

**Oral History Project
The Historical Society of the
District of Columbia Circuit**

**United States Courts
District of Columbia Circuit**



The Honorable Robert H. Bork

U.S. Court of Appeals for the District of Columbia Circuit

**Interview conducted by:
Victoria L. Radd, Esquire**

March 13, 1992

TABLE OF CONTENTS

Preface	i
Oral History Agreements	
Honorable Robert H. Bork	ii
Victoria L. Radd, Esq.	iii
Biographical Sketches	
Honorable Robert H. Bork	v
Victoria L. Radd, Esq.	vi
Oral History Transcript of Interview on March 13, 1992	1
Index	A1

NOTE

The following pages record an interview conducted on the date indicated. The interview was electronically recorded, and the transcription was subsequently reviewed and edited by the interviewee.

The contents hereof and all literary rights pertaining hereto are governed by, and are subject to, the Oral History Agreements included herewith.

© 1997 Historical Society of the District of Columbia Circuit.
All rights reserved.

PREFACE

The goal of the Oral History Project of the Historical Society of the District of Columbia Circuit is to preserve the recollections of the judges who sat on the U.S. Courts of the District of Columbia Circuit, and judges' spouses, lawyers and court staff who played important roles in the history of the Circuit. The Project began in 1991. Most interviews were conducted by volunteers who are members of the Bar of the District of Columbia.

Copies of the transcripts of these interviews, a copy of the transcript on 3.5" diskette (in WordPerfect format), and additional documents as available – some of which may have been prepared in conjunction with the oral history – are housed in the Judges' Library in the United States Courthouse, 333 Constitution Avenue, N.W., Washington, D.C. Inquiries may be made of the Circuit Librarian as to whether the transcript and diskette are available at other locations.

Such original audio tapes of the interviews as exist as well as the original 3.5" diskettes of the transcripts are in the custody of the Circuit Executive of the U. S. Courts for the District of Columbia Circuit.

ORAL HISTORY AGREEMENT
Form A (Unrestricted)

This will confirm my understanding and agreement with the Historical Society of the District of Columbia Circuit (hereinafter "the Society") with respect to my participation in an interview conducted as part of the Society's Oral History Project.

1. The interview is taped, and a transcript of the tapes will be made as resources permit. The tapes, or the tapes and transcript (collectively called "the Work"), will be maintained by the Society and made available by the Society in accordance with its policies for research and other scholarly purposes.

2. In consideration of the Society's preservation of the Work, I hereby grant, assign, and transfer to the Society all right, title, and interest in the Work, including literary rights and the copyright, except that during my lifetime I shall retain the right to copy, use, and publish the Work in part or in full.

3. This agreement contains our entire and complete understanding.

(Name) Robert H. Bork
(Date) 5/27/93

ACCEPTED AND AGREED: Historical Society
of the District of Columbia Circuit

David M. Gelsman
3/23/95

By Joseph M. Harrigan
Notary Public

My Commission Expires October 14, 1995

Historical Society of the District of Columbia Circuit

Interviewer Oral History Agreement

1. Having agreed to conduct an oral history interview with Robert Bork for the Historical Society of the District of Columbia Circuit, Washington, D.C., I, Victoria L. Radd, do hereby grant and convey to the Society and its successors and assigns, all of my right, title, and interest in the tape recordings and transcripts of interviews, as described in Schedule A hereto, including literary rights and copyrights.

2. I authorize the Society, to duplicate, edit, publish, or permit the use of said tape recordings and transcripts in any manner that the Society considers appropriate, and I waive any claims I may have or acquire to any royalties from such use.

3. I agree that I will make no use of the interview or the information contained therein until it is concluded and edited, or until I receive permission from the Society.

Victoria L. Radd 8/9/96
Signature of Interviewer Date

SWORN TO AND SUBSCRIBED before me this 9th day of AUGUST, 1996.

Marsha L. Dimel
Notary Public

Marsha L. Dimel
Notary Public, District of Columbia
My Commission Expires July 31, 1998

My commission expires _____

ACCEPTED this 14th day of August, 1996 by Daniel M. Gribbon, President of the Historical Society of the District of Columbia Circuit.

Daniel M. Gribbon
Daniel M. Gribbon

Schedule A

Tape recording(s) and transcript resulting from one
interview* of Robert Bork (number)
(Interviewee)
on the following dates:^{1/}

March 13, 1992 - one audio tape
20-page transcript

^{1/} Identify specifically for each interview, the date thereof and (1) the number of tapes being conveyed, and (2) the number of pages of the transcript of that interview.

