ORAL HISTORY OF
HONORABLE JOYCE HENS GREEN

Sixth Interview – March 11, 2001

MS. PORTER: The following interview is being conducted on behalf of the Oral History Project of the District of Columbia Circuit. The interviewee is Judge Joyce Hens Green, the interviewer is Jennifer Porter. The interview is taking place at the judge's chambers on Sunday, March 11, 2001. It is now 11:20 a.m. Now Joyce, didn't you have some libel cases that were of interest to you and probably also to posterity?

JUDGE GREEN: Well, if I start with the first one, I'm not so sure posterity is holding its breath. This 1985 jury action involved the Liberty Lobby, Inc. and its chair, Willis Carto, and the *National Review* and its chair, William Buckley, Jr. A libel action of one conservative opinion magazine and its principal versus another conservative opinion magazine and its principal. The men had been great friends in past years and then had come to a division of their ways. Most interesting thing about the claims and counterclaims were the lawyers involved, and Mr. Buckley, who performed much like he did on his own television show. At one point, slouching in the witness chair, he turned to me to ask if he could leave because he had a very important speaking engagement and had to catch a plane. When I said "No," he kept insisting that he was losing a great deal of money. The jury overheard this and did not appear impressed by his attitude. A news weekly reported a little bit about this trial and that a judge in Washington had denied Buckley his way. Mr. Buckley was represented by Daniel Mahoney, former chair of the New York State Conservative Party, who a short time after this trial was

appointed to the Second Circuit. He is now deceased. Mr. Mahoney, at the onset of the trial, took Mr. Buckley through his educational and recreational experience, his background, his governesses, his siblings; the jury registered emotion when Mr. Buckley detailed that he had spent his entire earlier education in private schools in Switzerland and in private schools in other countries for higher education; that he had lived in luxurious places, traveling and skiing at posh resorts. I found this an odd bit of lawyering, for a District of Columbia jury, which is not known for its sophistication and certainly did not have the benefit of similar education and recreational opportunity. The evidence reflected libelous statements to and by each principal. They had, for example, called each other Nazis and Fascists and sneered at each other's manhood. It seemed clear the suit/countersuit was brought to ventilate the growing enmity between these two. The jury, at the end, did the right thing, awarding only minimal damages to *National Review*, for the libel.

MS. PORTER: Joyce, you mentioned to me that you had another libel case that you remember involving Pat Robertson.

JUDGE GREEN: Yes, around 1988, certainly in the year of a Presidential election. Pat Robertson filed a libel suit against Pete McCloskey, a Congressman from California, and Andrew Jacobs, Jr., a Congressman from Indiana. He claimed against both defendants, asserting he was libeled in a letter McCloskey had sent to Jacobs, in which McCloskey claimed that Robertson, who served in his unit during the Korean War, was given soft duty, was the alcohol procurer for the other members of the fighting forces, was deferred from combative duty because his father, United States Senator (Virginia), had exercised his powerful position to put his son in non-combatant service. Pat Robertson was seeking the

Presidency at this time; there was speculation as to why he had initiated this particular libel suit in concert with his run for the Presidency. Nonetheless he persisted in this lawsuit. Substantial discovery was taken, much of which was mightily uncomplimentary to Robertson and seemed to substantiate the allegations McCloskey had made. Truth is a defense. Summary judgment was granted in favor of Jacobs. The matter continued, pretrial against McCloskey, because of some controverted facts. I urged the parties (through their lawyers) to settle. The lawyers spent two full days in my jury room (they asked to work nearby so I could continue to aid their efforts), literally with rolled up shirt sleeves, running back and forth to ask questions about could this be done, could that be done. The case did not settle. Therefore, I called the lawyers to chambers (the time was September 1987) to agree upon a time acceptable to all for this anticipated lengthy trial. We reached an agreement to commence trial on March 8, 1988. Each lawyer indicated the date was "perfect." The next day I picked up the *Washington Post* to the screaming headlines, "Judge sets Super Tuesday as Commencement of Trial for Pat Robertson." Super Tuesday is vital in the life of a politician running for office. Mr. Robertson used that agreed upon date to whine that he now was being forced to make a choice to either withdraw from the Presidency or be forced to dismiss this case, all because the judge had set it "arbitrarily for that particular Super Tuesday." When the lawyers came in the next day, I pointed to that headline and asked what had happened, why hadn't they alerted me to the consequence of the date we each agreed to, and if they were seeking a different date now. They both acknowledged that they had agreed on the scheduled date, and they both insisted they did not want a different trial date. But, of course, that was done in chambers, and the world wasn't aware that that was the fact. I issued an order that, with the consent of the parties, the trial continued to be set for that original date. I truly did not

know it was Super Tuesday when it was set, and I clearly, as I often do, would have worked around the date had I been asked to do so. But I wasn't. Thereafter, the decision was misused politically. Mr. Robertson persisted in complaining about the date until he finally said he had to dismiss this case. Then ensued a round of orders, four or five issued in one day, as to whether he could dismiss it without paying the costs and without paying the very modest attorneys' fees requested. At the end he did acquiesce and pay and the case was dismissed.

MS. PORTER: In all the political controversies surrounding that case, and the public attention to it, was there any suggestion that you had acted for political reasons in setting the trial date?

JUDGE GREEN: Oh, absolutely. Article upon article referred to me as an appointee of Jimmy Carter, Democrat. The veiled accusation from Robertson (repeated by the media) was, of course, that I had purposely tried to prevent Mr. Robertson's presidential candidacy by the selection of Super Tuesday as the date on which to commence trial. Robertson knew he was wrong. He acted untruthfully and unfairly. There is little a judge can do to set the record right.

MS. PORTER: Let's switch from the Moral Majority to Larry Flynt and *Hustler*. They came before your court, as well. What was that about?

JUDGE GREEN: This was a case involving *Hustler*, the magazine of Larry Flynt, which sued a photographer who had taken pictures of Elizabeth Ray, a person well known in the District of Columbia circles to be available for social reasons. She was a special friend of a number of Congressmen. Ms. Ray had posed for this photographer in her younger days, in the nude, and when there was a great deal of publicity concerning her and a certain Congressman,

this enterprising photographer contracted to sell this nude picture to *Hustler*. Later, he tried to withdraw from the contract, but *Hustler* did not permit this. Elizabeth Ray joined the lawsuit to prevent publication of her picture. Larry Flynt testified from a wheelchair, having been shot in an assassination attempt. It was an interesting and well litigated case, all the more so because of the colorful people who were involved. Often the persons are more interesting than the issues of the suit.

MS. PORTER: Joyce, in 1998 you had an immigration case, *Lee v. Reno*, that you mentioned as one you wanted to talk about. Would you like to explain why this is a case that you attach particular importance to?

JUDGE GREEN: It is a complex and novel case close to my heart, cited at 15 F. Supp.2d 26 (July 1998). Hsue Lee, a detained deportable alien, petitioned for a writ of habeas corpus to challenge the denial of his motion to reopen his deportation proceedings to seek a waiver of deportation based on his recently approved marriage to a U.S. citizen. This case raised two very important questions of statutory and potentially, constitutional interpretation. Did Congress intend only to streamline judicial review of final orders of deportation, or did it intend instead to remove federal courts from the picture altogether? If the latter intent, the question arises as to whether the constitution imposes limits on Congress' ability to sideline the federal judiciary in this context. The second question of interpretation concerns whether Congress intended one of the 1996 sweeping congressional changes to the nation's immigration laws to apply retroactively so as to eradicate all pending applications for a waiver of deportation filed by aliens facing deportation for reasons of prior criminal convictions. Lee, who has lived in the U.S. with his parents and siblings since he was eight years old, as a permanent resident, spoke

only English, was married with a child, admitted he was "deportable" because he had fired a handgun at some road signs in rural Virginia in 1988, had a series of citations for DWI, and had a prior burglary conviction. He sought a hearing which had been denied on his application for a waiver of deportation. Since his last conviction in 1989, he secured employment, joined AA and received alcohol abuse therapy. I held that, with respect to the two 1996 amendments to the INA, Congress neither explicitly nor impliedly repealed the grant of jurisdiction in 28 U.S.C. § 2241, to issue writs of habeas corpus to persons in federal custody, such jurisdiction having been continuously exercised for over 200 years (i.e., since 1789) and having at all times been available in immigration cases. Alternatively, had Congress intended such a repeal, then I held that the constitution requires that some court, other than an administrative court created by Congress, be available to inquire on habeas into the legality of a potential deportee's detention. Further, I held that the scope of such habeas review extended, at least, to pure issues of law as in the petition, also holding that Congress did not intend to extinguish applications such as Lee's, retroactively or elsewise. I directed that the writ should issue. The government appealed, and a few weeks later withdrew its appeal. More than two years thereafter, in September 2000, the Second Circuit decided a similar case, *Calcano Martinez v. INS*, holding as I had. The Supreme Court granted cert. in January 2001, and heard argument April 24, 2001. We await the decision.

MS. PORTER: In 1999, Joyce, you were back in court with Pat Robertson, with the Christian Coalition, and that was a case that you found memorable as well?

