

ORAL HISTORY OF THE HONORABLE DAVID B. SENTELLE
Fifth Interview
November 6, 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 November 6, 2003. This is the fifth interview.

MR. FREDERICK: Good morning, Judge Sentelle. It's November 6, 2003 and we're continuing with your oral history.

JUDGE SENTELLE: Good afternoon, David.

MR. FREDERICK: I wanted to take up where we left off last time, which was to talk about some of the opinions you have written that stand out in your mind. And I wanted to start, if we could, with the *Save Our Cumberland Mountain* opinion, which was one of the first that you wrote here on the D.C. Circuit. Do you recall how you got assigned the majority opinion in that case?

JUDGE SENTELLE: It was the first *en banc* that I was assigned. I think, probably, the assignment came in part because the alignment was not necessarily what people would have expected. The dissenters were judges viewed as conservative appointees and because I was a new conservative appointee to the court, I suppose that was in part putting some buffer around the opinion by having a new conservative appointee handle it. I'm psychoanalyzing her [Chief Judge Patricia Wald] a little bit, but there had been three separate

opinions on the panel opinion. Bork was no longer participating. He was one of the three and Pat had written each one separately so there was no natural heir to write the opinion where there usually is in an *en banc*. I suppose, much like the Supreme Court often, you'll put the least-expected Justice to be the one who writes the majority opinion. I think Pat Wald may have been thinking along those terms.

MR. FREDERICK: Well it was an interesting case and I detected from reading your opinion that perhaps some of your private practice experience had shone through in the opinion. Am I reading too much?

JUDGE SENTELLE: I don't think there's any question. It concerned, as you're aware, attorney fees and rates of remuneration for attorneys in a fee-shifting case. Some of my colleagues have never had any practical exposure to the questions involved in that at all. No denigration of them, but they had spent their careers in the academy and in government service and don't know what it really is like to make a living from the fees that your clients pay you for your work. I had a lot of experience in that so, yes, I think that won over.

MR. FREDERICK: Had you been, in private practice, involved in a lot of cases where there were fee-shifting statutes?

JUDGE SENTELLE: Not a lot, but some. More often, as it happens, I had been on the side representing the client who was going to have to pay

somebody else. I did defense for the City of Charlotte. I was their secondary counsel for police brutality cases and those matters on which they were self-insured. In any event, where we were paying a judgment, we were also paying counsel fees on those. I had been in other circumstances, but that was one recurrent element in representing the City of Charlotte on those cases.

MR. FREDERICK: Were you surprised when Judges Starr, Silberman, and Buckley ended up on the opposite side in that case?

JUDGE SENTELLE: No more than mildly surprised. I was perhaps a little surprised when Ginsburg came with me on it, but I guess Ginsburg was more open to that perspective than I might have expected. Those judges who were viewed as more political judges did not get those other three. Silberman maybe a little because Silberman had been a private practitioner. Of course, Starr had to some extent been a private practitioner, but he had not made his living as one, so he wasn't much of a surprise.

MR. FREDERICK: Judge Starr certainly has had more private practice experience now. It would be interesting to see how his views might have changed. An interesting evolution.

JUDGE SENTELLE: I would say one of the district judges who has spent his life as a government lawyer jumped on me about that opinion. He was a little bit edgy with me.

MR. FREDERICK: Who was it and what did he say?

JUDGE SENTELLE: It was my very good friend, Royce Lamberth, and he said he had been over talking with Ken Starr telling him how right he was on his dissent.

MR. FREDERICK: Does that happen very often?

JUDGE SENTELLE: No, Royce and I are very good friends and I'm much more likely to have that kind of conversation with a district judge I know well.

MR. FREDERICK: Tell me about the *DKT Memorial Fund* case. That was an obviously controversial case involving abortion-related restrictions.

JUDGE SENTELLE: It wound up amounting to a whole lot less than we might have thought at the time because the next administration that came in did not renew the Mexico City policy. As I recall it, the Reagan administration had declared in the Mexico City policy that the United States would not fund any foreign non-governmental organization in the performance of abortions or birth control. The action was brought challenging that this was unconstitutional. I wrote an opinion that it ultimately wasn't when we went through the range of arguments that the plaintiffs had made to protect who had the power to challenge that kind of organization funding scheme.

MR. FREDERICK: Did that case, in your view, give rise to any sense of special principles of law that resonated with your judicial philosophy?

JUDGE SENTELLE: That the government is not obligated to subsidize on the same basis by which it might otherwise be restricted. Whatever the person's

view of regulation of abortion, and there is certainly a strong difference today, the government doesn't have to subsidize every single constitutionally protected activity. And that can be viewpoint-related – that was the only thing I talked about was the actual issues involved in protecting that government option. I didn't think the separate opinion of my colleagues did very much with that aspect of the problem.

MR. FREDERICK: This is now-Justice Ginsburg? I noted that she kind of reflected her very polite style of dissent and it caused me to wonder what kind of reflections you had on having her as a colleague.

JUDGE SENTELLE: I think her style of dissent is the right style. I'm not sure that I can claim that I have always been successful in adhering to it, but I think she has the right idea that a dissenter should write an opinion that should stand on its own merit, not an attack on the jurists' position. Not all justices or judges go that route. I tried to do like Ginsburg, because she typically strikes the right tone. Ruth and I were very good friends and I'm told – I never saw this study – but I'm told that one year the *New York Times* did a study that showed, this was during her confirmation to the Supreme Court, an index of cohesiveness as to whom she voted with most often on divided decisions. And to the astonishment of whoever was doing it, I was the one with whom she was most often paired on divided decisions. And my samples were smaller than some colleagues in those days. I served for only a few

years with her. But, in divided benches, she and I were a more likely pair than she and anyone else.

MR. FREDERICK: What do you account for that?

JUDGE SENTELLE: I think that both of us are a lot less ideological than a lot of people give us credit for in our action on the court. We both try to follow the law and limit our opinions. And if your opinion is narrow, it is much more likely to be on a principle of law than on a principle of philosophy or ideology. But on our attempts to limit our opinions, I would say this: I'm not saying she does the same thing on the Supreme Court and I don't think the role is the same. I'm not being critical to say that I think she is more ideological there than she was here. Because they're taking a different approach, they have different goals than we do. But when she was here I thought she did an excellent job of following the law. I tried to do the same thing. So that's why we likely compared together. Sometimes the dissenter might be Pat Wald, sometimes it might be Larry Silberman.

MR. FREDERICK: Did you have many interactions with her outside cases?

JUDGE SENTELLE: Yes, we've joked a lot of times about me dating her when I first got up here. There was a time in my life when my wife had not moved up here yet. Marty was in the hospital and she had tickets for a one-woman show called, "The Search for Intelligent Life in the Universe," that she and I attended together at the Kennedy Center.

Neither of us had anybody else to use the tickets. And I've eaten at the home of Ruth and Marty. Marty is a very good friend as well. He's a delightful person and they are an interesting couple. He's as gregarious and outgoing as she is reserved and diffident and they fill each other's needs, apparently, very, very well. They are one of those couples who are obviously very much in love and very much need each other after forty some-odd years of married life. They've been to our home and we've been to theirs. I haven't seen them in the last year or so when she was here for an event. Just before her confirmation hearings – this is not going to be released for some time – she called me before the hearing and said that she had heard that Jesse Helms was going to filibuster her nomination. And I'd spoken with Jesse. I told her I didn't think he ever meant to filibuster her nomination, but I called and told her that I understood why he could not vote for her confirmation. And I'm not even sure I would have had I been there, but I thought it was in the best interest of the Court and the public that there be no filibuster of a Supreme Court nominee. He agreed with me. I don't know that he ever was going to filibuster. I called her back and told her all of that. During the confirmation hearing, she was having a colloquy with one of the Dakota senators. Somebody asked her some questions about Indian law and, just as an aside, I sent her down my article on Cherokee Indian jurisdiction. I said if I'd known she was going to have that

subject come up, I'd have given it to her before. She mentioned it in the next day's hearings.