ROBERT HERON BORK, circuit judge, lawyer, educator; University of Chicago, B.A. 1948, J.D. 1953. Born March 1, 1927, Pittsburgh, Pennsylvania. Married, Claire Davidson, June 15, 1952, died, December 8, 1980; children, Robert H., Jr., Charles E., and Ellen E. Married, Mary Ellen Pohl, October 30, 1982. Admitted to the Illinois bar, 1953, D.C. bar, 1977. Associate and partner of the firm Kirkland, Ellis, Hodson, Chaffetz & Masters, Chicago, Illinois, 1955-1962; associate professor, Yale Law School, 1962-1965, professor of law, 1965-1975, on leave, 1973-1975, Chancellor Kent professor of law, 1977-1979, Alexander M. Bickel professor of public law, 1979-1981; Solicitor General of the United States, Department of Justice, Washington, D.C., 1973-1977, acting Attorney General of the United States, 1973-1974; resident scholar, American Enterprise Institute for Public Policy Research, Washington, D.C., 1977, adjunct scholar, 1977-1982; partner, Kirkland & Ellis, Washington, D.C., 1981-1982; Circuit Judge, United States Court of Appeals for the District of Columbia Circuit, 1982-1988; nominated by President Reagan to position of Associate Justice, Supreme Court of the United States, July 1, 1987; confirmation denied by Senate, October 23, 1987; resigned as Circuit Judge, United States Court of Appeals for the District of Columbia Circuit, February 5, 1988; appointed John M. Olin Scholar in Legal Studies, American Enterprise Institute for Public Policy Research, Washington, D.C., February 8, 1988. Member of the Presidential Task Force on Antitrust, 1968; consultant, Cabinet Committee on Education, 1972; trustee of the Woodrow Wilson International Center for Scholars, 1973-1978; fellow, American Academy of Arts and Sciences, 1981-present; recipient, Francis Boyer Award, American Enterprise Institute for Public Policy Research, 1984; member, Board of Governors of the Smith Richardson Foundation, Inc., 1988-1991; member, Legal Advisory Board of the National Legal Center for the Public Interest, 1988; member, Board of Directors of the Institute for Educational Affairs, 1988; member, Development Board of The Federalist Society for Law and Public Policy Studies, 1988; appointed by President Reagan to the Permanent Committee for the Oliver Wendell Holmes Devise, January 19, 1989; member, Board of Directors of Sundstrand Corporation of Rockford, Illinois, 1989-1991; recipient, Shelby Cullom Davis Award, Ethics and Public Policy Center, 1989; member, Advisory Board of The Center for Christianity and the Common Good, 1990. Honorary degrees: Doctor of Laws, Creighton University School of Law, 1975; Doctor of Humane Letters, Wilkes-Barre College, 1976; Doctor of Laws, Notre Dame Law School, 1982; Juris Doctor, Honoris Causa, Brooklyn Law School, 1984; Doctor of Theology, De Sales School of Theology, 1990; Doctor of Laws, Honoris Causa, Adelphi University, 1990. Active duty, United States Marine Corps Reserve, 1945-1946, 1950-1952. Author: The Antitrust Paradox: A Policy at War with Itself (1978); The Tempting of America: The Political Seduction of the Law (1990).

VICTORIA L. RADD

Victoria L. Radd now serves as Deputy Assistant to the President and Deputy Director of Communications. From December 1993 to December 1995, she was Associate Counsel to the President, with responsibility for coordinating the selection and confirmation process for federal judges.

Previously, Radd was a partner at the Washington, D.C. law firm of Williams & Connolly. In 1992, she was co-coordinator of presidential debates preparation for the Clinton-Gore campaign. She also served as senior policy adviser to Senator Lloyd Bentsen's vice-presidential campaign in 1988.

A native of Greenfield, Massachusetts, Radd is a summa cum laude graduate of Harvard University and a magna cum laude of Harvard Law School. While at law school, she served as an editor of the Harvard Law Review and was a recipient of the Sears Prize. Radd also earned a masters degree with distinction from the London School of Economics. She served as a law clerk to Judge J. Skelly Wright of the U.S. Court of Appeals for the D.C. Circuit, and as a law clerk to Associate Justice Sandra Day O'Connor.

INTERVIEW OF ROBERT H. BORK

This interview was conducted on March 13, 1992 at the offices of the American Enterprise Institute, Washington, D.C.

Q: Judge Bork, can you describe how your appointment to the D.C. Circuit came about?

A: Sure. I had left Yale due to deaths of my wife and my best friend, Alex Bickel. My children had grown up, so, I came down here to practice law, and was with Kirkland & Ellis. One day, they had a firm luncheon and the speaker was Fred Fielding. I sat beside him and during the course of the luncheon he whispered that he wanted me to go on the D.C. Circuit. I said, I can't. I just came to the law firm. I've only been here two months. I can't leave them. We left it at that. Then, a couple of days later Jonathan Rose called. He was the Assistant Attorney General for the Office of Legal Policy, and urged me to do it. And I said, I can't. Then I went back up to New Haven to supervise the moving of the furniture with my children, two of them were there, and I got a call from Ed Schmults who was then Deputy Attorney General. He knew that I had turned down Fielding and Rose, and he began to argue. And I kept saying, I just came to this firm, I can't leave them right away. But he argued for 45 minutes or an hour, I guess, on a long-distance call and finally I said, I'll think about it. My children were all for me doing it. The next morning, William French Smith called me in New Haven. So, finally, I agreed to do it though I felt a little odd about leaving the law firm so soon.

Q: This is the firm you had been with.

A: In Chicago.

Q: In Chicago.

A: Yes. But I felt a little odd about zipping into the firm and then zipping out again.

Q: Right.

A: But, anyway, I finally did.

