ORAL HISTORY OF THE HONORABLE DAVID B. SENTELLE
Fourth Interview
August 13, 2003

This interview is being conducted on behalf of the Oral History Project of the Historical Society of the District of Columbia Circuit. The interviewee is the Honorable David B. Sentelle, Judge of the United States Court of Appeals for the District of Columbia Circuit. The interviewer is David Frederick. The interview took place on August 13, 2003. This is the fourth interview.

MR. FREDERICK: Good morning, Judge Sentelle. It's August 13 and we are here for the fourth part of your oral history.

JUDGE SENTELLE: Good morning, David.

MR. FREDERICK: When we last left off, you had just been invested as a circuit judge here on the D.C. Circuit. Now I wonder if you could describe the process by which you became integrated into the work of the Court of Appeals.

JUDGE SENTELLE: It comes very close, David, to being thrown in and swimming. They are kind enough, generally here, to give you some time before you begin to hear cases. I didn't get as much as had been expected because Bob Bork first quit hearing cases to go be processed for the Supreme Court and then, with the exception of an *en banc* case, quit altogether without hearing any more cases and so I got pretty much Bob's docket without having a lot of time to contemplate it. I did have a few weeks in which to hire three law clerks – or hire two and bring one with me – and get a secretary and get started on things. But I didn't have a lot of time to contemplate moving in. I simply was stuck into a slot and started hearing cases.

MR. FREDERICK: So the cases that Judge Bork had were simply just transferred to you? You got a big stack of cases for an argument calendar?

JUDGE SENTELLE: Pretty much I got Bob's docket. It was not literally the case, I guess, because I think there was a term that was set up, maybe two even, where they had set up anticipating a new judge. They sort of shifted things around to let me take those, but then from there on it was pretty much taking what Bob had left.

MR. FREDERICK: How were cases assigned when you first joined the court?

JUDGE SENTELLE: I'm told, and I've never participated in the process, the way the clerk's office handles it is as a double randomness. They set up the pairing of judges randomly within certain parameters, that is it was a goal that you would sit with each other judge at least four days and no more than twelve days. And then when they had the days set as to what judge would sit on what days, then the cases were assigned to those days randomly, except that if any case appeared on a judge's recusal list, it did not go on the day when that judge was sitting.

MR. FREDERICK: So both the pairings of judges was random and how the cases were assigned to panels was random?

JUDGE SENTELLE: Again, I didn't participate in it, but I'm told that was pretty much done manually at that time by people in the clerk's office. Now, after the leadership of Harry Edwards during his term as Chief Judge, everything is done by computer. The same goals are still the goals, but the computer does it rather than being done manually.

MR. FREDERICK: You had sat on panels in the Fourth Circuit as a district judge. How did the process differ between the D.C. Circuit and the Fourth Circuit?

JUDGE SENTELLE: The process is less different than the content of cases. There is a difference in process in that – and I guess this would come under the heading of process – there the term is set up five days Monday through Friday and the panels change every day. Here, we have four-day terms that are generally set to run Thursday, Friday, Monday, Tuesday, and the panel originally does not change during that four-day term. I say 'originally' because we swap with each other over the course of the year. I'll call Judge Randolph and say, "I'll swap you my first May day for your fifteenth so I can go to a meeting." So it gets mixed up by that method, but it originally starts out that you expect to sit with the same panel for four days in a row.

The Fourth Circuit generally has five days, five cases a day. We have four days with four cases, two days with three cases, although sometimes more than that. That sounds like they're getting a lot more work than we are, but that's what I mean by the difference in the content of the cases. Where the Fourth Circuit mix is generally a fairly high mix of criminal cases, a few *habeas* appeals, some diversity cases, our mix tends to be very heavily to the administrative law cases that have the very thick records that take a lot more clerk and judge preparation time than does the average criminal case or diversity case.

MR. FREDERICK: Is the amount of time allotted to oral argument different in the D.C. Circuit from your experience in the Fourth Circuit?

JUDGE SENTELLE: On paper, we may allot less, but we don't go by our allotments. Judge Spottswood Robinson used to say, "The lights only control the bar, God controls this bench." And we may allot 30 minutes to a case, 15 to each side, and have each lawyer on his feet 30, 35, 40 minutes answering questions. The Fourth Circuit may allot a little bit more for each case on average, but they adhere more closely to the time that they've allotted. I'm not saying ours is better or theirs is better, it's just different.

MR. FREDERICK: Do you recall who the first panel was that you served with?

JUDGE SENTELLE: On this court, I sat with Pat Wald and a visiting judge, I think, the first day. I've forgotten the name of the visiting judge. It was Ruben or Rosen and Chief Judge Wald and I.

MR. FREDERICK: Is there anything memorable about that first sitting that you recall?

JUDGE SENTELLE: Not particularly. Actually, I had sat on an *en banc*, I think, before that panel sitting. The *en banc* was memorable, I guess, in that it was something new.

MR. FREDERICK: How did the process of *en banc* decision making work in that first case that you sat on?

JUDGE SENTELLE: Well it had been heard once and decided by a divided panel, so everyone started out pretty much saying, "Well, look, I agree with the majority" or "I agree with the dissent" from the divided panel. As I recall, what had been the dissent before became the majority on the *en banc*.

MR. FREDERICK: Did a conference occur immediately after the argument?

JUDGE SENTELLE: Yes. That is the norm in this circuit, that we hear argument and then go to conference.

MR. FREDERICK: How does the deliberative process unfold in that conference? First let's take the *en banc* that you sat on as your first case and then describe the panel process.

JUDGE SENTELLE: *En banc* begins with the newest judge voting and saying anything you want to say about the reason for your vote. I think I was very abbreviated the first times that I did it. I just said my vote and looked at the next person. Then it goes up the ladder by seniority. There are some judges, and I'm not going to go into personalities, who just can't sit there and wait for their turn. They've got to jump in and argue with the judge who's already voted and declared. The norm is that it would be voted by seniority from the newest on up.

MR. FREDERICK: So without any discussion - -

JUDGE SENTELLE: Yes, you would discuss if you chose to. When you cast your vote you could say something. That sometimes prompts a judge to discuss it with you, although I like it better when we just go through it and then have the discussion after we get through.

MR. FREDERICK: Has that process maintained the same form throughout?

JUDGE SENTELLE: Pretty much so, although I think in the *en bancs* it may be a little more orderly now than it was when I first came in. There's less of the tendency of judges to jump place and start arguing than was once the case.

MR. FREDERICK: Have you found there to be differences in how the *en bancs* work depending on the number of judges who happen to be eligible for *en banc* service?

JUDGE SENTELLE: It's probably unsurprisingly a little more efficient when you have fewer judges. I don't find that surprising.

MR. FREDERICK: For the panel process, with only three judges, how does that post-conference deliberative process work?

JUDGE SENTELLE: It's much the same, although there is more discussion per vote on a three-judge conference than there would be in an *en banc*. There's more digression because, I think, you feel like you've got more time so we digress a bit. It's a little more chatty, but the process is essentially the same. The newest judge votes first and the ranking judge votes last.

MR. FREDERICK: Why is it done that way?

