ORAL HISTORY OF
HONORABLE JOHN ROBERT FISHER

Second Interview — December 20, 2011

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 Judge John R. Fisher, Associate Judge of the District of Columbia Court of Appeals. The interviewer is Cecil Hunt.

(TAPE 2)

MR. HUNT: Judge Fisher, would you please tell us when you were appointed chief of the appellate division of the Office of the U.S. Attorney in D.C.?

JUDGE FISHER: That was in 1989. I think I officially became chief in June of that year.

MR. HUNT: How did it happen that you got that position?

JUDGE FISHER: Well, before I left the office in 1983, I had been a deputy chief of the appellate division for about 3 years, and then, as we discussed earlier, I went back to Ohio for a few years. I missed doing appellate work. I'd stayed in touch with the office and knew that the then chief of the appellate division, Mike Farrell, who became a judge of this court, had been nominated to be a judge and if things went well they would need a new chief of the appellate division. So I applied for that, lobbied pretty hard to get it, and was fortunate enough to be selected.

MR. HUNT: Good. It was Judge Farrell you succeeded, and you had worked with him.

JUDGE FISHER: I had, yes.

MR. HUNT: Tell us a little about the size of the office when you joined it, and the scope of its responsibilities.

JUDGE FISHER: Well, I joined the office on two occasions. I joined in 1976, and I believe the office consisted of about 150 attorneys at that time. When I rejoined in 1989, we were somewhere in the area of 350 attorneys, so the office had grown considerably in size.

MR. HUNT: That's amazing, 350 attorneys in the D.C. U.S. Attorney's Office.

JUDGE FISHER: That's right, and it seems odd now, but in those years there was money available for law enforcement and I think soon after I rejoined the office there was a considerable hiring effort, but either when I rejoined or soon thereafter the total number got up to about 350.

MR. HUNT: What was the size of the appellate division?

JUDGE FISHER: It varied a little bit over the years. I think when I first became chief we had 22, 25 attorneys, something like that. I persuaded the U.S. Attorney at the time that we needed more resources to be able to do our appellate work in a timely fashion, and, because there was a hiring surge going on, there were more resources and I was fortunate to get some of those. By the time I left the office, we generally had 35 attorneys in the appellate division.

MR. HUNT: You mentioned you successfully persuaded the U.S. Attorney. Who was the U.S. Attorney at the time you rejoined the office?

JUDGE FISHER: That was Jay Stephens.

MR. HUNT: Tell us a bit about the appellate division chief's role; it sounds like there was a large enough office that you had kind of a management function. Tell us about the management and the lawyering aspects of the chief's role.

JUDGE FISHER: There are a lot of different aspects to being the appellate chief. There is a management role, there's a supervisory role, in terms of sort of small picture, supervising people on specific projects. There's a very substantial teaching role there, and I'll elaborate on

that in a minute. And then I also tried to emphasize a lot of giving advice to trial attorneys, before they created an awful mess that would be hard to clean up on appeal. And then one of the things that was hard to do but I tried very hard to do is to brief and argue important appeals myself. I wanted to be the primary appellate advocate for the office in very important matters, and so I tried to juggle all those different roles. One thing I should explain about the appellate division is that the bulk of our staff was made up of attorneys who were rotating through the division for a period of maybe six or eight months, and our job was to teach them some criminal law, to teach them how to be a persuasive legal writer, to teach them how to be a persuasive oral advocate, and then they'd go off to another assignment. And so there is a very substantial teaching and training role because of that phenomenon. At the same time, I tried to recruit and keep in the appellate division experienced attorneys who had been there and who had substantial skills and could handle some of the more serious cases, but the training role was very important, not only training the appellate attorneys, but I was often a part of efforts to train attorneys in other parts of the office.

MR. HUNT: Trial practice, mentoring?

JUDGE FISHER: Yes.

MR. HUNT: Now, of course you needed the cooperation of the U.S. Attorney in taking on that role. Was that formalized, or did you and your staff simply take advantage of openings?

JUDGE FISHER: It was formalized, at least as far as training the office at large. When I first started in the office in 1976, there was very little formal training at all. This time around there was a training director; there was a staff that organized training. With an office that large, and new people joining the office several times a year, it really required a big effort to provide

meaningful training to them, and so the training director would often call upon people in the appellate division, including myself, to contribute to those classes.

MR. HUNT: Did you inherit a deputy or deputies, or were you able to recruit your own or select your own?

