

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, August 15, 2013. This is the second interview.

MS. FEIGIN: Good afternoon.

MR. KOPP: Good afternoon.

MS. FEIGIN: When we left off last time, your aunt had just, in a very feminist way, joined a law firm, and her husband had stepped aside, and we're now ready to move onto the next part of your history.

MR. KOPP: The next significant part of my history, and in a way I think the most significant event in my life, was that in 1953 my father died of leukemia at the age of 41, and this was clearly a huge trauma for me, not to speak of for my mother and my grandmother. Fortunately, I was part of a large, close-knit family on both my father's side and my mother's side, and that helped us get through that very difficult period. Also my father, almost with a sense of knowing what the future might bring, was quite prescient back in 1936 when he and my mother got married, because he felt that she had to have an occupational skill. He insisted that she go to law school because he was concerned that at some point in her life she might have to support herself on her own. At that time, he had no idea that he had leukemia, but 15 years later, that proved to be absolutely critical. So she applied and got into USC law school in Los Angeles, which did admit women, and she graduated on the Law Review and number two in her class.

MS. FEIGIN: Do you have any idea how many women were in her class?

MR. KOPP: I think there were maybe four or five. Not a large number, but USC did admit women and was one of the relatively small number of law schools in the country at that time which did do so. George Washington University also did so, very important in terms of my Aunt Hermione's education. But women going to law school in those days was quite rare.

So she graduated from USC, and then along came World War II, and she was able to get a job in the District Attorney's Office in Los Angeles. But for her, it was not a very pleasant experience. She had to endure what today we would consider to be a type of sexual harassment that would get a superior officer discharged. Her boss would chase her around. She just had very unpleasant experiences and memories of that. When my father returned at the end of the war, she was very happy to stop practicing law. But once he realized that he was dying, he insisted that she resume the practice of law. Fortunately the family now had a law firm, Gang, Kopp and Tyre, so she started to go to work again and worked at Gang, Kopp and Tyre. She thus was back into the practice of law at the time that he died in 1953. It was something that was very important to her at the time, not merely because it brought in some money, but emotionally it kept her preoccupied during what was obviously the worst period of her life. But she hated it. She did not like law practice, and after she remarried and moved to Washington and lived in a world filled with lawyers, she had no need to practice law, and she let her bar license lapse.

MS. FEIGIN: We should say that by the time your father died, she was the mother of three.

MR. KOPP: Yes, she was the mother of three. I had two younger sisters, so when we moved to Washington, DC, my stepfather was married not simply to my mother, but a family of three, consisting of me in the midst of being a teenager and my younger sisters who would be at that stage in a few years, and for him, it was a shock (laughter) in a very different way.

I had mentioned earlier that my stepfather, Arnold Raum, had been a law school classmate of my father, Bob Kopp. Arnold had grown up in Massachusetts, and he was the son of poor immigrant Jews and had grown up in a part of the state where religious tensions were considerable.

MS. FEIGIN: How so?

MR. KOPP: He remembered that when he would go home from school, there was always a gang of Catholic boys that you had to watch out for while you were on the street and if they caught you, you'd get beaten up. Those were some of his less pleasant childhood memories, and I think when he applied to college, he was also at that stage sensitive to the fact that there were quotas in terms of the number of Jews that schools would take. It was sort of well-known, for instance, that Harvard College had quotas on the number of Jews it would admit. However, he was sufficiently smart that he did get into Harvard, and in fact academically he did very well, graduating *summa cum laude*. But he always thought his experience at Harvard was a very mixed experience. Academically, obviously, he did well, but he bridled at the discrimination that he perceived against Jews and people who were poor.

MS. FEIGIN: I think people down the road may not understand that many of the Ivies were gender-segregated. Were there only males at Harvard, and was Radcliffe entirely separate, or had they integrated by that time?

MR. KOPP: Radcliffe at the time was entirely separate, I believe, although I haven't looked this up. It was physically on the campus that it was on when I was at Harvard which was separated by quite a few blocks from the Harvard yard, and it really was a separate institution.