JUDGE SENTELLE: I suppose the idea is, or it originally was, so that there wouldn't be the senior person influencing the junior, although I don't know how much a connection that has to the outcomes.

MR. FREDERICK: Is it often a case that a judge will change his or her mind after hearing the discussion from other judges?

JUDGE SENTELLE: It does happen, David, and it often happens that we're able to reach a compromise position of some sort. Very often, there's more than two ways that a case can be decided. It may well be that we're able to work out one of the ways other than reversing the case or affirming the district judge. There might be something in between, such as, "Let's send this

back for further fact-finding on that first issue that would be dispositive if it were decided instead of the second one." There may well be other ways than an absolute black and white decision. Very often, we are able to work our way to a decision that everybody can agree with. Other times, you may have two judges who strongly reach an affirmation. The third judge says, "Well, I was prepared to reverse, but I'll wait and see your draft. And if it's convincing, maybe I can go with you." Very often you can.

There's a phenomenon that happens every now and then that Bob Bork referred to once in his testimony, I think. And that is that you start to write a case sometimes and it won't write the way you thought it was going to write. And you have to reconference – call your colleagues and say, "Look, this will never work. I'm going to send you a draft the other way around and see if you can go along with it. Otherwise I'll be dissenting and one of you can write it." But that happens maybe once a year that you'll have one that just won't work.

MR. FREDERICK: When you say reconference, you actually get the judges back together to discuss the case?

JUDGE SENTELLE: Conceivably, although fairly often it can just be done with phone calls or even a memo to say, "Look, if you'll look at *US Air v. NLRB*, you'll see that we can't do it the way that we originally talked about doing it." So you may not have to have another full-bodied conference. You might be

able to do it by a phone call or a memo. It doesn't happen all that often, but it happens enough to make you believe in the system.

MR. FREDERICK: So the one conference after the argument will be the one and only opportunity, typically, that the judges will sit down as a group to discuss the case?

JUDGE SENTELLE: Usually that's the only time all three sit down together to discuss the case. The judge who is writing will circulate the draft and then there will be comments coming back and forth after you circulate the draft. Sometimes the only comment is, "I concur. Good job." Very often you might send three pages of comments back saying, "You need to change this, change that, omit that, I can't go along with the other." It takes a grinding process sometimes to get something that all three can agree on.

MR. FREDERICK: When you first came onto the D.C. Circuit, were there any judges that you found to be particularly helpful in understanding the process better or becoming more inculcated into the work of the court.

JUDGE SENTELLE: Before I even came, Ken Starr had called me and said he was going to send me some memos about things that were happening internally in the court that he thought I would benefit from knowing and I did find them beneficial. He left me a note on some things to be on the lookout for when I got up here. Ken was particularly helpful to me insofar as finding out what was going on and who was doing what.

Silberman also, although he did not pre-contact me the way Ken did. Silberman was very available to me. Yes he did, he contacted me later.

They both contacted me later. Buckley had dropped me a note and was most helpful on physical things, such as making arrangements for my chambers and such. Those three stand out as being helpful. Everybody was nice, don't misunderstand me, but those three in particular stand out as having been particularly ready to assist me in commencing a new adventure.

MR. FREDERICK: How did you find working with the administrative law cases? Was that a new experience for you?

JUDGE SENTELLE: When I was first contacted about the possibility of coming on this court, I knew this circuit did an awful lot of administrative law and that I had very little background in administrative law. I pulled the last two volumes of F.2d at that point, read all of the D.C. Circuit cases, and, frankly, came to the conclusion that, hell, it's law and I've learned a lot of other kinds of law and I'll learn this kind of law. So, yes, it's different. And one thing is that the vernacular of each of the areas of administrative law – people think administrative law is one field, but it's important that it's not. It's a myriad of fields: energy law, communications law, labor law. Within each of them, they each have their own vernacular and I heard people exchanging conversation in the FERC cases, the judges and the lawyers and the dialogues and questions about Section 7s, full needs contracts, and things that didn't mean a thing to me. It really felt almost like I was holding court in a foreign country and I thought, "What have I done coming into this?"

Before long you begin to find yourself involved in the same exchange. You learn the language at least. To some extent, although we still at times have to say to the lawyers, "Look, if you refer to The Act, we spend our days dealing with a lot of different acts. You work on that one act all the time. Please tell us a citation to the act so that we can follow you because we're not as familiar with it as you are." But it was a bit daunting in that sense, in that my colleagues seemed to know so much more of the language than I did, although by now I find myself doing the same thing and I'm sure that John Roberts will, at times, have to ask, "What is a Section 7 contract in natural gas law?" or whatever is currently before us.

MR. FREDERICK: How did the opinion assignment process work when you first came onto the court?

JUDGE SENTELLE: Well, Spottswood Robinson told me, "Don't try to drop your pencil and duck when they're assigning the FERC cases because you'll just meet your colleagues under the table." The ranking judge on the panel on this court assigns a case if he's in the majority. If that judge is in dissent, then the senior judge of the other two will make the assignment. I'm not sure that the following is literally true but, with some exceptions, I think you'll find that FERC cases tend to wind up on the junior judge on the panel's case list. An interesting constitutional issue tends to wind up on the senior judge's case list. There is a certain self-interest involved and among the exceptions to that, Judge Williams, for example, likes energy, so if he were ranking, he might have a FERC case whereas it would be a junior

judge if Judge Silberman had been presiding who doesn't care for energy law. But in general, the ranking judge makes the assignments and with many, many exceptions, the more routine ones go to the more junior judge; the more interesting to the more senior. But that's only the mode. The curve is very broad on either end of it for various reasons. A new judge may get a very interesting case and a more senior judge may get a very dull one. I'm sure that didn't answer your question, but it at least approached it.

MR. FREDERICK: Well, what I wondered was whether a judge could express a preference for having certain kinds of assignments and whether the process was sufficiently informal.

JUDGE SENTELLE: Yes, of course. As I said, you're assigned the panel originally randomly, so you wouldn't get any more of your kind of case to hear, but as far as the writing, even when I was new, we had an Indian law case. Then-Judge Ginsburg was presiding and I told her that I had a background in Indian Law and I probably stated that I'd like to have that case. Even though both judges were senior to me, I got the Indian law case. That's why the mode is only a little bit higher than the tails. All things being equal, the newest judge might get the most routine case, but all things aren't equal very much of the time.

You do express preferences. Judge Williams, as I said, likes energy cases. If I'm on a case that has Indian law, I like to have the Indian law case. We don't get that many – only one every now and then. Same with tax. I'm

now senior enough that if we get a tax case and I'm on the panel, I can take it. Where when I first came on, if Williams and I were on a panel in a tax case, he'd wind up with it. We each have some affinity for tax law and by now, if I'm sitting, I'll take the tax case. We don't get many, but I like to have them when they do come along. There are many areas where a particular judge has a particular preference that he or she expresses. We try to accommodate each other.

MR. FREDERICK: Has your process for preparing for oral argument and the conference changed during your time on the court and, if so, how?