JUDGE FISHER: Well both. I inherited deputies, and then over the course of time some of them left. I think I may have been able to get one more deputy position, so from time to time I was able to select new deputies, as the old ones moved on to other things.

MR. HUNT: And you argued some cases yourself?

JUDGE FISHER: Quite a few.

MR. HUNT: Which ones did you reach out for? What type of case did you particularly want to take on your own?

JUDGE FISHER: Well, it depended. If there was something that was very important to the office, either because it was a high-profile case or because there was an issue that would have a lot of future ramifications, I always had to figure out whether I was the best person to do that, not only in terms of skills but also availability, could I devote the time to do that. And then from time to time I just got restless and I looked around for something that was available that I could brief and argue myself.

MR. HUNT: When the case involved representation of an agency, were there ever instances in which agency counsel would be involved in briefing or even arguing an appeal?

JUDGE FISHER: Very seldom, and I need to explain that the appellate division really handles only criminal matters, and agency counsel are more often involved when it's a civil matter, and the civil appeals were handled out of the civil division of the U.S. Attorney's Office. Now from time to time, we would have a matter that related to a parole issue, so we might

consult with the U.S. Parole Commission and their general counsel. I cannot remember an instance where one of those counsel argued a case, but they were often consulted in preparing the brief and preparing for oral argument.

MR. HUNT: During your years as chief of the division was the caseload bearable, unbearable, or manageable? What would you say?

JUDGE FISHER: It was never manageable in the sense that it was easy, but I think we did succeed in wrestling it to the ground in the sense that we adopted some good management practices. In a typical year, we would probably file 500 or 600 briefs. I think one year it got up to 700 briefs in a single year, and often there were motions and other things that didn't add to that tally. In a typical year we would argue maybe 150 to 200 appeals, and so that was a substantial effort—

MR. HUNT: Indeed

JUDGE FISHER: to find the resources to brief those and to prepare people for oral argument.

MR. HUNT: I assume you had considerable leeway and discretion in hiring and selecting attorneys to come into the office—well not the ones rotating, but people being brought into the regular staff. Is that correct?

JUDGE FISHER: Well basically the answer to that is no. We almost never hired anybody from the outside to work exclusively in the appellate division. The normal process was that you look at people who had been in the office for several years, who had been through the general rotation program, but seemed to have a special talent and an affection for appellate work. If they indicated they would like to come to the appellate division in a more senior capacity, then

there was often a competition for their talents. So I was involved in those efforts, of course, but as I said we didn't hire from the outside.

MR. HUNT: I'm asking you to reach back. Are there particular cases, either that you argued or the office handled while you headed it, that stand out in your recollection and for one reason or another you think would be worth mentioning for this oral history?

JUDGE FISHER: There are several, and I talked about how I'd often be involved in appeals that presented a programmatic or long-term issue for the office, and one of the things that happened under Jay Stephens, and this was really, I think, encouraged by Attorney General Thornburgh at the time, was an effort to bring more and more cases into federal court, to take advantage of the higher penalties for gun cases and drug cases, and that involved in the District of Columbia not only a change of policy going forward, where we would—let me back up. As U.S. Attorney here, you have the choice of whether to bring a case in the local court system (in the Superior Court) or in the U.S. District Court, and that's an option that most U.S. Attorneys do not have. Usually a U.S. Attorney has to decide whether to take the case or defer to the local prosecutor. Well, here the U.S. Attorney is *the* prosecutor, so he makes a decision whether to pursue a case in Superior Court or District Court. When there was this emphasis on bringing more and more cases in District Court, it was decided that we would take a lot of cases, I believe there were dozens of them, I forget the exact number, cases that were already pending in Superior Court, and we would dismiss them in Superior Court and re-file in U.S. District Court, and that created all sorts of protests. The principal protest was that the U.S. District Court judges did not like having these cases. They thought many of them were beneath their dignity—just a gun, a small amount of crack cocaine—but the penalties could be pretty severe. So there was a lot of litigation about that, and that resulted in an *en banc* argument that I handled about whether

or not we had violated various statutes and provisions of the Constitution by transferring those cases over to federal court. We won the case; I count that we won it 5½ to 5. One judge voted in our favor but he made it very clear he didn't care for what we were doing. That was one case that was very important.

MR. HUNT: Under what case title, was that particular one?

