on the D.C. Circuit.

MS. FEIGIN: As we do this interview, there is a controversy brewing about the computer records of former Secretary of State Hillary Clinton. Do you think the *Armstrong* litigation would have any bearing one way or another? I'm not asking you to predict an outcome, but is that litigation relevant to the current controversy?

MR. KOPP: I am going to leave that question to others. I am sure enough will be written on the topic. But I do want to make a generic comment that applies to the government's computer recordkeeping as a whole.

As we have to some extent discussed, there was in the late 1990s and the first decade of this century a whole series of cases involving computer records, the Federal Records Act, the Freedom of Information Act, and the role of the Archivist. I think the government won its share of the cases, and the plaintiffs won their share of the cases. As the litigation clarified the law, the government did have a significantly enhanced respect for preserving records and having systems for how you treat computerized material. Unfortunately, I think a lot of the law that evolved during that time– not to speak of the necessary funding – didn't necessarily trickle down terribly well through all of the government. I know even in the Department of Justice, which I think was much more advanced than just about any agency in terms of treating government records, I felt that we really weren't doing enough to have our own systems in place the way they should have been. If that's the way things were at Justice, you can imagine how they were at other agencies. So the transition to computerized recordkeeping has been a slow one. I hope maybe today things are much better than they were when I was in the government and we were litigating over this. But I think progress has probably been a lot slower than one would have liked.

MS. FEIGIN: Another thing that's in the news right now is executive orders and the power of the President to issue them. I think that's often a question, especially towards the

end of a presidential term. Is that something your office got involved with too, upholding the scope of executive orders or the right to issue them?

MR. KOPP: It probably was, but I don't think it was at issue as much as it is now. There were a few cases about the President doing things by executive order, but I think it's become a much bigger issue today because the deadlock within the government is so serious now. Even when there were administrations in the White House that were different than the majority in Congress, you didn't really have the deadlock that you do today.

MS. FEIGIN: In terms of other cases that you litigated on behalf of the Executive Branch, any come to mind?

MR. KOPP: One of the most interesting ones was a suit that came up in the Bush administration, and it involved the President's White House staff. Some of the people who are reading this may remember that at the end of the George W. Bush administration, there was a dispute concerning the White House and whether former White House Counsel Harriet Miers should testify before the Congress. As counsel for the Executive Branch, our duties included representing the White House in litigation, so we were in the litigation that was brought by counsel for the Congress against Harriet Miers. We defended against the litigation targeting her for refusing to appear before a committee of Congress to testify about the resignation, which apparently had been forced, of nine U.S. Attorneys. That was a big, controversial issue during the end of the Bush administration. The District Court ordered that Miers appear to testify, although the court said that she could invoke executive privilege in response to

specific questions. Also, White House Chief of Staff Joshua Bolten was ordered to produce relevant documents. We went to the Court of Appeals to get a stay of that order, and the Court had us do extensive briefing on the stay motion. It then granted us a stay.[40] By that time it was near the end of the Bush administration. The Court of Appeals, instead of expediting the case so that it could be quickly decided, apparently decided that while the issues are very important, they were not the type of issues that one should rush through, and it set the case down for regular scheduling. The Obama administration then came into power. With the change of administrations, the controversy over whether Miers and Bolten should comply suddenly became not so important, and the parties were able to work out a settlement, which permitted Miers to testify.

MS. FEIGIN: This was the D.C. Circuit?

MR. KOPP: This was in the D.C. Circuit.

MS. FEIGIN: I assume you think it was not an accident that they let this happen. This was their strategy to avoid having to handle the case?

MR. KOPP: Well, I hate to read what's in a judge's mind, but that was certainly the obvious consequence of putting the case down for briefing on the normal schedule.

MS. FEIGIN: I think people down the road who read this may not know so we should put this case in a little more context. Harriet Miers is not just anybody in the President's office. President George W. Bush wanted her to be a nominee for the Supreme Court. In fact he put forth her name and she ultimately withdrew.

MR. KOPP: Exactly.

[40] *Committee on the Judiciary v. Miers*, 542 F.3d 909 (D.C. Cir. 2008).

MS. FEIGIN: So she has a place in history independent of this case, but it made this case I think seem more important.

MR. KOPP: That's right. She was somebody that in the second half of the Bush administration was very much in the news.

MS. FEIGIN: Also I should say I believe, correct me if I'm wrong, that the firing of the nine U.S. Attorneys was one reason that the Attorney General, Alberto Gonzales, ultimately stepped down. So that was not just an everyday happening.

MR. KOPP: There are lots of things going on obviously.

MS. FEIGIN: So these cases, put in context, loom large, because there was a lot of political swirl around the participants.

MR. KOPP: I think that's right. Given how politically charged things are today, I think the Bush II administration was part of the time when the world in which we were operating involving the Executive Branch became a much more political place than it had been previously, even though, of course, you can never take politics out of the running of the government. But I think the attitudes that we have today – I'm talking in 2015 in terms of the political deadlock that we have in government today – came from seeds that were sown long before we reached the Obama administration.

MS. FEIGIN: And if we're talking about political swirl, we cannot avoid President Clinton, who was of course impeached. One of the big cases, and I know the Office was involved so I have to ask you about it, involved Paula Jones.[41] Do you want to remind people what that was and at least what the Office had to do with that?

[41] *Clinton v. Jones*, 520 U.S. 681 (1997).

MR. KOPP: Yes. Paula Jones was a person who sued President Clinton for damages because of advances she said he made to her before he became President. President Clinton had his own counsel in the litigation. The United States filed independent briefs in the case in the Court of Appeals and at the Supreme Court level to present the case from the viewpoint of the institutional interests of the President.

When we were discussing what I would be talking about today, you asked me about the case and I drew a blank in terms of responding to it because I had completely put it out of my mind. It made such a small impression on me. Now maybe I just put it out of my mind because I didn't want to think about it (laughter). But I really had very little memory of anything that happened about it concerning our office. Then I pulled the briefs in the Court of Appeals, and I saw that the names of attorneys from our office, Scott McIntosh and Doug Letter, were on the filings in the Court of Appeals and they were on the Supreme Court brief as well, so I began to question myself as to what was our role. I think, and I'm just speculating because I'm still drawing a blank, I think probably what happened was if you look at the Court of Appeals briefs, you'll see that the names on the briefs include, in addition to Doug Letter and Scott McIntosh from our office, they have Deputy Solicitor General Edwin Kneedler and the name of an Assistant to the Solicitor General, Malcolm Stewart, on them. And I think what probably happened was that this was one of those rare cases where even though it's in the Court of Appeals, the case became a Solicitor General operation. Even though our attorneys were involved, they're more or less operating as a sort of appendage of the Solicitor General's Office.