MR. FREDERICK: I'd like to just depart on the subject of filibusters because your court – and we're kind of getting ahead of the story in a sense – because the topic has come up with the filibuster of Miguel Estrada's nomination. What are your views about that tactic by the Senate as part of its advice and consent function?

JUDGE SENTELLE: I have the same reaction now on a lower scale than the lower court, but similar to what I had when there was the rumor – I think false rumor – that Helms was going to filibuster Ruth Ginsburg. I don't think that's consistent with the constitutional concept of advice and consent. Have the hearings, take your time. I'm not saying that things should be rushed through. But I do think that the President's choice should be given an up or down vote and not be killed by parliamentary maneuvers and delays. Mine was delayed. It finally got approved. Miguel's didn't and I don't think that's the way nominations should be disposed of. I don't think it was what the Framers had in mind when they said advice and consent. And I think that it's unfair of the Republicans to say that this is a brand new development. The fact is that it has reached a new low, but Allen Snyder, I think, would have been confirmed for this court as a Clinton nominee if he'd gotten a vote and not been stalled in

committee. They didn't literally filibuster him, but it was the same kind of thing.

MR. FREDERICK: You came onto the court, really, in the era of the Bork change in Senate relations with the Executive over judicial appointees. What are your reflections on where we have been in the last 15 years and where we might be going?

JUDGE SENTELLE: Well I'd take it a little further back than 15 years. I'd say probably over the last 17 or 18 years. Even before that there were instances when I think there was unfair and even underhanded treatment of nominees. I think it's gotten worse and worse on an escalating scale. Instead of attempting to determine whether a president's nominees are qualified to be judges, this has now become a battleground, "Let's see what we can do to those damn Democrats." And I can't absolve the Republicans because they did it in the last administration. It's become a place for vindictiveness and viciousness in certain things and the judiciary as a whole has suffered as a result.

MR. FREDERICK: Where do you think it ends?

JUDGE SENTELLE: I don't know. I had thought at one point that perhaps a fairly evenly balanced Senate might have some leadership on each side that could simply sit down and say, "Let's forget who shot first and see if we can't just quit shooting." But that hasn't happened in the last two administrations, so I don't know where we go from here. I also had

thought at one point that when Clinton nominated Snyder to be one of the court's judges that maybe that would be what would be the trigger. The cross-wounding made things worse instead of better. It now includes such a long list of nominees that you can simply point at and say that they're being filibustered. That had never been the case. As I said, I was delayed and others were delayed. At that point in time Allen Snyder was, before John Roberts was, Lillian BeVier, Terry Boyle were never given a hearing. Now they have an open tactic of "Well, we're just going to stop these people by filibuster." I don't know what they had to do to themselves. I don't know where it began. Maybe you need to talk to the political branches and get them to fix it.

MR. FREDERICK: Well, it's a fascinating question, particularly here in Washington where we see this as daily spectacle and, you know, as an observer to this process it's very depressing to see people of quality – Miguel Estrada was a colleague of mine in the Solicitor General's Office and I wrote a letter supporting his confirmation – it's a depressing process to see that as the slide continues down, there's no obvious leadership that can break through the impasse. And I just don't know where it comes from. I wonder if you have reflections on how a leader can step forward to come up with a solution that will stop it.

JUDGE SENTELLE: Not really. Sometimes there's something one person can't do and I think two people could do this, but you've got to have the right two

at the same time. Maybe because I know him well, I think Orrin Hatch might be one of the two to do it, but I think he hasn't found a counterpart. Pat Leahy isn't that counterpart. A different sort of ranking Democrat might be able to work with Hatch to solve it.

MR. FREDERICK: Well that's an interesting diversion. Let me go back to some of your opinions.

JUDGE SENTELLE: I hope I remember the ones you ask me.

MR. FREDERICK: Well I'm sure that you do. Your memory is quite remarkable for these things. You alluded briefly to the *Yellow Bus Lines* case and I wonder if you could talk a bit about that opinion and how your personal opinions, perhaps, in prosecuting RICO cases figured into the decision there.

JUDGE SENTELLE: It came up as a panel opinion that I was not on at first. The three-judge panel ruled that participation in a strike against the bus company was conduct of its affairs for the purpose of RICO. There was a petition for *en banc*. I called for a vote and did not get the vote granted. I wrote the dissent from the denial of *en banc* saying that you're not conducting the affairs of the enterprise in the strike against the company. Only Ken Starr joined my dissent at the time. It went to the Supreme Court based on another case, it came back down on a remand order. I believe the Court had a similar issue in some RICO case and sent this one back without looking at it for reconsideration. It really had nothing to do with our case.

The panel came and readopted their original opinion. At that point I wrote a concurrence in the denial of *en banc* saying I still think the case is wrong, but we don't have the votes. Boom, Ken joined, and then one by one enough colleagues joined until one day I realized I've got a majority, including one of the panel judges. So I then called for a vote to *en banc*. The *en banc* court assigned the case to me and I got my language in, which the Supreme Court later on – the name of the case is one of the old Big Eight accounting firms, a RICO case involving one of the Big Eight accounting firms – they adopted most of my language. They left out one adjective, but they did say that the person who is conducting the affairs of an entity you have to have is one with control within that entity. I had said “significant control.” They took out my “significant.” They got my nouns; I'll give up the adjectives to get my nouns.

MR. FREDERICK: Why did you feel so strongly about that case?

JUDGE SENTELLE: I think RICO is a very dangerous statute. I wrote a monograph that was published called *RICO: The Monster That Ate Jurisprudence*. It's been reprinted in whole and in part by a number of places since then. A loose-textured criminal statute – *Yellow Bus* was a civil RICO case, but the same statute was followed in that context. Citizens have a right to know precisely what conduct is being criminalized. And while you can't act with laser-like precision, you can at least give something other than a massive amorphous set of

general principles and say, “Go out there and don’t violate these.” I think that’s what RICO does. It’s not a statute drafted with precision. A Roman emperor said one should be able to run and look at the law and understand it, you can’t do that with RICO. I debated Phil Heymann on that subject at the Harvard Law School once and Phil, I think, thinks the attorney general should get a free pass to make illegal whatever he or she thinks should be illegal. Originally they tried to schedule a debate between me and Alan Dershowitz. But Dershowitz said, no, he agreed with me on that. He wound up on the same side as me. Steve Breyer was in the audience that night and he pretty much came up and said afterward that he thought I was right. I’ve had hopes ever since that Scalia’s view would prevail and that someday the Supreme Court would restrict RICO, but I don’t think it’s going to happen. It’s been too long now.

MR. FREDERICK: It’s been on the books for so many years and it’s had so many decisions. It seems unlikely that it would be struck for constitutional reasons, although there certainly have been some meritorious challenges to aspects of it. Had you defended any clients in civil RICO cases?

JUDGE SENTELLE: Yes, I had. I never had a civil RICO that actually went to trial. I had some criminal RICOs that I don’t know if I ever tried any of those. But I had some plea negotiations for disposition on some

criminal issues. I represented a labor union in Charlotte on a civil RICO and we actually got it dismissed. McMillan, I think, was the district judge in Charlotte where that case was filed. And I'm not hiding the name of the union. I can't remember what union it was. It was a RICO case that I thought was ill-brought at the time. Still do.

I had some criminal RICOs. A couple in Pennsylvania and I think I had one in North Carolina as well. We never went to trial on any of them. We either worked out something in the pre-indictment or begged a plea in the other cases. I'll tell this story if I haven't already. If I have, stop me because I don't remember what I've told you. I went up to Philadelphia on behalf of a client from Mooresville, North Carolina, who was charged with RICO violations. We went up to make a presentation to the U.S. Attorney's Office and I was wearing an old, beat-up hat and my oldest suit.