Q: Had it been something that you had considered doing?

A: No.

Q: And you hadn't tried to, obviously, get an appointment at that date.

A: I certainly hadn't.

Q: Right.

A: I said to Schmults, why don't you wait a couple of years. He said, who knows if there will be an opening in a couple of years.

Q: Little did we know the openings that would result.

A: Yes.

Q: Did they tell you why they were so anxious to have you on the bench?

A: No. Well, they said I'd be the kind of judge they'd like. That's about all they said about that.

Q: Did you take into consideration the impact on your income? Was that a factor?

A: Oh, yes. The day I bought a house on the expectation of a partner's income --

Q: Right.

A: -- and that same day I closed on the house and flew to New Haven. That's when Schmults called. And I came back and put the house on the market instantly.

Q: Yeah.

A: But the woman, the agent who had sold me the house said there had been a 25 percent drop in the market in a couple of days. I think I overpaid is what happened, so we couldn't get rid of it. I'm still living in it.

Q: Well, the future holds interesting things for us all. What was your -- what was the confirmation process like?

A: Oh, it was very simple. I went up to the Committee with, I guess my son, one son and my daughter, and, I can't remember who was there.

Q: This was for an informal --

A: No, no, this was the hearing itself. I guess there were four or five senators in and out. I remember Strom Thurmond I can't remember everybody that was there, but there were -- I probably have a record of it somewhere around here, the committee hearings. And I suppose there were five or six others there at one time or another during the process. But it went very smoothly.

Q: It didn't last very long.

A: Maybe an hour.

Q: When you first showed up at the Court, were there certain of the judges that you came to know well and to associate with?

A: I became moderately friendly with Ruth Ginsburg. Abner Mikva had been a friend since law school. I had friends among subsequent appointees. It's an isolated job.

Q: I was going to ask that. It's very different from what you were doing beforehand?

A: Very. They lock you away in this room.

Q: Right.

A: It's like a life sentence to the Law Review.

Q: You have law clerks for company.

A: Yes. Well, they were given room. No, it was funny, I went up to get sworn in. There's a private swearing-in before, just for the members of the Court in the Chief Judge's chambers. That's the first time I met these people. I'd known Mikva since law school days, and, but he was the only one I knew, I guess. I remember after I was sworn in somebody asked me, we were all standing around, why did you want to be a judge? And I said, I lost my last two cases and I figured my fast ball is gone and it's time to become an

umpire. At that point Bazelon said, hope you don't think a curve ball is necessary.

Q: That's good.

A: I had met some of them. I had met Skelly Wright and Malcolm Wilkey and so forth, but I didn't know them by any means.

Q: But it is . . . it has always appeared to be an isolated lifestyle.

A: Oh, it is. I was then a widower, and I guess I still am, but at the time I hadn't remarried. You sit all day in chambers by yourself working on these things and then you go home and talk to the dog at night. It's a very isolated lifestyle.

Q: Right. Did it surprise you that there was this lack of day-to-day collegiality among the judges?

A: I guess it did a little bit.

Q: You are after all in one building.

A: Yes, but everybody's busy and you don't drop in on a judge to kick around a legal question because the judging has become much too much of an assembly line process -- get the stuff out. And it was regarded as an imposition on somebody to drop in to talk over a case, particularly if they weren't involved in it. Even if they were involved in it, they communicate by sending drafts back and forth -- memoranda and dissents and so forth. Rarely do you get together. We'd get together right after the argument --

Q: Right.

A: -- for discussion and a vote. But typically that's the last time you are face-to-face about the case.

Q: So there really wasn't very much in the way you think of trying to win over a vote or rewrite an opinion in order to keep your second vote or --

A: Not much. Sometimes, sometimes it happens, sure, but usually as a result of a memorandum rather than a face-to-face meeting. Occasionally a phone call.

- Q: You talk about the assembly-line process. Is that because of the work load, because of the press of cases?
- A: Yes.
- Q: Did you see the number of cases increase during your time?
- A: Yes. I understand it's dropping off again.
- Q: So I hear.
- A: But then it was increasing, and the size of the Court was increased as a result of that. But, you know, somebody wrote an article saying no more Learned Hands -- that there'd never be a Learned Hand again, because there simply isn't the time to deliberate in the way they used to. Hand used to go out . . . he had a house in the country, as you know. The panel would sometimes meet at his house and spend all day Saturday discussing a case. Today we just keep cranking it out.
- Q: What's the role of the law clerk in that process?
- A: Very large. Very large. You know, if you don't come to the Court with some intellectual capital in certain fields of law, you don't gain it while you're in the Court because there's no time. You can't sit down and read a book, for example, about a case or a law review article, or even all of the cases that are cited. You read the important ones and the ones that counsel designate as important and the ones your clerk tells you are important.
- Q: Well, increasingly we have appointments to the Court of relatively young people, people who have not practiced for very long.
- A: I think that's worrisome, I think it's worrisome. For one reason, because I think they're going to become jaded. You know, it's a job, and after a number of years you see a lot of judges who just don't care anymore, and it's very hard to keep your interest up. Cases come up in a random order, that is, the subject matters are random, so you don't really have any -- it's not like teaching a course in which you learn a field of law. It's more like calling balls and strikes, which is not the most exciting thing in the world. I think a lot of those people going on when they

are 35 or 40, by the time they've been there 25 years, they're going to be very bored.