You mentioned that Doug Letter was giving an oral history. I would defer to whatever Doug has to say about it because as I say my memory of the Paula Jones case is really next to nothing. That doesn't mean our attorneys weren't involved in it; it just means that it somehow didn't make much of an impression on me.

MS. FEIGIN: I assume the government's position was he should not be sued during the time that he remained in the presidency.

MR. KOPP: Our concern, and I think it really is a very legitimate concern even though the Paula Jones case has so far been the only case where it's been a problem, is that you could have a suit brought against the President while he's in office for action taken before he became President, and it could be very time consuming in light of the time that it takes the President to focus on the case. And when you see all the things that happen in the world these days, you realize the President never has a moment that is truly a free moment. So I think there really is a legitimate concern about a President being required to defend a suit actively going on against him personally while he is the President. It's hard to disagree with the way the Supreme Court came out, that the rules are the same for everyone, but I don't think it's a simple matter, particularly given the way people have become so combative in politics these days. You could see something like this down the road becoming a serious problem, but I'm not going to question the Supreme Court's outcome.

MS. FEIGIN: We probably have time for one more category of cases. Let's do immigration, which also happens to be on the front burner today in the news. It's obviously been an important topic for Civil Appellate for a long time.

MR. KOPP: That's right. We are not the office that normally handles immigration cases, but there were some immigration cases that became so complex and of such significant importance in terms of the government as a whole that we did become involved in them. I mentioned, for instance, one case when I was not yet head of the Office where I was involved which was the Iranian immigration case. Another huge immigration case where our office was involved concerned Haitians. This was a very tragic situation that was occurring at the beginning of the 1990s where there was political unrest in Haiti and a coup. Thousands of Haitians then sought to escape. They were so desperate that they took to sea in very flimsy boats, and they had the hope that they would reach Florida. They also hoped they would not drown at sea, which was something which did happen to a number of them. The Coast Guard was out there and when it saw them, it would pick them up at sea, but unless they were political refugees who had a potential claim to asylum, the Coast Guard and the government concluded that they should not enter the United States; instead, the U.S. government would repatriate them and send them back to Haiti. This was, of course, very controversial. The Yale Law School in particular decided it should do something about this.

MS. FEIGIN: Give us the timeframe. The 1980s?

MR. KOPP: We're in 1991.

MS. FEIGIN: So they're at sea in 1991?

MR. KOPP: Yes. Harold Koh was Dean of the Yale Law School at the time. He was somebody who in the Obama administration became State Department Legal Adviser and our office worked closely with him on State Department matters. But when he was Dean of Yale Law School in 1991, he was teaching a class where he had his students involved in litigation. He was so upset over what was going on with respect to the Haitian refugees that the class became involved in representing the Haitian refugees. I might add that they were quite good. We always did in our office over the years have a number of really great people that came out of the Yale Law School environment. This was the Law School's pro bono project at that time in terms of providing representation. The Haitians who were picked up brought suit against the government, and in the litigation, they sought relief that would have them being released into the United States. They didn't want to return to Haiti. They drew a District Judge who was very sympathetic to their position. In December of 1991, he entered what was essentially a preliminary injunction barring the government from returning them to Haiti. We felt that there was absolutely no basis for the Court's interfering with the government in what it was doing outside the borders of the United States. We therefore took an emergency appeal to the 11th Circuit and at the end of December of 1991, we obtained a reversal of the injunctive decree. But the District Court was not convinced that the government was correct, and in swift succession, it entered three more injunctive decrees, and we took appeals from all of them. We had to do a whole series of briefs. The case was considered by the

11th Circuit on an expedited basis, and we got all the District Court orders reversed.[42]

It was an amazing litigation. Our team was three attorneys, Ed Swaine, John Daly, and the supervisor was Mike Singer. On the other side there was this very large number of students from the Yale Law School Clinic. Our attorneys would joke about the fact that there were just the three of us on one side and over twenty people on the other side of the case. During the time that the case was in the Court of Appeals, I remember our attorneys virtually every night were in the office working on the case until the very wee hours. It was a very grueling experience from the point of our attorneys.

MS. FEIGIN: Having three of them on one case was for the government a lot.

MR. KOPP: Yes. Having three attorneys was a lot. Usually our basic pattern was one staff attorney and one supervisor. In light of the fact that this was a case that took a lot of resources, we had two attorneys and one supervisor. As I said, the government eventually prevailed and the Haitians were returned to Haiti. I found the case to be perhaps one of the most disturbing that I had been involved in over my career. I found it disturbing for two reasons. First, I thought as a matter of law the District Court was just dead wrong. The government's legal position was correct, that since the Haitians had not entered into the United States, the government could pick them up at sea and send them back. But secondly, even though I thought the legal position was correct, I couldn't help but be very sympathetic to the people involved and couldn't help but wonder why the government, with

[42] *Haitian Refugee Center v. Baker*, 953 F.2d 1498 (CA 11, 1992); *see also*, 950 F.2d 685 (C.A. 11 1991), 949 F.2d 1109 (C.A. 11 1992).

respect to people who were so close to the United States, could not work out some policy that would be much more successful and humane. Of course, I'm saying this in 2015, and unfortunately you see that this type of problem was not something that was confined to that era and to those people. You see it now happening in the Mediterranean a lot where you have, I just read in the newspaper the last week or so, people trying to escape from the chaos in Libya being put on boats and the people in charge of them jump off the boats and escape after they get paid for having the refugees on board. These boats then sink and you have hundreds of people killed at sea. The world with respect to refugees is unfortunately a very unattractive and dangerous place, and actually by that standard, you look now at what's going on in the Mediterranean, and what happened in Haiti was not nearly of that magnitude. The world for refugees has become worse.

MS. FEIGIN: Just to make it clear for people reading this, you're not talking about the people in the Mediterranean trying to get to the United States.

MR. KOPP: No. They're trying to get to Italy. That's a very good clarification.

MS. FEIGIN: We probably have time for one more topic. Let's discuss tobacco because we actually started with tobacco early in this oral history and I know more happened. You told us then that there would be more to come, so let it come now.

MR. KOPP: That's right. When I was a young attorney, one of my first cases, as I discussed before, was defending against a suit by Ralph Nader who was seeking to have smoking banned on airplanes. The case that I handled – unlike a later case that Bill Kanter handled – was a pretty easy one because at the core of that case was

the notion that banning smoking on the airplane was an emergency. So I won my case. But many years later, the government began to wake up to the idea that smoking actually was a very serious and dangerous problem and that something did have to be done about it. HHS and the FDA in the Clinton administration began building a very extensive record with respect to the adverse effects of tobacco. Our involvement began suddenly one summer during the Clinton administration. Bill Schultz was our Deputy Assistant Attorney General at the time. He came into my office and asked us to put together a team to start doing research on tobacco in support of potential litigation.

