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, October 28, 2014. This is the eighth interview.

MS. FEIGIN: Good afternoon.

When we left off, Barbara Babcock had taken over and you had weathered a potentially rocky transition. What changes did she bring about?

MR. KOPP: I talked about how the Appellate Section barely survived the reorganization as a unit, but it did survive. Its name was changed to the Appellate Staff.

MS. FEIGIN: Why do you think that was?

MR. KOPP: I think it was intended to be an adjustment in status. It's a little bit unclear whether it was something that just happened fortuitously or was intended to indicate something. My own theory would be that since there was a reorganization and there were lots of names being changed, Appellate Section didn't quite fit. So they came up with a new name, and Appellate Staff was appropriate.

MS. FEIGIN: When you say it might reflect a change in status, as a diminishment?

MR. KOPP: In theory as a diminishment. It could be interpreted that way, and I think at the time a lot of people thought that, but I think history shows that it didn't work out that way.

MS. FEIGIN: What was different for the Appellate Staff from the way things had been before?

MR. KOPP: The first thing was that this occurred when Mort Hollander was head of the Office, and after this struggle – we got into this some in the last session – Hollander I think correctly felt that his relationship with Babcock was not a

terribly good one. When the appointment to go to London came up, she made the position available to him, and he took advantage of it and it was a great solution for both him and for her. I effectively became head of the office at the time and I was very fortunate that the bad blood that there was between Mort and Barbara really didn't spill over to me. I had a very cordial relationship with her.

We talked about the reorganization battle which was unpleasant, but there was something that she had instituted which at the time a lot of us had some skepticism about. Given that it happened at the time of the reorganization, a lot of my people thought it was something that was intended to harness in the Appellate Staff, but in fact with hindsight I think it was a very good idea.

The Civil Rights Division had an area of subject matter that overlapped with that of the Civil Division and in particular with that of the Appellate Staff. The Civil Rights Division was involved in civil rights litigation, and we in the Appellate Section were involved in civil rights litigation. The difference was, of course, that the Civil Rights Division was bringing suits on behalf of individuals who had been discriminated against, while the Appellate Staff and the Federal Programs Unit were defending civil rights suits that were brought challenging alleged discrimination by the government. Both the Civil Division and the Civil Rights Division were deeply immersed in civil rights law, but we were coming at it from very different vantage points because the Civil Rights Division clients in fact were people who claimed they had been discriminated against, and the Civil Division's clients were agencies who were charged by plaintiffs with discrimination. So there was a certain tendency both by the Civil Division and

the Civil Rights Division to argue the law in a way which was most advantageous to their clients.

Barbara Babcock and the head of the Civil Rights Division, Drew Days, identified this situation and felt that it was important that the Civil Division and the Civil Rights Division work out their differences in terms of how they look at the case law, not necessarily the facts of a particular case, but you couldn't have the different Divisions arguing that a provision of the statute means X if the government is supporting the plaintiff and it means Y if the government is defending an agency. So she and the head of the Civil Rights Division, Drew Days, set up a committee that would get together and discuss various issues and attempt to work them out. The Solicitor General's Office was there so that if a dispute couldn't be worked out, it could be escalated to the SG's office through the appeal memo process. But a lot of the things that we had to deal with weren't matters that would necessarily be the type that you wanted to take up to the high level of the SG. So this committee was set up, and we would meet about once a month or so and talk over significant issues in the civil rights area where we in the Civil Division as defense counsel were pushing in one direction, and the Civil Rights Division as plaintiff's counsel was pushing in the other direction.

I will say that at the time, particularly since this came right after the reorganization, some of us in Civil who were participants did look at this process a little bit skeptically as something that would restrain us in terms of our ability to defend our clients. But the process, in fact, I thought, worked out pretty well. We would talk through issues, and on most issues we actually didn't have that much

of a disagreement or we were able to work through our disagreements and, at least at the level of what the legal principles were, we were able to reach agreement.

MS. FEIGIN: Do you remember any examples of disagreements that occurred?

MR. KOPP: At this point I don't remember specifics except we would just go through things like scope of review and construction of certain statutory language and see if we could reach agreement. At the necessary level of generality we pretty much were able to reach agreement.