JUDGE GREEN: Yes, this involved the Federal Election Campaign Act. The Federal Election Commission (FEC) brought an enforcement action against Christian Coalition the nationwide ideological, religious corporation formed by Pat Robertson, for five stated

purposes: "(1) to represent Christians before local councils, state legislatures and the United States Congress; (2) to train Christians for effective political action; (3) to inform Christians of timely issues and legislation; (4) to speak out in the public arena and the media; and (5) to protest anti-Christian bigotry and defend the legal rights of Christians." The FEC alleged violation of federal campaign finance laws during congressional elections in 1990, 1992 and 1994, and the George Bush Presidential election in 1992. In August 1999, I issued an opinion that was about 116 pages. Too long, perhaps, but there was much to be said. The case presented two novel issues concerning restraints on corporate campaign related activities. Federal campaign finance law prohibits corporations and labor unions from using general treasury funds to make contributions, in cash or in kind, to a candidate for a federal office. Corporations and unions can make independent expenditures that are related to a federal election campaign, so long as those expenditures are not for communications that expressly advocate the election or defeat of a clearly identified candidate for federal office. One of first impression in this circuit, the issue had created, as I put it, a moderate division of opinion among other circuits. The question presented is whether express advocacy by corporations and labor organizations is limited to communications that use specified phrases, such as "vote for Smith" or "vote for Robinson," or whether a more substantive inquiry into the clearly intended effect of communication is permissible. The FEC advocated a substantive inquiry and alleged that the coalition had used general corporate funds to expressly advocate the election or defeat of certain candidates through a speech that was made by the coalition's then executive director Ralph Reed and by certain of the coalition's direct mail communications. The second novel issue related to how an in-kind campaign contribution is to be defined. According to the FEC, the coalition had spent

considerable general corporate funds in coordination with the election campaigns of certain Republican candidates and the National Republican Senatorial Committee (which the FEC referred to as coordinated expenditures), to produce and distribute millions of voter guides and congressional scorecards comparing candidates or incumbents' positions on certain issues. And although there was no doubt as to which candidates the coalition preferred (that could be read clearly through those materials), the FEC acknowledged that most of the voter guides did not expressly advocate the election or defeat of any particular candidate; but the FEC's theory was not that the election materials themselves violated the express advocacy limitation in independent corporate expenditures, but that the coalition's extensive consultations with the campaign staffs of certain candidates, regarding the distribution of its voter guide and other materials, turned otherwise permissible campaign materials into illegal in kind campaign contributions, giving new meaning to the saying that politics makes strange bedfellows, the coalition's position regarding coordinated expenditures was supported by amici, the American Federation of Labor and the Congress of Industrial Organizations, and the ACLU.

(TAPE 10 A)

MS. PORTER: This is a continuation of the interview being conducted on behalf of the Oral History Project of the District of Columbia Circuit. The interviewee is Judge Joyce Hens Green, the interviewer is Jennifer Porter. The interview is taking place at the judge's chambers on Sunday, March 11, 2001, and the time is 12:15 p.m.

JUDGE GREEN: *Buckley v. Valeo*, the Supreme Court's lengthy per curiam opinion, provided a partial First Amendment blueprint for restrictions on campaign finance while striking down or scaling back various Federal Election Commission provisions. In the Federal

Election Campaign Act, Congress had sought to restrict campaign contributions and expenditures equally, but the *Buckley* court read the First Amendment to require substantially different treatments of contributions and independent expenditures. Indeed, *Buckley* observed that virtually every means of communicating ideas in today's mass society requires the expenditure of money. It then reached its holding that restrictions on campaign contributions and expenditures are restrictions on political speech, and such restrictions are permissible only if they survive strict judicial scrutiny, concluding that the First Amendment permitted limits on campaign contributions, but not on independent expenditures by individuals. *Buckley's* analysis did not explicitly extend to the FECA provision limiting corporate and union expenditures that are at issue in the *Christian Coalition* case. In *Federal Election Commission v. Massachusetts Citizens for Life*, commonly referred to as *MCFL*, the court followed *Buckley's* two-step analysis, first declaring that express advocacy limitation also applies to the restriction on independent expenditures, but reaching a different result than *Buckley*, because the nexus between the government's anti-corruption interest in *Buckley* and the ban on corporate and union independent expenditures is much closer than was the case with individuals. Most courts that have considered the issue understand that *Buckley* and *MCFL* have separated permissible issue advocacy from impermissible express advocacy by a bright line, and those bright line rules of law (those that give the clearest possible advance notice or guidance to distinguish permissible from impermissible conduct) leave little room for the post hoc case by case considerations. But even those courts recognize that the context dependent nature of language introduces ambiguities that require case specific considerations. Having considered the relevant precedent, I understood the following attributes to be necessary to the application of the statute's prohibition on independent

expenditures containing express advocacy. The communication must, in effect, contain an explicit directive. That effect is determined first and foremost by the words used. More specifically, the express advocacy standard requires focus on the verbs. For example, in the cases when contemplating a phrase "don't let them do it," it shifted from the district court's focus on "it" to "don't let him." The distinction is tortured, but, in the *Coalition* case, I held that the verb, or its immediate equivalent (when considered in the context of the entire communication, including its temporal proximity to the election) must unmistakably exhort the reader/viewer/listener to take electoral action to support the election or defeat of a clearly identified candidate; the most obvious electoral action is to vote for or against the candidate. But, as the *Buckley* court recognized, when it included the verb "support" in its non-exclusive list, express advocacy also includes verbs that exhort one to campaign for or contribute to a clearly identified candidate. Therefore, the express advocacy standard covers only a narrow class of communications. While some have complained, understandably, that the express advocacy cannot be so limited as to easily be avoided by linguistic sleight of hand, I was compelled to conclude that that is precisely how the Supreme Court had narrowed the Act. *Buckley* had held that the FECA has too much bite; it recognized that the result of its narrowing construction rendered the FECA limitations on independent expenditures largely toothless. And so then I examined in the *Christian Coalition* case the three alleged acts of express advocacy that were at issue, looking strictly at the factual information that had been obtained through protracted discovery, making the legal analysis on that basis. As said earlier, in addition to alleging that the coalition engaged in prohibitive express advocacy, the FEC also alleged that the coalition violated the Act in relation to other communications, principally its voter guides. And while the

FEC had knowledge that those guides, which compared candidates' positions on express issues and were proliferated throughout churches in America, did not contain express advocacy, it asserted that the voter guides were not protected independent expenditures because the coalition shared information with various campaigns, including the 1992 reelection campaign of President Bush, to such an extent that the voter guides should be treated for the FECA purposes as literature distributed on behalf of the campaign. The FEC's view was that those expenditures on the voter guides were illegal, in kind, corporate contributions. *Buckley* and its treatment of coordinated expenditures as in-kind contributions, had left undiscussed the First Amendment concerns that arise with respect to expressive coordinated expenditures. An example would be for a television advertisement favorably profiling a candidate's stand on certain issues, which is paid for and written by the contributor, in which the advertisement does express the underlying basis for his support and does discuss candidates and issues, but for which the expenditure is done in coordination with, or with the authorization of, the candidate. I wrote in *Christian Coalition* that it can only be surmised that the *Buckley* majority purposely left that issue for another case, and in many respects, the *Christian Coalition* was that case. The two dissenting justices in *Buckley* drew the distinction on precisely the grounds I have referred to, stating that whether speech is considered an impermissible contribution or an allowable expenditure turns not on whether speech by someone other than the contributor is involved, but whether the speech is authorized or not. These were the facts that confronted us in *Christian Coalition*. The question presented was whether the First Amendment requires a limiting construction of the Act that would protect the coalition's expenditures in this case and, more specifically, whether the corporation's expenditures and voter guides, and get out the vote telephone calls, independent of

a campaign, or coordinated with a campaign (where the evidence shows that the corporation was privy to non-public information about a campaign's strategies and discussed the corporation's plans to make campaign-related expenditures in advance with the campaign) were matters that are implicated by this case under the First Amendment. As you can see, I have made this lengthy recitation because this very complicated case is exceedingly fact bound. It was a very difficult decision. I walked a tenuous line between *Buckley* and the subsequent cases and what was left unsaid. Our case ended with the decision essentially in favor of the Christian Coalition, although the FEC succeeded on a few fact bound issues. The coalition corporation had skirted just enough to come within permissible advocacy. As to matters concerning civil penalties, they were left for decision another day. This case was not appealed, the parties agreed to agree on what the statutory penalties were, they were paid and so we never reached chapter two in this case. We shall never know whether the divining forces would have agreed or disagreed with this court. At bottom, politics remain inextricably entwined with the actions of the Federal Election Commission, campaign reform arises chronically in the United States Congress, and reform action is persistently defeated. This case was troubling in many respects. A very difficult and thin line had to be walked between Supreme Court pronouncements, which obviously I must honor and give precedent to, and the fact that so much had been left unsaid; but had I made the decision in a certain way, it would somewhat alter the decision of both the *Buckley* case and succeeding cases.

MS. PORTER: You say repeatedly that you made this decision reluctantly.

JUDGE GREEN: I made the decision reluctantly because we stand bereft of law that would assist us in making these determinations. When *Buckley* didn't reach issues precisely,

it left so much unsaid that, as the dissent pointed out, the overall result was distressing. And so, the courts are going to be inundated for the foreseeable future, particularly in the District of Columbia where these cases are filed requiring decisions upon facts specific, and murky law, case after case, on pleadings filed four and five years after an election has taken place and long after the damage, if any, has been done.

MS. PORTER: How was this case perceived when you issued your opinion?

JUDGE GREEN: As you can imagine, I was the darling of some and the evil witch of others. Many editorials were published, a number stating that I had been too precise and tortured the reasoning; they would have preferred that I had thrown the rascals in jail. Of course, it wasn't a criminal case, but at bottom they felt that the Act was clear enough. Other editorials expressed an appreciation for my work and obvious comprehension of the difficulties all faced.

MS. PORTER: This was evidently a very difficult case for you, so let's make life a little bit easier for you now. We can go on and talk about your death penalty case.