JUDGE FISHER: The case title was *Mills & Wonson v. United States*; maybe as we tidy up I can get you the citation to that.[2]

JUDGE FISHER: There were a number of battles over the years respecting the United States' sentencing guidelines, and so I handled several appeals dealing with that. I feel a little chagrin now spending the flower of my youth defending the sentencing guidelines, and then the Supreme Court says at the end of all this that they really are not buying in after all, and maybe all that effort was wasted, but there were a number of cases I argued trying to sort out what the guidelines meant, whether various provisions of them were valid or violated constitutional principles, and so there were some of those.

MR. HUNT: Do you recall any appeal where you lost that you still feel that you should not have lost, if that's not too impertinent a question?

JUDGE FISHER: I'm sure there were some and they don't pop to mind right now. There are a couple of cases that you may have heard of that I ought to mention. One involved a spy named Jonathan Pollard, who had been charged with turning over classified information to the Israeli government. He had pled guilty, but then after he'd been in prison for a while he decided to attack the validity of his conviction, and I handled the appeal in that case.[3] That was not an *en banc* case but it was argued before a panel, and I happened to argue against Ted Olson,

[2] *United States v. Mills*, 964 F.2d 1186 (D.C. Cir. 1992).
[3] *United States v. Pollard*, 959 F.2d 1011 (D.C. Cir. 1992).

who became *Solicitor General* of the United States sometime after that. But that was a prominent case that I argued principally because of the prominence of it.

Another case that I argued involved Congressman Dan Rostenkowski. Our office was prosecuting him, and there were some pretty esoteric issues about how the speech or debate clause of the Constitution applied to criminal prosecutions, and did that preclude us from using certain evidence in our prosecution. I argued that case and substantially won it. I think they said some things in the opinion we didn't agree with, but we substantially prevailed.[4]

In this court, I argued an *en banc* case involving the wording of the reasonable doubt instruction. Various judges always thought the language of that instruction was pretty arcane and surely they could do better, but then when they tried to do better it would raise all sorts of issues about whether they had left something out or maybe had reworded something just not in the right way, so we had an *en banc* argument about that.[5]

I had an *en banc* argument dealing with the application of the Miranda Doctrine[6] and over the course of my time, not only as appellate chief but also a deputy chief, I think I argued 16 *en banc* cases, either before the D.C. Circuit or before this court. So those cases come to mind.

One of the last cases I argued before I became a judge involved a concept called "urban warfare," and it basically focuses on when people are having a shootout on the street, and they happen to kill an innocent bystander, what form of murder is that, and do you prosecute only the person who fired the lethal bullet, or can you prosecute all the participants in the gun battle on the theory that they were jointly creating the dangerous situation that resulted in a death, and so I argued that case toward the end of my time.

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[4] *United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995), *petition for rehearing denied with opinion*, 68 F.3d 489 (D.C. Cir. 1995).

[5] *Smith v. United States*, 709 A.2d 78 (D.C. 1998) (*en banc*).

[6] *Jones v. United States*, 779 A.2d 277 (D.C. 2001) (*en banc*).

MR. HUNT: Did the decision in that case become law in the federal courts that continues to be applied?

JUDGE FISHER: Well, it affects the local court system. It was a case that was argued in this court. It's the case of *Roy & Settles v. United States* and I'll get you the citation for that as well.[7]

MR. HUNT: Speaking now from your perspective as a judge, can you think back and name any judges before whom you argued who made a strong favorable impression on you, from the way they handled their bench?

JUDGE FISHER: There were several. I think out of diplomacy I'll not comment on the judges of this court, but in some of my early days I argued before judges such as David Bazelon and *Skelly Wright*, but the one who particularly impressed me during those years was Carl McGowan. He was a very courteous judge, very sensible and level headed, and I always admired both his approach in the court room and the tenor of his opinions. I also thought highly of Malcolm Wilkey, who was a D.C. Circuit Judge.

Before I left D.C. and went back to Ohio, I had the opportunity to argue a couple of important *en banc* cases, and on the panels in those cases were now Justice Scalia and Robert Bork, who was on the court at that time.[8] So I remember those arguments. In more recent years I had the chance to argue frequently before Ruth Bader Ginsburg, who is now on the Supreme Court. I also have had the chance to argue before John Roberts, who is now Chief Justice of the United States. I particularly admire Merrick Garland, he became a judge later in my tenure, but I've been able to argue before him on a few occasions and I particularly admire his approach to the task of judging.