The committee eventually was dissolved, in part because it had made its point that there had to be coordination; even without the formal setup of a committee in future administrations, the process tended to be carried out anyway in terms of coordinating and talking to people in Civil Rights. It also brought home to me that this wasn't just a question of working things out with Civil Rights; we in Civil dealt with all sorts of components in the Department, and it was important to be coordinated with them on legal positions. The Department of Justice couldn't go into court and argue one thing in a Civil Division case and argue a different argument on legal construction of the same statute in a civil rights case or an environment case or criminal case. There had to be coordination with the relevant Divisions in the Department. Through the years that coordination became one of the hallmarks of our office's way of looking at things. Civil Division comes into contact with just about every part of the Department sooner or later, and we can't ignore the fact that we think the law is X if some other component is going to be arguing Y. The process of coordination just worked into being a standard part of what everybody in our office was thinking,

that if you see that another Division is arguing something differently or has an interest inclining it to argue differently, then we better work things out before we get there and start taking positions.

MS. FEIGIN: It's hard to believe this hadn't happened earlier.

MR. KOPP: It is. And I think part of that was because the Department was a smaller place 20 or 30 years earlier, and it wasn't into as many things, and these types of overlapping issues weren't there. The Civil Rights Division of course in the 1960s and 1970s was quite a new Division. The Lands Division was transformed in the 1970s into the modern Environment Division. We in Civil had been around for a while and we just knew that we would get called on by the court sooner or later if we were arguing different positions.

MS. FEIGIN: So Hollander goes to London and you're the head.

MR. KOPP: I become the Acting head. Hollander, when he went to London, gave up his position as head of the office, so I was made Acting Director. Then with respect to my position, nothing happened. Hollander went to London in 1979 and for the rest of the Carter administration, there was no appointment of me or anybody to become Director of the office.

At first, I wasn't particularly concerned about the delay because my feeling was that if I wasn't appointed and the person who was appointed was somebody I liked and respected, I would be happy to stay in the position that I was in. Indeed, I heard that our professor-in-residence,[28] Walter Dellinger, had been considered for the job, but he had not been interested. Since I would have been delighted to work for Walter, I felt quite pleased that people like him were being considered. I

[28] See page 189.

felt enormously flattered when I heard he had said that I would make a better Director for the Appellate staff.

MS. FEIGIN: There's always this feeling in D.C. that your clout comes with your title, and the fact that you were Acting, did you think it in any way diminished your ability to make your voice heard when it needed to be?

MR. KOPP: Actually I didn't have that sense. Now maybe with hindsight I should have had a little more of it and maybe it was a little bit that this was sort of a post-death experience (laughter) in terms of the Appellate Section. I was so happy to be there and have our organization intact that maybe I was too focused on the dangers that we had just passed as opposed to the danger that lay ahead. In any event, I eventually began to realize that the delay was causing a serious morale problem in the office. I learned that attorneys in the office – I am told it was all of them – had signed a petition to our Assistant Attorney General to make me permanent.

When there was a change of administration and the Reagan administration came in, the new Assistant Attorney General was J. Paul McGrath, and one of the first things he did when he came on board was to end the suspense about who would head the Appellate Staff and appointed me as Director.

MS. FEIGIN: Did you have to interview with him?

MR. KOPP: I talked to him some. He actually had been a classmate of mine at law school, although he was one of those people you sort of know is there but you don't really meet, which is something that happens a lot at Harvard (laughter). He knew who I was, although he hadn't at law school had anything to do with me. And if I

recall correctly, we talked a couple of times, and then he appointed me as Director.

MS. FEIGIN: For people who don't know how this works, was there any discussion whatsoever about politics? You're obviously from a different place politically than he probably was.

MR. KOPP: No. Once I became a supervisor and saw how Hollander operated, I began to pick up both how Hollander operated as head of the office and some sense of Hollander's personal views in terms of how he looked at the world as an individual citizen. I learned very quickly that his own personal political leanings had nothing to do with how he ran the office. He strongly believed in the tradition that the head of the office was and *had* to be a very non-politically inclined person. That was one of the first lessons that I picked up, and so I always viewed it as an important and essential part of my job that I be strictly non-political. I was there to assist the people above me including the political appointees. On decisions that had a significant political or policy cast, it was important for them to make the call. It was my job to help them make those decisions by providing them with the necessary information. But as a career officer, it was not for me to make the political decisions.