So my stepfather got into Harvard Law School which he liked and thrived in that environment. He was on the law review. One of his colleagues on the law review was my father, Bob Kopp, and they stayed in touch after graduating from law school, and that was one of the reasons that Arnold was in touch with my mother after my father died. When Arnold was in law school, he knew a good number of members of his class who were eventually to go into government to work in the New Deal, and he was very close to Professor Felix Frankfurter.

MS. FEIGIN: Can you tell us any stories about Felix Frankfurter from that era?

MR. KOPP: Frankfurter was somebody who was always very sure of himself. At one point, and I'm not sure if it was when my stepfather was at Harvard or shortly afterward, he decided to write a completely made-up article and give it to Frankfurter. Whether it was a law review article or something else I'm not sure, but it was a completely made-up article by my stepfather, and he brought it in to Frankfurter and said, "I just discovered this very interesting article (laughter). Can you take a look at it and tell me what you think?" So Frankfurter went over the article and was very impressed by it and said, "This is really interesting. Maybe I should

look into it further.” And then my stepfather told him it was a gag. My stepfather liked the idea of goading Frankfurter a little in terms of his own view of himself.

MS. FEIGIN: Frankfurter was on the faculty then?

MR. KOPP: Yes.

MS. FEIGIN: And you said your stepfather was also friends with several people who became prominent in the government. Tell us what they did.

MR. KOPP: When he came to Washington, he moved into an apartment house on Q Street, and he had roommates who basically were people whom Professor Frankfurter had encouraged to come to Washington and look for jobs in the New Deal, although my stepfather came to Washington actually at the end of the Hoover administration. These graduates recommended by Frankfurter kept coming to Washington, and my father moved into a house on Q Street with some of them, and that included people like Robert Stern, Phil Elman and Paul Freund, all of whom ended up like my father in the Solicitor General’s Office. There were others, and I don’t know whether they actually lived in the Q Street house or not, people like Abe Fortas and David Kreeger, who worked on the legal side of the New Deal at the time, and who were socially part of the Q Street group.

MS. FEIGIN: We should say who David Kreeger was.

MR. KOPP: David Kreeger is a whole big story in himself. He went into the government and was in the SG’s Office for a while. He then came to the Civil Division, and during World War II he was head of a small unit of about five attorneys in the Civil Division which handled appeals. That unit eventually became the Appellate Section and then the Appellate Staff of the Civil Division.

Kreeger decided he saw a good investment out in the business field in a company called GEICO and so he took all the funds he had, plus he borrowed, and made a very large investment in GEICO. GEICO essentially for forty or fifty years or so was a terribly profitable company, and Kreeger became very rich, and for those of you who don't live in the Washington area, you should know that he ended up living in a very nice house which he contemplated would be an art museum and he filled it with art, and it did in fact become the Kreeger Museum.

MS. FEIGIN: Skipping around a little bit, but because of Arnold Raum becoming your stepfather, did you get to know some of these people as part of your stepfather's social world?

MR. KOPP: Yes, I met them, and I had this unfortunate characteristic of meeting my stepfather's friends and seeing them occasionally, and very few of them, however, actually became part of my world. There were a couple that I became close to. John Pickering, for instance, was a close friend of my stepfather's and we became very close. My wife and I became very close to John and then his daughter Leslie, so that was something that actually did sort of have an impact on my social life. But most of the time I would just meet these very interesting people, and I met Kreeger a few times, and it didn't really impact my life much, and now of course I'm very sorry.

MS. FEIGIN: Did you interact with Frankfurter at all?

MR. KOPP: No.

MS. FEIGIN: We should say who Pickering is.

MR. KOPP: John Pickering was one of the founders of a law firm which became Wilmer, Cutler & Pickering, and now has merged and become a super law firm, Wilmer Cutler Hale & Dorr. It has over a thousand attorneys and is a very different place than it was when John Pickering became one of the founders.