Q: Well, you obviously brought to the Court certain interests in the law. Did you find an opportunity to continue those interests? I mean, the D.C. Circuit does have an unusual docket.

A: Oh, sure. The D.C. Circuit has a docket of a lot of regulatory cases which are not very interesting as law because what you're doing is second-guessing a prudential decision by some regulator.

Q: Right.

A: And I'm sure nobody ever reads those opinions, ever. Maybe the parties, maybe the counsel does. But by way of compensation, I think we have more constitutional law cases than other circuits do. Those were interesting.

Q: Is there one that in particular . . . if I were to ask you one of your more memorable cases?

A: Well, it would be hard because I haven't thought about it for a long time. Yes, Barnes v. Kline which was vacated as moot in the Supreme Court. But, nevertheless, that was about congressional standing, which I thought was an atrocity.

Q: Why so?

A: For the many reasons in my opinion.

Q: Alright.

A: And First Amendment cases, Ollman --

Q: Ollman v. Evans?

A: And then there was some guy who, I can't remember the name of the case, he was an artist. Well, he said he was an artist. He was putting up doctored photographs of Reagan and people on the subway system --

Q: Lebron? I remember the case.

A: They were scared to death. His friends, the lawyer told me later, urged him not to appeal to that Court, and he got Starr and Scalia and me,

and he thought it was all over. He won unanimously.

Q: He thought it was over because of the political --

A: Yes, he thought conservatives would vote against him, and the only difference was that Starr and Scalia voted for him but for different reasons, and I agreed with both reasons so I wrote the opinion.

Q: And as I recall it was a pretty strong First Amendment opinion.

A: Yes. I remember that. Oh, I remember one about sovereign immunity. There are a number of them. I'd have to go through the books.

Q: Let me ask you, the D.C. Circuit, probably next to the Supreme Court, is seen as one of the most ideologically divided courts, and certainly when you came on board I think a majority of the judges had been appointed by Democrats.

A: Well, I think maybe that's right. You know, there had been some Republicans, but those were back in Eisenhower or Nixon days.

Q: Right. Older.

A: Yes, I was the first Reagan appointee.

Q: How was that? I mean, how was your entry to that activist and, at that time, liberal court?

A: Well, it was fine. I think they -- I think that insofar as there were tensions about ideologies, I think they grew as the number of Reagan appointees grew. At first there weren't many, there were disagreements but there wasn't many --

Q: But there weren't tensions.

A: No.

Q: They were still very collegial?

A: They were friendly, but I think over time as the number of Reagan appointees grew and then became a majority, I think there were tensions between the groups.

Q: How did that -- how did the tensions show themselves?

A: Well, people were a little less jolly with each other.

Q: Really? In conferences or also in social settings?

A: Mostly in conferences, but there was nothing horrible about it. I mean, it was not like the old days when it is said Burger and Bazelon used to scream at each other.

Q: Right. I've heard those stories.

A: It wasn't like that. I think it was just a little less happy when the division became really strong and the blocks were roughly equal and finally the Reagan appointees became the majority.

Q: It tipped?

A: Yes.

Q: Were those tensions worsened when there were en banc considerations of cases?

A: Yes. Because we began en bancing a lot.

Q: Do you think there were tensions within, say, the Reagan appointees, within the conservative block, let me call it?

A: I remember one occasion in which there was, but not generally.

Q: What is the occasion you remember?

A: A group of us decided that the liberals were right after en bancing the case we heard, and said, they were right the first time, and with one individual that did not sit well. He came there to reverse this thing --

Q: And you decided that after hearing oral argument and reading the briefs --

A: Yes. There was six of us, I think, Reagan appointees. Five of us decided the liberals had been right.

Q: Do you remember which case that was?

A: Yes, but I'm not going to discuss it.

Q: Okay, I won't push you. We talked a little about the heavy administrative case load. Did you find that less intellectually interesting?

A: Well, in the sense that there aren't any big ideas floating around. But you have to work very hard to get it right, and I used to analogize it to doing a crossword puzzle. You work on it and work on it and work on it. Maybe you think you finally get it right, but when you're all finished, what've you got? A completed crossword puzzle that nobody will ever look at.

Q: A shining precedent.

A: They aren't really.

Q: Right. And you certainly didn't have many criminal cases either?

A: No. We had a few but not many.

Q: Did you ever sit on other -- take any other cases in any other circuit?

A: No, we weren't allowed to because we were a net importer of judges. We had visiting judges come and under the rules in those days, maybe they're still the same --

Q: You couldn't . . .

A: You can't go sit anyplace else if you're importing judges.

Q: What was the impact of importing judges?

A: I don't think it was very great.

Q: Because they weren't as familiar with the issues?

A: Well, not that so much. We always tried to have two active members of our circuit on any case, on a panel, so -- for example, if we had an imported judge or a district court judge brought up for the occasion, we would not have a senior status judge also.

Q: All right.