MS. FEIGIN: But unlike Hollander, whatever his private views were – probably most people didn't know them – you were married to a woman who was politically active and liberal and a known quantity. That never was an issue?

MR. KOPP: No, that never was an issue, and part of the reason I think it never was an issue was because it was so obvious that with her being heavily involved in politics –

she was at the time in the Maryland State legislature – that it was obvious that I, just because of my connection with her, had to be very non-political to begin with. So my own personal circumstances reinforced the wisdom of why it was so important that I be very non-political. I will say that over the years I had just about as many bosses who were in Republican administrations as in Democratic administrations, and I think they all very much respected the fact that I was very non-political, and the fact that I lasted 30 years in the position I think confirms that.

MS. FEIGIN: The Reagan administration is in, and you're in. Did they bring any changes, new direction?

MR. KOPP: Yes. There was a very important change that came in the Reagan administration. Up to that time, we had reported to a Deputy Assistant Attorney General in the Civil Division's front office who was a career employee but had a number of components, mostly trial components, reporting to him as well, so we were just one among many in terms of reporting to him in terms of our next level of supervision. But when the Reagan administration came in, they decided that the Appellate Staff should report to one individual who would be a political appointee. I think it reflected the fact that in the Reagan administration, appellate litigation was viewed as extremely important. It is after all where legal principles are made, and they had a very high view of the importance of appellate practice, so they appointed for us just one person who would be the person we reported to.

MS. FEIGIN: You're the only group reporting to this individual?

MR. KOPP: We're the only group reporting to her, and the individual was Carolyn Kuhl who was appointed to the position of Deputy Assistant Attorney General in charge of the Appellate Staff. Carolyn was an important step forward for us in many respects.

There's an interesting story I can tell about when Carolyn was being considered for her position which indicates what a different era we were living in back in the early 1980s. Paul McGrath had just been appointed as the Assistant Attorney General, and he hadn't made the appointment of Carolyn Kuhl to be our boss yet. Prior to her being appointed to be our boss, Paul called me into his office and he told me that we would be getting a new Deputy Assistant Attorney General to be in charge of us and that I would report to her. Then he sort of delicately and politely sounded me out on how I would react to having a female as my boss. I think Paul thought it was going to be an awkward conversation (laughter). At first I was a little bit shocked that he was proceeding this way. I knew first of all that who the Reagan administration appointed as a Deputy Assistant Attorney General was not going to turn at all on my reaction to her, but my major reaction was one of shock that in this day and age it would be necessary for an Assistant Attorney General to sound out his subordinates on how they would react to a female boss. This occurred at a time when the Civil Division had already had three women as Assistant Attorneys General, and they had made a serious effort, a successful effort, to bring a number of women into the Civil Division, so it wasn't that women in significant posts were unheard of in the Civil Division.

I suspect that Paul McGrath – his prior job had been at a Wall Street law firm – and I think he was interacting with me maybe the way he would interact in his law firm if he were appointing a woman to some significant place where she would have subordinates. He was sounding me out in terms of whether he would have any problems in terms of her having men working under her. But in any event, from my viewpoint, it was easy to set his worries aside. I explained to him that I had grown up in a family where not only the men but the women had been lawyers, and I think he stopped worrying at that point.

When Carolyn came in, although I was very happy to meet her and I was happy to have a female boss, I did have some concerns because in the early Reagan administration she had been a political appointee in the Attorney General's Office. I had concern that her coming in would give a political element to the way we looked at our cases and that there would be a political impact in terms of how the office and the career attorneys were supervised by her. But it turned out that she was a wonderful boss and operated the office in a highly professional manner I think any lawyer running a successful operation would want to emulate. First of all, she was a brilliant and extraordinarily capable lawyer. When you dealt with her, you knew you were talking to somebody who was intelligent and smart. She was very supportive of her staff. I think we all liked working with her, and being the first person in that position, she set a very high standard that I think subsequent appointments and appointees all strived to meet.

MS. FEIGIN: Did the other components in the Division have the same thing, a political person to report to?

MR. KOPP: They did, but I think what made our situation uncommon is that we had only one person to report to where the more common arrangement was that you would have a lot of components reporting to a single political appointee.