MS. FEIGIN: But it was a big player in D.C. Did you interact at all with Abe Fortas?

MR. KOPP: No, I just heard stories about him, and in particular, his wife, Carolyn Agger, because she was, according to my stepfather, one very tough lady and she was the type of woman who would go around and physically wrestle anybody and win (laughter). She was a real powerhouse in terms of whatever she did.

MS. FEIGIN: She was a lawyer too.

MR. KOPP: Yes, she was a lawyer too, and I gather a very successful one.

MS. FEIGIN: Any stories you can share about Abe Fortas himself?

MR. KOPP: Not really. I never actually met Fortas, and of course his time on the Supreme Court was cut short by his own behavior.

MS. FEIGIN: So back to your stepfather.

MR. KOPP: After he graduated from law school, my stepfather got a job with the Reconstruction Finance Corporation. I'm not sure that he necessarily came to Washington because he was interested in working in government. He came in 1932 when we were still in the Hoover administration. He was a strong Roosevelt Democrat so there wouldn't have been anything in the Hoover administration that would have attracted him, but it was very hard for Jews in those days to get into the top law firms, so I suspect that the reason that he came to Washington was that the government didn't present any barriers. He got a job at the

Reconstruction Finance Corporation, and then a year later moved over to the Tax Division of the Department of Justice.

MS. FEIGIN: The government didn't have religious barriers, but it did have racial barriers.

MR. KOPP: There were racial barriers, and I don't know whether people even thought about having barriers based on sex in 1933; there just were at that time no women lawyers around. Some of them began to come into the Department during World War II when all sorts of positions opened up to women, and the government really never had the barriers and the obstacles to women that were out there in private practice. In 1932, barriers even for men existed, unless you were in certain social or religious circles.

MS. FEIGIN: So here he is working for Reconstruction Finance, and then what happened?

MR. KOPP: In 1933 he was hired by the Tax Division, and so he went there, and then in 1939, he moved on to the Solicitor General's Office where he after a few years became the Principal Assistant to the Solicitor General.

While he was in the Tax Division, he argued cases in the courts of appeals. In those days, the Solicitor General's Office was very small. It consisted in the neighborhood of five or six attorneys and used attorneys in the Divisions on Supreme Court briefs. So my stepfather was often assigned to argue Supreme Court cases, and in 1935, in fact while still in the Tax Division, he had a case that was the first case ever argued in the Supreme Court building which was then brand new. I never knew that until fifty years later they had a ceremony commemorating the Supreme Court building and a picture of him there, so then he told me about it.

MS. FEIGIN: What were some of the significant cases he argued in the Court?

MR. KOPP: I think he told me that he argued something like 50 cases or so in the Supreme Court during his career in the Department. I'm not sure of the exact number. I know these days it's dwarfed by people like Larry Wallace who have argued well over a hundred cases, but at the time, I think it was probably one of the larger number of arguments that had ever been made in the Supreme Court. Since he was an expert in tax law, being in the Tax Division, and some of the most important New Deal cases involved tax law and came up from the Tax Division, he was involved in cases like the challenges to the constitutionality of the Social Security Act, which included *Helvering v. Davis*¹ in 1937, where he wrote a substantial portion of the brief, and the companion case, *Steward Machine Company v. Davis*². The Court, of course, did uphold the constitutionality of the Social Security Act, and my stepfather always viewed that as one of the proudest accomplishments of his career.

One of the things I kept saying to myself a few years ago when I was working on the healthcare litigation involving the constitutionality of the Affordable Care Act was that I felt that I was sort of treading in my stepfather's footsteps and I hoped that the result will prove to be as successful as was his work on the Social Security Act.

MS. FEIGIN: He also did some interesting prosecutions outside the Supreme Court. Would you tell us about some of those?

¹ *Helvering v. Davis*, 301 U.S. 619 (1937).