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[7] *Roy v. United States*, 871 A.2d 498 (D.C. 2005).

[8] *United States v. Byers*, 740 F.2d 1104 (D.C. Cir. 1984 (*en banc*); *also United States v. Cohen*, 733 F.2d 128 (D.C. Cir. 1984) *(en banc*).

MR. HUNT: You are generous and helpful with your recollections there. During this period, while you were chief of the appellate division, did you have any opportunity for activities outside the office—bar activities or other organizations?

JUDGE FISHER: One of my principal bar activities was serving on the legal ethics committee of the bar, and that's a group that met generally on a monthly basis. We would receive inquiries from lawyers about how the rules of professional conduct applied to a particular situation they described, and we would on occasion just give a quick answer, but our primary task was to write opinions, which are then published by the bar.

MR. HUNT: Which we've all read cheerfully!

JUDGE FISHER: So I served on that committee for six years, which was the maximum number. Actually, before that, the D.C. Court of Appeals adopted a new version of the rules of professional conduct that went into effect in I think January of 1991, and I was involved in lots of efforts to get the word out, and I'd provide training to lawyers and our group particularly focused on government lawyers, so I was involved in some of those efforts. And then toward the end of my time in government I served as treasurer of our church for five years, so that took up a good bit of time. Those were my principal activities, apart from work.

MR. HUNT: Are there any other highlights from the period when you were Chief of the Criminal Appellate Division that I haven't touched on and that you would like to touch on before we move forward in time?

JUDGE FISHER: Well, it was a wonderful job to have. I may have mentioned earlier that for someone whose been infected with the appellate virus, being chief of the appellate division of the U.S. Attorney's Office was a terrific job to have because it allowed you to devote your efforts to appellate practice—

MR. HUNT: It gave you an opportunity for cherry picking, in the best sense of the word.

JUDGE FISHER: Yes, indeed. It gave you quite an opportunity to train other lawyers, and one of the things I especially tried to do was to select issues at an opportune time for litigation so maybe we could change the law in the a way that was favorable to us. That sometimes involved decisions about, "well, we don't like what the judge did in this case but this is not the time to really fight it out, let's look for a more favorable case." Sometimes you'd make the same arguments again and again, as the opportunity arose, and then eventually they'd sink in and bear some fruits.

MR. HUNT: That's an interesting comment that you make about the selection, the decision as to whether to appeal certain cases, I'm just wondering, was that left exclusively to you or to the appellate division, or would there be instances in which the U.S. Attorney or top people in the office would influence that decision?

JUDGE FISHER: For most cases, well let me back up. It depends on which side of the house you're talking about, and for reasons that I think are primarily historical, although don't make perfect sense, whenever we were going to take an appeal in the D.C. Circuit, or whenever we were going to seek rehearing *en banc* in the D.C. Circuit, we had to not only get the approval of the United States Attorney but we had to get the approval of the Solicitor General of the United States, because the Solicitor General was concerned about how the law looked throughout the country, trying to make sure that law was consistent, as far as the Department of Justice was concerned, and trying to make sure that people in the hinterlands didn't screw things up too badly. So there was a fairly rigorous process one had to go through to get permission to take a government appeal or to get permission to seek rehearing *en banc* in the D.C. Circuit. I think for primarily historical reasons, they did not exercise that oversight over the local court system, so

when we were deciding whether to take an appeal from the Superior Court to the D.C. Court of Appeals, or whether to seek rehearing *en banc* in this court, that decision was primarily up to me. I had to make a judgment as to whether it was important enough to take up the U.S. Attorney's time in consultation, but I didn't consult the U.S. Attorney in each instance because it wasn't that important a question.

MR. HUNT: And when it was an appeal from the Superior Court as opposed to the District Court, the Solicitor General's Office would not be involved at all?

JUDGE FISHER: That's correct. And so we had that process deciding how to take appeals, seek rehearing *en banc*, try to shape the law. Often you were not all that concerned with the outcome of the individual case but were really concerned about what the law would say going forward. Another effort that I put a lot of energy into that I've referred to briefly as what I call preventive appellate advocacy, trying to get trial attorneys in the mindset of thinking what the record would look like on appeal, and we made a lot of resources available to consult with trial attorneys, so they would often stop by unexpectedly seeking advice. Oftentimes they would call from the courtroom, some crisis had arisen and they needed a case cite or they needed advice on what to do, and my deputies and I would spend a lot of the time during the day giving that sort of advice with the hope that ultimately it would be good for the office as a whole, and also with the hope that if we sort of made some strategic judgments at the trial level, then it would be a lot easier to defend the conviction on appeal, so we invested a lot of time and effort in that sort of thing.