JUDGE SENTELLE: It's different from what I thought it would be. It's different from the first period, but since then it hasn't changed a lot. What I originally thought I would do is that I would assign the law clerk a case and say, "Go through and draw me a bench memo that will be a road map to the file and won't keep me from going through the file, but will make it a lot faster for me to have your outline first. You're free, but not required to recommend how you think an issue should be decided. When I get through with the review, we'll have a conference about the case." I found I rarely had that conference. I do have the law clerks do that bench memo, which means that a case I might have to go through two or three times without it, I may go through once. A case I might have to go through several times without it, I may have to go through two or three times. I'm more efficient by having the law clerks outline the brief first. But we don't have that conference. We're much more likely to talk about an issue when I think

it's time. And lots of times, the law clerk comes to me and says, "I went through that *U.S. v. Smith* file. You were right. There ain't nothing there." So there's much less discussion with the law clerks and much more working with the written documents.

The other thing that's changed is I'm simply faster in a lot of ways than I was to start with because of learning the language. FERC, in particular, but in all areas of administrative law there are jargons and vernaculars. You begin to think in those terms rather than having to stop and reconsider, "What does that sentence mean?" I find I'm faster.

MR. FREDERICK: Do you prepare questions in advance for oral argument?

JUDGE SENTELLE: That's another thing that I guess did change. Originally I started out preparing a few questions in advance for oral argument. I don't do that anymore. I may, and very often do, know of an area I want to question counsel about, but as far as writing out or dictating a question I'm going to ask, I just mark that I'm going to ask him about the evidentiary basis for his argument at issue one. I'm going to ask what he means by this reference to the earlier contract. So I make notes of what I want to question, but I don't any longer write out questions. Some judges do and I think you can tell that sitting in the courtroom. Again, I'm not saying my way's better or their way's better, it simply works.

MR. FREDERICK: Have you prepared a written memorandum of notes about how you think the case ought to be decided before you go into conference?

JUDGE SENTELLE: Rarely. Very often I can take a page of my law clerk's bench memo and mark it for the same purpose. More often I don't unless it's a complex case. I know what I want to do and I won't bother with a memo. In a complex case, I can have two or three pages of outline on the various issues. Now we have a category of cases that are officially declared complex. They sometimes may take a day for argument. The order 500 series, we actually broke into three cases eventually and three full days of argument on the reorganization of the pipeline industry. In those cases, yes, I would have an outline of what I'm going to say in conference. In most cases I don't.

MR. FREDERICK: How often does oral argument change your mind about how you think a case ought to be decided?

JUDGE SENTELLE: More often it crystallizes when I go in there thinking, "I probably want to send it back for further proceedings on this issue, but I'm going to explore it at oral argument." And I find at oral argument that I'm right, I do need more to go on. But from time-to-time there is a literal change of mind, not necessarily because of what a lawyer says. Sometimes because of what one of my colleagues says. I think, again, if you sit in the courtroom you'll find that we're often using the lawyers as sounding boards to talk to each other. So I couldn't give you a quantification of numbers, David, but there's a substantial minority of cases in which my result is somehow different going out than it was coming in. Maybe not 180 degrees

different, but at least is in some way affected by the oral argument or conference process.

I remember sitting on the Fourth Circuit having a bankruptcy case where all three of us had gone in prepared to construe a statute in a particular fashion which was dispositive. A lawyer from Raleigh did a masterful job of telling us why that construction of the statute simply wouldn't work. And we all three came out the other way. Similar thing happened here on a communications case that Judges Ginsburg and Williams and I were on where we all three were prepared to construe a statute a particular way. A very good lawyer, a D.C. lawyer, explained to us why it had to be construed a different way. And we all realized he was correct. It changed part of the outcome about 180 degrees like the bankruptcy case. That dramatic a change is not the norm, but some modification of view is.

MR. FREDERICK: Do you recall who that lawyer was?

JUDGE SENTELLE: In each instance? The one from Raleigh was a guy named Jasper Cummings. The lawyer here was from the Huber firm. Could have been Peter Huber himself or one of the others.

MR. FREDERICK: Michael Kellogg or Mark Evans?

JUDGE SENTELLE: It might have been Kellogg. It was either Kellogg or... I think it was Kellogg who actually did change our construction of the statute.

Another really dramatic instance was one time when Buckley and Edwards and I were on a banking case. We decided the case. We didn't change at oral argument, this changed at the motion for rehearing. It was

dramatic. Even the winning side came in and asked us to change the rationale of our decision. The way we had construed that statute could have really fouled up the banking industry. Congress couldn't possibly have intended what we thought they did. But we didn't realize it until after we got the motion for rehearing. We did reissue the opinion and went the other way. I don't know who the lawyer was on the banking case, but Kellogg was the firm and I believe Kellogg was the lawyer of the other case.

MR. FREDERICK: Are there judges in your time that you particularly enjoy sitting with as a panel?

JUDGE SENTELLE: Yes, for various reasons, various different panels. I understand that Harry Edwards and Larry Silberman and I were known as the panel from hell in a lot of the D.C. Appellate Bar because we were an aggressive panel and I think we'd have worn each other out if we'd sat together all the time. But the three of us liked sitting together and doing our aggressive thing together.

It seems to me that Williams and Rogers and I have very complementary styles. The three of us don't wear each other out at all, but each of us have things that we do better than each other and that's a very enjoyable panel to sit with.

MR. FREDERICK: Can I just stop you there and tell me what you think are those qualities that Judge Williams and Judge Rogers have that complement your style.

JUDGE SENTELLE: Rogers is very good at getting lawyers to explain things. She's very patient with them. I have a tendency, I think, to be overaggressive and get impatient with lawyers. The *Post* referred to me once as a curmudgeon. I think that was their basis. I think Rogers is very good at teasing out of a lawyer the things that they don't want to tell us. Williams has a very good contemplative method of viewing cases. Where Judge Rogers and I are very good at dealing with the details of the case, I think he's very good at getting the big picture of the case put together. The three of us have had some very good sittings together. I've enjoyed all of my couplings, but that's a couple that stand out in my mind.

Wald and I enjoyed the time before argument. Nobody else on this court except she and I and Clarence Thomas for the brief time that he was here can ever get anywhere on time. We were always early, so Pat and I spent a lot of time waiting on our colleagues before argument. And we had long discussions not just about the cases, but about grandchildren and children and the world in general. So Pat and I enjoyed the time before the argument together.

MR. FREDERICK: Were there any colleagues that you found difficult in oral argument because of the way they approached their task?

JUDGE SENTELLE: Wald's questions were way too long and too many hypotheticals. She wore me out at oral argument, particularly *en bancs*. Williams and I exchanged the comment with one another in writing one day in notes up there that we could tell she trained by working for Congressional

committees. She'd have these five minute speeches that would end with, "Don't you think so?" I didn't find those questions helpful and I didn't think they moved the case along very well.

MR. FREDERICK: Anybody else?

JUDGE SENTELLE: We all get irritated with each other at times, I guess, David, but nothing in particular about oral argument.

MR. FREDERICK: Now Chief Judge Wald was the chief judge when you came on the bench. What was she like as the leader of the court?

JUDGE SENTELLE: Pat is like two different people. In social conversations, she is a very social and relaxed person. As a chief judge, she was all business, very businesslike.