MS. FEIGIN: So it's not just that you had one person to report to, it's that she had just one person to listen to.

MR. KOPP: One component. I didn't quite appreciate it at the time because as indicated I was worried in the beginning that we would have a politically run office, but the fact that we had only one person to report to and that person then reported to the Assistant Attorney General turned out to be extraordinarily significant. It gave us a lot of clout in our front office.

Over the years my having the ability to talk to a political appointee who had the ear of the Assistant Attorney General gave the office a lot of influence. It was very important when you were doing things like hiring, for instance. I noticed that after she came on board, our recommendations as to hiring, which sometimes had not gone anywhere when they got to higher levels, suddenly they almost universally were successful. In fact, close to 100% successful. I'm pretty sure now that if that type of arrangement had happened five or ten years earlier, there never would have been this question that the Appellate Section should be dissolved because we would have had the strength bureaucratically to ward off that thought at the very beginning.

It also turned out with the passage of time that another reason it was very important to have a single deputy that we report to is because of the number of big cases that had enormous political consequences, for instance, most recently, matters like healthcare and the Defense of Marriage Act. Cases of that significance obviously were enormously important not only legally but in the political world as well. It was just very important that the person we reported to within the Civil Division had the clout to persuade his or her political colleagues. That type of leadership would not be appropriate for a career appointee when you're dealing with explosive issues that came up like healthcare, or Defense of Marriage Act, or national security issues such as Guantanamo. Those are issues where you really did want the political appointees to be significantly involved from the very beginning. The fact that we had this type of deputy leading Appellate gave us a lot of strength in some of the disputes and debates that occurred afterwards.

MS. FEIGIN: You wanted the political appointee to shield you from politics, ironically.

MR. KOPP: That's right. The political appointee was a buffer for us. I think I mentioned to you earlier the time during World War II that David Kreeger, who was then the head of the predecessor component of the Appellate Staff, was sitting at his desk and President Roosevelt called him up. Well, the President stopped calling (laughter), and I think as a matter of having a well-run non-political office like ours, that was important because our Deputy both understood how career people operated and were supposed to operate, and she understood how the people above her, who were all political people, operated.

MS. FEIGIN: Has that continued through the years? She was the first one and you had a home run.

MR. KOPP: That basically continued over the years. Some of our deputies are a little bit more effective or less effective than others, but that was really a process that I think was very successful. That was true not only on major issues but on more mundane things where it's important to have a lot of clout and influence. Concerning our memos, for instance, when there was a dispute with other components, we had a lot of weight in the internal debates, and I think most of that was due to the logic of the positions that we articulated. But it certainly helped to have the person at the top in terms of authority arguing vigorously in support of the position that was in our draft memos. So sort of imperceptibly, this change in the Reagan administration made a very significant difference to the future of the office.

MS. FEIGIN: I think the Solicitor General's office changed during the Reagan administration as well, right?

MR. KOPP: In the SG's office, there was one change that I think happened that was quite significant, although at the time it happened, it was one of these changes that nobody notices or even knows is happening. That is when the Reagan administration came in and the Solicitor General's Office became more interested in Supreme Court cases that didn't involve the government. They picked up the idea that the United States has the ability to file an amicus brief whenever it thinks appropriate. In the past, the government had filed quite a few amicus briefs, but we often stayed out of cases and didn't file amicus briefs. I think I mentioned earlier the case of *Scheuer v. Rhodes* which was a case involving

immunity for state government officials, the officials being those in charge of the National Guard that had killed people at Kent State, and then who were being sued. The United States didn't participate in that case, I think in large part because it was such an unattractive case. I have mentioned that I was among those who were quite happy that we were not involved in that case. But the Supreme Court in *Scheuer* came down with a significant ruling that impacted government employees, not simply state government employees but also federal government employees, and the Reagan administration began to pick up that what happened in the Supreme Court, even in non-government cases, could be extremely important. The Solicitor General's office began asking us to prepare memos in just about all the cases in the civil area that the Supreme Court was granting cert in because they wanted us to explore the cases where the government should participate as amicus. So we got heavily into writing amicus memos, and with time it became clear that in the Reagan administration, there now was an implicit presumption that if the Supreme Court granted certiorari in a non-government case that there still probably was an interest of the United States that would merit amicus participation. During the Reagan administration the number of amicus filings by the government and by our office went up significantly, and ever since the government has much more heavily been involved in amicus filings in the Supreme Court than it used to be.