MR. HUNT: That's very interesting. Shall we move forward in the timeline?

JUDGE FISHER: Indeed.

MR. HUNT: Then we get to your nomination and confirmation as associate judge of the District of Columbia Court of Appeals. When did this occur, and as best you can tell us, how did it come about?

JUDGE FISHER: Well, in order to become a judge on the local courts you cannot be a shrinking violet; you don't wait for people to come to you. We have a process that is articulated in statute. There is a judicial nomination commission, and whenever a vacancy occurs, on the trial court or on this court, that's announced. The commission solicits applications; they then screen the applications and conduct interviews, and the commission then selects three names for each vacancy and it forwards those names to the White House, and then the White House has to choose a nominee from the names that have come from the judicial nomination commission. So you don't wait for somebody to come seek you out, you have to apply for the job. In 2005, I think, there was a vacancy on the court, and, actually it was 2004, the first vacancy that I applied for, and I decided that I would apply for the vacancy and see what happened.

MR. HUNT: Let me interject, I think, a related question. If my understanding is correct, in effect the Home Rule Act did not delegate to the District any of the function or any authority, with respect to the naming of judges. Is that correct, and is that why the position on this court is handled out of the White House without any involvement of the council or other arm of D.C. government?

JUDGE FISHER: That's right. Actually two things happened in the early 1970s, and one was the Court reform and reorganization act. Up until the very early 1970s, although there was a local court system, it had very limited authority, and most of what we would call "street crime" was prosecuted in the U.S. District Court. So the U.S. District Court judges would have jurisdiction not only over the typical federal matters—big drug cases, mail fraud, bank robbery,

that sort of thing—but the district judges would try rapes and murders and street robberies, things like that. There was a Court of General Sessions, but it had primarily misdemeanor jurisdiction and then somewhat limited civil jurisdiction. There was something called the Municipal Court of Appeals, but that had limited jurisdiction as well, and its decisions were reviewable by the D.C. Circuit on basically a *certiorari* basis. And so in the late 1960s the White House decided that it would propose the creation of a robust local court system, and that led to the creation of the Superior Court and it led to the upgrading, I'll say, of the District of Columbia Court of Appeals. So this court became the highest court of the District of Columbia. Our decisions were no longer reviewable by the D.C. Circuit. If anybody was going to review our decisions it would be the U.S. Supreme Court. So at about the same time, what we generally call the "home rule" effort was going on, but I think it was primarily in connection with Court Reform and Reorganization Act, that Congress decided that they would retain in the President, the appointment authority for judges of the local courts, and so judges of the Superior Court and judges of this court are nominated by the President, confirmed by the Senate, and the Mayor and the Council of the District of Columbia are not involved that process.

MR. HUNT: Thank you, I think that the digression was very helpful brief explanation of the history and structure of the D.C. Courts. Back to your elevation to the bench—was there anything that stood out in the confirmation process, or was it not an event?

JUDGE FISHER: Well, I probably ought to fill in more about how I got to be nominated, and it was in many ways a very uncomfortable process because to succeed before the commission you not only have to fill out a lot of paperwork to explain your background and experience and everything, but you also need to be a salesman for yourself. You need to recruit people to recommend you and then it is advised that you try to visit with each of the

commissioners individually. Eventually there is a group interview before the commission, but it's recommended that you go around and try to visit each commissioner privately if you can. Not every commissioner will sit down with you privately but most of them do, and so that was a very uncomfortable process, sort of trying to sell yourself. I was raised in Ohio to be a modest young man and not to be a self-promoter, and this was kind of awkward.

MR. HUNT: Well self-promotion aside, in any instances were there inquiries into, say, judicial philosophy, that you thought might be beyond line?