MS. FEIGIN: We're talking about litigation not in the appellate court at this point?

MR. KOPP: No. The litigation actually hadn't yet begun.

MS. FEIGIN: Isn't that extraordinary that you would be involved before anything is even brought in the District Court?

MR. KOPP: It was extraordinary. It did happen on occasion in really big litigation which we knew was coming. For instance, in the Obama administration we knew healthcare litigation was inevitable and was going to be big and resource-intensive so we tried to get involved even before the litigation started. That also happened in the Clinton administration with respect to tobacco. And there was a round of litigation where the government's position was that tobacco was a drug and cigarettes a device and these were the types of things that could be regulated under the Food and Drug Act.

Eventually that issue went to the Supreme Court, and the government lost 5 to 4 in *FDA v. Brown and Williamson*.[43] In 2000, the Court found it very hard to accept the government's position that tobacco was a drug and cigarettes a device within the meaning of the FDA Act. But there was also a second theory the government had because, as you may recall from those days, the tobacco industry was very aggressive in terms of pushing the idea that tobacco smoking was not endangering people's health. A lot of the information that they were spreading was eventually shown to be false and inaccurate and people helping the industry were working with each other in terms of spreading inaccurate information. So the government was able to work up a suit under the RICO Act – the Racketeer Influenced and Corrupt Organizations Act – and we were able to sue on a theory that for decades the tobacco industry had pursued a corrupt conspiracy to deceive the American public about the health effects of smoking and the addictiveness of nicotine. This theory prevailed in the District Court before Judge Kessler, and the industry, of course, then took an appeal to the D.C. Circuit. I assigned the defense of the appeal to a team that was headed by Mark Stern, Alisa Klein, and several other attorneys, and it was just a wonderful team. The team was totally unfazed by the fact that a very large number of the people above them in the Department, the type of people that normally on sensitive cases one would be consulting with a lot, had to recuse themselves.

MS. FEIGIN: Why?

MR. KOPP: It turns out that the tobacco industry over the years had been hiring a good number of the best law firms to represent them, and there was this very big

[43] *Food and Drug administration v. Brown & Williamson*, 529 U.S. 120 (2000).

collection of outstanding attorneys who when they joined the Department had a background where they had been in the top law firms. When these attorneys came into the government and there was litigation brought against the tobacco companies, they had to recuse themselves. So Mark Stern and his team had a very small number of people above him who were not recused in the case. Ironically it turned out that I ended up having to be recused as well.

MS. FEIGIN: Why was that?

MR. KOPP: That was because my wife and I had a very tiny ownership in the stock of a company which decided it wanted to intervene in the litigation in the District Court. I think, actually, it was on the plaintiff side, as opposed to the tobacco companies' side, but I'm not sure about that. So I recused myself. It was a very small amount of stock, and there's a procedure in the Department where you can get a waiver when you have essentially a de minimis interest. I could have gotten a waiver so I could participate, but by that time, it was apparent to me that Mark and his team were doing so well in terms of managing the litigation that there wasn't a point to my seeking a waiver, so I just let them go without my being involved and they did an absolutely amazing job.

In 2009, they achieved what was a historic decision in the D.C. Circuit where the Court held that the tobacco companies were involved in a racketeering enterprise and that they should be enjoined from making false or deceptive statements and should issue corrective statements. That case was *U.S. v. Philip Morris USA*,[44] and it's a case that has had an enormous impact on American society. The funny thing is that even though I was recused from that case, I view

[44] *United States v. Philip Morris USA*, 566 F.3d 1095 (D.C. Cir. 2009).

that decision as one of my greatest accomplishments as Director of the Appellate Staff because in that litigation we had on the other side from the government some of the best and highest-paid lawyers in the country, and the litigation was able to show off to the legal world just how capable were people on the Appellate Staff in handling litigation. Again, notwithstanding my recusal, I think I took more pride in this decision which I had nothing to do with (laughter) than most of the litigation that I was involved in over the years. It certainly was one of the most important things that the office did for many, many reasons.

MS. FEIGIN: It's nice to end on a high note, and I want to thank you for a fascinating trip through some amazingly important litigation.

ORAL HISTORY OF ROBERT KOPP

This interview is being conducted on behalf of the Oral History Project of The Historical Society of the District of Columbia Circuit. The interviewer is Judy Feigin, and the interviewee is Robert Kopp. The interview took place at the home of Robert Kopp in Bethesda, Maryland, on Tuesday, July 21, 2015. This is the tenth interview.

MS. FEIGIN: Good morning.

MR. KOPP: Good morning.

MS. FEIGIN: We have covered a significant chunk of your legal career, but there's so much more because it's so vast. One of the things that is particularly interesting I think is the First Amendment work that you and your office did, so could you tell us about some of that?

MR. KOPP: Sure. One of the wonderful things about the office is there's a great diversity of subject matter that we get into, and one just can't sit down and describe the whole thing. It's just so vast. But the First Amendment litigation was one of these constant subject matters that always was reoccurring, and during the course of the years our office was repeatedly involved in First Amendment cases. Sometimes it was where the government was a party, and sometimes it was where the government would come in as amicus. The First Amendment cases were just one of those constant diets that we had, and the litigation was often extremely important and extremely controversial.

I'm just going to give you a few samples of the types of First Amendment cases that we got into. For instance, in 1986, we were involved in a case that went to the Supreme Court, *Goldman v. Weinberger*,[45] where the Supreme Court

[45] *Goldman v. Weinberger*, 475 U.S. 503 (1986), *affirming* 734 F.2d 1531 (D.C. Cir.) (Judges Swygert, Mikva, and Edwards).

held 5-4 that an Orthodox Jew in the military service could not insist on wearing a yarmulke.

Another case from that era, which is very controversial, was *Marsh v. Chambers*.[46] The government was amicus there. The Supreme Court upheld the constitutionality of a state legislature opening its session with chaplains giving prayer. The Court 6-3 upheld the practice, noting that there was a long historical practice.

More recently, we've had litigation involving the Secret Service and demonstrators who were trying to get close to the President. The case of *Wood v. Moss,*[47] which was recently decided by the Supreme Court, involved a situation that arose in 2004 where President Bush was eating in a restaurant and a group of demonstrators wanted to be closer to the President than the Secret Service would allow. While I was in the office, we litigated that case for many years, and eventually, after I left, it produced a Supreme Court decision in favor of the Secret Service.

A lot of these cases are obviously very controversial with people that follow the Court as well as the general public. There are a couple of cases that probably are less controversial. One case which produced a Court of Appeals decision by Judge Sentelle was *Larry Flynt v. Rumsfeld,*[48] where Larry Flynt and *Hustler* magazine were arguing that they had a constitutional right as members of the media to embed themselves with U.S. military forces in combat in

[46] *Marsh v. Chambers*, 463 U.S. 783 (1983).
[47] *Wood v. Moss*, 572 U.S. ___, 134 S.Ct. 2056 (2014).
[48] *Flynt v. Rumsfeld*, 355 F.3d 697 (D.C. Cir. 2004).