JUDGE GREEN: You're a very interesting person, Ms. Porter, to think that a death penalty case is easier than a First Amendment case. This was the first death penalty case expected go to trial in the District of Columbia in about 50 years. It was well known that no defendant in the local court can be punished by death since the citizens of the District of Columbia voted overwhelmingly, years ago, against the death penalty. Were they to vote today, some experts opine, the vote would be opposite. Nonetheless, the only tribunal that could undertake a death penalty case was the D.C. Circuit's federal district court. In August 1999, I was assigned *United States v. Carl Cooper*, a single defendant charged by indictment with multiple counts of RICO (the pattern of racketeering activity by participation in the affairs of a

criminal enterprise), conspiracy, multiple counts of first degree murder while armed, ancillary counts of bank robbery, second degree burglary, felon possession of a firearm, and other firearm offenses, in the 48 counts.

MS. PORTER: This is the guy who walked into the Starbucks and shot up the store and some people. How does this become a RICO case?

JUDGE GREEN: He walked into the Georgetown Starbucks (Wisconsin Avenue). The store was closed. It was the end of the July 4th weekend. He expected substantial monies had been received by the store, multiplied by the activity over that three-day holiday. How did this become a RICO case? Cooper led a criminal enterprise (although with a small group of confederates) to perform a pattern of criminal racketeering activity. I appointed two excellent lawyers as defense counsel, each of whom was qualified for death penalty cases. We had to really track law new to the District of Columbia to decide who to appoint, what kind of a budget to establish, how to estimate the length of this case (because at that time it had not yet been determined whether the death penalty would be invoked; that was to be determined a few months later). At our initial meeting, all agreed to a prompt trial date of April 2000. This case was treated from day one as if it would indeed be declared a death penalty case, so that the work in investigations, in motions in discovery, experts' examinations, decisions on procedure and evidence would not have to be revisited.

MS. PORTER: How would it become a death penalty case? What is the procedure for that?

JUDGE GREEN: The reviewing committee of the U.S. Attorney's Office, which prosecuted this case, examined the totality of information provided both by the

prosecutors and by the defense counsel (to whatever degree the defense counsel wants to share information) and then, in consideration of both aggravating and mitigating factors, decides whether or not this should be a death penalty case. A recommendation is made then by the U.S. Attorney to the Attorney General of the United States. The U.S. Attorney at that time was Wilma Lewis, the Attorney General, Janet Reno. Janet Reno, in turn, convened a committee to ascertain the similar considerations as to whether this should become a death penalty case. She made that decision in early February 2000. Thereafter, the case was handled accordingly. Only the Attorney General can make that ultimate decision. In *Cooper* the recommendation by the U.S. Attorney was against the death penalty, but Janet Reno decided the jury should consider the death penalty. The lawyers asked an additional month to prepare; and they were given 22 days more. Trial was then scheduled for early May. From the onset of the indictment, all persons involved contributed massive efforts. My staff and I worked constantly on the huge number of motions. There were many hearings and status calls. The hearing on the motion to suppress his confession and other evidence (wire interception, physical evidence, photographic evidence) consumed four court days, resulting in a 68-page opinion in which I denied each of the four motions to suppress, concluding that his statements were "clearly voluntary, readily and eagerly initiated and provided free of coercion and duress." More jurors were summoned for this particular case than had ever been before in the District of Columbia. I requested summonses for 3,000 potential jurors, recognizing that by past statistical surveys about half never show (and we don't have the resources to go out and locate this half). In the *Cooper* case, this number would have left us approximately 1,500. Since the jury is not told initially that it is a death penalty case (we could merely tell them it was a case that would last three to four months, through the hot summer of

Washington), we accepted the fact that many jurors would never serve because of business and personal matters, as, for example, significant encumbrances on their ways of life, or a physical or emotional inability to sit for three or four months. We, of course, anticipated the impact of the death penalty issue. The jurors would be told of this the day they came to complete the questionnaire, specifically tailored to fit this case. Again, a huge number of jurors could not be qualified to fairly decide a death penalty case. Based on guesstimates, we might have a panel of 200 remaining jurors to work with.

MS. PORTER: Was your estimate correct?

JUDGE GREEN: We will never know. Our estimate was correct in the loss of jurors that didn't show, our estimate was roughly correct in the numbers that made acceptable excuses (each one of which I individually addressed as whether they had to be interviewed for the purpose of this jury selection), but at the end, when we awaited jurors for the questionnaire, we had perhaps 400 or 500 jurors left. Probably there would have been 175-225 jurors left after they were informed that it was a death penalty case. The jurors were to come in to fully hear about the *Cooper* case and for completion of the detailed questionnaire (which ascertained the juror's feelings about death penalty, murder, guns, confessions, high publicity). For fair trial and due process, we had to make sure the jurors were not influenced by these and other factors.

(TAPE 10 B)

JUDGE GREEN: Several days earlier the defendant had made it clear he wanted to plead guilty. The terms of the guilty plea, however, were not completed until three or four days before the jury questionnaire session, which we postponed until the day after the expected plea. Then, on the night before the day he was to plea guilty, a telephone call was

received in chambers, advising that there was a problem and that chambers would be notified the next morning as to whether the plea could go forth. At 8:00 a.m. the next day, pleadings arrived over the fax and were filed in the Clerk's Office (not under seal), requesting that the two defense counsel be permitted to withdraw from the case immediately, due to "irreconcilable differences," but asking me to appoint amicus to talk to the defendant. I took that as a signal (it wasn't so stated) that perhaps the problem could be resolved once the defendant had an opportunity to speak to independent counsel. I immediately ran through my mind the names of eminent counsel who, although always busy, might be readily available to the court. The amicus had to be highly respected, a household name that my defendant might recognize. At the top of my list I put one name (there were several others in the event this person was unavailable or didn't want to touch this case or had a conflict). I was also searching for a lawyer who did more white collar crime than street crime, because this would make it less likely that he would have had cases that would create conflict, due to our many witnesses with criminal records who were going to testify. I telephoned this lawyer, who was in his office. All I had to do was say, "This is Joyce Green and I need your services." Without even asking what these services would involve, he asked where I was and said he was on his way to the courthouse. I stopped him to say which case this was and what I needed from him; he immediately left his office and his very busy practice and (with his sole associate) came to the rescue. That was Plato Cacheris, a remarkable lawyer and special person. I am truly indebted for his service to the court and for his service to the defense and the prosecution representing the public's interest. He first talked to the lawyers, to familiarize himself with the problem, then talked to the defendant, who I had brought in immediately by the Marshals to the cellblock in the courthouse so that Mr. Cacheris could have quick access to him.

Shortly thereafter, Mr. Cacheris advised me that there was no problem, asked if he could he go to lunch and if I could have the court convene two or three hours later. He felt that the problem had been resolved. I did as suggested. I asked the government to wait in another room. In the courtroom I listened to ex parte details of the difficulty, heard from the defendant, under oath, heard from the defense counsel as to their present position on withdrawal, to establish what was to be done in the future of with the *Cooper* case. The defendant, as the court record will show, immediately indicated that he wanted his counsel to remain, that the night before he had expressed distress with the contours of the plea agreement, and briefly did not believe counsel were on his side. The moment they left, he told me in convincing terms that he realized his serious mistake; he wanted to call them, but was told a prisoner's opportunity to make telephone calls had expired for the evening, so he wasn't able to reach them. The lawyers agreed that they could responsibly remain as counsel now that this impasse had been resolved; Mr. Cacheris graciously had completed his responsibility to this case with the swiftness that a master lawyer can muster. I then brought the government counsel in and had a repetition, under oath, so there would be no doubt where this case would end. Mr. Cooper entreated me over and again to accept his plea to life in prison with absolutely no chance of ever seeing daylight again. The government understood now the reasons why all of this flurry occurred. I put off the plea until the following day so that the defendant could be examined by a clinical psychologist (who had remained present to testify at trial, and who had examined him before) to assure that this defendant knew what he was doing and was competent to proceed and wanted to proceed, as he had told us over and over again, with the same attorneys and with the plea agreement. The psychologist testified briefly, affirming Cooper was fully competent to proceed. The next day, in

a marathon session, I took the plea as to each count of the indictment. The taking of the plea began at ten o'clock in the morning and ended at about six o'clock at night; there was but a brief luncheon recess. The government had insisted he plead to each one of the 48 counts (dismissing one during the plea). As to each, I read the count, the defendant admitted his guilt, separately as to each element of that count, and the government said what it could have proved in each and every count. The defendant stated his agreement with the government's proffer and, in his own words, gave full details as to what he had done. I accepted the plea to each count, separately. That's why it took so long. But for a case of this difficulty, this gravity, it was essential to walk this very carefully, step by step, although as a judge I didn't think it was necessary to plead to 48 counts when he was going away for consecutive life terms on each of the three Starbucks murders, and also had received severe penalties for his other crimes, including a fourth unrelated murder, and another attempted murder, the nucleus of the federal RICO conspiracy. In the Starbucks matter, Cooper had planned with a cohort to commit robbery on the last day of the July 4th weekend of this particular year. He couldn't reach his confederate when he was ready to proceed. By this time the co-conspirator had decided to go straight, giving up crime, had really begun to turn his life around, but, had not shared that information with Mr. Cooper. And so, Mr. Cooper said since he couldn't find his cohort he "seized the moment of opportunity." As he explained, he left for the Starbucks coffee shop dressed in a black outfit, black mask, black sneakers. He entered with two guns blazing, forced the woman manager back towards the safe and directed her to open it; she refused and he shot her. He stood over her body and pummeled more shots into her. Then he turned to the two quivering men, her co-workers, who viewed this horrendous act, and shot both of them to death. I asked if he examined the bodies before he left

to see if any one of them were still alive. He said no, that wasn't part of his "agenda." He calmly returned to his work at an Internet firm, to his wife and a four-year-old son, going about his normal activities, but the demon within continued the commission of other crimes. Not only did he commit these three murders, years earlier he had decided that one of his conspirators needed a gun, so they rode through the streets of Washington, and when they saw a uniformed man through the window of a building, correctly surmised him to be a security guard and would likely have a gun, entered the building, whereupon Mr. Cooper shot this individual in the head and took his gun. There was another incident in a wooded and dark park when Cooper saw two persons in a car obviously making love. One happened to be a policeman, not in uniform at that time. The woman who was with the policeman was prepared to testify at the Cooper trial that she offered him $20 to not shoot them. He took the $20 and then he shot the policeman and left the scene. The policeman survived to be in court (dressed) at the time of the plea.