JUDGE FISHER: Nothing that went beyond the line. People were of course very concerned about one's approach to being a judge, and one of the questions I encountered a lot was, "well, you've been basically a lifelong prosecutor. What are defendants and defense attorneys going to think when they look up and see you on the bench?" So that was something I needed to address. I was fortunate in my first effort to be included among the three candidates whose names were sent to the White House, but the White House nominated somebody else for that first vacancy. Unexpectedly, another vacancy came along, and there's a very odd system here, but because the first vacancy had not yet been filled I technically was not eligible to be recommended again by the commission, yet under the statute my name was still before the White House, and the White House has the ability to reach back to a previous list if that vacancy has not yet been filed, so the new vacancy came along and they remembered me and so they picked me from the prior list and I was nominated for the second vacancy that came along.

MR. HUNT: That sounds efficient and certainly not inappropriate.

JUDGE FISHER: Well, it's kind of bizarre, but it's part of the statutory process. So then the confirmation process went relatively smoothly. One of the things that affects confirmations to this court and to the Superior Court is that our nominations do not go to the Senate Judiciary

Committee but they go to the Committee on Homeland Security and Government Affairs, which has the portfolio for the District of Columbia. And so a lot of the partisan wrangling that you read about a lot dealing with the nominees to the federal courts that occurs before the Judiciary Committee does not typically occur with our nominations.

MR. HUNT: News to me, thank you.

JUDGE FISHER: So it was mainly a process of filling out a lot more paperwork, interviewing the staff at the Senate committee, and then waiting for them to pay attention to my nomination, but that did occur in what in retrospect seems like a fairly timely fashion. I think I'd been nominated in June of 2005 and was confirmed in October of 2005.

MR. HUNT: With your background as an appeals advocate, was there still a learning curve when you ascended the bench, a learning curve as a judge, how did that period evolve?

JUDGE FISHER: There was a very substantial learning curve. I probably was as familiar with the workings of this court as a lawyer can be. I'd been appearing before the court for close to 20 years, off and on. Some of the judges of this court I'd worked with in previous jobs, but one of the things that really shaped my first few years on the court was that I had to recuse from most criminal cases involving the United States, so as a result I had a pretty small docket of criminal cases and a very large docket of civil cases and administrative reviews and things like that. So I was not allowed to work, for the most part, in my area of expertise—

MR. HUNT: It was probably an advantage for your growth as a judge.

JUDGE FISHER: Well, it has been an enormously rewarding period of growth. It was very hard, in that I had to learn to be competent in areas that I had not practiced in before, and there was a fairly steep learning curve in a lot of those things, so I would have occasional criminal appeals if they were really recent, had not been percolating in the U.S. Attorney's

Office while I was there, or if they involved juvenile matters, which are prosecuted by the local Attorney General's Office, but I was doing a lot of civil cases, a lot of administrative reviews, and that really took a lot of hard work to try to understand those cases.

MR. HUNT: As a judge with a case coming before you for oral argument, how do you go about preparing for oral argument—would be question one. I guess question two would be what are you trying to accomplish during the course of oral argument?

JUDGE FISHER: Well, I think, from the point of view of all of the judges on this court, one of the primary benefits of oral argument is that it presents sort of a deadline, at which all of the judges need to be well-prepared, because immediately after the argument we go into conference and we take a tentative decision about how the case is going to come out, so ideally all three judges will be well-prepared at that time, and so one of the principal benefits of oral argument is that at one time and place all the judges are equivalently prepared and ready to make a decision. As far as the argument itself, I think we're seeking clarification. We're seeking a comfort level; that is, if a party is asking us to take a certain position in this case, what kind of trouble will that get us in down the road, how far-reaching is their argument going to be, and just satisfaction that the argument they're asking us to adopt is well supported in the case law and in the record. A lot of the questions we ask are trying to clarify factual things about the record. You sort of put this spin on what happened, but demonstrate to us that that's a fair reading of what happened in the record. Often people will be asserting things that are not in the record, and thus we're not supposed to consider them.

MR. HUNT: On that point, are you really fully dependent on opposing counsel to point out mis-citations or misuse of the record or is it ever something that you would have your clerks check on.

JUDGE FISHER: Yeah, we often go back to the record or the transcript, depending on the kind of case, and try to verify the accuracy of the representations. Sometimes opposing counsel will point them out, but not always, and so sometimes we catch those glitches on our own.

MR. HUNT: Glitches may be putting it kindly.