Afghanistan. The D.C. Circuit held that there was no such right to accompany the ground forces; that was beyond what the Constitution requires.

Another First Amendment case that we were involved in, which I suspect is not terribly controversial for most people, is a case called *Mainstream Marketing v. Federal Trade Commission*,[49] which was a case decided by the Tenth Circuit in 2004. There we and other government agencies like the FTC were involved. We successfully argued that the Do Not Call Registry, which is designed to limit unwanted commercial calls, did not violate First Amendment rights and was indeed intended to protect privacy.

MS. FEIGIN: We probably should say for people who may read this fifty years from now, that before this case dinner time was often havoc because you got dozens of phone calls from all kinds of organizations, and no matter how much you said, "Don't call me," they constantly called you back.

MR. KOPP: Yes. And I wish I could say that ten, twelve years later the situation has radically changed. I think the Do Not Call Registry is probably a first step towards dealing with the problem, and hopefully there are other solutions down the road.

MS. FEIGIN: In addition to the First Amendment, there's so much to cover. 9/11 presented you with a lot of issues.

MR. KOPP: Yes. 9/11 presented all sorts of huge issues but I am going to leave them to other people who I know are being interviewed and were more involved in the post-9/11 litigation than I was. Administratively, 9/11 had a significant impact on the relationship between our office and the Solicitor General's office by bringing the offices much closer together. The SG's office after 9/11 got very heavily

[49] *Mainstream Marketing v. FTC*, 358 F.3d 1338 (CA 10, 2004).

involved in Guantanamo and the other national security issues. They're a small office, and they needed us very badly just because of the resource situation. In my view, the relationship between the Appellate Staff and the Solicitor General's Office at that time made a shift from being two highly separated offices to two offices that were in effect a little bit like partners in a marriage where there's a lot of squabbling but you're all trying to reach the same goal and have a very common purpose. I know your son is in the SG's office now (laughter), so I just want to say that in fact working very closely with the Solicitor General's Office was one of the great things about my job.

MS. FEIGIN: That's really nice. Let's move on to healthcare.

MR. KOPP: The healthcare litigation, which started in the Clinton administration and then later on of course became the landmark of the Obama administration, was one of the most exciting and rewarding parts of my career. Healthcare was always a very significant part of our litigation. When I first joined the office in the 1960s, we litigated over Medicare, we had Social Security Act cases which would turn on medical judgments, and the Food and Drug Act produced over the years a large number of very significant cases. Then in 1993, the Clinton administration came in and they felt that the country's healthcare system needed some fundamental reforms, so they set up a task force to come up with a proposal that they hoped they would get through Congress. This task force consisted of a number of cabinet officers and other top-level officials in the government who were to do a study and propose healthcare reform legislation. The First Lady at the time, who was Hillary Rodham Clinton, was named to head the task force.

There was an organization, the Association of American Physicians and Surgeons, who, because they were opposed to healthcare reform, brought suit to challenge the task force. The principal argument of the American Physicians and Surgeons was that the task force violated the Federal Advisory Committee Act, which is an open meetings statute. Their argument was that because Hillary Clinton was not a government employee, the Act required that the task force hold its meetings in public. Their suit was brought in the District Court in D.C. before Judge Lamberth, and on this particular issue, he agreed with the plaintiffs and entered a preliminary injunction in their favor. We then took an emergency appeal to the D.C. Circuit and obtained a reversal with respect to the aspect of the case that concerned the task force and the First Lady.

The D.C. Circuit, in an opinion by Judge Silberman,[50] ruled in our favor that the task force could conduct its business in private without violating the Federal Advisory Committee Act. The Act exempted committees composed wholly of full-time officers or employees of the government. Judge Silberman concluded that in the particular context of this case, and given factors such as the need for confidentiality of presidential communications, it was appropriate to treat the First Lady as an officer or employee of the government. This decision is one of a very small number of cases which relate to a president's spouse.

While the government won on this issue, that was, however, not the end of the litigation. The task force, which was a relatively small group, was supported by a large working group of several hundred people. While the working group as a whole seemed a bit more like what Judge Silberman called a "horde" than a

[50] *Association of American Physicians and Surgeons v. Clinton*, 997 F.2d 208 (D.C. Cir. 1993).

committee subject to the Advisory Committee Act, Judge Silberman in his opinion observed that there might be subgroups which were subject to the Advisory Committee Act, and therefore the record wasn't adequate on that subject. So the Court of Appeals remanded the case for further proceedings, including discovery.

The Clinton administration's proposed healthcare reform died in 1994, and the merits of the litigation became moot. Nonetheless, that wasn't the end of the case. It went on for years after there were no more Clinton administration proposals on healthcare. It went on for years because of disputes over sanctions and attorneys' fees and eventually it came to an end I believe about five years later.

Apart from the legal issues involved in the case, the litigation made a very strong impression on me because twice during the course of the litigation, Mark Stern and I were called to brief the White House, and one of our meetings was with Hillary Clinton.

MS. FEIGIN: Can you tell us something about those meetings?

MR. KOPP: The first one was towards the beginning of the Clinton administration, and the Civil Division didn't have an appointed political head. Indeed there were hardly any political appointees in the Department at all so that it was an interesting experience to be there and to in effect be temporarily one of the top officials in the Department just through fate.

The second White House meeting was right after the administration's healthcare proposal had met the end in Congress. When I met Hillary Clinton,

you could tell that she was not happy with what she had just been through and I must admit that I felt very sympathetic to her situation. It must have been probably one of the worst periods in terms of her public life.

MS. FEIGIN: As we know there were some really rough periods. Did she seem totally on top of the litigation?

MR. KOPP: Yes. She is very smart, very much plugged in. It was a little bit nerve-wracking going and having a meeting with somebody you know had just been through a very bad emotional experience.

MS. FEIGIN: Was she gracious?

MR. KOPP: Oh yes. She was gracious. She really looked forward to meeting with us.

MS. FEIGIN: That can be a story to pass down to your grandchildren.

MR. KOPP: Yes.

MS. FEIGIN: Healthcare obviously continued to be an important issue, and I know you worked on other aspects of it, so can you tell us some of the other cases?

MR. KOPP: Sure. When Obama became President, healthcare was obviously one of his important concerns, and I'm going to talk about the Affordable Care Act, known as Obamacare, in a second, but one of the earlier actions of the administration that took place concerning health should not be overlooked. This involved stem cell research.

