ROBERT KOPP, ESQUIRE

Oral History Project
The Historical Society of the District of Columbia Circuit
ROBERT KOPP, ESQUIRE

Interviews conducted by Judith Feigin, Esquire
July 18, August 15, October 1, 2013
February 6, April 1, May 20, July 30, October 28, 2014
April 16, July 21, 2015
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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.

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

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PREFACE

The goal of the Oral History Project of the Historical Society of the District of Columbia Circuit is to preserve the recollections of the judges of the Courts of the District of Columbia Circuit and lawyers, court staff, and others who played important roles in the history of the Circuit. The Project began in 1991. Oral history interviews are conducted by volunteer attorneys who are trained by the Society. Before donating the oral history to the Society, both the subject of the history and the interviewer have had an opportunity to review and edit the transcripts.


With the permission of the person being interviewed, oral histories are also available on the Internet through the Society's Web site, www.dcchs.org. Audio recordings of most interviews, as well as electronic versions of the transcripts, are in the custody of the Society.
Historical Society of the District of Columbia Circuit

Oral History Agreement of Robert E. Kopp

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, Robert E. Kopp, do hereby grant and convey to the Society and its successors and assigns all of my rights, title, and interest in the digital recordings and transcripts of my interviews as described in Schedule A hereto, including literary rights and copyrights. All copies of the digital recordings and transcripts are subject to the same restrictions herein provided.

2. I understand that the Society may duplicate, edit, or publish in any form of format, including publication on the internet, and permit the use of said digital recordings and transcripts in any manner that the Society considers appropriate, and I waive any claims I may have or acquire to any royalties from such use.

3. I reserve for myself and to the executor of my estate, any member of my family, or any other person who I or my executor may designate, non-exclusive right to use the digital recordings and transcripts and their content as a resource for any book, pamphlet, article or other writing of which I, my executor or designee may be the author or the co-author.

[Signature]
Robert E. Kopp

8/22/2016
Date

SWORN TO AND SUBSCRIBED before me this __th day of _____________, 2016

[Signature]
Notary Public

My Commission expires ____________

ACCEPTED this __th day of _____________, 2017 by Stephen J. Pollak, President of the Historical Society of the District of Columbia Circuit

[Signature]
Stephen J. Pollak

RONALD SINKER
Notary Public, Montgomery Co., MD
My Commission Expires May 21, 2019
Schedule A

Voice recordings (digital recordings, cassette tapes) and transcripts resulting from resulting from ten interviews of Robert Kopp conducted on the following dates:

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The transcripts of the ten interviews are contained on one CD.
The Historical Society of the District of Columbia Circuit

Oral History Agreement of Judith S. Feigin

1. Having agreed to conduct an oral history interview with Robert F. Kopp for the Historical Society of the District of Columbia Circuit, Washington, D.C., and its employees and agents (hereinafter "the Society"), I, Judith S. Feigin, do hereby grant and convey to the Society and its successors and assigns all of my rights, title, and interest in the digital recordings 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 digital recordings and transcripts in any manner that the Society considers appropriate, and I waive any claims I may have or acquire to any royalties from such use.

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

Judith S. Feigin

Notary Public

My Commission expires My Commission Expires
March 31, 2021


Stephen J. Pollak
## Schedule A

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ORAL HISTORY OF ROBERT KOPP

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 Judy Feigin, and the interviewee is Robert Kopp. The interview took place at the home of Robert Kopp in Bethesda, Maryland on Thursday, July 18, 2013. This is the first interview.

MS. FEIGIN: Good afternoon.

MR. KOPP: Good afternoon.

MS. FEIGIN: You have an amazing career, and you have an amazing family history, so I want to start with the family to put you in context. Let’s establish where and when you were born and then we’ll move back to the family.

MR. KOPP: I was born in Los Angeles, California, in 1941, on November 29.

MS. FEIGIN: A week before Pearl Harbor.

MR. KOPP: A week before Pearl Harbor.

MS. FEIGIN: I’d like to go back as far as you know your family history, and since yours is complex, I think we’d better keep the strands separate, so which side would you like to start with?

MR. KOPP: Why don’t we start with my father’s?

MS. FEIGIN: Okay. Let’s do that. How far back do you know your father’s family?

MR. KOPP: At the end of the 19th century, my grandfather Harold Kopp and his brother emigrated from I guess it was Lithuania to the United States, and they started their American life in New York.

MS. FEIGIN: Were they educated people?