I went and sat down with the Assistant U.S. Attorney. I said, "They had got this fellow here from Mooresville and charged him with something about racketeering and we don't understand it because we don't have any racketeers in Mooresville, North Carolina." He let me go on for a couple of minutes and then he said, "It's a RICO case similar to the one you had in New York last year. You got immunity there. You're not getting immunity here." I had to back

out and began some more serious negotiation at that point. It worked in Brooklyn. It worked once, but it didn't work twice.

MR. FREDERICK: *Danielsen* was another civil RICO case that the opinion even tried to cut back on RICO, I think.

JUDGE SENTELLE: I probably overwrote that one. I look back at that and say we really didn't need near everything I put in there. But it was defective in so many ways. I probably had a pent-up essay on RICO that I wanted to get out, so I did write on all aspects of why that one didn't meet the elements of RICO. I probably should have been satisfied with having written the law review article.

MR. FREDERICK: Has that opinion had legs in the sense of spawning more law than the D.C. Circuit?

JUDGE SENTELLE: It's a little hard to say that it has. In a way it may have. We don't get as many civil RICOs as we once did. It may be that it's responsible for us not getting as many. It's been cited in other civil RICO cases in this and other circuits. The rush to civil RICO backed off. It became less and I hope it's in part because I pressed it in *Yellow Bus* and *Danielsen*. Stopped them before they ever even got here.

MR. FREDERICK: Now not long after *Danielsen* I think, if I have that chronology right, you handed down one of the *North* decisions that addressed the release of the Independent Counsel's report and the use of the grand jury material that, upon rereading, strikes me as a very significant opinion because of

the whole question of power to release the report and what constitutes a matter of public concern in that context is one that is very critical under the independent counsel statute. Did you perceive at the time that opinion to be as important as it may seem in retrospect?

JUDGE SENTELLE: Yes. We thought it was a) a very difficult case, a very difficult set of questions, and b) very important. We tried to not do anymore precedents than we had to do. We still made a number of precedents. The independent counsel statute harkens to the rule of unintended consequences. It wrought much evil and we had to deal with an awful lot of questions that wouldn't have come up without the independent counsel statute.

MR. FREDERICK: Can you describe some of the deliberations that went into that case?

JUDGE SENTELLE: You know, it's one of the few situations in which I did a telephone deliberation. We were not in the same town and we usually worked by conference calls and memos and faxes, so we called back and forth a lot. Do you have that opinion in front of you there?

MR. FREDERICK: I do.

JUDGE SENTELLE: I have a couple in my mind that are sort of running together. I want to see which one that is.

MR. FREDERICK: This is with Judge Butzner and Judge Sneed.

JUDGE SENTELLE: That's the one I was thinking of. And we really got to the point on that one. I don't want to pull the curtain back too far in fairness to my colleagues, but we had only worked this out in

general parameters and my colleagues said, “Why don’t you write something and get it to us and then we’ll try to respond with something concrete instead of chasing this round and round in abstract circles.” And I put it off until I had a weekend when I could come up here on a Sunday and it came together that afternoon. Nobody asked for any substantial changes in the opinion at all. Again, this is something that’s not going to be released for quite a while.

A friend later told me that he had prayed for me on that particular afternoon. He just had the sense that I was in the need of prayer. He had called his prayer chain and asked for them to pray for my judgments that day. And around that time was when it all came together. I was standing up and dictating into my dictation unit, pulling books off the shelf. It was before I had a command of Westlaw and I was working in hard copy and I was working so fast that I couldn’t sit down. I just had to dictate and it all came together. And, as I say, my colleagues asked for no changes.

MR. FREDERICK: I know Judge Sneed very much liked to have the opportunity to read something and I suspect that, I don’t know Judge Butzner, but I would imagine that having the explanation written out was particularly helpful to him.

JUDGE SENTELLE: Yes, I think that Sneed may have been who proposed that I just go ahead and write something and let them respond to it because our

discussions were just getting circular. They were just chasing it around in the abstract. It probably wasn't going to go anywhere. I could just write it, send it to them, and if they didn't like it, they didn't have to join. They were a pleasure to work with. They were both real gentlemen, they both were real professionals. Sneed was only with us on the panel for two years. Butzner was with me, I think, about three terms.

MR. FREDERICK: Tell me about your relationship with Judge Butzner.

JUDGE SENTELLE: Well, I've had multiple relationships with Judge Butzner. First time I saw Judge Butzner, I was looking up at him. I argued in front of him a number of times on the Fourth Circuit. He was not a hyperactive questioner, but he was a hot judge. He always knew the file and his questions were incisive and confrontational. He was very a gentle man, but as a professional he could cut in the courtroom. And then later I sat with him on the Fourth Circuit by designation.

He did a very sweet thing when I was a district judge. I had decided some asbestos litigation. There were many similar cases pending across the circuit. In a case before the circuit one of the other districts of North Carolina had come out the opposite way on a question I'd ruled on. Butzner called me and said, "We're looking for your opinion where you made the decision on how to apply the statute of limitations to asbestos because we can't find it anywhere."

I said, “I didn’t publish.” He said, “Let me make sure you understand. We have a case up here that goes the other way and we’re looking for a published version.” I said, “Yes, sir, I’ll send it to West.” So then they cited it and relied on my interpretation of the North Carolina statute, which went the other way than the other judge who had decided it. Butzner was not going to pull the curtain back too far, but he wanted me to get credit for having come up with the right interpretation.

And, as I said, I sat with him on the Fourth Circuit and enjoyed him there, but then we had our relationship working on the independent counsel court. He had an institutional memory. He had served with McKinnon before I took over the panel. He was invaluable to me for his memory. And as a colleague there was not a nicer person to work with than John Butzner. I don’t know how he’s doing now. He hasn’t held any court in a while. His arthritis is quite painful, I understand. I don’t know what he’s doing now, but he’s not holding court.

MR. FREDERICK: Just a few years ago, you wrote in the *Cobell* case – the Indian Trust Fund case, which has subsequently also generated quite a lot of publicity. Would you describe that case and your role in the court’s decision?

JUDGE SENTELLE: The principal of law involved in that case that you don’t think of unless you’re as much of an administrative law nerd as we’ve

become on this court and that is how you interpret the statutes for Indians in light of *Chevron*. I don't think that you ever get to the *Chevron* question of whether the agency gets *Chevron* deference or not, or, if so, which agency gets it. Because laws for the benefit of the Indian tribes are to be construed generously in favor of the tribes. It goes back to the trust relationship. It's not just a canon and interpretation in my view. It actually has substantive underpinnings. And so we start with the principle that if the law is for the benefit of the tribe, then it should be generously construed and the ambiguity needed for *Chevron* won't be presented.

MR. FREDERICK: Now that principle works in cases involving the trust relationship, but there are a plethora of statutes involving Indian tribes or regulation of gaming ...

JUDGE SENTELLE: And the threshold question would be, "Is this for the benefit of the tribe?" And if it is then I think *Chevron* won't apply. I had written two other opinions that contained footnotes to that effect, but less important content. And so I cited my own prior opinions. *Albuquerque Indian Rights Movement* and *Muscogee Creek Nation*. Both had been cases that stated that proposition, both of which I had authored.

MR. FREDERICK: Now the government in that case argued unsuccessfully that it was bound more or less just by the duties that were set forth in the 1994 statute. And your opinion for the court sort of swept that away given the longstanding trust relationship. But I was struck with the view –

although the court didn't express an opinion on the merits – as a former government lawyer, I was left thinking how the government could possibly fulfill the obligations set forth in the court's opinion given the destruction of records by the Treasury Department.