MS. PORTER: You said he had a job with an Internet firm? What sort of job did he have?

JUDGE GREEN: Mid-level employee at the Wang Corporation in Tyson's Corner, Virginia.

MS. PORTER: It seems an unusual background.

JUDGE GREEN: It was an unusual background. It was fortunate in many ways that this defendant was as intelligent and knowing and understanding as he was of all the ramifications of the investigations, the motions to suppress, the discovery, the impending trial, the plea, the sentence. He was absolutely aware of every stage of the proceedings. He enjoyed what he obviously considered a game between law enforcement and himself. He felt always that

he had the upper hand. Highly intelligent, personable, attractive, articulate, with a wife and son, a leader, never confused, a psychotic personality without a scintilla of remorse. What a time the psychiatrists will have during Cooper's life in prison, should Cooper elect to talk to them (and I suspect he will).

MS. PORTER: I know that you personally are opposed to capital punishment. How did you feel about having to handle the first case capital case in the federal court in the District of Columbia in so many years?

JUDGE GREEN: Since the federal district court has jurisdiction over the death penalty statute, I've asked myself repeatedly whether I would be able to handle such a case, since I have always been opposed to capital punishment. Inhumanity to victims does not require the ultimate inhumanity to the perpetrator (except, I believe, in a handful of instances, like the intentional Oklahoma bombing of the Federal Building causing 168 deaths). Statistically, we are told, the death penalty does not deter others from the commission of heinous crimes. How did I feel? It was a very difficult decision. When I received the case and knew that it was death penalty eligible, my prosecutor son asked if I could do this. I acknowledged that I had searched within and I could. In the first instance, it is the jury that makes the decision whether or not the defendant receives the death penalty, and then, and only then, the judge could, under the law, set aside that decision, lowering the penalty to life. I decided that I would be able to see the *Cooper* case all the way through, as my duty as a federal judge required. As it turned out, I never had to face the ultimate question, for which I am grateful. I do believe in the *Cooper* case that the decision reached by the prosecution and the defense was the most appropriate one also for the victims' families, each of whom had agreed to the life sentences.

MS. PORTER: You mentioned issues other than capital punishment on which your personal feelings may be different from the law that you're called upon to apply. Do you recall any specific instances in which your personal philosophy has been at variance with what you have had to do as a judge?

JUDGE GREEN: There are numerous occasions I could recite, but I'm going to let it rest with capital punishment.

MS. PORTER: You mentioned that one of the reasons that you were able to take the capital punishment case was, in the first instance, that the decision would be made by the jury. In your experience as a judge, how has the jury system worked? Do you think it is generally effective? Do juries generally come out with the right decisions?

JUDGE GREEN: For most of my years on the bench, and until the last perhaps five years, I found that the jury system worked superbly well, not perfectly, but certainly better than anything else that can be offered to the litigants in civil and in criminal cases. Most jurors carry out their responsibility impeccably, with earnestness, and with an intense desire to reach the right decision under the law, as the court had explained the law to them, and are not swayed by their personal inclinations. But in more recent years, the result often has been distressing. The jurors are asked, of course, the usual questions as to whether they can identify any of the parties, or the lawyers or witnesses, if they've heard anything about the case, whether they can accept the testimony of a law enforcement officer with the credibility that they would apply to any other witness, neither giving them greater credibility nor less credibility. You ask about their own experiences, as to whether they or any member of their family have ever been arrested or convicted for a crime, anywhere, anytime, or been a witness to a crime anywhere, anytime, or

been a victim of a crime. Some answers are taken at the bench, so the responses are more detailed, and, hopefully, more candid, and also so the jurors can further discuss, if necessary, potential/actual bias. There are occasions people tell you that they mistrust the police or that they or their relatives have been unjustly convicted of crimes; sometimes they say the conviction was just and the defendant is doing well now. Overall, the judge and lawyers try to know the jurors as best as they can to assure that when they approach the case they do it free from taint of publicity, free from taint of personal druthers and the like. It has become obvious in recent years that jurors approach cases differently. This is particularly so for defendants charged as felons with guns. When the jurors somehow for whatever reason, whether they accept this crime as a way of life and therefore don't believe in punishment, or whether they have been swayed by the miserable actions of some law enforcement people, such as frisking them roughly, kicking a leg out from where it is positioned at the wall, deliberately hurting an arrestee without justification, whatever it is, so many of our jurors, who call the police when needed, really distrust the police and their testimony. Although jurors have told us, under oath, they will treat the officer exactly like anyone else, the truth is, they don't; and many have known, even before the trial begins, that they would never accept law enforcement testimony. We know this from interviews with other jurors after a case has mistried and angry jurors tell us, the court, the lawyers and the defendant, that juror X entered the jury room saying, "I didn't believe a word that officer said," or "the officer must have planted the gun on the defendant" (even though there was absolutely no such testimony). Dedicated jurors are dismayed at the inability of other jurors to fulfill their duty and examine the evidence, and their determination, instead, to mistry the case, or force an acquittal. It is astonishing how jurors intentionally nullify a verdict. This became most noticeable after the

O.J. Simpson case. After the *Simpson* verdict, it was commented by many that the amazingly swift verdict, in a few hours only for a trial of many months, contradicted overwhelming evidence. It is equally distressing to hear professors of the law assert that minority persons have every right to nullify when they don't believe the defendant should have to face justice, conviction and punishment, even though the evidence has proven that the defendant committed the crime, indeed, even when the defendant admits commission of the crime.

MS. PORTER: As a society then, what solutions do we have for that problem? I mean, on a day to day basis, you're confronted with a jury. What sort of procedures do you use to counteract that phenomenon.

JUDGE GREEN: First of all, let me say, even before I get to my procedure, that as a result of frequent nullifications, over and over again in every courtroom, state courts, federal courts, in this courthouse before each judge, there are recommendations that legislation be enacted so we can proceed with non-unanimous juries in criminal cases. As example, 11 must vote in favor of guilt before that person can be found guilty beyond a reasonable doubt. Suggestions like that. Or to do as other countries do, live without a jury system. It has gotten to that point. There is such serious concern about the casual or skewed deliberations some jurors give to cases (most jurors are earnest, most are well intentioned and try hard to render a fair verdict on the evidence). It's something that may well change our system of justice unless nullification can be largely eradicated.

MS. PORTER: Why not have cameras in the courtroom?

JUDGE GREEN: The complaint all along has been that people act differently when cameras are thrust on them in a setting where they are aware of that presence. Witnesses, it

is feared, will either testify in a way that advances their own cause, or will testify for the camera, for the media, for the public. There are those concerned that the witnesses might be intimidated, may speak differently. There has always been this concern, and there is some justification that the witness may act differently, but today cameras can be positioned so they are really not obtrusive. For the first few moments and until you adjust, certainly you are more careful with your choice of words. It is a little less spontaneous. There may even be some acting. It does, briefly, alter the position of a person. Afterwards, you forget the camera is present and act normally, probably too normally. But, even those (as I) who favored cameras in the courtroom, almost all say no, not yet, until the climate has changed. There is a deep concern about the jurors. Our jurors want to know that they have security when they go home, that people will not target them as one seen on television the night before as part of the jury coming and going from X's trial. There are many concerns, and it may well be that the jurors also act to the cameras, to a lesser degree, when they sense the camera beam. This has happened in state courts where cameras are used. The jurors are initially entranced with the idea that a camera is being trained on them, and they smile, arch eyebrows, even put on makeup in front of the camera. They are not then listening attentively. Then I think many do forget the cameras, or at least are not constantly aware of it. But cameras do impact; they also could, someday, be used in such a manner to really illuminate court proceedings, and that could be very healthy. But I did stray a good deal from the question asked, what procedures do I take to try and prevent jury nullification and to work with that phenomenon that exists. There is so little a judge can do to prevent jury nullification other than continue to press ask the questions, to probe to the point where it's not just the answer the person gives, but it's the body language, the manner in which it's given, it's the

context to make you determine whether this is a juror appropriate to sit in judgment on this particular matter. In high-profile cases, in particular, because of their nature and the principals, and the need to weed out those who have been unduly influenced by their knowledge of this case, it's not uncommon to prepare a jury questionnaire in great detail. So much can be learned about a potential juror, about the types of activities that he/she engages in that may give a clue to the juror's disposition, and what the juror's attitude towards a particular charge might be, especially in a criminal case. The most illustrative example, of course, is the death penalty case earlier mentioned.

(TAPE 11 A)

MS. PORTER: Continuation of an interview being conducted on behalf of the Oral History Project of the District of Columbia Circuit. The interviewee is Judge Joyce Hens Green, the interviewer is Jennifer Porter. The interview is taking place in the judge's chambers on Sunday, March 11, 2001, and it is now 2:00 p.m.

JUDGE GREEN: The point I make is we must probe, we must examine, we must ask sensitive questions to ascertain whether personal philosophies or beliefs will, nonetheless, allow the jurors to make a fair and reasoned judgment in the case under the evidence and the law. The reason for asking if any judgment can be made is that jurors of certain religions (Jehovah's Witnesses, among others) believe that they cannot make a judgment because only God can make a judgment, and so, if selected as a juror, that person will never participate in a verdict. It is a serious, sensitive question. We accept the representation of the individual without further inquiry and that potential juror is dismissed from service.

