HONORABLE JAMES ROBERTSON

Oral History Project
The Historical Society of the District of Columbia Circuit
HONORABLE JAMES ROBERTSON

Interviews conducted by Ann Allen, Esquire
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NOTE

The following pages record interviews conducted on the dates indicated. The interviews were recorded digitally or on cassette tape, and the interviewee and the interviewer have been afforded an opportunity to review and edit the transcript.

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Historical Society of the District of Columbia Circuit

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1. In consideration of the recording and preservation of my oral history memoir by the Historical Society of the District of Columbia Circuit, Washington, D.C., and its employees and agents (hereinafter, "the Society"), I, James Robertson, do hereby grant and convey to the Society and its successors and assigns all of my rights, title, and interest in the voice recordings (digital recordings, cassette tapes) and transcripts of my interviews as described in Schedule A hereto, including literary rights and copyrights. All copies of the voice recordings (digital recordings, cassette tapes) and transcripts are subject to the same restrictions herein provided.

2. I understand that the Society may duplicate, edit, or publish in any form or format, including publication on the Internet, and permit the use of said voice recordings (digital recordings, cassette tapes) 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 reserve for myself and to the executor of my estate only the non-exclusive right to use the voice recordings (digital recordings, cassette tapes) and transcripts and their content as a resource for any book, pamphlet, article or other writing of which I or my executor may be the author or co-author.

James Robertson
January 24, 2017

SWORN TO AND SUBSCRIBED before me this 24th day of January, 2017.

Sandra L. Freedman
Notary Public

My Commission expires: ____________


Stephen J. Pollak
Schedule A

Voice recordings (digital recordings, cassette tapes) and transcripts resulting from seven interviews of James Robertson conducted on the following dates:

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The transcripts of the seven interviews are contained on one CD.
Oral History Agreement of Ann Allen

1. Having agreed to conduct an oral history interview with James Robertson for the Historical Society of the District of Columbia Circuit, Washington, D.C., and its employees and agents (hereinafter “the Society”), I, Ann Allen, do hereby grant and convey to the Society and its successors and assigns all of my rights, title, and interest in the voice recordings (digital recordings, cassette tapes) and transcripts of the interviews as described in Schedule A hereto, including literary rights and copyrights.

2. I understand that the Society may duplicate, edit, or publish in any form or format, including publication on the Internet, and permit the use of said voice recordings (digital recordings, cassette tapes) 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 oral history or the information contained therein until it is concluded and edited, or until I receive permission from the Society.

Ann Allen

Date

SWORN TO AND SUBSCRIBED before me this 27th day of January, 2017.

Notary Public

My Commission expires: 02/14/2021

**Schedule A**

Voice recordings (digital recordings, cassette tapes) and transcripts resulting from seven interviews of James Robertson conducted on the following dates:

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The transcripts of the seven interviews are contained on one CD.
So let me just start with a general question about where you were born and grew up and your family.

I was born in Cleveland, Ohio in 1938 as one of twins. My parents were a little older than most parents. My father was born in 1891 and my mother in 1902. My sister and I were their second and third children, the last of their three children. My father, at the time I was born, worked for the Cleveland Trust Bank in Cleveland. I am not exactly sure what the story is, but after some years he was on the outs with the president of the bank, George Gund, who went on become a very wealthy Clevelander. My father left the Cleveland Trust Bank and joined, what I think we would call today, an investment banking firm called Otis & Company in Cleveland, which got into some trouble with the SEC. My father saw that coming and got out because he had nothing to do with the SEC problems. He tried to continue working as an independent financial consultant. All of this occurred over a period of, I don’t know, five, six, seven years, when we lived first in Cleveland and then in the little college town of Oberlin, Ohio. Oberlin is the town that I consider my home town.

How old were you when you moved there?
MR. ROBERTSON: Probably two or three years old.

MS. ALLEN: Oh, very young.

MR. ROBERTSON: Yes. We moved away from Oberlin when I was about 12. My sisters and I reconstructed this recently. So it’s amazing how the years between three and twelve are the years that anchor one in a place. I’ve always considered Oberlin my home town, even though I only lived there for nine years.

MS. ALLEN: So when you think back on your childhood, that’s home?

MR. ROBERTSON: Yes, that was home.

MS. ALLEN: Was your family from Cleveland originally?

MR. ROBERTSON: No. My father was from Wabash, Indiana. My mother was from Kansas City, Missouri. They met – my father was sort of an itinerant banker. He was in Chicago at the time of the Black Tuesday crash in the stock market and wound up in Cleveland somehow. My mother was a psychiatric social worker, kind of a very early psychiatric social worker. In those days, to be a psychiatric social worker, you had to undergo analysis. So I was raised with a lot of psychiatric social workers and psychiatrists. My mother never told us whether we were being good or bad, she told whether we were being normal or not.

MS. ALLEN: Did she work outside the home when you were growing up?

MR. ROBERTSON: She went back to work after my father’s employment situation got shakier and shakier. When he left Otis & Company I think he began on this independent financial consultant track. She found it necessary. She went
back to I think Smith College and got a refresher degree in social work and went back to work in a mental hospital in Cleveland.

**MS. ALLEN:** She was kind of, I would think, the exception then among your friends’ parents?

**MR. ROBERTSON:** She definitely was. She did not work at all until, as I say, until I was about nine or ten, but then she went back to work and worked from then until the end of her working life.

**MS. ALLEN:** So you weren’t in Oberlin because of the college?

**MR. ROBERTSON:** My father, I told you he’d been in Chicago, he got caught with a short position in stocks in Chicago and had a substantial amount of debt that arose from that. He felt it was unprincipled to file for bankruptcy and never did. He carried with him the debt that he incurred in the stock market crash of 1929 for virtually the rest of his life. My mother used to tell the story of when she met my father and was considering marrying him, she learned that he was in debt to the tune of $100,000, which in those days was a very great deal of money, and she thought he must be pretty important to be in debt for that much money [laughter]. But I’ve kind of forgotten the question.

**MS. ALLEN:** I’d just wondered if your family moved to Oberlin because of the college.

**MR. ROBERTSON:** Because of the debt. Life in Cleveland for a not-so-young vice president of a bank and the attendant lifestyle of country clubs and so forth was not what they wanted and not what they could afford, so they moved out to Oberlin for what they called “high thinking and plain living” and
commuted. He commuted for years to Cleveland by the train back and forth every day.

**MS. ALLEN:** So you then were in Oberlin until you were twelve?

**MR. ROBERTSON:** When I was about twelve, my father was not making a very substantial income with his independent financial consulting and got a job working for the Air Force as a procurement specialist. He was a GS16, one of the first GS16s in the government. That was before the senior executive service. We moved down to Dayton, Ohio. I went to public high school in Dayton my freshman year in high school, and then I left home and went back to northern Ohio to a little boarding school in Hudson, Ohio called Western Reserve Academy, and I spent three years there.

**MS. ALLEN:** Was that a hard decision to leave the public high school?

**MR. ROBERTSON:** It was a wonderful decision. It was very easy for me. I came from this little tiny college town where I knew everybody to what I thought of as a big city high school. Dayton, Ohio was a big city. Now, of course, from Washington, it is ludicrous to think of Dayton as a big city, but everything is relative, and it was a big city. And I don’t think I was doing very well, and I was a year ahead of my class anyway because I had been skipped a grade, and I was probably a little immature for the high school scene. My parents put me in line to go to this school. I received a scholarship to go there, and it changed my life. It was a wonderful experience, wonderful experience. All boys school, great teachers, small class. Very, very highly privileged atmosphere to be in. I was just plain lucky to be there.
MS. ALLEN:  This is a boarding school, obviously?

MR. ROBERTSON:  It was and is a boarding school.  There were some day students, but mostly boarders.  I got home at Thanksgiving and Christmas and Easter, but not on weekends.  Hudson and Dayton were 200 miles apart, and in those days, that was a long way to go for a weekend.  Now people bounce back and forth and think nothing of it, but in those days you didn’t do that.  Besides, we were in class until noon on Saturday.

MS. ALLEN:  What was growing up as a twin like?  Do you think you were closer to your sister who is a twin, for example, than your other sister?

MR. ROBERTSON:  I actually am probably closer to my sister today than I was growing up.  For one simple, and I think in retrospect, kind of a disturbing reason.  In those days, the doctrine was that twins shouldn’t go to class together.  So there were two first grade classes in Prospect Street Elementary School, and they split us up in first grade, put one in one class and one in the other.  And we screamed and yelled about it for a day or two, and then we kind of went separate ways.  And I skipped the second grade and she didn’t, and then she skipped the eighth or ninth grade, but by that time I had left home and we had different trajectories and somewhat different friends and it’s kind of sad when you think about it.  She, until quite recently, lived just outside Washington over in Fort Washington, Maryland.  So we’ve spent twenty years living close together, and we are very, very close now.  Growing up, she was my sister, but the twin aspect of it was not emphasized very much.
MS. ALLEN: Interesting. So you went off to boarding school. Before you went, were you very studious or were you athletic?

MR. ROBERTSON: I was not very athletic, that’s for sure. Studious, I don’t know that I was studious. I suppose I had the gift of quickness and cleverness more than I did study. So I was good at math and good at spelling and good at all that. But I did very well in prep school, high school, boarding school. I think I graduated number one in my class from that school. I did much better there than I did in college I must say. But I was also one of the biggest kids in school.

MS. ALLEN: You obviously were tall.

MR. ROBERTSON: I was tall. I was skinny, but I was tall. But I couldn’t play basketball at all. You had to do some sports there all seasons, so I played football in the fall, was on the wrestling team in the winter and played baseball in the spring. You had to do sports.

MS. ALLEN: What were your favorite subjects in school?

MR. ROBERTSON: Well I hate to make this sound like I’m writing my resume, but since you want all the facts, I was first in my class at school. I was editor of the school paper, I was chairman of the student council, and I got the prize at graduation for best Latin student.

MS. ALLEN: Best Latin student, wow.

MR. ROBERTSON: I love Latin. I studied Latin for four years in high school. I’m fond of saying today that the most important things I learned, maybe the only things I learned in high school, were Latin and typewriting.
MS. ALLEN: Two very disciplined fields [laughter]. You went to Princeton. How did you decide where to go to college? Was it a difficult decision?

MR. ROBERTSON: Well, there is a short answer to that question. My father went to Princeton.

MS. ALLEN: Okay. There’s a longer answer too, probably.

MR. ROBERTSON: Well, not much longer. In those days the competition was nothing like what it is today. The truth is that Princeton is the only place I applied. Can you imagine doing that today? What chutzpah that is.

MS. ALLEN: Right!

MR. ROBERTSON: Not only that, but I applied to Princeton for the Navy ROTC scholarship, and I got their NROTC scholarship, and I got into Princeton, and the Navy paid my entire way through Princeton. Tuition, room and board, books, uniforms and $50 a month. Amazing program.

MS. ALLEN: Did you apply for that because you were interested in the Navy or were you looking for different kinds of scholarships? I’m curious, and I digress a bit, but my brother did the same thing, went to Princeton and did their NROTC scholarship, and I never quite knew which came first, Princeton or the Navy.

MR. ROBERTSON: Did he? I believe – and I wish I knew who it was – but I believe there was somebody at Western Reserve Academy who had told me about the possibility of the NROTC scholarship. I’ve had an awful lot of luck in life, and one of the lucky things was having a teacher or a placement person in school who found this for me, suggested that I apply and kind of
sent me on my way. I mean I don’t know that I was enterprising enough to find it myself. But I filled out the form when they got it for me and got this NROTC scholarship, which, if your brother did it, you know that not only does it pay your way through college, but it gives you summer jobs every summer that you are in college. So I was off on one cruise or another for all three summers while I was in college.

**MS. ALLEN:** Great.

**MR. ROBERTSON:** Very, very lucky and again, privileged experience.

**MS. ALLEN:** You graduated from college in 1959. So I guess when you were in college, the Korean War was over, so you missed that.

**MR. ROBERTSON:** I vividly remember, I think it was the summer of 1958 when we landed troops in Lebanon. Eisenhower landed troops in Lebanon in 1958, and I was on a summer cruise that summer and I was on a destroyer, and we were – the cruise went up the St. Lawrence River – I mean that’s a pretty cushy way to take a summer cruise. Went to Montreal on a destroyer. But at the particular time this Lebanon thing broke, the ship was in New York and we were all on liberty, and the word got out that everybody was to return to the ship because we were being mobilized and we were going to go to Lebanon. Well, these were a bunch of college boys. We thought we were non-combatants. We didn’t think they could send us to Lebanon. Of course they could, but it wound up that we didn’t go to Lebanon. The whole thing evaporated. We didn’t have to go anywhere, but I remember very vividly thinking I was actually going to war. As it turned out, I spent
three years at sea in the Navy after four years of being a midshipman.
Then I spent two more years in the Navy after I did my sea duty while I
was going to law school, and we’ll get to that later. I never heard a shot
fired in anger. It was just a, it was kind of a spit-and-polish Navy doing a
lot of maneuvers but not engaged with anybody.

**MS. ALLEN:** When you went off to Princeton, did you have a sense that it was a real
break with Ohio at that time?

**MR. ROBERTSON:** No, I didn’t have that sense, but it turned out to be. I thought I was going
to Princeton and then I would return to Ohio. I had no idea to do what.
But I never did go back to Ohio except for weddings and funerals and so
forth. I just stayed on the east coast after that and have been here ever
since.

**MS. ALLEN:** When you were at Princeton, what did you major in, concentrate in?

**MR. ROBERTSON:** I went through something called the Woodrow Wilson School of Public
and International Affairs. It’s a graduate school at Princeton, but there’s
also an undergraduate program. It was an interdisciplinary program
involving history, politics, economics, sociology, at least those four
disciplines. It was widely thought of at that time as a pre-law program,
although I didn’t really know that I was pre-law. I kind of thought I might
be, but it was the way to prepare yourself if you had law school in mind. I
now say that I majored in Committees, because the method of the
Woodrow Wilson School was – what set it apart from the rest of the
academic curriculum – was that students in their junior and senior years
would be divided each semester into study groups and the study groups
would take on some public issue and study it and issue a report.

**MS. ALLEN:** This was a real public issue? Not a hypothetical one?

**MR. ROBERTSON:** This was a real public issue. I’m not sure that I can remember all the
public issues that we had, but one I do remember had something to do
with nuclear power, what should be the national policy with respect to
nuclear power? And the process was you would meet, the first meeting in
the fall, and you’d talk about the what the issues were and you’d have a
couple of more meetings trying to figure out what the issues were, and
then you’d decide on the topics that had to be studied and parcel out the
topics and all go out and study and write papers, and come back and then
you’d discuss them, and the discussion would somehow turn into a
committee report, and then there would be conclusions and you’d debate
the whole thing out. So it was literally learning to work by committees.
And you did that once in the fall, once in the spring for each of two years.
And when you got to be a senior then you got to be chair of this
committee. It was quite interesting. I’m not sure how substantive it was,
but it taught you a lot about working with other people and group
scholarship in getting things done together.

**MS. ALLEN:** Was that very different from your other classes in Princeton?

**MR. ROBERTSON:** It was. I don’t even know if it was a course. I think it was sort of laid on
top of the courses. You still took a history course and a politics course
and an economics course and a physics course and whatever else. The
other courses were lectures. At Princeton, they had something called preceptorials, which are discussion groups. But this methodology, this committee methodology, was overlaid on top of all that in the Woodrow Wilson School. It was interesting, and I think in retrospect, quite useful. Although thinking about college education and what you really get out of it, I think I probably spent too much of my college career studying something called Naval Science, which was one class every semester, which would be guns or navigation or seamanship or something like that. And how to work by committees. I’m not sure how much substance I actually got out of it.

**MS. ALLEN:** [Laughter]. When did you get interested in the idea of the law as a possible career?

**MR. ROBERTSON:** I can actually remember quite specifically and vividly when that happened. Edward Bennett Williams came to Princeton to speak. He was at that time representing, I think, Jimmy Hoffa. Hoffa, of course, was a notorious union leader who was always in criminal trouble, and Williams, being the brilliant lawyer he was, was smart enough not only to defend him in court but to make something of a public relations campaign about it. He went around to colleges, including Princeton, and spoke to students about not only the constitutional right to be represented by counsel, but about the whole system of justice and how necessary it was that there be good defense lawyers pushing back against the prosecution, and how the credibility and the sustainability of the American justice system depended
directly on the quality, not only of the prosecution but also of the defense. And I was hooked, perhaps in some naïve college student way. I was hooked on the idea of the law, and the rule of law as the cement that held society together, and I set my sights on law school right then and there.

**MS. ALLEN:** Do you remember what year it was?

**MR. ROBERTSON:** I don’t remember. It may indeed have been before I even applied to the Woodrow Wilson School. It may have been the reason why I applied for the Woodrow Wilson School, but I can’t reconstruct that anymore. I mean I could, but I haven’t.

**MS. ALLEN:** But it wasn’t senior year? It was fairly early on?

**MR. ROBERTSON:** It was fairly early on. And another thing that happened fairly early on, and it in some way informed this whole thing – and I was involved in this decision, by the way – happened when I was a freshman at Princeton. Alger Hiss was invited to come and speak at the Princeton campus. This was a national happening. It put Princeton squarely in the national spotlight. Hiss had just been let out of prison, and the notion that he would be given a platform to speak anywhere, let alone at Princeton, was outrageous to some people. The Princeton alumni went ballistic and tried to put pressure on the president to un-invite Hiss, because Hiss had been invited by a student debating society that I belonged to called the American Whig Cliosophic Society.

**MS. ALLEN:** What a wonderful name.
MR. ROBERTSON: The American Whig Cliosophic – or Whig Clio – invited Hiss to speak, and he agreed, and it became a huge, huge issue. The faculty and administration of the University, to its everlasting credit, did not interfere and decided that free speech on campus was a critical virtue that was going to be maintained. Hiss did come to speak, and I was there to hear him. I don’t remember a single thing he said, but I do remember the issue and the whole – if you combine that early immersion into the notion of free speech with Edward Bennett Williams’ notion of the constitutional right to a defense in a criminal case, you have sort of a lawyer in the making. I remember both of those as being an important milestones for me.

MS. ALLEN: So did you take constitutional law classes?

MR. ROBERTSON: I took constitutional law. There was a famous course at Princeton called Constitutional Interpretation taught by a very eminent scholar by the name of Alpheus Mason. Indeed, Mason was my senior thesis advisor at Princeton. I wrote my senior thesis on the Sam Sheppard murder trial in Ohio and on the issue of free speech versus fair trial. Sheppard was a famous case. His trial was a circus. He was found guilty. Years later F. Lee Bailey filed a habeas corpus petition and got him a retrial, and in the retrial Sheppard was acquitted. So the Sheppard case was my senior thesis, and Mason was my advisor. So I guess there was more law than I thought at Princeton.

MS. ALLEN: Did you have lawyers in your family?
MR. ROBERTSON: No lawyers in my family. I don’t know where it came from. My father was a banker, my mother was a psychiatric social worker. My aunt was married to a Presbyterian minister. One of my uncles was a chief of police in Flint, Michigan, and another was a real estate appraiser. So no lawyers.

MS. ALLEN: Did you enjoy college?

MR. ROBERTSON: I had a wonderful time in college. I graduated *cum laude* at Princeton, but frankly I think that was the result of grade inflation more than it was academic excellence on my part. I mean I got very much involved in extracurricular activities. I was chairman of the humor magazine which was mostly what I did during my last two years. I was a little bit involved with student government. I had a good time at Princeton. I think most people who have had the opportunity to go these amazing universities, when they get to my age in life wish they’d studied harder or taken it more seriously. I know when I sent my own kids off to school, I begged them to consider how important an opportunity they had. I begged them to study hard, I begged them to dig into it, and I’m sure they did it about the same way I did [laughter]. Youth is wasted on the young as they say.

MS. ALLEN: Well, but part of college too is that there are so many opportunities. I mean the debating society sounds wonderful.

MR. ROBERTSON: Oh, it was an absolutely wonderful experience to be there, and I loved every minute of it.

MS. ALLEN: On to the Navy after Princeton? Did you have a break?
MR. ROBERTSON: One of the reasons why Princeton was so much fun for me was that in the fall of my senior year, I met the woman I was going to marry, and I married her a year later. I was no more than three months out of college when I got married.

MS. ALLEN: How did you meet?

MR. ROBERTSON: My roommate fixed me up with a blind date. My wife is Swedish. She had come to Princeton to work as an au pair for a family in Princeton. Her best friend lived and worked for a family right across the road, and her best friend was dating my roommate. We went on a blind date. Neither one of us will ever forget it. We went to see Tony Curtis and Janet Leigh and Kirk Douglas in a movie called “The Vikings.” If you can imagine your first blind date with a Swedish woman going to the movie “The Vikings,” which she thought was stupid and so did I. But we spent a lot of time together that senior year, and we were married the following September. So I went straight from Princeton to the Navy with no break at all and was married in September. We lived in a little apartment in Jacksonville Beach, Florida, where my ship was, with a little side trip to Key West for sonar school.

MS. ALLEN: Were you given a choice of what to do in the Navy, or did they just assign you?

MR. ROBERTSON: Not really. You had some broad choices. You could be a Marine, which I didn’t want to be, or you could try to be a fighter pilot, but I was too tall for that. Or you could just go to sea. If you went to sea, they just put you
where they wanted you, and in my case they put me on what was called a radar picket destroyer, and I spent three years as the first lieutenant, which is a deck officer, and then as the anti-submarine warfare officer, and then as the gunnery officer of the destroyer. Wonderful life.

MS. ALLEN: It was called picket radar?

MR. ROBERTSON: They called it radar. Radar picket destroyers is a little bit of a misnomer today, but in World War II – we are always fighting of course the last war – but in World War II, destroyers with strong radar were put out, way out, around the aircraft carriers like a picket fence. Picket duty. In fact, picket may be a military term before it’s a fence term. Picket fence may be named after picket duty, but outlying guards are called pickets. Most of what we did was to form screens around aircraft carriers or steam right behind them to do what’s called plane guarding. If a plane didn’t land properly and fell into the water, we basically picked up the remains.

MS. ALLEN: Did that ever happen?

MR. ROBERTSON: Well, it happened to me several times when I was on duty that a plane fell off, but we never found anything. One of the most interesting things we did was when in 1962, one of the first men in space, maybe the first man in space, was launched from Cape Canaveral. The capsule went up and down. It didn’t go around the world, it just went up and down.

MS. ALLEN: Is it Alan Shepard?

MR. ROBERTSON: It was John Glenn in Friendship 7, on February 20, 1962. My ship was one of three ships that were down range to do the recovery duty. I was in
charge of the deck gang, and my job was to practice and practice and practice and practice picking up a space capsule. And we picked up a space capsule out of the water until we could do it blindfolded, and the big day came, and the rocket was launched, and my next-door neighbor picked it up with his ship, the USS Noa, which was about ten miles down range from mine. We didn’t get to do it, but we sure practiced.

MS. ALLEN: But you practiced. You were ready [laughter].

MR. ROBERTSON: We were ready.

MS. ALLEN: So were you at sea for long stretches of time and then just back in land briefly and then out again?

MR. ROBERTSON: Well, remember this was a peacetime Navy. We were at sea. We did one major deployment to the Mediterranean. For that one, we were gone for six or seven months. My wife had just had our first child, and she went to Sweden while I went to the Mediterranean. Except for that, there weren’t any. We’d go out for two or three weeks at a time, or a month at a time, then come back and stay for a month. We were at sea a lot, but it wasn’t as if we were in a nuclear submarine and lost and gone forever. We were in and out.

MS. ALLEN: Were you stationed in Jacksonville the whole time?

MR. ROBERTSON: The ship was in Jacksonville, and I did a month or six weeks or two months in Key West, Florida. My wife went with me to learn about sonar and antisubmarine warfare. I went up to gunnery school in Newport, Rhode Island and learned about gunnery. I went to some other school to
learn about doing air controlling, but Jacksonville was home port. Oh, and we were in the Brooklyn Navy Yard. They tore off the whole superstructure of the ship and built a new one. That was a big deal in those days, and we were in the Brooklyn Navy Yard for maybe ten months out of the three years.

**MS. ALLEN:** You were assigned to the Navy yard while the ship was being worked on?

**MR. ROBERTSON:** I was actually assigned to the ship. I was still assigned to the ship, but nobody lived on the ship. We lived in an apartment off the ship during that time. But I was there supervising construction and so forth, as if I knew anything about supervising construction.

**MS. ALLEN:** Did the Navy train you in that?

**MR. ROBERTSON:** No. But they gave me gold bars and told me I could do anything. That’s what the Navy does to you [laughter].

**MS. ALLEN:** Anything else about the Navy that you remember with fondness?

**MR. ROBERTSON:** Oh, I remember a lot of it was fun. It’s no life for a married man, at least not for me. In fact, I was the only married officer in the wardroom, except for the captain and the executive officer. So when we went to the Mediterranean, I was the guy who always agreed to take everybody’s duty because they were all going to go out and get drunk and disorderly on the beach, and I was married, you know, and I didn’t want to do those things. Or I’d be on shore patrol or something like that. I loved the Navy. I learned an enormous amount in the Navy. I met some good people and some terrible people, like anyplace else. But I’ll tell you one thing. I went
from the Navy to law school, and then from law school to the law. We’ll get to that I’m sure, but I developed a bias in that process. I will not hire a law clerk today who has not had some kind of life experience other than college and law school. Something to give some perspective to all that learning. The kids that go from high school straight to college and get great grades and go straight to law school and get great grades come out with a great resume and a great sense of entitlement, but no world experience. And without world experience of some kind, I disqualify them from clerkships. And I suppose that’s a bias based on my own experience, because by the time I got to law school, I knew why I was in law school, and I had some sense of what the world was about and what my place in it was and might become.

**MS. ALLEN:** How many years were you in the Navy before you went to law school?

**MR. ROBERTSON:** I was in the Navy for three years from 1959-1962, and then my tour was up. By that time, I had a wife and a child and I wanted to go to law school and I had no visible means of support. So I asked the Navy if I could – I thought this was very clever of me – I asked the Navy if I could be assigned to one of the universities where I could teach some Navy subject, ROTC subject, and then I would be able to go to law school for free.

**MS. ALLEN:** What did the Navy say?

**MR. ROBERTSON:** The Navy said, “That’s a great idea. We’re happy to do that.” And the next thing I knew, they had cut me a set of orders to the Iowa State College of Agriculture and Mechanics at Ames.
MS. ALLEN: The Navy in the middle of Iowa?

MR. ROBERTSON: The Navy had an ROTC program at Iowa State. I received those orders one day when the ship was getting ready to go to sea. The mail came and I looked at this thing and I ran up to see the captain. I said “Captain, I’ve got a real problem. I’ve got to go call the Bureau of Personnel because I am in trouble here.” Because I had run down to my stateroom and looked and there was no law school at the Iowa State College of Agriculture and Mechanics. The closest law school was at the University of Iowa, which was about 100 miles away. So I called up the detailer and I said I can’t do this. He said, “But Mr. Robertson, we have already cut you the orders.” He said “You have already been appointed to the faculty of the Iowa State College of Agriculture and Mechanics. We can’t change it.” I said, but, but, but,” I said, “I think I’ll have to resign.” He said “But Mr. Robertson, have you read Naval regulations?” He said once you have orders cut, you can’t resign for a year. But he said we have a nice minesweeper for you to be executive officer, and you could of course go to Japan. Would you like to go over there? And I said “Help! You’re putting me in an untenable position. Could you please try to find something else for me?” He said, “All right, call me when you get home, when you get back to port.” In these days you couldn’t send e-mails to people from sea. So when I got back about three weeks later, after biting my nails down to the quick, I called him and he said “Good news!” He said, “We found a desk for you in the Pentagon.” So they assigned me to the Office of Naval Intelligence
at the Pentagon where I spent two years doing basically administrative work and went to night law school at GW in Washington. Perfect.

MS. ALLEN: I hadn’t realized you went to law school at night.

MR. ROBERTSON: The first two years I went at night. Very interesting experience. It was 1962. The Vietnam thing was heating up. A great many law students in those days, particularly at – I don’t know how to put this delicately because I hope I’m a loyal alumni of GW – but at schools that were not in the very top tier, which GW wasn’t, a great many students were there not to study law but to be deferred from Vietnam. The night school was different. People who were in night school were people who really wanted to study law. It was hard to be in night school. You had to work during the day, you had to work hard enough not to get fired from your job, and you had to study way into the night, and on weekends. There were no dilettantes in that night school. I believed then, and I still believe, that the night program, at least in the mid-1960s, was as rigorous and as competitive as the day school. Now I did very well in night school, and at the end of two years when I was ready to get out of the Navy, I was elected editor-in-chief of the law review and I got a scholarship for my senior year. And so I was able to switch over and go full time, and I went full time the third year and one whole summer and scraped together enough credits to graduate in three years.

MS. ALLEN: How did the day law school compare to the night one?
MR. ROBERTSON: Well, it’s hard to say because in the third year of law school everywhere, even today, students are kind of putting in time and they all think they are qualified to be lawyers and why do I have to keep doing this, and I was running the law review anyway, so I don’t know that I ever did make a comparison. What I missed in being a night student of course was the whole study group phenomenon that everybody else got who was in day school.

MS. ALLEN: Night students didn’t have time for it.

MR. ROBERTSON: No time for it. You are on a treadmill. You just barely made it to class. You got home, you grabbed a bite to eat. In my case, you may or may not be there in time to say goodnight to your child, and then you stay up to 2:00 in the morning studying. I don’t know how anybody does that, by the way, who is not married. It was a terrible thing to do to my wife, but without her, I wouldn’t have had the discipline or the kind of structure that made it possible.

MS. ALLEN: So you were in Washington, in uniform as it were, when there were protests going on? Had the war protests started when you were at GW, and how did that affect you, or didn’t it?

MR. ROBERTSON: There were some protests, but when I was at GW, the war protests had not really begun. They didn’t really begin until a little bit later than that. I mean, I can remember, for some reason I have this visual recollection of myself in some department store in Washington in uniform and stopping to watch Lyndon Johnson give some speech on television about Vietnam.
But it was just getting serious then. The flag burning and all that hadn’t really begun to break out yet. But it happened very shortly after that. The late 1960s and the early 1970s were a time of enormous turmoil.

MS. ALLEN: And you stayed in Washington?

MR. ROBERTSON: I graduated from GW law school on June 5, 1965 and went to work at Wilmer, Cutler & Pickering on June 6.

MS. ALLEN: By choice?

MR. ROBERTSON: I was broke. And a parent. My wife had taken a series of jobs to try to make ends meet. We didn’t have any health insurance. We had another child.

MS. ALLEN: By the time you graduated from law school you had two children?

MR. ROBERTSON: By the time I graduated from law school we had another child. Child number two was born in the Bethesda Naval Hospital while I was still in the Navy. But that last year in law school I wasn’t in the Navy, had no income, had no health insurance. They didn’t have student loans in those days.

MS. ALLEN: So where were you living? Were you living in Washington?

MR. ROBERTSON: We lived in a wonderful area in Virginia called Fairlington, just off the Shirley Highway. A lot of people started in Fairlington and ParkFairfax right across the road.

MS. ALLEN: I remember the old Fairlington building. We had friends who lived there.

MR. ROBERTSON: That’s where we lived.
MS. ALLEN: So you had a job, but you still had the bar exam to face and you’re working, so in a way you went back to night school again.

MR. ROBERTSON: Yes. You know the bar exam – Yes, I was already at work at Wilmer, Cutler when I took the bar exam. I took the D.C. Bar. These days nobody takes the D.C. Bar. I mean it’s a hard bar to pass and almost all kids today take the easiest bar they can take and then waive into the District of Columbia later on. You couldn’t do that in those days. There was a bar review course taught in the District of Columbia at that time by a wonderful old man by the name of Joe Nacrelli. Do you remember him?

MS. ALLEN: Yes, I do, very vividly.

MR. ROBERTSON: Joe Nacrelli’s bar review. I still remember Nacrelli’s lecture on bailments. He said, “Now I will tell you the law of bailments.” He said, “If you go into a restaurant and give your hat to the hat check girl, you have not bailed that hat. But if you go into a barber shop and put your hat on the rack to get your hair cut, you have bailed that hat. Why? Because you can’t get your hair cut with your hat on.” I swear that’s what he said [laughter]. Joe Nacrelli’s bar review. I took the bar and worried about it and sweated about it with everybody else and got The Washington Post the morning that it came out and learned that I had passed the bar. And spent the years from June of 1965 until about March of 1969 at Wilmer, Cutler & Pickering.

MS. ALLEN: Let me go back a little bit and ask you about the decision to go to Wilmer, Cutler. Had you thought much about options or what you wanted to do?
MR. ROBERTSON: Oh yes. I told you, I have been unbelievably fortunate in my life to have some people steer me in the right direction, from the teacher at Western Reserve who found the Navy scholarship to just any number of people who kind of nudged me. I wasn’t even aware enough to know that – I didn’t care where I went to law school when I was in the Navy. Iowa State would have been fine with me if there had been a law school. I guess I knew that Harvard was supposed to be a great law school, but I didn’t think I could afford it actually, so I didn’t apply there. At any rate, getting back to Wilmer, Cutler & Pickering. As I said, I was editor-in-chief of the law review, and I had the best grades in my class. I didn’t go to Harvard, but I was – I wouldn’t say I could write my own ticket, but I had lots of offers. And so I took advantage of it. I flew out to California and interviewed at a couple of law firms in Los Angeles. I went back to Cleveland and interviewed at a couple of law firms because I contemplated going back to Ohio to practice law because I thought, gee, maybe I am an Ohioan, I can practice law, maybe I could get into politics someday. I didn’t know. I went to Atlanta to interview there. I interviewed at Sutherland, Asbill & Brennan, which was then in Atlanta and in Washington. I interviewed with Jones, Day and a couple of other firms in Cleveland. I interviewed with a little firm called Kindle & Anderson and a couple of other big firms in Los Angeles. I interviewed in New York with White & Case and two or three other firms. I really had a ball running around and letting people buy lunch for me and interviewing.
I interviewed at Covington & Burling here in Washington. I couldn’t interview at Arnold & Porter. They weren’t taking anybody right out of law school in those days. I had quite a number of very flattering offers, but a college classmate of mine, who had not been in the Navy and who got into law practice earlier than I did, was at Wilmer, Cutler & Pickering and said you ought to come over and talk to us, this firm is just getting off the ground. The firm at that point was only three years old. Indeed, when I interviewed, they were less than that. And I got quite excited about Wilmer, Cutler & Pickering. It was small, it was very high quality, it was growing. I guess I won’t – I will too, I mean this is legal history after all, why not. I had a very nice offer from Covington & Burling, but I was advised at the same time I had the offer that my chances were about one in three of ever making partner there.

**MS. ALLEN:** Was there a because?

**MR. ROBERTSON:** Because we take in more people. It was one of these “look to the left and look to the right and one of you is going to be a partner” things. It was and arguably still is the premier law firm in Washington D.C., and I was enormously flattered to have the offer, but I guess I was already getting to be a little bit conservative because you know I was married, I had two kids, I wanted certainty in my life. That’s what young people got in those days. You went to IBM and stayed the rest of your life. Wilmer, Cutler & Pickering, which was just getting started, had a completely different view, and they could afford to because they were still growing. They said if you
are as good as we think you are, you’ll be made a partner in this firm. That was a lot more comforting than you have a one in three chance. And I liked the people enormously.

**MS. ALLEN:** Do you know how big the firm was when you went in?

**MR. ROBERTSON:** Very specifically. I remember I was the 26th lawyer in the firm. There were sixteen partners, and I was the tenth associate. In the first year I was there, I worked for every single lawyer in the firm. That’s just the way you did things. You worked for every partner in the firm. Let’s see, in 1965 I went to work. Actually, I divert here. The first day I reported for duty at Wilmer, Cutler & Pickering was a Monday in June, and I walked in and there was nobody there. I said what’s going on here. Well it turned out the first Monday in June was the Monday when traditionally the Cravath firm in New York had its outing at some golf club in the Hamptons. Wilmer, Cutler & Pickering sprang from the rib of Cravath, Swaine & Moore. Mr. Wilmer, or Colonel Wilmer as we all called him, had been the Washington partner of the Cravath firm.

**MS. ALLEN:** So Cravath had an office here?

**MR. ROBERTSON:** They had a Washington partner. Not much of an office. I don’t think they had an office at all. Pickering and Cutler had both been associates at Cravath in New York at one time. So, it’s a long story and sort of outside my own legal history, but when the firm came together, it established a “corresponding relationship,” as they called it, with the Cravath firm, and Cravath considered us to be their Washington office. Every year at
Christmas time, John Pickering would give a speech to the firm in which he said, “Once again we are not giving any bonuses, and once again I can announce that we are not going to open an office in New York, and Cravath has agreed not to open an office here” [laughter]. So I worked for nearly four years at Wilmer, Cutler & Pickering. One of the people I worked with was Louis Oberdorfer, who was a partner who had just returned from Bobby Kennedy’s Justice Department.

**MS. ALLEN:** What had he done there?

**MR. ROBERTSON:** He’d been Assistant Attorney General in charge of the Tax Division. But he also, like everybody else on Kennedy’s team, had a roving portfolio. He was involved in civil rights and all kinds of other things. I worked for Lou Oberdorfer during that first year. Then I went on vacation the following summer in 1966, and when I came back there was an envelope on my front door with a note from Lloyd Cutler telling me that I was to meet him on the Northwest flight to Detroit the next morning at 7:00.

Well, you know, you are 28 years old or something, you are on vacation with your wife and your two babies, you’re coming home all scruffy. You don’t have any money left, and there were no ATMs in 1966, so I had to go and talk to somebody at a 7-Eleven into cashing a check for me which was almost an impossible thing to do in those days. So, I had enough cash to get to the airport. I got on this airplane, looked around, and there were six or seven Wilmer, Cutler lawyers on the airplane, and we were all going out to Detroit where we met with the Automobile Manufacturers
Association, whom we had undertaken to represent in connection with all of the safety standards that were being proposed by the federal government. There’s a long story here. Ralph Nader plays a role in all this. Ralph Nader had written this book called *Unsafe at Any Speed*, a broadside attack on the motor vehicle industry, and General Motors made a terrible mistake. They thought Nader was kind of an enemy of the state, and they hired somebody whose advice was to put a tail on Nader. Nader found out about it and let the press know about it, and General Motors was looking terrible until they turned to Lloyd Cutler who straightened it all out and saved General Motors’ bacon. That led to a very large engagement to represent the Automobile Manufacturers Association, which had to deal with the development of new safety standards for American cars.