MS. FEIGIN: Do you see this as a positive development?

MR. KOPP: I think it is a very reasonable development because the fact is that a lot of the decisions of the Supreme Court do impact governments and the United States government, and if we're not involved, we can still be impacted.

MS. FEIGIN: One other big thing that happened during that era involved the Honors Program. Can you tell us a bit about that?

MR. KOPP: That is something that was quite important to us. The Honors Program I think formally started in 1953. As I understand it, it was developed by the Department as a way to avoid political influence with respect to bringing new attorneys fresh out of law school into the Department, and the idea was to have a set process of interviews and evaluations that were not influenced by political influences. It was under this program that I was hired.

I was hired in 1966 when the Department sent senior attorneys out to the various law schools to interview. The person who was assigned to Harvard happened to be Mort Hollander, head of the Appellate Section. At the time, I was only interested in appellate law. I didn't think of myself as a potential trial attorney. Mort and I just hit it off at the interview very well. He liked me, I liked him, and that basically was why I got hired and ended up in Appellate. If the interviewer had been someone from another component in Civil, say one of the trial components, there might well have been a different chemistry at the interview, and I wouldn't have gotten an offer or wouldn't have ended up in Appellate. That was a situation where fate intervened in a very favorable way for me.

The Honors Program at that time ran in a way where people from Washington would go out to the law schools and interview. There might be an attorney from the Civil Division who would go to schools in Boston and New York, and another would go out to interview applicants on the West Coast. So the person who was doing the interviewing was extremely significant. And the process continued that way for many years. In the Reagan administration, it was changed. Richard Willard was the Assistant Attorney General at the time, and he felt there was a better process for hiring which would be that the top applicants would be brought to Washington. They would be interviewed by the components that were interested in them, and where the applicants were interested in those components, you would have people on both sides of the interviewing process involved in interviews where each was interested in the other.

MS. FEIGIN: When you say they were brought to Washington, does that mean the government paid for them to come?

MR. KOPP: The government paid for them to come. I will say that the government was somewhat of a cheapskate. They paid the bare minimum you could get with airfare, and the interviewees often had to go back in a *very* short period of time so the government got the benefits of bargain rates. But the process worked in that it meant that interested applicants were talking to interested employers. In our office, we quickly perceived that if we had a hiring committee, all the people on the hiring committee could actually meet the applicants. This meant that our hiring process became very successful. One might say that under the old hiring process, it worked about 80% of time; this way it worked about 95% of the time

or so. So over the years, our hiring just became very, very good, and I know that as somebody hired in the old procedure I became very impressed by how well the new process worked. I was very glad that I hadn't been involved in the new process (laughter) because the people we kept drawing into the hiring process from the law schools kept getting better and better and I suspect that had I applied in later years, I might not have gotten an invitation to come to Washington.

MS. FEIGIN: The Honors Program went off the rails a bit in Bush II. Can you tell us about that?

MR. KOPP: The Honors Program over the years was working very well and better and better, and then in the Bush II administration, it, at the Department level, ran into a big problem because in that administration, there were some political appointees connected with the Attorney General's Office who didn't understand how the Honors Program was supposed to work. Maybe they weren't interested in how it was supposed to work, but they began looking at the program from a political viewpoint in terms of hiring. This eventually came out in public. The Inspector General of the Department investigated, and some of the people involved were alleged to have seriously abused the process and brought political influence into the process where political influence was not supposed to be.

Curiously, this scandal to some extent was to the benefit of the Civil Division because our Assistant Attorney General at the time, Peter Keisler, very effectively resisted pressure from these high-level political appointees, and the Civil Division process under the Honors Program was never implicated in the scandal. This became known among law school applicants who were interested in

the Department. The Civil Division had always had very good Honors Program applicants, and while the rest of the Department seemed to be having serious problems with the Honors Program, the applicants to the Civil Division kept being at a very strong level. The Civil Division, for people in the law schools who were interested in the Department, didn't have the adverse baggage that the other components did, and as a Division, we did extremely well at a time that the Honors Program otherwise was under a big cloud with people who were interested in the Department. One indication of what this meant was that until the scandal, Civil Division often gave offers to the same people who had offers from the Civil Rights Division. So you had very good applicants with an outstanding offer from each Division, and it used to be very predictable for the applicants in that position to select the Civil Rights Division over the Civil Division.