MS. PORTER: You mentioned that there is some interest in, I guess in

Congress, in having juries that don't make unanimous decisions, or having juries with less than 12 people. Doesn't this raise interesting constitutional questions?

JUDGE GREEN: Of course. The matter must be examined thoroughly. I'm not certain Congress has anything yet pending, but certainly lawyers are advocating such legislation. There are law review articles about this, and it is in criminal cases, of course, where the greatest concern exists about one juror less than the 12 we have always had. In a civil case, by rule of court, for years now (we don't have alternate jurors anymore in a civil case) we can select up to 12 jurors for a civil case, but no less than six, unless the parties have so agreed. Five, with the parties' consent, can render the verdict. So we already have accepted inroads on jury selection.

MS. PORTER: There was something you said a few minutes ago, this is sort of suggestive of the topic you and I haven't really touched on, and that was jurors being concerned about their own safety. Is that a relatively new phenomenon as well in your experience?

JUDGE GREEN: I've known of this concern for years, perhaps a decade and a half. A note will be sent from the jurors who have already been admonished, when sent out to deliberate, to not tell us how you are voting, to not tell us how you are split, just tell us whether and when you are ready to give us a unanimous decision, yes or no. Then a note arrives saying a unanimous decision has been reached, and asking if the Marshals may accompany the jurors to their bus, to their homes, whatever the request is. To the court, that is a signal that the verdict is a conviction. I had one note that came in and said exactly that, and added, "We know that the defendant's friends are in the courtroom watching us." They were right. The defendant's friends were studying the jurors' faces intently, one by one. I put up a screen so that participants had full

view of all persons who sat in a certain area and most could see the jurors from their locations. I suspected the four, with locked arms and sitting closely side by side, were friends of the defendant. In fact, I talked to the lawyers during a recess and opined that, if those are friends of the defendant the jury seems very uncomfortable, I would suggest they are not doing the defendant any good being in here and glaring at the jury, but I'm not going to ask them to leave, since they are quiet. If the defendant invited them in here or they are watching him, we'll see what happens. But since the jurors appear concerned, I am ordering that a half screen be placed, unobtrusively, to block the jurors from the view of the four. Safety is always a concern. It takes courage to be a witness in a criminal case, it takes courage for the prosecution, and also for the defense. It certainly takes courage to be a juror in a case where horrible things have happened and the defendant is accused of doing these acts. As a juror, you must make the decision whether or not these matters did happen, and, if so, whether this defendant perpetrated the charged crime. Think how difficult it is for a juror to convict when that juror must return to the community where the action happened or where the defendant and his family live. Most jurors have read about "contracts" put on persons during the course of a trial and witnesses who have been assassinated before or after testimony. It takes heroism these days to do honorable service as a juror.

MS. PORTER: One of the other issues that I think we need to address here is the sentencing guidelines, which of course have affected criminal cases. How do you as a judge feel about the sentencing guidelines and how do they affect your work on a day to day basis?

JUDGE GREEN: It is astonishing to recognize that the sentencing guidelines have been with us only since 1987; it is less than 14 years since they went into effect. We deal

with them daily and in the case of each defendant who is convicted, whether through plea or through trial, that defendant is impacted by the guidelines. When the "guidelines" were promulgated, many judges were certain they were unconstitutional. Indeed, I felt so strongly about the unconstitutionality of these draconian guidelines, that when the Supreme Court was considering the very constitutionality of the guidelines, I began to give written judgments in two forms, both appearing on the same judgment page. One judgment was the sentence I would give if unencumbered, the second said, "Should the Supreme Court deem that the guidelines are constitutional, then under the guidelines your sentence will be – " It was generally a harsher sentence, but not always. The dual judgment avoided future transport of the defendants back and forth from the institution where they were incarcerated, also eliminating the safety concerns and the separation of the defendants from the continuity of prison life (education, health needs, work). This assisted the efficiency of the process and overall helped the defendant. Of course, the Supreme Court did declare the guidelines constitutional. While many judges continued to rebel inwardly at the injustice we believe the guidelines promoted, we have no choice but to follow them. Let me give some background on this. The original intent of the guidelines was to eliminate disparity in sentencing, a well intentioned goal, a noble goal, but you cannot dispense equal justice by playing the numbers game and by using a grid, which is what we have to do. Literally, use a grid to determine the fate of a defendant for the particular offense of which he or she was convicted. Most judges believe that judgment and discretion and common sense and individual application are essential when sentencing another human being, but now judges are required to say, “Mr. Jones, the guidelines show you are in criminal category IV, the offense level is 32; therefore, my discretion is 168-210 months. I sentence you to the lower end, 168

months (14 years)." Departures (exceptions) from the guidelines are uncommon. The guidelines exist because of relatively few cases where bad law was made and horrible sentences imposed, either much too lenient or much too severe. So, to make the process uniform and to avoid disparity, in came the sentencing guidelines at a time that the courts were confronted by a huge influx of drug cases which absorbed the full attention of the court. In fact, the interesting statistic I picked up the other day for our bicentennial, where I was addressing this problem with a panel I was moderating, is that 42 percent of the young African-American males in the District of Columbia, between the ages of 18 and 35, are under some form of criminal justice, be it, arrest, conviction, probation (we don't have parole anymore), or supervised release. It's almost impossible to consider that an accurate figure, but it is. And so, with the sentencing guidelines, let me give you some examples of the injustice we impose daily.

MS. PORTER: I was going to hop back for a minute, Joyce, to jury nullification. Doesn't that 42 percent figure make it very difficult to get a jury in the District of Columbia?

JUDGE GREEN: Of course, it is very difficult to get a jury. Not many available 18- to 35- year olds who are African-American, to so serve. It also makes it difficult to get a jury because many families live daily without a son, or husband, or cousin who is incarcerated or who is awaiting trial, or who died violently. If selected as a juror, no matter how one may try to focus on the facts and law relative to the defendant on trial, it is inevitable that memories exist of the incarcerated or deceased relative. How does this fact impact on the judgment of that juror? We shall never know.

MS. PORTER: Feel free to go back to the sentencing guidelines now, Joyce.

JUDGE GREEN: Let me give you a couple examples of the unfairness of the sentencing guidelines, and, in particular, the evil of coupling statutory mandatory minimums with the guidelines. Let's say there is a drug conspiracy. Common sense dictates that the leader of the conspiracy, if convicted, would receive the harshest sentence. Under the present system of mandatory minimums with the guidelines, the leader frequently receives a lighter sentence than his or her co-conspirators because the leader is usually capable of providing information to law enforcement that allows him or her to obtain a significant reduction in the sentence and a departure if the prosecutor so requests from the statutory mandatory minimum.

MS. PORTER: Are you talking about information about people further up the line or are they giving information about people lower down?

JUDGE GREEN: It can be both. The government does not give much credit to a defendant who gives information about the people lower on the scale. What, understandably, law enforcement wants are those higher and higher on the pyramid of crime. After all, it is common to convict the top, the leader, by testimony from his former cohorts who go undercover and/or inform, and the co-conspirators, in turn, for this cooperation in bringing the leader to trial or plea, will be rewarded by a lesser sentence recommended by the prosecution. This is clearly a useful tool of law enforcement. The knowledge of mandatory minimums and guidelines, and the skill in application, by the preparation of the indictment, predicts the future of the case. The charge by the prosecution sets the parameters for trial or for plea negotiations; it is a vital tool in the hands of the prosecutors. All of this has removed the discretion of the judges and has allowed the prosecutor to define the outcome. But minor persons in the same drug conspiracy know little, if anything, and won't be able to provide the substantial assistance required; and

therefore won't be eligible for a departure from the guidelines or mandatory minimum. So this person at the bottom of the group can be incarcerated for 10 or 20 years, depending on whether there has been a prior conviction and, more importantly, the quantity of the drugs involved in distribution or possessed with intent to distribute. This could be (and has been) a one time courier found in possession of a large quantity of drugs charged with possession with intent to distribute. This means a mandatory minimum of 10 years or 20 years. This could be a first offender who, at age 18, is going to spend the next 20 years in a federal institution. Judges confront this type of situation frequently. The guidelines say incarceration is for punishment and warehousing, not rehabilitation. I remain hugely concerned, not only about the injustice we are required to impose, but for the future of my children, grandchildren, and yours, who will someday encounter such a defendant upon his release, not rehabilitated, unemployed, poor, uneducated, angry, and ready to tackle society. A very dangerous situation we have fostered here. One of my colleagues, known as a law and order judge, a former U.S. Attorney, told the judges he was brought to tears by the uneven justice he had to administer. He described a scenario much like the one I've just outlined. He related how he had to turn away from the audience in the courtroom and face the wall so that no one would see the tears trickling down his face as he had to impose a very heavy sentence on the lowest member of the conspiracy, while he gave more lenient sentences to others at, or near, the top of this conspiracy. We do this everyday; we know it is unjust. It is so difficult for a judge to ladle out sentences you are absolutely certain are unfair, but you have no choice, you must follow the law. Very sad, very disturbing.

MS. PORTER: Is there any movement to reconsider the sentencing guidelines, politically at least?

JUDGE GREEN: Oh you hear about "reform" every once in a while, that they'll get rid of the mandatory minimums or lessen the terms, that they will do something about these guidelines, but there have been few changes downward, only upward, and more severe. The construction of penitentiaries continues. Most judges in senior status (who can select their categories of cases) go out of the criminal draw because of the sentencing problems because they can no longer stomach what they are compelled to do in sentencing. And there are judges who will try the criminal case and insist that another judge sentence if there is a conviction. I inherited the case of Charles Campbell from Judge Oberdorfer, who recused because he felt so strongly that way. Charles Campbell had a record, was a drug addict in his forties, who received a piece of crack (he had cooked crack from powdered cocaine) as reward for his cooking role in this drug distribution conspiracy. The leaders were sentenced, as they should have been, to long terms; Campbell had to receive 20 years to life. Judge Oberdorfer unsuccessfully tried to depart. I wrote an opinion deploring the sentence I had to impose. President Clinton reduced the term to time served (six years). Campbell was freed appropriately, but still serves the time of release I had also imposed.