**MS. ALLEN:** The National Highway Traffic Safety Act.

**MR. ROBERTSON:** Engineers from Ford, General Motors, Chrysler and American Motors were getting together to write safety standards and propose them to the government. Any time you get engineers from four motor companies together, you have antitrust problems. We were hired to provide antitrust prophylaxis to these companies when they got together. So there’d always be a lawyer in the room who would tell them what they could talk about and what they couldn’t talk about. But lawyers are pretty useful people, and just sitting and chaperoning these guys became pretty dull, so we began inserting ourselves into their business, and we would help them
write their standards. I spent I think fourteen months going to Detroit every Monday morning and coming back every Friday evening.

**MS. ALLEN:** Sounds grim to me.

**MR. ROBERTSON:** At first it was fun, and then I felt important, and then I wasn’t seeing my children, and then it was grim, really grim. I may have the chronology a little bit off, but sometime around late 1968 or early 1969. Excuse me, there’s one other important milestone here. In April of 1968, I’d been doing this Detroit thing for about 14 months. We were still doing it, but not as constantly as we had been. Martin Luther King was assassinated, and this town went up in smoke. And I was probably in some down period of my time with the law firm. I wasn’t enjoying what I was doing. I was very much in a sophomore slump. That day I walked from 17th and I Streets where our offices were down to Superior Court, almost following my nose to the teargas. I walked in and started accepting assignments of criminal cases of people who were being arrested for looting and all the other things that were happening to people in those days.

**MS. ALLEN:** You did this spontaneously?

**MR. ROBERTSON:** Completely spontaneously. I don’t think anybody in my office knew where I was. I just responded. Some neuron was triggered. I just had to do it, so I went down there. I didn’t really know what I was doing. I didn’t know much about criminal law. They didn’t care about that. They needed lawyers who would step up, and I went up to that assignment court or arraignment court over in what was then the Court of General Sessions,
and I must have picked up 15 or 20 cases that day. I went home that night completely exhausted. I remember we had house guests at that time. As a matter of fact, our house guest was my wife’s good friend from Sweden and her husband. They were later divorced, but they were visiting us.

**MS. ALLEN:** So they came in at the time of the riots?

**MR. ROBERTSON:** They just happened to be here at the time of the riots. They didn’t come for the riots. And I hadn’t been in the house ten minutes before the phone rang, and it was Lou Oberdorfer on the phone, and he said, with that wonderful Alabama accent of his, “Jim, a number of us are going down to Superior Court to see if we can help take cases,” and I said, “Lou, I’ve been there all day.” He said, “Well, I guess if you don’t want to be a part of it,” and I said “All right, I’ll be right down.” So I turned around and went back downtown and stayed there all night. That night – somebody should write this story up because it is really an important part of legal history in Washington, and maybe somebody else has talked about it – but that was the night that Lloyd Cutler went down to the Court of General Sessions and practically took over the Courthouse. With that very special sense of presence or self-confidence that he has, or whatever it was, he went down there and began organizing lawyers, and everybody accepted his leadership. Everybody including the chief judge of the court accepted his leadership, and he became the organizer of an effort to bring Washington lawyers down there to accept court appointments and to
regularize the whole intake and lawyer assignment process in Superior Court.

**MS. ALLEN:** So he was almost doing an administrative role as well?

**MR. ROBERTSON:** He was sort of a volunteer chief judge of that Courthouse. I wasn’t in his presence at that time, so I don’t know exactly what he did, but I know from having heard many people talk about it at that time that Lloyd basically took charge of the situation. When the night was over and we began to kind of tally up the situation, Wilmer, Cutler & Pickering had taken on – I can’t remember – my memory tells me upwards of sixty cases. And I volunteered to be the follow-up person, so in effect all the cases became my cases, and of course almost all of them pleaded out or were nol-prossed or disposed of in one way or another, but I became the firm’s point man for organizing all of this volunteer activity, and that probably was another turning point for me in my career because it gave me a glimpse I had not had of a lot of other aspects of the law. Frankly if you go straight from law school to a big law firm, there’s a lot about the law you have no idea about. And that was April/May of 1968. A month later, Robert Kennedy was assassinated. And eight or ten months after that – the way I remember it – I got out of bed and looked at myself in the mirror one morning while I was shaving it struck me that I’d spent more than three years practicing law and had no idea how many different ways there were to be a lawyer, or indeed what I was doing in this big law firm. I didn’t have any perspective. So I quit.
MS. ALLEN: When we’d talked before, I think you mentioned you talked to Lou Oberdorfer?

MR. ROBERTSON: I did. The way you quit in those days, and I’m not sure anyone had quit, but one sort of instinctively knew that the right way to quit was to go around and speak to every partner in the firm, and I did that, because I thought they’d been awfully good to me and they’d given me a lot of encouragement. They had given me useful work, and I felt like I was betraying them somehow. And many of them for their part were very concerned that they had not treated me very well and they thought it was the Detroit experience that had done it, that I was quitting because I couldn’t stand the Detroit experience. But I think the truth was that I was in some sort of identity crisis. Erickson says we all go through one. I just didn’t know why I was doing what I was doing and I had to find out.

MS. ALLEN: Did you spend a long time thinking about it before you decided to talk?

MR. ROBERTSON: Oh yes. Well, I didn’t spend a lot of time thinking about talking to people because, as I say, I literally woke up one morning and said “I can’t do this anymore.” But one would be foolish just to walk out the door. I mean I had to get some idea what I was going to do next.

So I looked around, and a couple of people gave me some advice, and I came very close to taking a job for Pierre Salinger, who at that time had organized some offshore investment opportunity with headquarters in the Bahamas, and he wanted a general counsel to go to the Bahamas. The notion of my leaving Washington and taking my family and going to the
Bahamas to be general counsel of an offshore mutual investment fund is ludicrous in hindsight, but it sounded like a plan in those days.

Well, one of the people I went to talk to was Lou Oberdorfer. Lou said, “Why don’t you go to Mississippi? We need a chief litigating counsel in the Jackson office of the Lawyers’ Committee.” I said, “I can’t do that, Lou. I’m married and have three kids.” By that time I did have three kids. He said, “Well, it’s not as dangerous as it used to be down there. Why don’t you go take a look at it?” So I approached my wife with that proposition. Her immediate response was “No way.” And I said, “Why don’t we go check it out just for Lou’s sake.” So we flew to Jackson and we were met there by Judy Lichtman and Elliott Lichtman. Elliott had just left, or he was on the point of leaving. He had been a staff lawyer in the Jackson office and was back in Washington where he’d gotten a job working for Joe Rauh, but he came back to Mississippi to show me around. He and Judy were both there. He took us on a tour and showed us what life would be like in Mississippi, and I think it’s probably fair to say that my wife was horrified, but I was hooked. And I won’t, for the benefit of the legal history project, recount the domestic aspects of this discussion which were complicated.

I left the firm and went to Jackson in March of 1969. I lived for three or four months in the volunteers apartment off Lynch Street in Jackson and worked at the Lawyers’ Committee, and then in July, moved my family to Mississippi. It seemed that we were there for a long time,
but we actually lived there only for 13 months. So I was there 18 months, and my family was there for about 13 months.

**MS. ALLEN:** At that point I think you had children in school, right?

**MR. ROBERTSON:** Let’s see, that was 1969, so Steven is eight and I think in second grade. Catherine is five and in kindergarten, and Peter is three and isn’t anywhere.

**MS. ALLEN:** So what was it like living in Jackson?

**MR. ROBERTSON:** It was professionally exhilarating. It was both the most fun, the most intensity, the most important – I’m mixing the tenses of these adjectives, but it was the most fun, intense and important work of my life. It was very difficult for my family. We were neither black enough nor white enough. We lived in a white subdivision, a brand new subdivision. We were required by the banks to sell our house in Bethesda before they would loan us money to buy a house down there. We think in retrospect it was because word was out that I was a civil rights lawyer and they were afraid that I was a “blockbuster” – a person who would go around and buy up houses and then sell them to black people who would move into the neighborhood. So they wanted some bona fides that I really wanted to live in the house, and for that they required me to sell our little starter house in Bethesda. So we sold it, and you take a loss every time you sell a house.

We sold our house, bought another house, moved down there and the kids were – I don’t think they were ostracized – we had some nice neighbors who were good people, they didn’t want much to do with us,
but they didn’t give us any trouble either. Steven’s elementary school was just up at the head of the street. Jackson’s school had desegregated that very year, and that is when the white community learned first-hand what they had wrought. A black teacher was transferred to teach in Steven’s school who himself was the product of a Mississippi education and didn’t know anything and couldn’t teach anything, and it was a tough year all the way around. The most interesting story, though – it didn’t have anything to do with race, it had to do with our daughter Catherine who we tried to find some educational opportunity for. Some schools were not open to us because of who we were. Private schools, they didn’t want us. She finally went to kindergarten at some Southern Baptist church, and for a month or two – she was just a five-year old girl, really a very, very bright five-year old girl, and she wanted to learn. She had started to read at home, and then she went to this school where, as far as we can tell, all they did all day long was to tell her that she was damned.

MS. ALLEN: Oh no.

MR. ROBERTSON: And this frustrated little girl used to come home and just raise hell with the rest of us because she was so frustrated about what she was not learning. But my wife was tuned in and said we’ve got to get this kid out of this school. We put her into an Episcopal day school called St. Andrews, and just overnight little Catherine flowered. She was reading, she was speaking French; she was happy. It was just unbelievable what a change came over her as a result of the whole atmosphere of the school. It was
quite stunning. It had nothing to do with legal history, but it certainly had a lot to do with family history.

St. Andrews, by the way, was of course an independent school, but it was integrated. It was integrated before the Jackson public schools were. So that was the situation. In July of 1970 or maybe August or September, I’ve forgotten exactly what month, the Lawyers’ Committee co-chairmen called me and asked me if I was interested in coming back to Washington to serve as the National Director of the Lawyers’ Committee. That was an easy question because as much as I loved what I was doing down there, it was just too hard on family life.

**MS. ALLEN:** What kinds of cases were you bringing?

**MR. ROBERTSON:** Well, there were five or six of us in that office. We were doing voting rights work, and we were doing some of the early Title VII class action work. We were still doing a lot of First Amendment work because there were civil rights movements in all the little towns where people wanted to march and picket and demonstrate and boycott, and they were being shut down in various ways by the town governments. I remember one case in which one of the civil rights leaders announced a civil rights march for the next Saturday night and instead, the town fathers got three doctors to certify that he was probably mentally ill, and he was involuntarily committed at the State Facility for the Insane at Whitfield for observation for 30 days. You could do that then.
We had some criminal cases to defend. I remember so well one case in Lexington, Mississippi, in which we were asked to represent a black man, a woodcutter who was charged with assault on a police officer. The police officer was what is known in Mississippi as a constable. The constable is sort of a sub-sheriff whose job is to serve papers and that sort of thing. This particular constable had made quite a habit out of harassing black people, wandering around the black community and ogling their women and fondling their women and dissing the men. One Sunday afternoon he came into a black neighborhood to serve some papers on a man and they had some kind of an altercation. The man was sitting in the driver’s seat of his car, the constable was standing outside, and it’s not quite clear who did what first, but at the end of the confrontation, the woodcutter had a bullet in his lung, and the constable had a very deep cut across his neck inflicted by a razor. The charge was of course brought against the black man. Bob Fitzpatrick and I defended him in a jury trial in a courthouse that was packed to the rafters with the black community. That case was ultimately won by the jury selection process because we actually managed to get two blacks on that jury, and they took the position in the jury room that not only did they think this man was innocent but that they were going to stay there until Thanksgiving. Maybe it was Easter – they were going to stay there for months. The whites all gave in and voted to acquit. He was innocent. The attack was provoked by the constable.
Then there was the case of Reverend Perkins who was rehearsing his Sunday school choir when he got notice that one of his flock had been arrested and was in the jail and they were beating him. Reverend Perkins piled his choir into a van, drove down to the jail, and knocked on the door. In some towns in those days the jail and the courthouse were in the same building. The jailer answered the door, and Perkins said, “We understand you’ve got X here.” The response was, “You are under arrest, nigger, and so are all those little kids.” So all the kids and Reverend Perkins were thrown into a jail cell just for being there. Reverend Perkins, who knew a good issue when he spotted one, threw open the windows of the jail and began singing with his choir “We shall overcome” out into the square, whereupon the jailer panicked and maced the kids through the bars.

**MS. ALLEN:** Oh, no!

**MR. ROBERTSON:** The state highway patrol were summoned and it was a big brouhaha. Reverend Perkins was charged with contributing to the delinquency of a minor. They had gotten to the parents of one of the children who didn’t like it that he had taken the kids to the jail. The charge was that he had caused this 12-year old girl to be in a bad place. We tried that case. With me was a young woman, the first black woman graduate of the Ole Miss Law School who was on my staff at the Lawyers’ Committee by the name of Constance Iona Slaughter. Connie Slaughter got her first trial experience in this case. She was the one who got to cross-examine this 12-year old girl. She kind of hunkered down and talked to this little girl in
her own language. The girl recanted everything she had said, but the jury, which was all white, convicted Perkins in about ten minutes. The hardest part about that trial was the decision not to let Perkins testify because he really wanted tell his story, and we said that’s not a good idea, just let it be where it is. We got it reversed on appeal.

**MS. ALLEN:** They were wonderful victories.

**MR. ROBERTSON:** Oh, wonderful, wonderful!

**MS. ALLEN:** How many lawyers were in the office did you say?

**MR. ROBERTSON:** I think the most we had when I was there was five or six. Some really marvelous people. Bob Fitzpatrick, who is now in practice here in Washington, is an employment discrimination lawyer. I think he’s mostly on the defense side now. Bob was there. A legendary guy by the name of Frank Parker who worked for the Lawyers’ Committee for the next 25 years and was really one of the greatest voting rights lawyers in the country was there at that time. A guy named Larry Ross who is now up in New Jersey. Martha Jenkins, then known as Martha Woods, who went over and became city attorney for Charles Evers, Medgar Evers’s brother. And one or two others. Great group.

**MS. ALLEN:** So there were some Mississippi trial lawyers as well?

**MR. ROBERTSON:** Well, Connie was from Mississippi. Connie came on board maybe six months before I left.

**MS. ALLEN:** And the rest of you?

**MR. ROBERTSON:** The rest of us were from the north. Carpetbaggers.
MS. ALLEN: Carpetbaggers. So you came back to Washington. Was that because there was someone leaving the job, or was it a new job?

MR. ROBERTSON: There was. A lovely guy by the name of Mike Miskovsky was the Director of the Lawyers’ Committee. He was hired by Oberdorfer. Lou Oberdorfer, by the way, I forgot to tell you had been the Co-Chairman of the Lawyers’ Committee at the time. That was the connection. When I got back, the co-chairmanship had changed. The co-chairs were John Douglas of Covington & Burling and John Doar, the famous John Doar who was in New York. I worked for those two people. After that, it was Lloyd Cutler and somebody else whom I’ve forgotten. The Lawyers’ Committee always had two co-chairs, and very carefully one was a Republican and one was a Democrat, and one was in Washington and one was in New York. It was just convenient to do that to kind of keep everybody together.

MS. ALLEN: For the record, it would be interesting to get a little background of the Lawyers’ Committee. Was it founded in New York?

MR. ROBERTSON: I’ll give you a quick thumbnail of the official version of the Lawyers’ Committee. The Lawyers’ Committee was founded in June of 1963 at the request of President Kennedy, and it grew almost directly out of the confrontation with George Wallace in Alabama when somebody, the President or his brother, was heard to say, “Where are all the lawyers? Why aren’t the lawyers standing up for the rule of law here?” That rhetorical question brought a very few people, including Lloyd Cutler,
again, the ubiquitous Lloyd Cutler – the ubiquitous Lloyd Cutler – and Bernhard Segal of Philadelphia, who either had been or was about to be the president of the American Bar Association. They organized a White House meeting to which, I don’t know, a couple of hundred lawyers were invited. The President spoke and urged the lawyers to do something to reestablish the rule of law, and the Lawyers’ Committee was founded then and there because of that meeting.

The Lawyers’ Committee’s original membership included – not Oberdorfer because he was still in government, but Whitney North Seymour, who had been president of the American Bar Association, and a blue ribbon list of real bar leaders. They came together more or less under the rubric of the American Bar Association. But the ABA had gone its own way in response to this and it put together really quite a – I wouldn’t call it a reactionary – but quite a conservative group of people who didn’t really want to do much of anything. The Lawyers’ Committee was much more proactive and was trying to figure out a way in which it could be of help.

The first thing the Lawyers’ Committee did was to recruit some volunteer lawyers to go to Mississippi to work with the Freedom Riders, and that led to the opening of a litigation office in Jackson, Mississippi in about 1966 or 1967. It was about two or three years later that I got there. There were two or three groups of lawyers down there working on various things. There was the NAACP Legal Defense and Education Fund, Inc.,
which we called the “Inc. Fund.” There was a group called “LCDC” which was the Lawyers Constitutional Defense Committee of the Roger Baldwin Fund of the American Civil Liberties Union. And there was the Lawyers’ Committee, which was known at that time as the “President’s Committee.” The President’s Committee had a pretty substantial grant from the Ford Foundation to keep us in business, and the Jackson office of the Lawyers’ Committee was sort of where it was at. That was the entire program of the Lawyers’ Committee until the urban riots of 1967-68, and the Kerner Commission report on violence in the cities. When Lou Oberdorfer was co-chairman in 1967-68, the Ford Foundation made a huge grant to the Lawyers’ Committee in order to try to replicate the Committee’s structure in cities around the country. The idea of the Lawyers’ Committee was to mobilize the private bar to become involved pro bono in the race conflicts of the cities.

**MS. ALLEN:** So it had offices in several cities?

**MR. ROBERTSON:** Beginning in 1968, there were Lawyers’ Committee offices in a lot of cities – New York, Chicago, San Francisco, Boston, Philadelphia, Atlanta, Los Angeles, Indianapolis, of all places, and maybe one or two other places. This was all done by kind of networking through the “establishment bar,” which is a euphemism for the big firm defense bar really. Organized bar leadership people would hire a staff guy and get all their buddies to come together as the executive committee of the local Lawyers’ Committee and go to work on the problems in their community.
There was one in San Francisco and one in Oakland. So at that point the Lawyers’ Committee had become quite a big operation. We had a litigating office in Mississippi and then these urban areas, committees all around the country. David Tatel, who of course now sits on our Court of Appeals, was the executive director of the Chicago Lawyers’ Committee while I was executive director of the National Committee.

**MS. ALLEN:** So you met him at that time?

**MR. ROBERTSON:** I did meet him at that time, and not only did I meet him at that time, but when I decided to go back to practice, he was my nominee to replace me as Director, and he did. Some time in 1972, I got a call again from Lou Oberdorfer, to whom I owe so much. He asked, “Are you ever going to come back to this firm?” He said, “If you’re going to come back, now might be about the right time because you’ve been gone long enough that if you stay gone much longer, you’re going to lose all of your seniority rights and opportunities to become a partner.”

**MS. ALLEN:** You’re still at the Lawyers’ Committee?

**MR. ROBERTSON:** I’m still at the Lawyers’ Committee, and by the way, I was not on leave of absence from Wilmer, Cutler & Pickering. I left Wilmer, Cutler & Pickering. I was gone. Although the firm, to its – this was such a beautiful place, still is – the firm and John Pickering particularly really didn’t like the idea of my going down there without insurance coverage. So the firm kept my health and life insurance policies in effect while I was in Mississippi.
MS. ALLEN: That’s wonderful!

MR. ROBERTSON: Isn’t that beautiful?

MS. ALLEN: Yes.

MR. ROBERTSON: So I went back to Wilmer, Cutler & Pickering in 1972. I agonized for a while about going back to the firm because what I really wanted to do was to start my own law firm, but I don’t think I had the energy or maybe the entrepreneurial spirit or something to do that. I had a lot of family obligations and they were paying awfully good money at Wilmer, Cutler & Pickering. My friends in the civil rights movement all thought I was selling out, but I went back to Wilmer, Cutler & Pickering on the belief, probably seizing the rationale, that I could do something. I could provide some leadership and connections for the firm so that the firm could keep its pro bono projects going and could keep its hand in the pro bono field. And it worked out pretty much that way. I was pretty active in pro bono stuff all the time I was there, lots of pro bono cases kept the firm plugged into the community that could send pro bono cases.

MS. ALLEN: Were big firms doing a significant amount of pro bono work in the early 1970s?

MR. ROBERTSON: Some. Washington was then, is now, and always has been, by far and away the leader in pro bono practice of any city in the country. It’s part of the culture and tradition of the legal community in this city that has not ever been matched anywhere else. We had a lot of trouble getting a Lawyers’ Committee started in New York and never did really get one
going successfully. It started, but it didn’t go anywhere because New
York is so entrepreneurial and so commercial and so big, we didn’t have
that nucleus of leadership that you had here in Washington. But here in
Washington, with John Douglas at Covington & Burling, with John Nolan
at Steptoe and Johnson, with Stuart Land at Arnold & Porter, with Lloyd
Cutler and John Pickering at Wilmer, Cutler & Pickering – I don’t know
who was in charge of things at Hogan & Hartson, but later on it became
David Tatel, he went to Hogan and became the pro bono partner there –
John Ferren and David Tatel. Those firms, and maybe four five others,
there was a lot of leadership for and a lot of interest in it. The usual
suspects were all ex-Roosevelt Democrats who were trying to do the right
thing.

**MS. ALLEN:** Does this seem like a good time to break?
MS. ALLEN: Judge Robertson, at the end of the last interview we were talking about your return to the law firm of Wilmer, Cutler & Pickering in 1972 and the pro bono activities of the firm. Maybe you can expand a little bit on what legal practice in Washington was like in the early- and mid-1970s.

MR. ROBERTSON: I think I said the last time my return to Wilmer, Cutler & Pickering was, in my mind at least, not absolutely the first thing to do leaving the Lawyers’ Committee because I thought of myself as going out and starting another law firm, but I didn’t. I was self-aware enough to know that I probably didn’t have, I don’t know, the energy or something to go out and hustle up clients. That was never my strong point. Besides that, I knew that if I tried to start my own law firm, the economic reality of it would be that I really wouldn’t have any time to keep doing what I had been doing at the Lawyers’ Committee, which was civil rights work and some pro bono things as well.

So I went back to Wilmer Cutler thinking that I was going to help provide some leadership to the pro bono program, and I think over the years I did that. I certainly cannot and do not claim that I invented or was the leader of pro bono of Wilmer, Cutler & Pickering. Wilmer, Cutler & Pickering was already in the vanguard of the law firms that were doing a lot of pro bono work in the city and they were doing it through the real
leadership of people like Lloyd Cutler, John Pickering, and prominently at that time Louis Oberdorfer, as the very senior partners in the firm. Even they were not, I think, the inventors of the pro bono movement though, because the early 1970s particularly were a time of great ferment among law students and young lawyers who were still reverberating with the 1960s. We were still in Vietnam, and Nixon was still in the White House, and there was an enormous amount of talk among young lawyers and certainly among young liberal lawyers about changing the system through litigation and making a difference in American society through litigation and systemic reform through litigation. And not only that, but young lawyers were looking askance at some of their colleagues and some of the causes that law firms were representing. I remember Wilmer, Cutler & Pickering responded to that concern by declaring, I think quite publicly, that the firm would never have anything to do with representing the tobacco industry. You remember the film called *Never on Sunday* when Melina Mercouri played the role of a heart of gold Greek prostitute who didn’t work on Sunday?

**MS. ALLEN:** I remember very vaguely.

**MR. ROBERTSON:** Well I, with my probably quite inappropriate sense of humor, called it Wilmer Cutler’s “*Never on Sunday* Syndrome.” But it was a heartfelt and serious position of the firm that they could not in good conscience take on the representation of the tobacco industry. As the 1970s wore on, Wilmer Cutler and everybody began to be convinced that a lawyer can’t really
pick and choose clients on the grounds of the moral content of the client’s causes, but that was the kind of issue that was afoot in those days. Is it moral for you to be representing this, that and the other thing? At any rate, law students began demanding of law firms, “Who are your clients? What is your practice? Why should I come to work for you? Do you have any pro bono work?” The law firms, particularly in Washington, DC, began responding, “Yes, we do do pro bono work.” Wilmer, Cutler & Pickering was one of the first.

When I went back to the firm, I actually took some clients with me, although they were civil rights clients. One case I took back to the firm with me, or brought into the firm, involved some agents of the Drug Enforcement Administration who wanted to sue the Drug Enforcement Administration for racial discrimination. These were black agents who had not gotten promotions and were getting all the undercover assignments, and they were being discriminated against in a number of different ways. I think that case went on for 30 years before it finally got resolved. Maybe 25 years. The case went on forever and ever and ever.

**MS. ALLEN:** What was the outcome?

**MR. ROBERTSON:** There was a settlement eventually. It was a class action, and eventually the case was settled. I’ve forgotten the name of the case for that matter. Anyway, I went back to Wilmer, Cutler & Pickering and worked in general litigation. One of my standing jokes in the firm – people who knew me at the firm thought it was a standing joke. Before I left the firm
in 1969, I’d been working on a case for our client Bethlehem Steel Corporation. Grace Line had bought four banana boats from Bethlehem, and when they were delivered, they were too small. They didn’t carry enough bananas. These ships were subsidized by the Maritime Administration, so it became a government contract issue in which the Maritime Administration was involved in some way. That case was one of these monumental big paper cases. By the way, I had been assigned to this case because I had a Navy background. “You know about ships. This is a banana boat. You could figure this out.” Well, indeed I could figure it out. I did know something about ships, and I spent a lot of time at the Bethlehem Naval Shipyard poring over naval architects plans and talking to naval architects and studying the construction of the ship. Then I went off to Mississippi. When I came back three-plus years later, the case was still there in almost exactly the posture in which I had left it. It was as if somebody put it in the freezer and saved it for me when I returned.

MS. ALLEN: And it was yours.

MR. ROBERTSON: It was mine. I did general litigation at Wilmer, Cutler & Pickering. I was made a partner effective the year after I got back, on January 1, 1973. 1973 was a very bad year for the economy and particularly for law firm economies. 1973, you remember, was the year of the great gasoline crisis, and we had lines half a mile long. It was the oil embargo, the long gas lines, the even and odd license plates. That was a troubled year in a whole lot of ways, but I’d just become a partner, and Wilmer, Cutler & Pickering
was struggling that year. I remember my first partnership meeting. I was no longer being paid a salary. I was now going to be paid a share of the firm’s profits, and I had a serious thought that first year that I might wind up getting paid less than I had been as an associate. The firm’s finances in that year were such that one joke in the firm was, “Well the way we’ll solve this problem is, we’ll just make all the associates partners.” Of course it was a short-lived problem, and Wilmer, Cutler & Pickering went on to grow and prosper quite dramatically over the years. That was my return to law practice here. I’d opted for the big bucks and there weren’t any [laughter].

**MS. ALLEN:** Had you always enjoyed litigation? How did you become a litigator? Is it kind of a natural thing, or at some point did you have to make a conscious decision and choice?

**MR. ROBERTSON:** The way law practice was organized in the late 1960s and early 1970s when I started, litigation was not the strong point of the big firms. The big firms were more solicitors than they were barristers. The big firms were interested in doing mergers and acquisitions and giving tax advice and corporate advice and trusts and estates advice. In Washington, the practice had a lot to do with advising corporate clients, sort of translating the government to private corporations and corporations to government. There was a lot of that. It was helping government teach the private sector what government was about and helping private industry teach government what private industry was all about, but not an awful lot of
litigation. Litigation was a little bit, I don’t want to say tacky, but it was a little bit beneath the dignity of some of the big white shoe firms.

I’m not sure where my own interest in litigation came from. Maybe it was boredom with office practice. Quite recently I’ve had occasion to think about that. The last few weeks here in my chambers have been very quiet. I’ve had no trials, not even any really serious contested motions. I’d go into court for a couple hours in the morning and do sentencing, and that’s about it. The rest of the day I’d spend in my chambers working on motions, and I have had occasion to think good grief, this must be what it’s like to be in the court of appeals. You go in and sit down, they hand you a pile of briefs and they close the door and they say “Have a good day,” and there you are with your briefs all day long. I was getting cabin fever. I hope I have a healthy scholarly interest in the law, but I am not fundamentally an office person. I need the action of the courtroom, and maybe that’s what drove me to be interested in litigation, or maybe it’s just a certain combativeness, or I’m not sure why. But I do remember that when I was first at Wilmer, Cutler & Pickering, I was looking for litigation work to do and there wasn’t an awful lot of it. I also remember that the chance to do trial work was one of the reasons, not a particularly altruistic reason, but one of the reasons why I left and went to Mississippi. I knew I would be thrust right into the courtroom and be able to try cases.
When I came back to the firm from Mississippi, I kept looking for opportunities to get into the courtroom, but the firm didn’t have an established trial practice. There weren’t then and there aren’t now too many law firms in Washington, D.C. that one regards as primarily “trial firms.” It was at about that time I think that a number of lawyers broke off from Hogan & Hartson and formed the Williams & Connolly law firm. Ed Williams and Dave Webster and couple of other people started it. It was conceived as a barrister firm. They were going to be trial lawyers, to the exclusion of everything else. They were trial lawyers, and that was a very exciting idea. Hogan & Hartson had a good deal of trial work because they represented D.C. Transit. And D.C. Transit had all kinds of buses hitting people or people hitting buses, or that sort of thing, and there was insurance defense and trial work there. Wilmer wasn’t all that big then, but it was growing, and it had aspirations to be a big firm. The day-to-day work of the trial courts was not being done by the big firms, and still isn’t being done by those big firms. The question for me was how do I support myself as a litigator and then how can we get more litigation into this firm so that the younger lawyers can get their hands dirty and go into court and make mistakes and learn how to talk to judges and so forth.

The pro bono program at Wilmer, Cutler & Pickering and at other law firms was in substantial measure designed to give young lawyers opportunities to get into court, which is another reason why I worked on it
and tried to get the firm doing more pro bono work. But I digress [laughter].

**MS. ALLEN:** Other than pro bono litigation, what kind of cases did you handle? Was it mostly in the District of Columbia, or were you litigating around the country?

**MR. ROBERTSON:** Well, it was not mostly in the District of Columbia. Litigation then was considered, and maybe to some extent these days still is considered, kind of a service that firms did for their big clients. For example, one of the firm’s big clients was the Monsanto Chemical Company. In some year, that I could pin down if I had to but I frankly can’t remember what year it was, an employee of Monsanto who was a toxicologist was indicted in Chicago for things that happened before he got to Monsanto, things that happened in another company he worked for, and Monsanto asked if we would undertake his representation. I wound up representing this guy. I wound up representing him in the investigation stage and at the time of the indictment, and we defended him in trial, and we represented him on appeal. Monsanto picked up the tab for the whole thing, which is quite remarkable, because he was then an employee of Monsanto but what he did happened before he got to Monsanto. I never figured out why Monsanto was so generous as to pay for this defense, but they did and that was a huge matter. There were four defendants. It was a seven-month-long trial in Chicago.
I took with me a young associate by the name of Pat Douglass who was involved with me in every step of this case. The case went on so long that all three of Pat’s children were born while she was working on this case. I have to tell you about this. She was pregnant with her first child just before our client was indicted. Pat and I flew out to Chicago to make one last effort to convince the U.S. Attorney not to indict. Pat was very pregnant, very pregnant at that time, and I said “Pat, you can’t go,” and she said “I’m going to go.” So she went with me and met with the United States Attorney, who I think was Dan Webb. He turned us down, and as we went to the airport – in those days, they were quite leery about letting a very, very pregnant woman get on an airplane – Pat sort of covered herself with a raincoat and walked behind me so nobody would notice her and went and sat down in the plane. The plane had no sooner taken off than she said, “Oh.” She had some twinges. I thought ‘God, this is terrible.’ Well, it was a false alarm, but I did take her directly from National Airport to Columbia Hospital for Women that night, and her baby was born a few days later. That was baby number one.

The case then went to trial and Pat was with me in court every day. It was a seven-month trial, and you really get to know the jury in a seven-month trial. They get to know you, and after about the third month, Pat was showing this pregnancy, and I noticed the jury was kind of giving her dirty looks. One day I figured out that Pat was not in the habit of wearing her wedding ring in court. I said, “Pat, would you please put your
wedding ring on,” so she did and the jury was all smiles after that. The second baby was born within a couple of weeks after the guilty verdict. Pat was very pregnant with her third child when she went down to argue the appeal in the 7th Circuit. So all three of Pat’s children were involved with that case.

I did a lot of work with the securities enforcement part of the law firm. Wilmer, Cutler & Pickering had a very busy and successful SEC practice. The firm had brought Manny Cohen in from the SEC, and then Manny Cohen brought Art Matthews in from the SEC, and later Art Matthews brought Ted Levine in from the SEC. Cohen had been the Chairman of the SEC, Matthews had been the Director of Enforcement, and Levine had been I think either his deputy or also Director of Enforcement. So the firm got quite a toehold in securities enforcement and in SEC fraud cases.

I did a great deal of work over the years in SEC civil fraud cases, either investigations from the SEC or lawsuits between companies or by investors against companies arising out of SEC fraud. Those cases were in New York, in Denver, in Detroit. I’m still answering your question whether I was litigating in the District of Columbia or all over the country. The answer is, all over the country. Commercial litigation, SEC litigation.

I think I told you the last time that before I went to Mississippi, I was doing a lot of auto safety work, but I was involved then in the regulatory phase in helping the Automobile Manufacturers Association
work with or against the government in the formulation of auto safety regulations. When I returned to the firm, we were in the litigation phase of auto safety, and indeed I had quite a career working on auto safety litigation between probably the early 1970s when I returned and the late 1970s when it all disappeared in a puff of smoke, and if I may I’ll kind of spin that out for you.

MS. ALLEN: Please do.

MR. ROBERTSON: The National Highway Traffic Safety Administration (NHTSA) (which we called “nittsa”; they hated to be called “nahtsa”) was the regulatory agency that was to enforce auto safety regulations, and I think beginning with Carter in 1976 is when they began to get really proactive. I’m trying to think of the name of the director.

MS. ALLEN: Is that when Joan Claybrook was there?

MR. ROBERTSON: Yes. I think that may have been Claybrook’s time. She of course being a former Nader person, and depending on which side you were on, I think the industry probably thought of Joan Claybrook as the fox in the hen house, and the activists thought they finally had somebody in there who could really make something happen. NHTSA brought a series of cases. Actually, the cases arose this way: NHTSA finds something in an automobile they think is a defect, they tell the car company there is a defect, and the car company disagrees. The agency studies it, investigates it and finally issues an order to the car company to recall the cars and fix the defect. The car company objects, and then the government sues for an
injunction to require the car company to recall the car. General Motors’
pitman arms, Ford windshield wipers, Buick carburetors, and one or two
other defects were all cases that I worked on. This was my stuff. I was a
young partner, and I was in charge of these cases and they were mine to
run with.

The most memorable of them was the General Motors pitman arms
case. The 1959 Cadillac had a piece in the steering linkage that connects
the steering wheel with the thing that makes the wheels actually turn
called the drag link, and this connection between the steering column and
drag link was called the pitman arm. In fact, I’ve got a bunch of them
around here, they’re paperweights. The pitman arm in the 1959 Cadillac
was a cast metal thingamajigger which had a metallurgical defect. It
would break if there was too much pressure put on it. Well, I won’t bore
the historians with the details of this case, but of course when you are in
the middle of litigation nothing is boring. This was a huge case, because it
was a test case for both the agency and General Motors on what was
meant by the statutory term “unreasonable risk of accident injury and
death.”

We had to litigate first what is a defect, and second what is an
unreasonable risk. These cars at the time we dealt with this case were
already 15 years old, and one of the arguments we were able to make was
that the defect that they are talking about as most metallurgical defects
will only happen in the first few months of the life of any product. It’s
called, believe it or not, infant mortality, things that are going to go wrong will go wrong quick or not at all. That was argument number one.

Argument number two, and the one that I always thought was most fun, was that you can’t put enough pressure on a pitman arm to break it unless the steering wheel is turned all the way to the left or all the way to the right putting a maximum amount of pressure on it. When can you do that? Only when you are parking the car. And when you are parking the car, it’s not moving very fast, if at all, and so there is no unreasonable risk of accident injury or death, even though it can be quite startling to have the steering wheel spin completely free in your hands.

MS. ALLEN: Which is what happens when it breaks?

MR. ROBERTSON: Well, Michael Burack, who was then an associate in the firm, worked the case with me. Burack found and we developed and put on an absolutely world-class expert witness. His name was Alan Tetelman. Tetelman had three degrees from Yale, culminating in a Ph.D. in metallurgy. He was at Stanford University teaching, and he was putting together a new consulting firm on risk evaluation. Tetelman was one of the first people to be deeply involved in the kind of actuarial, mathematical notion of what risk really is. We tried this case ultimately before Judge Oliver Gasch here in this Courthouse and put Tetelman on the stand. Gasch later told me that Tetelman was the best expert witness he’d ever heard anywhere. Alan Tetelman convinced Judge Gasch that whatever risks were posed by this potential pitman arm failure – because none of them had happened for
years, since the first infant mortality phase – was not an unreasonable risk of accident, injury or death. Well, I was at the top of the GM charts until the Court of Appeals got hold of it, and it took the Court of Appeals about ten minutes to reverse. The Court of Appeals said it was clearly an unreasonable risk. The Court of Appeals never paid any attention to the details of the risk analysis, but then this comes under the category of ‘say no more’ about the Court of Appeals.

A footnote to the Alan Tetelman story. Some years later, Tetelman was hired to do a safety analysis of the San Diego airport, which was then perceived as being not a very safe place to land. He was going to San Diego for his engagement when a PSA airplane, and you may remember the two PSA airplanes collided over the San Diego airport and everybody was killed.

**MS. ALLEN:** He was in one of them?

**MR. ROBERTSON:** He was in one of them. And Mike Burack and I, over the years, every time we get together, we talk about Alan Tetelman and we can both see him now standing on a cloud saying to us, “I told you guys there is no such thing as a risk-free society, no such thing as zero risk.” That was the proposition he stood for.