During the Bush administration, the government funded research to a strictly limited extent on embryonic stem cells. By executive order, the research was limited to approximately 60 pre-existing cell lines. The Obama administration, when they came in, concluded that the controlling statute

permitted the government to fund more research than just on those pre-existing cell lines. President Obama issued a new executive order providing that the National Institutes of Health may support and conduct responsible, scientifically worthy stem cell research "to the extent permitted by law." The National Institutes of Health then issued new guidelines, which contained specific ethical restrictions for research.

A couple of researchers who did not agree with the Obama interpretation then went to court. Judge Lamberth entered a preliminary injunction against the new guidelines, concluding that the Obama policy would violate the controlling statute and result in the illegal destruction of human embryos. The Solicitor General's Office authorized an emergency appeal, and our litigation team quickly obtained a stay from the Court of Appeals. We then briefed and argued the case on an emergency basis, and our Deputy Assistant Attorney General Beth Brinkmann presented the oral argument. The court ruled in favor of the government. Judge Douglas Ginsburg in the majority opinion concluded that the administration's construction was a reasonable construction of an ambiguous statute. Further, leaving the preliminary injunction intact would cause "certain substantial" hardship for researchers and their projects, and it was vacated.

I am no scientist, and I don't really have a good sense of the medical developments that are happening, but I understand that what is happening in the area of stem cell research is very important in terms of new medical discoveries. Our avoiding the disruption threatened by this litigation may well prove to have been extremely significant in terms of what happens in medicine.

MS. FEIGIN: We should probably identify the case for anybody who wants to look it up based on what you've said.

MR. KOPP: It is *Sherley v. Sebelius*,[51] and I should add that for our team's success in setting aside the District Court's ruling, the litigation team received the highest award from the National Institutes of Health. This ruling actually is only a reversal of a preliminary injunction. On remand, Judge Lamberth then entered summary judgment in favor of the government, and after I retired, that judgment of Judge Lamberth was affirmed[52] and the Supreme Court denied certiorari. Now we get to "Obamacare."

MS. FEIGIN: For people reading this years later, I think it's fair to say it's hard to exaggerate the importance of this issue during the Obama administration. It was huge.

MR. KOPP: That's right. It's as big a political issue as you can get, and I suspect that if somebody way down the road is reading the history of the United States at this particular time, one thing that they will probably know about are the political and legal struggles over "Obamacare."

In any event, by March of 2010, the President, who strongly supported healthcare reform, was able to get through Congress and sign into law the Affordable Care Act which extended healthcare insurance to most Americans. It did not take long before the constitutionality of the statute was challenged in litigation. Obviously this was litigation which drew attention at the very highest levels of the Department, and high-level decisions were made that the Department would staff these cases a bit differently from the way that we handled other big

[51] *Sherley v. Sebelius*, 644 F.3d 388 (D.C. Cir. 2011) (D. Ginsburg, J.; Henderson, J. dissenting).
[52] *Sherley v. Sebelius*, 689 F.3d 776 (D.C. Cir. 2012) (Sentelle, C.J.; separate concurring opinions of Henderson, J. and Brown, J.).

cases. An Associate Deputy Attorney General who had previously been a partner in a law practice, Robert Weiner, was brought into the government and joined the Deputy Attorney General's Office in order to supervise the healthcare litigation. Such an appointment was quite understandable given the significance of the case and particularly the fact that the Solicitor General at the time, Elena Kagan, had just been nominated to the Supreme Court.

MS. FEIGIN: It doesn't seem that understandable to me because the government has huge cases and we have career people who handle them. I don't quite understand why someone special had to be brought in.

MR. KOPP: I can only speculate on the reasons for it. The fact that Justice Kagan was leaving the Department meant that we had an Acting Solicitor General. I don't know whether there was a sense that for something like this you had to have essentially, if not a presidential appointee, somebody sort of at that level. One can speculate exactly why Weiner was brought in. It struck me that it was unusual. We were used to the SG's office making the big calls in the biggest cases that we were handling, so this type of new structure added to the pressure that we in the Civil Division felt; on top of having to litigate, we also had to adjust to a new working relationship. But eventually, I figured out that Weiner was working in well and that he was easy to deal with. We developed our legal positions, and I felt that we had developed some very strong positions. I was confident that we had a very strong position on the merits, and in particular I thought that we should win our case on the basis that the individual mandate of the healthcare law was a permissible exercise of authority under the Commerce Clause.

The courts, however, did not necessarily see the case that way, and there were split decisions in the District Courts and in the Courts of Appeals. By then it was December 31, 2011, and that was the date that I retired. After I was gone, given the conflict in circuits and the importance of the case, the case went to the Supreme Court and 5-4 the Court upheld the constitutionality of the law.[53] They did it not on the basis of the Commerce Clause on which I had been so confident, but we won on our alternative argument that the government's authority could be premised on the taxing clause. Nonetheless, even with what the Supreme Court did with respect to Medicaid in the case, this was just an enormous win, and I felt very happy that I had stayed in my job long enough to be able to see this historic legislation get on its way to success in the Supreme Court.

A future Congress, of course, might modify or replace the Affordable Care Act with a system that operates differently, but I think the most significant thing about the passage of the Affordable Care Act and its implementation is that the government has crossed the Rubicon with respect to the government's responsibility to ensure that healthcare insurance is available to those who cannot afford it. Whatever the future may bring, I think that's a step that people a hundred years from now are going to wonder why that was such a big controversy at all.

MS. FEIGIN: Do you think the way they rejected the Commerce Clause argument is going to have repercussions for other issues?

MR. KOPP: It could. You read the decision and put the pieces together and in litigation on different issues, there's a lot in there that cuts back on some of the arguments the

[53] *National Federation of Independent Business v. Sebelius*, 567 U.S. ___, 132 S.Ct. 2566 (2012).

government likes to make in cases. The lesson I draw from the decision is if you're a legislator in the future and the Supreme Court in this litigation has said what the law is and you're writing future law, you have to adapt and write your statutes so that they fit within the guidelines of the law established by the Supreme Court.

MS. FEIGIN: Let's discuss gay rights, which ironically is one of the first issues you handled when you were a brand new lawyer.

MR. KOPP: That's right. Gay rights is one of those issues that during my career was often around in some form or another. When I came into the Office in 1966, the situation of the government's relationship with people who were gay was almost as though these people didn't exist or shouldn't exist. It was a totally different world than we live in today. Slowly with the passage of time over years people's attitudes began to change. I know my own awareness over the years has changed quite radically. People at the highest level of government began to become aware and become concerned about what was happening to people who were gay.

When Bill Clinton was running for President, he committed himself to doing away with the injustice of having military personnel discharged solely because they were gay. This set up, of course, a very big fight with Congress. It was an awkward time for the administration because it was in 1993 almost immediately after Clinton had taken office, and Clinton was unable to get his way with the Congress. The administration felt that it had no choice but to agree to a compromise solution concerning the military, and that was to adopt what became known as the Don't Ask, Don't Tell policy so that if a serviceman basically kept

his mouth shut and did not engage in homosexual acts while he was in the military, he would not be discharged.