MS. PORTER: We've talked about a number of cases where you have given decisions that were controversial or were a source of a lot of public debate, and I assume that many cases have been appealed, so perhaps it would be timely now to touch on the relationship between your court and the court of appeals. How does it feel when your cases go to the court of appeals and they disagree with you? Of course they may not disagree with you.

JUDGE GREEN: It's kind of you to say so. In my 33 years as a judge I cannot count the number of cases that I had, much less the number of cases I've had that have gone to

the court of appeals. I cannot state the number of cases in which I have been roundly affirmed, partially affirmed, fully reversed, partially reversed, remanded. This happens to every judge. Overall, I'm satisfied with my record. As an aside, I will tell you what happened the very first time I was reversed, when on the local court (and I was 99 percent plus affirmed by the D.C. Court of Appeals, in my 11 years on the Superior Court). The lawyer for the appellant was also a friend, and I promptly marched to my personal address cards and pulled out his card for destruction. After I thought about it for a day or two, I returned the card to my roster list, but that was my initial reaction to my first reversal. After that I hope I became more tempered. I have not agreed with a negative decision of the appellate court on a number of occasions, some of my colleagues react similarly, but more vociferously. It's an expectation that most cases will be appealed. Judges can't satisfy both sides unless the case settles, and then litigants and lawyers sometimes are only partially satisfied. The fact is we are in an adversarial system, one brings a case against another, be it corporate, be it individual; one wins, one loses. The one that loses usually takes the matter to the court of appeals; more often than not he is not vindicated and the judge is. It is inevitable that there will be tension between the reviewing appellate court and the district court. The district court is on the first line, sees the individuals and deals with the case in progress, including minutiae. Most of the time the appellate court renders scholarly interpretation of the law and either agrees or disagrees with the way the district judge interpreted the law. There are times that the court of appeals overreaches when it examines and determines the credibility of the witnesses never seen or heard. The trial judge's evaluation of the credibility of the witnesses he/she saw and heard (and examined in context of all other evidence) used to be wholly accepted. So it shocked me, about 15 years ago, when a circuit appellate judge called to

apologize for having reversed me in a case in which he had determined the credibility of the witnesses differently than I. When I gasped and asked how can an appellate judge evaluate the credibility of the witnesses not seen or heard, he said, "Well, there's something novel everyday, isn't there?" I am still aghast about this, but I have observed it happen time and again to other judges as I read the decisions and hear their remarks at the lunch table we share. Our court of appeals has a very different attitude. While several of the appellate judges are friends, I never, ever, discuss cases; I just won't discuss a case with them which they may review some day, or on a case which they have concluded. It makes our conversation a little sterile, but friendships can endure this way. I firmly believe that, but it is disconcerting to read an appellate opinion which says "X" was not in the record, or the district judge must have overlooked this sentence, when, in fact, the district judge did examine the record, did not overlook a sentence, and this is patently obvious when the district judge's opinion is read. It makes a district judge wonder if her opinion is read in the appellate court. There is no way we can defend ourselves by saying not so, not so, appellate judge. The circuit's opinion has issued, been sent out for publication, and distributed. It's over. All you can do is gnash your teeth and say, well, better day tomorrow. The district judges certainly talk about such things among themselves, as we know what I've described is not a rare occurrence. But I think in most instances appellate judges do try to "get the record straight." They may not have had the experiences we district court judges have had. If the appellate judge had never been a trial judge, this does create difficulty in fully understanding the climate in which we work, the climate in which the litigants come, the things we see (like body language and facial expression), it's more than just the words expressed. That assists in perceiving credibility, in discerning facts, in evaluation of cases, in testimony to the arguments,

in observing people approach the courtroom, in watching the ongoing asides or whispers to others. It is impossible to make a record of every nuance, body movement and the like (particularly when a jury is present). You would be stopping every minute to make the record, but you do the best you can, realizing that your record is the mirror through which the court of appeals has to view this. And so, tension will always exist. There are many times I'm grateful to be reviewed, the best example being a death penalty case. I do not argue against the existence of an appellate court. It is good that we have an impartial system of review. I just decry, sometimes, the manner in which the review is approached. I have sat on courts of appeal, by invitation, numerous times (both on the local D.C. Court of Appeals and the U.S. Court of Appeals for the D.C. Circuit). Later, in conscience, I chose not to sit again on the appellate court. Many times I have been asked what does happen in a trial court, how do you handle this, what did they mean when they said this? If an informed judge is not on the panel to give that information, then perhaps the appellate judge knows, or guesses, perhaps not.

MS. PORTER: You said in conscience that you don't sit on the court by designation any longer.

JUDGE GREEN: I knew you'd pick up on that. There are a couple of reasons. One is I was asked to sit on the cases of my fellow district judges and I found that difficult. If I could have affirmed them all at the time, not so difficult. But I found it very difficult to sit on cases of people I know so well, and am so very fond of, but I knew so much about them that really, it became to me a conflict. Were I to review agency cases or something neutral, no problem. That was one concern, and the other concern was with some panels' (certainly only some, not all) casualness, even mockery, with which they view the district judges' labors. We are

asked to write opinions, we are asked to provide findings of fact in our written opinions, we are asked to set it out so the court of appeals can truly review this. Astonishingly, some judges on some panels I joined made it strikingly clear, unhesitatingly, right in my presence, that they had never read the opinion of the district judge whose case they reviewed, or, if read, some laughed about style, the judge's family life, as well as the legal conclusion. All they had to know, they said, was whether the district judge granted or denied relief, and what that relief was. They just ran roughshod over the trial judge's opinion. It was clearly a matter a judge had worked on for days or weeks, for months sometimes, and had tried to make as clear as possible. When I would defend the opinion, one or more circuit judge would cough and claim they don't read those opinions. Even if I agreed with the panel's legal decision, I just could not accept that attitude and the personal criticism of my fellow judges.

MS. PORTER: Well did they offer philosophical reasons for not doing that? Was it part of their approach to reviewing?

JUDGE GREEN: It was, in effect, who cares, unimportant. It was hard to deal with. There were other cases, of course, most, where the panel judges were extraordinary, brilliant, who knew the case intimately, considered each case thoroughly, who earnestly strived to give the fairest understanding of the law to that particular case they were reviewing. And when they revised, they did not cast snide remarks. You had to respect and honor those judges. Also, when I was invited to sit and did, it was for four days at a stretch; that meant 16 cases on the panels that I sat on for years. I was asked to do this often and selected to write the opinions for several cases, sometimes only the unpublished opinions, and on occasion the full opinion. It takes an incredible amount of time because our district court caseload doesn't go away. We have

an independent calendar that I'll address later, if you want me to, and this means that nobody else is going to take over the cases when you're not there. So at the end of a long day on the court of appeals, I'd return to chambers, work on my district court cases, go back the next day to the court of appeals, and so on. And while I appreciated both activities, I am a trial judge in deed and in spirit, and ever shall be.

MS. PORTER: These were only D.C. Circuit cases? So there isn't any place – since you mentioned before you had a problem sitting on cases that some of your close colleagues on this court had ruled on – do you get around that problem if you sit by designation on some other circuit?

(TAPE 11 B)

JUDGE GREEN: To sit in another circuit on cases of their trial judges (particularly if I don't know them) wouldn't be too great a problem. Yes, I could request to serve elsewhere, or if asked by the appropriate committee to serve temporarily in a jurisdiction where vacancies exist and there is a need for judges, I could readily do so. I knew very well the people who chaired those committees. I would have been assigned wherever I may have chosen to be had this been my inclination.

MS. PORTER: We've talked about the court of appeals. In your time as a judge did you have cases go to the Supreme Court?

JUDGE GREEN: I did. I had a number of cases that went to the Supreme Court, but will mention only a few. In 1981, a decision implicated both banking law and administrative law. *A.G. Becker, Inc. v. The Board of Governors of the Federal Reserve System*, cited as 519 F. Supp. 602, was reversed by the circuit court at 693 F.2d 136, and the Supreme

Court reversed the circuit court (6-3) in 468 U.S. 137 (1984). The case was a challenge to the efforts of a state commercial bank to enter the business of selling third party commercial paper, requiring interpretation of the Banking Act of 1933 (Glass Steagall Act), legislation enacted to restore public confidence in the financial markets at the time of the nation's Great Depression. The Supreme Court agreed with my decision that commercial paper fell within the plain language of the Act and inclusion of commercial paper was fully consistent with the Act's purposes. Commercial paper was held to be a "security" under the Act. Times have changed; the result would be different today. In 1988 public interest groups filed suit against the U.S. Department of Justice seeking declaratory and injunctive relief in connection with the Department's longstanding use of the American Bar Association's federal judiciary committee for evaluations of the qualifications of nominees for federal judgeships. *Washington Legal Foundation v. U.S. Department of Justice*, 691 F. Supp. 483, affirmed, 491 U.S. 440 (1989), 8-0. The circuit court was bypassed and the case taken directly by the Supreme Court, unlike its action recently in the *Microsoft* case. The ABA's investigations, reports and votes on potential nominees are kept confidential, although its rating of a particular candidate is made public if he or she is in fact nominated. The public interest groups had sought, and been denied, the names of the potential nominees and the reports and minutes of the ABA's meetings. I ruled that the ABA committee was an "advisory committee" under the Federal Advisory Committee Act (FACA), which requires notice of the meetings, open meetings, and the availability of its reports and minutes to the public, but that "FACA cannot constitutionally be applied to the ABA committee because to do so would violate the express separation of nomination and consent powers set forth in Article 11 of the Constitution and because no overriding congressional interest in applying FACA to the