Anyway, I tried another case in this court before Judge John Lewis Smith on the subject of windshield wipers that flew off Ford cars. He thought that was pretty risky. I tried another case before Judge June Green of this Court, and that was memorable. When I say I tried, actually that
case went off on summary judgment. This case had to do with carburetors that burst into flames. We said, well, maybe they burst into flames occasionally, but that’s not an unreasonable risk of accident injury or death. Why not? Because the carburetor is up in the engine compartment, separated from the passenger compartment by something called a firewall. That’s what the original firewall was, it had nothing to do with computers. The original firewall is the wall between the engine compartment and the passenger compartment of an automobile.

MS. ALLEN: I didn’t know that. I always thought it was a construction term for houses.

MR. ROBERTSON: It may also be that.

MS. ALLEN: There is one in a car?

MR. ROBERTSON: There is one. And nobody in the whole history of this car had ever been injured at all by one of these burning carburetors. Everybody had always been able to stop their car, get out of the car, get away from the car. Defect? Yes. Unreasonable risk of accident injury and death? No. I was making that argument to Judge June Green, who everybody who knew her will remember as a rather regal woman, and I have this visual picture in my mind to this day. Here I am making this perfectly rational argument about a perfectly rational subject and statistics, and she sat up straight in her chair at the bench and leaned over with that white bow she had above her robe, and she looked over and she said, “Mr. Robertson, do you expect this Court to wait until someone is burnt to a crisp before we take any
“action in this case?” And while I was stammering with a reply, she said, “The Government’s motion will be granted.” That was it.

**MS. ALLEN:** Right from the bench.

**MR. ROBERTSON:** Summary judgment in the middle of the argument. Well, that was pretty much the end of my career as a litigator of the auto safety cases. But I spent a lot of my time on them between the time I returned from Mississippi and the late 1970s. I’m just pulling these books to look at them. The pitman arms case actually went to the Supreme Court in 1977. I think the Supreme Court question had to do with a penalty and whether a penalty was proper.

**MS. ALLEN:** Did you argue the case before the Supreme Court?

**MR. ROBERTSON:** Actually, I think cert. was denied. Oh, that was the issue. The question presented was whether in applying the key definitional provision of the National Traffic and Motor Vehicle Safety Act requiring that a manufacturer recall automobiles containing defect which poses an “unreasonable risk” of accident, injury and death the Court of Appeals disregarded the intent of Congress by adopting a preset rule which precludes introduction of evidence on the existence and degree of risk. Cert denied. End of auto safety career. I think many people who were litigators in Washington in the 1970s and 1980s, which, you will recall by the way, was the high tide, or at least the most energetic part of the tide, of what came to be known as “deregulation” – lawyers who had dined out for years on regulation of some industry or another had to be reprogrammed
to do something else because the regulatory practice didn’t exist anymore in many sectors.

MS. ALLEN: So it made a difference to your practice?

MR. ROBERTSON: You bet! We’ll probably have to come back and do this again because just the discussion of it helps me to sort out the timeline. First, banana boats to deal with, but after banana boats, auto safety for five, six, seven years, and I think after that was when I got involved in the securities fraud issues. The criminal case from Monsanto was one-off. I didn’t really do much criminal work. The firm continued to do an awful lot of SEC work. I never did much of the SEC regulatory work, but I was defending companies in SEC fraud class actions. That work I did for maybe another ten years during the 1980s. And then in the first half of the 1990s, before I came on the bench, I was doing completely different kind of litigation. I was doing what was then called “insurance coverage litigation.”

MS. ALLEN: Representing insurance companies?

MR. ROBERTSON: Yes. Representing insurance companies. The typical insurance coverage case is by a manufacturer against an insurance company for refusing to pay on a policy. In that period of time, the coverage cases we were working on involved what was known as the “long-tailed tort problems.” Asbestos, plastic piping, those were two particularly vexing cases, just to describe some.

In the asbestos case, for example, shipyard workers would sue asbestos manufacturers for injury to their workers. The problem was that
there were eight or ten asbestos manufacturers and nobody knew whose asbestos had done the damage. So they sued them all and got judgments against them all or they settled them all. Then one of the asbestos manufacturers would then go and sue its insurance company, but it wouldn’t just sue one insurance company because it had insurance policies with different carriers, year after year after year. So you had, let’s say, arguably, ten asbestos companies suing fifteen or twenty insurance companies for policies that were in different years. It was a huge mess. The insurance companies all said it didn’t happen during my policy, you have to prove it,” and that “it comes within this exclusion or that exclusion of the insurance policy. So there were huge numbers of lawyers involved in these insurance coverage cases that went on for years and years. Huge numbers of lawyers.

I can remember going to a meeting of insurance company lawyers in Houston in one of these insurance coverage cases. I think this one had to do with plastic piping, PVC pipes that were used for house plumbing systems, and they leaked, causing incredible amounts of damages to builders all over the country. Builders sued the insurance companies, and there were, I don’t know, 15 or 20 insurance companies, 15 or 20 years’ worth of liability, and maybe double that number of lawyers in this law firm in Houston. I walked in and looked around and realized that almost everyone in that room was young enough to be my son or daughter. And I thought, ‘I don’t feel like I’m too old to be a trial lawyer, but maybe I am,
maybe they think I am.’ Litigation is – and certainly the traveling and courtroom part of litigation is still – a young person’s game.

The trial of a case is a real adrenalin producer. When I was in trial on a case I used to joke that I couldn’t believe that clients were paying us to do this. We ought to be paying them for the opportunity to do it because it was such fun. But it was also unbelievably trying to the body and sleep deprivation and everything else. You work too hard when you try cases. While I didn’t decide I was too old, that I had to quit, there was a point at which I said maybe I should be thinking about doing something else.

I think this interview also didn’t cover some discussion I was having about another whole area of litigation that I did in this roughly 20-year period after Mississippi and before the bench. That is the vaccine litigation. Wilmer, Cutler & Pickering represented a major manufacturer of the DPT vaccine and polio vaccine. Diphtheria, pertussis and typhus vaccine – DPT. Whooping cough was pertussis. But the sad fact is that vaccines confer immunity on everybody only if everybody accepts the vaccine. Actually, it is literally called “herd immunity.” All of the public health officials and all pediatricians will urge that every child receive the DPT vaccine because if every child doesn’t receive the DPT vaccine, then the possibility of whooping cough spreading and becoming a wild virus again is a real possibility. So that’s why kids have to have the vaccine. But if kids have to have the vaccine to go to school, it’s also true that
some tiny, tiny percentage of children will have very bad reactions to it. And the reactions can become serious neurological deficits and retardation. All kinds of awful things happen to a very few kids. Those are the kids who bring the lawsuits, or their parents do. Those are very wrenching cases, but if you are defending them, you can’t just say “Oh, you have a retarded child, well it must be the vaccine, we’ll pay you.” You need to insist on proof that the vaccine caused it or that there was enough of a temporal relationship that it’s reasonable to conclude that the vaccine caused it. These were high-stakes cases. There were experts on both sides disputing whether the vaccine was at risk, why the vaccine was at risk, whether it was a defect or not. It was extremely complicated and also very emotional litigation. Eventually the federal government took over the issue by enacting a vaccine compensation act which essentially reduced most vaccine claims to a no-fault posture in which parents could get relief from the federal government if they could prove the injury, and that would be that. So, I got legislated out of the vaccine litigation practice.

At about the same time I was involved with vaccine compensation litigation, I took a side trip into a large but quirky piece of litigation involving an oil spill in Alaska and the claims of fishermen to be reimbursed for salmon they did not catch. Our client was the Trans-Alaska Pipeline Liability Fund, essentially a pot of money that was funded by the deposit of five cents for every barrel of crude that crossed the state
in the Trans-Alaska Pipeline. The Fund existed for the very purpose of providing compensation for damage caused by oil spills, but of course compensation for oil spills, like compensation for vaccine injuries, is not simply paid over on demand – pots of money are entitled to a defense – and so several of us – Steve Hut, myself and Alan Braverman, among others – became quite knowledgeable about the salmon fisheries of Alaska, the sushi markets of Japan, the Russian-speaking fishermen of the Kenai Peninsula, and several other fascinating subjects. One indelible visual memory of that case is of three Washington lawyers in blue suits looking for breakfast one March morning in Soldatna, tiptoeing in their tassel moccasins around pools of spring melt in the parking lot and then into a restaurant, where the bearded heads of about fifty big guys in overalls and plaid shirts turned in unison to check us out, and immediately swiveled back to their ham, eggs, biscuits, and gravy.

I think I’ll summarize by saying that in a time of deregulation and changing administrations, there really was in Washington something like litigation du jour. I did auto safety, and then I did securities class actions, and then I did vaccine compensation and TAP and Alaska salmon, and then I did insurance coverage defense. It was sort of one wave after another. All quite different types of litigation.

**MS. ALLEN:** But a lot of litigation. It was 1984 and you were invited to be a member of the American College of Trial Lawyers?
MR. ROBERTSON: I raised that because you asked me if many of my cases were jury trials, and I said no, not many. I think it’s correct to say that I tried more jury cases in a year-and-a-half in Mississippi than I tried in almost all the years after that until I came on the bench. Some of the cases I was working on weren’t really jury triable. Very few securities class actions have ever been tried by juries. They are almost all settled. The automobile safety cases were by statute not jury triable. They all went off on injunction actions by the government. The insurance coverage cases, again, those cases were too big to try, too complex to try. Nobody could figure out how to try them. Some insurance coverage cases are tried, but they are cases in which the jury essentially is asked to determine what the intent of the parties was when they adopted some exclusion in an insurance contract – how can the jury make that determination?

The white-collar criminal trial of the toxicologist I told you about earlier was certainly a long jury trial, and I tried a couple of jury cases out in Missouri for a company that was a distributor of propane gas. That was Empire Gas, a regional propane company that had all kinds of commercial disputes concerning the purchases and sales of companies. Except for those, there really weren’t that many jury cases, which is why I was surprised and seriously flattered when I was invited to join the American College of Trial Lawyers. Up until some time in the 1980s, they wouldn’t even think of admitting anybody to fellowship who didn’t have a lot of jury trials under his belt. But they did and actually, it’s interesting – I was
installed in the American College of Trial Lawyers in the same year as Thomas Penfield Jackson of this Court. Judge Jackson – not a judge then, or maybe he had just become a judge – was what I call a real trial lawyer. He was doing medical malpractice defense and insurance defense in the courts of the District of Columbia and Maryland. He was the kind of guy who was in court all the time trying cases.

**MS. ALLEN:** I didn’t know that.

**MR. ROBERTSON:** Yes. He was. And he was a wonderful trial lawyer, and I felt very privileged to be recognized by an organization that honored that kind of trial experience. But the College was then waking up to the fact that there were a lot of good litigators around who didn’t have the chance to actually try many cases but who at least were worth a look anyway.

**MS. ALLEN:** You cited some interesting recent statistics that the decrease in the number of cases that go to trial has continued. The chances of actually litigating a case to a jury trial now is a real rarity.

**MR. ROBERTSON:** Absolutely. There is a good deal of discussion going on in the judiciary today about the decreasing number of jury trials, of trials of many kinds, but jury trials is mostly what we do. Just in the time that I have been on the bench, the percentage of civil cases going to trial has dropped from something like 3 or 3 ½ percent to something like 1 or 1 ½ percent. The number of criminal cases going to trial has dropped from something like 4 percent to something like 2 percent. Why? Well, that’s a matter of some dispute. Some people say that trials are too expensive. Other people
are saying they take too long. Still others say there are too many technicalities. But I think the judicial sense of it is that most people settle cases because the risks are too large. There’s too much of a downside risk to going to trial if you are a defendant. And if you are faced with a claim for $10 million and you can settle for $500,000, at least you walk away with some money. So, it’s risk analysis again that’s driving most settlements. But the truth is that the work of the federal courts is many fewer trials than it used to be. Many fewer.

**MS. ALLEN:** And more motions?

**MR. ROBERTSON:** More motions. Yes. Simply that. More motions. I think that’s a complete answer.

**MS. ALLEN:** I want to ask you about one more thing that didn’t get on the last tape, and that’s the interesting connection you had with Judge Gasch. Can you talk about that?

**MR. ROBERTSON:** Oliver Gasch and I had something in common. We both had gone to Princeton, and we were both night students at GW Law School. For some reason, I met Judge Gasch while I was still in law school. I think it’s because he came over there to speak just after he’d gotten on the bench, and because a fellow I worked with on the law review, John Tansey, either knew Judge Gasch or [Something happened to the tape here. The recording stops, with a very faint, muffled sound].
MS. ALLEN: What I’d like to do today is talk more about your judgeship, getting appointed to the bench, how the nomination worked and what that experience was like, and then just talk about your years on the court, which is little bit open-ended. We can start with your appointment or talk about private practice in the early part of the 1990s leading up to the appointment.

MR. ROBERTSON: The appointment process is of intense interest to every judge who’s ever gone through it. Whether it’s of any historical interest to anybody except that individual judge is another question. I found when we went to the so-called “baby judge school,” which is the week of orientation that new judges have after they are appointed, we were all very excited to tell our stories, and no two stories were anything remotely alike. It was quite remarkable.

MS. ALLEN: These were all Clinton appointees?

MR. ROBERTSON: Yes. These were all Clinton appointees.

MS. ALLEN: You might expect some homogeneity.

MR. ROBERTSON: I’ll try to put the appointment and confirmation story in a nutshell, but it may be a pretty big nutshell. The thing that’s important to know about the Clinton appointees to our court is that after President Clinton was elected – or maybe before he was elected, maybe he was worried that he wouldn’t
draw enough votes in the District of Columbia. In any event, Eleanor Holmes Norton, our non-voting Delegate to the House of Representatives, persuaded the President to give her the functional equivalent of senatorial privilege in the appointment of district judges, the United States Marshal, and the United States Attorney.

MS. ALLEN: She can be persuasive.

MR. ROBERTSON: As you know, in every judicial district except this one, there are two United States Senators and they somehow work out between themselves who will have the right to give the nod to the next person whose name will be sent to the White House for a judgeship. In the District of Columbia, where we have no vote, no senator, and no voting Congressperson, for Ms. Norton to get that authority was really quite remarkable. But she did. And to her considerable credit, she immediately appointed a commission, I think it was a 17-member commission, to collect, review, vet, and interview applicants for judgeships, and to submit recommended names to her. As I recall, the Commission was going to give her three names for each opening, and she was to send one of those names to the White House. Or maybe she initially thought she was going to send three names to the White House. But as a practical matter, what she wound up doing was choosing the name she would send to the White House. This Commission turned out to have a number of members I knew pretty well. Its chair was Pauline Schneider and maybe still is. That Commission may still exist, at least in name. I don’t think President Bush has given the time of day to
Eleanor Holmes Norton on judicial appointments, although she maintains that she has something like the same deal with President Bush.

Pauline was a President of the District of Columbia Bar two or three years after me. I had worked with her on the Board of Governors. Mark Tuohey, I believe, was on the Commission. Mark had also been a President of the DC Bar. Judy Lichtman was a member of the Committee. It was Judy and Elliott who persuaded me to go to Mississippi back in 1969, so I had known Judy for a long time. There were three or four more members I happened to know.

Now I deny that who you know plays a dominant role in American life, but it certainly didn’t hurt my chances that I knew these people and that they knew me and that I at least had some credibility going into the process. There were some obvious and terrific potential candidates for judgeship. I thought then and still think that anyone’s chances of being appointed to the federal bench was roughly the same as being struck by lightning. You cannot run for that office and think you’ll fall on your sword if you don’t get it. You just can’t do that because there are so many imponderables in the process. At this particular time, there were four vacancies. Everybody thought that this being the Clinton presidency, and Clinton being very, very devoted to diversity as a principle, indeed in the early days of the Clinton Administration the deal was you couldn’t appoint anybody to anything unless you presented a slate that included at least a minority candidate and a female candidate. So at any rate, diversity was a
big deal. There were lots of great people lined up for the appointments, and it was pretty well understood in the community that it was high time we had a Latino judge on this court, and everybody loved Ricardo Urbina, so one of those appointments was going to go to him. It was pretty well understood by everybody in the community that Gladys Kessler, because of her tremendous work at Superior Court and the national reputation she had obtained for herself, was going to get one of those appointments. It was pretty clear in the community that one of the four appointees was going to be an African American. So that left one white male slot. The potential candidates included people like Chuck Ruff – the late, lamented Chuck Ruff – Fred Weisberg, this fabulous judge over in Superior Court who might be interested, but turned out he wasn’t, Paul Friedman who had been President of the DC Bar before me, who had clerked on this court and clerked on the Court of Appeals and had all kinds of wonderful credentials for the job. But I threw my hat in the ring anyway.

I put my name in the hopper and had a good interview with Eleanor. By the way, I lived in North Bethesda, Maryland at that time, out near White Flint and Montgomery Mall, and had been living there for 30 years. Eleanor made it pretty clear that she wanted her appointees to be residents of the District of Columbia. She said, “I know there is no legal requirement that judges in this district live in the District of Columbia, but neither is there a legal requirement that I send anyone’s name to the White House.”
MS. ALLEN: She said that?

MR. ROBERTSON: Pretty much. She was a District of Columbia politician and held all the cards. That was her deal, and I took it. I said, “I have a 50% share of the house that I live in, I have half the vote.” “This is going to be difficult for my wife, but I will tell you that it is my intent to try to persuade her to move, and I will do that.” And she seemed to accept that. But the first four seats went to Ricardo Urbina, Gladys Kessler, Emmet Sullivan, and Paul Friedman.

MS. ALLEN: Okay.

MR. ROBERTSON: Eleanor called me and said, “You’re a great candidate, but I’m sorry, I can’t appoint you.” I said, fine, thank you, and retired to lick my wounds. One of my partners at Wilmer, Cutler & Pickering, a wonderful computer visionary by the name of David Johnson, said, “Don’t worry, Jim. “You don’t really need to sit on that Court. We’re going to need new judges in the new Court of Cyberspace.” He also said, “You wouldn’t have to wear a robe,” but he was dead serious. He thought that a court system would develop with specific jurisdiction over cyberspace.

MS. ALLEN: Sort of like a tax court or separate jurisdiction?

MR. ROBERTSON: Sort of like a tax court. But the analogy that he or somebody drew fascinatingly was to the law that developed in the Hanseatic League back in the 13th and 14th centuries when commerce was getting started in Northern Europe and there wasn’t any system for it. The system developed itself. It was Hanseatic League. So the theory was that
something like that will develop in cyberspace. Well, then there was an
unfortunate death on this Court. It was George Revercomb, a wonderful
judge who died unfortunately of cancer. Because there was now another
open slot, I started to put my name in again. Then, I got a call from a
good friend who was a FOB, as we called him in those days, who said,
“This seat has been promised to someone else.”

MS. ALLEN: Did you know him?

MR. ROBERTSON: Oh yes, I knew him very well. He said this seat’s been promised to
someone else. I said “Oh.” He said it’s been promised to somebody who
is a friend of Hillary’s, and if you really want to be a team player, don’t
apply for this one because your face will be on the radar screen.
Everybody knows you and you’ll get the next appointment, but this one
has been promised to someone. Well, I knew who that person was and
checked it out and thought about it and checked out how close a friend of
Hillary that person really was and made my own analysis of the situation.
Then I said to myself, life is too short, and I’m not getting any younger,
and I’m going to go for it anyway. And I did, and that appointment I got.

The appointment process itself is amazing. You have to fill out a
form that is 70 or 80 pages long. It’s like an FBI clearance form squared.
You have to collect the names of all the cases you’ve tried, the judges you
have appeared before, and the attorneys you’ve appeared against, and you
basically have to recap your whole history. In fact, if I really were doing
this oral history properly, I’d have that in front of me because I did that quite seriously for this whole judicial confirmation process.

**MS. ALLEN:** Did you have to do that first time?

**MR. ROBERTSON:** No. The White House begins this process and they wouldn’t have known about me unless Eleanor had sent my name up to them. And Eleanor didn’t send my name the first time around.

**MS. ALLEN:** So you didn’t have to fill out these forms before you got to meet Eleanor?

**MR. ROBERTSON:** No. Well, actually that’s not true because she had her own form. I had to fill out forms for her first, for the Commission first, and then another set for the White House and then another set for the Senate. It went on and on.

The clearance process is quite amazing. There were a lot of people who were very helpful to me, and at this stage, when your name goes to the White House, you begin to get a little proactive. You begin to muster the friends who know you, who you think might have some clout up there. I had very nice letters and recommendations from all kinds of people, from former partners of mine, partners who put me in touch with senators from Maryland where I then lived who were kind enough to write letters. Vernon Jordon wrote a nice letter for me. I thought he had some connection with the White House. A wonderful guy from Denver who was a very close Friend of Bill’s, so to speak, Jim Lyons, was very helpful. Lyons had been the author of the famous Lyons Report, which was the first Whitewater Report.
There were lots and lots of people who were very helpful to me in this process, but to make a long story short, it was now September of 1994 and the White House satisfied itself that I would be okay, and the President sent my name up to the Senate with his nomination. Then I had to get through the Senate.

Let me back up for a minute, because there are two other parts of this that I thought were kind of funny. If you remember early in Clinton’s presidency, there were some flaps about disqualifying issues. There was Zoe Baird’s Social Security for her nanny, there were people who belonged to clubs that were not considered open enough, there were all kinds of issues like that. We scrambled around, my wife and I, to make sure that we had done what we should do with any nanny concerns. We didn’t have any nannies. Our kids were long raised, but we did have cleaning women in the house from time to time, and the question was if they were independent contractors or not, were there records that could be produced. We got ready to answer the questions, but nobody asked. We were clean, but nobody asked the question. The only question I was asked was in the category of, “Does the country club you belong to permit women to play golf on Wednesday afternoons?”

MS. ALLEN: What was your answer?

MR. ROBERTSON: My answer was “yes.” I belonged at that time to the Columbia Country Club and to the Metropolitan Club, and I was required to get from both clubs statements and by-laws to establish that they were not racially
discriminatory or exclusive, which neither of them was. But that golf thing kind of blew me away. It goes back to the days when all the doctors and dentists (not the lawyers!) took Wednesday afternoon off and played golf and didn’t want women on the golf course. I didn’t even play golf.

The other thing they wanted to know, I thought to their considerable credit, and I got a lot of feedback from people who had been approached about this, one thing the Clinton White House was very interested in was whether its judicial appointees would have the proper judicial temperament. Would they be respectful of litigants before them? Would they be prone to the disease that judges sometimes call “robe-itis?” Would they become marionettes on the bench? They wanted to know if I had any judges that I thought were models that I would try to emulate, and I said yes and named two. I named Judge Fred Motz up in Baltimore who was then a young judge and I thought just a model of dignity and decorum and respect and simplicity in a judge. And a wonderful judge out in Springfield, Missouri named Russell Clark, who I thought was the Harry Truman of the federal bench. He just called it as he saw it, no nonsense, plain, simple “I’m from Missouri” kind of guy. It was Russell Clark who desegregated the Kansas City public schools and required them to bring in funding from the suburbs. He was reversed on that, but it was a real act of courage on his part. In any event, the White House was interested in my judicial temperament, and I liked that. I thought that was the right question – and never mind golf on Wednesday afternoon.
MS. ALLEN: White House staff asked you questions about that, or the Senate?

MR. ROBERTSON: Frankly, at some point it becomes a blur. The White House is interested in this, but they really delegate this part of it to the Justice Department.

There was in the Justice Department in the Clinton years a woman named Eleanor D. Acheson, who was the head of the Office of Legal something or other. It doesn’t sound like they are judge picking, but that’s what they were doing. It was her people who actually did the vetting.

Once I got through that process, then the nomination formally went up to the Senate. Then you’ve got to get a hearing. It’s late September, early October of 1994. Congress is getting ready to adjourn, and there’s an election coming up. The senators all wanted to go home and campaign. There hadn’t been all that many judges confirmed, and there was a great rush to get a whole bunch of them through. Day after day, week after week, I was being told “Gee, I don’t know if we can get a hearing for you, they only take five or six at a time in the Senate Judiciary Committee.”

About three days before the Senate was to adjourn, I got a call from somebody in the White House who said, “Mr. Robertson, we are very sorry, but I just don’t think we are going to be able to get a hearing for you this time. We’ll just have to carry you over to the next term.” I said “right.” The handwriting was on the wall. Control of the Senate was going to change, or if it didn’t change, it was going to become much more contentious.
So I said all right and began to lick my wounds again, and then I got a call from somebody in the Justice Department. This was Susan Liss, who worked in Acheson’s outfit. Susan Liss said, “We are not going to give up on this yet.” She said to call Lloyd Cutler. Cutler was back at the firm, having been White House counsel for a while, but he was no longer White House counsel. I called Cutler and carried out my instructions, which were “Ask Cutler to call Hatch.” I reached Lloyd at home. This was 8:00 at night. Lloyd, who had recused himself in this process while he was still in the White House but he was no longer in the White House, called Orrin Hatch. He called me back about 15 minutes later and said, “Hatch says tell DOJ to tell Biden Hatch says Robertson is okay.” Next thing I knew, I got a call from the Justice Department saying my hearing is tomorrow morning at 9:00. I think it was the very next day. I may be telescoping this, but I think it was the very next day. So I went up there and had a hearing. The only reason there was a hearing at all was that Senator Metzenbaum had a protégé from Ohio by the name of Kate O’Malley who had been nominated for the Northern District of Ohio, and Metzenbaum really wanted her to be confirmed. So Metzenbaum agreed to sit in the chair. That’s all you need for the Committee is one member sitting in the chair. He agreed to hold a hearing for five or six judicial appointees, in addition to O’Malley, and I was one of them. The hearing was hilarious. Kate O’Malley showed up with – I think she has four children and a couple of nieces and nephews – a bunch of little kids.
Metzenbaum put them all up with him in the Committee chairs and said, “Now, children, what do you think? Will your mother make a good judge?” “Yes, I think my mother will make a good judge.” “Well, do you think she’ll be fair?” “Oh, I think she’ll be fair.” “Is she fair with you all the time.” “Well, most of the time.” So, that was the show, and when it got around to me, they asked me about two or three questions, and Orrin Hatch appeared in the Committee Room. He had been sick with the flu the night before and he was still sick, but you know, Senator Hatch always looks like he stepped out of a band box. He walked in and he said “Mr. Robertson, I understand from some sources that you’ve been quite politically active on the liberal side of the aisle.” I didn’t confirm or deny that. The truth is, I’d never been all that politically active, but I didn’t bother to quarrel with him about it. He said, “If you are confirmed as a judge, do you think you’ll be able to decide the cases before you on the law and the facts without regard to your political beliefs?” It was a tough question. I said, “Senator, I will.” He asked if I had any agenda going to the bench. I said the only agenda I have is to try to make litigation work faster and more inexpensively for people. That seemed to be the right answer, and I was confirmed – rather, I was voted out of that Committee that night, and confirmed two or three days later as I think the very last item of business.

It was sooner than I thought, October 11, 1994. This is from the Congressional Record, I think from the very last few minutes, Executive
Calendar. At any rate, I was confirmed on the last day of the 103rd Congress at about midnight, and the Congress adjourned sine die a few minutes after that. And the next time Congress adjourned, it was the Newt Gingrich Congress, and I don’t think I would ever have been confirmed under those circumstances.

**MS. ALLEN:** It was the next Senate where you started having the great delays?

**MR. ROBERTSON:** The Republicans slowed down the Clinton appointees from the very beginning. This business of slowdown began long before that. It began really after Bork and Thomas. It began back in the 1980s. Now of course it has gone nuts.

The day that I was confirmed, I was out on the Eastern Shore, our place on the Eastern Shore of Maryland, with an old friend who couldn’t believe I went to sleep that night before knowing what had happened. The phone rang at 2:00 in the morning, and he woke me up so that I could go answer the phone to see if I had been confirmed. The next day he took a picture of me standing on my dock holding a stupid little crab hanging onto a wire. I didn’t even think about it. About two months later, a completely anonymous envelope appeared, and in it was the photograph and an anonymous card that read, “For immediate release from the Office of the Speaker, House of Representatives” – who was Newt Gingrich at that time – “as an example of misguided liberal Democratic party thinking, recently appointed U.S. District Judge James Robertson is shown holding what he thinks are the scales of justice.”
MS. ALLEN: [Laughter]. That’s great! It’s really a pathetic little crab.

MR. ROBERTSON: That’s the appointment story. It wasn’t a nutshell, I know, it’s a long story.

MS. ALLEN: And worth telling.

MR. ROBERTSON: And here is one more piece of the story. Before I went to sleep on the Eastern Shore the night my nomination was confirmed, I had a call from an associate at Wilmer Cutler whose wife worked on Capitol Hill. “There’s a blue slip in your nomination,” he said. “Who put it there,” I asked. He did not know. It’s amazing that I was able to sleep after that, because the news of a blue slip, which was a privileged Senatorial “hold” on a nomination, immediately put me in mind of my role in the Robert Bork nomination battle in 1987. I was then one of two co-chairmen of the Lawyers’ Committee for Civil Rights Under Law, serving a two-year term that had begun in 1986, I believe. The other one was Harold “Ace” Tyler, of the Patterson, Belknap firm in New York, a Republican, a former federal District Judge, head of the Civil Rights Division under Eisenhower, Deputy Attorney General under Ford, and, in 1987, chair of the ABA judge-vetting committee – a seriously distinguished lawyer.

The Lawyers’ Committee was determinedly nonpartisan, and so was the ABA’s judge-vetting process, but I was not. I was very upset by the Bork nomination. Moreover, I was asked by a group of associates in our law firm to head up a decidedly less nonpartisan effort to collect and
analyze Judge Bork’s writings – a form, I suppose, of opposition research. I decided that I could not do that and retain my chairmanship of the nonpartisan Lawyers’ Committee, so I resigned that position before my two years were up, and I went to work on the Bork research.

Lloyd Cutler, the super-lawyer and head of my firm, was a devoted Yale alumnus, as was Judge Bork, and was way out front in support of the nomination, (this is a bit of a detour) and there was a serious, formal debate within our law firm as to whether the two of us could be publicly associated with opposing positions on the nomination. We resolved that dispute, sensibly, by decided that each of us was free to do our own thing. Later (detour upon detour), when Bork was defeated and Douglas Ginsburg was nominated – briefly – in his place, Cutler appeared in my office. I don’t think he had ever set foot in my office before that. “Are you happy now?” he asked.

Our Bork research found its way into what proved to be important and devastating testimony by Dean Erwin Griswold before the Senate Judiciary Committee, and Bork’s nomination was defeated. When I was nominated to the District Court seven years later, my involvement in the Bork matter never came up. I did nothing to cover my tracks, but nobody ever asked about it. When I heard about the blue slip that night on the Eastern Shore, however, I will admit that I was a bit nervous.

And just to put a cap on this story, I will say that today I regret giving support to the anti-Bork effort. I was a minuscule part of that
effort, to be sure, but I feel that I bear some part of responsibility for a campaign that started what has now – in 2016 – been thirty years of feuding about judicial nominations. Bork was certainly qualified to sit on the Supreme Court. He was defeated only because his would have been a swing vote, as Justice Kennedy’s votes indeed have turned out to be. If Bork had been nominated before Scalia, before the swing vote was in play, he would have been confirmed – and the genial, personable, clean-shaven Scalia would have sailed through, too.

Okay, so where are we?

Ms. Allen: You just got appointed, so we are in the middle of October. You’re appointed, and what comes next? How much time do you have to get out of your private practice and appear in court?

Mr. Robertson: You have actually as much time as you want, but it was important to me for tidiness reasons, and to make sure that I got the year-end distribution, to stay at Wilmer, Cutler & Pickering until the end of the year. So I formally resigned the partnership and was sworn into this Court on December 31, 1994. Chief Judge Penn was the chief at the time and very kindly offered to swear me in at his house. My wife and I and my twin sister and her husband all went to Jack Penn’s house, and he had a bottle of champagne and swore me in at his house on New Year’s Eve 1994, and then I came to work.

Coming to work in a federal courthouse when you’ve never been a judge is kind of a surreal experience. They try to give you a little
orientation, but you don’t understand a lot of what they are saying. They drop a bunch of files on your desk and say these are your cases. What happens in this Courthouse is when a new judge is appointed, every other judge gives cases to the new judge to balance everybody’s case load, but the cases are not selected by that judge. They are selected in random by the Clerk’s office. That’s a very useful idea. It avoids judges dumping their old dogs on the new judge, which they used to do here, but they don’t do that anymore. So I found myself with 200 cases, all with deadlines. I had to find law clerks. My secretary, Marlene Taylor, came with me from Wilmer, Cutler & Pickering, thank goodness.

My first two law clerks were Michael Yeager, a brand new law graduate who had grown up across the street in Bethesda and who was my younger son’s good friend, and Claudia Serringer, who had been an intern for Judge Urbina for a few months. Urbina preceded me by maybe three or four months there. So four people walked in and tried to figure out how to do this job.

MS. ALLEN: You said there had been a vacancy created by a death on the court, but there weren’t clerks for that judge who stayed on and kind of managed the office?

MR. ROBERTSON: No.

MS. ALLEN: So everybody was new? Were you assigned cases at all different stages of litigation so you had some that weren’t ready for trial, and some that were?
MR. ROBERTSON: The ground rules for the assignment of cases were that the only criminal cases you would get would be new ones because they moved much faster. You can’t pick up a criminal case that’s about to go to trial if you don’t know anything about it. So we only got new criminal cases and we got civil cases that were not more than two years old. I disposed of most cases in less than a year. A case that is 12 or 14 months, or a case that’s two years old, is already an old case. You weren’t supposed to get any cases assigned to you that had been set for trial, but some of them are ready to be set for trial. Mostly what you get is cases with pending motions that haven’t been decided and you have to dig into them, read the motion papers, and begin to nibble away at them and somehow you find your way through. I was very, very lucky to have assigned to me as a courtroom deputy clerk a guy by the name of Joe Burgess who had clerked for Judge Charles Richey for 14 years. Richey was, to put it mildly, a very demanding judge of everybody. Burgess had about burned himself out and was looking for I think a softer touch. He taught me an enormous amount about how this court works, about how the dockets work, about the paper flow, and about almost literally how to do everything. So the nuts and bolts of being a judge are not all that complicated, but somebody’s got to show you how to do it. You don’t just invent that, and Burgess led me by the hand. Having Joe Burgess as a courtroom deputy clerk was a little bit like being a young lieutenant in the army and having an old master sergeant who knows the ropes and can show you around.
Now I’m a lot older than Joe Burgess was then, and still am, but he was a lot more experienced in this Courthouse.

**MS. ALLEN:** Did he stay on in that capacity for a number of years?

**MR. ROBERTSON:** He did for a number of years, maybe four or five years, and then he got promoted in the clerk’s office. Joe and I got to be quite computer savvy, and when the court began its journey into electronic case filing about four years ago, Joe was promoted because he was computer-adept and was interested in doing that, so they gave him a job as one of the supervisors of the whole electronic case filing. I suppose that my epitaph in the court system is going to have more to do with technology than anything else. A significant piece of my experience on the bench has had to do with technology, so here’s that story. It’s another big nutshell.

**MS. ALLEN:** Just to preface this, you mentioned before that someone said you’ll be judge of the cyber court, so you had interest in technology in the past.

**MR. ROBERTSON:** Wilmer, Cutler & Pickering was one of the very early adapters in the use of personal computers in law firms. They were in the vanguard, and I can date it pretty precisely to around 1986-1987. This whole revolution hasn’t been out of the box that long. The firm had tried all kinds of ways to centralize and make more efficient the business of dictation and word processing and none of it had ever taken. When the IBM PC came out – IBM, by the way, was a big client of ours – whoever was the managing partner of the firm at that time, I think maybe it was P.J. Mode, really had a quite a brilliant approach to how to get people to start using it. He
remembered the old story about how Tom Sawyer got Huck Finn to paint the fence. You remember the story. Tom is painting, and Huck comes along and asks, ‘what are you doing, Tom,’ and Tom says, ‘I’m painting the fence,’ and Huck asks, “can I help?” and Tom says, “No, you don’t qualify.” Huck says, “Yeah, but I could get qualified.” And Tom says, “I don’t know.” It’s a long story of course, but Huck wants to do it and is told he can’t do it and so his competitive juices flow and he finally gets a paint brush and when he starts painting the fence, Tom sort of goes fishing. Well, that’s the way computers were introduced to Wilmer, Cutler & Pickering. “We’re buying 50 of them, and only those people who have a real need for them will get them.” Well, of course, the competitive juices started flowing and everybody had to have them.

I got interested in the computer not as a techie, but simply because it’s such a perfect tool for lawyers. It just made so much sense. It helped you organize things, it helped you keep things where they ought to be, it helped you remember things, it was just a fabulous tool. So when I got to the Courthouse, I knew about computers, and how to use them, and what to do with them.

**MS. ALLEN:** Was the court using computers very much?

**MR. ROBERTSON:** The court’s use of computers was in a very embryonic stage. Judges had just gotten computers, but nobody was using them. I actually knew how to send and receive e-mails and was in the habit of doing it a lot at Wilmer, Cutler & Pickering, so much so that I had to impose rules on
myself about how many times a day I would look at my e-mails. But here, I turn on my machine and I get two e-mails in a whole day.

As the old saying goes, in the land of the blind, the one-eyed man is king. I was soon tapped to be a member of the court’s information technology committee, and then because Royce Lamberth’s time was up on the Judicial Conference Committee on Automation and Technology, or CAT, I was appointed to his seat. I have been on that Judicial Conference Committee for almost eight years now, even though you’re supposed to be on it for only six years, two three-year terms. I was re-appointed for an extra year, and then when the chair of that Committee, Ed Nelson, tragically died a couple of years ago, I was asked to become chair. So for eight years, I have been involved with the Judiciary’s information technology effort. That will probably be my epitaph. On my watch, probably the biggest change in the judiciary since the Federal Rules on Civil Procedure I think has been the introduction of electronic case filing, which we now have 100% in this Court.

**MS. ALLEN:** Was this one of the first courts to use this?

**MR. ROBERTSON:** This was one of the first courts, yes. Not all courts have it yet. It’s still being rolled out nationwide. About half the district courts have it, and almost all the bankruptcy courts have it, and it has really changed our lives, changed the way we deal with cases, making it so much easier and so much less paper and so many fewer moving parts in the whole judicial process. Anyway I’ve spent a lot of time on this.
MS. ALLEN: Did you become involved in the IT endeavor early on, as soon as you started in early 1995?