JUDGE FISHER: Well, I think sometimes they are truly glitches, and other times it may be an effort to maybe distort things a little bit. In terms of my individual preparation for oral argument, I always read the briefs myself, and in many instances I read them more than once, but what I will typically do is ask my law clerk, one of my law clerks, to read the briefs and I will read the briefs too and then after we've both done that we will talk about the case, and one of the things that shapes our approach to oral argument here is that, unlike in many courts of appeals, we know in advance which case we're assigned to write, so you take a special care in preparing for the cases that you're assigned to write and you feel more comfortable devoting increased resources to those cases. So I'll have the law clerks read the briefs, I'll read the briefs, we'll talk about the issues, we may do some preliminary drafting to try to get things worked out in our minds about what the facts are and what the legal issues are. And so I think it's fair to say that all the judges of this court are well-prepared when we go into oral argument.

MR. HUNT: Now you mentioned the kind of pre-selection of which judge will be writing which case, but that suggests a selection in advance of the judges who vote on the decision. How does that work?

JUDGE FISHER: Well, it's still in part a mystery to me, but the important thing to emphasize is the judges themselves have no say in what they're assigned to write. I think there are two operations that go on independently of each other. Somebody out there decides which

judges will sit together on a particular day and somebody else working independently will decide which cases are going to be heard on those days, and then there's some sort of random selection about who will be assigned to case number one, case number two, and case number three, so there's no opportunity to cherry-pick the cases that we will work on.

MR. HUNT: That is interesting. I don't know if it's possible to reach back and come up with a recollection of this, but, as to questions that you raise during oral argument, do you have any sense as to how many of them have been formulated in your mind or your notes in advance of argument and what proportion occur to you in the course of argument?

JUDGE FISHER: It's hard to say. In my early months, and maybe still even my early years as a judge I was more apt to prepare a list of potential questions in preparing for argument—not that I would ask them all, but try to formulate things that I thought were important to address. Now I'm less apt to write anything out in advance, but I think maybe I've become more adept at doing it mentally. Probably most of the questions I ask I've thought about in advance, but a lot of them come up just in the spur of the moment. An advocate will say something which will spark you to say, "well wait a minute, how can that be?" and "how do you reconcile that with this legal doctrine or this portion of the record?" So, at least a significant number of the questions I think are spontaneous, a reaction to what an advocate said or maybe a reaction to what one of the other judges had said.

MR. HUNT: What goes into your decision to write a dissent?

JUDGE FISHER: Well, I should say that I write very few dissents. I generally feel that I'm not God's gift to jurisprudence and people are not just hanging out there waiting to learn my individual views, so I write few dissents and I write few concurrences. I believe our primary goal ought to be to make the law, make the individual decision, as clear as we can, and having an

extra opinion out there often detracts from the clarity. When I do write a dissent I have to feel pretty strongly that the decision is wrong and that it is worth my while to state why I think it's wrong. I think you'll see that the judges of this court do not dissent all that often, and often it's more a process of uncertainties or disagreements which will be worked out in the drafting process, so that the majority opinion ends up being something that, if you're not necessarily wild about it, you're comfortable enough with it that you will remain silent. So a lot of the disagreements, the uncertainties, are worked out in the drafting process, and often I will go along with an opinion even if I disagree because I know I'm not going to change the result, I've had my say and I've failed to persuade the other judges. I have to think "well, what good is it going to do for me to voice a dissent?" Occasionally I think it's worth the effort, but as I said I don't write separately very often.

MR. HUNT: Case conferences can be pretty exciting occasionally?

JUDGE FISHER: Actually, the conferences themselves generally do not get all that exciting. It's the effort to write it down that often sparks more comment, and sometimes you will think that "yeah that sounds like the right decision in this case," but then when you see a draft you'll think "hmm, I didn't bargain for that." And so I think more effort goes into the process of commenting on draft opinions than necessarily goes into the conference.

MR. HUNT: That's interesting. From your time on the court, do you have any wise words for advocates appearing not necessarily before this court but you've talked about when you were in the U.S. Attorney's Office, training trial attorneys for their advocacy. What advice might you give advocates, based on your experience on the bench?