ABA committee has been demonstrated." Justice Brennan, on behalf of the Court, concluded that this was a close case, with competing arguments based on FACA's text and legislative history both plausible. Nonetheless, the Court held that that background "tend(ed) to show" that Congress did not intend FACA to apply to the Justice Department's confidential solicitation of ABA views and "sound sense counsels adherence to our rule of caution. Our unwillingness to resolve important constitutional questions unnecessarily thus solidifies our conviction that FACA is inapplicable." With that conclusion, I was affirmed. This certainly has much interest since President Bush has indicated his intention to not use the ABA in any respect in his selection of federal judicial nominees. As you can see, Jenny, I have gathered some of the opinions so that I can recite more accurately and quote exactly, when appropriate. This aids materially, as I recall the past 22 years of judging in the U.S. District Court. The case of *Hechinger v. Metropolitan Washington Airports Authority,* had a long relationship with the courts. In 1987 the Secretary of Transportation (Elizabeth Dole) entered into a long-term lease of the Washington National and Dulles International Airports to the Metropolitan Washington Airports Authority, an independent regional authority created 2 years earlier by compact between the State of Virginia and the District of Columbia. Prior to this time, the airports had been operated by the federal government. Congress conditioned the lease on the Authority's establishment of a Board of Review consisting of nine Members of Congress. Requirements included the board's consideration and approval of most of the work of the Authority. This, the Supreme Court held in 1991, reflected that the board was vested with power that violated the constitutional doctrine of separation of powers. Six months later Congress enacted amendments that effected major changes in the composition and powers of the board. In 1994 I held that the amended Act was

unconstitutional (again) in that the major changes continued to permit the board to exercise impermissible control over the Authority, 845 F. Supp. 902. Circuit Judge James Buckley (former U.S. Senator from New York) wrote the court of appeals opinion, 36 F.3d 97, affirming my ruling that the board continued to be an agent of Congress in a sufficient exercise of federal power to violate the separation of powers doctrine. In the rapidly evolving area of employment law, and in particular, employment discrimination law, I was gratified that Judge Harry Edwards, senior on the panel and also in the majority, recognized my enthusiasm about the case and suggested I author the opinion for the circuit court on which I was sitting by designation. Judge Williams wrote the dissent. *Hopkins v. Price Waterhouse*, 825 F.2d 458 (1987). Judge Gerhard Gesell, my colleague on the district court, had been the trial judge. (In large part, he was affirmed, but never could stop twitting me subsequently about the relatively minor issues where he had to be reversed.) This was the case of a female manager at one of the nation's "Big 8" accounting firms, who had generated more business for her company and billed more hours than any of the other 87 candidates for partnership, but was, nonetheless, denied partnership. Comments from the evaluating partners centered on her difficulties with staff and her overly aggressive, unduly harsh impatience with staff and her demanding manner. A number of these complaints were couched in terms of her sex. We held (2-1) that ample evidence supported finding that the partnership selection process was impermissibly infected by stereotypical attitudes towards female candidates; Ann Hopkins' showing that she was treated less favorably than male candidates because of her sex was sufficient to establish discriminatory motive, and the gender stereotyping played a significant role in blocking her admission to partnership. We ruled further that the partnership failed to demonstrate by clear and convincing evidence that

impermissible bias was not the determinative factor in denial of partnership. We concluded by holding that the denial of partnership and the failure to renominate her for partner amounted to constructive discharge, entitling her to compensation for the period between partnership denial and her eventual resignation. One of my proudest moments came when the Circuit Judge Ruth Bader Ginsburg (not on the panel, but who had received a copy of the draft opinion circulated among all non panel members, as is customary) telephoned me at home in excitement to enthusiastically comment that I had advanced the state of employment discrimination law "hugely." To hear this from such a respected world authority in this area of law, who was also a good friend, had me dancing on clouds. The clouds separated a bit, bringing me to earth, when the Supreme Court (J. Brennan), 6-3, reversed on the burden of proof required by the employer, ruling that since the lower courts required Price Waterhouse to make its proof by clear and convincing evidence, we had not determined whether Price Waterhouse had proved by the less stringent standard, preponderance of the evidence, that it would have placed Hopkins' candidacy on hold even if it had not permitted sex-linked evaluations to play a part in the decision making process. The case was remanded for that purpose under the preponderance standard. Other than which burden of proof was the correct one, my opinion advancing the law was fully approved and became the law of the land. Then Congress, lobbied by industry, changed the sex discrimination part of employment law, in large part (the legislative hearings reflect) due to the Price Waterhouse case.

MS. PORTER: You had other discrimination cases.

JUDGE GREEN: In 1997 I ruled that a temporary employment agency could be held jointly liable under Title VII if it knows or should have known of discriminatory action by

its client and failed to take corrective action. *Caldwell v. Service Master and Norell Temporary Services*, 966 F. Supp. 33, issued in 1997. It was not appealed and has been cited as the leading case in this area, EEOC Policy Guidance on Contingent Workers, December 1997. *Williams v. District of Columbia*, 916 F. Supp. 1 (1996) (I know I'm going back and forth on dates here) involved a female District of Columbia correctional guard who brought action against the District of Columbia alleging sexual harassment by her supervisor in violation of Title VII and deprivation of her Fifth Amendment rights. She asserted many things: assault, battery, negligent training, intentional infliction of emotional distress. I granted in part and denied in part the motion to dismiss for failure to state a claim. But the important part of the case, for advancement of the law, in the first such ruling in the District of Columbia, is that Title VII applies to cases involving sexual harassment by a supervisor of the same sex. There had been other decisions reaching (impliedly or in dicta) the same conclusion, that same sex sexual harassment was actionable under Title VII, as, for example, a 1995 case in the Seventh Circuit, but Williams was the first from our jurisdiction. Essentially I held that, as is obvious, Title VII broadly prohibits all forms of sex discrimination, this includes sexual harassment, and I found that Title VII made no distinction based on sexual orientation. The determinative question is not the orientation of the harasser, but whether the sexual harassment would have occurred but for the gender of the victim. So, I wrote that, absent compelling and contrary legislative history, federal courts were obligated to apply statutes as written. Title VII is written to protect victims of sexual harassment who are harassed because of their sex. There is no legislative history that suggests that victims of sexual harassment must be sexually harassed by the opposite sex before they may invoke the protections of Title VII. Had Congress intended to insulate sexual harassers from liability, as

long as those sexual harassers selected their victims carefully, not only should Congress have spoken more clearly, it should at least have said something. (laughter) Since this decision, the Supreme Court, opining on another case, has spoken in agreement. Once memory is opened a bit, it is swept open wider and wider as thoughts brim over, each evoking others. Of course, here were so many other cases important to the nation, to the litigants, to the judiciary and to me. But this oral history is already far too lengthy and must come, soon, to its close.

MS. PORTER: Apart from being a judge of the district court in the District of Columbia, you've also been appointed to the Foreign Intelligence Surveillance Court. Can you explain what that court is and how you came to be appointed to it?

JUDGE GREEN: The U.S. Foreign Intelligence Surveillance Court (FISA) reviews applications made by a federal officer, in writing and under oath (heavily scrutinized for classification as top secret, etc.), for electronic surveillance anywhere in the United States, specifically setting forth the mode of surveillance requested, the precise place and target of the surveillance and the anticipated duration. The application requires the approval of the Attorney General (often the federal officer and applicant and Justice Department lawyer must fly to wherever the Attorney General may be that day for the essential signature), and the Attorney General must certify that the application satisfies the statutory criteria and that this requested order is vital to national security and/or involves international terrorism. Like certifications must be attached from the directors of our various law enforcement agencies. With complete history of the matter before the court, including results of the most recent surveillance, the most recent facts known about the target, and an explanation of why the surveillance is being requested this time (or, if so, for the first time), the judge, if she or he finds probable cause for the issuance of

the order, enters an ex parte order approving, modifying or denying the application. If there is denial of the application, the case can be appealed to the three judges comprising the court of review, or the application can be withdrawn. A target is a foreign power or an individual agent of that foreign power. The orders are for one year, renewable as appropriate, if the target is a foreign power; for an individual agent of a foreign power, the order expires after 90 days, unless renewed. Each renewal is by application with the same safeguards and criteria already noted. Essentially, and the statute controls, electronic surveillance includes the acquisition by an electronic, mechanical or other surveillance device, of the contents of any wire or radio communication sent by or intended to be received by a known U.S. person in the U.S.; or to or from a person in the U.S. No information acquired in this manner shall be disclosed for law enforcement purposes unless for use in a criminal proceeding with advance authorization of the Attorney General. If any of the gathered information is to be used in a criminal trial, the aggrieved person must be notified of this by the government and can file a motion to suppress such evidence obtained or derived from such electronic surveillance. That district court reviews the matter, in camera and ex parte, and makes a determination. If the motion to suppress is denied, that becomes the subject of review before a circuit court of appeals. All circuits which have ruled, as have most, on the constitutionality of the procedures and the particular order at issue in these cases, have found the procedures constitutional and to be valid. The Supreme Court has never granted cert. There is so much curiosity about this "secret court" that I have partially described the operations of FISA. All I have related, and more, can be found at 50 U.S.C. § 1805, *et seq*. For those who are even more interested, there are quite a number of reported cases throughout the nation which relate an idea of the scope of the activities (these

have been well publicized criminal cases against spies, IRA, a state murder case (either the Sixth or Eighth Circuit had this fascinating matter). The media, also, in addition to the above cases, has often pronounced the involvement of FISA when it becomes known that a defendant has been so targeted.

MS. PORTER: So, for example, Aldridge Ames or Walker or Jonathan Pollack, these are names that have been in the press in recent years as people who spied for foreign powers.