MR. ROBERTSON: Almost as soon as I started. The chair of the CAT Committee at that time was a judge named Owen Forrester from Atlanta. And he, it’s fair to say, was a visionary. He had the “vision thing” about IT in the judiciary, and he probably is as responsible as anybody for pushing and jumpstarting this electronic case filing system. He asked for volunteers, for people that would be, as he put it, “the coaches” of the IT projects. For electronic case filing, he wanted a volunteer to chair a subcommittee that would supervise the design and installation and run-out the project. I volunteered, and he said fine, you’ve got it. So I really was involved at the very early stages.

The Administrative Office had built its own system experimentally to handle a huge number of asbestos cases in Cleveland. There were hundreds of cases, or maybe thousands of cases, and they needed help badly because they couldn’t docket all the material. They cobbled together this internet-based system and it seemed to work pretty well. Forrester got hold of that and decided he was going to make this a national product. Well, the Administrative Office of the U.S. Courts doesn’t do anything quickly or easily. They had to have study groups and working groups and project meetings and analysis and requirement sessions. I think we came up with something like 2,000 requirements for this system and then put it out for bids and then tried to find out if there was anybody
in the private sector who already had something else like this or would make something like this for the judiciary. When the answer was “no,” the judiciary went on, completed designing and adapting its own program. And that program evolved into what we now know as CM-ECF, or Case Management and Electronic Case Filing.

**MS. ALLEN:** It did it internally with its own employees?

**MR. ROBERTSON:** Own employees, did it internally. And I’m sure it’s not a simple system, but in concept it isn’t that difficult. In concept, a lawyer now prepares a pleading or a motion or something on his own typewriter or on his own computer in his own office, and then connects to the internet and goes to the website of the court. He logs on and the court recognizes him and his case and gives him a menu to select what he wants to do. He says he wants to file a motion and is asked the name of the motion. He types in the name of the motion, he’s invited to attach the computer file of the motion that he has just created, he attaches it, he pushes a button, and bingo, it’s filed. And not only is it filed, but it is now also served on all the other lawyers who automatically get e-mails that tell them something has been filed and here’s a hot link. Click on it, and you can read what’s just been filed. So, the lawyer is now filing the document electronically without any paper, creating the docket entry, electronically serving all the other parties in the case. They are getting notice electronically. I’m getting a notice on my computer when something has been filed.
In the old days, before CM-ECF, the process would be that the lawyer would send a messenger down to the court with two copies and another messenger over to the office of the other lawyer or mail copies to the other lawyers. He’d have to make copies and put them in envelopes and stamp them and address them and mail them, or have them sent by messenger, sent to the Courthouse, and once they are in the Courthouse, the Clerk’s office had to stamp them, file them, log them, and bring them up to my secretary who would stamp, file, and log them and then bring to me. And all that is done now in a nanosecond. It’s quite amazing.

**MS. ALLEN:** All the old issues of proper service have evaporated.

**MR. ROBERTSON:** You got it right. Totally evaporated.

**MS. ALLEN:** Was there resistance in the court to switching to an electronic system? Was it hard to get it implemented?

**MR. ROBERTSON:** Yes. Yes to all the above. But the resistance wasn’t uniform. When we first conceived of this system – I don’t mean to say I first conceived it – but when I came on board in this process, there were concerns that the Clerk’s office would resist this. The thought was the clerk controls the docket, and now you are turning over control of the docket to lawyers who are creating their own docket entries. And the concern was, don’t sell this to people on how you are going to save manpower because clerks get paid in accordance with how many people work for them. So we expected resistance from the Clerk’s offices. We expected resistance from judges who are generally perceived to be Neanderthals where technology is
concerned. We expected resistance from the small practitioners who, we feared, wouldn’t be able to afford all the computers and all the software and so forth that were necessary to make this work. We expected resistance from Clerk’s office personnel who resist any change in their job descriptions. We were wrong about almost all of that. The Clerks loved this system because it cuts down the amount of work they have to do. It really, really reduces the amount of work they have to do.

In the old days, clerks used to have to copy and mail out all copies of judges’ opinions and orders. Now that’s all done by my secretary from her desk with one stroke of the key. And they had to file things in the file rooms, and now they are filing less and less. They still file sealed materials, and they still file papers in criminal cases. We haven’t gone completely electronic there yet, but the Clerks’ Office loves it.

**MS. ALLEN:** People didn’t lose jobs?

**MR. ROBERTSON:** People did not lose jobs, although we are in the middle of a huge budget crunch in the judiciary, and if we can’t get a little more money pretty soon, the whole judiciary is going to be riffling people. The Clerk’s office will survive because of the efficiencies that CM-ECF has allowed them to maintain. Small practitioners love it because for them it levels the playing field. They can get a big slick publication together and get it on file just as fast as any big firm can and they don’t have to hire bicycle messengers to do it. They don’t have to worry about service anymore. And it turns out the small firms are more agile and more adept at handling computers than
the big firms are. They have to be to survive in this day and age. So they love it. There are some Neanderthal judges, but they are not necessarily the old judges. Some of the younger judges are most resistant, but it just depends on whether you like computers or not. So, long story short, the resistance has been very slight, and almost every lawyer I’ve talked to who has used the system thinks it is the greatest thing since sliced bread.

**MS. ALLEN:** Is it an ongoing implementation? Are you making changes constantly?

**MR. ROBERTSON:** Oh yes. I mean in any computer program you’re making changes constantly. We are about to roll out Version 2 which will have enhancements and then Version 3 and then probably in a few more years, there would be some entirely new system. It’s constantly evolving and getting better. Now I’m making it sound as if I spend all of my time with technology. I don’t.

**MS. ALLEN:** Actually that was a question I was going to ask you. What percentage of your time do you spend on technology?

**MR. ROBERTSON:** It’s three or four percent of my time. It’s not an enormous amount of my time. I think of it as what we used to call in the Navy a “collateral duty.” In the Navy, I was the gunnery officer on a destroyer, but I was also the public information officer, the Protestant lay leader, and one or two other things. So I consider this IT Committee thing to be a kind of collateral duty. It’s a lot of fun. The Committee consists of one representative of each judicial circuit, and we meet at exotic places twice a year. So we go to nice places and there are nice people to work with. It’s a fun part of the
job. I enjoy it. I’m finished at the end of October, I think. My third term will be my last.

**MS. ALLEN:** Let me go back to your initial few months on the job. You said there was a training session for baby judges. Was that after you had been on the job for a while?

**MR. ROBERTSON:** No, not very long. In my case, it was within a month or two after I arrived. This one was in a hotel in Atlanta and it was a week. An experienced judge from Chicago came down to lead the enterprise. The orientation week consisted of training videos and discussion. That’s what it was, talking heads and discussion. So, you’d get half a day on courtroom and jury management, nuts and bolts stuff. You might get half a day on employment discrimination cases, which is a big part of the judiciary work these days. We had almost two days on the sentencing guidelines, which is very complex and was then still a relatively new subject. Then we went to visit a prison. So that’s part of what you do. I forget all the subjects, but just general overview subjects for judges. Care and feeding of law clerks and chambers staff. This is your job, this is how we suggest you might want to do it, but the wonderful thing about being an Article III judge, it’s always a suggestion. Nobody ever tells an Article III judge how to do anything.

**MS. ALLEN:** They just suggest, even to each other?

**MR. ROBERTSON:** It’s hilarious. Even to each other. When I first got here, lots of judges were very helpful and welcoming. “Please come to see me if you have
any questions at all. You’ll see new things every day, things you never heard of. You may not know how to deal with them, give me a call, come to see me, I’d be delighted to talk to you.” Well, I took a few of them up on it, but I always got the same answer. The answer was, you’re an Article III judge, do whatever you want to do. And it’s obvious that I am overstating that for effect, but that’s the culture of the district court bench. You’re basically running your own little enterprise.

MS. ALLEN: Is there much interaction with the other judges?

MR. ROBERTSON: Yes and no. In a very odd way, the atmosphere in the Courthouse has a lot to do with that. There is a kind of a critical mass of collegiality that has to exist before people start really relating to each other. As in any other walk of life, there are two or three judges on this court that I spend more time with than others. We have a very interesting institution called the judges dining room. In the old days, the judges’ dining room was a place where there were cooks and waiters and servants who would bring food to the judges, and the judges could bring guests in. I actually ate in the judges’ dining room years ago as a guest of Oliver Gasch, but either the money ran out or it was decided that it was little undemocratic for the judges to be eating like nobility, so the whole thing was downgraded significantly to a dining table. Basically we are served cafeteria food on real plates with real forks and glasses. We hire a person, a retired person – the current person is a retired gentleman who worked in dining cars on Amtrak for years and years. Lovely man. He works part-time. He comes in at about
11:00 in the morning, he picks up our food orders, goes to the cafeteria, gets the food, brings it up, puts it on real plates and serves it to us. It is really quite lovely. The judges pay his salary, it’s not paid out of the public funds. It’s kind of our little club.

**MS. ALLEN:** And this is every day?

**MR. ROBERTSON:** It’s every day. We’re charged a certain monthly fee for his services, and we are charged for whatever we eat. You never know who is going to be there. Some days there is a table full of people. A tableful is defined as 12 or 13 judges. And some days there are two or three judges, and most days somewhere in between. There are regulars, and there are not-so-regulars. There are judges who never eat there, and there are judges who always eat there. There is a lot of collegiality in that room. We don’t often talk about cases, particularly since one of the regulars in that room sits on the Court of Appeals and there are lot of things we don’t want to involve him in, discussion of cases that may come before him on an appeal. And like any table where people come and sit all the time, if we talk about politics, we do it very gingerly, and if we talk about religion, we do that very carefully, and nobody ever talks about sex. It’s like the British Navy. It’s a happy, daily form of contact with other judges.

Email has had a tremendous effect on the way judges work together, and it’s becoming more and more common for one judge to send an email to all judges. I have this problem, does anybody have an answer. And then you’ll get people chiming in with answers and opinions and
sometimes it goes on for two or three days. So it’s sort of a virtual electronic collegiality that is useful.

**MS. ALLEN:** Which is relatively new, because you have to not only have facility with the computer, but to feel comfortable with communicating that way.

**MR. ROBERTSON:** That’s right. Since this is history, one little piece of history that I think is interesting. I think it was when Judge Colleen Kollar-Kotelly was confirmed to our court. She was the seventh Clinton appointee, and somebody made a reference in one of the investiture speeches to a group of judges over in the Superior Court who had called themselves “the magnificent seven.” There were now seven Clinton appointees here, and so shortly after that happened, we – the Clinton appointees – began every two months or so to take our brown bag lunches to the chambers of one or another of us. And for a while we called ourselves the magnificent seven, and then there were eight and then it was I don’t know. Somehow, somebody got wind of the name that we had given ourselves, somebody I think in the Clerk’s office began to let other judges, some of the Bush appointees or Reagan appointees, know about this. There was considerable paranoia around this Courthouse that the Clinton appointees had formed some sort of a cabal.

There had not been a new appointee to this court in eight years, and it was clear that there were going to be a lot of us, and it was clear that within a few years the Clinton appointees would have a distinct majority in this court. The Republican appointees were looking over their
shoulders wondering who these guys were and what we were all about. The idea of a cabal among judges here was anathema to them. Some suggestion of this leaked out into one of the newspapers – Democratic Clinton appointees secretly meeting for lunch, or something like that. And there was a considerable amount of anxiety about it here. The truth is these judges liked each other, and we had something in common, and we simply were breaking bread together once in a while. There was no court business conducted, no cabal of any kind. But as soon as we heard about the anxiety of the other judges, we dropped it like a hot potato because we were headed towards a sort of your camp/my camp, distinctly non-collegial, orientation and nobody wanted that. So we stopped that immediately.

And then, right on top of that, or about the same time, there was what I will call the Norma Johnson special assignment flap. There was a rule in this court, a published formal rule, on case assignment that permitted the chief judge to select a judge to handle a large or complex piece of litigation. I don’t know when the rule was adopted, but the theory was if everybody is busy and if a particularly complex or difficult piece of criminal litigation comes in to the Courthouse, the chief judge ought to have an opportunity to see who is in a position to take it and assign that case to that judge rather than random assignment, which in all other cases is the absolute, unshakeable rule here. Chief judges had been using this power for years, and making one, two, or three such appointments in a
year. Chief Judge Norma Johnson assigned Paul Friedman a complex, if politicized, case involving election law. She assigned to me a very high-profile criminal case involving Webster Hubbell. Somebody got the idea that she had made those appointments for political reasons, and giving voice to that idea was like throwing a match on some brush fire. That idea took hold and there was a lot of publicity about it, and there was a formal – the exact rubric of this escapes me – there was a name they gave, a charge of some sort was preferred against Norma Johnson by Larry Klayman or by Judicial Watch or one of these organizations.

**MS. ALLEN:** I saw quite a lot about it on the Internet when I was researching.

**MR. ROBERTSON:** Did you? It’s still there?

**MS. ALLEN:** It’s still there. It’s not being updated, but it’s still out there.

**MR. ROBERTSON:** There was a lot of sturm und drang about that. I think Paul Friedman is still quite bitter about it. There were some nasty op-ed pieces about Friedman and about Norma Johnson, and Norma Johnson had to hire a counsel. She hired Mike Madigan. Madigan by the way, was also a member of the judicial nomination commission that considered my name and he is another old friend. A law professor from the University of Illinois, who used to be an associate at Wilmer, Cutler & Pickering, wrote a particularly nasty and disingenuous piece in *The Wall Street Journal* about my handling of the Webster Hubbell case implying – no, alleging – that it was all political. It was an ugly time here. Those of us who were Clinton appointees were very upset about this because the story leaked
from someplace in this Courthouse to the press, otherwise nobody would have known about our completely innocent brown-bag lunches.

**MS. ALLEN:** The original story about the special assignment?

**MR. ROBERTSON:** That was a reference to the magnificent seven, but the story about the special assignments, yes. It leaked from someplace in the Courthouse. There was a lot of suspicion, and we would have been angry if we had known who to be angry at. The thought was Judge X talked to the press, but Judge X denied it, and Judge Y talked to the press, and Judge Y denied it, and Judge Z, and it’s a little bit like Deep Throat. We all still have our opinions about how this was leaked to the press and why and when, but nobody knows. All of this happened in an atmosphere in which the chief judge of the court was herself not a collegial person at all. So there were a few years here that were really quite difficult on the collegiality front. Tom Hogan became Chief Judge when Judge Johnson stepped down, and it was as if the sun had come out. Hogan is not only collegial but open and friendly and mutually respectful and fosters an element of happiness here. Then, of course, Republicans have gotten four appointees on this court, so the imbalance or perceived imbalance is not anywhere near what it was. All of the new Republican appointees – I’m talking Walton, Bates, Leon and Collyer – are all wonderful people, and everybody loves them and happiness reigns around here again.

**MS. ALLEN:** Do you think Judge Hogan made particular efforts to try to restore collegiality, or was it just a difference of personality?
MR. ROBERTSON: It’s both. But I’m sure he made specific efforts to do it. Norma Johnson I don’t think ever in her life ate dinner in the judges dining room, but Tom Hogan eats there four or five times a week and is accessible and shares things with people. He is a terrific chief judge and it has made all the difference in the world to the whole collegiality in this place, and all of that paranoia in the past is forgotten.

MS. ALLEN: I should know this, but I don’t. Are there vacancies on the court now?

MR. ROBERTSON: There are no vacancies right now. We are full strength for the first time in quite a long time.

MS. ALLEN: Do you see that in your workload having lessened at all?

MR. ROBERTSON: Actually our workload has increased, and the reason it has increased principally is because – this is not I think widely known – the judiciary relies very, very heavily on senior judges to help out. The way that works is when I am eligible for senior status, which will be in about 2-1/2 years, I have the option of quitting, continuing as I am, or taking senior status, which means that I will retain my chambers and my staff, but I will only have to do about half as much work. None of those three choices has any impact on my income. That’s not quite true. The advantage of taking senior status is it will stop taking social security payments from me so it’s worth something to take senior status, and of course, you don’t have to work as hard. But, by the same token, you don’t have a vote in all court matters. Most judges take senior status and keep working because they like keeping their hand in, they like to have something to do. Maybe they
like people bowing and scraping and calling them Your Honor all the
time. Maybe their robes aren’t quite worn out yet. Who knows. But
judges do tend to stay on. When you take senior status, you create another
vacancy so another judge can be appointed. So, it’s like adding half a
judge to the court. When I first came on the court, we had Senior Judges
Lou Oberdorfer, June Green, Harold Greene, Aubrey Robinson, Oliver
Gasch, William Bryant, John Pratt, Tom Flannery, and Chuck Richey.
Shortly after I came on the court, Joyce Green took senior status. That’s a
lot of senior judges. Chuck Richey is dead, Tom Flannery is retired, John
Pratt is dead; Bill Bryant at age 93 is still trying cases. God bless him.

**MS. ALLEN:** I actually had jury duty last summer and was on a panel in front of Judge
Bryant.

**MR. ROBERTSON:** He tries more cases than any of us do. Oliver Gasch is dead, Aubrey
Robinson is dead, June Green is dead, Harold Greene is dead. So now we
have three senior judges left, Joyce Green, Oberdorfer and Bryant, instead
of eight or nine. Oh, and Stanley Sporkin of course is gone, but he never
took senior status. He just retired. Stan Harris took senior status and is
now retired. So of the judges who were here when I came on the bench,
only Sullivan, Friedman, Lamberth, Jackson, Hogan, Kessler and Urbina
are still here. Turnover is more rapid than you think.

**MS. ALLEN:** That’s a big turnover.

**MR. ROBERTSON:** Yes, that’s a big turnover. So we have more cases than we did. Lot of
things are happening in the whole caseload front. Criminal cases tend to
plead out much more frequently than they used to because of the sentencing guidelines, although in very recent years, more cases have been going to trial because District of Columbia juries are more inclined to acquit, particularly in gun possession cases.

**MS. ALLEN:** What percentage of your cases are criminal?

**MR. ROBERTSON:** If you do it strictly by the numbers, it would be on the order of 15-20%, but the numbers don’t really mean anything because criminal cases and civil cases are handled so differently. I would say that I probably spend 20-30% of my time on criminal cases. If you are Royce Lamberth and have tried two huge gang capital murder cases back to back over the last 2-1/2 years, his answer would be he spends probably 80% of his time on criminal cases. But unless you have a huge trial like that to weigh down that side of the boat, the criminal practice in our court consists very largely of an arraignment, status conference, a motion hearing, usually a motion to suppress, a guilty plea, and a sentencing. Very few trials. Civil case loads are probably back to roughly where they were when I started. My current caseload is on the order of 190 cases, I think, civil cases.

**MS. ALLEN:** It sounds huge to me.

**MR. ROBERTSON:** It sounds huge, but you know something, it is one of the lowest, if not the lowest, per judge caseload in the whole country. There are border state courts, courts in northern New York State, courts in other parts of the country, that have 600 or 700 cases per judge.

**MS. ALLEN:** Does that include lot of immigration-related matters?
MR. ROBERTSON: It includes lots of immigration matters. And again, we maintain that the numbers don’t mean anything. Of course, we maintain that we work as hard as any judge does, and we do, because work expands to fill time. But some of the districts that have huge caseloads have them because they have vacancies and there are political problems in getting the vacancies filled. That’s a problem in some places. More likely, however, the courts that have huge caseloads have, for example, 200 Social Security claim cases, which may be handled entirely by magistrate judges but they are on the docket of the judge anyway. Or Indian reservation cases or immigration cases. The truth is, the caseloads in district courts in this country vary quite dramatically by size and subject matter, depending on where you are. In this jurisdiction, we do an unusual number of large complex administrative law cases involving the government in one way or another. Review of administrative decisions in environmental matters, review of Bureau of Indian Affairs decisions and Indian casino cases, review of all kinds of big record government cases, which is still only one case, but it’s much, much more complicated than any individual Social Security case. Another 25 or 30% of our cases are employment discrimination cases. That is pretty standard.

MS. ALLEN: And that is standard throughout the country?

MR. ROBERTSON: Pretty standard. We do a lot of Freedom of Information Act cases in this jurisdiction, and we have some special jurisdiction cases that can only
come here. But at any rate, you want judicial history, you don’t want administrative analysis of the workload.

MS. ALLEN: No. We want both. We want everything in this oral history. Do the employment cases actually go to trial or do they tend to settle?

MR. ROBERTSON: All cases tend to settle. Either they are dismissed on a motion for summary judgment, or a motion to dismiss, or for want of prosecution, or for some reason like that. Or, they settle. The system is supposed to work that way. The number of cases actually going to trial has reduced dramatically in the last ten years since I came on the bench. And now I think it’s in the order of something like 2% of the cases that are filed that actually go to trial. Title VII cases are no different. They tend to settle too. They get dismissed, they get disposed of, but most of the civil trials we have are Title VII cases.

MS. ALLEN: It’s very interesting, and my first reaction was strong cases will go to trial.

MR. ROBERTSON: Sometimes a strong case will go to trial because the plaintiff has an inflated notion of what he or she can get out of the trial, or sometimes a case will go to trial that maybe should have been settled because for one side or the other it’s become a matter of principle.

MS. ALLEN: Do you see automobile accident cases in federal court?

MR. ROBERTSON: You do see them and they are rarely if ever tried. I just happened to see Judge Walton in the hallway today, and he says he is trying one of those cases right now. It didn’t settle. We see them only because of diversity jurisdiction, that’s the only time we ever get them. Occasionally, there
will be a Federal Tort Claims Act case involving a postal service truck ran
into someone or something like that.

**MS. ALLEN:** I asked because the Superior Court it seems is inundated with automobile
accident cases, and insurance companies aren’t settling them.

**MR. ROBERTSON:** I’ve never tried an automobile accident case, and I haven’t seen that many
of them. Whether or not an automobile accident case is brought in federal
court or not initially has to do with the calculation of the plaintiff’s lawyer
and whether he is going to get a favorable jury in one court or another,
whether he is going to get as good a judge in one court or another, whether
he can get a good trial as quickly in one court or another. And then the
defense may try to remove a case from state court to federal court if the
defendant feels that the jury panel isn’t to his liking. In the District of
Columbia, the truth is both Superior and the District Courts select from the
same jury pool so there isn’t any difference in the juries. There may be a
difference in the speed with which you can get a case to trial. I can
remember a time when the Superior Court was the last place you wanted
to be if you were a plaintiff because things just didn’t move over there.
But since so-called Home Rule, since Superior Court became Superior
Court and since that court has eaten up most of the growth in litigation in
this town, Superior Court is perceived to be an excellent court. Plaintiffs
are perfectly happy being there. They have no need or interest in coming
over to this court, and unless there is total diversity, the manufacturer, if it
is a manufacturer, or the other driver, doesn’t have much of a chance.
ORAL HISTORY OF JUDGE JAMES ROBERTSON

This interview is being conducted on behalf of the Oral history Project of The Historical Society of the District of Columbia Circuit. The interviewer is Ann Allen, and the interviewee is James Robertson. The interview took place at the Federal Courthouse on August 19, 2004. This is the fourth interview.

MS. ALLEN: This is a continuation of the oral history of Judge James Robertson.

MR. ROBERTSON: Well, Ann, I told you before we started today that I had made a note of two things I wanted to be sure I covered because they are two of my favorite stories from my career, such as it is. I call them the Diva of Divorce story and the Claibourne Hardware story.

The Diva of Divorce story goes like this. In January 1993, just after Bill Clinton had been inaugurated, he was trying to fill out his cabinet, and you remember the flap that he had about the woman he appointed Attorney General who had not paid her nanny social security.

MS. ALLEN: This was Zoe Baird?

MR. ROBERTSON: It was Zoe Baird, and she had to withdraw, and all of a sudden it became very important to get nominees up for attorney general immediately. Well, I was part of an effort that was organized and orchestrated by Jim Hamilton, who was at Swidler & Berlin then, to get teams of Washington lawyers who would vet candidates for cabinet positions. I had a team of five or six lawyers, and other team leaders had teams of five or six lawyers, and I was given the task on very short notice for vetting a candidate for attorney general. Marna Tucker was another team leader and was given the same job. Because it was such a big job on such a short notice, Marna’s team and my team went to work together.
MS. ALLEN: On this one candidate?

MR. ROBERTSON: On the same candidate. And it meant interviewing the candidate and calling people and running down leads and reading things that the candidate had written, and it was a labor-intensive process of amassing the record of this candidate. Actually, now that I think of it, there were two candidates. Marna and I had two candidates that we were working on and we had to get reports together. At any rate, we were asked to deliver our reports to the White House on Sunday morning at 11:00. The reports were to be delivered to the President’s White House counsel, whose name was Bernie Nussbaum.

We met in a big conference room at Wilmer, Cutler & Pickering before we went over there, her whole team and my whole team, about 10 or 15 people. That morning’s Washington Post Magazine had a big picture of Marna Tucker on the cover, under the headline “Diva of Divorce.” Marna is a very, very well-known and well-established family law divorce lawyer. She had the most enviable divorce practice in the District, so the Post singled her out for coverage. Marna also was an FOB. She was a legitimate FOB. She and her husband Larry Baskir had been going to these Renaissance Weekends for years and had gotten to know Bill and Hillary Clinton, and their kids had gotten to know Chelsea, and they were close. Marna said at this meeting, “You know Jim, when we finish this meeting with Nussbaum, the President says he wants to see me.” I said, “That’s cool.” So, only Marna and I went to the White
House. All the rest of them had to stay back because only two of us would be cleared in.

We went to the West Wing, to the office of Bernie Nussbaum, and there we met Bernie Nussbaum and Vince Foster. Now these people had been in the White House I think for less than a week. This may indeed have been the first Sunday after the inauguration. Marna said to Nussbaum, “The President wants to see me when we’re finished here.” He gave her a fishy look like ‘Who are you, lady?’ He picked up the phone and called somebody, and in a minute, his phone rang. He picked it up and listened, and then he looked at Marna with a quite a different look on his face. He said, “Okay, we’ll go see the President when we are finished.”

Marna and I delivered our reports on these candidates, which took about ten minutes, and then Nussbaum said, “Let’s go.” He and Vince Foster and Marna and I went upstairs to the Oval Office. Foster had never been there before. In the Oval Office were President, dressed in a lumberjack shirt and corduroys – I remember this like it was yesterday. It’s a Sunday morning at 11:00. Hillary Clinton looked like a Wellesley girl in a sweater and a plaid skirt. Paul Begala was there with his baseball cap turned backwards and sneakers on. The other guy, the fellow with the shaved head, the raging Cajun, Carville. Carville and Begala were both up there, and Mack McLarty, you remember, was the Chief of Staff. Only Mack McLarty was dressed formally. He looked like one of these cut-out
posters that you see near the White House, gray suit, red tie. Well, we
walked into the Oval Office and Clinton gave Marna Tucker this big bear
hug, and he was very warm to me. He had never met me before, but he
obviously knew Marna. He said, “Come on, I want to show you around.”
He showed us around the West Wing. He was like a kid with a new toy.
He said, “Look, look at the pictures they tell me I can hang here. Look at
this, and look at that, and look, this is historic, and that’s historic,” and he
took us over and showed us the conference room across from the Oval
Office where Nixon had installed a big flood light over the head of the
table to make it look like something out of a science fiction movie or
something. And he laughed at that, and he showed us around, and he was
just marvelous. And then he said, “Come here, Marna,” and walked over
to the President’s desk in the Oval Office, which was completely bare
except for a copy of that morning’s *Washington Post Magazine*. He said,
“Marna, how do you get publicity like this? I’d like to know.” And we all
laughed. He said, “This is a good article.” Marna said, “You haven’t read
it, you’re the President of the United States.” He said, “Yes I have. Ask
me some questions.” So she did, and it was clear that he had read and
remembered every word of it. It was just amazing. And then he said,
“Marna, I want you to do something for me.” He pulled out a pen and he
said, “I want you to autograph this for me.”

**MS. ALLEN:** That’s a great story.

**MR. ROBERTSON:** That’s my Diva of Divorce story.
MS. ALLEN: That’s Clinton, new to the White House.

MR. ROBERTSON: That’s Clinton, brand new to the White House. Brand new. He was just delighted to be there. “Look what they are going to give me to hang here,” and that sort of thing. That’s the Diva story.

The other one is the Claiboure Hardware story. When I was in Mississippi, in fact, the first day I was in Mississippi in 1969, I was driven over to the little town of Port Gibson, Mississippi, down on the Natchez Trace, west of Jackson, and down near Natchez, Mississippi. The policemen in Port Gibson wore a badge on their shoulder that said “The Town Too Beautiful to Burn.” That was what General Grant reportedly said in 1863 when he passed through on his way to the siege of Vicksburg. The town was burning anyway in a sense because they had this deep, deep racial problem there. The black citizens of Port Gibson had started a very effective boycott of the local merchants in town. It was a little bit like the bus boycott that we all heard about in Alabama. The issues were really old-fashioned, basic civil rights issues. There weren’t any blacks who were clerks in any of the stores. Black people were referred to by their first name and given no courtesy titles. And other issues, but basically that was it. The black citizens of the town said, “We have money to spend here, but we aren’t going to spend it unless you shape up.” The merchants, of course being Mississippians in 1969, didn’t want any part of that and didn’t go along with any of it and wouldn’t sit down and meet with the black people.
So the boycott went on and it became quite effective. It also got a little rough, as boycotts do sometimes. And, as I say, my first day in Mississippi was observing that and talking to some of the people involved with it. The state highway patrol and the National Guard were called in on that particular day, and they went away, and the boycott went on. After eight or ten months, literally eight or ten months, I think the merchants of Port Gibson, led by a lead plaintiff, Port Gibson Hardware, filed suit against the NAACP for damages arising out of the boycott alleging that the NAACP was responsible for it, that it was an unlawful boycott, that they were losing money and they wanted damages from the NAACP. That suit went to trial after I had left Jackson. By that time I was Director up here at the National Committee. It was tried in the Chancery Court of Hinds County, Mississippi. Mississippi at that time still had a law side and a Chancery side, and I suppose the plaintiffs wanted to avoid a jury, which would have been integrated. The trial went on for months, and a big judgment was rendered against the NAACP. It had to be appealed, but Mississippi had a requirement that in order to perfect an appeal of a civil judgment, the appellant had to post a supersedeas bond in the amount of, I believe, one-and-a-half times the judgment, which in this case would have been millions of dollars. The NAACP didn’t have that kind of money.

By the time the judgment had been rendered, I was no longer with the Lawyers’ Committee. I was back at Wilmer, Cutler & Pickering. And David Tatel wasn’t with the Lawyers’ Committee anymore either. He was
at Hogan & Hartson. Tatel and I, both Lawyers Committee loyalists, agreed to help. We decided that we would go in two directions. Tatel would go into federal court and seek to enjoin or stay the supersedeas bond requirement as unconstitutional. I would go to the Mississippi Supreme Court and try to get the judgment reversed on merits. Wilmer, Cutler & Pickering wrote a brief on the merits. The Mississippi Supreme Court at that time had a page limitation of 35 pages on briefs. Our team of avid young lawyers wrote a 90-page brief and moved for leave to exceed the page limitation. The motion was denied a few days before the filing deadline, and we had to squeeze a 90-page brief into 35 pages. It was a much better brief when we finished, but I’m not sure anyone read it.

I went down to Jackson and argued before the Mississippi Supreme Court. There were seven judges on that Court. They all sat and stared at me. I thought they were all made out of wax. Nobody said a word or asked a single question during the entire oral argument. It was a very strange experience.

**MS. ALLEN:** What were the grounds for your argument, because this wasn’t an appeal?

**MR. ROBERTSON:** This was an appeal.

**MS. ALLEN:** So somehow the NAACP got the money for the bond, or could that be waived?

**MR. ROBERTSON:** No. Excuse me. I omitted an important piece of this story. During this whole bonding exercise, the NAACP reached out all over the country for enough money to meet the supersedeas requirement. Money was coming
in from churches in shoe boxes. It was quite amazing. I didn’t actually see the shoe boxes, but I heard about it. The NAACP raised an enormous amount from around the country, but it was not enough. David Tatel went to federal court in the Northern District of Mississippi and got an order from one of the judges from the Northern District – I think it was Judge Orma Smith, also known as “Hack” Smith – enjoining the operation of the supersedeas bond requirement.

**MS. ALLEN:** That’s quite a victory.

**MR. ROBERTSON:** That case went from there to the Fifth Circuit, which affirmed. The seven waxed judges of the Mississippi Supreme Court affirmed the chancery judgment, and we filed a petition for certiorari in the Supreme Court. I led that effort, and John Payton of Wilmer, Cutler & Pickering, is still telling the story of how his decision to come to Wilmer, Cutler & Pickering was because he was given a chance to work on this case. He has been there ever since, thank goodness. We wrote the petition, and cert was granted.

I thought the correct and proper thing to do was to go to Lloyd Cutler and offer him the opportunity to argue this case in the Supreme Court, thinking, of course, that Lloyd would say, “Oh no, Jim, you did the motion, you do it.” So I went to Lloyd and said, “Well, Lloyd, we just got cert granted in the Claibourne Hardware case, would you like to argue it?” He said, “Sure.” I tried not to look too visibly disappointed. And then he looked at me for a moment and he said, “Boston Tea Party” and I said, “What?” He said, “Boston Tea Party.” You know, we need to do some
research. I’ll bet most of the signers of the Declaration of Independence were engaged in boycott activities themselves.” He said, “I would bet you that there is a solid First Amendment kind of originalist argument that can be made out of the boycott activities of the Framers of the Constitution.” I said, “Works for me.”

So we went to work. There was an associate in the firm, a wonderful guy by the name of Jamie Kilbreth, who is now a partner in a big firm up in Maine. Jamie, John Payton, I think Bill Richardson, and I went to work on this, although John, Jamie, and Bill did most of the work. We went over to the Library of Congress, the Supreme Court library, and back to original documents, and wrote this fabulous brief about the signers of the original Constitution and the Declaration being people who understood what boycotts were and what their purposes were – the Stamp Act, the Boston Tea Party and all that – and it enabled Lloyd to stand up. Lloyd said, “The Chief is going to love this.” The Chief was Warren Burger at the time, who was second, I think probably, only to Cutler in his Anglophilia, so he said the Chief’s going to love this. Cutler stood up and said, “May it please the Court, 17 of the 35 signers of the Declaration, and 25 of the signers of the Constitution were engaged in boycott activity…” and proceeded to educate the Court on all this original history of the boycott activity of the Framers. Our case was called at about quarter to twelve. The Supreme Court recesses on the dot of 12:00 p.m., even in mid-sentence.
MS. ALLEN: But not this case?

MR. ROBERTSON: This case too. I looked up at the bench – in the Supreme Court you’re close enough to the Justices that you could touch them. By the way, Nate Jones was on the brief with us in that case. Nathaniel Jones was then general counsel of the NAACP, but he went on to become a judge of the U.S. Court of Appeals for the Sixth Circuit. It was Nate Jones, Lloyd Cutler, and me at the counsel table. It was a big day for me. I didn’t argue the case, but I got to sit at the counsel table with these two great Americans, and I looked up at the bench and there was Justice Burger with his eyes rolling back in his head like somebody who was going to sleep. Here’s Lloyd going on and on about the boycott activities of the Framers of the Constitution. At 12:00 p.m., we’re off to lunch. We go into this dining room that’s just a few steps from the courtroom, and Lloyd said, “How about the Chief?” he said, “Was he following that?” I didn’t have the heart to tell him that the Chief was asleep. Well, some months later we won that case in the Supreme Court by a vote of 8-0 (Justice Marshall recused).

MS. ALLEN: So maybe he was listening?

MR. ROBERTSON: Lloyd at the time, as was his wont in the summer months, was in Salzburg listening to opera. So I called him in Salzburg, and I said, “Good news, Lloyd. We won 8-0 in the Supreme Court.” He said, “What did they say about the boycott, about the Boston Tea Party?” And I said, “Lloyd, I have to tell you, there’s not a single word in this opinion about the
Framers.” There’s a lot of threads in that story, but to me it said a lot about Lloyd Cutler’s original mind, the tenacity he had, and his determination to go ahead with things. It was quite a story.

The Claibourne Hardware opinion of the Supreme Court has not proven to be as useful in subsequent years as I thought it would be, but it basically stands for the proposition that a peaceful boycott in support of civil rights was protected by the First Amendment. All right, that’s the end of the storytelling.

**MS. ALLEN:** Good storytelling. You would think it would have been a very important precedent for a lot of cases coming out of that era.

**MR. ROBERTSON:** You will remember some years later Texaco-Pennzoil.

**MS. ALLEN:** Vaguely, yes.

**MR. ROBERTSON:** Pennzoil sued Texaco, and it was a famous breach of contract case. It all had to do with some handshake deal between the two companies. The lawyer for Texaco thought so little of the plaintiff’s case that he refused to say anything to the jury about damages. That’s what we all remembered it for, how you can’t afford not to mention damages. The plaintiff asked for $60 trillion and basically got it. Texaco had this enormous multi-billion judgment and a supersedeas bond requirement. And Cutler was scratching around trying to figure out some way that we can help with getting that supersedeas bond requirement set aside on the strength of the Fifth Circuit decision that David Tatel won, but it didn’t work because Texaco had no
First Amendment protection. It didn’t have that constitutional veneer that you needed to avoid the supersedeas bond requirement.

MS. ALLEN: I guess I’m up to bat then. I want to talk with you about cases and how you handle a case procedurally before it gets to trial, how you decide motions, the role of the clerks, who does the research, different people’s roles.

MR. ROBERTSON: Not long before I came to this Court, Congress enacted a very useful piece of legislation called the Civil Justice Reform Act. Paul Friedman, who was then still in private practice, chaired a committee that worked out a plan for the application of the Civil Justice Reform Act to this court. All courts had to have a CJRA plan. The Civil Justice Reform Act is the statute that requires us to report twice a year any motions that have been pending more than six months or any cases that are more than three years old. Every year you can see the lights in this Courthouse on very late the last few nights before March 31 and September 30, because judges are rushing around trying to get their numbers down as low as possible. Judges don’t like it very much, but all of us I think have to acknowledge that it has really made a difference in the way courts in general deal with cases. It used to be that you would file a case and nobody had any control over it. The parties just sort of went off and did their thing.

I give a lot of credit to Friedman and his committee for setting up a process in this Courthouse, which is not mandatory but which came quite naturally to me. I would like to think that I would have done case
management this way anyway, but the whole Civil Justice Reform Act idea emphasizes taking control of cases early.