A: Because we always wanted them -- because that meant if the two active judges split that meant that the district court judge or the imported judge made the law of the circuit. But I don't think that posed a major problem that I recall.

Q: What was the impact of -- you talked about the heavy work load. Did that slow down the process of deciding cases? I mean --

A: No. I think it -- it had the unfortunate result of speeding it up.

Q: Oh. How so?

A: Well, we had to keep going all the time. When I first got there, I began to sit around and think about these cases and I discovered I was falling behind. You know, put it in there, get it out, get it out. So after a while you began to move faster and faster.

Q: With correspondingly less thought?

A: Yes, that's the reason you don't have any deliberation with your fellow judges after the initial meeting because of this, I got to get it out of here. No, I don't think any major mistakes were made. I made some mistakes, but I then withdrew the opinion and did it over again. But I think the intellectual quality of the product suffers when you have to move that fast. You may get the case right, but its contribution to the intellectual body of the law becomes less and less important.

Q: Did you have a philosophy about concurrences in cases?

A: No, we all did -- if you mean --

Q: When you would write?

A: -- the idea that we shouldn't --

Q: Right.

A: Yes, that's broken down at the Supreme Court level and everywhere else. Well, I'm not sure about everywhere else.

- Q: Certainly at the Supreme Court level.
- A: That's right. Everybody has to express their views, and I think that was true of the D.C. Circuit too.
- Q: How did your chambers function? What was the role of the law clerk for you?
- A: Well, what we would do when the briefs came in for a sitting period, the law clerks from year to year devised various methods of dividing them up, so that each one got a third. Sometimes one would divide the cases into three piles and then somebody else -- the other two would then get to choose first, you know, it was that kind of thing.
- Q: Like siblings with a cake.
- A: Yes. And after they did that, then they would read, each one would read a third of the briefs. I would read all of the briefs. One difference, we'd get a lot of amicus briefs and I would ask them which -- they would read all of the amicus briefs, but since I would be reading all the cases and they weren't -- I would ask which amicus briefs are worth reading. Because a lot of them are just there to show the flag, you know, they don't say anything. And then the day of the argument I would come in early, and the clerks who had worked on the cases that day would come in, and I would discuss each case with them, what we thought the proper outcome would be.
- Q: You didn't have written bench memos?
- A: No. I did at first, but if you're going to read the briefs, bench memos are worthless. I think they cover for people who don't read the briefs. In fact, all that does is add another thing to read. It's bad enough as it is.
- Q: And another thing to write from your perspective.
- A: Right. So they would come in and we would discuss the four cases for that day, and then afterwards, after the argument and then the vote. Although the discussion often went one way, a lot of people don't believe it but the fact is oral argument often changed views.
- Q: Really?

- A: Yes. People always --
- Q: There is a conventional wisdom -- that oral argument is irrelevant.
- A: No, that's nonsense. It's irrelevant, I think, in a case in which people have very firm views about a subject matter and the facts are not really hard to comprehend. You know, you're never going to get a Hugo Black to change his mind about the First Amendment by an oral argument. It's not on the boards. But I think all of us routinely had our views of the case shift, not necessarily from one side to the other side, but what was important about the case or what the pivotal point was, and very often it would change the outcome. Not in a majority of cases, but fairly often. Then after the conference with the judges, I'd come back and discuss with the clerks. At that point --
- Q: How extensive was the conference with the judges?
- A: Varied with the nature of the case -- whether there was a disagreement and how complex it was, whether, you know, the judges liked to discuss. There were judges, older ones in particular who I remember we had an en banc case one day, and it takes a long time to go around the table, everybody holds forth. I remember one older judge saying to another judge who was explaining the vote: "Affirm or reverse, the rest is dictum." But I didn't view it that way and a lot of them didn't. I thought the reasons given were important. Anyway, we'd discuss it with the clerks when we came back and sometimes they were upset, sometimes they weren't. And then, depending on the case, the clerk whose case it was would do a first draft. Sometimes there was a -- like Ollman v. Evans, I did the first draft, or like Barnes, I did a first draft. And the ones I regarded as kind of rich intellectually and where it made a big difference, I'd do the first draft and then send it around to the clerks. And the clerks varied. One set of clerks that I had, every time I discussed a case with one clerk, the other two would come in, sort of seminar. Other clerks didn't do that. I would call them in because we were really stumped and we wanted to hear --
- Q: Other views --

A: -- ideas.

Q: When you hired your clerks -- some judges do look for clerks that are ideologically compatible. Did you do that in hiring clerks?

A: Not at first, but I came to it.

Q: Why did you come to that?

A: Because I couldn't stand the look of agony on the clerk's face. You know, you get more ideas from somebody who is not upset with what you're doing.

Q: Right, but you can get more ideas from someone from a different perspective as well.

A: Oh, sure, but the case I have in mind, I heard the ideas but it didn't do any good, didn't change my mind about anything. And I got clerks who were fair-minded, and although they had the same approach to law -- well it wasn't so much -- I don't know if you could call it ideological. I wanted clerks who had the same approach to law that I did, that is you stick with the law and try to keep policy out of it, your own policy. And I got clerks like that. Therefore they were quite capable of raising objections if they thought something was not going to go that way, and the clerks and I disagreed sometimes. But I thought -- I had one clerk who really didn't do me any good because, if I was going a way the clerk didn't like, I would get a little draft, skimpy as can be, then I had to fill the whole thing out. So I decided it's hard enough without having one essentially non-functional clerk.