² *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

MR. KOPP: Yes. In the 1930s, Huey Long was essentially the boss of the State of Louisiana, and then in 1935, he was assassinated. The federal government began to look into the corruption that what was called “Long’s Gang” had brought to Louisiana as he had had strong influence in terms of getting many of those people into very high positions in the state. My stepfather in 1939 was assigned to look into whether any crimes had been committed, and he ended up having a grand jury bring indictments against a former governor of Louisiana, the president of LSU [Louisiana State University], and other significant individuals in the state. The governor and the head of LSU ended up in prison as a result.

MS. FEIGIN: Were these tax crimes?

MR. KOPP: As I understand it, basically the tax law was one of the key elements of being able to establish a violation of criminal law. I don’t know whether that was the litigation that started the use of tax law as a way to successfully prosecute criminals, but it obviously was one of the ones where the Tax Code was very helpful.

After my stepfather returned to Washington, he was transferred to the Solicitor General’s Office. World War II then came along, and attorneys in the Department of Justice who had been defending the New Deal now found themselves defending the war effort. Part of what the government and the Justice Department was defending was the mass removal of Americans of Japanese ancestry from their homes, and my stepfather worked on and played a key role in the very greatly criticized Japanese exclusion cases, *Hirabayashi*³ and

³ *Hirabayashi v. United States*, 320 U.S. 81 (1943).

*Korematsu*⁴. It's safe to say that those decisions, as well as the government's litigation strategy which my stepfather was involved in, have not stood up well under the test of time. *Korematsu* and *Hirabayashi* are obviously today viewed as contrary to what we think are our basic principles. But he was part of the government's legal effort and he had to live with the criticism.

MS. FEIGIN: Did he argue the cases?

MR. KOPP: No.

MS. FEIGIN: Did you get to talk to him about how he viewed it in retrospect?

MR. KOPP: As a practice in our family, we found it very difficult to argue with my stepfather. He was a judge, and actually he sort of had the type of personality where he was a judge even outside the courtroom, and if you therefore argued too hard, he would essentially do the equivalent of bringing down the gavel and you wouldn't get anywhere. So in our family we generally didn't argue much with him. But once in a while the Japanese exclusion cases would come up in discussion and then our family would give him a lot of flak. I remember in the earlier times when they came up that he would defend the result in those cases and explain that in war when you are faced with an imminent danger, there are things you had to do that you couldn't do elsewhere. But his view of those cases began to change I think as he got older, and in later discussions, he refined his position to being that as a government lawyer you had to provide the best argument you could for your governmental client. So I think with the passage of time he began to change his views on the merits of those cases.

⁴ *Korematsu v. United States*, 323 U.S. 214 (1944).

MS. FEIGIN: That leads to the obvious question that you as a career government attorney had to have had cases which might have been difficult. What was your view on that kind of thing, if at the time you had problems?

MR. KOPP: When I first came to the Department of Justice in the late 1960s, *Hirabayashi* and *Korematsu* seemed so foreign to me. But we in our office got involved in, of course, defending the government in terms of the legal principles in the various wars that it was involved in during my career, and I began to realize that sometimes you get into these cases and not only can they be very controversial, but you keep hoping that history isn't going to prove you wrong and that you end up being on the wrong side in terms of the judgment of history.

In our office, we have been involved, for instance, in the Guantanamo litigation. Awareness of my stepfather's experience made me sensitive to the fact that I hoped we were doing the right thing in terms of defending the government's position and that we were presenting the best arguments that we could and that the judgment of history would be that that's something that the government legitimately had to do to protect the public. It seemed to me that being a government lawyer and representing the government position, that's part of the job and that you have to do the best you can and hopefully be able to shape the government's position in a way where it does in fact stand not only among contemporaries but in history as well.

MS. FEIGIN: We'll probably get to some cases that you may have shaped in certain ways, but just as a proposition, did you ever decline to work on a case because you felt uncomfortable with the position the government was taking?