JUDGE SENTELLE: Yes, it's the further history of that trust relationship to now and in the future it's as difficult as we thought it would be. We did not think we were sending back something that was going to be very easy, David. And the difficulty is, as you are indicating, that may be impossible. The government had a mess to deal with. But at the same time, the problem has to be dealt with by the court. And it may be impossible for the judge to deal with it either. Witness the fact that he's already held them in contempt and our court has already reversed him. I guess the only thing we can do is watch and see what happens next.

MR. FREDERICK: Well it is an interesting question because the court of appeals does have a certain role in solving and addressing this problem and maybe it ends up being a legislative solution.

JUDGE SENTELLE: That may well be the case. The political branches may have to do something to step in. And that's not easy.

MR. FREDERICK: No. You've got maybe tens of thousands of Indians whose trust records have just disappeared and reconstructing the relationship for which they're entitled to regular payments by the government becomes very difficult.

JUDGE SENTELLE: I was on an airplane coming back from somewhere in the U.S. I forget where. Sitting next to me was an Indian silversmith who, as happens on planes and trains, eventually started talking. And he talked about professional wrestling, silversmithing, and then he got to the Indian Trust case. And I stopped him at some point and said that because of my professional position – he didn't know what I was – I can't discuss this. I said, "I know what you're talking about, but I can't discuss this." He was a very ordinary silversmith, wrestling fan, Indian and he knew about the Indian Trust cases. They just took tens of thousands of Indians from across this country and messed up their accounts.

MR. FREDERICK: It's difficult, but do you have any predictions of how the problem might resolve itself?

JUDGE SENTELLE: Politically. I think it's going to have to be done legislatively eventually. I just don't see how the judiciary can deal with this. But in the meantime, we have to keep trying. And it may be that they can grind it down. He can keep refining his orders and pull the rest of his hair out. It needs to be ground down eventually, but I don't know how.

MR. FREDERICK: I wonder if you could describe your work habits as a judge.

JUDGE SENTELLE: I'm sloppy. I spend a lot of days reading briefs. I have law clerks who do bench memos and they will file one at a time. Reading a synopsis first helps me get through quicker in a more organized

fashion. I spend a lot of days just reading. This has been one of those days. Other days I write, depending on where we are in the court term, I guess. I can't say that I necessarily – I don't start at the same time every day. It depends on what the traffic patterns are and what meetings I have that day, how late I've gone out last night. I do have a habit of working late when I get behind or working on weekends. I'll be up here this weekend. Does that answer the question you asked?

MR. FREDERICK: Well, yes. Do you find that your term has a certain rhythm to it?

JUDGE SENTELLE: Yes, the early part of the term you don't have time to write. You're so busy reading and getting ready for the arguments, it's very hard to get any decisions finished. With the independent counsel cases now, I haven't gotten cases from our own term out yet. But you're too busy preparing for the next case and then when you start getting some breaks around December, you start catching up on writing.

MR. FREDERICK: Can you describe your process for writing opinions?

JUDGE SENTELLE: Ideally, I like to say that I give an outline to the clerk and tell them to do the first draft from my outline. That's really overstating what it entails. I tell him what we've done and how to do the first draft. Then I'll come back and edit the draft myself and send it back to the law clerk for comment. The majority, I have the clerk do the first draft. I either re-write their draft, or if it looks like about what I want, I make revisions and then it goes back to the clerk. And about

the second or third time through, we get it right. Some opinions I dictate myself, for various reasons – a decreasing number as I have learned better how to delegate intellectually, take fewer exchanges. When I first came up here, I dictated a lot and I tried to make a very general outline and then dictate from the outline. I rarely do that anymore with the cases. If it was going well, I'd be standing up and dictating. Otherwise, I'd be sitting at the table with a stack of books. As I say, I've learned more and more how to efficiently delegate to clerks, so I don't do that near as much anymore. I probably get clerks to do the first draft on most of the cases.

MR. FREDERICK: What is your process for delegating, as you put it, intellectually?

JUDGE SENTELLE: It really starts before we've even decided the case. When I'm looking at the case ahead of time, I'll come up with who I think should prevail, and then after the conference with my colleagues, I tell them what we really want. They give me a first draft that adopts the approach we've taken here. I tell them what arguments, what precedents to follow, how it will bring us to the conclusion. We might need to broach a second issue. And I give them a general discussion about what should be entailed in the judgment. We will have notes of the judicial conference that I can furnish which shows very briefly what the judges think about that case.

It normally comes back and, as I said, sometimes I rewrite it myself, but other times I may review it and say something like, "We really

need to discuss this point in more depth and we need to bring into it the Supreme Court's line of cases that dealt with this." You tell them what you want them to do instead of trying to dictate that. And I now get it back in writing and I make her do it until it's the way I want it. But I dictated more my first years.

MR. FREDERICK: What percentage of the cases are decided without an oral argument?

JUDGE SENTELLE: The last time we met, I knew the answer to that question, but now I've forgotten. That's an old figure that Harry Edwards had compiled.

MR. FREDERICK: Aside from the normal operating procedures that the court has, every institution has an unofficial rules of the game or rules of the road. Can you describe what some of the D.C. Circuit's are, whether they be like the Supreme Court Justices always shaking hands before going into a public session or before a conference?

JUDGE SENTELLE: We don't do that.

MR. FREDERICK: That kind of unofficial practice that is followed but not written down?

JUDGE SENTELLE: Well there are a number of areas in which one judge can grant a stay. We won't do that except in an emergency. We will have at least a majority of the three-judge panel grant the stay. We confer on motions with the staff attorneys and that's a big part of the job of the staff attorneys. They get to sit on these panel discussions and research the judge's orders on stays. I don't know. It's the kind of

thing that you do all the time you don't think of. It's hard to notice what you always do and I think that's what you're asking me for, but I can't come up with anything.

MR. FREDERICK: Well perhaps now having planted the seed, you might reflect on that question and then raise it at some other, better time. Now you're one of the most senior, active judges on the court and a number of freshman, so to speak, have recently joined the court. John Roberts was confirmed just a few months ago. Is there a kind of period where a new member of the court has a honeymoon period or a kind of freshman acceptance period and how does that work and how long does that last?

JUDGE SENTELLE: I think that back when the court was more divided, there was some attempt to co-op new judges. I don't think that happens anymore. We're much more collegial. Some judges come on and they're reluctant to break the horizon when they first come on. They're not likely to call for *en banc* votes. They're not likely to dissent. That goes on usually for about one session and then they gradually begin to be more assertive as characterizes the judges of this court. That's not true of John and it wasn't true of me. I understand that when I had been here about a month that somebody asked Bork, "How is the new guy doing?" and Bork said, "He called for an *en banc* vote the first day he was in the office. He's no shrinking violet." He was very pleased with that. John – this is public – one of his first public

acts was to file a dissent from the denial of *en banc*. He and I were the only votes for *en banc*. John is no shrinking violet.

I don't know that we need a honeymoon period anymore like we did before when the court was more divided. People come close to getting right into the court's work rather than easing in.

MR. FREDERICK: And presumably it depends on the personality of the judge.

JUDGE SENTELLE: Indeed.

MR. FREDERICK: As a circuit judge, can you tell me what your perception is of the court of appeals writ large as an institution? It's now been around for 112 years. The courts of appeals were created by the Evarts Act in 1891 and, as a body that decides cases to weed out cases that don't need to go to the Supreme Court, how, in an historical perspective, do you think the court of appeals has worked as an institution?

JUDGE SENTELLE: Institutionally, it was absolutely necessary. With the size of the country now and the size of the federal jurisdiction, it would simply be impossible for the Supreme Court not to have an intermediary court to handle all these cases. We are a lot less important jurisprudentially than we like to think we are. As Ray Randolph says, the shelf life of our decision is really not all that long because if it's a really important question, it goes to the Supreme Court and they decide it and our case isn't cited anymore. If it's not important, no one has occasion to cite it anymore. Our older cases are of

dwindling importance as time passes, but as far as the working courts in the meantime, we have to give the district courts a body of law to work with. The Supreme Court doesn't have time to do that. So we provide that body of law that is the working law. I think that most of our judicial institutions are like that.