There are still courts in this country where a judge never becomes involved in a case at all until the day of trial. That doesn’t make any sense at all. What happens in this court, at least in my chambers, is this: When a complaint is filed, I really very seldom pay any attention to it unless it is obviously high-profile and high-visibility. But as soon as the first response is filed – after summons has been served, which can take a long time – as soon as there is somebody else in the case, I tell my courtroom deputy clerk, “Get the parties in here for an initial scheduling conference.” And that is the first real look I have in a case, and that is where thirty years of experience as a civil litigator has been helpful to me, because no two cases that walk in here are the same. Some of them need to go immediately off to mediation, and some of them are not ready for mediation. Some of them – in fact, there really isn’t any reason to bring them in for an initial scheduling conference. I don’t invariably do that. For example, if it is a Social Security appeal, everybody knows that the next step will be a motion to affirm by the government and a motion for relief by the claimant, and you just have to issue an order that sets a schedule. You don’t have to have anybody in here for such a well-worn path. But in most cases, I have a scheduling conference right here where we are sitting now, off the record, no tape recorder, no court reporter, to try to get a sense of what the case is really about. And the lawyers have a
chance to tell me what they know about the case. It is actually pretty
astonishing how often lawyers will come in here for their initial
scheduling conference and don’t know anything about their case.

MS. ALLEN: They’ve done no preparation for the conference?

MR. ROBERTSON: They’ve done no preparation for the conference. The defendant may not
know anything about the case, and the plaintiff’s counsel may not really
know much about the case. He filed a complaint three months ago, so he’s
kind of forgotten it, he doesn’t have his file with him, he doesn’t
remember, but at least we have some sort of a discussion regarding the
case, and it then enables me to set a schedule. Usually I set a trial date at
that very first meeting. Sometimes it’s pretty clear the case will never go
to trial, and I just issue a briefing schedule. Sometimes my guess is the
case will never go to trial, but if they need some discovery before they go
to mediation, I’ll allow that. At any rate, this actual physically sitting
down with the lawyers very early in the game sounds like a trivial thing,
but it’s an immensely important part of getting control of your docket.

Every judge has a different way of keeping track of his cases. I’m
a computer nut, and I’ve got lots of computer systems that work for me
and for my law clerks. But I try to keep on top of cases. There are little
tricks. You never let the lawyers go from your courtroom or your
chambers without setting another date on which they’ve got to do
something. You’ve got to keep setting deadlines. I don’t have to tell you
that this is an unbelievably deadline-driven profession. Without deadlines,
nobody would ever do anything. So you have to keep deadlines, you have
to keep some general pressure on, you have to remember that you are not
god, that the lawyers have their cases to try, that they need to do it their
own way within limits. But lawyers need to understand that I have to
make a report every six months, and I want to keep my numbers down. I
don’t know if that’s responsive to your question, but that’s part of the
whole case management process that judges go through.

**MS. ALLEN:** Will you have a clerk in on that first scheduling conference?

**MR. ROBERTSON:** One of my so-called elbow clerks is always in here. They keep running
notes in a little notebook of what happens, just little informal notes, not a
transcript and not a docket sheet, but informal notes of what’s going on,
and that’s what I refer to when I come back to the courtroom the next
time.

**MS. ALLEN:** You talked earlier about most cases settling rather than going to trial.
How far do you push litigants to settle? Do you size up cases fairly early
on and just say directly to them that they should settle it?

**MR. ROBERTSON:** The answer is I don’t do it very much. But I have to tell you another
story. One of my favorite colleagues at Wilmer, Cutler & Pickering was a
law clerk to Louis Oberdorfer before he came to Wilmer, Cutler. In fact,
he had been a law clerk to Oberdorfer and then to Sandra Day O’Connor.
And now he is the outgoing dean of the Vanderbilt law school. His name
is Kent Syverud, an elegant guy and a wonderful lawyer. Syverud and I
worked together on a case just about the time he was looking around for a
teaching job, and he got an invitation to go out and meet with the faculty of the Michigan Law School. Part of the deal is you have to give them a lecture so they can tell whether or not you know how to give a lecture. Well, Kent was too busy to prepare much of a lecture, but he cobbled together some anecdotal evidence and put together a lecture on the subject of settling cases. He came over here to the District Court and got some records – I don’t know how he got them – and was able to make a comparison between the settlement rates of two different poles of judicial approaches to settlement. One was the famous Charles Richey, who was a self-professed head knocker and the classical “you people have to settle this” judge. He’d send people back to the jury room and say don’t come out until you have settled this case, and he meant it. He would keep them in there for hours and hours and hours. Richey would dismiss cases as soon as they came in and tell the lawyers they had to try to settle before he would reinstate them. He was a very heavy-handed, flamboyant, I’m-going-to-make-you-settle-this-case, kind of a guy.

Syverud compared Richey’s settlement numbers with the numbers of Aubrey Robinson, who was at the other pole. Robinson would say to lawyers “I’m here if you need me, and if you don’t settle, I’ll see you at the time of trial.” He never interfered, never leaned on anybody, never pushed anybody. Syverud showed that the settlement rates of those two judges, there was not a dime’s worth of a difference between them.

**MS. ALLEN:** Fascinating.
MR. ROBERTSON: And then he compared their settlement rates. I don’t know how he measured settlement rates, but he compared them with settlement rates in the Eastern District of Virginia, the so-called rocket docket. There he found daylight. Cases settled a lot more over there than they did here. Now, some lawyers felt then and still feel – and I sort of feel myself – that pressuring lawyers under unreasonable time pressures to settle a case is a little unfair. But there’s no question at all that it is a firm trial deadline that gets cases settled.

Now, back to your question. What do I do? I don’t do anything the same all the time. I like to think that this is an art and that cases settle when they are going to settle. I am not high on the list of favorites of the people who run the Courthouse mediation program, and maybe you should probe that. I think if Nancy Stanley and Michael Terry were to tell you which judges are their favorite judges, they wouldn’t list me, because I don’t send many cases to them. I don’t do it very often because my own view is that mediation is like psychiatry. If you’re ready for it, it will work, and if you’re not, it won’t. It is, after all, a voluntary process by law, so sending people to go through mediation if they are going to do that with their fingers crossed behind their backs is hardly worth the effort. But I look for opportunities.

The other day I had a bench trial here, and it was a civil case between two owners of a pizzeria, I think on diversity grounds. It had been a jury trial, and then the plaintiff waived his right to a jury trial on
the first day, and so we began a bench trial. We tried it for one day, and at the end of the day, I said to the lawyers, “Here’s how I see it so far.” And the next day they came in and settled the case. Now, I did that on purpose, and it had the desired effect. Lawyers will settle cases once they get a sense of where they are, but they need to have that sense of where they are. Lawyers are the most risk-averse people around, so you need to give them information. That’s why a case will often settle after summary judgment has been denied but before trial. So some cases I send to mediation, some case I don’t. Some cases I ask a magistrate judge to try to settle, sometimes I bring the parties in here. Usually that’s done quite spontaneously, usually if I have a status conference and I can sniff something in the air that the parties need a little help, and I’ll say, “Why don’t you guys come back to chambers, we’ll talk about this.”

The very best trial lawyers are people that you feel lucky to see in your courtroom, and you don’t see them enough. Every judge will tell you that. The truth is, we see a lot of trial lawyers who are here all the time and they are perfectly good. I have actually no complaint about the trial lawyers in this town. I think they do a good, solid, workmanlike job, but there is a notch up that you get occasionally, and it’s a real pleasure when that happens. Just to give you a couple of names, I’m not going to mention names of anybody I think is just a journeyman, but I don’t mean to omit anybody by giving couple of names. Just for an example, Bill Jeffress is a fabulous trial lawyer, was involved in a piece of the *Hubbell*
case. Bill Jeffress has two children that I know of, one is Amy and the other is John. Amy is now the Deputy Chief of the Criminal Division of the U.S. Attorney’s Office, and John has just signed on with the Federal Public Defender’s Office here. John clerked for Tom Hogan, Amy for Gerry Gesell. They were law clerks, so that’s a real lawyers family. Bill Jeffress is the gold standard as far as I am concerned of trial lawyers.

There are lots of others. John Nields was in my courtroom for an important case, and he is just a remarkably good lawyer. But we don’t see those guys enough. You wish you could spend all day listening to the Bill Jeffresses and the John Nieldses of this world making their cases, but that’s not the way it works. That’s a treat. It’s a real treat when those people come in here.

**MS. ALLEN:** This may sound like a silly question, but can you generalize the sort of changes in the type of quality in trial practice in the ten years you’ve been on the bench?

**MR. ROBERTSON:** Maybe somewhat. I wasn’t on the bench in the times that the other older judges refer to as the good old days. What do they say, the good old days aren’t what they used to be? As a historical matter, the trial practice in this court underwent an enormous change in 1970, shortly after I was admitted to practice here, with the Court Reorganization Act which established the Superior Court across the street. Until 1970, this Court, the District Court, handled all serious crimes in the District of Columbia. All serious civil matters, any civil matter that involved title or real
property, came here. Judges in this Court signed adoption papers. It was a completely different kind of court until 1970 when all of that local jurisdiction just got sucked out of here and went across the street. What is left here is very little commercial litigation, which is a lot of what I did in private practice; a great deal of employment discrimination litigation, which has changed in ways that I will report to you in a minute; a lot of guns and drugs, routine criminal litigation, which has not changed much, except it ebbs and flows depending on the United States Attorney and how much of it he brings in this court. A considerable amount of agency Administrative Procedure Act cases like what I’m working on right now, was it proper for the Corps of Engineers to give a 44(b) dredging fill permit to somebody who wants to operate a limestone mine in Florida in the middle of panther habitat? Was it proper for the Department of the Interior to count farm salmon when they are deciding whether salmon are an endangered species? That sort of thing. A lot of those cases. A lot of Freedom of Information Act cases which are dreadful, and a lot of prisoner cases.

The changes that have come about since I have been here are, first, the prisoner cases. We used to have to do a lot of pro se prisoner work. We don’t do much of it anymore because of two things. First, we now have an in-house staff of pro se attorneys who are highly expert and who take most of that stuff off of our hands. They are in effect our law clerks for those cases. We didn’t used to give these cases to our law clerks
because (a) they were tedious, and (b) it took a certain amount of expertise to get up to a level where we could handle them, and a judge could handle them easier than a law clerk. But now we don’t have to do it at all. The pro se’s do it and give us the papers and we almost always agree with them. There’s also been some legislation that makes it harder for prisoners to file cases in federal courts. So the prisoners cases, at least our involvement with them, is down.

Title VII cases, when I first came to this Court, the word was you can never grant summary judgment in a Title VII case. The Court of Appeals would throw it out. Not anymore. The Court of Appeals has changed. It’s become, I won’t say defense-minded, but the Court of Appeals has a different view of Title VII cases, so more Title VII cases go off on summary judgment than used to, and there are fewer trials of Title VII cases. I can’t say that there are any other real changes.

**MS. ALLEN:** One subject that we haven’t talked about that I wanted to cover today is opinion writing and how you go about it, how the clerks are involved, and what you do and what they do.

**MR. ROBERTSON:** The typical opinion comes about either after an oral argument or before. If there is no oral argument, I’ll talk to a law clerk and I’ll say, “Look, I think the plaintiff wins or the defendant wins. It seems to me A, B and C,” and I’ll just give a rough outline of the way I see the case. The law clerk then goes off and produces a draft, and I start chopping on the draft. I am a very, very heavy editor. I insist on writing it the way I want to
write it, partly because I have the hubristic notion that I can write better than anybody, partly because my own belief is that you don’t really get something right until you have deconstructed a sentence to make sure exactly what it says and put it back together again the way it makes sense to you, and partly because I’m going to sign it. The law clerk isn’t going to sign it. I want to make sure that it’s my work. I’ve challenged every law clerk I’ve had to be a better proofreader than I am, and I have never lost. I will put an opinion through sometimes six, eight, ten drafts before it goes out. Sometimes it’s only three or four, but it’s never fewer than that because I am kind of a perfectionist about writing, and I am an anti-footnote person. I’m a “less is more” person. I keep chopping and cutting and shortening and reducing, and then I sometimes look at it and say “God, I don’t know what this says anymore, it’s short, it’s too brief,” and I have to go back and add a little material back in. But the process of opinion writing is definitely an interactive process between me and the clerk. I send a draft back out, the clerk sends the draft back in, I send the draft back out, the draft comes back in. Sometimes we sit together and work it over, but really it’s just sort of “here, take this, work it over again.” I keep asking my law clerks to edit me the way I edit them. Unfortunately very few of them have the chutzpah to do that. Maybe it’s because I am such a much better editor than they are, but I don’t think so. I think it’s because their instinct is, “Judge, however you want it.”

**MS. ALLEN:** Do they get bolder towards the end?
MR. ROBERTSON: Absolutely. And indeed, the great moment in every clerkship – and it’s happened with almost every clerk – when he or she presents to me, usually towards the end of a clerkship, with an order, sometimes it’s a three-page order or a little opinion, that I just sign without changes. That’s great for the clerks, and it’s great for me.

MS. ALLEN: I don’t really have any other questions on my list about the judgeship, per se, just some open-ended ones. Is being a federal judge what you thought it would be like, or have there been surprises?

MR. ROBERTSON: It’s been much, much better than I thought it would be. Much better. I was more than a little concerned when I came over here, both that I didn’t have enough experience with criminal law – I’d had to deal with criminal cases very little – and that I would be so overwhelmed by criminal law cases that I’d spend the rest of my life doing guns and drugs and wouldn’t have time for any really complicated, intellectually satisfying stuff. Both of those fears proved to be completely unfounded. It doesn’t take anything away from criminal lawyers to say this, but criminal law isn’t all that complicated. It’s pretty routinized. Most of these barns we’ve been around many, many, many times. Every motion to suppress evidence is different, but they are all the same, they are just slightly different, and it’s just a matter of understanding exactly what the facts are. So in criminal law, the learning curve is steep and short. And as far as being overwhelmed by criminal law cases, it just hasn’t happened.
As we discussed earlier, I’ve spent by far the majority of my time working on civil matters. Criminal cases, mostly of the Sentencing Guidelines kind, take care of themselves. Now, as I’ve just told you this afternoon, recently there have been more trials than there had been, but that’s cyclical. If I were sitting in South Florida, I’d be doing nothing but trying criminal cases. Drug cases. Or if I were sitting in a border court in Texas, I’d be spending my entire time with immigration cases. But not here. Here, we do plenty of criminal cases, but it doesn’t overwhelm us. When I came here, I don’t think I could possibly have understood the satisfaction that there is in getting it right, in looking at opposing theories of the facts and in finding the right answer. Sometimes it’s excruciatingly difficult, sometimes you don’t know what the right answer is, and sometimes the Court of Appeals doesn’t think you knew what the right answer was. But more often than not, it’s not all that hard. It was harder in private practice to make up arguments why you should win even though you didn’t think you were going to win, or it was harder to marshal facts and evidence towards a view when, if you allowed yourself to be fair-minded about it, you know the truth is somewhere between your view and the other guy’s view. Well, as the judge, that’s where you get to go, right there in the middle. Not that it’s Solomonic, not that you split the baby or anything like that, but I find that it’s not hard to sift the arguments, to throw out the ones that are weak, weigh the ones that are strong and come
out with the right decision. The hard part of it isn’t finding the right
decision, it’s explaining the decision clearly and persuasively.

**MS. ALLEN:** Which is the opinion writing.

**MR. ROBERTSON:** Which is the opinion writing.

**MS. ALLEN:** Do you know what percentage of cases are appealed?

**MR. ROBERTSON:** I don’t know, but I would think a fairly high percentage of cases are
appealed. I’ve never taken the time to measure that, so I just don’t have
an answer to that question. It seems to me like a lot.

**MS. ALLEN:** You have the Court of Appeals lurking in the background as you’re
writing those opinions.

**MR. ROBERTSON:** That’s another case of “don’t get me started.” There’s a lot of back-and-
forth carping between circuit judges and district judges. It is for the most
part pretty good-natured. Lou Oberdorfer once told in public the story
about how the district judges are the ones who slog their way through the
mud like the Battle of the Marne, and the Court of Appeals judges are the
ones who come down to the battlefield and shoot the wounded. We carp
at them a lot. Just yesterday I got an opinion – and I have to laugh about
this – in this little case called *JMM Corporation*, a guy who operated an
adult video store and sued the District of Columbia saying the zoning
regulations were unconstitutional. It was a difficult case, constitutional
case, but I abstained on *Younger v. Harris*.

**MS. ALLEN:** Which is?
MR. ROBERTSON: Which says district courts ought to stay out of the way and let local court processes work out. The District of Columbia was still in the process of deciding the case administratively, so I wrote I think a five- or six-page opinion dismissing the case because of the Younger doctrine. Well, the Court of Appeals got hold of it, and Judge Garland wrote a 17-page printed opinion with 24 footnotes because he got very interested in the question of whether the District of Columbia was a state for purposes of the Younger doctrine. So there’s this long involved opinion about a subject on which I just wrote a footnote. I just wrote footnote 2, noting that no court has squarely held that the District of Columbia is a state for Younger purposes, but the court seems to assume that it is so I just let it go. Of course, Judge Garland had to answer the question. I’m kind of fascinated by the ratio of appellate pages to district court pages. In my case, it’s got to be close to 5 or 6 to 1. They are not impelled the same way I am to brevity.

MS. ALLEN: Different function, different approach.

MR. ROBERTSON: Well, it is a different function. I’m not sure that I understood when I came here how different the two jobs are. I wrote an op-ed piece. Have we talked about my op-ed piece?

MS. ALLEN: No, we haven’t.

MR. ROBERTSON: I wrote and published an op-ed piece in The Post about a year ago, right in the middle of the worst of the judicial filibuster thing, about the inability to get anybody confirmed. I wrote a piece saying I know how to take the
politics out of this process. The way to do it is to return to the way the courts were set up originally. It used to be there was one Supreme Court and then everybody else was the same – Article III judges. We are all Article III judges, and there should be just one category of Article III judges. We might sit as trial judges “nisi prius,” or we might hear appeals, but if we were all just one kind, nobody would know whose confirmation to oppose. It would be like putting an X on every door. We wouldn’t have these political battles. And, by the way, I wouldn’t let any judge hear an appeal until he or she had been sitting in trial court for five years so that the political impetus to appoint ideologues on one side or the other would be absent. The President wouldn’t be the President any longer by the time that person could decide appellate cases.

I began that article with frankly a rather snide reference to an even more snide comment in an opinion written by Karen Henderson. She sat with Dick Leon and Colleen Kotelly on that famous campaign finance case. You may remember that that case went up to the Supreme Court basically with three opinions. Karen Henderson was the dissenter. Kotelly and Leon agreed, for different reasons, that the campaign finance bill was constitutional, and Karen Henderson thought it wasn’t (or maybe it was the other way around). At any rate, Judge Henderson, in a footnote, permitted herself the observation that lower court judges don’t have the same skills for deciding cases on briefs and oral arguments as appellate judges do. Well, that ruffled a bunch of feathers, including mine, so I
began my op-ed piece with a reference to that statement, and said nonsense, we can perfectly well decide cases on briefs and oral arguments. That’s what we do. But that’s not to say that we have the same job. It really is a different job. For one thing, we only have to please one person—ourselves. And they have to constantly form coalitions to get at least one other vote. No appellate judge can do anything by himself or herself. They have to get somebody else to agree with them. We do it ourselves and then see if we get reversed. Stanley Sporkin told me when I came over here that this is a wonderful job. He said it’s like you’re running your own little mom-and-pop store. It’s just you, and your secretary, and your law clerks, that’s it. It’s your own little business. You run it the way you want to run it. And that’s the way most district judges do run it.

**MS. ALLEN:** You would agree with him?

**MR. ROBERTSON:** I think it’s wonderful. Yes. I think we could all use a little more feedback than we get. The Council for Court Excellence has recently published a report on the district court judges based on feedback from community observers who look at how we’re doing, and ranked us and rated us and scored us.

**MS. ALLEN:** So it’s not from litigants or attorneys?

**MR. ROBERTSON:** As far as I know, they are volunteers who come over and sat in the courtroom and watch, and they issue reports. They are superficial and facile and not very helpful, but at least it’s something. We after all are
community servants and we should have that feedback. Have we wandered enough around here?

MS. ALLEN: I think we’ve wandered around, but I think we’ve gotten a lot on the record. Is this a job that leaves you any time for hobbies? Do you ever get away from it completely and get on a sailboat or a tennis court?

MR. ROBERTSON: Well, at 5:00 this morning, I was in St. Michaels, Maryland. We have a place on the Eastern Shore. My wife was out there all week, so I went out there on Wednesday night just to say hello and came back this morning.

MS. ALLEN: It’s a long drive.

MR. ROBERTSON: It is a long drive. I will do it once a week if she is out there for a whole week. That’s my other life out there on the Eastern Shore.

MS. ALLEN: Anything else you want to add?

MR. ROBERTSON: Nothing I can think of right now. I probably will think of more stories.
ORAL HISTORY OF JUDGE JAMES ROBERTSON

This interview is being conducted on behalf of the Oral History Project of The Historical Society of the District of Columbia Circuit. The interviewer is Ann Allen, and the interviewee is James Robertson. The interview took place at the offices of JAMS, 555 13th Street, N.W., in Washington, D.C., on November 15, 2006. This is the fifth interview.

MS. ALLEN: Judge Robertson, you were talking about Judge Oliver Gasch and George Washington night school.

MR. ROBERTSON: Judge Gasch. As I think I’ve said elsewhere, what we had in common was that we had both gone to Princeton and had both been night students at GW law school. I had known Judge Gasch slightly because he came over and talked at the law school either shortly before or shortly after he was appointed to the bench. A former associate of his was an associate of mine on the Law Review and we got connected in that way. For some reason, Judge Gasch was kind enough to pay attention to me. In fact, I use Judge Gasch as an example a lot when I talk to young lawyers today about mentors, because in a very real sense, Judge Gasch was a mentor of mine. Not a day-to-day mentor. I didn’t go to him for advice about much, but I tried to stay in touch with him a little bit. I tried a couple of cases before him, so we knew each other in that way, and so Judge Gasch paid attention.

I think it was Judge Gasch – in fact, I know it was Judge Gasch – who put me up for membership in the American College of Trial Lawyers, which was a huge benefit to me and a great thing he did. He didn’t have to do that. He was just looking out for the next generation. That’s the
kind of fellow he was. Gasch kept track of me when I went off to Mississippi. I would hear from people that Judge Gasch had asked about me. He asked somebody, “What’s a nice fellow like him doing in a place like that?” [Laughter].

At any rate, back to the night school. At some point, and I don’t remember exactly when it was, I think it was after I had left the Lawyers’ Committee and was back at Wilmer Cutler Pickering, the dean of the GW Law School got the idea of getting rid of the night school. He felt that night school was beneath the dignity of George Washington University Law School, and he thought that you couldn’t be a great law school if you had a night school. A lot of the faculty thought that was right. They wanted to upgrade the law school by getting rid of the night school. Judge Gasch went to the barricades and solicited support from former night students, including myself. We went to a couple of meetings, and I wrote a letter. Judge Gasch did most of the work. I wasn’t literally at the barricades with him – it was he who went to faculty meetings and did the work. But ever after, Judge Gasch was grateful to me for my support, and I was an admirer of his for making the effort.

I don’t know whether I previously said this in this interview, but at least in my day, the night school had more committed, substantive students than the regular school. Why? Because in the mid-1960s, many of the day students – I won’t say all of them; obviously, I don’t want to characterize them – but many of the day students were there not so much
for the law school as for the draft deferment. The night students were there because they really wanted to be lawyers. They had incentives. They had to work during the day and go to law school at night. It was a tough slog, but they were focused and committed people. And, my view then, and it may have just been chauvinistic because I was a night student myself, but my view then was that the night school was a much better, much better, venue than the day school.

MS. ALLEN: I think you said you transferred over to the day school. When did you make that transfer?

MR. ROBERTSON: I spent two years at night school, and then I got out of the Navy and finished up my third year of law school as a day student. I was also editor-in-chief of the law review, and frankly, I spent most of my time in the law review office. That’s just the way it was.

MS. ALLEN: Right. So you didn’t really see the classroom that much?

MR. ROBERTSON: Not much, not from the Law Review I didn’t. I didn’t have that study group experience that everybody talks about that happens mostly in the first two years.

MS. ALLEN: Right. I hadn’t thought of that difference. You wouldn’t have an opportunity to be in a study group.

MR. ROBERTSON: You go from work to law school then home. And if you’re lucky enough, as I was lucky enough, to be married, you’d go home, your wife would have dinner for you, and you’d start studying until you had to go to sleep.
And that was five days a week. It was a rough deal. But it was purposeful, really purposeful. And, I think that made a big difference.

So that was Judge Gasch. And then I think we were also talking the about D.C. Bar.

**MS. ALLEN:** We were. And the formation of the D.C. Bar and your election as president.

**MR. ROBERTSON:** Well, there are two threads of that. I think the formation of the D.C. Bar occurred really just about the time that I was in Mississippi. I wasn’t present at the creation of the D.C. Bar. It was all of a piece with the reorganization of the District of Columbia courts in 1970. Other people who had done oral histories have commented more knowledgeably or extensively than I will or could comment on that period of time. But, suffice it to say, the D.C. Bar was mandated by the Reorganization Act. The Bar was to be an organ of the District of Columbia Court of Appeals, formed under orders of the District of Columbia Court of Appeals. It was to be a so-called “integrated bar.” That has some irony in the District of Columbia. In bar speak, an “integrated bar” is a bar that everybody has to join, a mandatory bar. But in the District of Columbia, it had historic resonance because the Bar Association that existed before the D.C. Bar – the old original Bar Association of the District of Columbia – was decidedly not an integrated bar. It was open only to white lawyers. The Bar Association of the District of Columbia maintained the library that was in the Federal Courthouse, the old bar library.
There was a time when black lawyers were not welcome to use that library. Other oral histories by Judge Bryant, by Judge Aubrey Robinson, and probably by John Pickering will tell that story. Aubrey Robinson integrated the bar library by going in and sitting down. It was almost like a sit-in or like a lunch counter sit-in. He wasn’t a judge then, he was a lawyer. And that ended the segregation of the bar library.

When the time came for the D.C. Superior Court to establish the integrated bar, the mandatory bar, the old bar association wanted to be that bar. It wanted to phase itself in and become the institution that was recognized by the D.C. Courts as the official bar. But a number of bar leaders like John Pickering – that’s the one I know most about, but there are a number of others probably all of whose oral histories have been recorded here – put their feet down and said, “No way is that Bar Association going to be an integrated bar. We’ll start a new one.” That was the beginning of what is now the District of Columbia Bar, not to be confused with the Bar Association of the District of Columbia. The District of Columbia Bar now I think has something like 60,000 or 70,000 members. It’s a huge bar. It’s very well-established, very well-run. In its early days, it was kind of a hotbed of disputatiousness among various elements of the bar who were fighting about what shape this bar association – not an association, I don’t want to use that word – what shape this mandatory bar would take.
I was fairly uninvolved with the bar for quite some time. I did do some work with the Litigation Section, but there was a time early in the life of the Bar when lawyers of the big firms didn’t pay any attention to it. When John Pickering became president of the D.C. Bar and had his inaugural dinner or investiture or whatever they called it, not a single lawyer from his own law firm was in attendance. It was a bitter moment for John Pickering, who never forgot it and never let me forget it when I became President of the Bar. It’s as if the big firms had turned their noses up at it, like we didn’t have to do this.

Well, I didn’t feel that way about it. I thought that the Bar was an interesting organization, possibly an important organization, and one that I wanted to know more about. But I never really was very active until one day, almost out of the blue, I got a call from Ann Macrory. Ann was a member of the Board of Governors, and she probably was a member of the Nominating Committee that year. Ann and I had known each other for years because we had been involved together in the Lawyers' Committee for Civil Rights. Ann was this absolutely wonderful, gregarious lawyer. She’s now married to Ralph Temple, and they live out in the northwest someplace.

**MS. ALLEN:** I remember her name. Did she work for the bar for a while or was she just active?

**MR. ROBERTSON:** You know, I can’t remember that. I know she was active. She may have – it’s coming back to me now. I think Ann did work for a segment of the
Bar. I think she had something to with the creation of a program called Open Door, which had to do with mediation. But I’m not too clear about that. At any rate, Ann called me and said, “How would you like to be president of the D.C. Bar?” I said, “What are you talking about? I’ve never been active in the D.C. Bar.” She said, “Well, I think you’d make a good president of the D.C. Bar” [laughter]. I said, “Well, that’s pretty flattering, Ann. If you think so, and if you think it’s important to proceed, yeah, you could say that I would be interested.” Well she called back a month or two later and said, “Uh, sorry, sorry,” she said, “Bob Jordan is going to be the one that they consider.” Well, Bob Jordan was supremely qualified to be president of the bar. Bob was older than I was and was much better established. He was a partner at Steptoe and Johnson. And I said, “Wonderful. Good luck to him.” And she said, “But would you like to be a member of the Board of Governors?” And, I thought to myself, well that’s a bait-and-switch [laughter]. But the long and short of it is --

**MS. ALLEN:** You said yes?

**MR. ROBERTSON:** I said “Yes,” and became a candidate for the Board of Governors, and was elected, and served on the Board of Governors for several years. And then when I had gone through the chairs, at some point I was put up as a candidate for President. But what you and what historians need to understand about the D.C. Bar is that leadership in the D.C. Bar doesn’t just happen because people decide to run for office. The leadership of the D.C. Bar, for at least the last twenty years, has been managed by the
Executive Director of the Bar, who is Katherine Mazzaferri, who is one of the great kingmakers of Washington. She will never acknowledge it, and never admit it, but it’s Katherine Mazzaferri who basically picks the presidents of the D.C. Bar. That’s an overstatement, of course, but not much of one. She is a very fine invisible hand. She makes people aware of opportunities and makes the opportunities aware of people, and somehow it all works out. Katherine sees to it that the right people get to be president of the D.C. Bar. It’s quite fascinating to watch. And I was the beneficiary of that process. Katherine doesn’t really select the president of the D.C. Bar, but she makes it happen.

The year I ran for President, my opponent was Jim Schaller, a wonderful guy and a wonderful lawyer. But Jim Schaller didn’t have the big firm backing, and at that time, a lawyer from a big firm would win every time. There wasn’t any campaigning. A letter would go out, signed by somebody like John Pickering. It was a little like high school. John Pickering would send a letter to Stanley Temko at Covington & Burling, and Bob Jordan at Steptoe and Johnson, and Stuart Land at Arnold & Porter and Dan Gribbin at Covington & Burling, and say, “My partner Jim Robertson is running for President of the Bar. If you can get some votes from your firm, it would be useful.” And they would send memoranda around the firm. The big firms may have kept their distance from the Bar, but they voted as a block. It’s different today. And that’s
the way I got to be President of the D.C. Bar. It was quite simple, wonderful for me, and unfair to Jim Schaller.

**MS. ALLEN:** What years were you in office?

**MR. ROBERTSON:** I have the certificate around here somewhere. I was President 1991 to 1992. I was president-elect the year before that, and immediate past president the year after that. Now you will ask me why I did that.

**MS. ALLEN:** So why did you?

**MR. ROBERTSON:** I’ll give you the idealist answer and then another answer. As Maureen Dowd of the *New York Times* reminds us, morality without realism is naiveté. Realism without morality is just cynicism [laughter]. So, there was an idealist reason to seek the presidency of the D.C. Bar. It was much more intense than practical. I was interested in the Bar. I thought the change in the practice in law over the then-twenty-five years that I had been in it was so dramatic, and there was so much going on in the life of lawyers, that I wanted to learn more about it. There were changes in concepts of ethics, in size of firms, and the way people related to their work and billable hours and all of these issues that have afflicted the legal profession over the last fifteen to twenty years. I wanted to kind of jump in and muck around and talk to other lawyers about it and think about it and have the occasion to work on issues involving lawyers. So I did it because I was interested in it. I also did it, frankly, because at some point in the late 1980s, I had concluded that it would not be any fun to grow old in a big law firm and that I’d like to be a judge some day. And if I was
going to be a judge, if I had any shot at being a judge, it would be
enhanced by my having and demonstrating community involvement, and
the Bar presidency would be a very, very good way to do that.

The legal profession had changed so dramatically. My own law
firm, which from the time I’d been a partner beginning in 1973 until the
late 1980s, had been one of these completely egalitarian, one-for-all, all-
for-one, everybody makes the same amount of money, we’re all in this
together kind of a place. It was in the process of becoming quite a
different kind of a place. I wasn’t quite eager to change, but there was
much, much more emphasis being placed on business-getting and who
was the top dog and that sort of thing. That was not an environment that I
thought I was going to continue to thrive in. So I said, well, if I can be
President of the Bar, that’s a good thing all by itself. It’ll add something
to the firm, and it will enhance my own chances if there’s ever – if a
Democrat ever gets elected again.

**MS. ALLEN:** At this point, the Carter Administration was a thing of the far past?

**MR. ROBERTSON:** At this point, it had been ten or eleven years since there was a Democrat in
the White House. The Reagan-Bush judicial appointment thing was
intensely political. No Democrat need apply, that was very clear. So there
was this great pent-up demand among Democrats who might be interested
in the bench. I don’t know whether I said this already, but I had never
really thought I wanted to be a judge because I didn’t think I could afford
it.
MS. ALLEN: I think you may have mentioned that.

MR. ROBERTSON: But some time around the mid-1980s, judges were given a very substantial pay raise, up to a point where it made some sense, some economic sense, if you were to consider being a judge. That probably was the last major pay raise the judiciary ever got [laughter].

MS. ALLEN: Was the law firm supportive of your running for the presidency of the D.C. Bar? Had large-firm attitudes changed towards the bar?

MR. ROBERTSON: Yes. Well, I realized that as I was talking about large firm attitudes towards the bar, I wasn’t being quite clear. It was actually more subtle than that. It wasn’t that the big firms didn’t support the bar. They did support the bar and actually wanted to control it. It was just that it was the kind of support you give to a charity or something. You want to be known as supporting the bar, but most of the lawyers in the firm had nothing to do with it. So the firm was very proud of the fact that we already had two presidents in the bar by the time I was president. John Pickering and Louis Oberdorfer had both been presidents. The firm was proud of that, and proud of the fact that I was going to run for President and very supportive of me and completely understanding of the fact that I billed about half as many hours that year as I ordinarily would have because of the Bar. But it wasn’t as if thirty members of the firm were really anxious to get involved with me. It was, well, that’s Jim’s thing. It’s good for us and I’m glad he’s doing it. He’s doing it, but we don’t need to do it [laughter]. And the D.C. Bar, then and now I think, probably has 300
really active members. People who are really into it. “Bar junkies,” as I call them, or “bar groupies.”

**MS. ALLEN:** It’s a small percent, a very small percent.

**MR. ROBERTSON:** It’s like any institution. A few people make it go. Just like very few people vote in this country and make the decisions, very few people run the D.C. Bar. They’re active in it, and they’re interested in it, and they’re interested in the American Bar Association, and they go to meetings and they go to conventions. But it’s not the daily fare of most lawyers. And for me, I spent three years, maybe five years, on the Board of Governors, and then three more for the presidency. I got really into Bar issues. But as soon as you leave, you’re gone. You forget about the Bar. I read the magazine every month. I’m glad to know what’s going on, but it’s out there now. I’m not involved in it. In fact, I can’t even vote. As a judge, I can’t vote on Bar elections.

**MS. ALLEN:** Does the D.C. Bar have much interaction with the judges? Do they come to you?

**MR. ROBERTSON:** They would like to have more. The D.C. Bar has always had a weaker relationship with the federal courts than it would like to have. It is, after all, a creature of the local courts. I mean, part of my duty when I was President of the Bar was to go over periodically and make reports and have meetings with the bench. My wife and I went to see Helen Mirren in *The Queen* last night.

**MS. ALLEN:** I saw it a couple of weeks ago.
MR. ROBERTSON: When I saw Tony Blair going to meet the Queen, for some reason, my first thought was of my meetings with Judith Rogers when I was President of the Bar and she was Chief Judge of the D.C. Court of Appeals. It was something like that kind of relationship [laughter].

So there is that formal relationship with the local courts. But a relationship with the federal courts is something the Bar would like to have more of, and our court, and the Court of Appeals always sort of brushed it off. We do get asked to serve on panels occasionally and get invited to meetings of sections. The president of the D.C. Bar is an ex-officio member of the Circuit Judicial Conference and attends its annual meetings. There was a time when the president-elect of the D.C. Bar was a member of the Arrangements Committee for the Judicial Conference and was given the privilege of selecting or helping to select or at least having an important role in selecting who would be invited to the Judicial Conference meeting. That lasted for some years, maybe ten years. I don’t think it happens any more. A different group of people took over the Court of Appeals and said, “We don’t need this anymore,” so the Bar no longer had a role to play.

MS. ALLEN: Which sounds like not that great a role.

MR. ROBERTSON: Not that great a role. But you know, oddly enough, it had its uses. It meant that the Bar had – being invited to the Judicial Conference is a big deal for lawyers.

MS. ALLEN: I know.
MR. ROBERTSON: To give the Bar that role, being chief inviter, added a cache to the Bar with the people the conference attracted.

MS. ALLEN: I want to ask you about the *Hamdan* decision, both your decision and the opinion, and what happened. Since you issued that, it’s now been a year.

MR. ROBERTSON: Yes. Well, the problem with talking about a case like *Hamdan* is that it is now being recognized by some scholars as an important case. It’s been studied and re-studied and counter-studied, and there’s a lot of really authoritative information about it. And of course there is the actual record of the case, which I don’t have before me, so I’m not going to talk about the details of the case. What you’re getting here is memory impressions, which should all be taken with a grain of salt unless you have the actual record before you. But here’s my take on the *Hamdan* case.

After Guantanamo Bay, after the government began taking hundreds of people over to Guantanamo Bay, habeas corpus petitions began to be filed in this court and in other courts around the country, and for a long time, there was uncertainty about how we were going to deal with them. Most of the petitions were being filed in this court, so the judges of this court came together to try to decide whether one judge should handle all these cases. Fifteen judges handing down fifteen different kinds of opinions on essentially the same case was silly, and we all knew it was silly. And besides that, it would be much more efficient if one judge handled all of these opinions. Well, I should say here that the actual lineup of events I’m a little uncertain about, but I think that the
Supreme Court had just decided the two cases of *Hamdi* and *Rasul*. Those cases were decided in June of 2004, I think.