MS. FEIGIN: Why?

MR. KOPP: I think these were obviously the people who were interested in civil rights.

MS. FEIGIN: But that wasn't an era when civil rights was high on the agenda.

MR. KOPP: Civil Rights was still doing important things. The nuts and bolts of government goes on from administration to administration, and in the Civil Division, civil rights law is just one small part of what the Civil Division does, and also if you're interested in practicing civil rights law, you're probably interested in it because you're interested in the plaintiffs and not the defendants. So Civil Division would almost always lose out to the Civil Rights Division when they both gave an offer to the same person. After these scandals broke, I began to notice that suddenly if you had someone who had an offer from both Civil and Civil Rights, they would

come to Civil. After that period, I stopped worrying about Civil Rights hiring away our top Honors Program applicants. The Civil Division, by doing well in what was otherwise a bad period for many Department components, had enhanced its reputation in the law schools, and at least from the viewpoint of our office, seemed to have the ability to maintain that step up in status with law school graduates.

MS. FEIGIN: Speaking of who you're hiring, can you tell us about the professor-in-residence program because that seems unique.

MR. KOPP: It was an interesting program. It wasn't actually unique. We instituted it because I had heard about it being done from time to time in some other components. It was often done not so much as a program, but a professor would indicate he would be interested in coming, and you had to figure out what you were going to do with him and where he would be, so you made him a professor-in-residence. We took that and tried to create the program as an institutionalized program. We would save a slot every year for a professor-in-residence who would stay with us for a year and work for us and then go back out into teaching. Having people like that in teaching would help attract students to the office in the future. We did hire under that program some very distinguished people. Walter Dellinger from Duke was hired under that program. He was our first professor-in-residence, and he ended up being in the Department in Democratic administrations. He became the head of the Office of Legal Counsel, and then he was Acting Solicitor General in the Clinton administration. We also brought in under that program Linda Silberman from NYU Law School who was a leading expert in Family Law, and

surprisingly we found that a significant amount of our case law actually involved family law, and it was very helpful having a professor-in-residence with a strong family law background in the office. We also had as a professor-in-residence somebody who had been in our office earlier, John Rogers, who eventually became a judge on the Sixth Circuit. So we had the professor-in-residence program for probably 10 or 15 years or so and it brought in some very good people, and then they'd go out and teach and that would help the office in the future in terms of getting people interested in us.

Eventually we decided we couldn't justify continuing the program because one thing about professors-in-residence is they would only stay for a year. Our regular hires were developing a track of staying much longer than that. When I came into the office, we had people staying on the average three or so years. That stay began to get longer and longer, and we just couldn't justify to ourselves bringing in people for one-year positions when there were people who we wanted to hire who would stay with us for an extended period.

MS. FEIGIN: From their point of view, they'd get to write briefs but might not get to argue only being there a year. They'd be lucky to get an argument.

MR. KOPP: There was a process by which if you had somebody who had written a brief and then they left, you could make a temporary appointment for a week or so so that they could prepare for the argument and go out and present the argument. We thought we were going to have problems with that kind of arrangement, but we actually found that there was flexibility in the system to avoid that.

MS. FEIGIN: We haven't gotten to any of your big cases today, but there was so much going on in the Department that today we'll get all that done and next time get into the major litigation that you were so involved with. Can you tell us about the committees you served on and the administrative positions you were given because of your position as head of the Appellate Staff?

MR. KOPP: I was on a number of committees that I found to be a very worthwhile experience for me, and I hope the committees involved found it equally worthwhile. In the 1980s, I was appointed and then re-appointed to the D.C. Circuit's Advisory Committee on Procedures. I was on that committee, I forget whether it was six years or eight years, but I was on that committee for quite a while. We would examine the rules, and lawyers would write in and say that this rule wasn't well written and should be revised, and so our committee would come up with proposals for changes in various rules. We made a number of changes to simplify and clarify those rules, and I learned from that experience that it's not easy to write court rules in a way that they are going to be uniformly understood. I learned also there's a process in any institution like court rules that when a problem comes up, often people just plug in a simple fix to a sentence or paragraph. When that's done, the rule as a whole may suddenly have a bigger problem than it had before. For instance, inserting the word "and" somewhere in a sentence somehow can change a lot more things than just what it was intended to change. So I had a good lesson in how delicate a process it can be to write rules.