Q: And that was because of reasons of policy disagreement?

A: Well, in part, in part. I also think there was also a problem of just getting the work done. But I know that in part it was kind of -- never expressed to me but I would hear that this clerk was in agony about --

Q: Decisions?

A: Yes.

Q: How did you select them? What were you looking for?

A: Very bright people whose approach to law was the same as mine, and I got very good clerks in those days. And I would have -- and we would get a couple of hundred applications or whatever it was, and I would have my clerks go through them and pick out 20 or so that were most worthy. I would go through the 20 and pick out five or six that I initially wanted to interview to see if that would do it, and usually it did. Actually, out of that five or six, you'd get three. But what the clerks were doing was eliminating people with grades that just weren't anywhere near the threshold.

Q: Right. Getting people that met the threshold requirements.

A: Yes. Because I didn't want to go through that stack and look at all the grades and so forth.

Q: What were your contacts with the district court judges at the court?

A: Oh, you mean how often, or what?

Q: I mean did you see them socially?

A: No.

Q: Would you discuss cases?

A: No.

Q: Was there a dining room where people got together?

A: Yes, there was, but I stopped going there. You know, too much of the conversation was anecdotal: "I remember an FBI witness I had 20 years ago." And then of course, if you reverse somebody, there was always a little bit of unhappiness. So I didn't think it was a good idea to hang around too much with people you're reviewing.

Q: Or to talk to them about the cases.

A: No, I didn't want to talk to them about the case that I was reviewing, no, no.

Q: Even after the case was over?

A: I don't think I did, but that was just because we all lost interest in it by that time.

Q: It moves fast.

A: Well, but also the fact that while I think it's important to have cordial relationships with the district court judges, but I don't think you'd want to get too chummy with them -- because you don't want it to affect your performance in reviewing them.

Q: Did you pay attention? I mean, you would notice from whom the opinion came below?

A: Oh, sure.

Q: And it would affect how you viewed the judgment below.

A: Well, not necessarily. I must say that there were a couple, when you would say, oh, boy, I wonder what's going to happen this time, but sometimes a decision is perfectly fine even though you didn't think highly of a particular judge.

Q: I won't even ask for names anymore.

A: No.

Q: We have been talking about oral arguments, what do you think of the general caliber of the oral arguments that were in front of the Court?

A: Well, it varied enormously, varied enormously. I must say on average I think it was better than you get in the Supreme Court.

Q: Really?

A: Yes.

Q: Is that because there are more? And one thought that strikes me is there are more government attorneys on average.

A: No, fewer. The thing that drags down the level of Supreme Court argument is the lawyers for the states.

Q: I was thinking federal.

A: At the D.C. Circuit, we didn't get the states in there so very often. I remember when I was Solicitor General, I was backing up a lawyer from

Nebraska, from the Attorney General's office in Nebraska. It was a prison disciplinary case, something like that. I was an amicus because it would affect the federal prisons. But after I got finished speaking, when he got up on rebuttal, Thurgood Marshall asked him a question and this lawyer said, well, that depends on whether you think prison itself is unconstitutional, which it isn't. He said, you know we used to draw-and-quarter people, but we don't anymore. And Marshall said, is it your position that Nebraska could constitutionally draw-and-quarter people and therefore it can do anything less. And I thought the lawyer would laugh that off, but there was this long silence. The guy was thinking, and he finally said, "That's part of my position."

Q: Did he go on to explicate the rest?

A: We didn't get people like that in the D.C. Circuit, so it was much better.

Q: Do you think the time allocated is enough? They're relatively short arguments.

A: I know that and the answer to that is yes and no. I had a habit, as some other judges did too, if people were saying something worthwhile and there was still more to be learned, we'd let them run over. But there were cases in which the people were saying nothing and 15 minutes was plenty. We had one lawyer that got up and he was denouncing the agency as an immoral, corrupt bunch of people. It was nothing but a personal attack on the entire agency with no evidence, just, "These people are arrogant," on and on. I finally said, "Look, I'd like to hear about the jurisdiction," and he looked at me and said, "Your Honor, I haven't got much time." He didn't want to be interrupted by that kind of a question. Well, for him, 15 minutes was too much.

Q: Right.

A: But then we had, you know, complex cases and we'd let it run. When I say we, I mean I don't think all of them did, but some of us did.

Q: On any given panel, especially during the years where the liberals and conservatives were fairly equal, did you really think that the composition of the panel determined the outcome of the case?

A: Often, yes. There was one case that was very funny. We began -- I don't know if they're still doing it -- we began announcing the composition of the panel well in advance so the attorneys would know, but this was before that policy.

Q: For what reason?

A: Because we'd recognize that the composition of the panel made a difference and the attorneys should be allowed to take that into account if they could.

Q: In writing their briefs, for example.