MR. FREDERICK: What is your perception of the Supreme Court?

JUDGE SENTELLE: I think it has gone beyond its constitutional limits. There are too many decisions, and whatever you think of the policy content, *Lawrence* is one that goes way beyond the normal judicial role. The role of the Supreme Court is no longer applying the law. They're applying their views of what ought to be the law and I think that invades the legislative prerogative and I can understand why the legislative body is very often not very happy. I think judicial activism is a violation of the separation of powers and there is far too much of that nowadays. It always has been, but it has accelerated as the years have gone by. The Supreme Court's ability to be final has gone to its collective head, perhaps inevitably, but too often now we find opinions that decide, for example, when is capital punishment to be applied not on the basis of constitutional principles but on the basis of "will." A lot of the states and a lot of foreign countries don't do that, so we'll call that unconstitutional. So I think the Supreme Court has become too ideological, too legislative.

MR. FREDERICK: For both the conservatives and the liberals?

JUDGE SENTELLE: The conservatives have had very little chance to. I guess it's inherent in the way the conservatives have approached cases with a fair amount of self-restraint. The current conservatives – Thomas, Scalia, Rehnquist. They're generally trying to hold the line on a constitutional basis rather than legislative judicial decision-making. But they're going to try to be fair on the case as it comes to them. If you look back at the pre-New Deal court, I think there were certain excesses, what were considered conservative judges then were activists in their own way, holding that the Due Process Clause would allow them to decide whatever they wanted to.

MR. FREDERICK: Do you perceive it to be just simply part of the cycle of how the Court works as an institution?

JUDGE SENTELLE: No, I don't think it's a cycle at all. I think it has spiraled out of control. It hasn't come back to where it was in a historical context. I don't know that it's irredeemable, but I do think it's been more spiraling than circular. It's gone farther out each round.

MR. FREDERICK: Can you describe your relationship with the circuit executive and the judicial council and other administrative elements of the D.C. Circuit?

JUDGE SENTELLE: The circuit executive, as the name implies, is simply an administrative officer who generally has done a good job of staying out of the way of the business of the court's activities. The clerk is a professional. Our present clerk is an excellent clerk, although

historically this court has had a hard time finding good clerks. The present clerk Harry appointed from within, Mark Langer, who was the chief of staff counsel. He works very closely with the chief judge in meeting the needs of the court. His role is broader than that of the chief executive. Not just scheduling, but also, do we need revisions in the rules of court or the way we're doing things. He is good at tying our statistical evidence to possible changes in the way we do things. He is also good at finding out how other circuits do things and seeing if they have better ideas.

MR. FREDERICK: So can I interrupt you for just a second? Do all of the judges meet with the clerk and the circuit executive once a month?

JUDGE SENTELLE: No, that's an exaggeration because we don't meet during June, July, and August and we'll skip another month if there's not much to do. We have a judge's conference once a month and the executive and clerk meet with us at those conferences. I'm trying to think if anybody else attends. There has to be another – the deputy clerk. We can go into executive session and throw them out and we often do. We get to the point where we ask them to leave. They leave us with our statistical and physical and clerical needs. And with these days of shrinking budgets, that's very important to our process. We need that information to decide where we can make cuts.

MR. FREDERICK: You mentioned in one of our earlier sessions the important role Chief Judge Edwards had played in bringing technology to the court. What

are the other important changes that have occurred while you've been a judge?

JUDGE SENTELLE: Intangibly, the way in which Harry Edwards brought us together as a collegial body whereas previously there had been a lot of prickly feelings and a lot of even publicly perceived division within the court. Harry came in with no agenda except to run the court as well as he could possibly run it and be the first among equals. Intangibly, well, the court has come together as a collegial body under the leadership of Harry, and Doug Ginsburg is trying very hard just to replicate what Harry did.

We've got the building going on down there, but I think that's an obvious change we made to accommodate the new annex coming in. Before I came in at the beginning of the time I was here there used to be visiting judges at the time. It's pretty nearly a consensus now that we don't want to use outside judges like we have in the past. We'll do it all ourselves even if we get busy unless we have some sort of major conflict where we had to use outside judges.

MR. FREDERICK: Why is that the consensus view?

JUDGE SENTELLE: Other courts just don't have the daily familiarity with administrative law that we do. And since much of our docket is that law, it's very difficult to assign that and be more confident of the opinion. So we wind up not gaining anything when we bring people in. Randomness is an important principle so we don't get accused of

assigning cases to a panel other than randomly. If we could assign deliberately in criminal cases or something, maybe we could use visiting judges. But because most of our cases are administrative cases, it's more effective or efficient, so we do what we have to do. Personnel change has been – in a way I guess you'd say fifteen years is a long time. In another way they've gone quickly. Suddenly I noticed I was up near the top of the list. "What are we doing up there?" I came in and I was at the bottom of the list, most junior. Then little-by-little, I suddenly realized one day that Doug and Harry and I are the senior panel in the court now.

MR. FREDERICK: So you are next in line to be chief judge?

JUDGE SENTELLE: In the ordinary course of time, I'll never be chief judge unless Doug steps down early. You serve as chief for seven years. You can't become chief after your 65th birthday. You can hold it until 70, but you can't become chief. Doug's seven years will pass my 65th birthday, so I will not ever be chief unless he steps down.

MR. FREDERICK: Is that by statute?

JUDGE SENTELLE: It's codified by statute and it was a very deliberate and, I think, beneficial statute. Around the country, I don't remember the precise terms of the old statute, but you used to be able to hold it until age 70 no matter when you took it. We had some chiefs who were not very good chiefs, but nonetheless were chiefs for fourteen years or something like that. The Congress put in that statute under the huge

criticism of having struck with laser-like precision on certain judges to keep them from ever becoming chief. I doubt that they knew that much. But it has effectively worked in some parts of the country to keep people from being chief. The criteria are set up that to be chief you have to be a senior judge in active service, have been a judge at least two years, and have not reached age 65 and have not been chief. Now there is a default order in which those qualifications fall off if nobody meets all of the qualifications. I do not recall the default order, but I think the first is the two-year requirement. The last one to go, I believe, is age 65. I think you have to go at age 65 unless nobody meets any of those qualifications.

MR. FREDERICK: Now one of Chief Judge Edwards' last cases as Chief Judge was the first *Microsoft* case. Am I allowed to ask you about that?

JUDGE SENTELLE: I probably would rather not discuss that, David. It's still too live. And we heard it again this term.

MR. FREDERICK: Right. Apart from the technological and collegial changes, how would you describe Chief Judge Edwards' working manner with the court?

JUDGE SENTELLE: He was a better administrator than anybody I had seen as a chief judge before. I'd served on three courts with five chiefs. Harry is very efficient. He understands the role of an administrator is not the role of a boss, but he knows how to set a goal, tell you the goal, achieve it quickly, and not waste a whole lot of anybody's time. He

understood what the role of chief judge is. He was efficient and collegial.

MR. FREDERICK: How does his style contrast with Chief Judge Ginsburg's?

JUDGE SENTELLE: Doug is trying to copy Harry, I think. I think he's doing his best to replicate Harry Edwards as chief. Harry stepped down a little bit early, so Doug began his service before the beginning of the fall term. But Doug said that he wanted to emulate Harry to continue to be chief. He's trying very hard to do the same thing as chief. Harry had some original ideas for things that are sort of innovative and yet very good. I don't know if I mentioned or not the judge's lunches Harry began where we invited interesting outside persons to come have lunch with us. Not a speech, just a casual interaction. We started with Colin Powell and we've had FBI directors, CIA directors, the Library of Congress. We had a guy who is a master chef, Paul Tagliabue, Dan Snyder, Abe Pollin. Doug has continued that tradition and he has, a time or two, arranged joint lunches with the district judges. He added that idea.