MR. KOPP: There were actually very few that I did, and part of it was that by the time some of the most controversial of these cases did come up, I was more a manager than just an attorney arguing a case. As a manager, my job was to make sure that the work in our office was properly assigned and staffed. If I was asking one of my attorneys to work on a case, it seemed to me that there was a very strong presumption against my then saying well, I can't help in terms of your work on a case although I'm the one, after all, who asked you to work on the case. So I really didn't recuse myself on some of the litigation which a lot of my friends outside the government found to be very unattractive litigation.

MS. FEIGIN: Getting back to your stepfather. Before we have him leaving the SG's office, were there any other cases you want to bring up that he worked on?

MR. KOPP: Well, he was extremely proud of what he did in a case called the *United States v. California*⁵ in the Supreme Court which involved whether state governments had title to tidelands. The Supreme Court held that the land belonged to the federal government and therefore things like the oil royalties belonged to the federal government, not the states. I found in my stepfather's papers an article he kept from a newspaper dating from around 1990 which said that with the passage of time, that decision had led to the United States collecting more than \$100 billion in royalties, and he wrote a little note that said that he feels he made a significant contribution to reducing the public debt (laughter).

He was also involved in the landmark civil rights case in 1947 of *Shelley v. Kraemer*⁶ where the Supreme Court held the judicial enforcement of racial

⁵ *United States v. California*, 332 U.S. 19 (1947).

⁶ *Shelley v. Kraemer*, 334 U.S. 1 (1948).

exclusions in real estate violated the Fourteenth Amendment, and that decision was one of the key decisions in a series of cases that led up to *Brown v. Bd. of Education*.

MS. FEIGIN: Did he ever talk about the politics of that case or how the government came to take its position?

MR. KOPP: No, he didn't, and actually I hadn't known of his involvement in it until I was doing some research online and came across a very interesting episode involving my stepfather and *Shelley v. Kraemer*. It was something that Justice Ginsburg talked about in a speech. Phil Elman, who worked in the Solicitor General's Office and was the number two person when my stepfather was the number one person, writes about it in his book, and it's picked up by a lot of people. It's an episode that is very illustrative of how far as a country we have travelled since 1947. In that case, the United States filed an amicus brief in support of the black families represented by Thurgood Marshall who were being evicted from their homes due to racial exclusions. And that was a subject my father was personally very sensitive on. He was very disturbed by the racial and religious covenants on property which were widespread at the time in the Washington area and barred blacks and Jews from purchasing real estate.

The brief in *Shelley* was drafted by Phil Elman in the Solicitor General's Office and three other attorneys. Consistent with the Office's tradition, in addition to the name of the Solicitor General, who was Phil Perlman, the draft cover page of the brief included the names of the four attorneys who had worked on the case. Since the case was so important, it also included on the cover page

the name of the Attorney General, Tom Clark. My stepfather, who read over the brief, noted to Phil Elman that all four attorneys working on the brief happened to be Jewish, and he said to Elman, "It's bad enough that Solicitor General Perlman's name has to be on it, to have one Jew's name on the brief, but you have also put four more Jewish names on it. That makes it look as if a bunch of Jewish lawyers in the Department of Justice put out this brief." So he crossed out all the names on the brief except for that of Attorney General Clark and Solicitor General Perlman. And that episode, I think, just shows you how different a world it was back in 1947.

In the Truman administration, my stepfather had been considered as a candidate for appointment to the D.C. Circuit, but he was competing with another Justice Department official, David Bazelon, and Bazelon was the individual who got nominated and appointed to that position. Looking back, it's interesting to speculate on how the law in the country and the D.C. Circuit would have developed had my stepfather been appointed instead of Judge Bazelon. While my stepfather was a New Dealer, he was in many respects quite conservative. Sometimes around the house he said in the privacy of his own home what he thought of some of Bazelon's opinions. My stepfather would have been a very different D.C. Circuit judge than Judge Bazelon.

MS. FEIGIN: Did he ever talk about the politics of that appointment, how it came to be that he lost out to Judge Bazelon?