**MS. ALLEN:** Right. They were.

**MR. ROBERTSON:** In one of those cases, *Hamdi*, the Supreme Court said yes, there is jurisdiction in federal district courts to deal with habeas petitions from Guantanamo Bay. Guantanamo Bay may be outside the territory of the United States, but it’s land that is controlled by the United States. *Rasul* said the government can hold detainees at Guantanamo Bay indefinitely, or it implied that they could be held indefinitely, but not without doing a combatant status review – what became known as a CSRT, or Combatant Status Review Tribunal – to determine that these people are unlawful enemy aliens or alien combatants. Those two decisions left a huge number of unknowns. And they also left hundreds of detainees at Guantanamo Bay with rights to sue for habeas corpus – rights not to be held there unless they had been found to be unlawful combatants by CSRTs.

It was after that that we began to be flooded by these petitions. And it was after that that this court decided that we would find a judge to turn over all of our cases to, and that judge was Joyce Hens Green, who had retired, although she was in a status called inactive senior status. The Chief Judge invited her back, and she accepted the assignment. All the judges except one decided that they would transfer their cases to Judge Green for uniform handling. But I had already been assigned the *Hamdan*
case, and *Hamdan* was not like the other cases. The other cases were all either challenging detention without yet having had the Combatant Status Review Tribunals, or they were challenging the findings of the Combatant Status Review Tribunal, which had been held, or they were challenging something else, like conditions of their detention or they didn’t have a Koran, or something else about their detention. *Hamdan*, unlike all the rest of them, had already had his combatant status review and was being teed up for the first trial before the Military Commission. The Military Commission that had been cobbled together by the president without asking for Congressional approval.

Judge Green and I had a discussion about *Hamdan*. She said, “I know you’d like to do this one yourself, wouldn’t you?” And I said, “Yes, frankly, I would.” So Judge Green, really quite generously, said, “Well that’s an interesting case, it’s a different case, it’s a special case, you do that one. I don’t need to do that one.” Then she took all the rest of the cases – except one. The one that she didn’t take was assigned to Judge Leon. Judge Leon, exercising his Article III independence, declined to transfer the case to Judge Green. Judge Leon and Judge Green wound up issuing two diametrically opposed decisions on what powers they had over the detainees at Guantanamo. Judge Leon said, “I have no constitutional power to do anything with them.” Judge Green said, “I do have the constitutional power, and I will exercise it here.” Both of those cases were appealed to the Court of Appeals on the question of whether there was
jurisdiction in this court to do anything. That was the internecine dispute that eventually led to the Supreme Court’s *Boumediene* decision.

**MS. ALLEN:** What do I do after I have the habeas petition?

**MR. ROBERTSON:** What can we do after, that’s right. Now, set those two cases aside for a moment. The *Hamdan* case had been filed originally in the District of Oregon. A very good judge in the District of Oregon had been instructed by the Ninth Circuit that all these cases belonged in Washington, D.C. So with understandable reluctance, he transferred the case to Washington, D.C., and it wound up on my desk. It got here in September, late August or early September, of 2004. I had two brand new law clerks. They both pitched in on this case, and we had a decision on, I think around November 7.

The threshold question that I confronted in *Hamdan* was, did the President have the power to have these people tried before a military commission at Guantanamo Bay. And for me, the case was primarily, almost exclusively, about the allocation of powers between Congress and the Presidency. There were sensational amicus briefs filed in this case. You don’t normally see amicus briefs in district court, but they were filed in this case. An amicus brief filed on behalf of a hundred members of the British Parliament. There were a number of other amicus briefs, but the most influential amicus brief, the one that I paid the most attention to, was one filed on behalf of nine or twelve retired general and flag officers in the Armed Services, who argued that these military commissions were in
violation of the Geneva Conventions, and if we permit people to be tried under these conditions by military commission, we will have no right to expect our own military people to be treated any differently if they are captured on enemy battlefields. That brief had a profound impact on me.

The petitioner was represented by Lieutenant Commander Swift, the Navy JAG lawyer now assigned the case of representing Hamdan, and [laughter] who I read not long ago is not going to be promoted to Commander. I was not surprised. He will end his military career and probably make a lot of money as a private lawyer. He was nothing if not dashing. And by Neal Katyal of Georgetown University, a very gifted young professor, who was the constitutional brains in petitioner’s camp. The case was argued before me by a young Justice Department lawyer named Jonathan Marcus. Jonathan is the son of my former partner, Dan Marcus. It’s a small world [laughter]. I remember Jonathan as a very tiny baby, and here he was arguing the government’s position before me, and arguing it powerfully and very well. You’re not supposed to pay attention to things like this when you’re a judge, but I did that day. The courtroom was full of people, the case was already famous. On one side of the courtroom, there must have been twenty or thirty military officers in uniform. I assumed, and as far as I could tell by looking at them sitting there, that they were all JAG officers from the various branches of the service. Every time the petitioner’s – Hamdan’s – lawyers, made some point, they would be nodding their heads. And when Jonathan Marcus
was making points, they were shaking their heads no [laughter]. I had spent five years in the military. I knew something about the military mind. I knew, or thought I knew, that a lot of what was happening at Guantanamo Bay was being done over the objection of the military, and so these officers were more or less demonstrating. A very, very quiet, subtle demonstration, but a demonstration nonetheless.

In order to decide Hamdan the way I did, it was kind of a thread the needle decision, because the first and one of the most powerful questions presented by the government was whether I should abstain. There was a long line of cases that say you have no business dealing with this case, let it go through the trial there, and then come with a habeas petition. Well, I decided for reasons set forth in my opinion that I would not abstain. Then there was the issue of whether the Geneva Conventions were self-executing or not, that is, whether or not they could be used as a basis for action in our court or whether they were simply something to be debated between governments. In other words was there any such thing as a right of action. I said yes, there was a right of action. Before I got to the Geneva Conventions, I had to deal with what I thought was the core of the case, which was the President’s power and authority as Commander-in-Chief. And for that, I had to go back and deal with cases like Yamashita and Quirin.

I decided the President had not been given plenary power by Congress. Then I had to deal with the Geneva Conventions. Were they,
could they, provide a cause of action or not. I said yes. Or could they be
the basis of a cause of action, and I said yes. And then there was a good
deal of conflict here in chambers about whether I would add the last
section dealing with the actual rules that had been adopted by the Defense
Department in its trials.

The petitioners had attacked the rules across the board and wanted
a lot of rulings about confrontation, cross examination, secrecy, rules of
evidence, you name it. The whole structure of the Military Commission –
appeal rights, who would be appointed to the commission, who would
hear the appeals – it was all bad as far as they were concerned. My
conclusion was that almost all of that I really should abstain from, but that
one aspect of it in particular needed to be dealt with, and that was the
provision of the Military Commission rules that the detainee would not be
able to listen to some of the evidence against him, couldn’t be in the
courtroom when the evidence was put on. His lawyer could hear it, but he
couldn’t, and his lawyer would be told that the lawyer couldn’t tell his
client. That I found troubling, and I found it to be in violation of the
Geneva Conventions and the laws of war and every other law I could think
of. I was going to leave that part of it out, but one of the law clerks talked
me into doing it.

I don’t think I was quite prepared for the publicity that that opinion
generated. It was huge. For the second time since I came on the bench, I
was on the front page of every paper in the country for a day. I got calls
and letters from all over the country. It was quite a heady experience. But I knew that my decision had very little chance in the Court of Appeals [laughter]. How little a chance I didn’t quite appreciate until I saw Judge Randolph’s opinion. He just shot me down in an opinion written with typical Randolph sarcasm. He couldn’t believe that I had not even mentioned the *Eisentrager* case, which he thought was pivotal. John Roberts, a new judge on our Court of Appeals, concurred. And that was that.

Katyal and Swift went to the Supreme Court, and to my surprise, cert was granted. The new Chief Justice of the United States recused himself, and the Court of Appeals was reversed five to three in an opinion by Justice Stevens that came about as close as a trial judge could ever dream of to a complete vindication of what I did.

I have to tell you. I had a call from a judge I know in Iowa who said, “G[expletive] it, Robertson,” he said, “All I ever wanted out of this job was to make a decision, get reversed by the Court of Appeals, and get affirmed by the Supreme Court. Why can’t I have that? Why can’t I?” And it is true that for a trial judge there is no sweeter day than the day in which something you decided has been vindicated by the Supreme Court after being reversed by the Court of Appeals. It is a beautiful, beautiful day. And it’s a sin to be so vainglorious about that, but I am a sinner.

**MS. ALLEN:** [Laughter] Were you really surprised that cert was granted?
MR. ROBERTSON: Yes. I was a little surprised that cert would be granted because as

Mr. Dooley says, the Supreme Court reads the newspapers. And, I thought, I suppose naively, that the Supreme Court would say hey, we’re in the middle of this war. The Supreme Court has done a lot of strange things in the middle of war, and they have refused to do things they should have done in the middle of a war. And I thought the Supreme Court would simply adopt one of the major premises of the Randolph opinion, which was abstention. Randolph didn’t abstain. He didn’t abstain because he wanted to write the opinion [laughter]. So he didn’t want to stop with an abstention. He had a few things to say too. But I thought the Supreme Court might say now let’s find out what happens after the trial. Because I thought abstention was a pretty powerful argument.

MS. ALLEN: You did?

MR. ROBERTSON: I did, which they continued to make in the Court of Appeals and in the Supreme Court. But, the Supreme Court jumped into it with both feet, and that ringing opinion by Justice Stevens is of course history now.

There is a program being put on by the American Constitutional Society tomorrow or the next day called, “The Fallout from Hamdan.” And there has been some fallout. The Military Commission Act is fallout from Hamdan, a serious fallout. A couple of little asides if I may on the case. First, this was the second time that I have been vindicated by the Supreme Court. I can die now. The first time was the Webster Hubbell
decision, which I think I probably talked about at some point. The second time was this. Justice Stevens wrote both opinions. So he’s my guy.

**MS. ALLEN:** He’s your guy.

**MR. ROBERTSON:** He’s my guy. Another thing about this *Hamdan* opinion is there was a little bit of a dissent in the Court of Appeals, and that was by Steve Williams, who said, “I don’t think the Geneva Convention’s article” – I’ve lost track of that. There were two Geneva Conventions at play here. The one that I relied on said that Hamdan had not been properly determined not to be a prisoner of war and that it was necessary to have a determination as to whether he should be treated as a prisoner of war. Until they had made the determination as to whether he should be a prisoner of war, he could not receive the military commission. That was shot down by the Court of Appeals.

There was also Common Article 3 of the Geneva Conventions, the earlier Geneva Conventions Article 3 which had said nothing about treatment of prisoners of war, but which simply provided that judgment should not be passed except by a “regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” That’s all Common Article 3 says. Judge Williams agreed with me that Common Article 3 applied. That’s all he agreed to at that time. But my opinion had said, it had turned almost completely on the other Geneva Convention, on the prisoner of war point. I believed that Common Article 3 applied, but I also thought that Common Article 3 did
not have specific enough normative content to use to evaluate these
procedures at Guantanamo, so if Common Article 3 were applied, I would
have abstained. I would have to abstain, until I saw the results.

MS. ALLEN: I see what you’re getting at.

MR. ROBERTSON: Well, Justice Stevens jumped completely over the prisoner of war thing,
completely over that, and went straight to Common Article 3. The
Supreme Court decided that Common Article 3 was what they would hang
their hat on. And they decided that it did have normative content and that
the normative content made it unlawful, among other things, to have a trial
in which people could not confront the evidence against them. So, I was
vindicated, but not perfectly vindicated. The Supreme Court really had a
quite interesting and different rationale ultimately than mine about which
Geneva Convention applies and what it meant. Steve Williams was the
only Court of Appeals judge who spotted that Common Article 3 point.
Now he, like I, didn’t think that anything would come of it.

MS. ALLEN: You certainly thought that there was an issue. You cited it.

MR. ROBERTSON: Oh yes. I thought it applied. I just didn’t know what it meant.

MS. ALLEN: Right.

MR. ROBERTSON: I didn’t know how to apply it, or what it would – and maybe having
already decided that there’s no war issue, I felt I didn’t need to. But, the
point is that, as vindicated as I felt, it wasn’t perfect vindication – although
I won’t have to explain that to anybody but a historical writer [laughter].

MS. ALLEN: So *Hamdan* today is back to you?
MR. ROBERTSON: Back to me. Congress responded to Hamdan by enacting the Military Commission Act, which is exactly what I said in my opinion Congress needed to do. If Congress authorizes these things, then the president has the power to do them. If Congress doesn’t, which it hadn’t then, he doesn’t. That was the thrust of my basic Hamdan decision. So, Congress basically did what I said they had to do, and what the Supreme Court always said they had to do, and passed this Military Commission Act. Now the matter is back before me because the Court of Appeals – the case came out of the Court of Appeals – remanded from the Supreme Court to the Court of Appeals. The Court of Appeals passed it off to me with no instructions. “Here, take it. Back to you.” And there is now pending before me what I have deemed to be a motion to dismiss Hamdan on jurisdictional grounds. Even if this oral history is going to be locked up, I don’t think I should say where it’s coming out.

MS. ALLEN: Should this have gotten a lot of attention?

MR. ROBERTSON: It remains to be seen. The petitioner’s brief is due next week, and the government will file a couple of weeks after that. I don’t know if there’s going to be a lot of amicus briefs this time around or not. I frankly rather doubt it. It’s a much purer legal question today than it was then. And the Court of Appeals, who set aside the Green and Leon opinions, we talked about that, they set them aside. They are still pending before the court. The petitioner’s brief will be filed within ten days or two weeks. The
Court of Appeals should decide that case before I get a chance to decide this one. They should decide the jurisdictional question.

**MS. ALLEN:** The Green-Leon jurisdictional question?

**MR. ROBERTSON:** The Green-Leon question, which has now morphed into a much different question because of the Military Commissions Act.

**MS. ALLEN:** Right. And the Military Commissions Act, I believe, says that the district courts don’t have jurisdiction and they did it retroactively.

**MR. ROBERTSON:** Yes, ousts the district courts of all jurisdiction of any cases that have to do with detention at Guantanamo Bay. There is a huge fight about how constitutional that is. I expect that the Court of Appeals will hold that there is no jurisdiction in either one of those cases, either in the Green case or the Leon case. *Hamdan* would be a different situation because jurisdiction was already asserted and confirmed by the Supreme Court of the United States. The question is I suppose whether Congress can undo something the Supreme Court has done quite that directly. But I don’t know. That’s all that is up in the air. It’ll be unfolding in the next couple of weeks.

**MS. ALLEN:** That’s quite a case for new law clerks.

**MR. ROBERTSON:** Oh, man. Rob Ditzion and Mona Sahaf, brand new law clerks, did a good job. I got tickets for them to hear the argument at the Supreme Court. It was a real kick for them. I should have gone over to hear it myself actually. There is some dispute among judges about whether it’s “done”
for judges to go to the Supreme Court and listen to argument in their cases.

MS. ALLEN: But some judges do go?

MR. ROBERTSON: I think some judges go.

MS. ALLEN: Have you ever gone?

MR. ROBERTSON: Never even in the Court of Appeals. I do set spies at the Court of Appeals. We all do that. I send my law clerks when they’re arguing my cases. And they come back and handicap the results.

MS. ALLEN: Predictable?

MR. ROBERTSON: Absolutely predictable.

MS. ALLEN: So did your two clerks go to the argument in *Hamdan*? There was an argument I assume in the Court of Appeals.

MR. ROBERTSON: I can’t remember.

MS. ALLEN: Might not have been?

MR. ROBERTSON: I can’t remember whether they did or not. They must have. Oh, of course they did. The *Hamdan* Court of Appeals argument was held in the Ceremonial Courtroom. It was a packed house. I’m just trying to remember whether it was Rob and Mona or whether it was the next year’s law clerks. I think it was the next year’s law clerks. But whoever it was, they came back and said, “You’re toast” [laughter]. This is not good. This isn’t going to last long.

MS. ALLEN: The great legal prediction, you’re toast.

MR. ROBERTSON: Toast [laughter].
MS. ALLEN: Wow. What a satisfying Supreme Court ruling.

MR. ROBERTSON: Yes. It’s stunning really. Just stunning.

MS. ALLEN: Any more comments on Hamdan or follow-up questions? If not I’d like to ask you about the FISA Court, resignation from that, if that’s something you think you could talk about.

MR. ROBERTSON: Yes. I am going to talk about this. I was trying to think if there’s anything more that I had to say about Hamdan. I feel very good about Hamdan to be honest with you. I feel like I made some real contribution to the issue of presidential authority. And a lot of my interest in this job has to do with separation of powers and checks and balances and balance of powers between the President and Congress. And I am appalled really at how weak Congress has become in the American constitutional balance. The chief executive of a company or the chief executive of the nation or the chief magistrate as the Constitution calls the President of the United States, doesn’t have to be power hungry in reaching for power. But it’s kind of in the nature of the beast to reach out for as much power as you can get. And that’s what our presidents have done, particularly in the last fifty years. Congress has become more and more and more complacent and less and less willing to take him on. But the Supreme Court’s opinion in Hamdan really awakened a lot of people in Congress and a lot of scholars to believe that Congress has to assert itself. So I feel like I’m part of history. It’s great fun.
MS. ALLEN: Was it a hard opinion to reason through and then set down on paper in the order that you did? I don’t have it in front of me, but it seemed very logical and very, very carefully thought out, reduced to a clear logical explanation.

MR. ROBERTSON: Well, I hope it was clear and logical. I sort of pride myself on that. I pride myself on writing as short and succinctly as I can. But I have to tell you that, as I think I said earlier, I felt like I was threading a needle. I knew what I wanted to do in *Hamdan*. The question was could I do it. Would the law permit me to do it.

MS. ALLEN: Right.

MR. ROBERTSON: And I had to get over abstention and whether the Geneva Conventions provided a cause of action, specifically those two questions. They were serious obstacles to any ruling. Now, of course, we have a third problem, which is jurisdiction.

MS. ALLEN: Right.

MR. ROBERTSON: And yes, it was hard to write, and I struggled with whether I had the power to do it. But I kept remembering something Bill Bryant said. He said, “You know, we’re just judges, and we can’t go out gunning for whatever we want to gun for. We can’t go out gunning for cases.” He says, “It’s more like we’re a stationary cannon sitting on the mountain overlooking the harbor. Every once in a while something comes within range, and, boom! You pull the trigger.” I thought that was such a beautiful metaphor for the role that a judge plays. You can’t call that
activist. I mean, I didn’t go looking for this case. It wound up on my docket. It presented itself. I didn’t go looking for it, but it came within range [laughter].

MS. ALLEN: That was the boom.

MR. ROBERTSON: So, enough about Hamdan.

MS. ALLEN: FISA.

MR. ROBERTSON: What I’m about to tell you I’ve never told anybody outside my family and my law clerks. But I think I can tell it to you, for whatever historical value it may have. Some time in December of 2005, I think it was, I woke up in the morning and read in the newspaper that the President had been for years authorizing NSA surveillance of telephone calls, both inside and outside the country, and didn’t do any of it with a FISA warrant. Within 24 hours, I had resigned from FISA Court. My resignation from FISA Court took the form of a letter to the Chief Justice, whose predecessor had appointed me to the FISA Court. I said, “I hereby tender my resignation from the FISA Court.” I didn’t say why, didn’t add any of the old grace notes, like, “I have been honored to serve, blah blah blah.” I just resigned. Never got an acknowledgment, never got an acceptance, it was just done.

Before I resigned, I sought the advice of two of the judges in this Courthouse, whom I don’t think even for the historical record I’m going to name, who are people I’m close to and people I respect, and told them the story. I told them I think I have to resign, what do you think? And one of...
them said do it. And the other one said, “How is anybody going to know why?” I said, “I don’t think it’s appropriate for me to explain.” He said, “Well why don’t you find somebody who could tell the press what they think your reasons are.” I said, “Well that’s a good idea.” And so I called Jamie Gorelick. And then when the reporters got wind of the resignation, I wouldn’t talk. I’ve got a file that thick of telephone messages, letters, emails, faxes, asking me for interviews, to go on “Sixty Minutes,” to every major news outlet, “Nightline,” – people wanted to talk to me about it. I didn’t choose to talk to any of them.

The only person who ever talked to anybody who knew anything about it was when Carol Leonnig, I think with The Washington Post, somebody told her Jamie Gorelick might know. In fact, one of these two judges I told you about is the person that told Carol that Jamie Gorelick might know. And Jamie did know. And what Jamie said was that the resignation was in protest of what the President did and also because the judge felt like he was being compromised into a position in which he didn’t think he could do his job properly. And that’s all the press ever got.

Well, I walked out the door of my house in Georgetown the next morning and there was a CBS cameraman with his camera in my face. He followed me all the way to the car, and that was on the evening news. The next morning, I looked out the window. It was cold. It was December, I think. I looked out the window and there was another cameraman on the sidewalk. I said to my wife, “Would you go out and get the newspaper?”
She said, “Get the newspaper yourself.” So I, in my slippers, opened the front door and went out and this camera came at me. He looked at me, he took one look at me, and said, “I can’t do this to you.” I said thank you. I said, “I’ll make a deal with you. It’s cold. It’s 7:00. I’m not going to leave here until a little before 9:00. There’s no point in you standing out here on the sidewalk for two hours. I promise you, I will not go out the back door. Why don’t you go and get a cup of coffee and be back here about a quarter to nine, if you still want to film me.” He said, “Okay.” I was hoping he’d get another call and have to go someplace else, but he didn’t. He was there at a quarter to nine.

After Hubbell and Hamdan, that was my third fifteen minutes of fame. And this one was really intense. I suppose the reason it was so sensational for the press was that nobody would tell about what the story was. They all had to write it off The Post’s story because nobody had any other confirmation of the reason that I had resigned. Oh my God, I got hate mail. It was just amazing the stuff that poured in. Just amazing.

**MS. ALLEN:** Just from members of the public?

**MR. ROBERTSON:** Oh yes. Members of the public from all over the country. There were about 200 or 300 letters. I said I had hate mail, but frankly, I think the mail was ninety-five percent favorable. Now, here’s the real scoop. This NSA surveillance program had been going on for three or four years. The Administration had briefed the presiding judge of FISA Court, who had been Royce Lamberth until May of 2002 and then Colleen Kollar-Kotelly...
after that, and had instructed them that they couldn’t tell anybody else. So they were in the compromised position of having the information, but being forbidden to tell the other judges on the FISA Court. That was completely unacceptable to me. It was unacceptable to me first of all that they had put Judge Lamberth and Judge Kollar-Kotelly in that position. It was unacceptable to me that either of those judges had accepted being put in that position. And it was unacceptable to me that we were being presented with FISA warrant applications that may have contained information that came from those, that surveillance program, without our knowing about it.

The basic FISA warrant process involves the presentation to the FISA judge of a warrant application. Sometimes it’s 50, 60, 70 pages long, a lot of which is boilerplate, but which also contains the recitation of facts that the applicant for the warrant thinks gives rise to probable cause to believe that the target of the proposed surveillance is an agent of an enemy power and that they, whatever is going to be surveilled, is of interest to the intelligence community. Those statements of facts are annotated with footnotes that explain where the information came from. When it comes from a confidential informant, we’re told, it comes from a person who has himself been under surveillance or has a criminal record or something like that or it comes under circumstances that are questionable so we can evaluate that information and decide whether probable cause has been properly established. If I’m reading one of those
applications and it has information in it that was obtained by NSA, by
warrantless NSA surveillance of telephone calls under a special program
that I’ve never heard of and don’t know about, there’s no way for me to
ask the questions I need to ask in order to make an informed evaluation of
whether probable cause exists. And so I decided that I was being denied
the tools I needed to do the job and that the only correct thing to do was to
resign. That’s the whole story, it’s as simple as that. Again, I had no idea
what kind of a bombshell that was going to be.

MS. ALLEN: Were you ever inclined to give a reason, to claim publicly and make
people think about the ramifications of the eavesdropping program?

MR. ROBERTSON: I think I got wrapped up in the “Judges don’t talk” mythology. There are a
lot of reasons why judges don’t choose to talk. For one thing, if you talk
but don’t answer questions, then you don’t give satisfaction to the press or
anybody else who wants to listen. If you start to answer questions, there’s
no end to the questions you’re going to be asked. We are not by training,
by tradition, by culture, by any other measure you can think of, equipped
to talk to the press. Judges don’t do it. Some, a few.

MS. ALLEN: Right, they don’t.

MR. ROBERTSON: They just don’t do it. When Senator Specter started putting legislation
together to turn this NSA surveillance program over to the FISA Court, he
wanted me to come testify up on Capitol Hill. I said, “No.” “Oh, yes,
come up and have lunch with me in the Senate Dining Room.” So, I went
up and I have great respect for Senator Specter, a very nice guy. I said to
him, “Senator, you don’t really want me to testify up on Capitol Hill about this because it would be kind of a feeding frenzy because the press has been after me, and I would become the story and not your bill and that’s not what you want.” By the way, an enormous number of people think what I resigned was my judgeship. My God, how principled could you be to resign your judgeship.

**MS. ALLEN:** They think you resigned the federal judgeship?

**MR. ROBERTSON:** I hope I’m principled, but I’m not stupid. Lately I’ve taken to answering people’s questions about the FISA Court. I’ve done this a few times in the last few weeks, and people kind of walk away shaking their heads. I tell them this. I say, “I’ve never told anybody why I quit the FISA Court.” I say, “Do you read poetry?” “Well, sometimes.” “How about Emily Dickinson?” “Well, I don’t—.” “Well, here’s an Emily Dickinson thought. Here’s my complete answer to your question. “The thought beneath so slight a film is more distinctly seen, as laces just reveal the surge, or mists the Appenine.” Then people walk away and shake their heads and say that’s interesting.

**MS. ALLEN:** And my reaction is I need to get a copy of the poem and ponder it [laughter].

**MR. ROBERTSON:** I think you can ponder it. It is beautiful. I think I gave Jamie the Potemkin village language for this. Do you know what a Potemkin village was? I’m not sure I have these historical facts quite accurate, but Potemkin was Catherine the Great’s prime minister, who in order to
convince the empress that he had the country under control, that everything was going well in the country, built this whole village on the banks of the Dnieper River. It was nothing but facades. And there were cheerful peasants walking their animals and carrying milk and doing their daily chores and waving gaily as the empress rode by on her boat out on the river. And part of the whole nuance of this FISA thing was, the FISA Court is a Potemkin Village, being held up to show everybody what a great system we have protecting everybody’s civil liberties, but it’s being ignored when the President wants to ignore it.

**MS. ALLEN:** I think the attention that it got revealed people’s heightened sensitivity to privacy interests. Well, thank you very much. I don’t think I have any further questions.

**MR. ROBERTSON:** I don’t think I have any further answers.

**MS. ALLEN:** Thank you sir.

Except poetry, oral history.
MS. ALLEN: Judge Robertson, I’m going to turn this over to you. I think you and I agreed that you would talk about the FISA Court and perhaps a few other related issues this morning. Thank you.

MR. ROBERTSON: Okay. That’s what I call a softball question [laughter].

MS. ALLEN: Very softball.

MR. ROBERTSON: It has been a long time since we were doing this together, and I alone am responsible for the delay, and I appreciate your returning to continue this process.

I don’t remember when the last time was that we talked, but I think it was either at or near the time that I resigned from the FISA Court. My resignation from the FISA Court was a subject that I declined to talk about at all when I was still on the bench. But now that I have retired, I feel perfectly justified – not justified, that’s not the right word. The right word is, I think it’s appropriate for me to tell the story of why I resigned from the FISA Court. To do that, I should back up just a little bit and explain what the FISA Court is and what my relationship to it has been.

The FISA Court is the Foreign Intelligence Surveillance Court established way back, I think in 1978, with the enactment of the Foreign Intelligence Surveillance Act – a specialized court established in the wake
of the work of the Church Committee and its revelations about secret spying on Americans by the FBI and the CIA. The FISA Court was established as a secret court to review and approve, if appropriate, surveillance warrants for electronic surveillance of people believed to be agents of a foreign power. Electronic surveillance has serious constitutional implications, and the thought was at the time that a secret court could be shown secret materials. These materials were classified almost entirely because of the sources and methods that were employed to do electronic surveillance. These were not the kind of warrant applications that could just be handed to any judge at any place in the country because of their sensitivity.

At the time of my appointment to the Court in 2002, eleven judges from circuits all over the country. One judge at a time had FISA Court duty for one week. That judge would fly to Washington if he or she was from outside the city. They’d spend a week here, hear warrant applications, issue warrants, and go home.

The business of the FISA Court was conducted in what’s called a SCIF, a special compartmentalized intelligence or information facility, within the Justice Department, a big lead-lined box. You would go in there and the door would close. It was like being in a safe. FBI agents and Justice Department lawyers would come in and present warrant applications to us, we’d read them, we’d almost always approve them, we’d sign them, and that would be the work of the FISA Court. After
9/11, the work of the FISA court became much, much more intense. There was, of course, a lot more surveillance going on. It was in May of the year after 9/11 – that is, May 2002 – that I was appointed to the Court. I was appointed for a stub term because before me there had only been nine judges, and the Patriot Act increased the number to eleven, and I was one of the other two. For reasons that had to do with phasing people in and out, I only got a four- or maybe a five-year term. I began sitting one week out of every eleven over at the Justice Department in that SCIF, reading and signing FISA warrants. The presiding judge at the time was Judge Colleen Kollar-Kotelly of this Court. She had been preceded by Judge Royce Lamberth of this court. By “this court,” I mean the United States District Court for the District of Columbia, on which I no longer sit. Judge Lamberth and Judge Kotelly were presiding judges because the statute said the presiding judge had to be here to deal with emergencies that had to be handled locally by hand service of documents and so on.

The FISA Court was an important, but not all that exciting, assignment. The truth is that these surveillance warrants and the applications for them were very detailed, very carefully done, fastidiously prepared by the FBI, the CIA or the NSA people who wanted the warrants issued, carefully reviewed by the Justice Department people. It was all perfectly ordinary and correct, and after a while, maybe a little boring, although we learned some things about suspected terrorism that were a little bit scary. There were no real hot button emergencies, at least on my
watch, until December of 2005, when *The New York Times*, in a front-page article written by Eric Lichtblau and another *Times* journalist, James Risen, disclosed for the first time – although some people say it had been known publicly before that – what has since come to be called the NSA metadata, mass data collection program.

Now this program had different formats over time, and I’m not being very precise about what exactly was being collected, but whatever it was, I’d never heard about it before. I became instantly and irrevocably irritated by this because it was clear to me that the Bush administration had been deliberately bypassing the FISA Court and going about this data collection without the permission from the FISA Court which I believe that they had to have as a matter of law. So I resigned. I resigned with a one-line letter to the Chief Justice of the United States stating no reason. The letter was made public, and frankly I forget exactly how it was made public. I suppose I knew that it was going to be made public, and in some way made sure that happened, but I wasn’t going to explain why or point fingers or make a big ruckus out of it. I was going to let people make up their own mind about what they thought about it. For some months after that, I was sought out by a lot of people who wanted me to explain myself. My resignation, to use a term that became part of the lingua franca of our nation afterwards but was not known at the time, my resignation went viral. I think I was on the front page of every newspaper in the United States, or at least my name was. I may have said this earlier, when I gave
earlier versions, earlier segments of this oral history, Andy Warhol said that every American should have 15 minutes of fame, and my 15 minutes came after my resignation from the FISA Court.

I remember that one snowy morning in December, one cold morning a week or so after my resignation, I opened the door – I lived in Georgetown – I opened the door kind of in my skivvies to pick up my newspaper from the step, and there was a CBS cameraman out there with his camera pointed at me. I said, “Please go away.” I said, “I’ll tell you what, I’ll make a deal with you, it’s a cold morning, go get a cup of coffee, let me get dressed and I’ll come out the front door dressed properly and I promise you I won’t sneak out the back door.” I hoped that if he did go away to get a cup of coffee, he’d decide that the coffee and the warmth was better than standing in the cold, or that he would get another call to go film someone else, but no, he was waiting when I went out the front door and insisted on filming me walking from the front door of my house to get in my car.

My former partner, David Westin, who was then the president of ABC News, contacted me and wanted me to be on ABC News. I had a request from 60 Minutes that I appear on the show. Newspaper reporters called me, and called me, and called me, and I just simply didn’t answer any questions at all. But now that I am retired, and now that ten years have passed since this event, and now that the Congress has finally acted to limit the mass data collection of the NSA – that happened just a few
days ago – I feel perfectly comfortable in saying plainly that I quit for one simple reason and that was because of the unlawful activity of the Bush administration in avoiding, end running, ignoring, outflanking, whatever word you want, whatever verb you want, the FISA Court.

I was also quite upset to learn later that the administration had given some form of notice, I don’t know exactly what, to Judge Lamberth and to Judge Kollar-Kotelly, the two presiding judges. Lamberth had been presiding judge, his term ended when my term began, and Kollar-Kotelly after that. They both knew about what was going on, or knew something about what was going on, but both had been instructed – my word is co-opted – by the administration not to tell anybody else. So here we were, we thought we were brethren in the FISA Court, but we were not being told what was going on, and the cases were not being brought to us. I objected to that then, and I still object to it. I have no judgments to pass on Judge Lamberth or Judge Kollar-Kotelly. They were and are fabulous judges. It’s not them that I blame, it’s the administration for co-opting them and giving them orders which they felt they could not disobey or ignore.

So that’s my FISA Court story, and if you have any questions about it, I’ll answer them, but that’s it in a nutshell.

MS. ALLEN: Do you think that your resignation had any impact on the FISA Court procedures?
MR. ROBERTSON: Not immediately. To be honest about this, as I hope I’m being honest about everything I’m saying, I had some hope in the back of my mind that other judges on the FISA Court would understand what I had done and why I had done it and join me. I thought that if that happened, it would have a real impact. As it turned out, none did. I did not think it was appropriate for me to proselytize or reach out or to argue to other judges that they should do what I’d done, and I didn’t. And because only one judge resigned and not the others, I think the fame did last about 15 minutes. There was a big splash, but nothing much happened to it after that.

But over time, I think the resignation did have some effect. I was taken to lunch in the Senate dining room by Senator Arlen Specter some months after my resignation. Specter wanted me to testify on Capitol Hill about my resignation, and he was very complimentary. He called me a hero actually. But I wasn’t about to testify about this, didn’t want to, declined respectfully, had some good navy bean soup in the Senate dining room, and went about my business and he went about his. I was called upon over time and asked about my FISA Court experience because actually I was the only judge who had retired or who was able to talk about his FISA Court experience, and I appeared on many symposia and panels and discussions, and I always said the same thing. I always said that I was a fan of the FISA process, that I had volunteered for the FISA Court because I wanted to find out what it was up to, that I was pleased to
witness the care and precision and fastidiousness of all the players in the FISA court, that the judges, the lawyers, the staff, the FBI agents involved with the process were all almost perfectionists in getting it right.

When it came time for – when a few years ago, probably after the Snowden disclosures – when the subject became politically active and the amendment of the FISA Act became a serious subject, I was, I think one of the first people to recommend that the FISA process be amended by the addition of an adversary when the court was dealing with programs or with new legal issues. And that’s another whole story, but that recommendation finally became law the other day, and I think the fact that I was listened to when I made the recommendation was because of my resignation. I was perceived as a critic of the FISA court.

That’s a very complicated answer to your question, but it’s the best one I can think of at the moment.

MS. ALLEN: It’s a very interesting discussion and revisiting of the situation. Thank you for sharing it.

MR. ROBERTSON: I want to augment the FISA adversary story a little bit. I mentioned that I spoke at seminars and symposiums and so forth, but I think that the first time I clearly and publicly asserted what I thought was the need for an adversary process within the FISA court, was at the first public hearing of the PCLOB. I think it stands for Public Civil Liberties Oversight Board. No excuse me, Privacy and Civil Liberties Oversight Board, a new board that was established at the order of the President and wasn’t staffed for
years and years and years until very recently. And then it was staffed finally. Judge Pat Wald is a member of it. The chair is a fellow named Medine. It has bipartisan membership and they conducted their first public hearing, I don’t remember exactly when, but I was invited to speak, and that is when I first articulated the need for an adversary in the FISA process. I was quite clear then, and I think I have been since then, that you don’t need an adversary every time a warrant application is filed before the FISA Court. Because in the exercise of its quotidian warrant-issuing function, the FISA Court acts like a magistrate judge. Everything is ex parte, and there is no reason, no occasion, to have a defense lawyer there arguing that the warrant should not be issued. But when the FISA court is asked, as it was after the enactment of the Patriot Act, to approve not only individual warrants but also surveillance programs that would be carried on without a warrant, then the FISA Court was acting I thought like a court reviewing the work of an administrative agency. And when courts review the work of administrative agencies, they do it in an adversary context with somebody arguing the other side. I said to the PCLOB that a judge who hears one side of an argument may think that’s a pretty good argument until he hears the other side of the argument. Our system depends entirely on somebody pushing back and arguing the other side of any proposition. And I said that without that, courts are going to make mistakes. That proposition has now morphed through the process of negotiation and compromise. Believe it or not, Congress did compromise
on this – into a provision in the new USA Freedom Act which calls for the appointment of a panel of five lawyers who can be cleared for this duty who will be amici, or friends, of the court, called upon by the court to offer their views or to present adversary views when the court thinks it needs them. There are a lot of people who think that’s not enough. I think it is enough. I think the FISA Court will reach out and ask for help whenever it needs it in the future because now it has the mechanism for doing it.

MS. ALLEN: Thank you very much. Next I would like to turn to Guantanamo and litigation related to people who were interned there – a very open-ended question.

MR. ROBERTSON: One of my other 15 minutes of fame – and there weren’t many – came as a result of a decision in a case called Hamdan. Hamdan was captured in Afghanistan or Pakistan – I don’t know exactly – brought to Guantanamo Bay after 9/11, detained there, charged with war crimes, and was about to become the first Guantanamo Bay detainee actually tried under the military commission rules that had been established at Guantanamo Bay. And by the luck of the draw, that case had been assigned to me and I was presented with an application for a writ of habeas corpus.