MR. FREDERICK: What role did the chief judge have when you came on the court?

JUDGE SENTELLE: I think the best way is to go to Harry Edwards and contrast it backward. When Harry became Chief, Harry's agenda was making the court more efficient and seeing to the immediate needs of everybody on the court without interfering with each other. He had no other agenda, he was never pushy in the position. I think that was a change from the way things had been before. And I just as soon not go too far into why I think it was a change, but there had been times in the past when chief judges had been viewed as maybe having an agenda – trying to shape the composition of panels or committees to accomplish the goals of that chief. It doesn't work well. Harry came in with no agendas and made the court run efficiently.

And Harry was so attuned to the technology of the late 20th century. He made us so much more efficient. The way the court functioned changed dramatically during his chiefship. Where we used to circulate a hard copy of every vote on every motion, we've now reached the point where we circulate no hard copy. We get it off the computer completely. All the voting is done by computer. Some judges want a hard copy of the vote delivered. I don't unless it's extremely long. Most of us don't. We don't circulate the votes by hard copy at all, it's all done by computers. I see how my colleague voted. If she has a comment, I see that, but I see it on the computer. They don't have all this paper passing around anymore. So Harry improved our efficiency. Harry had no agenda. Both of those things were a change from prior years.

I hope you're treating all of this as confidential, David.

MR. FREDERICK: Oh, absolutely. Does the D.C. Circuit have motions panels that are sitting for particular periods of time to decide motions?

JUDGE SENTELLE: The motions I'm referring to on the computer tend to be those that are addressed to the whole court. Rehearing motions and other things that go to the *en banc* phase go to the whole court. The routine motions that come in all the time – I mean routine in the sense that they come in all the time. I don't mean that the parties don't think they're necessarily important. Requests for stays, asking for appointment of counsel in the *pro se* cases, the motions that we get all the time. There is a panel that is assigned. We have the same process of randomness as argument panels that is

designated as the motions panel at any given time. We've been doing it in such a short number for so long, I've forgotten how many weeks it's supposed to be but it's approximately six or eight weeks that you sit on the motions panel. The necessary clerking of those motions is done by the staff attorneys. It generates "emergency" calls when you have somebody wanting to stay something that a district judge or a commission has ordered. So you're supposed to be accessible when you're on motions duty. I'm delivered a stack of motions that sometimes will be quite high that you prepare for the motions conference. That conference is held every twelve weeks. You have three conferences during the regular term. During the summer it's broken up into smaller intervals. And everybody but the chief sits on and rotates on the motions panel. It's time consuming only because there are so many. Most of the things the motions panel does are not individually time consuming. Most of them are not individually difficult. But each of them takes a small increment of time. You multiply it by enough motions and it adds up to be an additional burden. That's been one of the major problems with being shorthanded. There are only seven of us doing the motions duty, where normally there would be eleven, but the chief doesn't sit on those. But it feels like you never get off motions, but you've got to sit on them still.

MR. FREDERICK: Do you assign any of that work to law clerks?

JUDGE SENTELLE: Very, very little. Nearly always I just work with the staff attorneys on those. We had some matters that were classified at times when I've been

fortunate enough to have a clerk who had a clearance or an area of expertise. I've used clerks for those. Beyond that unless a clerk had some special expertise or there was a particularly burdensome matter, I have not bothered with them. Sometimes I'd like to just because it's funny to get some of these *pro se* cases – they can be very amusing.

MR. FREDERICK: You mentioned tax cases**Error! Bookmark not defined.** as an area of particular interest and expertise. Over the time, are there other areas of law that you've found to be particularly interesting and enjoyable that you maybe hadn't expected to be so.

JUDGE SENTELLE: I had some background in tax litigation. I was not a tax lawyer, but I enjoyed tax litigations and I had a background there. International law I had done almost none of before I came here and I found I liked the occasional international law case. National security law I expected to find interesting and I did. So those three areas – international law, tax law, and national security law – would be three areas that I like to work on.

MR. FREDERICK: You were assigned a panel in the *North* case, the case of Oliver North, only a couple of years after you had become a judge on this court. When that case was percolating, it was a big news item. Did you have a sense as you were watching the Congressional testimony or reading about it in the paper, perhaps, that this was a case that might end up being one of the first important cases that you would decide?

JUDGE SENTELLE: Yes, to some extent David. Of course, I didn't know I would be on the panel until fairly shortly before oral arguments were heard. But I was

watching it with some interest, thinking we would have a piece of that someday. We did. We actually had bits and pieces before that. Not the same panel, precisely, but there were a couple of interlocutory appeals by North and Poindexter before the merits appeals. I sat up here all day on New Year's Day – it was actually January 2nd because New Year's Day came on a Sunday and the big bowl games were on January 2nd at that time. We reviewed classified information all day when Oliver North had an interlocutory appeal under the classified information procedure act, which says you can access classified information to see if you can use it. In each of those cases we had motions to dismiss that came up as an interlocutory appeal claiming immunity, so I really already had heard bits and pieces of the case about two or three times before I heard the merits case. Yes, I was watching it with some interest anticipating.

Now the trial you couldn't miss. It was one of those times when this courthouse was surrounded by microwave trucks that are wasting the money of the media enterprises day after day. They'll have two employees and a camera and a phone and a big truck sitting here all day long to get 45 seconds of film in the morning and another 45 in the evening. You couldn't miss the trial. This courthouse was surrounded by news media for several weeks. We knew it was coming unless North was acquitted.

MR. FREDERICK: Describe the oral argument on the merits. It was a complicated case with a lot of different issues. You sat with Chief Judge Wald and Judge Silberman.

JUDGE SENTELLE: Yes, and it was about the thickest file I had had up to that time, not counting the classified material that took up most of one file drawer. There was a wheelbarrow full of classified material. The oral argument had many issues, some of which probably shouldn't have been brought to us.

The oral argument was the best I had heard up to that time taken across the board. Barry Simon and Gerard Lynch who is a district judge now himself in the Eastern District of New York and a Columbia professor. He'd been an assistant U.S. Attorney. They were both professionals there. I knew him from the RICO scholarship. He and I had done some writing on RICO. He represented the independent counsel. Barry Simon from Williams and Connolly represented Oliver North. Brendan Sullivan had been the principal trial counsel. He sat at the table with Barry Simon. They have, on their big cases, I think they have a practice to do precisely that. Brendan is the lead counsel at trial and then they change seats and Barry becomes the lead counsel on appeal.

It was impossible to ask either Lynch or Simon a question that they did not seem to be prepared for. Everything we asked them about, they knew what their position was, they knew what the file reflected, they knew what the authority was. It was the way you wanted it to be when you came on

the court of appeals. Cases are not like that very often, but that was one that I think first fulfilled the role of being what cases ought to be. It was complex, it was interesting, and the counsel were highly competent and thoroughly prepared.

MR. FREDERICK: There were amicus briefs that were also filed in that case, but they did not participate in the argument?

JUDGE SENTELLE: They did not orally argue as I recall. We did look at amicus briefs and the one that stands out in my mind as being very good was the ACLU brief on behalf of North. They did their usual very good job.