JUDGE GREEN: Right. When I say right, I cannot confirm or deny, everything you suggest, save for one. Truly, there is little I can talk about concerning the court. I can tell you what the statute says. I can tell you that there are seven judges who comprise this national court, although we sit individually to review and hear applications. I can tell you that the appointment is a maximum of seven years; a judge is not eligible for redesignation, and there are shorter appointments when one replaces a judge who is unable to complete the term, and that there is but one judge from any given judicial district at a time. The appointments are made by the Chief Justice of the United States and the Federal Bureau of Investigation performs an intense investigation taking months, a far more invasive and probing investigation than other federal judicial appointments.

MS. PORTER: You mean the FBI is vetting judges to see whether they can be appointed to this court?

JUDGE GREEN: They examine every particular of your life back to birth, your siblings, your relatives, your parents, your friends, your husband, every association you ever had. I had so many I listed them by decade and had to confess then that probably 55 years ago boys

were not permitted to join the Girl Scouts. I was relieved to share that the Women's Bar did have (associate) male members. The investigation is extraordinarily detailed, I'll come to that in a moment.

MS. PORTER: And the Chief Justice makes these appointments on his own?

JUDGE GREEN: He makes these appointments. They're made from sitting district judges who have already been confirmed by the United States Senate. I received a call in 1988, from Chief Justice Rehnquist, asking if I would consider serving on this court. I was completely surprised. I had no idea there was a vacancy, I had no idea that I was under consideration for that vacancy. He asked if I knew about the court. I paused and when I said, "I'm a quick study," he laughed heartily. The Chief asked if there would be any hidden reason I couldn't serve. He said that when I was formally appointed it would become the most important matter I could ever do as a federal district judge, i.e., preserving the national security of our country and protecting us from international terrorism. And while I certainly couldn't disagree, I would like to think that I have done a few other important things along the way, and perhaps moved justice slightly forward with all these 33 years in the judiciary. Nonetheless, I was humbled with the opportunity and, of course, accepted. The next day, three agents of the Federal Bureau of Investigation gathered in chambers to examine my life minutely. I answered inquiry upon inquiry. They took my fingerprints, unsuccessfully. They returned the following day and took my fingerprints, again unsuccessfully. The third time, when they once again came to take my fingerprints, I delicately suggested that we let the United States Marshals in this courthouse, who are very conversant with taking fingerprints, do the job. We went downstairs, the Marshals performed and apparently I passed muster. Indeed, every part of my hand was utilized for this

purpose. I ghoulishly told my kids that if anything happened to me, and a sliver of my palm passed in the wind, they could say, "There goes mom!" The investigation, as I indicated, was so detailed. It was important the FBI learn of every foreign country I had ever gone to at any time in my life, and for how long. This proved challenging, since there was a period before I became a judge that my husband and I, every year, would travel with the D.C. Bar Association, for perhaps five days, to some foreign country, get a little bit of legal training, but mostly vacation. I called the bar association to ask exactly when was this trip to Canada? When was this trip to Austria? When was this trip to the Caribbean? In any event, in 1988 I was selected as a judge of this court. The then presiding judge (Chief Judge) was a former Congressman from a distant state who asked if I would serve as his delegate and do the activities of the presiding judge for him. I did that for two years, and when his term expired the Chief Justice appointed me as the presiding judge for the balance of my term. So, I served on the FISA Court from 1988 to 1995, at the same time not diminishing my full load in the district court. Each year, all FISA judges met with the Chief Justice, with the Attorney General of the United States, with the head of the National Security Agency, the Director of the CIA, the Director of the FBI, and other intelligence officials. We used the Supreme Court facilities for this purpose and the Chief Justice always joined us for the luncheon. There were other meetings in the interim to determine the course of action as law was evolving and as particular matters became of special interest in our work. I cannot discuss cases. The FISA judges have the highest security clearance, the same security the President has. It was sort of a downer and an upper to learn this, because I always thought I had the highest security as a district court judge and then found out I didn't. But then I got it. So, it was one of those things that one learns very quickly to adjust to. It was an enormous honor to serve. People

ask whether I received extra pay for this; the answer is no, just the honor of being able to be on duty for 24 hours a day, seven days a week, for seven years. Since I was Chief Judge and handled all emergencies for the U.S. (and there were so many!), I always advised where I was going, how I could be reached, whether I was on vacation or even when I left this jurisdiction for a day or two. If an emergency arose, which it always seemed to do, I would be available, or another judge in the immediate vicinity or close by could be available. If not, they would have to locate another FISA judge to do duty. When the Gulf War broke out, I was in North Carolina at Duck, on vacation with the family. When I heard about the happening, I knew that the court would be in some manner most likely implicated, and, therefore, I checked with Justice (from where all applications flowed) to see if my services were needed; the response was it was too hard to get to Duck, so instead the agents were going to go to Minnesota, to Judge Devitt, a FISA judge. But there were cases where it was so imperative that the most sensitive security be in effect that I handled exclusively. I assigned my judges for periods of time to come to Washington so that one judge was here twice a month, every month of the year, to handle assignment of cases that built up over the intervening period. Some cases have to be renewed periodically, depending on the nature of the case; others less frequently, and others were new or not renewed. One of the things I am most proud of was requiring the intelligence forces to be absolutely current with information provided. I had no objection (in fact I encouraged) to inclusion of the details of the past, before the present application was made, but it was important to know what had occurred since the last application was granted. While our decisions are made on probable cause, which is not an exacting standard, I wanted to be certain that the information was very much the kind of thing looked for when a judge is asked to authorize a search warrant.

All of the applicants who provided this information are sworn, always accompanied by a Justice Department lawyer who had helped prepare the application and the papers. In this way, questions could be asked both of the affiant as well as the lawyers. The intelligence service requesting the application, as example, the FBI, the Director, would have to sign and certify under oath that the order requested was necessary to national security and/or for protection from international terrorism. I have already discussed basic procedure. I started to say that there were cases in which it was mandatory that only as few people as possible handle the case, to lessen the opportunity for a leak. Such a case was that of Aldrich Ames. I mention this now only because Attorney General Janet Reno elaborated on this after that case went to conviction by plea. She discussed my role at an awards ceremony for the Department of Justice. Since I couldn't be present at that ceremony, a videotape was presented with a brochure outlining my role as Chief Judge of FISA and the particular case, which was widely circulated to thousands of Justice employees and others. General Reno insisted on presenting me, in chambers, the Attorney General's Edmund Randolph Award, the top award of the Department of Justice, for my service to the FISA Court. She told the world that I had monitored the Aldridge Ames case from beginning to end and that it was because of my efforts that he had now come to custody and to conviction, and that it has been a formidable and lengthy task. I guess she knew that when I was on vacation in Dewey Beach, Delaware, as a hurricane was momentarily expected, the agent and lawyer flew from Washington to Delaware, seeking assurance that I would be present when they arrived. My short answer was, the police have already been here with an evacuation warning and, if they returned and told us to leave for shelter, the agent would have to find me on the road somewhere. I illustrate that only to say that it was important for matters that needed an

emergency order, that I be available, and I was. I grew mightily impressed with these law enforcement agencies, and their agents, men and women. The best I've ever seen: intelligent, dedicated, hard working, geared to the goal. Often I would bake cookies and pies, and fix coffee and iced tea, if I had sufficient notice of their impending arrival at my home. They would help themselves to food. I would review the application, carefully, put them under oath and, if appropriate, issue the order. Not only did I receive agency honors from the CIA, NSA and FBI, but four of the agents, on behalf of all, personally presented a tribute of respect and affection. They wished to inscribe thanks, also, for your blueberry pie, but their chief wouldn't permit it. (TAPE 12 A)

MS. PORTER: A continuation of the interview being conducted on behalf of the Oral History Project of the District of Columbia Circuit. The interviewee is Judge Joyce Hens Green, the interviewer is Ms. Porter; the interview is taking place on Sunday, March 11, 2001, and the time is now 4:20.

JUDGE GREEN: As you said, Ms. Porter, for obvious reasons these matters cannot be open to public scrutiny. Indeed they have to be done in a manner where we are sure that there is no electronic surveillance being trained on us as we do our task, as sure as anyone can be of those matters. There is a special place, a special room in which this can be done, which, I've been told, is impervious to assault, electronic or otherwise. I also worked on these matters in locales necessary to accomplish the goal of our national security. It is obvious you cannot say to one you believe is conducting matters detrimental to this country, come listen to everything that I am going to say and how I found out about you and what I'm going to do to stop you from acting out your activities. It simply can't be done. Because I very much believe in open

disclosure, I had serious concern about the secrecy involved. On balance, of course, the court has to proceed in that manner. I am satisfied that everything is checked over and again as best as can be done to minimize "listening in," to protect civil rights. Without this confidence, I would not have remained on the FISA Court. As of this date, I am the only woman ever appointed to this court, and, of course, the only female Chief Judge. I am very proud to have been the first in that regard; as time goes on there will be more. The FISA Court was created in 1978 by Executive Order of President Jimmy Carter, in an effort to prevent the executive branch (as President Nixon had done) from electronic surveillance on someone considered a political or personal enemy. The FISA Court was created to be the judicial protector from unwarranted, illegal surveillance. It performs its work magnificently. People have asked whether it had been difficult to keep the nation's secrets. As point of fact, it has not been at all difficult. You tell yourself that you simply cannot talk about this to anyone, the details of what has been done through the years, why it has been done and in what fashion. I will say, for the seven years I was a FISA judge, I believe, without exception, that my judges and I gave correct action to our cases. I trust that history will so show. History will not show, because we cannot reveal, the catastrophes prevented, some too horrendous to dwell on in memory for more than seconds, by the intelligence agencies, by the agents and by the FISA Court.