A: Yes. Planning their argument. But before that policy went into effect there was a case in which a wiretapping under the Foreign Electronic Surveillance Act had taken place, and some Persian rug dealer was caught up as an accessory, after the fact to a murder. His lawyers mounted an all-out attack on the constitutionality of the Foreign Electronic Surveillance Act, and then they saw their panel -- Wilkey and Scalia and me. You could see them slump, and the lawyer got up and said, we waive all our constitutional arguments. Our point is simply that the district judge failed to make one finding he had to make, so please remand the case for him to make that finding. He knew that if we did remand the case, he would get a different panel when he came back.

Q: So, he didn't get his remand.

A: No, no. But I felt sorry for the man when he took a look at the panel.

Q: It's a gutsy move to do at the last minute. What other activities were you involved in while you were at the court? Didn't you teach during this period as I recall?

A: Yes. I taught one semester at Yale, flying up and back, and I taught one semester at South Carolina, which turned out to be a disaster. When I signed up to do the course, there was a direct flight from here to Columbia. And after about two class sessions, they canceled the direct flight. So I had to go through Atlanta and it took me 14 hours a day to get a two-hour seminar in. But I did it. And then I had a course in Chicago, I flew out

there one day a week. After that I gave it up. It was just too tiring.

Q: Trying to do both teaching and --

A: Yes. It was too tiring, the travel is what did it.

Q: You didn't teach at all in the area here?

A: No.

Q: Did you participate in Bar activities during this time at all?

A: No. I don't think so. I did a lot of moot courts around the country, law schools, gave a lot of talks, but that's about it.

Q: Certain of the judges in particular who have since died, I'm thinking of Judge Wright, for example, and some of the more senior judges. Do you have any particular recollections of working with them?

A: Skelly was very pleasant to work with. He was a very gallant fellow and we got along very well. With Bazelon, I never had any problems. Some people did. I didn't have any problems.

Q: Judge McGowan?

A: I replaced McGowan. Well, he was senior . . .

Q: He was senior status.

A: Yes. He was a very nice fellow. I had no problem with him. By and large, I didn't have any personal problems with any judges. As I say, tensions would surface now and again about a case, but --

Q: Do you see any tensions -- we had talked about the tensions between the two blocks? Were there any tensions within, let's say the liberal side? I mean, you did have some older judges and then the new Carter appointees.

A: Well, I don't know, because I wasn't privy to their tensions if they had any. I think -- I think there was a period when some judges who were considered primarily of one block or the other but

nevertheless were capable of switching over came under some pressure from their block.

Q: From one side or the other.

A: Yes.

Q: I've read that you had no opinion that was reversed by the Supreme Court.

A: Well, there was part of one opinion. Between my opinion and the Supreme Court's opinion Congress had passed a resolution to the effect that they didn't think something I had upheld was necessary anymore and the Supreme Court majority in reversing that part of the opinion said that had the D.C. Circuit had this action by Congress before it, we probably would have come out the other way. So I don't know if that's a reversal or not. Three or four Justices agreed with me nonetheless and dissented.

Q: Not much of a reversal. Did you think about the Supreme Court with the potential for reversing your cases when you were writing the opinions?

A: No. I thought about what they'd said in the past -- I wasn't thinking about what they might do to this case. I remember my first year in law school, one professor told us in class that he knew a judge who, when a lawyer came in and said, "I'm sorry I'm going to have to appeal your decision," the judge would say, "I don't care. They're not necessarily right up there, they just have the last guess." Which is the way I felt about it. I mean, I tried to follow their precedent, but I didn't worry about whether I'd get reversed or not.

Q: Right.

A: In fact, I had several -- I forget how many -- dissents that were . . .

Q: Adopted . . .

A: Yes.

Q: On reasoning. Do you remember a particular case where you felt you pushed on the precedents? In other words, slavish devotion to the precedents would have lead to one result, but you thought

they were either wrong or had not addressed a particular area and therefore went off in a different direction.

A: Well, there was only one case like that and that was Dronenburg v. Zech, in which the lawyer argued that the Supreme Court had already said all sexual matters are constitutionally protected no matter what they are. Well, I said I can't make out what they're saying. I can't find a principle in Griswold and Roe and so forth that I can apply to homosexual conduct in the Navy, and I suppose saying that I couldn't find a principle was a criticism of the Supreme Court. And Scalia agreed with me on that case as well as a visiting judge.

Q: Right.

A: But I didn't think I was pressing any precedent because I didn't think those were precedent for this homosexual conduct --

Q: For that proposition.

A: Yes.

Q: Thank you very much.