I was involved in some of the meetings where the administration was attempting to do away with the discrimination against gay personnel, and I know the leadership was very disappointed in this outcome.

MS. FEIGIN: Were these meetings with DOJ personnel?

MR. KOPP: There were a number of meetings that took place between DOJ personnel and DOD and maybe there were others in attendance, but obviously if the Clinton administration couldn't sell its proposal to the Defense Department, it wasn't going to go anywhere. At this point, I don't really remember how much the Defense Department bought into the Clinton proposal, but certainly there were lots of people in Congress who thought that the military was very uncomfortable.

MS. FEIGIN: If I remember correctly, Colin Powell, who had been Chairman of the Joint Chiefs of Staff, was opposed to the plan.

MR. KOPP: Yes. This was something that was obviously quite controversial.

MS. FEIGIN: His opinion would have a lot of sway with the military.

MR. KOPP: That's right. So the best the administration could do was to get this compromise called "Don't Ask, Don't Tell." It lasted for a period of about seventeen years until the repeal during the Obama administration. While it was in effect, a good number of servicemen were kicked out of the military because they were gay. A number of them went to the judicial system and when cases got to the Court of Appeals, we were there on the other side opposing them.

MS. FEIGIN: Opposing the servicemen.

MR. KOPP: Opposing the servicemen. And somehow the plaintiffs on the other side in the courts of appeal always seemed to be impressive people. I suspect that the lawyers who were representing them had started to do what the government as a matter of practice does in its litigation strategy. When you can choose to go to the Court of Appeals, you pick your best cases. A lot of these plaintiffs were the type of people that, as I say, were just extraordinarily impressive. There was a certain sympathy factor that over the course of the years became, I think, something that began to sink in not simply with judges who had to decide these cases but with a broader audience as well.

As I said, since we represented the Department of Defense in this litigation, when these cases got to the Court of Appeals, we were responsible for defending the existing Don't Ask, Don't Tell policy. The core of our argument at bottom was that the courts should not interfere with the policies that involve the management of the military. There is Supreme Court case law saying that judges should not run the Army, and we were successful, at least in terms of general legal concepts, although not necessarily in terms of factual applications, in sustaining the legality of the Don't Ask, Don't Tell Act.

MS. FEIGIN: Meaning they might reiterate the principal but say it wasn't properly applied in this case?

MR. KOPP: Exactly. The key case was in 1994 in the liberal Ninth Circuit where that's exactly what happened. The Court upheld, conceptually, the Don't Ask, Don't Tell policy, at least in some contexts, but then remanded because in the particular

context, the plaintiff could be right, that the military couldn't discharge him.[54] And there were a lot of things like that that would happen in our litigation over the years. Basically in terms of justifying the concept of Don't Ask, Don't Tell, we were generally successful, but the courts had remands and there was never really a definitive resolution of the law. This was so particularly after the Supreme Court's 2003 decision in *Lawrence v. Texas,*[55] where the Supreme Court, overruling a prior decision in *Bowers v. Hardwick,*[56] held that a Texas anti-sodomy statute was unconstitutional when applied to consenting adults. The case didn't have anything to do with the military, but the ramifications of it were sufficiently unclear that it stimulated a new wave of appellate litigation involving gays in the military.

While Don't Ask, Don't Tell, to me personally, seemed to be quite a cruel policy in terms of the dilemma that it put gay servicemen in, I suspect – and this is just my own personal view – that in one sense, Don't Ask, Don't Tell actually led to a very significant advance in gay rights. As a result of Don't Ask, Don't Tell, gay people were now in fact being taken into the military. I would guess that more and more people in the military began to realize that they had some gay colleagues and that they were normal people and could accept them and that they cared enough about their colleagues not to turn them in if they violated the policy. I think at one point I saw some numbers on people who were actually removed from the military, and the number struck me as quite low compared to what one might think it would be. My guess is that many people in the military just looked

[54] *Meinhold v. United States Department of Defense*, 34 F.3d 1469 (9th Cir. 1994).
[55] *Lawrence v. Texas*, 539 U.S. 558 (2003).
[56] *Bowers v. Hardwick*, 478 U.S. 186 (1986).

the other way and did not turn in a colleague who they liked and thought was a good soldier just because they were gay. So when President Obama began to first soften the application of Don't Ask, Don't Tell and then seek its repeal, the amount of resistance from the military to that development was much different than it was during the Clinton administration when a lot of significant people in the military, as we just discussed, were strongly opposed to bringing gay people into the military.

In short, I think an increasing number of people in the military began to know people who were gay and seeing nothing wrong with them, and that evolution had its impact. So in that limited sense, I think one can say that maybe Don't Ask, Don't Tell actually was a significant advance with respect to gay rights.

In the Obama administration, the gay community began to see that they had their best chance ever at major changes, and they began heightening the pressure on the Obama administration to do something about it. The challenges to Don't Ask, Don't Tell began to ramp up. One would think that since the Obama administration was sympathetic to the gays that therefore people might hold back from suing, but in fact the way that politics and litigation works is that if you have an administration that might do what you want, you apply pressure to them to make sure you get it, and the gay community began to seriously ramp up their litigation efforts. There are some extraordinarily good lawyers who supported the cause and there were impressive legal organizations that represented the plaintiffs.

During the 17 years Don't Ask, Don't Tell was in effect, the government in cases that were handled by our office in the Court of Appeals did reasonably well in defending the litigation. We in essence mostly won, or at least avoided squarely losing, just about every decision of consequence. However, there never was a legal knockout punch that could settle the law at the Court of Appeals level, and Courts of Appeals that had their doubts about Don't Ask, Don't Tell were able to at least find sufficient flaws in the government's position which would require remands. Meanwhile, the cases that the government had won could arguably be distinguished in one way or another.

After putting the issue on the back burner for a long time, the Obama administration became willing to support legislation to repeal Don't Ask, Don't Tell. Many Americans had changed their attitudes towards homosexuals since 1993, and this seemed to be particularly true with respect to servicemen. In December of 2010 there were enough votes in Congress to enact legislation that would provide for a process to repeal Don't Ask, Don't Tell. The Repeal Act provided that repeal would become effective after the Department of Defense had conducted an administrative review and made necessary certifications. That happened at the end of the summer of 2011.