I should back up a little bit and explain the way the Guantanamo cases were handled. All of the Guantanamo Bay detainee cases came to the District of Columbia – to our court in the District of Columbia – and that was by operation of a decision rendered by – I’ve actually forgotten
why that happened. Either our Court of Appeals or the Ninth Circuit or somebody decided that these cases all had to come to the District of Columbia, and so they did. And our court all of a sudden found itself with, I think, a couple of hundred habeas corpus cases brought by detainees at Guantanamo Bay. It was going to overwhelm our court. The Chief Judge at the time was Tom Hogan, and Hogan invited Judge Joyce Green, who was in a state called inactive retirement – she’d left the court but subject to recall – to come back and coordinate the handling of these Guantanamo Bay cases so that they would all be – at least the administration handling of them – would all be in one judge's hands and we wouldn’t be tripping all over each other and issuing different kinds of orders. But Judge Green knew that the Hamdan case was considerably more advanced than the others and knew that I was actually on the brink of dealing with the merits of the Hamdan case, and I thought graciously and generously asked me if I would like to keep the Hamdan case, even though all the other cases were going to be taken under her wing and dealt with administratively. I thanked her and I said yes, that I thought the Hamdan case was ready for some action and I wanted to do it. And I wanted to keep the case and so I did.

The application for a writ of habeas corpus had been filed in the Federal District Court in the State of Washington by a Navy Lieutenant Commander by the name of Swift who was a zealous advocate for his client, although he worked for the government. The case was transferred,
because all cases were coming to the District of Columbia, to our court. I got the case, conducted hearings, listened to arguments, read briefs. The arguments before me were handled by Commander Swift and by Neal Katyal, who was then a young law professor at Georgetown who has gone on to be Solicitor General. He is a spectacularly good lawyer. I issued an order enjoining the proceedings at Guantanamo Bay. It wasn’t exactly a habeas corpus order. It was an order forbidding the trial to continue because the rules of the Military Commission had not been approved by Congress and because I believed that Hamdan should have been accorded prisoner of war status under the Geneva Convention. Shutting down the trial at Guantanamo Bay was another one of those front page events, but this one didn’t last very long because the Court of Appeals reversed me quickly and without much hesitation in an opinion written by Judge Randolph. It is a mystery to those of us on the District Court, by the way, how it was that Judge Randolph wound up with so many of the Guantanamo Bay habeas decisions. I am sure they assigned their cases randomly and on the wheel just the way we do in the District Court, but we were all stunned at the odds that Judge Randolph would get yet another one of these cases. I was reversed by the Court of Appeals and then the Supreme Court reversed the Court of Appeals. It doesn’t get any better than that for a trial judge. It happened to me twice when I was on the bench. The Hamdan case was one. The other one was the Webster Hubbell case. I forget whether I mentioned the Hubbell case at the earlier
chapters of this history, years and years ago, but the Hubbell case. Do you remember Ann whether I talked about Hubbell?

MS. ALLEN: You did. But I can’t remember whether you talked about the Supreme Court reversing the Court of Appeals.

MR. ROBERTSON: Well I’ll just touch on it lightly again because I don’t want to leave this out.

MS. ALLEN: Okay.

MR. ROBERTSON: This is a complete diversion from Guantanamo Bay, but I’m going to do it anyway. Webster Hubbell was either the Deputy or Associate Attorney General under President Clinton. He had been a law partner of Hillary Clinton’s in the Rose law firm in Little Rock, Arkansas. He was implicated, along with other members of the Rose law firm, in issues relating to the Whitewater case – fee padding. I’ve forgotten all of the issues, but Hubbell was in the process of being charged by Ken Starr’s special prosecutor machine. The issue had to do with a subpoena that had been issued to him for documents that he had turned over under a grant of immunity. He was indicted on the basis of information that was in those documents. I heard a motion to dismiss the Hubbell case. I remember being surprised by the revelation that he had been granted immunity and that they were trying to charge him with what they learned from the documents that he had turned over under a grant of immunity.

MS. ALLEN: Right.
MR. ROBERTSON: Something popped out of my mouth from the bench. I think I said, “That’s scary,” and that was widely quoted by critics of mine. But the truth is that it really kind of took me by surprise when I realized what the government was doing. And there’s a lesson there for lawyers and judges. Sometimes important things happen in courts without anybody planning it or realizing how important they are. Because to me the whole thing was scary, but I reacted, I think shortly thereafter, by dismissing the indictment, which gave me — I’ve still got it in the closet someplace — this headline in the *New York Post* the next day: “Hubbell Outta Trouble.” Which I thought was right up there with the headline written by the guy who died yesterday. Did you see the *Times* this morning?

MS. ALLEN: No.

MR. ROBERTSON: A front page obituary of a guy who wrote the best headline ever written: “Headless Body in Topless Bar.” At any rate, “Hubbell Out of Trouble” was my nominee for the best headline ever written. I was reversed on that one too by the Court of Appeals, unceremoniously. And the Court of Appeals was reversed by the Supreme Court. So that’s twice, once with *Hubbell* and once with *Hamdan*.

MS. ALLEN: That’s an excellent record.

MR. ROBERTSON: So back to *Hamdan*. My beef with the *Hamdan* case was that Congress had not approved these Commission rules. I rejected the notion that the rules could be adopted by the President because the Geneva Convention required a tribunal to approve them, and I said the President is not a
tribunal. As I said, the Court of Appeals reversed that, and the Supreme Court reversed them. Congress then did act to amend and approve the rules for the Military Commission at Guantanamo Bay. The next step of the *Hamdan* case was that Hamdan came back and asked to enjoin the trial again, but I was satisfied that the rules that Congress had adopted were satisfactory and I declined. Shortly after that, Hamdan either pleaded guilty or was found guilty and was sentenced to time served and was sent home to Yemen. End of the *Hamdan* case.

**MS. ALLEN:** And the second time when you were asked for an injunction was the last?

**MR. ROBERTSON:** Last I had to do with it. Later on, much later on, I was presented with a habeas application of a detainee by the name of Salahi. Salahi was a very interesting case. He was, if memory serves, a Mauritanian who had gone to Afghanistan, as many had, to do jihad. He went to Afghanistan before 9/11, at a time when jihad was being carried out against the Russians, not the Americans. He did pledge, I've forgotten the Arabic word, but he pledged whatever the Arabic word is for fealty to Al Qaeda. All of this was before Al Qaeda was arrayed against the United States. After that, he fought there in Afghanistan for a while. All of this is of record, and people who are seriously interested can look up the *Salahi* case. But he went to Frankfurt, and the record shows, to the extent that they had a record in these cases --

By the way, the whole question of evidence in these Guantanamo cases is a very vexed subject because there aren’t any real witnesses.
There are scraps of intelligence paper, there are cables, all kinds of hearsay is received and given whatever weight it deserves in these habeas cases. I believe the record fairly establishes that he lived in Frankfurt, and that while in Frankfurt, he offered a place to sleep or stay for a night or two to one or two of the people who ultimately flew airplanes into the World Trade Center or in Shanksville, Pennsylvania, or into the Pentagon on 9/11. The record tracks him to Canada where he lived, maybe in Montreal, maybe in Ottawa, someplace in Canada, and lived for a time with people who are under the watchful eye of Canadian and American intelligence. At least one of those people was apprehended at the Canadian border near Seattle, headed towards Los Angeles to bomb LAX.

MS. ALLEN: I remember that news story.

MR. ROBERTSON: On top of that, his uncle or his wife’s uncle was close to Osama bin-Laden, and there was some issue about when he was back in North Africa trying to locate and perhaps acquire telecommunications equipment for his uncle or for someone in Al Qaeda. So there were all kinds of dots that could be connected if you used what the Court of Appeals called the mosaic theory or the mosaic approach. You have to wonder what the chances are that someone who is not an active member of Al Qaeda would be a host of people who would later fly airplanes into the World Trade Center, was connected with bad people in Canada, and was related to somebody close to Osama bin-Laden, who was involved with communications equipment.
But under the decisions of the Court of Appeals that had been rendered previously, I could not find that Salahi met the test for detention under the applicable Supreme Court rules. I didn’t find that he engaged in any hostilities that had to do with 9/11 directly or that he was a member of Al Qaeda thereafter. And, on top of all that – and really the most important part of the Salahi case – Salahi had been brutally, brutally, handled after his apprehension. He had been subjected to – I don’t know if he was subjected to waterboarding, but he was subjected to many, many “harsh interrogation techniques,” including, I don’t remember them all, but they were horrifying. They were sleep deprivation, physical harm. At one point I think he was taken in a boat out to sea and spun around and he didn’t know where he was and wasn’t told where he was. If I’m not mistaken he was told that his mother was going to be either raped or killed. What Salahi was subjected to was so terrible that the government had decided that there was no way that it could prosecute him, because none of the evidence they had gotten directly from him could be used. Salahi had been treated so badly that he was almost by definition unpersuadable. On top of that, he had become a very responsive and cooperative witness. He was a peaceful and cooperative prisoner. He was given special privileges. I think he was allowed to grow a little garden. He spoke and wrote fluent English, was clearly a civilized, and I thought, decent human being. I didn’t think the rules permitted him to be detained
any longer, and I issued a habeas corpus order for his release which was —
guess what — reversed. The Court of Appeals has never --

MS. ALLEN: By Judge Randolph.

MR. ROBERTSON: Well, I don’t remember. I think this actually may have been my good
friend Tatel. It was issued after I left the bench, or maybe it was just as I
was retiring. The reversal was, I thought, quite respectful, as you would
expect from Judge Tatel. What it said was, that since I had ruled the court
had issued other opinions squarely adopting this mosaic theory and
requiring a different result. Salahi is still at Guantanamo Bay, and it is
likely that, unless they close Guantanamo Bay or unless there is some
breakthrough, he will be there for the rest of his life. He has written a
book which was published a few months ago, or a book was published a
few months ago, I’m not sure you can say he wrote it, but the book
consists largely of his own diary of what happened to him at Guantanamo
Bay. It’s been heavily redacted – there are pages of it – I mean it's
photocopies of his own diary.

MS. ALLEN: So much of it has black lines?

MR. ROBERTSON: Much of it has black lines, but it is nevertheless a stunning record of his
own detention at Guantanamo Bay. And somebody told me they are going
to make a movie of this book which dwells at some length on his
appearance before me and my ruling. And somebody suggested that the
role of Judge Robertson should be played by George Clooney. I said
that’s great, that’s perfect, but Clooney isn’t old enough or dumb enough.
The Court of Appeals – I believe this is correct to say – has never sustained a Guantanamo writ of habeas corpus. Some of these that were issued were not appealed. So a few people have been released from Guantanamo Bay on writs of habeas corpus, because the government had no grounds for appeal. But in every single case of an appeal from a decision in our court, the Court of Appeals has reversed, and frankly nobody could understand it.

MS. ALLEN: I didn’t realize that.

MR. ROBERTSON: But it is – let’s just leave it that it’s hard to understand.

MS. ALLEN: Now I’d like to turn to a very different subject, which is your retirement from the court and maybe starting off with the decision to retire, which I know was a difficult one to make.

MR. ROBERTSON: Let me again back up a little bit and talk about how this retirement thing works. The Federal Judiciary, Article III judges – that is to say district judges and circuit judges, are appointed for life or for their good behavior. There is a joke about the Tennessee politician who was appointed to the district court. His friends came to see him in his chambers and saw the certificate on his wall and got up close to it and read it and it says, “It says here Bob that you’ve been appointed for your good behavior. What’s that mean?” Bob said, “Well it means I don’t steal money from widows or do bad things to little boys.” And the politician said, “I don’t know, Bob, if it were me I’d rather have ten years certain.” So, unless we are impeached, an appointment is for life. When a judge has accumulated a number that is
the equal to his or her age, plus his or her years of service that equals 80, then – if he or she is at least 65 – that judge can retire, resign, or take senior status. And whichever he does, or she does, he continues to get paid. It is quite a spectacularly great deal. Many, many judges, indeed I would say most judges, when they fulfill the so-called Rule of 80, or soon thereafter, will take senior status. Senior status means that you’re still on the bench, you’re still wearing a robe, you’ve still got chambers, you’ve still got a courtroom, you’ve still got a caseload, but not as heavy a caseload you still have law clerks, and you still have your full salary, as long as you want to do it. I did that almost the moment it became possible for me to do that for the reason that many judges do it. It’s just money. When you take senior status, you stop paying into the FICA program a percentage of your salary, I don’t know, $7,000 or $8,000 a year that you don’t have to pay into the Social Security program. And at the rate judges were being paid when I retired, $7,000 or $8,000 was not a lot of money, but it was worth taking senior status for because there was no downside.

MS. ALLEN: Right.

MR. ROBERTSON: Judges on the court of appeals often postpone senior status longer than other judges because on the court of appeals, if you are a senior judge, you won’t sit with the court en banc – when all of them sit together. And those are the big important cases and nobody wants to be excluded from them. But in the district court – it varies district by district – but in our district, there’s absolutely no downside of becoming senior judge and you
can take yourself off the wheel of particular kinds of cases you don’t want to handle any more. You can shape your own caseload, you can reduce your caseload, and it’s a great deal. Retirement is a different thing entirely. Retirement means you are no longer a judge. You are a retired judge. You don’t have chambers.

I’ll digress here for a moment. I was asked to do the wedding of two of my law clerks who were marrying each other shortly after I retired. I said, “I’m sorry, retired judges don’t have any power to do it anymore.” I said, “You can get married by the clerk and I can do a reenactment, but I have no power.” “Isn’t there something you can do?” they asked. “Yes, I can become an ordained minister in the Universal Life church.”

MS. ALLEN: You can probably do it online, too.

MR. ROBERTSON: You can do it online in five minutes, and it costs nothing. It’s bizarre. Now I actually am Reverend Robertson in the Universal Life church. And I did this wedding in that capacity. I felt like a fraud, but I did it, and it was lawful. But if you retire, you’re gone, you leave the court.

I had taken senior status as soon as I was eligible to do that, and I think that was in 2008. I decided to retire and go into private mediation and arbitration, which I have done. I did that in June of 2010. The decision to do it was not easy. I know that a number of people whom I know and love and respect and who supported me as judge were disappointed that I did that. I know that there are some judges – and frankly I may have been one of them myself at one point – who sort of lift
an eyebrow at the notion of a life-tenure appointed judge leaving the bench and perhaps attracting business and clientele from the private sector because of his or her previous judicial standing. That’s worth thinking about, and I did think about it, a lot.

At the time I retired, the judges of the U.S. District Court had not had a pay raise in something like 12 years. There was a promise made to the judiciary about that long ago that judges would get cost of living increases the same as those other federal employees. That promise was ritually broken year after year by Congress. There were some, and I was one of them, who thought, well, there are still people lining up to be appointed to be judges, so what’s the big deal? I mean if people still want to be judges knowing they will be underpaid, that’s fine. But the truth is that if you are a federal judge living in one of the high cost of living parts of the country, and I’m talking Boston, New York, Philadelphia, Washington, maybe Miami, certainly San Francisco, Los Angeles on the coasts, it’s pretty hard to keep it all together on what a federal judge was then paid. And yes, you could criticize my standard of living. I suppose that’s reasonable. But for many of us, being a federal judge is or was a negative cash flow proposition. On top of that, I had family reasons why I needed not to invade capital too much. There are reasons that are private to me and have nothing to do with this history why I really didn’t want to die broke. So I began to rationalize, and my joke about my retirement was
that I had reduced the whole rationale to two words – and the words were estate planning. So I did retire.

I had been approached by this organization called JAMS (it used to be known as the Judicial Arbitration and Mediation Service) which thought I might be a good mediator and arbitrator, and I had been talking to the people at JAMS about it for a year or two. And I got a call one day from Abner Mikva. Now Ab Mikva had also retired. He never came back to the bench after his White House stint, and he was out in Chicago. He was with JAMS, and he was appointed by one of the parties as an arbitrator in a huge arbitration that involved the tobacco industry and their liabilities under the settlement of the tobacco litigation. He and another judge were looking for a third judge to chair that arbitration, and he told me I would be terrific as chair of that arbitration. I thought, whoa, that would be a pretty good way to start my new life as an arbitrator. He said, “Well, the problem is, Jim, that you’re still sitting on the bench. If we put your name forward as a possible chair of this arbitration and the parties turn it down, everyone will be embarrassed. It’s a little difficult for people to turn down somebody who’s a sitting judge. Are you going to retire?” I said, “Yes, I’ve been thinking about retiring for some time.” He said, “Well, now might be the time to do it.” So I said okay, that’s fine. So I put my papers in and retired some time in June of 2010. Shortly thereafter, I was told that somebody else had been selected as chair of the tobacco arbitration, so I did not start my JAMS career with a big bang at
the tobacco arbitration. The only tangible result of that whole exercise was that, when the Circuit Judicial Conference took place later that month, I was retired and no longer subsidized by the government, so I had to pay my own way! But I took a couple of months off and then I came over to JAMS and signed up, and I must say that I have never looked back. I mean, I miss the court, I miss the people on the court, I miss the sense of being part of the Courthouse family, and it is a family at the Courthouse. When I came to the court in 1995, the beginning of 1995, I promised myself that I was not going to get hooked by the honorifics of being a judge – the bowing and scraping, the Your Honor this and Your Honor that. I did get used to the parking space, but I didn’t, I really never got, if I say so myself, I never became afflicted with what sometimes has been called robe-itis. People still call me judge, and I still answer to it, but I’m not a judge anymore, and I know that, and I’m comfortable with it. I do miss the occasional, the very occasional, case of real public importance, like *Hamdan*, like *Hubble*, like *Salahi*, like two or three other cases that I handled when I was on the court. But there are not that many of those.

I have been telling anyone who will listen that since I came to JAMS and started mediating and arbitrating complex commercial cases, the work that I am doing in the private sector is the equivalent in terms of interest value, complexity, certainly dollar value, and quality of lawyers, of the top 30 or 40 percent of what I was doing on the bench.
The cases I’ve worked on have virtually no public importance, because they are all private. I mean you don’t get public policy cases in the private sector and that part I do miss, I will tell you. But I’m not going to die poor, and I’ve had a good time with the cases I’ve done here. I’ve been quite busy and I have no reason to regret what I have done, except leaving behind some of my good friends in the Courthouse. I mean, when I retired, I left behind two of my closest friends in the Courthouse, Louis Oberdorfer and David Tatel. The three of us had been very close friends for years and years and we were all tied together with the Lawyers’ Committee for Civil Rights back in the 1960s and 1970s. We and our wives and several other couples had been together in a book club for 25 or 30 years.

MS. ALLEN: It still continues I hope.

MR. ROBERTSON: Well, actually I will get to that in a minute. The death of Louis Oberdorfer a couple of years ago pretty well scotched that, and John Nolan has become quite unwell and is unable to participate. So we’ve kind of lost our leaders and our spirit in the book club. But leaving behind Tatel and Oberdorfer and my secretary of many, many years Marlene Taylor, was hard. Actually I waited to retire until Marlene could retire. And she retired shortly after I did, although she came back for a while and worked for another judge, a brand new judge. Now Marlene is retired. You know I have very good friends on that court, Paul Friedman, Ellen Huvelle and many others, Rosemary Collyer, Reggie Walton, John Bates,
John Facciola. Great people on that court, and I miss them all. I miss the regular lunches that I enjoyed with them when I was in the court. But I’ve turned the page.

MS. ALLEN: It sounds as though you are the exception if you retire. Very few judges do retire. They move into senior status and continue.

MR. ROBERTSON: That is true, although at the time I retired, there was beginning to be something of a wave of retirements. Jay Plager, who I think may now be a senior, but was a judge from the Court of Appeals for the Federal Circuit, took it on himself to do a study of why judges were retiring. And there was a period of time back in 2008, 2009, 2010, 2011, 2012, right around there, when lots of judges couldn’t deal any longer with the failure to get a pay raise. And there were judges retiring all over the country. It wasn’t exactly in droves. It definitely is still the exception, definitely the exception. But then about two years ago a case called Beer was filed. The name of the case was Beer, but it really was filed by Larry Silberman. Silberman had kept his eye on Congress’s failure to raise pay for a long time and finally concluded that the time was right to renew a litigation approach to the problem and to seek judicial relief from Congress’s repeated breaches of its promise to give us cost of living increases. It was intolerable. I was actually one of the named plaintiffs in the Beer case. This is interesting. Silberman wanted to put together a group of plaintiffs in the case who were Republicans and Democrats, new judges, old judges, northern judges, southern judges, a representative group of judges, and
asked me if I would join him in the lawsuit. I said sure. Silberman and Hogan and I were all plaintiffs in the original Beer case. I’ve forgotten where Judge Beer was from, but Judge Beer was the first name alphabetically, and so it became the Beer case. When I retired and told Ab Mikva that I was going to clear the decks so that I could be the chair of this big tobacco arbitration, one of the things I also had to do was to withdraw from the Beer case, because the lawyers representing us were also the lawyers representing one of the parties in the tobacco case. So for that reason, I withdrew from the Beer case and am no longer a plaintiff. It didn’t matter, because when the case was decided, all judges who had been made the promise of the COLA and didn’t get it were ultimately given relief. So some time, either last year or the year before, I got a big back pay check from the government, and my retirement pay was raised from something like $165,000 a year to something like $195,000 a year. If that pay raise had come five years earlier, I might never have retired. I might never have retired.

MS. ALLEN: Well, you’re retired, but here you are at JAMS, working hard.

MR. ROBERTSON: I was telling you this morning when I got here I was in Oklahoma City yesterday and took a plane home from Oklahoma City and got home at midnight last night, so I’m a little ragged out this morning.

MS. ALLEN: And that was for an arbitration or for a mediation?

MR. ROBERTSON: It was for a mediation that has been going on for some time.
MS. ALLEN: Just pursuing your interest in arbitration and mediation, I think somewhere early on you talked about mediation quite a bit and how you didn’t necessarily push parties to go for mediation. Sometimes you would, sometimes you wouldn’t.

MR. ROBERTSON: It won’t surprise you to hear me say that where you stand depends on where you sit. Yes, I had a different view of mediation when I was on the bench. But my view of the whole ADR (alternate dispute resolution) process in general when I was a judge was one of something like alarm.

MS. ALLEN: Oh really?

MR. ROBERTSON: I used to, and it was kind of joke-ish alarm, but I used to tell people you know these ADR people are eating into our market share. They are taking all of our interesting cases away from us. Well now, I am on the other side of that fence, and I’m saying bring it on. But to be quite serious about it, I have now been involved in all three phases of this judicial process – of this dispute resolution process. For 30 years I was a trial lawyer, I was an advocate, I was hard-wired into the American adversary system, doing my best to beat other people or to persuade other people that I would beat them so that I could achieve an adequate settlement in litigation. Because that’s what I was – I was a litigator. And then for 16 years I was on the other side of that fence. It’s a lot easier to be a judge than a litigator. A lot easier because a litigator is always trying to make his case better than he knows it is.

MS. ALLEN: Right.
MR. ROBERTSON: And make the best he can out of whatever he is given. But the judge hears from both sides and just has to find the right answer. And the right answer is usually not all that hard to find. Now, there are cases that are very close, there are cases in which the right answer is elusive. There are cases that make you scratch your head, and there are cases in which the court of appeals reverses you. But by and large in most litigation cases there isn’t an awful lot of doubt about the outcome – at least in the mind of this judge.

Now the ADR process is where I sit, and where I now stand is that I think ADR is good for every case. I really think there are very few cases that should not be settled. Or that cannot be settled or resolved by arbitration. And the trick is – and it is quite a trick frankly – to achieve the efficiencies in terms of time and money that arbitration has promised for so long, but hasn’t really delivered. Arbitration is supposed to be cheap, fast, private and to some extent within the control of the parties because you can either select your own arbitrator or at least say who you don’t want to have as an arbitrator. The privacy and selection of arbitrator parts are pretty well established. Cheap and fast are more elusive. And it’s no secret or should be no secret to anyone that most of the reason why cheap and fast are so elusive is because lawyers – Well, I don’t think there is a dark reason that lawyers do it. Lawyers are just – it’s the risk aversion of lawyers. They want more discovery. Lawyers are not risk takers. Businessmen would like to get it over with. Let’s decide, let’s do it. Lawyers say well, you can do it, but there are these issues that have to be
resolved and after those issues have been resolved what if this, what if that, and how do I know that these documents don’t show something. And so they want more discovery, more depositions, more motions. And the result is more complications, more time and more money.

I’ve been telling a small joke to lawyers, but I actually believe it. I tell them, you know what makes great lawyers? Great lawyers are the ones who do well in law school, and because they do well in law school, they get invited to big firms or the government and they go on to have good careers. The so-called best lawyers are usually the ones who do best in law school. And why did they do best in law school? Because law school examinations usually consist of a hypothetical question that is written by the professor. What he’s looking for is the law student who finds the most issues in the question, who spots the most complications, who figures out all of the hidden traps and issues that can be teased out of this hypothetical. That’s the guy who gets an “A” in law school. I think therefore the best lawyers by definition are complicators. They are trained and rewarded for finding more problems than anybody else finds.

MS. ALLEN: That’s a bit of a discouraging way of looking at lawyers. I can’t disagree with you.

MR. ROBERTSON: Well, I don’t know if I’m discouraged by it or amazed by it, but it is the way the process works. Obviously I’ve overstated my point. The lawyer who can cut through everything and get to the chase and finds the one issue and resolves the case and gets it done will be the most successful
one. But the opinions we write are too long, the briefs we read are much
too long. The contracts we write are too complicated. The more
complicated the contract gets, the more likely it’s going to be breached or
there’s going to be litigation about it.

MS. ALLEN: Right.

MR. ROBERTSON: We’re complicators.

MS. ALLEN: But not always.

MR. ROBERTSON: Not always. We’re also problem-solvers. Which leads me to this other
general kind of proposition that I want to leave on this record. Since I left
the bench and made the decision to retire and to some extent rationalized
the decision to retire by the financial needs and the so-called estate
planning issue that I talked about earlier, I have come to the realization
that one of the reasons I like what I’m doing so much now is that I am not
held back and dragged down and slowed down by all of the hoops and
hurdles that a judge has to go through with a case in court. A district
judge dealing with a new case has to go through many steps before ever
getting to the merits of the case. We have to worry about jurisdiction and
venue and the statute of limitations and justiciability and ripeness and
standing and whether the complaint states a claim under Rule 12 and
whether summary judgment has to be granted. And then we have to deal
often with discovery disputes, and motions in limine – and all these things
happen before you get to a trial. I’m not sure the statistic is true or not,
but I heard it someplace and I prefer to believe it, that in the 15 or 16 years
that I was on the bench, the number of civil cases filed in this country nationwide that went all the way to verdict and judgment decreased by 50 percent. From 2 percent to 1 percent. It may not be true – most people instinctively use numbers like 10 to 5 percent. But the truth is that very, very few civil cases ever get to trial, and part of it has to do with the hoops and hurdles that have to be gone through and hopped over before you get there. There are so many barriers. At one point in my career we called them barriers to access to justice. But the truth is, I realize that I spent an enormous amount of my time as a judge throwing cases out instead of deciding them. It is refreshing, absolutely delightfully refreshing, to parachute into the merits of a case and be told we’ve got this problem, we want to resolve it. And in a day, sometimes a day, sometimes several meetings, sometimes more than several meetings, but in a very short period of time, the mediation process very often succeeds in resolving that case without worrying about jurisdiction, venue, statute of limitations, standing, ripeness, justiciability, etc. Just do it. You solve the problem.

MS. ALLEN: That’s a real radical change for you.

MR. ROBERTSON: It is a radical change for me. And it is, it is, one of the reasons why I have never looked back and why I enjoy what I’m doing.

MS. ALLEN: Well, arbitration though you’re still making decisions.

MR. ROBERTSON: Arbitration – that’s a little dicier because arbitration is much more like court cases. In fact it’s almost indistinguishable from court cases, except that the parties make their own rules and tell you what they want. So that,
for example, if I’m chairing an arbitration or a sole arbitrator on a case and I think the parties ought to get this thing to trial in three months and forget about all this discovery, the lawyers may say well, we want to do discovery. The arbitrator is in sort of a tight spot there. The arbitrator’s instinct is to say no, you can’t do the discovery, but he is being paid by the participants, and he who pays the piper calls the tune to some extent.

MS. ALLEN: What if both sides want discovery?

MR. ROBERTSON: If both sides want discovery, and, you know, the arbitrator – there is a good deal of angst among some arbitrators about how directive they should be. I’m way over on the “I used to be a judge, this is how we’re going to do it” side of things. And by and large lawyers respect that and respond to it and really expect me to do that.

MS. ALLEN: Okay.

MR. ROBERTSON: They expect me to crack the whip and keep things moving. But the rap on arbitration is that there’s no incentive for anybody to move quickly. Arbitrators can string it out, lawyers can string it out, and things take a long time. I’m doing a big international arbitration now.

MS. ALLEN: Oh really. In this country?

MR. ROBERTSON: Well, it is in this country, but it involves a party from another country. And the chair of the arbitration is from Europe. And I’m getting a glimpse of international arbitration which strikes me frankly as unbelievably cumbersome by American standards.

MS. ALLEN: Because of the procedural rules?
MR. ROBERTSON: Because of the formality and the deliberateness of the process. The international arbitration business is quite different from American arbitration, at least the ones I have been involved in which tend to be much more, let’s do it, let’s get it over with, let’s move the ball. But it depends on the arbitrator, it depends on the parties, it depends on, it’s like anything else, it depends on who the judge is. I mean I used to think that I was quicker than most judges in cases decided. I think I was. I wasn’t the quickest, but I was quicker than some. Some people work that way and some people don’t. That’s human nature.

MS. ALLEN: So do you find it difficult to switch from being an arbitrator in some cases and a mediator in others?

MR. ROBERTSON: No. It’s like playing baseball one day and football the next day. It’s a completely different thing.

MS. ALLEN: Right. That’s why I thought it might be hard, particularly having been a judge for so many years to switch to the mediator role.

MR. ROBERTSON: Mediation – you’re a mediator Ann, you know about mediation. I’m sure you know a lot more about mediation than I do.

MS. ALLEN: I doubt it. But I keep learning all the time.

MR. ROBERTSON: I am. I have become a big fan of mediation.

MS. ALLEN: Good.

MR. ROBERTSON: I mean when I first came here to JAMS I said well, I know that mediation is about 70 percent of the ADR phenomenon. And so I thought to myself I’ll have to do some mediation before I become a world famous arbitrator,
and the truth is, I never became a world famous arbitrator and I’ve done a lot of mediation. But I’m almost completely self-taught. I’m kind of an autodidact when it comes to mediation. I went to a certification course that the DC Bar offered years and years ago, and I’ve read a lot about it, but I’ve never really been a student of mediation. And there are lots of theories of mediation.

MS. ALLEN: There are. They can be confusing theories.

MR. ROBERTSON: There are theories. And I mean Linda Singer will hit me on the head, and she’ll probably read this someday, because she and Michael [Lewis] are teachers and theoreticians and internationally famous for what they have done with mediation and God bless them. But I have to tell you that there’s a sort of magical quality about mediation that I don’t fully understand. The mere fact of having somebody in the space between two parties who communicates back and forth between them is what brings it about. And I know I’m oversimplifying this, and shame on me for doing it, but I see mediation simply as a process of listening and communicating.

MS. ALLEN: I definitely agree.

MR. ROBERTSON: Just listen carefully, understand what’s really being said, try to get a sense of where the parties really need to go. Take some of the rough edges off what you’ve heard communicated in the other room. And it’s just astonishing why it works. I don’t know why it works or how it works. But every single one is different. There is no standard format for mediation in my view. It’s a kind of a high wire act for the mediator. I
call mediation liars’ poker because neither side will tell you what they really want.

**MS. ALLEN:** And people will surprise you.

**MR. ROBERTSON:** People surprise you. I never ask people in mediation what is your bottom line. Because they won’t tell me and if they do tell me, I won’t believe them.

**MS. ALLEN:** They won’t really tell you.

**MR. ROBERTSON:** No. Sometimes.

**MS. ALLEN:** Sometimes you could say rather than what’s your bottom line, what do you think about what the worst thing could be at trial.

**MR. ROBERTSON:** Yeah.

**MS. ALLEN:** It’s hard to get anything, but sometimes that startles them and they get so caught up. It sounds as though the switch maybe wasn’t so easy. But you’re enjoying it.

**MR. ROBERTSON:** No. The switch wasn’t easy. I think the worst part about it was the notion, or the fear or the belief, that I was letting people down. There aren’t that many judgeships to go around. And when you accept one of these judgeships for a lifetime appointment, you are taking a big step and you are accepting an enormous vote of confidence and a big responsibility. And to walk away from that is not easy to do. And I didn’t do it rashly or quickly. But the best thing about my leaving the court is the guy who took my seat.

**MS. ALLEN:** Okay, and that was?
MR. ROBERTSON: That was Robert Wilkins, who was such a great lawyer. And he occupies
the seat that I occupied – or he did occupy the seat that I occupied, and
within a very short time was recognized for the great judge he is and was
promoted to the Court of Appeals. The first judge of our court to be
promoted to the U.S. Court of Appeals since Spottsworth Robinson back
in the 1960s.

MS. ALLEN: That’s very surprising.

MR. ROBERTSON: Well, it is surprising. And it has disturbed us in the District of Columbia
for a long time because in every other court in this country, every other
circuit in this country, the natural process is that many district judges will
move up to the court of appeals. And they’ll move up because of their
merit. Here, going way back to Kennedy and even before Kennedy, the
Court of Appeals has always been seen as a place for appointments that
are much more political and much less tied to the merits or demerits of
district judges. I mean from the time that Skelly Wright was brought up
here from Louisiana and put on the court to sort of escape from the
calamity that was being heaped on him because of his school
desegregation opinions in the South. Or Harold Leventhal was brought
here from Chicago. I think he’d been a partner of Adlai Stevenson. And
there are many, many examples like that. Judge Henderson was brought
up from South Carolina because there was no seat on the Fourth Circuit
for her and because Strom Thurmond or Jessie Helms wanted her on the
Court of Appeals.
MS. ALLEN: Maybe this is a good place to end. You said Randy Moss.

MR. ROBERTSON: Oh. Complete the thought of my seat. So-called my seat. The seat that I occupied was occupied before me by George Revercomb, a much beloved guy who died much too young of cancer, who worked through an opinion on his death bed that he had to finish. He was very fondly remembered by everyone here. This legacy of passing a seat from judge to judge is no big deal, but we all sort of remember it. I had Revercomb’s seat, Wilkins had my seat, and when Wilkins went to the Court of Appeals, Randy Moss took his seat, my seat, Revercomb’s seat. Randy Moss is a former partner of mine at Wilmer, Cutler & Pickering, and I would say a spectacular young lawyer, except he’s got as much gray hair as I do. And a very, very welcome addition to the court. So it feels pretty good to have your former partner occupy your old seat on the court and that’s where Randy Moss is today. And I’ll let you go now.

MS. ALLEN: Alright. Well, thank you very much. You have given a lot of your time to this effort, and I appreciate it.
ORAL HISTORY OF JUDGE JAMES ROBERTSON

This interview is being conducted on behalf of the Oral History Project of The Historical Society of the District of Columbia Circuit. The interviewer is Ann Allen, and the interviewee is James Robertson. The interview took place at the offices of JAMS, 555 13th Street, N.W., in Washington, D.C., on July 28, 2015. This is the seventh interview.

MS. ALLEN: Judge Robertson, do you have a statement you would like to make for the record?

MR. ROBERTSON: I do actually. I have spent some time in the last couple of days going over one of the recent transcripts, and I realized that the transcriber of these tapes is accurate to a fault. Lawyers are used to being embarrassed to read what they have actually said when it comes back on a transcript, but the embarrassment seems to have diminished over the years because court reporters seem to give a break to judges, and then when you see a transcript of what I said on bench, it doesn’t have all of the “uhms” and throat clearings and quiet chuckles and restarting sentences that appear in this transcript. So just for the record, I have edited this transcript to make me look much more articulate than I really am. End of statement [laughter].

MS. ALLEN: An excellent statement. All of us have our “uhms” and “ers” on record. I think we’re winding down, or moving slowly, to the end of this interview, which I have really enjoyed immensely, and I know there are a few things that you just wanted to talk about briefly, so I’m going to turn it over to you with a softball question of what would you like to discuss first.
MR. ROBERTSON: This interview and oral history is being done under the auspices of and for the D.C. Circuit Historical Society of which I have been a member and a supporter, if not a terribly active participant, for some years. I am a fan of history and I read history. It’s a little daunting actually to think that I am history or that history pays attention to anything that a district judge does or thinks or has done. I remember just before I became a judge and after I learned that I was going to be nominated, I spoke to a partner at the Cravath firm. I was up in New York with my wife and felt a little puffed up and I said, “I’m going to be a district judge.” And he said, “Well, two things you need to know. First of all, you will never know again whether you have a funny joke.” And he said, “You have to remember that district judges write on water.” What we write disappears. It’s not precedent. Nobody pays attention to it unless the court of appeals rules on it. And with a very few exceptions of very famous and well-noted district judges that, of course, has proven to be true, so that the cases that I have decided probably have very little historic value.

We have talked about, I think, two of them, the two occasions on which the Supreme Court reversed the Court of Appeals which had reversed me. And I have waxed, if not eloquent, at least delighted, about those cases, because it doesn’t get any better than to have the Supreme Court reverse the Court of Appeals who reversed you. Those are the Hamdan and Hubbell cases.
If you look on Wikipedia, or if anybody wants to know anything else that I’ve done that is noteworthy, you will probably find references to the Schroer case and to a case called American Council of the Blind and I’m going to mention them briefly and say a little something about them.

Schroer was a decorated Army Special Forces Ranger Colonel who retired from the Army and was looking around for something to do and saw an advertisement by the Library of Congress that they needed a terrorism expert to do research, and that was right up his alley. That’s what he had done in the Armed Forces. He was a combat veteran. So he applied for the job. The Library of Congress was thrilled to have him apply for the job, and he got an enthusiastic offer which he enthusiastically accepted. And then the next day or shortly thereafter, he called up his new boss and said, “I think we should have lunch.” So they went out to lunch, and at lunch he said to her, “You should know that when I report for work next month, I’m going to be wearing a dress, because I am transgender and I am preparing myself as I am required to do before all of the formal surgery and so forth is done. I’m required to live as a woman for a certain length of time.” The person with whom he was having lunch said “Oh,” and went back to the Library of Congress and consulted with the Office of General Counsel and called him up and said maybe not. Maybe not. He was represented by the ACLU. Art Spitzer and others filed suit. The suit landed before me, and I didn’t quite know what to make of it because Title VII of the Civil Rights Act of 1964,
which is the core discrimination statute, protected against discrimination “on account of sex” but had been construed up until then not to provide any protection either for homosexuals – nor had there been any mention of transgender persons. And frankly, I being sort of a conservative, or if not conservative, a not very adventurous judge, thought that that was probably the solution I was going to have to reach in this case. But I had a law clerk, and I’m going to name him here because he deserves a lot of credit for the decision I finally entered in the case. His name is Matt Peed. And Matt Peed came from Georgia and Duke Law School, and was, I think it’s fair to say, of a conservative mindset when he came to me, but Matt retired into his office, and I didn’t see him for weeks. He was studying, and reading, and thinking and agonizing about this case. He came to see me finally, and he said, “Judge, we have to deny this motion to dismiss. There is protection under the statute, and we can find it, and there is a case out in Illinois in which a judge decided something like this and we should follow that reasoning and we should rule in favor of Schroer.” And then I started to wrestle with it. And Matt and I wrestled and wrestled until we came up with an opinion denying the motion to dismiss. Ultimately Schroer, whose name I think now is Linda Schroer, won a substantial judgment in my court.