MR. FREDERICK: Can you describe the post-argument conference.

JUDGE SENTELLE: Extended. We met for a very long time. There were two other cases to be argued that day, as I recall, and I was not on the other cases. So I think that Pat and Larry went and heard the other cases. I had been on all three, but Judge Edwards wanted to swap out a day and he was recused on North. I wouldn't have swapped out of *North* anyway, so I wound up keeping *North* and I think Judge Edwards had the other two. Anyhow, I think they went and heard the other two cases and then we conferenced afterwards as I recall. We conferenced for quite a long time. We broke and ate and conferenced some more. We were able to agree unanimously on some issues. On others, Larry and I were the majority. On I think just one issue, Judge Wald and I were the majority and Judge Silberman concurred on a different matter. I wound up writing the bulk of the opinion because I was the only one in the majority on everything in it.

The *Kastigar* section, which was the most interesting and most difficult, was the one that got the most attention, but all those other issues had to be dealt with in some fashion.

MR. FREDERICK: Why did it come out as a *per curiam* rather than under your name?

JUDGE SENTELLE: We decided in advance that we were going to treat it as a *per curiam* so that no one person would be taking all the heat or all the credit for what was going to take a great deal of effort on the part of all three of us. I wound up having to make much less revision in the bulk of the opinion than I thought I might have to. We thought in advance that this would be one of those that we'd go back and forth on a lot of times. So when we first sat down, I think Silberman or somebody proposed, "Let's decide in advance *per curiam* and then we'll decide the issues one-by-one and not worry about who's doing what." But, as I say, because of the way the majorities fell out, I wound up having the bulk of it. But there are parts of it that are written by Silberman and, I think, one part of it was written by Wald. So we felt in advance that it would be good to *per curiam* it.

MR. FREDERICK: Well it's one of those negative pregnants that's fairly obvious when a separate opinion is written by Judge Wald and a separate opinion is written by Judge Silberman and...

JUDGE SENTELLE: And guess who wrote most of the majority opinion?

MR. FREDERICK: That's right. So as the principle author, you would take pieces that were done by the other judges and switch them with the mass of what you had done?

JUDGE SENTELLE: Yes. And things went back and forth several times. We tried to get it as unanimous as we could. And yet if you read the separate opinions, you will find there was a lot of heat generated on that. Not as much as would have been in the drafts of the opinion, even what finally went into the published opinion had heat.

MR. FREDERICK: Did that heat linger on the court?

JUDGE SENTELLE: For a while, David. I think you'll find that Larry and Pat are very good friends. They have a long history and Judge Wald came and spoke at Larry's retirement. So they made their peace some time ago. Larry also spoke at Pat's retirement.

MR. FREDERICK: The *North* opinion, I think, is regarded as transformative in the way Congress does its investigations, particularly when there are pending criminal charges. Did you expect that consequence as you were working on it?

JUDGE SENTELLE: Yes, we did. Laurence Walsh had warned Congress. That sort of got overlooked by most of the media. He warned Congress that precisely this could happen if they went ahead and forced *North* to testify. And it was documented and we quoted in the opinion that he had said himself that he didn't think he'd be able to do what he did here. So we thought that the next independent counsel or the Congressional counsel would say, "We're running the risk here of killing the prosecution and here is the proof that Laurence Walsh was correct. What he feared in *North* is precisely what

happened." So, yes, it was on our minds that we may have been informing future Congresses on how to do investigative work.

MR. FREDERICK: During the course of the discussions, was there a sense of the fact that the jury had found *North* guilty on these charges and that the Kastigar issue was something of a technicality with respect to the finding of guilt or innocence on several of the charges?

JUDGE SENTELLE: There actually, as I recall, were only three guilty verdicts. There's an old half-flippant but really serious statement saying "a technicality is something that causes the other guy to win my case." It's not just a technicality, it's Fifth Amendment protection and if it causes the release of somebody who otherwise would have been convicted, that's what happens under exclusionary remedies. And the fact that this was high profile shouldn't make a difference.

MR. FREDERICK: After *North* came *Poindexter*. What role did you have, if any, in the other cases that were coming along as part of that?

JUDGE SENTELLE: I happen to have been on the *Poindexter* merits panel. I did not write it. Judge Ginsburg wrote the majority and Abner Mikva dissented in part. There were references to the *North* case. It was not precisely on point, but there were references to it both in the oral argument and in the brief. I believe Andy – I cannot think of the man's name who argued for the independent counsel, but he's a former deputy counsel –

MR. FREDERICK: Frye?

JUDGE SENTELLE: Andy Frye argued that, if I recall. And I could see the attorney – Dick Janus argued for Poindexter. It was well done. It was not the dramatic case that the *North* case had been. There was a ground that I thought was overlooked by both lawyers and I hate to blank up, but I can't remember precisely what it was. I questioned Frye on something and he said, "That's not in the brief," and I said, "No, but it's sufficiently suggested that I don't think I'm blindsiding to ask you this" and then somebody told me that they heard him on the elevator on the way down saying, "Judge Sentelle was right. I don't know why they didn't argue that for the other side." Whatever it was, we decided the case without using it, I know. Andy apparently had anticipated it, but Janus had overlooked whatever my point was on that. Every now and then you get elevator feedback later when some law clerk has heard comments in the hallway after a case is over.

MR. FREDERICK: Always wise for a counsel to keep quiet until well outside the courtroom.

JUDGE SENTELLE: Until well outside the building.

MR. FREDERICK: Now after the *North* case, I would have thought that would have been a kind of crucible in terms of your experience on the court. That after that you would have felt a much more integral part of the court. Is that fair to say?

JUDGE SENTELLE: Not entirely as a result of that case. That year was a crucible year. The same year I had referred a lot to the *order 500 series* complex case from FERC, which was the reorganization of the whole natural gas pipeline

industry. Judges Williams, Ginsburg, and I were drawn for that one. We realized right off you couldn't do it in one case. We broke it into three and we treated it as three each complex cases. One law clerk spent most of his year working on *North* and *the order 500 Series*. Each of us wrote one of the three opinions that resulted from that case. We broke the issues into three, one day's worth each. So that total immersion in administrative law and the high profile constitutional case of *North*, I guess I came out much more a part of this court than I had gone into that year. And it was generally early in my career, so it was a good time to get it over with.

MR. FREDERICK: Not long thereafter, the '92 presidential election occurs, so why don't we break the tape here because we are going to run out of tape in just a couple of minutes.

MR. FREDERICK: So the '92 presidential election occurs. Not long thereafter, allegations of wrongdoing arise about then-governor Clinton's transactions in Arkansas under the general title of Whitewater. And I believe it was '93 or '94 that the Chief Justice asked you to preside over the special division that handled the independent counsel appointments. Do you know how you came to be the Chief Justice's pick for that?

JUDGE SENTELLE: Yes. Although the Chief Justice and I are good friends now, we did not know each other well at all at that time. George MacKinnon had been the presiding judge for I think three two-year terms prior to that. George was getting up there, was already quite old, was in poor health, and he told the Chief Justice he simply could not do it. The Chief asked George who he

would recommend for the job. He said that temperamentally either I or Ray Randolph would be good for it and then he said that my experience was so intensive in the relevant areas of the law that I was the logical choice. George told me all of this himself. As a matter of fact, Randolph and I were the only judges on the short list who had extensive experience in white collar crime, which is the area of law that you're essentially working in as an independent counsel.