But the end of Don't Ask, Don't Tell did not come without a bit of litigation dramatics in a case involving gay servicemen called *Log Cabin Republicans v. United States*.[57] The government had lost the case in the District Court, and the District Court had entered a broad worldwide injunction against Don't Ask, Don't Tell. We had obtained a stay from the Ninth Circuit. Then, a

[57] *Log Cabin Republicans v. U.S.*, 658 F.3d 1162 (CA 9, 2011).

few months before the Repeal Act process was completed, the Ninth Circuit lifted the stay, with the result that Don't Ask, Don't Tell would have been immediately enjoined. People in government were very upset that a court – not a law enacted by Congress – would be the engine that repealed or prevented Don't Ask, Don't Tell from being operative. So our attorneys had to scramble to obtain an emergency stay from the Ninth Circuit to preserve the status quo until after the Department of Defense made the certifications required under the repeal statute. That happened about two months after we obtained the stay. Once that was done, the Ninth Circuit, recognizing the importance of what had happened, held oral argument, and one of our attorneys, Henry Whitaker, went out and presented argument in the Ninth Circuit. The Court then entered an opinion and order vacating the District Court's judgment, and remanding the case with directions to dismiss the complaint as moot. So our litigation over Don't Ask, Don't Tell did come to an end as did Don't Ask, Don't Tell.

MS. FEIGIN: And then an even bigger issue came.

MR. KOPP: Yes. After Don't Ask, Don't Tell and its repeal made some of our litigation with respect to gay rights go away, our office became heavily involved in litigation which involved the defense of the constitutionality of the Defense of Marriage Act, which barred federal recognition of gay marriages. Under the law, for federal purposes, a marriage had to be with a member of the opposite sex. DOMA, as the Defense of Marriage Act is commonly called, had been passed in 1996 with wide support from both Democrats and Republicans and had been

signed into law by President Clinton. At the time, it did not generate much controversy.

In 2010, there were two suits brought to district courts within the First Circuit in Boston. One was *Gill v. OPM*,[58] and in that case, gay plaintiffs lawfully married under state law won a ruling from the District Court that the Defense of Marriage Act was unconstitutional. The second was brought by the Commonwealth of Massachusetts against the United States and two cabinet departments challenging the constitutionality of DOMA.[59]

The government lost both cases in the District Court. As is our standard practice, once the adverse decisions came down, we had to prepare memoranda for the Solicitor General and present a memo of recommendation to the Solicitor General after consultation with the affected government agencies. We in our office were a key part of the process of making recommendations to the Solicitor General as to what should happen and other DOJ components, like the Civil Rights Division, for instance, were also very interested in the outcome.

MS. FEIGIN: Were there any others besides those two?

MR. KOPP: Yes. The Office of Legal Policy, I forget what it was called at the time, but that office was involved. This produced more than the usual number of memos, more than the usual number of meetings, and more than the usual number of people (laughter) at meetings. We had a good number of internal Civil Division meetings as well, and our attorneys in Civil Appellate who were working on the case met quite a few times with our Assistant Attorney General, Tony West. That

[58] *Gill v. Office of Personnel Management*, 699 F. Supp. 2d, 374 (D. Mass. 2010).
[59] *Commonwealth of Massachusetts v. U.S. Dept. of Health and Human Services*, 698 F. Supp. 2d, 234 (D. Mass. 2010).

caused me to think through carefully what exactly is my role in these meetings. Here we are on one of the hottest button political issues in the country. If I look at the case through my personal political thinking, I would come out one way, but that's totally irrelevant to me as a career civil servant. My job was to make sure that there was an objective legal presentation to Tony West, that we make a careful study of the legal pros and cons of each alternative and present them in a way so that he, not me, but he, Tony West, could ultimately make a decision for the Civil Division as to what our recommendation should be. That recommendation, of course, would then be considered by the Solicitor General as well as others at very high levels. But we knew the Civil Division recommendation would be an extraordinarily important recommendation.

The key issue was whether the standard of review by which to judge DOMA was whether it gets analyzed under a rational basis standard of constitutionality or whether it was judged under the stricter standard of heightened scrutiny. If the standard was heightened scrutiny, it was much more difficult to defend the standard than if the standard was rational basis. And so, as I said, we did lots of memos, lots of meetings.

There's one meeting in particular that I remember very well. It occurred the week between Christmas and New Year's, a week when lots of people in the government and the Department of Justice would be out on leave. I was on leave, Tony West was on leave. We both actually were in Europe at the time. Tony was in Italy, and I was in Amsterdam visiting my daughter who lived there and who had just had twin babies. The rest of our team, which consisted of Mike Singer,

August Flentje, and Benjamin Kingsley, were back in Washington. Tony said we had to have a telephone conference that week, and so we had a very long and very frank conference concerning the DOMA case. Tony drew out from each of us our own personal views as to whether we thought the proper test by which the statute should be judged was rational basis or the stricter heightened scrutiny. I'm not going to go into what we said, but I can't resist mentioning a quote from Tony that appears in a book called *Forcing the Spring*, which was about the litigation. Tony is quoted in that book as saying, "I was never so proud of those line lawyers as I was that night." [60]

Shortly before our brief as appellant was due in mid-January – this was after we had all returned from vacation and we were all back in Washington – we received the word from higher up that we should file a draft brief which we had prepared which defended the constitutionality of DOMA. That brief argued that under First Circuit precedent, DOMA was subject to rational basis review and DOMA satisfies rational basis scrutiny. The brief was based on law within the First Circuit. The names on the brief included myself and the attorneys in our office working on the case. That is Michael Singer, August Flentje and Benjamin Kingsley. When we were told to file that brief, I assumed that the decision-making process was over. However, it turned out it wasn't.

After we filed the brief, meetings still continued to be held on the case and it quickly became apparent that a definitive decision remained to be made. Further, there were recent filings of DOMA suits within the district courts in the Second Circuit, and the Second Circuit had no controlling case law on what

[60] Jo Becker, "Forcing the Spring," Penguin Books (2015), p. 258.

would be the standard of review with respect to a statute like DOMA. So people began to take into account that we couldn't just go out there in the First Circuit and gracefully develop the position that was founded on First Circuit law on the standard of review when in fact the issue was wide open in the Second Circuit. If we were going to rely on the rational basis for review standard in the First Circuit, we'd better be prepared to rely on it in the Second Circuit, and if we were not comfortable with it, we'd better have a position that applied in both Circuits. A case within the Second Circuit was the case of *Windsor v. United States*, and that was the case which eventually was to become the critical Supreme Court ruling concerning DOMA.[61]

So there we were. We had filed a brief in the First Circuit, but the decision-making process in the Department was continuing. Indeed, eventually the decision-making went to not simply the level of the Attorney General but to the President. The President determined that heightened scrutiny would be the appropriate standard of review for classifications based on sexual orientation and that under that standard, DOMA cannot be constitutionally applied to same-sex couples whose marriages were legally recognized under state law. The Department of Justice then tendered the defense of the constitutionality of DOMA to the Congress.

MS. FEIGIN: How did you learn that it was the President himself who made the decision?