MR. KOPP: He did say that he wasn't very good at building alliances and winning supporters as was Bazelon. And I think, since I knew him well, that's easy to see because he

was much more of a take-it-or-leave-it type of person in terms of personal relationships. It can help a nominee to have political as well as legal skills, and he wasn't really very good at doing things that required him to win support.

MS. FEIGIN: Were he and/or your mother politically active?

MR. KOPP: I knew him only when he was a judge. After losing out for the position that went to Bazelon, my stepfather was nominated by President Truman to the Tax Court, and he was confirmed and began his service in 1950 and served on that Court for 48 years until his death in 1998. Although he took senior status in 1976, he continued virtually full time until his death in 1998. In the 48 very prolific years that he was on the Tax Court bench, he was a key force in the development of the tax law.

MS. FEIGIN: Are there any cases that you think are worth mentioning from that era?

MR. KOPP: Since I'm not a tax practitioner, I'd hate to go into that. I know that at some of the receptions that I would go to in his honor, his colleagues and other people who practiced tax law would be very flattering in terms of what they would say about him and his influence on the law, and he won many citations and honors during his career as a judge.

MS. FEIGIN: So I guess we should talk a little bit about him and your mother.

MR. KOPP: My mother started dating Arnold Raum after my father died in 1953. The Tax Court, while it's based in Washington, is one of those courts where the judges go out and ride circuit, and so my stepfather was often assigned calendars in Los Angeles, and that sort of assisted the dating relationship.

MS. FEIGIN: Kind of what happened with you and your wife down the road. But we'll get to that (laughter).

MR. KOPP: And in 1957 they got married and our family moved to Washington, D.C.

MS. FEIGIN: What was your reaction to that?

MR. KOPP: Well at the time, I was in high school, in the middle of 11th grade, and I was quite satisfied with the high school in Los Angeles that I was in, so I wasn't terribly happy to begin a new semester with a move to Washington. My mother and my stepfather were quite nervous about how I and my sisters would react to the move, not to speak of also having a brand new stepfather just a few years after the death of our father. They enrolled me in the local high school in Washington, D.C., which was Western High School. Western was a fine high school. It many years later became a special school for the arts. When I moved to Washington in 1957, it was one of the top high schools in the city, and both of my sisters after me went to it and they got a very good education there. However, I was a boy, and in 1957, all D.C. high schools had a rule that male students were required to take Junior ROTC [Reserve Officers Training Corps]. So when I got to Western, I found myself spending an hour a day in ROTC which looked to me like it was strict military training, and I had never experienced anything like that. When I had been in high school in California, no one there had thought that military training was important enough to be a required subject in high school, and I was not terribly happy about taking that course. My parents were very concerned about my reaction. In those days, one could transfer from the District of Columbia school system to Montgomery County school system by paying \$500,

and my parents decided that it was worth the \$500 to make that move and keep me happy. So I ended up going to Bethesda Chevy Chase High School, which is actually not terribly far from where I live today in Bethesda.

MS. FEIGIN: I understand from the family lore that there was a bit of a bribe to you to get you to move to D.C.

MR. KOPP: Yes. As I said, I was not very happy about the move to Washington, and my uncle Martin Gang talked to my mother and they decided that it would make things easier for me in the move if we had a color television, which was not common in 1957.

MS. FEIGIN: I would just interject here to say that I myself did not have one until the 1970s, so that was quite a novelty.

MR. KOPP: So the color TV did help a little bit (laughter), although it turned out that was a stage in my life where I actually was starting to watch less and less of television, and it probably ended up being something that my sisters actually appreciated more than I did.

MS. FEIGIN: We should also say, for putting this in historic context, in those days most shows were not telecast in color, and if they were, my recollection is, and correct me if I'm wrong, that it was specially noted in the TV section because it was unusual. So even having one you did not see that many shows in color.

MR. KOPP: That's right.

MS. FEIGIN: Do you want to talk a little about life in D.C., or would you like to use this as a stopping point?

MR. KOPP: I think we might as well stop at this point.

MS. FEIGIN: Okay. Next time we'll pick up with life in D.C. and on to your career. Thank you very much.