I was then, and remain now, the head of the only white collar crime American Inn of Court in the United States. I'm a charter member and the second president and continue to be. I've presented in the white collar crime committee of the ABA's criminal law section. I've made much of my living in it. I had run investigations for city governments that were on a local scale similar to what independent counsels do for the national government. I had investigated police corruption for the City of Charlotte. As an assistant U.S. Attorney, I did a lot of investigative supervision. That position involves a lot of trial law. I was one of only two trial judges on the court, so I simply was the most logical judge to take the role. The statute requires that the Chief give priority to senior judges. The only senior judge we had was MacKinnon and MacKinnon was telling the Chief he couldn't do it anymore. So with MacKinnon's recommendation and my background, it was logical that I was the choice to be presiding judge. It has to come off of this court. It has to be a D.C. Circuit judge

and nobody else fit the role really at all except for Randolph and he had much less experience than I did. And he'd never been a trial judge.

MR. FREDERICK: Did the Chief interview you before making that selection?

JUDGE SENTELLE: No. The Chief made a phone call.

MR. FREDERICK: Who else did you serve with at that time of your appointment?

JUDGE SENTELLE: Originally, Joe Sneed from the Ninth Circuit and John Butzner from the Fourth Circuit. John had been on the court previously on the special division for two or three terms. He was our institutional memory. McKinnon was a great deal of help to me. I had the benefit of his papers as well as his counsel and my colleagues knew they could call on McKinnon anytime they needed to. But my colleagues originally were Sneed and Butzner. Sneed served only one term because he had some bad health.

MR. FREDERICK: As presiding judge, you would serve for a two-year term as well or at the pleasure of the Chief Justice.

JUDGE SENTELLE: Two-year term subject to reappointment. I've been reappointed each time since.

MR. FREDERICK: Not long after you were appointed, an investigation began of President Clinton led by Robert Fiske. And this was during a period in which the independent counsel statute had lapsed. Fiske completed his investigation and the independent counsel statute was reenacted. And a question arose of what to do about this Whitewater matter. What do you recall about

how the Whitewater matter came to you as the presiding judge in that period? This would be the summer of '94, I recall.

JUDGE SENTELLE: I got the word that it was going to be sent to us while I was in Austin, Texas, visiting my daughter out there. I called Will Garwood on the Fifth Circuit whose chambers are in Austin and whom I'd never met before. I told him who I was and that I needed a government phone and access to a library and fax machine. I went over there and they forwarded to me the necessary papers to see what was being assigned to us. I called my colleagues and we conferred by phone on what to do next. That's how it unfolded.

MR. FREDERICK: These papers came from whom?

JUDGE SENTELLE: The attorney general sends what she is assigning to the independent counsel.

MR. FREDERICK: So this was done by paper? Did you have a phone conversation with Janet Reno?

JUDGE SENTELLE: No, interestingly all the other attorneys general with whom we have dealt during my tenure have dealt with us very much personally and by phone. Reno dealt through subordinates and on paper. She never communicated directly with me at all. Although I tried at times to communicate with her, she was never engaged in the process at all. It was always subordinates. Sometimes as high as the deputy, but usually further down than that.

MR. FREDERICK: Do you recall who you dealt with?

JUDGE SENTELLE: No, I don't. I believe it was somebody in the public integrity section. Whoever was the Deputy Assistant Attorney General in charge of that division.

MR. FREDERICK: What was the nature of that referral? Publicly it was said that she had asked for Robert Fiske to be appointed as the special counsel.

JUDGE SENTELLE: That was actually, as I recall, in a separate piece of paper there was the suggestion of appointing Fiske. We didn't feel like we could do that, although it would have been legal. See people in general don't seem to understand what the term 'independent' means in independent counsel. I was criticized once for saying precisely what it really means, and that is not independent from the whole system, it's independent from the Department of Justice. Because Fiske had worked on this as a person appointed by the Department of Justice, we didn't see how he could fill the need of having somebody independent of the administration. So because he had served in the administration, we didn't think he could be the independent counsel. It was nothing against Fiske personally. We simply thought that there was a conflict between his having served in that administration as a special prosecutor or regulatory counsel, they call them, but how could he be independent? We never really considered it. She did send a note asking for it or suggesting that he be appointed, but we didn't think it was consistent with what we saw as the meaning of the statute.

MR. FREDERICK: So from the very initiation of the referral, the special division had come to the conclusion that it was going to have to find somebody else. How did that process unfold?

JUDGE SENTELLE: The same way it had under McKinnon's stewardship. He had left us with a talent book that he and Judge Butzner and their colleagues had compiled of people who had been suggested for independent counsels in the past who they thought had necessary resumes. We added names of our own of people whom we either knew or had been suggested to us who had governmental experience, investigative experience, high integrity, high visibility. We went through it and culled those who, for various reasons we thought would not be the right person – people who had worked for the administration, people who had conflicts of various sorts. We took them out and got it down to a fairly short list.

I then contacted each of the people on that list and I could not now tell you how many. We've been through too many appointments to remember each one. We narrowed it down to about four people finally. Sneed by that time was having health problems and couldn't travel. So we conferred with Sneed by conference call. Butzner and I would be together in one place and we talked with Sneed by conference call. We came down to, I think, four names.

MR. FREDERICK: Who was on that short list?

JUDGE SENTELLE: You know I don't know now who the others were besides Ken Starr. I think Earl Silbert may have been one of them, but I'm not sure. I know

Earl was on the short list for one of the cases and I think it may have been that one.

MR. FREDERICK: Was Starr in the talent book or was he one of the names you added?

JUDGE SENTELLE: We added him, principally because he had so recently been unanimously chosen by the Senate to do the investigation of one of their own members – Packwood, I guess it was. We thought, naively as it turned out, that this would be somebody we could appoint who would have the unanimous support of the political system. He tracked so closely the qualities of the original special counsel investigating Nixon, Archibald Cox. Starr was the near-picture of him. He was the Solicitor General in the immediate prior administration, he had been a man who had done a lot of public things with unanimous public acclaim, so we thought we have here Archibald Cox and nobody's going to criticize this man as not being an ideal independent counsel choice. Before the sun set, you had Carville out making these scurrilous, name-calling accusations that are his measure. We realized that we had been naive. We thought we had the ideal person, but the fact is nobody would have been able to function with a Carville-type attack machine.

MR. FREDERICK: Well I think there had been also a brief that Starr had written in the Paula Jones litigation. Had you been made aware of that in the special division?

JUDGE SENTELLE: Yes, that's part of what they used against him. I do not now know if I was aware. I'm not trying to evade the question, but it's been nine years now or ten and I just don't remember.

MR. FREDERICK: I have to ask about the famous lunch you had with Senators Faircloth and Helms. It was right about the time that the special division was deciding who should be appointed the independent counsel. Tell me about that lunch.