JUDGE FISHER: One piece of advice is that you need to know your case backward and forward. I think what really disappoints me and disappoints other judges is when I know your

case better than you do, and that should never happen. The advocate ought to know the facts better than we do and because they've had more time to work on this individual case they ought to know the legal framework better than we do. Another thing is that you need to put a lot of preparation into getting ready for oral argument. One of the things that I always urged as an advocate and tried to do myself is in the preparation, step out of your advocate role, try to identify all the problems with your case, try to anticipate the questions that a judge might ask, and try to be prepared to give a satisfactory answer to those questions. So that involves a lot of self-criticism, I think, being able to set aside the fact that you've convinced yourself you're right and anticipate all the pitfalls, and it also requires a lot of collaboration from colleagues, so I think moot courts are indispensable. When you work for an institutional litigant you have colleagues around who help you prepare for oral argument; that's very hard for sole practitioners or people in small firms to do because often there just aren't the resources available. But I think those two things are important; having a thorough knowledge of your case, having thought through your case and anticipated questions, and just the style of argument I think is just very important. You're not up there to regurgitate your brief. You're not up there to give a speech. You're not giving a closing argument to the jury. Ideally you're engaging in a conversation with the judges in a pretty conversational style with good eye contact. When I grew up I did not have a high opinion of salesmen, but when I think critically about the role of an appellate advocate I think you have to be in many ways a salesman. You have to be able to look somebody in the eye, you have to be able to state sincerely to them your view of things, you have to be able to respond candidly to questions they have about the product you're selling, and I think a lot of people who come into appellate courtrooms don't approach things in that way.

MR. HUNT: May I see if I could translate that into—"some style without histrionics"?

JUDGE FISHER: Exactly. I have no use for oratory. We had an argument the other day where people commented that maybe the lawyer just got a little too emotional and it wasn't particularly helpful to the cause, but you know the art of persuasion is something that takes practice.

MR. HUNT: Going further away from the workaday, are there reforms that you would like to see in the court system as it exists here in the District of Columbia or more generally from your experience?

JUDGE FISHER: Well, there are a number of challenges that I think we're dealing with. I should begin by saying I think the people of the District of Columbia are very well served by the Superior Court and by our court. We have very conscientious judges who bring a lot of talent and experience to their jobs. One of the principal challenges is the volume of the work, both in the trial court and here. One of the challenges the Court of Appeals is dealing with is trying to manage the volume of the work in a more expeditious fashion. It can take years for an appeal to migrate from a notice of appeal to a final decision, and we are working very hard to try to figure out how to deal more efficiently with the easier cases and how to conserve resources for the more challenging cases. I think in the last few years we've made a lot of progress on becoming more current, but we've got a long ways to go and it encompasses things from how long it takes to prepare a transcript so people can then write their briefs, how long we allow them to write their briefs, how quickly we get to argument after the briefs have been finished and of course after argument how long it takes us to write the opinion. I think we're doing a lot better at the latter stage, how long it takes us to get an opinion out, and our statistics are looking better and better. I think in the earlier parts of the process there are still some useful changes we can make.

MR. HUNT: May I ask specifically about delay in the preparation of the transcript. Is that strictly a matter of resources?

JUDGE FISHER: I think in large part it is, yeah. Sometimes you have to get the attention of the lawyers to focus on what they need and sometimes there are delays that, oops, they set out to write their brief and discover they don't have a transcript that's essential, but it's in large part a question of resources and technology. I think now we're getting to the point where we will get more and more transcripts in electronic form rather than in paper form and what goes on in the courtroom. There are newer systems that can produce an almost instantaneous transcript. I think we're not there yet in the Superior Court, but technology will be a big part of that too.

MR. HUNT: That's excellent. To wind up, what aspects of your career have provided either the greatest challenges or the greatest satisfaction to you?

JUDGE FISHER: I guess my current job and my next previous job would be the greatest challenges and satisfactions. I thought being Chief of the Appellate Division of the U.S. Attorney's Office was a marvelous opportunity. It wasn't easy at all; as we've talked about there were a lot of aspects to it, but it gave me the opportunity to do the kind of thing I enjoyed very much. I like to think I made a useful contribution in that role. And then being a judge of this court is just a great opportunity, a lot of responsibility. It's a constantly evolving job where you're facing new cases. People sometimes ask me the question, "do you miss being an advocate?" and I answer yes, I do miss being an advocate. "Which would you rather be, a judge or an advocate?" and my response to that has been I feel very blessed to be able to do both in one lifetime. Probably there's nothing that compares to standing at the podium, giving an argument in an interesting case, but being a judge of this court is a marvelous opportunity, it allows me to

put to use the experience that I have gained over 30, 35 years, and so I feel very blessed to be able to do both in one lifetime.

MR. HUNT: Thank you Judge Fisher. We've covered a lot of very interesting ground and I appreciate your time and your recollection.

JUDGE FISHER: It's been a pleasure Mr. Hunt.