[61] *Windsor v. United States*, 699 F.3d 169 (2d Cir., 2012); *United States v. Windsor*, 570 U.S. ___, 133 S.Ct. 2675 (2013).

MR. KOPP: First of all, we were told that, and then it was written out. There was a statement from the Attorney General describing what the President decided and a letter to Congress.[62] So this was clearly a personal decision of the President.

With the President having made the decision and with the Department of Justice deciding that it couldn't defend the statute and the defense of the law would be tendered to Congress, we asked the First Circuit to postpone further briefing until the Congress weighed in, at which point we suggested there should be totally new briefs. The House of Representatives did decide to intervene to defend the constitutionality of the statute, and the court granted the parties an extension of time for re-briefing. We then filed what we called a superseding brief in September of 2011 where we argued that DOMA was unconstitutional.[63] As a result of that filing, I had the rare honor (laughter) of putting my name on two briefs filed in the same case where the second brief took a position opposite the position we had supported in the first brief. No one can say that being a government lawyer is not interesting.

MS. FEIGIN: Did the other side quote your earlier brief back at you?

MR. KOPP: At this point I don't remember, but I suspect there was a little bit of it, although the House attorneys were very professional attorneys. It was a very high-class legal show. After I retired, the new Executive Branch position that the Defense of Marriage Act was unconstitutional prevailed in the First Circuit. And then 5-4 in the Supreme Court in *United States v. Windsor*. Three years later, in 2015, the

[62] Statement of the Attorney General on Litigation Involving the Defense of Marriage Act, February 23, 2011; letter from the Attorney General to Congress on the Defense of Marriage Act, February 23, 2011.
[63] The two district court cases (*Gill* and *Commonwealth of Massachusetts*) were heard together and the lead name became *Commonwealth of Mass. v. HHS*, 662 F.3d 1 (1st Cir. 2012).

Supreme Court, 5-4, determined that there was a constitutional right to gay marriage, and that case, which I didn't have anything to do with because I was retired, was *Obergefell v. Hodges*.[64] So during the course of 2011, all sorts of things had happened that were certainly at the top level of what I would consider to be the highlights of my career.

During the course of 2011, I had decided that retirement was getting close, and at the end of the year I retired. I had become 70, I had been in the same office for 45 years, and I had been its Director for 30 years, and I could envision nothing that would be as remarkable an ending to my career as the experiences I have just gone through.

MS. FEIGIN: I think that's right. It's an extraordinary career, and I'm thrilled that you shared it with us. Before ending this session, I want to turn this from your career to your personal life to round out the picture of you. You mentioned that your daughter had twins, but we don't know anything about your children. We know about your wife because you talked about her astonishing political career, but can you tell us a little bit about your children?

MR. KOPP: My daughter Emily is in the news business and works in public radio. As I mentioned during the course of our discussion, she has twin children, a boy and a girl, who keep her extraordinarily busy. My son Bob, a professor, is a scholar in the field of climate change, which is a very interesting place to be these days. So they are staying very active.

MS. FEIGIN: Speaking of staying active, I know you have hobbies that keep you busy. Tell us a little bit about what takes your attention these days.

[64] *Obergefell v. Hodges*, 135 S.Ct. 2071 (2015).

MR. KOPP: I've actually been very interested in this particular project that you've been involved in because I found it fascinating to sit back and try to figure out the significance of what I have done in the past 45 years of working for the government. How meaningful was it in terms of it being a job that not simply was enjoyable, but also a job that really meant something, had consequences in terms of the law and indeed how the government operates? Looking back on it and thinking about the things that we were involved in, it made me feel that I had made the right choice back in 1966 when I decided that I wanted to go into law practice with the government, and the Appellate Section of the Civil Division had decided it was willing to take me. I never could have possibly dreamed at the time I signed up that it would be the type of career that in fact occurred.

As for the future, I am by my prior standards taking life easy, although I find that somehow taking life easy doesn't mean that you aren't even busier than you were (laughter). I'm involved in things like gardening and photography, but as I say, I am operating at a different pace now, or at least in a different area, than I was when I was with the Department of Justice. Indeed, there are days when I wake up and I say how could I have ever done what I did (laughter) under the pressure and the importance of what we were involved in.

MS. FEIGIN: I think that a good way to end this final session would be to get your ideas on what you would tell a young lawyer today. Looking back, seeing how your career evolved, seeing how the law has changed so much, what advice would you pass on to a young law graduate today?

MR. KOPP: That's a very difficult question, which could require a whole new set of chapters given all the changes that are taking place in both the legal profession and in the government. I think I was extraordinarily lucky in how my career worked out. I wasn't at the very top of the class, but I did well enough to be very competitive in terms of jobs that I applied for. I wasn't interested in trial litigation and so when an offer from the Appellate Staff came to me, I leaped at the opportunity to be an appellate lawyer, and the more I stayed in that office, the more convinced I was that I was an appellate lawyer, that I wasn't a trial lawyer, and through a long career which was supported by a lot of good luck and breaks falling in the right way, I was able to have a very successful and exciting career. How that relates to advice to people just entering the legal profession today is a very difficult question. To some extent, no matter how much you prepare in law school for what's down the road and what you intend to do as a lawyer, life isn't going to turn out the way you expect it to, and fate is going to intervene. In my case I think basically what I feel was I positioned myself in such a way in terms of career development and working within the structure of the Appellate Staff and the Civil Division that I got a few lucky bounces and my legal career worked out better than I ever anticipated that it could.

I think in today's world it's a lot harder to know what's going to happen in 40 or 50 years. Technology is changing so radically. It has affected the legal field, both in a positive sense and – for people looking for jobs – sometimes in a very negative sense. Maybe we don't need more lawyers in the modern world, and I think for people who are considering the law today, I think if you really

want to be a lawyer, you have to have your heart set on not just one career path as a lawyer, but have in mind that during the course of your lifetime you may have to have the flexibility to adjust to a series of career paths and legal areas. Above all else, I would think that part of your ability to adapt and do well is to develop a strong understanding of the technology behind computers and research and have a level of command over the modern technology that lawyers of my generation, and certainly I, never had. Being technologically adept is a critical skill for anybody who wants to be in any job of consequence in the future, and for lawyers, I think mastering the technology is necessary for being able to be a force in whatever part of the law practice you operate. I think that's really just a critical skill for anyone today because there's so much uncertainty in the world, and the technology is everywhere, and you're just going to have to have a much greater ability to adapt than my generation did, and certainly than I did.

So if I say one thing to future lawyers, I would say you've got to master the technology, and those that master it well are going to have a heads up in terms of chances to be a leader in the future.

MS. FEIGIN: Thank you so much for sharing your career with us and passing on your advice to future generations.

MR. KOPP: Thank you very much for conducting this interview. It's really been my pleasure, and as I say, looking backwards at what I've done is something which I have very much enjoyed.