JUDGE SENTELLE: I eat from time to time with Helms and/or Faircloth. They were both old friends of mine. I've known Jesse since before 1972. I met him here when I was a student at Chapel Hill, between '61 and '65. I came to know him well from '72 forward. We were good friends and we lunched together from time to time. Faircloth I actually had represented on some matters in Charlotte when I was practicing law there. I met him when I was representing contractors when he was hiring contractors and he was Secretary of Transportation for North Carolina. So, again, he was an old friend.

Faircloth and I had planned this lunch. He got called to the floor to vote, he ran into Jesse, and asked him to join us. We had a good old time reminiscing. The *Washington Post* picked up on us having had the lunch shortly before the appointment and started this ridiculous notion that a conspiracy met in public in the Senate dining rooms to conspire against the poor, pitiful Clinton. I've been charged with a lot of things, but that's the most absurd accusation and it remains so. The *Post* has been so dug in about it. In response to the letter they sent me, I wrote back a response and said something like, "it's possible that somebody mentioned the

independent counsel. I don't recall, but I know there was no extended conversation about it and I would not have had one."

I later was asked under oath when they were considering reauthorization of the statute before the Senate Government Affairs Committee if there had been any discussion and I said, "I can tell you there was no discussion of it. It's possible somebody mentioned it, but I don't recall." The *Post* literally took half of one sentence and the other half of the other sentence and printed it as if I was saying something inconsistent between the two occasions. And if you ran the two sentences together, they were virtually the same but just built backwards. I will say I said some nasty things about the *Post* the same day of my testimony. Maybe that pissed them off. In any event, believe me, David, if I were ever going to hold a conspiracy to pick on poor, pitiful Clinton, it would not meet in the Senate dining room. And I said that under oath, too. That got picked up as the quote of the week on some Internet site that has quotes of the week. I said, "There is no vast right-wing conspiracy and if there was one it wouldn't meet in the Senate dining room."

But I believe that a fellow named Richard Brown was responsible for getting that word to the *Post*. He was a North Carolina politician who came to my mind recently in a different context, but he's the only person I can think of that would have known the three of us and would have had reason to have gone to the media to try and scathe us. He'd been a Democratic politician in North Carolina. The reason I thought of him

particularly this week was that when the Republican Chairman in Virginia resigned after pleading guilty to a misdemeanor over electronic eavesdropping on Democrats, Richard had done the same thing in North Carolina the other way around. He had resigned from his Democratic Party post after he pleaded guilty for a misdemeanor for eavesdropping on Republicans.

MR. FREDERICK: Did you see him that day?

JUDGE SENTELLE: Yes, we saw him and talked with him a little while. My thought is that he probably mentioned it to somebody at the *Post*, but I don't know that he was the source. We saw many people. In fact, there were other people at the table at times. Chuck Grassley sat down with us for a while, Chris Dodd was with us for a while. It was not the sort of group you would conspire with. Kay Bailey Hutchinson walked over with Lauch and I before we met up with Jesse. And it's not easy to say exactly who was with us at different times because we did lunch from time-to-time. I'm not certain who we talked to that day and who we talked to other days. There was no reason for it to stick in my mind until it became a matter of attacking me.

MR. FREDERICK: How did that affect your relationship with either Senator?

JUDGE SENTELLE: Well a few months later Jesse called and said, "Let's you and me and Lauch have lunch at the same table." And we called that the "in your face" lunch. Chris Dodd came back and congratulated us for getting back together again. He thought "in your face" for the media was a good thing.

They remain good friends today. I haven't talked to Lauch in several months, but I had lunch with Jesse when I was back in North Carolina a few weeks ago for the first time in quite a long time. Jesse and I had planned to have lunch, as it turned out, on the day of September 11. I had not come in that morning, but I was going to bring my daughter and granddaughter in to have the baby's picture made with the Senator. So I was not downtown during the September 11 tragedies. We rescheduled that lunch a number of times and each time something came up related to national security or foreign relations. We never got to lunch, so I called when I was going down to North Carolina recently and we had lunch. The years are telling, but he's still a good friend. Lauch and I had dinner within the last year when he was in town for something. They remain good friends.

MR. FREDERICK: When Starr was in the course of his investigation, you used the word "naive", I think, to say that you didn't expect what would end up happening in terms of the reaction to happen. If you had it to do all over again, would you pick somebody other than Ken Starr?

JUDGE SENTELLE: If I would, it would be only because I'm sorry about what it did to Ken. It might have been better to have an older man who had fewer years to live with the attacks because I'm fairly satisfied that James Carville and the rest of his attack machine would have gone after whoever we appointed in the same vicious and underhanded way. I have no regrets as far as anything about Ken's being suited for the job. I have some regret that he

had to go through what he went through. I have said, only half-jokingly, that I suspect Alice Starr has my picture up on a dartboard somewhere where she can throw darts at it every day. She denies it. She says we're still friends, but we certainly made Ken have to go through hell unnecessarily.

MR. FREDERICK: Now you had a friendship with Ken Starr before the appointment? Were you able to maintain that after the appointment?

JUDGE SENTELLE: Yes, Ken and I are still friends. I reviewed his book, in fact, for *American Spectator*. His book on the Supreme Court. I did a very favorable book review. Ken and I see each other still from time-to-time. We belong to a prayer group that Ken rarely attends, but he does still come from time-to-time. It's a judge's prayer breakfast that is composed entirely of judges and former judges. Ken remains a member even though he's not been a judge for some time.

MR. FREDERICK: Did you see him socially after he was the independent counsel?

JUDGE SENTELLE: I saw him occasionally at the prayer breakfast and then I would run into him lots of other places. Washington is not a big city. It's a whole lot of small towns and he and I function in the same small town – the bar, the bench, the same establishments.

MR. FREDERICK: Has the experience with the appointment of Starr affected the consideration that you have given to appointments of other independent counsels?

JUDGE SENTELLE: I think inevitably. I'd have a hard time trying to be specific, David, but I think inevitably. We have asked each one since then, "Now you know what Starr went through. Are you prepared for the same kind of attack?" They all think they are and then it happens and they're not.

MR. FREDERICK: What is your assessment of how workable the independent counsel system is?

JUDGE SENTELLE: Frankly, I never thought it was a good idea. I think everything Scalia said about it in his dissent on the *Morrison* case was right. If you go back and read that dissent, I think you'll have an accurate prophecy that is dead on. I also think there are constitutional problems with an executive establishment that's not within the executive branch of government. So I think it's unconstitutional. But a higher authority said by seven to one with one not sitting that it was constitutional and I'm bound by the higher authority.

MR. FREDERICK: What system would be better for investigating allegations of wrongdoing against the president?

JUDGE SENTELLE: The ones that worked best ever were done without an independent counsel. Watergate itself, Archibald Cox with Jaworski succeeding him, that was not under the independent counsel statute. The Teapot Dome investigation was not under the statute. Congress is fully capable of bringing pressure on the executive to name a regulatory or administratively appointed special prosecutor to do the job in conjunction with Congressional investigations. It worked in Watergate, it worked in

Teapot Dome. There have been other times it didn't work, I'm sure. But it's more likely to work than the independent counsel is.

MR. FREDERICK: I guess some would argue that it worked with Fiske before he completed his investigation.