Index

- Attorney General's Office, 1
- Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1984), *judgment vacated by Burke v. Barnes*, 479 U.S. 361 (1987), 6, 12
- Bazelon, David L., 4, 8, 18
- Bickel, Alex, 1
- Black, Justice, 12
- Bork, Robert Heron:
 - Judicial philosophies:
 - appeals of cases, 19
 - approach to law, 13
 - "assembly line" process of judging, 4-5, 10
 - bench memos, 11
 - judges:
 - age of, 5-6
 - isolation of, 3-4
 - oral arguments:
 - caliber of, 15-16
 - time allotted, 16
 - value of, 11-12
 - relationships between Circuit and District judges, 14-15
 - Legal career (prior to judgeship):
 - Kirkland & Ellis, 1-2
 - Solicitor General, 15-16
 - prison disciplinary case (Wolff v. McDonnell*, 418 U.S. 539 (1974)), 15-16
 - Yale Law School, 1-2
 - Personal life:
 - children, 1, 3
 - death of best friend (Alex Bickel), 1
 - death of wife, 1
 - on U.S. Court of Appeals for the District of Columbia Circuit:
 - anecdote about becoming a judge, 3-4
 - appointment, 1-2
 - associations with other Circuit judges, 3-4
 - confirmation process, 2-3
 - deciding cases, process of, 4-5, 11-13

- ideological division of Court, 7-9, 18-19
- law clerks:
 - role of, 5, 11-12, 14
 - selection of, 13-14
- memorable cases:
 - Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1984), *judgment vacated by Burke v. Barnes*, 479 U.S. 361 (1987), 6, 12
 - Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984), 19-20
 - Foreign Electronic Surveillance Act case (United States v. Belfield*, 692 F.2d 141 (D.C. Cir. 1982)), 17
 - Lebron v. Washington Metropolitan Area Transit Authority*, 749 F.2d 893 (D.C. Cir. 1984), 6-7
 - Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984), 6, 12
- panel composition, 16-17
- relations with U.S. District Court judges, 14-15
- Supreme Court, reversals by and adoptions of dissents by, 19
- swearing-in ceremony, 3-4
- teaching engagements, 17-18
- Burger, Chief Justice, 8
- Carter, Jimmy, 18
- Chicago, 1, 17-18
- Congress, U.S., 19
- Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984), 19-20
- Eisenhower, Dwight D., 7
- Fielding, Fred, 1
- Foreign Electronic Surveillance Act case (United States v. Belfield*, 692 F.2d 141 (D.C. Cir. 1982)), 17
- Ginsburg, Justice, 3
- Griswold v. Connecticut*, 381 U.S. 479 (1965), 20
- Hand, Learned, 5
- Justice Department, U.S.,
 - Attorney General's Office, 1
 - Solicitor General's Office, 15-16
- Kirkland & Ellis, 1-2
- Lebron v. Washington Metropolitan Area Transit Authority*, 749 F.2d 893 (D.C. Cir. 1984), 6-7
- Marshall, Justice Thurgood, 16
- McGowan, Carl, 18
- Mikva, Abner J., 3-4
- Nebraska, 15-16
- New Haven, 1-2
- Nixon, Richard M., 7
- Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984), 6, 12
- Prison disciplinary case (Wolff v. McDonnell*, 418 U.S. 539 (1974)), 15-16
- Reagan, Ronald, 6, 7-8

Roe v. Wade, 410 U.S. 113 (1973), 20

Rose, Jonathan, 1

Scalia, Justice, 6-7, 17, 20

Schmults, Ed, 1-2

Senate Judiciary Committee, 3

Smith, William French, 1

Solicitor General's Office, 15-16

South Carolina, 17

Starr, Kenneth W., 6-7

Supreme Court, U.S., 7, 10-11, 19

Cases:

Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1984), *judgment vacated by Burke v. Barnes*,
479 U.S. 361 (1987), 6, 12

Griswold v. Connecticut, 381 U.S. 479 (1965), 20

prison disciplinary case (Wolff v. McDonnell, 418 U.S. 539 (1974)), 15-16

Roe v. Wade, 410 U.S. 113 (1973), 20

Justices:

Black, 12

Burger, 8

Ginsburg, 3

Marshall, Thurgood, 16

Scalia, 6-7, 17, 20

Thurmond, Strom, 3

United States v. Belfield, 692 F.2d 141 (D.C. Cir. 1982) (*Foreign Electronic Surveillance Act*
case), 17

U.S. Court of Appeals for the 2nd Circuit:

Hand, Learned, 5

U.S. Court of Appeals for the District of Columbia Circuit:

Caseload, 6, 9

Cases:

Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1984), *judgment vacated by Burke v. Barnes*,
479 U.S. 361 (1987), 6, 12

Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984), 19-20

Foreign Electronic Surveillance Act case (United States v. Belfield, 692 F.2d 141
(D.C. Cir. 1982)), 17

Lebron v. Washington Metropolitan Area Transit Authority, 749 F.2d 893
(D.C. Cir. 1984), 6-7

Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), 6, 12

Ideological division of Court, 7-9, 18-19

Judges:

Bazelon, David L., 4, 8, 18

Burger, Warren E., 8

Ginsburg, Ruth Bader, 3

McGowan, Carl, 18

Mikva, Abner J., 3-4
Scalia, Antonin, 6-7, 17, 20
Starr, Kenneth W., 6-7
Wilkey, Malcolm R., 4, 17
Wright, J. Skelly, 4, 18
Panel composition, 16-17
Visiting judges, 9-10
U.S. District Court for the District of Columbia, 14-15
Wilkey, Malcolm R., 4, 17
Wolff v. McDonnell, 418 U.S. 539 (1974) (*prison disciplinary case*), 15-16
Wright, J. Skelly, 4, 18
Yale Law School, 1-2, 17