MS. FEIGIN: Who was on the committee? Were judges on the committee with you?

MR. KOPP: Essentially it was a committee of appellate lawyers with a D.C. Circuit judge as a liaison. I believe it was Judge McGowan and then Judge Edwards who were the judges that were the liaison with the committee when I was there. My first chairperson was John Pickering. I was just a member.

MS. FEIGIN: Who appointed you? How did you get to be on the committee?

MR. KOPP: John Pickering knew me and recommended me. I assume he recommended me to Judge McGowan, and I got appointed. At the time this was not a very visible committee, and I don't think I had any idea of what I was getting into. It turned out to be very interesting, and a lot of impressive people were on it.

MS. FEIGIN: Can you tell us some of the changes you made so people can understand how different it is now from the way it was perhaps when you first started.

MR. KOPP: When I was on that committee, I think essentially what happened was that lawyers would write in and say here's a problem with such-and-such a rule, don't you think the Court should do something about it? It would be looked at by somebody who would say that this is really a problem. Let's circulate it to the full committee and see if we should recommend something to fix the rule. Later on, and I think this process started toward the end of the time that I was on the committee, the process became more structured. The Court would ask, isn't it time that our rules should be redone, they have all these strange things in them that are redundant and confuse people. Shouldn't we start rewriting the rules so that they fit together in a more comprehensible way than before? That more organized process started before my time on the committee was over.

After I got off that committee, the Solicitor General's office needed a representative to work with the Federal Advisory Committee on Appellate Rules, and the Solicitor General's Office appointed me. The Solicitor General was a member of the committee but he in fact almost never went to the meetings. He always went through a proxy, so I became the proxy for the Solicitor General and was on the Federal Advisory Committee for Appellate Rules for seven years. During that period, there in fact were some very significant changes to the rules. The committee would study the problem, and they would come up with a proposal to fix the problem. It would then be presented to a standing committee. If the standing committee approved, then the rule was circulated and if it survived the comment process, it would be approved and become a change in the Federal Rules of Appellate Procedure. In my early years on that committee, there was a situation where each of the Courts of Appeals had their own rules on some very important aspects of appellate practice, such as the format of the brief, what to put in a petition for rehearing en banc, and other very important aspects of the process. One of the first projects the Advisory Committee handled when I was there was to come up with rules that would take the major aspects of appellate practice, like briefing times and en banc procedures, and come up with a proposal that would apply to all the circuits and effectively preempt the local rules. So we did that. Our recommended rules changes went over very well with the courts because for the most part the idea of having major rules identical in all the circuits made a lot of sense to just about everybody. So these early things that we did brought a lot of uniformity to the practice of appellate litigation. The circuits still

have room for local rules but the local rules now deal with the finer points, and the major points of appellate practice are the same in the various circuits.

The committee while I was on it also had another significant task that dealt with the appellate rules. The committee was assigned the task of being the first advisory committee to rewrite the rules in a consistent style because the rules had up to that point been written at different times for different reasons, and as a style matter they were not consistent. Style, when you're talking about rules, is more than just something that looks nice. If you have words that in one rule are written in a certain style and in another rule the same words appear but they're in a different style, lawyers are going to pick up the difference and start finding substantive reasons why one rule should be construed one way and one rule the other way. So when you're writing rules, having a consistent style is actually quite important because it can spill over and have substantive impact.

MS. FEIGIN: This must have given you real sympathy and appreciation for your wife's work in legislative drafting (laughter).

MR. KOPP: It did. It was very similar to that. I knew as an appellate lawyer that what you say and how you say it is obviously very important, but what I didn't realize until I started to have this experience was just how many meanings a particular word could have, and it was for me an eye opener. Sometimes you sit down and you write something and after many tries you realize there isn't any way you can write something with a perfectly clear meaning and that it be the only meaning of what you write. It's just a very, very hard experience. The committee had the advice of people with significant expertise in legal writing. Dean Carol Ann Mooney of

Notre Dame Law School was the first person to lead the committee as its staff expert, and Brian Garner was the second on the committee as an expert. I learned a lot about vocabulary from the experience of being able to work with them.