JUDGE SENTELLE: All he completed, though, was the Foster suicide investigation and it might well have been that it would have worked fine if Fiske had been permitted to continue as a regulatory independent counsel. We just didn't think, consistent with the statute, that he could continue. That's nothing against him. I think Fiske had the reputation of being one of the finest U.S. Attorneys in the finest office in the country and I'm sure he did a good job on Foster. I read his report, I read Ken's report, and, all the paranoids out there to the contrary notwithstanding, they both came to the same conclusion, I think correctly, that Foster sat down on that hill and killed himself.

MR. FREDERICK: Have there been other independent counsel investigations that have stood out in your mind as being particularly excellent or particularly problematic in the way they were executed?

JUDGE SENTELLE: Before I came in, there was one that Jake Stein did of Meese that I thought was awfully good. I read the report that he had prepared and reviewed it. I reviewed all the files that McKinnon had and I thought Jake's was very efficient, very much to the point. His report was free of a lot of extraneous gossip as it were. Similarly, Ralph Lancaster did one for us on

one of the Clinton cabinet members that I thought was very clean, neat, efficient work.

There's one that stayed under seal for a long time and finally leaked. It was one that Curt von Kann did of Eli Segal, the head of the AmeriCorps, where he came back very quickly and said, "This man should not be prosecuted for anything." And we thought he did a very thorough job in a very short time. He gave us a very accurate report.

The reporting requirement is one of the reasons why the independent counsel statute is so problematic. Historically and traditionally, American and British prosecutors don't do reports. If they don't get indictments, they don't get pieces of paper. It's better that way. After a full investigation, you wind up too often having to publish truthful but derogatory non-criminal material about the investigation that should have stayed in the grand jury. I thought Lancaster, Stein, and von Kann all did a very good job of not cluttering up reporting more than they had to.

MR. FREDERICK: Any independent counsels that you think will not fare well in the view of history for how they performed their responsibility?

JUDGE SENTELLE: I think most of them history will pay a lot less attention to them than we think they are. The only ones that are going to be remembered are going to be Ken Starr and Cox-Jaworksi, who was not under the statute at the time. The events that we think are important may be very, very important, but they are not going to go down as important in history.

MR. FREDERICK: Now once the appointment has been made, just as a matter of process, what role do you have in monitoring or having communications with the independent counsel during the course of that investigation?

JUDGE SENTELLE: Our busy times are at the beginning and the end, after it's over with. In the middle, we have fairly little. We would occasionally have a request either from the attorney general or from the independent counsel himself for an expansion of jurisdiction. McKinnon's court at one time had been asked for a clarification of jurisdiction, which they issued. The Supreme Court in dicta said that was an advisory opinion that shouldn't have been done. You don't know that, maybe, by reading *Morrison*, but that's what they meant by a stray sentence in dicta in there. But we would from time-to-time get those motions for expansion of jurisdiction.

There would be other motions of a smaller nature occasionally, but most of our work came at the beginning and the end. The appointment of independent counsel was a time-consuming process. Then at the end when the report comes in, we reviewed the report before it was released and were responsible for seeing that everybody named in it had a chance to comment. The statute provides for comment by the people who are named in it, so we would use the court staff and my own staff would contact everybody whose name was in it and give them the chance to file comments. That way we would make sure that their comments reached the independent counsel and were either acted upon positively or were published along with the report. Occasionally somebody would have a

comment and the independent counsel would say, "Yes, that's right, we'll change that part of it." Usually it's something that's said and is published in an appendix.

Then following that we have all of the attorney fee applications for the people who were investigated but not indicted. The vast majority of those were turned down, although some of them got allowed fees. In between, it's just a few motions matters.

MR. FREDERICK: Now the process of having people comment on the reports must be very difficult. Sometimes these reports are quite long. Do those people come here to the courthouse and review them in camera?

JUDGE SENTELLE: They are given in camera access to the parts of the reports in which they are named and they have a right then to comment. They are provided with a copy usually, if necessary. Now if somebody is pervasively named, they are given access, along with their counsel, to the whole report. The Clintons had full access to the whole Starr report. Reagan and Oliver North both had full access. They needed it to respond.

MR. FREDERICK: Now as presiding judge of the special division, do you get any special dispensation on your other case work or is this just an extracurricular activity on top of everything else?

JUDGE SENTELLE: It's on top of everything else. There is, in fact, a sentence in the statute that says "this duty is not to interfere with any other duties." And we've pretty well lived with that. Therefore, because I do *per curiam* opinions on counsel fees and such, when we have our internal report every year of

how many opinions each judge has done over the past year, I've had more opinions than everybody else for the past several years, ever since I've been on the independent counsel division. That's why it would be good if a senior judge had the duty, but it's too late now to change it to somebody else for this winding up period that we have. I would like for it to be able to be given to Steve Williams, but the learning curve is not necessary now. It's over if the Chief wants it to be. Every two years, he has that choice to make all over again.

MR. FREDERICK: I'd like to turn to some of the favorite cases that you have authored. If you could tell me what stand out. You have written hundreds of opinions now as a judge. Were there any in particular that stand out and why?

JUDGE SENTELLE: *Yellow Bus* was an *en banc* on RICO that I wrote. The Supreme Court later adopted nearly my language. They took out one adjective in describing what was necessary for the RICO portion. There's another RICO case, the name of which is escaping me, where I wrote an extended outline of the elements of RICO and why that case didn't meet it. Those were a couple I really enjoyed because I had done some writing on RICO and it gave me a chance to put that knowledge to work in an official Article III capacity and get something in the *Campbell Law Review* of the North Carolina Bar seminar. I also had written a paper on RICO for CATO called, *RICO: The Monster That Ate Jurisprudence*, a portion of which was reprinted in a criminal law casebook. So I was glad to get a chance to use my RICO knowledge.

I wrote up a case a couple of years ago, the *Cobell* case, which was an appeal from Judge Lamberth's opinion of the Indian Trust case that I also thoroughly enjoyed where we got to deal with the Indian law canon construction. That, I believe, and I've now written three times for this court, trumps the deference under *Chevron* that the statutes passed for the benefit of Native American tribes are to be construed liberally with a view to the welfare of the tribe. That trumps the deference you normally would accord to an agency. That's a couple. There are number of others, but that's a couple that I enjoyed.

MR. FREDERICK: That principle is unique as to administrative agencies, isn't it? I'm not aware of other areas where the *Chevron* principle gets trumped by some other --

JUDGE SENTELLE: The only other trumping, and I wrote one on a labor case not long ago that involved this, if the interpretation followed by the agency creates a constitutional problem that could be avoided by another interpretation, then that preference for avoidance of constitutional litigation can trump the deference normally accorded to the agency. The later case involved to what extent the employees of a religious institution were exempt from some labor law principles. The agency, the labor board, had, we thought, construed the statute in such a fashion as to unnecessarily raise constitutional problems. That's one of the cases where we've held that the principle of constitutional avoidance will trump *Chevron*. That's the only two areas I know of in which there's something trumping the deference.

Chevron's no longer necessarily the defining case, but we still call it that. We've got *Harris County* and *Mead*.