The amazing thing about this story is that not only was it the first time that any transgender person has been granted rights under Title VII in this country, but within 15 minutes after that decision was filed
electronically in the Court CM-ECF system, somebody had edited Wikipedia to note this. (I should note that this discovery was made by a law clerk!) The LGBT websites, of which there are many, many, many, lighted up with news, and I was the hero of the LGBT movement for a day or two until they went on to something else.

But speaking of writing on the water, that decision was not appealed by either side. I granted a little bit to the government and I granted a little bit to – I think I did not grant her what’s called front pay. Both sides had reason to appeal, and neither side did. The ACLU didn’t really want to hazard that opinion to the tender mercies of the Court of Appeals. And the government, the Library of Congress, had the same reaction, so nobody appealed. You can find the opinion out there, but I doubt that it’s ever been cited by anybody anywhere. It’s an interesting commentary on the way the law works.

The other quirky case that appears on Wikipedia if you Google it, you will find some reference to a case called *American Council of the Blind*. The American Council of the Blind filed suit and said that the United States Department of the Treasury was violating discrimination laws by refusing to issue currency that accommodated the needs of blind or other visually challenged people who could not tell a one-dollar bill from a five-dollar bill from a ten-dollar bill from a twenty-dollar bill, unlike almost every other country in the world which does provide ways for visually impaired people to sort out their money. For example, the
5 Euro bill is smaller than the 10 Euro and so forth. The Pound or the Deutsche Mark or almost any other major currency in the world, there are size differences, vivid color differences, or in some way tactile differences.

MS. ALLEN: A lot of foreign currencies have writing on the edge.

MR. ROBERTSON: Right. Embossing or writing on the edge or additives. It turned out that there are two organizations for the blind and the visually impaired, and they were at odds about this case. The American Council of the Blind was the plaintiff in the case, and the other group, I’ve forgotten the name of it, but they were either amicus against it or didn’t think we should make a big thing of it or thought there was something sort of discriminatory about singling out blind people. In any event, after a lengthy hearing and after quite a long time waiting for briefs, I decided that the Council for the Blind was correct, and I issued an order to the United States Department of the Treasury that they redesign the currency so that it would be accessible to blind people. Well, that case wound up on Stephen Colbert’s Daily Show.

MS. ALLEN: Really?

MR. ROBERTSON: Colbert had great fun with this opinion. You may be able to find it on YouTube. He had somebody make up a five-dollar bill that had fur on one side of it, and I’ve forgotten what else, but he had fun with it. Oh and by the way, the Court of Appeals, Judge Judy Rogers writing, affirmed me in that case I am happy to say.
MS. ALLEN: Excellent. What did the Department of the Treasury say?

MR. ROBERTSON: Well, they first of all made the accurate point that by statute nobody can mess with the one-dollar bill. The one-dollar bill is a greenback. It’s got George Washington on it. It’s protected by statute. Well, that’s fine. Keep the one-dollar bill and change everything else. So finally the case was settled with the Treasury Department agreeing that the next time any major bill was redesigned – they wouldn’t redesign them all at once because it’s incredibly expensive and they have to plan for phasing money out and so forth – but the next time bills were redesigned, they would make some accommodation, and basically we were going to have to leave it to them as to how to do it, but they were going to do it.

A few weeks ago I had occasion to go to the bank and get a few $100 bills which my wife and I wanted to give to one of our grandchildren for the occasion of a graduation. I don’t deal with $100 bills. You can get $100 bills out of the ATMs in Las Vegas, but not around here. The $100 bill to my surprise and pleasure has indeed been redesigned, and if you look at it, you can see that it has a sort of foil strip on it.

MS. ALLEN: I hadn’t noticed that. I don’t really deal in $100 bills.

MR. ROBERTSON: I don’t either, but you can feel that it’s a $100 bill. Well the wheels of justice grind slow but exceedingly fine, and I was very pleased to see that. So *The Council for the Blind* and *Schroer* ensure that if there is any legal legacy that I leave behind, it’s probably those two cases and *Hubbell*. So much for writing on water.
MS. ALLEN: If you don’t have many cases going to trial, there are not a lot of opportunities to write.

MR. ROBERTSON: Well, it might work that way. You end up writing more for the cases that don’t go to trial because the cases that go to trial get decided by a jury and it’s yes or no. The verdict is guilty or not guilty. It’s plaintiff or defendant and so many dollars. You may write an opinion along the way or after or a challenge to it, but you don’t write as much for a case that is actually being tried. And, of course, I think I probably wrote something like 1,000 published opinions. Frankly, I didn’t keep track of it. But if you go back and look at them, as I do from time to time, you find some decisions that actually have been cited elsewhere and are somewhat important. But they are just minor points along the way, and they are frankly not all that memorable. I wrote a few opinions in the pharmaceutical field that received some notice. I wrote one opinion in the antitrust field which 50% of the antitrust bar absolutely loved and thought it was groundbreaking, the other 50% disapproved of it, and so did the Court of Appeals. So that one is gone, too. That one involved baby food.

So you really don’t, I don’t at least, spend much time thinking about or remembering or unearthing or doing archeology on the actual cases I’ve decided. You decide them, you write the opinion and you move on. One case that I made a note to you and to myself to talk about is the Cobell case. Have I talked about that in previous sessions?

MS. ALLEN: You have not.
MR. ROBERTSON: Well, *Cobell* was a famous case. Still is. Eloise Cobell was a Native American. I’ve forgotten which tribe she was from, somewhere up in the Northern Plain states, Blackfeet, perhaps, who brought suit against the United States Department of the Interior, also the Department of Treasury, but mostly the Department of the Interior and the Indian Affairs Section of the Department of the Interior, complaining about the behavior of the United States over the previous 125 years in dealing with the trust accounts of Native Americans. It’s a very, very long story and one that frankly I’m not prepared to talk about in any detail this morning. I don’t need to anyway because so much has been written about it. *Cobell*, when it was originally filed, was assigned to Judge Royce Lamberth. Judge Lamberth labored with and over that case for, I think, 13 years, issuing opinion after opinion after opinion and dealing with appeal after appeal after appeal. I think there were nine trips to the Court of Appeals. The suit was so complicated and the attorneys were so combative that the case developed its own toxicity really within the small group of people who were litigating it. The plaintiff’s lawyers and the Justice Department lawyers did not get along, and that’s a euphemism for the way they behaved. Judge Lamberth became increasingly disturbed by what he saw as the behavior of the federal government in not producing documents, not producing information, and resisting much of what the plaintiffs wanted. But in fairness, some of the lawyers on the plaintiff’s side were pretty outrageously difficult people.
I won’t try to reconstruct the whole history of it, but suffice it to say there came a time, sometime around 2008, when the Court of Appeals had had enough of whatever they saw that was happening in this case, and they not only reversed Judge Lamberth but remanded the case with instructions to the court, which meant to the Chief Judge, to assign another judge to the case. In other words, they fired Judge Lamberth from the case. That was shocking. To my knowledge, they had only done that once before that I knew of which was when they took the Microsoft case away from Judge Jackson. They may have taken a case away from Judge Sporkin. But Royce Lamberth was the next most senior judge on our court after Tom Hogan, who was still the Chief Judge. He was about to become Chief Judge himself, was universally respected among other judges on our court and on the Court of Appeals for being a hard worker, a call-it-as-he-sees-it, stand-up straight-forward judge. If he had one characteristic that may have gotten him into trouble with the Court of Appeals, it was that Royce Lamberth was never afraid to use all the power that a judge has to sanction or hold people in contempt. And at one point, he held the Secretary of the Interior in contempt. He may have held the Secretary of the Treasury in contempt. He was, shall we say, frustrated with the government. But the Court of Appeals said ‘no more Lamberth, give it to somebody else.’ Well, I confess here that I volunteered for the case.

MS. ALLEN: You did?
MR. ROBERTSON: I did. I suppose for the sake of history, I’ll make that confession right out in front of everybody. I volunteered for it because I had my own theory about the way warring lawyers should be dealt with. And the theory was partly home-grown and it was partly the offshoot of a speech I once heard by Judge Robert Merhige. Have I mentioned him before?

MS. ALLEN: No. It’s such a distinguished name from the past.

MR. ROBERTSON: Judge Merhige, of the Eastern District of Virginia, sitting down in Richmond, gave a talk at one of our judicial conferences here maybe 25 years ago, which I attended and heard and it stuck in my mind. He said the way to deal with the problem of incivility among lawyers is not to pass rules or sanction people but to lead by example. And he said that when he was a practicing lawyer and a new case came into his office, he made it a habit to call the lawyer on the other side and say ‘Let’s go out and have lunch together.’ And he said that when you break bread with another lawyer, you get to know him a little bit, you can talk about the children, you can talk about their backgrounds. It’s awfully hard to yell and scream and be nasty to them in court. Such a simple yet human way of dealing with conflict.

One of the first things I did when I got the Cobell case was to bring all of the lawyers together. I remember we sat in a jury room some place, and I’ve forgotten whose jury room, and the electricity in that room was palpable. You could see that the lawyers could hardly stand to be in the same room together. That’s how bad it had gotten. There was one lawyer
in particular on the plaintiff’s side and I, for the sake of his privacy and
maybe my liability, won’t mention him. But everybody who was involved
in the case knows who I am talking about. He was just impossible. And
that poison had spread everywhere. Well, long story a little bit shorter,
after that meeting I recalled for these people the Merhige story and I said
that I wanted them to go have lunch together. I said as a matter of fact,
come and have lunch in the judges’ dining room. So it was a little
strained, it was a little awkward, but we all had lunch together.

MS. ALLEN: In the dining room?

MR. ROBERTSON: In the judges dining room, and slowly but surely people began to warm up
a little bit to each other. Well, I don’t mean to put too much weight on
that little trick, but suffice it to say that after a couple of hearings and a
couple of long opinions – and I’m going to name another law clerk here
who was critical to this effort, her name is Emily Coward. Emily was
indispensable in helping me through the two long opinions that I issued in
this case. They led up to the settlement of the case. The case was settled
just before I retired. Now I have dined out on that settlement ever since.
My JAMS publicity thing says that I settled the Cobell case.

I just recently facilitated, I would have to say, the settlement of
another major Indian claims case in which I was selected by the Justice
Department and by the Indian tribes because of the work that I had done in
the Cobell case. But the historical purposes of this interview would not be
served if I sat here and told you that it was I who settled the Cobell case.
The *Cobell* case was settled principally because the Obama government had decided that it wanted it settled. There were four people in the Interior Department and the Justice Department who basically got it done.

**MS. ALLEN:** These were Obama appointees?

**MR. ROBERTSON:** They were Obama appointees. One was Ken Salazar, who was the Secretary of the Interior, one was David Hayes who was the Under-Secretary of the Department of the Interior, and, by the way, had been an Oberdorfer law clerk. The third was Hillary Tompkins, the Solicitor of the Department of the Interior, which is like General Counsel of the Department of the Interior. And the fourth was Tom Perelli, who was either the Deputy Attorney General or maybe an Assistant Attorney General. Those people did what they had to do to pull the right levers to get this case settled. And it settled for a huge amount of money – I think $3.4 billion dollars. They had to go to Congress to get enough money to fund it. I’m happy to accept all of the accolades that come to me for settling that case. When Royce Lamberth presided over my portrait hanging, he was kind enough to mention the *Cobell* case and to give me credit for settling the case. But the case wouldn’t have settled without the people that I just mentioned. Now, the alumni of the case. Steve Harper was a plaintiff’s lawyers, and not, by the way, the obstreperous one [laughter]. Steve Harper is now an Ambassador.

And life has gone on. Eloise Cobell has passed on. But the *Cobell* case was really quite a tour de force for me, for Royce Lamberth, for the
nine opinions of the Court of Appeals, for Secretary Salazar, who by the way is now a partner in my old law firm of Wilmer Cutler Pickering Hale and Dorr and who was importantly involved in the settlement of the most recent Indian case that I was a mediator of. So what goes around, comes around. Salazar is still an important player in that field.

I think that tape recorder ought to be filed with the Historical Society with the transcript of this because it has done yeoman’s work in this history and it is obviously a historical object all by itself.

MS. ALLEN: I think I told you my 6-year-old granddaughter when she saw the tape recorder said, “What’s that?” [laughter].

MR. ROBERTSON: Some two or three years after I became a judge, I had some lawyers before me in the courtroom one morning who were very, very serious and very anxious and very distressed about some discovery disputes they were having. It was for them a real nail biter and they were upset and angry with each other and I issued an opinion at the close of that thing. Not an opinion, but about a two-line order ruling on the dispute and telling the lawyers to “lighten up.” And that little two line order went viral or whatever the pre-Twitter, pre-YouTube version of going viral was. It was circulated by emails all over the country and I got a lot of responses from old friends who thought that was pretty funny. As I was saying earlier, I think lighten up would be a pretty good inscription to put on my tombstone. I’m going to see what I can do to make that happen. And speaking of fun, the other really fun case I had was one of the birther
cases. And birther is now a well-known word meaning cases that challenge the citizenship of Barack Obama. The case was filed by a former Marine officer, long since retired, and now, I think a retired reserve officer who hadn’t been in uniform for many, many years, but whose complaint said that he was still technically subject to recall in the Armed Forces of the United States, if ordered to do so by the Commander in Chief. And who could not be certain if the person purported to be Commander in Chief was actually his Commander in Chief. Because it hadn’t been proven that he was born in the United States. Well, it turned out – I dismissed the case in an opinion that I will cheerfully confess was snarky. I made the comment somewhere in the opinion that many people, perhaps as many as a few dozen, were convinced that Barack Obama had not been born in the United States and I got all kinds of hate mail for that comment about only a few dozen of them. But I think for the first, or maybe the second time in my 16 years on the bench, I issued with the opinion an order to the lawyer who signed the complaint to show cause as to why he should not be sanctioned for violating Rule 11. Well the lawyer turned out to be an 80-year-old man in Washington who had had – and I use the verb form very deliberately – who had had a distinguished career. I think he may have even been a Rhodes Scholar at some point in his life, but he had apparently gone off the rails and filed this kooky lawsuit. And to make a long story short, he responded to the show cause order with a blistering response. And I wound up issuing some sort of letter of censure
and no financial sanction at all. The birther case ended with a whimper instead of with a bang. But it is something of a footnote to my “legacy,” whatever it is. I often think that the real legacy that I leave to the judiciary and to the legal system of the United States, has nothing to do with any case over which I presided. It has to do with something called Oscar.

MS. ALLEN: Oscar. Is Oscar an acronym?

MR. ROBERTSON: OSCAR is an acronym. It was selected by the late, lamented, famous and revered Third Circuit Judge Eddie Becker. Judge Becker helped me with the creation, implementation and roll out of a computerized system, an online computerized system, for dealing with the flood of paper that came in every year for law clerk applications. OSCAR stands for on-line system for clerkship applications and review. That’s OSCAR. Here’s the story. I had been, as I think I indicated earlier, the chair of the Judicial Conference Committee on Information Technology. That was a very, very interesting job, and I enjoyed doing it very much. And somewhere about the second year of that assignment I got it into my head that the way we were dealing with law clerk applications was just crazy. Every year it all happened on a day certain because by gentleman’s agreement the whole judiciary had established a nationwide calendar. All law students take a course in procrastination in law school and learn to live by deadlines. On the agreed deadline, the mailman would arrive with hand trucks full of boxes full of applications from law clerk applicants. Applications that would come in by FedEx, UPS, regular mail and express mail. They’d
come in in huge envelopes and then letters started coming in from law professors and people recommending candidates. The recommendations would have to be married with the applications, and then somebody would have to go through the applications and sort them out and do a first cut. And I’m talking about 400 or 500 applications every year, all or most of them arriving simultaneously.

MS. ALLEN: Wow.

MR. ROBERTSON: In the Court of Appeals, 1,000 applications. In fact, one year I did get 1,000 applications or more in my chambers. So it was an enormous burden, and every year it got worse and worse because clerkships became more and more important to people looking for jobs. And I said there’s got to be an easier way to do this. I started asking questions in the judiciary. Well, the Office of the Director of the Administrative Office of the US Courts had a lot of IT people, but they didn’t want to deal with it. It was just too complicated. And they said why don’t you go to the Federal Judicial Center, because they’ve got IT people there too. The Federal Judicial Center said no, we don’t want to deal with it either. I’m making a long story. It really was a tedious story, because there were turf wars between the Federal Judicial Center and the Administrative Office for years, about IT stuff and lots of other issues. Neither team wanted to handle it, and I finally said, “You know, we don’t have to invent the solution here, we can buy this stuff off the shelf.” Long story a little bit shorter, I got some people together and we put together some rough
requirements for what we’d like to see and we got a request for proposals out to five or six providers of software to see if any of them were interested in adapting this program.

We put together a small committee and Judge Becker was one of them. Judge Lamberth was very helpful on this one. He had been involved with the IT Committee. In fact, I took his place on the IT Committee. And there were two or three others. And we had a committee and we supervised the work of this off-site guy who was developing the program. And ultimately the product that we rolled out was the product that we now know as OSCAR. There was a period of two or three years when it was hard to get people to buy into it. Some judges didn’t trust it. They thought it would encourage people to send too many applications. There were people who didn’t want to deal with it. But OSCAR finally became the standard for law clerk applications. And what it enabled a judge to do was to make a quick review of all the applications that came in. So, if, for example, I wanted only law students from Harvard, Yale, Michigan, Virginia, Pennsylvania, Georgetown, Stanford and Berkeley – which unfortunately many judges do – I would screen for those. Those are the only ones that I would read. Or if I wanted only somebody who was in the top 10 percent of the class, I could screen for that. Or if I wanted someone who had experience in the singing of barbershop quartets, I could do that. Actually, that’s not so far off the mark. There is a judge in the Eastern District of Virginia, in Alexandria who routinely looks for clerks...
who have singing experience because she likes to sing. And her clerks
sing with her in choirs and singing groups and so forth. It’s perfectly okay
with me. And it also provided automatically for letters of
recommendation to marry with the clerkship application so that you could
see everything in one screen, in one program. You could screen what you
wanted, put together what you wanted, you could get it down to the 15 or
20 folks you wanted to interview and then go from there.

MS. ALLEN: And OSCAR churns on today?

MR. ROBERTSON: OSCAR is still there as far as I know and is still doing well. The last thing
I want to mention has to do with law clerks. I’m sure I have said earlier
somewhere in this history that having law clerks is one of the great joys
and benefits of being a judge in the first place. But I’ve had about 35 of
them. They are so much a part of the whole experience. And they have
been so important to the work that I have been doing that I’d almost like to
add an addendum of this thing identifying them. But I, just for the hell of
it, I have pulled up on my iPhone, a spreadsheet that I have of all the
addresses, of hundreds of peoples’ names and addresses. And I have them
sorted. So here are my law clerks. The first two were Claudia Salem and
Mike Yeager. Claudia had been an intern for Judge Urbina. Michael
Yeager was my younger son’s best friend. They rode bicycles together
across the country after they graduated from high school. Michael grew
up across the street from us. And I was a brand new judge and I didn’t
know who I was hiring and I hired Michael Yeager. Yeager and Salem
are now both involved in the immigration business, if you will. Claudia is in the Office of the General Counsel at the Immigration and Naturalization Service and Michael Yeager is doing congressional relations work for INS or one of the new alphabet soups that has to do with border control. The next two were Charlie Moore and Syd Patel. Charlie Moore was a late applicant for the job. He had been I think number 1 or 2 in his class at Stanford Law School. A brilliant fellow. Syd I think is referred to as a second generation immigrant. Her parents both came from India. She was raised in this country and went to law school at Yale. Brilliant, wonderful people. Neither one of them is still a lawyer. Charlie went on from me to clerk for Judge Tatel, went on from Tatel to clerk for Justice Breyer, went to Williams & Connolly for a while and then escaped into the money and is now doing, I don’t know, not a hedge fund but he’s doing private equity in New York and is probably worth three times, ten times, fifteen times what any of the rest of us are. But Charlie was one of the smartest people I ever met in my life. Syd is brilliant, too. She is a poet. And we talked earlier about lawyers who were contract lawyers who went to work for a few months so they could be sculptors?

MS. ALLEN: Right.

MR. ROBERTSON: Syd is a poet. She has a poetic soul. She came to me after doing a lot of research on bride burning in India because a cousin of hers had been a victim of the whole bride burning thing, and she was more interested in the human rights part of things than she was in the law. She married at the
end of my clerkship. She had a clerkship with Judy Rogers after mine, but
she didn’t do it because she got married. Then she got divorced. And
now she’s living out in California. Long story.

MS. ALLEN: Not practicing law?

MR. ROBERTSON: She’s writing. She’s teaching yoga. She’s living in Haight-Ashbury and
she’s happy.

MS. ALLEN: Good.

MR. ROBERTSON: Then came the dynamic duo of Sean Fox and Lisa Stevenson. They were
kind of my all-American law clerks. Sean was an athlete and had been a
White House fellow and was the leader of the law clerk’s softball team at
the Courthouse and was clearly a leader. Absolutely a leader. And Lisa,
who was British born, had gone to the University of Michigan. Sean is
now running a dot com company in California, not a lawyer anymore.
And Lisa Stevenson is, or recently was, I think is, Acting General Counsel
of the Federal Election Commission, which is a vexed job. She had been a
partner at the Zuckerman Spaeder firm, and she’s now over there. A huge
job. Then came Stephanie Marx and Todd Richman.

MS. ALLEN: Did you always have a woman and man?

MR. ROBERTSON: No. It happened that way. I was trying to be even handed but I wasn’t. It
wasn’t deliberately woman and man. Stephanie has probably gone as far
as any of my law clerks in government. She is now in the White House
General Counsel’s office doing all kinds of sophisticated stuff. Before
that she was Senator Schumer’s – I think she was his Chief of Staff. She
had a big job. She, by the way, is married to a partner of the Wilmer Hale firm, and, by the way, I did her wedding. And I did Syd Patel’s wedding.

**MS. ALLEN:** You were saying earlier that you went online?

**MR. ROBERTSON:** Oh yes. I did tell you that, but that was much later.

**MR. ROBERTSON:** Stephanie’s co-clerk was a guy named Todd Richman who worked for a Boston law firm for a while and is now a Federal public defender across the river in Alexandria. After Richman came Cassie Motz and Harry Wingo, two fabulous people. Both Yalies. Cassie is the daughter of two judges, Fred Motz of the District of Maryland and Diana Motz of the Fourth Circuit, and she is the granddaughter of Daniel Gribbon of the Covington & Burling firm, so she was born to the purple, no question about that at all. She worked for a while as a Special Assistant to the Attorney General of Maryland, who is now a candidate for President of the United States. She has left that job and is now running a foundation in Baltimore, doing good works there. I did her wedding too.

Harry was an NCAA boxing champion at the Naval Academy, a Navy Seal, a Yale law student, an African American. It was great fun to walk down the street with Harry Wingo. He was always checking the buildings to make sure there were no snipers nearby because he was hard-wired into this whole military security thing. It took Harry six months to stop saying “sir” at the beginning and end of each sentence that he spoke to me. There’s a long story about Harry which I guess I will not put on this tape. But anybody who meets Harry should ask him about his ride in
a sports car on his first vacation from Naval Academy, when he and a
classmate of his were riding with two young ladies and somebody got into
the back seat with a knife. Shall I finish that story?

MS. ALLEN: Yes [laughter].

MR. ROBERTSON: Harry was a brand new midshipman at the Naval Academy, African
American kid, home for his first vacation, went out for a date with a young
woman and one of his classmates was in the back seat with another young
woman. I guess it wasn’t that small a sports car, but it was a small car.
They were driving along and some nut jumped in the back seat of the car
and said “Drive.” Kind of a carjacking thing.

MS. ALLEN: Sounds like a movie.

MR. ROBERTSON: Harry began thinking about how he was going to solve this problem, and
once again, to make a long story short – he tells a rather long story of
driving up and down Connecticut Avenue and being told what to do –
began to think, well, do I do this or do I not. Finally he did. He smashed
the car into another one and used the moment of confusion to turn around,
jump into the back seat, grabbed the guy with his hands, and put his eye
out with his thumb.

MS. ALLEN: I mean under the circumstances ….

MR. ROBERTSON: Whereupon, of course, the police gathered and Harry was braced up
against the car because young black guys in cars are obviously guilty of
something. But when the cops realized what he’d done, he became --

MS. ALLEN: A hero.
MR. ROBERTSON: A hero – of the cops and at the Naval Academy and every place else. And the story has gone with Harry all of his life. And anybody who knows Harry knows to be careful.

MS. ALLEN: So what is he doing now?

MR. ROBERTSON: He is now the President of the Washington, D.C. Chamber of Commerce. A distinguished job for a distinguished guy. I’m deliberately doing this because I am so proud of my law clerks that I really think I should cover this ground.

MS. ALLEN: It’s very interesting. They’ve done such a variety of different things.

MR. ROBERTSON: The next two law clerks were Sean Palmer and Matt Solomon. Two men. Sean went from my chambers to Covington & Burling, but he moved to Amsterdam with his partner four or five years ago, and I frankly haven’t heard much of him since then. He was doing great before he went and I’m very fond of him. Sean’s co-clerk was Matt Solomon. Matt has had a very distinguished government career as an AUSA in the Fraud Section of the Justice Department, and now I think is Deputy Chief of Enforcement at the Securities and Exchange Commission. Very distinguished government service. I did Matt’s wedding.

After two men, came two women, Stephanie Brooker and Kelly Cochran. Stephanie went on to become law clerk to Judge Motz, the Fourth Circuit Judge Motz. From there she became an Assistant United States Attorney and served with great distinction for a number of years. And now she has a very high position in the group which calls itself
FinCEN. I don’t remember what the alphabet soup stands for but it’s financial. It’s part of the new government, all new Dodd-Frank financial enforcement establishment. Kelly is now with the Treasury Department doing the same kind of enforcement work. Kelly went first to Wilmer, Cutler, Pickering, Hale & Dorr – then Wilmer, Cutler & Pickering – and then into the Treasury Department, where she is now serving in financial enforcement. After Kelly and Stephanie came Jihee Suh and Vassily Thomadakis, my ethnic clerkships. Jihee is second-generation Korean. She is now working as an Assistant United States Attorney in New Jersey. Vassily Thomadakis is second-generation Greek, now working as an Assistant United States Attorney in Boston. Both of them came to see me in Washington faithfully every once in a while. Jihee was here for a reunion I had last year. She is a wonderful woman. I wish we could get her back to Washington in some government job, and I haven’t given up hoping that she will come back. Vassily, same thing. I don’t know how he stays away. He’s a great Georgetown basketball fan. He will come down here four or five times a year just to see a basketball game. His mother was a very distinguished historian and professor and academic at Harvard and connected with Dumbarton Oaks. She was very important at Dumbarton Oaks at one time.

Where are we? We’ve gotten as far as Lisa Kaufman and Ashley Lunkenheimer – two women, both distinguished collegiate rugby players.

MS. ALLEN: They both played rugby?
MR. ROBERTSON: They both played rugby and they both were all-stars.

MS. ALLEN: Did you know that?

MR. ROBERTSON: I did not when I hired them, but they were both all-star and NCAA top-gun rugby players. Ashley is the daughter of a well-known United States Attorney from Philadelphia and is now back in Philadelphia where she too is an Assistant United States Attorney, married to her partner and they are the parents of three children, two of which were born within months of each other. Ashley used to tell a hilarious story of going to birthing class with her partner. Because they were required to do slow dancing and they were both out to here with their pregnancies. Ashley is fabulous fun.

Lisa Kaufman married a park ranger and moved to the mountains of California where she and he built a house. She comes down from the mountains to work as a permanent law clerk for a federal judge in Fresno. And the last I heard she is still doing that. So that was two women rugby players.

That brings me to Rob Ditzion and Mona Sahaf. Rob and Mona were the two law clerks that I had when I decided that Hamdan case and I believe I have mentioned them both.

MS. ALLEN: Yes, you did.

MR. ROBERTSON: Rob went to work for a plaintiffs’ law firm outside the Boston area and has recently moved to the Massachusetts Attorney General’s office. Mona was an Assistant United States Attorney here and has also moved recently into the financial enforcement field with one of the government agencies,
but I frankly lose track of which agency is which. She, Stephanie Brooker, and Kelly Cochran are all in the same field.

Ruza Afram, now Ruza Shellaway, and Matt Peed were my next two law clerks. Ruza started at what used to be called Hogan & Hartson, now Hogan Lovells, then moved to a government agency, and has now become Assistant General Counsel at Vanderbilt University. And Matt Peed I’ve already told you about, but what I haven’t told you is that Matt was the lawyer who represented one of these pirate cases from the horn of Africa. What country am I thinking of?

MS. ALLEN: Not Somalia?

MR. ROBERTSON: Yes. Somali pirates. He represented the fellow charged with piracy. His actual function in this particular piracy takeover was as a mediator. My understanding is that he mediated the release of hostages and then was arrested himself and charged with conspiracy. And brought to trial here in the District of Columbia before Judge Huvelle.

MS. ALLEN: How could there be jurisdiction?

MR. ROBERTSON: International piracy jurisdiction reaches anywhere you can grab anybody.

MS. ALLEN: Oh. Okay.

MR. ROBERTSON: And this guy lived here in the United States. He went from Virginia to Somalia to --

MS. ALLEN: To be the mediator.

MR. ROBERTSON: To be the mediator, and when he came back he was arrested.
Then there was Emily Coward and Jonathan Olin. Emily is the lawyer who was so helpful to me in the *Cobell* case. She is now in North Carolina where her husband is a professor at the University of North Carolina, and Emily is doing work for some public interest organization down there. Jonathan has also escaped private practice. Last I saw of him, he was in the Justice Department, where he is now getting to a pretty high place in the Civil Division. And that leads to Anna Baldwin and Eric Citron. I did Anna Baldwin’s wedding too, to Emma Cheuse, in California. No need for the Universal Church there. Anybody can marry anybody. Anna works on election law in the Civil Rights Division of the Justice Department. Let’s see. Bill Meeks and Bharat Ramamurti. Bharat also a second-generation Indian. Came to me from the Boston Red Sox.

**MS. ALLEN:** The Red Sox?

**MR. ROBERTSON:** He had a summer intern job with the Red Sox and when he graduated from law school they offered him a job in the General Counsel’s office. He said, “I don’t want to work for the General Counsel, I want to work for the statistician.” The famous statistician of the Boston Red Sox, Bill James, who is the guy who really brought statistics to baseball. He was the predecessor of the hero of Michael Lewis’s *Moneyball*.

**MS. ALLEN:** In the movie.

**MR. ROBERTSON:** In the movie and the book. Bharat was, and is, fascinated with statistics. I did Bharat’s wedding, too, and I’ll come to that in a minute. Bharat and Bill Meeks knew each other I think in law school. Bill Meeks is now one
of my only law clerks who is still in private practice. And he has gone to work in New York for one of the premier plaintiffs’ law firms doing work in securities class actions. Bill Meeks will be able to buy all of us within a few years. Wonderful guy. I hired law clerks because I liked their stories, I liked what they had done in life.

MS. ALLEN: And kept on doing.

MR. ROBERTSON: I didn’t want to hire anybody who went straight from college to law school to a clerkship. I wanted people with life experience. Bill Meeks had been a tree surgeon and he’d written a book about ice cream parlors.

MS. ALLEN: Where was he from?

MR. ROBERTSON: Somewhere in New York. Wonderful guy. And Bharat. I have told you about the statistics. About the time Bharat and Bill were getting ready to leave, I announced that I was going to retire. I had a short clerkship left because I was going to retire in June and the clerkship began in September. I didn’t have a full-year clerkship. Bharat’s girlfriend was a woman in the Wilmer Hale office in Boston.

MS. ALLEN: Was she an attorney?

MR. ROBERTSON: Oh yes. And she wanted to come to Washington to be with her boyfriend. Wilmer Hale said I’m sorry we don’t have a place in our Washington office for you – this was at a low point in law firm hiring. So Bharat said, you know, Paige is available. Well to make a long story short (laughter), I hired Paige as my last law clerk, and Paige and Bharat ultimately got married. And she is now Paige Ramamurti, and they have a new baby.
And I did that wedding. And that’s the one I did as a clergyman because I was no longer a judge.

MS. ALLEN: So you had to go online for your credentials.

MR. ROBERTSON: So I went online for my credentials, and I’m Reverend Robertson on their certificate.

With Paige was a lovely guy by the name of Daniel Cahn, and I’ve kind of lost track of him. He went to Covington & Burling when he left me, but I think he’s now gone to the FCC. In fact I know he has. So that if I look down this list of 34 law clerks. Oh my goodness, somehow I skipped over two very important law clerks, Joseph Hall and Abigail Carter.

MS. ALLEN: They were clerks together?

MR. ROBERTSON: They were clerks together and they were clerks between Sean Palmer and Matt Solomon – after those two and before Stephanie Brooker and Kelly Cochran. Abigail Carter had been the reader for Judge David Tatel and then she went to law school and really distinguished herself. She was a slam dunk hire for the clerkship. Abigail is now a partner in a Washington law firm, and Joseph Hall is now a partner in a Washington law firm. They are, I think, the only two law clerks out of 34 that have stayed in the private practice of law. Almost all of the rest of them are in some form of government service. It’s very interesting and I’m actually quite proud of it. Although they are not making enough money of course. Well, I take
that back. Bill Meeks is a partner in a law firm in New York. Paige is in a law firm here. Matt is in a small law firm, but he’s still practicing law.

As I go back up this list, government, government, government, government, government, government, government, government, Amsterdam, Chamber of Commerce, private foundation, federal public defender, White House, Federal Election Commission, dot com business in California. I didn’t mention Kathy Zern. She was not Zern at the time. She’s since been married to Peter Zern. She was what I call a stub-clerk. She was my clerk for three months because Syd Patel left to get married. So at any rate, I don’t mean to stretch this out.

MS. ALLEN: I think it’s an important theme.

MR. ROBERTSON: So, very few of my law clerks have become full-time private practitioners. Most of them are in public service, and actually I may be guilty of steering some of them in that direction. I used to give a lecture to all my law clerks. As a matter of fact, I bored a lot of them. I used to give them a book to read. The book was called *Generations*. It was written by a fellow named Bill Schultz. Schultz’s day job was that he was the founder and chief songwriter for a satirical singing group here called the Capitol Steps.

MS. ALLEN: Oh sure.

MR. ROBERTSON: But his passion in life was this theory he had about generational cohorts. Sort of a mixed psychological, sociological, anthropological construct in
which he began with the proposition that American generations – there have been 22 American generations since the Pilgrims.

MS. ALLEN: Okay.

MR. ROBERTSON: They have followed each other one, two, three, four; one, two, three, four; one, two, three four; in four repeatable types. Dominant, recessive, dominant, recessive, dominant, recessive. It’s a fascinating book, and at the end of the book, he predicts the future based on the past. I used to order my law clerks to read this book. They would kind of roll their eyes. Some of them decided they would read it, and some of them decided they wouldn’t. And then I would give them a lecture about going to work for big law firms, and I would say to all of them something like this: Look, big law firms are a great place to practice law, but they will capture your soul if you allow them to because you can eat breakfast, lunch and dinner there. You can find your mate there. You can live your entire life within the confines of a law firm, and I want you to remember when you leave here that your law license is yours and not theirs. Establish an identity for yourself outside that law firm in some way – Bar, arts, public service, revolving door, be a sculptor, do something else. Don’t let your whole life be sucked up into the life of a law firm because the law firm will suck it all up. Particularly in these days when they want 2,000 hours a year from associates. And I guess a lot of them took that to heart, because very few of them still are in big law firms.
MS. ALLEN: That’s interesting. I think when I was a new lawyer, and I mean this is me being from Columbia, in New York City. They wanted a clerkship so they could get into a firm.

MR. ROBERTSON: That’s right. That’s the way it was. And for some people that’s the way it still is, and there’s no sin in it. It’s honorable work, it’s exciting work, it’s interesting work, and it’s very remunerative work, but it’s all-consuming. At any rate, end of story.

MS. ALLEN: I think it’s wonderful to have that list included.

MR. ROBERTSON: Well, they are very much a part of my history.

MS. ALLEN: Thank you very much. I would interrupt if I had a question.

MR. ROBERTSON: And it’s been great fun to do this. And you and I will probably have to do some more work to get it into publishable shape. I can’t think of anything that I’ve said over the last however many years we’ve been working on this that I would not want to be public, although I will go over it. I don’t want to embarrass anybody if I’ve said anything inappropriate or something that I don’t want uncovered until I die or until somebody puts lighten up on my tombstone. I will probably excise it. But basically I think I’ve told it like it is, and I really appreciate all of the work you’ve done.

MS. ALLEN: Thank you. It’s really been enjoyable.
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Statutes

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Neutral arbitrator and mediator, 2010—

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  • Chair, Judicial Conference Committee on Information Technology

  • President, D.C. Bar 1991-92
  • Co-chair, Lawyers’ Committee for Civil Rights Under Law 1985-87
  • President, Southern Africa Legal Services and Legal Education Project 1989-1994
  • Fellow, American College of Trial Lawyers 1984—

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Ann E. Allen spent most of her career as Vice-President and General Counsel of the American College of Obstetricians and Gynecologists (1982-2001). She then became General Counsel of the Gynecologic Oncology Group, a national cancer research organization, from 2001 through 2012. Her earlier experience includes serving in attorney positions at the U.S. Commission on Civil Rights, Micronesian Legal Services Program, and the U.S. Office of Personnel Management.

Ms. Allen is now retired from legal practice. She is a mediator with the District of Columbia Superior Court Multi-Door Dispute Resolution Division. She received a J.D. from Columbia University Law School, and a B.A. from Smith College. She is a member of the District of Columbia Bar, and resides in Washington, D.C.

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