He and Tommy Hogan came up with a different kind of judicial conference, a judges-only conference where we had Joseph Ellis and Gordon Wood stay with us for two or three days and we did some reading of the Framers's writings and had three days of seminars. So Doug is trying to take the same kind of ideas Harry had and keep expanding.

MR. FREDERICK: Those are things that are very much outside the public view. How do you think they affect the court as an institution?

JUDGE SENTELLE: I think they help the court think together and work together. It's much harder to write a spiteful dissent if you like the guy that wrote the majority and if you know you're going to have interaction. Sort of the British concept that we've tried to replicate in the American Inns of Court that professionally you may have to cross swords with each other, but you always do it only professionally, only civilly, then you'll have less acrimony. I think that's the view that Harry and Doug have tried to advance. I think he's done a very good job of it.

MR. FREDERICK: And around the late '70s and early '80s, the D.C. Circuit had the reputation of being a very difficult and contentious court. Your view is that that is ...

JUDGE SENTELLE: I think it's behind us. Knock on wood with both hands as they say. I think Harry Edwards deserves a lot of personal credit. So do the rest of us. He couldn't have done it without the cooperation of his colleagues, but it wouldn't have happened without Harry.

MR. FREDERICK: You came on the court at a time when that was probably at its height. What do you think were the principal causes for that antagonism?

JUDGE SENTELLE: Well, without calling too many names, there were people in senior positions who were trying to operate on agendas rather than operate

as a court. And it became personalized. Ruth Ginsburg, in her dissents acted as a judge should have done. Others – like former chief judge – personalized it unfairly. We did have some distrust because you did perceive people as operating with agendas instead of simply trying to take the case and decide the case by the law. So once you think somebody’s standing behind the door, you start looking behind the door as you’re coming through. So the presence of agendas made people look for agendas.

MR. FREDERICK: I know this is a sensitive subject, but can you provide any illustrations of that?

JUDGE SENTELLE: You know, I’d rather not, David. I would say, without providing exact illustrations, that there were times when I hesitated to go out in the hall for fear of who I might run into. That doesn’t happen any more.

MR. FREDERICK: Do you perceive now there to be any factions on the D.C. Circuit or kind of blocs?

JUDGE SENTELLE: No, I don’t. I know that you get these academics who write about being able to who falls in line behind the President that appointed them. But I don’t think that actually bespeaks the existence of a faction. There is a range of viewpoints from which you operate the law and those people who would be considered by Carter or Clinton are somewhere different on average along that scale than those who would be appointed by Reagan or Bush. So that it isn’t

surprising that if you had a large enough sample of cases, you would find some tendency of cohesion between the appointees of a particular president. Not because the president appointed them, but because of the pools from which they were chosen.

However, as I said, Ruth Ginsburg and I, often are coming together from different party appointments. And you'll find opinions ... I remember a criminal opinion that I wrote where Harry was my other majority judge and Garland was the dissent. We were reversing and Garland would have upheld the convictions. I think on criminal justice issues, for example, Edwards and I are probably together as often as any two judges on the court. On labor matters, you'll find Silberman and Edwards together an awful lot of the time.

MR. FREDERICK: What do you account for that? That is an interesting observation to me.

JUDGE SENTELLE: The labor laws?

MR. FREDERICK: Yes.

JUDGE SENTELLE: They were both labor gurus and they take a very specialized approach to how they look at labor laws where the rest of us are more likely to think that the general principles of law should govern, they're more likely to think that the specific principles of labor law should govern. And I'm not saying they're right or we're wrong or we're right and they're wrong, I just think it's a little different approach.

But it causes them to come out sometimes differently than the majority in the pool. But again, if you take a broad enough scale and a large enough sample, you will be able to say that you can make some differentiation by who appointed the different judges. But I don't think it breaks along party lines on a regular basis.

MR. FREDERICK: My observation has been, and anyone who can look at the statistics can gauge this, is that the D.C. Circuit is not reversed that often by the Supreme Court. But I wonder if you could describe the feeling of having worked so hard on a case, being fairly certain that you got it right, and then having it reversed by the Justices.

JUDGE SENTELLE: Usually those cases that go to the Supreme Court, you know that they're a case that's difficult. So you're neither shocked nor greatly offended, I think. The first time the Supreme Court reversed me was, I think, in a FERC case. It involved the question of whether the regulations of the Securities and Exchange Commission or the regulations of the FERC had primacy in the questions of accounting for inter-corporate transfer in wholly owned coal supplying subsidiaries of electric companies.

MR. FREDERICK: Not a subject one would normally get passionate about.

JUDGE SENTELLE: Right. After they reversed me – Scalia wrote the opinion reversing me. Larry had been my co-judge in the majority on the court here. I saw Nino at a breakfast the next week and he said, “Don't jump on me, Larry already did.” I said, “I'm not going to jump on you. I

understand why you thought we were wrong. What I don't understand is why you gave a damn. We had to take that case. You people voluntarily granted cert on that."

MR. FREDERICK: What did he say?

JUDGE SENTELLE: He laughed and he said the Solicitor General petitioned for it. That always gives it a leg up. But I don't honestly know why the Solicitor General petitioned for it. And I think the Supreme Court a) was right and we were wrong; b) I'm eternally grateful Harry Blackmun who wrote in concurring opinion, said, "Okay, we're right and they're wrong, but this was not the way it was argued in the Court of Appeals, so we really shouldn't be deciding it at all because they didn't argue it this way down there"; and, c) I still don't know why it mattered.

The other times that I've been on the wrong side of Supreme Court votes – sometimes when they reverse me and sometimes when they don't take the position that I dissent – I've always gotten votes for my position and that reiterates my belief that there were two ways to look at things. We don't check our record for greater precision than that. It's the only case I can give you the citation to, it's no longer good law. 1 F.3d 1. Where Steve Williams and I would have held that "taking" fish and wildlife regulation doesn't include changing the environment. I was utterly convinced we were right and three Justices thought so, but six Justices didn't.

More recently, when I dissented from *Eldred*, the intellectual property case, the one where I would have found constitutional limits on the copyright power. I still think I was right, and Justices Breyer and Stevens got that one right.

MR. FREDERICK: Looking the other way, in the other direction, are there district judges who make decisions that you may give heightened scrutiny to?

JUDGE SENTELLE: I'm afraid that's true. There are and have been district judges who simply seem to be seeking to impose their will. To solve a problem in society rather than follow the law. We all know who they've been and we may look more closely at them. I'm not saying we should, but I am saying it does work out that way when we know that a particular judge has lots of times in the past tried to do justice without following the law.

MR. FREDERICK: What district judges do you respect the most or have you respected the most during your time?

JUDGE SENTELLE: The danger in that is who do I leave out? Tom Hogan is an obvious choice. He's a judicious thinker, a very sound judge in every respect. Royce Lamberth is a very close friend and he and I see many things the same way. One who hasn't been there that long is, a very excellent judge. He's very lawyer-like. I won't go any farther than that because I don't want to risk offending anyone. I think three is enough.

MR. FREDERICK: In supervising - I see you use the word “supervising” the district courts in kind of a loose fashion - but in providing guidance, are there things you think that are particularly important for the court of appeals to do in its opinions?

JUDGE SENTELLE: There is one thing I think we should not do. That is be unnecessarily critical. Cut down the adverbs. “Grievously erroneous” is not going to do any more legal good than “erroneous.” Do not take on issues that are not necessary to make your case. Yes, that isn’t what other judges think necessarily, but don’t go beyond what’s necessary. Also, I think it would be better if we do what we can to write in terms of the issue rather than the court as erring. That’s one of the things I’d change if I could. A district judge has granted a summary judgment it shouldn’t have and then a district judge has to hear about it. Granting summary judgment would not leave the matter open and then you can just write it as if the district judge had never been there. Then we’re not as insulting to the district judge. More and more, I try to do that. I think the way I approach some of these cases is to the effect that it is bound up with respect. I think about that fact when I’m writing a decision reversing a district judge.