During this period I was also on the D.C. Circuit's special task force on gender equality which was a task force set up to study how the court was doing with respect to gender and seeing that people didn't run into problems that you run into in society when women are being treated differently. There was a special task force on race, which was a counterpart to that committee. I was just on the gender committee.

MS. FEIGIN: Was there one for gay rights as well?

MR. KOPP: I don't remember one. This was back in 1992 to 1995. Our side of the task force, the one studying gender, came up with a recommendation that while the D.C. Circuit was probably one of the more advanced courts in terms of seeing that the litigation process before it was not burdened by disparate treatment of people because of gender, there were still improvements that had to be made. There was a group of twenty or so attorneys on this task force and most of us were assigned specific areas to look at. I remember looking at the area involving the court's internal EEO process for the staff of the court. We looked at the cases and had the benefit of some surveys, and we had access to a staff member on the committee who prepared material. I remember that in that particular area, the court's internal EEO process, there were concerns that it wasn't as effective a process as it should be, largely because the court was a very small place. Having a formal EEO process in a small institution becomes difficult because everybody

knows everybody. There are fewer secrets that are kept in such an institution than in a larger one.

At least at that time there were a number of people that felt that the D.C. Circuit and the District Court's EEO process really weren't working as well as they should be. A number of court managers felt the same way and so one of the recommendations was that the court focus on that aspect. I don't think we necessarily came up with a solution. I'd be interested 20 years later in how much progress has been made. One of the suggestions was that in a small institution, you have to not only work on the formal process but work on informal ways of dealing with problems so that people who feel they have problems can comfortably find somebody to talk to and talk through what is concerning them without it becoming a big and unpleasant thing. If you don't have someone you can comfortably complain to, you will end up suffering in silence and not happy about your job.

MS. FEIGIN: Before we close out, let me ask you one gender-related question because you were there at the time when many more women were in the office, and attire for women changed. Women started wearing pants and pantsuits, and there was a time when this became a real issue, how should women dress for court. Did Civil Appellate have any philosophy on this? Did you?

MR. KOPP: No, we did not, and part of the reason we did not is because our people I think instinctively knew how to dress when they were going to court or a significant meeting. At least it was never brought to my attention that there were any

problems in that area, and we felt that our people could be sensitive to the occasion and dress accordingly.

MS. FEIGIN: People reading this down the road may not understand that this was an issue, but women wearing pants was definitely a new thing. You didn't care?

MR. KOPP: No, I didn't care. Now my wife will tell you that there are certain areas where I just don't notice things, and this could well have been one of them. In terms of getting any feedback about how our attorneys appeared in court, I never got any adverse feedback. There was some criticism that some attorneys dressed too casually in their offices.

MS. FEIGIN: Really? What?

MR. KOPP: We were located – and the office still is – on the 7th floor of the Main Justice building, out of the way where people who have an important appointment with an Assistant Attorney General or are going to the conference rooms will be wandering. The 7th floor is isolated from anybody going through except for those who have an appointment with one of our people, so people can become very comfortable in that type of environment. A number of the attorneys, and I think it was mostly men, but probably spread to some women as well, began to have their dress clothes hanging up on a hanger in the office, and except when they were meeting with people from outside of the office, they would dress comfortably. It didn't look like Google, but it did become more informal over the years, and part of it was simply because the office was out of the mainstream of the Department and part of it simply was over the course of my working lifetime there was an evolution in what was viewed as permissible dress. When I went to law school

we wore a coat and tie. I think my law school class at Harvard was probably the last one that did, and after that point, in law schools things became much more informal and as people in law schools graduated, the notion of informality got carried more and more into law offices. The big private firms probably were the last to go, but the ones that weren't run like private firms had the evolution happen much earlier.

MS. FEIGIN: Thank you very much. It's been very interesting. Next time we'll probably get more into cases, but it's important to have the context so it's really interesting to hear about your placement in the Justice hierarchy and the administrative framework.

MR. KOPP: Thank you.