MR. FREDERICK: Is that a topic that you discuss with your colleagues who have not had that similar service?

JUDGE SENTELLE: Yes, many times I have sent a note back on a draft opinion saying, “Couldn’t you take this out? It’s not necessary and I think the district judge could find it offensive.” And usually they do.

MR. FREDERICK: Are there opportunities outside the formal opinion process where the court of appeals might offer informal advice in matters to district judges here?

JUDGE SENTELLE: There may be, David, but I don’t think it’s very much taken advantage of. Now the Chiefs discuss things and I think Doug may ask Tom, “Could you talk to two judges about so-and-so,” with that kind of advice. I think it encourages collegiality.

MR. FREDERICK: Is it something you think should happen more?

JUDGE SENTELLE: I think there ought to be more interaction among the courts. Not maybe formally, but I just think there is better judging with more interaction among judges. I customarily lunch with district judges, but most of my colleagues don’t. I don’t think they see interaction as being important.

MR. FREDERICK: Perhaps this measure by Chief Judge Ginsburg will improve the relations. As a result, do you think there has been less collegiality between the district court and the court of appeals?

JUDGE SENTELLE: I don’t want to make it sound as if there is hostility, but I think there could have been more collegiality among judges. I get the sense that there used to be a long time ago. When I first started eating lunch with the district judges, including MacKinnon, he and I regularly ate

at the district court with the judges. Jack Pratt were still here and we used to go there together. And the thing that they recalled is that there used to be a lot more interaction. I'm not saying that there's any hostility, but it's not the same feeling of collegiality as before. I feel like a lot of our judges come to their engagements and don't know each other at all.

MR. FREDERICK: To what do you attribute your views and attitudes on that subject?

JUDGE SENTELLE: I've got a broader background than most of my colleagues. I was a district judge, I was a political animal. I've just always been involved with a variety of people. And the things that go on in district court are fun and interesting to me. I like to hear about it. I guess that's about it.

MR. FREDERICK: So trading war stories would be part of that process? But there surely has to be a little bit of unease if the story gets too close to something that ...

JUDGE SENTELLE: Yes, sometimes I have to say, "I'd rather not talk about that right now." Sometimes I have to do that in my conversations. They understand that. Merrick Garland has lunch with them, too. Beyond he and I, there isn't very much interaction between the circuit judges and district judges. Doug and Tom now get together, but I think they did not know each other all that well until they became chief judges. They found a rapport that they didn't know they would.

MR. FREDERICK: And do you have a regular schedule of lunches?

JUDGE SENTELLE: No, there's a room upstairs which you actually have to pay a subscription just to use and if you're not doing anything else you can order your lunch sent up there and eat there. Just about all district judges have them. We had a few circuit judges who went up there. But off of our court, no one really did that because you do have to pay for it and there's a way of identifying who's doing it. I know John Roberts has been a regular member up there, as is Merrick Garland. He doesn't have a problem with that. He has a very good friend who is a regular up there.

MR. FREDERICK: Well I know from having served with Merrick Garland at the Department of Justice, and I was at his going away and Jamie Gorelick made the comment that appointing him to the court of appeals was a waste of a great problem-solving talent because Merrick had an ability to get people of different personalities and different viewpoints together and to help solve problems, so I'm not surprised to hear you describe him as one of the people who reaches out to the district court.

JUDGE SENTELLE: I think he was someone who would be very effective. He will be a great Chief Judge one day.

MR. FREDERICK: Do you regard yourself in your role as a problem solver?

JUDGE SENTELLE: No. But in the inner-workings of the court, there is a certain limited problem-solving role and I think our primary role is a judge's role.

Trial judges inherently, as the lower court to see the issues most directly, they are engaged in problem solving. We focus on the administration of the court and have little interaction between judges.

MR. FREDERICK: I want to talk about or ask you about some of the agencies that regularly appear before you through administrative law cases. What agencies have you been the most impressed by in the quality of their administrative decision-making process?

JUDGE SENTELLE: I suppose on some level the FCC are quite good. They have a very strong mandate and yet they manage to issue rules fairly firmly. Although we have to reverse them a lot, but they have a lot of ability. Their litigation staff is first-rate. I have said many times I wish they would consult with a litigation attorney in rule-making because that would inform their process for rulemaking. But they have a very broad mandate and handle it fairly well.

FERC I'm much less impressed with, but on the other hand their job is awfully difficult. They get into some very difficult and technical issues. With the Labor Board, I think there is a fundamental flaw in their approach and I don't know that they'll ever change. They don't do rule-making. They do everything by case-by-case decision-making. Therefore it's much easier for them to take allegations and deal with them in a more ad hoc way than through the more formal process of rulemaking. The Ten Commandments

laid out there with what thou shalt not do, I think, would be a lot easier for the legal entity to know what not to do. I think it would be a lot easier for the Board to make coherent rather than arbitrary and capricious decisions. The Labor Board is fundamentally flawed in their approach, but I see no sign that they're going to change. The Court has expressly said they can. What the Supreme Court did not say is that they should. And they've chosen to stay with their old approach.

MR. FREDERICK: Is that an historical development?

JUDGE SENTELLE: I don't know how it got started, but I know the Supreme Court has approved it. They probably like the district court kind of approach. It lends itself to a lot of flexibility.

MR. FREDERICK: What other agencies would give rise to a greater level of scrutiny?

JUDGE SENTELLE: We have to reverse the Social Security Commission a lot and I would say I have a great sympathy for them because I think they not only have a very broad mandate, but it expands every time Congress gets into session and they can't keep up. They have to do all the agreements based on fairly vague principles. Definitions of what providers are, etc. Congress changes their mandate and expands it every time they're in session, so the Social Security Commission just can't keep up. They have a very difficult job at times with a lot of pressure.

The EPA has never been that strong. Over and over, we've had to say, "Well you had to have this done by such-and-such date and it's not done. Get it done." I don't know what type of information they have to work with. I know I'm sounding critical of all these agencies, but remember we see the cases in which they're under attack. I guess there's a lot of routine cases out there that we don't know about where they're doing a much better job. The more problems there are, the more we see.

I didn't know a lot about matrimony when I was a state judge handling family law cases. I thought all marriages were coming to court because the only ones I saw were the ones that were coming to court.

MR. FREDERICK: That's one of the unacknowledged principles of *Chevron* deferences that some agencies get more deference than others seem to and I think that's a part of the reflection of some of the dynamics that you're talking about.

JUDGE SENTELLE: I had a law clerk who proposed that she should come up with a FERC deference that said, "I have neither the time nor the inclination to figure out what you're talking about and I will therefore defer to the higher court."

MR. FREDERICK: Save for the fact that they have huge commercial consequences and whether or not judicial review and judges that were willing to take the time to parse that...

JUDGE SENTELLE: I read an article after we had dealt with a FERC case that was authored by an administrative law judge. I asked him what he thought about where we had gone with a limitation in guideline regulations relating to energy accounting. He said, "Thank heaven for the D.C. Circuit imposing proper accounting procedures on FERC or otherwise nobody would know how to handle these issues." So I thought maybe we're doing the right thing if somebody out there realizes what you just said about the commercial consequences. It makes for the litigation involving high stakes. Sometimes there are attempts at success, but if you know over the life of the agreement you're going to make \$4 billion worth of difference, then you've got a 2 percent chance of winning.

MR. FREDERICK: Well it also creates a very interesting litigation challenge because there are times when you don't want the court necessarily to perceive that a decision on some small accounting measure will be worth a gazillion dollars because that may cause the court to think about the problem in a different way. Or, conversely, if the court understands the nature of the problem... it's a very interesting dynamic when you're litigating that case.

JUDGE SENTELLE: I didn't mention the banking agencies. I think on the whole they do a good job because we don't see them very much. I remember an early case involving the Fed. We decided the proper interpretation of the statute was not one wanted by any of the parties. We issued

our opinion and we got petitions for rehearing even from the winning side which explained to us the implications of the statute that we had not even thought about, which I think shows why we should have asked for supplemental briefs. Instead, we granted the petition for rehearing and reversed our own decision. And that may be a parallel to what you're saying, but it's something we don't often have to confront directly. They brought it to our attention and we realized that we could not possibly continue to keep that language, so we realized what we had to do.

MR. FREDERICK: How often do petitions for rehearing get granted in that way?

JUDGE SENTELLE: Very rarely. But sometimes we have to admit when we got it wrong and go fix it.

MR. FREDERICK: I'd like to turn to some of the judges with whom you've had a particularly close relationship. I have read that you had been close to Judge Spottswood Robinson. His chambers were next door to yours when you first came on to the court. Do I have that correct?

JUDGE SENTELLE: Well that's not literally true. After he took retirement, he used my secretary when he was up there. Spots was part of something we called "The Southern Wing." He and I used to have lunch together a lot when he was here. We used to just go out and have lunch and tell old Southern stories. No one knew more about how the law worked in practice. He was a piece of history and we just really delighted in getting to hear old stories about *Brown v. Board of*

Education. He was a real lawyer's lawyer. Everybody in D.C. knows what he did. People know him as a scholar's lawyer, but he was also very practical. He wrote the briefs for Thurgood Marshall's arguments, he did the first argument in *Brown*, but he also tried murder cases. He tried landlord-tenant cases back when there weren't many black lawyers. He tried cases all over the state of Virginia. We would get him started and listen to him and ask questions for hours. He was a fascinating old gentleman. And the personality type – I've known three men from Richmond and they were all like that. They all were such classic, genteel people. He and John Butzner had that same gentle, in the real sense of gentle, way about them. There was nothing wimpy about these men, but they were so gentle. They were kind and there was no meanness about them. Foxworth was a real gentleman, too. We didn't always agree on the law, but we never disagreed on anything personal.

MR. FREDERICK: Who reached out to whom when you came on the court? He had been on the court for a long time.

JUDGE SENTELLE: He offered some fresh advice when I got here and I guess he'd say he did. He welcomed me and offered some rather funny advice. I enjoyed him.

MR. FREDERICK: Are there any other judges like that with whom you've had a personal relationship?

JUDGE SENTELLE: Varying sorts over the years, David. When I first came up, Doug Ginsburg invited me to stay with him and his wife until I found a place. I lived with them for a couple of weeks. It was a pleasant and interesting couple of weeks. It was a different lifestyle than any I'd ever been accustomed to. We finished dinner and retired to the drawing room and had some brandy. And yet there was sort of a relaxed way about them in other ways. They had about a four-year-old daughter, she rarely had clothes on in the house. They were laid back in some ways and very old-fashioned in others. I've enjoyed Doug over the years. Doug is one of the smartest people I've known. He can talk about a range of subjects very intelligently. Harry is very witty. Karen and I used to be very good friends, but now she just stays gone so much that I rarely see Karen these days. We have known each other for years. She wanted more space in South Carolina to interact with her family.

MR. FREDERICK: So she will commute in a sense to hear hearings? Are her law clerks here or in South Carolina?

JUDGE SENTELLE: She comes up for hearings, but then goes back down to South Carolina. Garland and I have had some good times together, some good conversations. Some of those I know less well, but I think that they are all good people. Paul Friedman and I – Paul was the other person on the judiciary here besides Karen that I had known for years.

MR. FREDERICK: How did you get to know Judge Henderson?

JUDGE SENTELLE: Henderson was a year behind me in law school. I had known her as a friendly acquaintance.

MR. FREDERICK: Tell me about some of the lawyers who have appeared before the D.C. Circuit. We talked a little bit last time about a few of the oral advocates, but I wonder if there are particular attorneys who have stood out as being special?

JUDGE SENTELLE: I may have named some of them. I made one mistake in that it's such a big court. There are so many people standing there that I soon realized that it might take being here a while before you see a lot of them.

Mack Armstrong from the FCC. Mac rarely argues a case himself. He normally is one of the names above the three names under his on the brief, but when he argues it's impressive. I noticed him in the *NextWave* case and I saw that everybody was in the courtroom. Ted Olson **Error! Bookmark not defined.** argued too.

MR. FREDERICK: I think Richard Taranto also argued in that case. I don't know if he is as well-known in the D.C. Circuit.

JUDGE SENTELLE: No, we don't see him here that often. Rarely did the agency counsel get to argue up in the Supreme Court because the Solicitor General always takes those arguments. We see the best agency lawyers here.

MR. FREDERICK: Yes, Paul Clement, the Principle Deputy Solicitor General argued for the government in that case and Don Verrilli argued as NextWave's counsel. I know Don Verrilli and Paul Clement argued. I can't remember. There was, I think, a third advocate.

JUDGE SENTELLE: I know Mack got to argue the *Metro Broadcasting* case in court because the Solicitor General's Office just felt it was wrong and let the FCC take it. The Supreme Court reversed. And then years later when the government disavowed that position. Now Mac thought we were right. He was a consummate professional and he did a great job with defending this court after remand would have been the minority on the panel at the time. Anyhow, back in those years my job was to defend that position. I did it successfully.

I don't see him real often. Barry Simon from Williams and Connolly is very, very good, and so is Andy Frey from Mayer Brown. There's a guy who is not well-known. He has a well-known name, but he's not well-known. Tommy Corcoran. He's kind of an eccentric, I guess. The name is familiar, but his father was the famous fixer in F.D.R.'s cabinet. Tommy does a lot of pro bono criminal work and does a really great job of it and then what he does for a specialty practice is the Foreign Sovereign Immunity Act for foreign governments. But whatever you see him come in on, he comes in prepared, he answers the questions directly, he makes cogent, well-organized, rational arguments, and I don't think he's

ever pushed himself. He's not an aggressive businessman, but he's an excellent appellate advocate. When I see him on the brief, I'm always hoping he's going to be doing the oral argument. Those are some of the most fun ones to be on.

MR. FREDERICK: Are there any from Justice that have stood out for you?

JUDGE SENTELLE: There's Don Fisher from the U.S. Attorney's Office. Doug Letter is one of the greatest oral advocates that I've ever seen. He's a very skilled advocate. You know Doug.

MR. FREDERICK: Very well.

JUDGE SENTELLE: There are others, but I can't think of the names right off. If I had to say who's the best I've seen, it would be Doug Letter. He's handled some very difficult cases extremely well for the government.

MR. FREDERICK: I'd like to spend a few minutes talking about your law clerks if you would like. Can you tell me about some of your outstanding law clerks? What they've done since they left you, what caused you to regard them as outstanding law clerks.

JUDGE SENTELLE: I hate to start differentiating because I've had so many very fine young people come through here and very, very few disappointments. I can't say none, but I would say very few disappointments. There have been a high number go into academia after they leave here. I always stress to them, "Don't ever let money get in the way of having a satisfying career and a satisfying life."

You can make a living and do what's going to be satisfying before you make a mint rather than go make as much as you can and I think maybe they listen. Maybe they've gone on to teach.

Joanie Larsen is an example, she went on to teach. She is someone I would have recommended for any job in the law. She could have tried cases, she could have done appellate work. She had a delightful personality and an incisive legal mind

I don't do what some circuit judges do, I think. Like Luttig. I've known him for 20 years from the Fourth Circuit. I think some deliberately hire clerks they think will go to the Supreme Court. I don't try to hire people that way. I also try to hire in breadth. I hire from a lot more law schools than a lot of my colleagues do. I think I get a greater variety in my clerks that way. I think I benefit from it.

MR. FREDERICK: This is a good stopping point.