MR. KOPP: They seemed to have acquired from their parents a very strong respect for the value of education, and although Harold and his brother were very poor when they came to America, they saw education as the key to advancement in the
United States. Harold enrolled in a pharmacy school, and he got a degree in pharmacy, and started off operating drugstores at several sites in New York. He also was ambitious enough to enroll in Brooklyn Law School, although that never seemed to work out because he didn’t graduate. His brother Shepard also had respect for the value of education, and he went to pharmacy school, and for decades thereafter ran one or more drugstores. Both of them had this great respect for education which meant that their children got great support from them in their own educational endeavors.

MS. FEIGIN: Was there a tradition in the family where your grandfather was expected to become a pharmacist, or was there something else the family had him destined for?

MR. KOPP: Harold and Shepard were basically on their own when they came to the United States. I think pharmacy schools were a way to get a start in this country if you had a certain level of aptitude, and that was the path they took.

MS. FEIGIN: He became a pharmacist, and how did the family grow.

MR. KOPP: Harold married Frances Burger in 1908, and she’s my grandmother. Frances had a father who had grown up in Russia, and her father felt particularly strongly about the value of an education. The father’s parents had stressed to him how important it was to be educated so that you could become a rabbi. Frances’s father was not very religious at all, and he didn’t want to become a rabbi, but he did take it to heart about the importance of becoming educated, and he passed that desire on to his children. So Frances grew up with a very strong appreciation of the value of education. She was living in Brooklyn, and when she graduated from
high school, she wanted to go to a normal school, which was preparation for
becoming a teacher.

MS. FEIGIN: “Normal” being a proper noun. You don’t mean that as just a regular school.

MR. KOPP: Normal school is what it was called. Normal schools were schools for teachers.

She applied to normal school, but she was turned down because in her high school
she had not taken the courses that the normal school required. So she then went
uptown a few blocks and applied to Barnard College, and she got in. At Barnard,
she did very well. She was near the top of her class. After graduation, she went
into teaching and she taught for about a year. Then she married Harold, and the
school’s policy at that time was that if a teacher married, she had to stop teaching.

MS. FEIGIN: Incredible. But before we get to her teaching, or her lack of teaching, maybe we
should say for people down the road reading this that Barnard was, and still is, a
sister school to Columbia, part of Columbia University, and in those days – hard
for this generation to believe – women could not go to the Ivy League schools.
Women could not go to Columbia. So there was a chain of what they called the
Seven Sister schools, Barnard being one of them, for women who wanted an
academic career, a good education, and couldn’t apply to the Ivies.

MR. KOPP: That’s right.

MS. FEIGIN: What was her husband doing when she got married?

MR. KOPP: He was a pharmacist.

MS. FEIGIN: Still a pharmacist. So she gave up teaching, and what happened to her? What did
she do?
MR. KOPP: Let me tell you a little bit about Frances’s side of the family. Her mother was Sonia Sarah Schenck Burger. Sonia was part of a family that had produced nine children, so she was one of the nine. This was the Schenck family. Several of the brothers in the Schenck family in New York decided to go into the amusement industry there.

MS. FEIGIN: What does “amusement” mean?

MR. KOPP: I think running amusement parks. I’m not totally sure what it is. I picked this up from some reading that I did. I got the idea that it basically was amusement parks and the like. These amusement parks were closely connected with the entertainment business in New York. I gather they provided entertainers for the parks and things like that. So they developed very close ties with the entertainment business. At that time, movies were just starting to become significant, and so knowing actors and people like that, they got into the movie business. Several of the Schenck brothers, Joseph and Nicholas, gravitated to Hollywood as a result, and they became the leaders of the movie industry in Hollywood. They ran MGM during the Depression, and Joseph was heavily involved in 20th Century Fox.

It wasn’t exactly a joy ride; there were a lot of ups and downs in terms of their business. They were both brilliant. On the other hand, they never figured out that television was going to be a significant industry and in the 1950s or so, when they were elderly, their influence faded quickly. But in their heyday, they were at the apex of Hollywood and were extraordinarily wealthy. I understand a good portion of their wealth went down with the Depression, but by normal
people’s standards, they remained very well-to-do.

In the 1920s, my grandmother’s part of the family also moved to California and settled in Los Angeles. Frances there obtained a job as a reader for MGM and that meant that she would read a book and write it up and evaluate it in terms of its potential for a movie. She got paid $5 a book. She loved reading, and she continued in that job until she eventually retired herself when she reached the age of 65.

MS. FEIGIN: Do you know whether anything she ever read she suggested they turn into a movie that then became a blockbuster?

MR. KOPP: I think there may have been one or two, but I don’t know. She read thousands of books. I know most of them were books that neither you nor I, nor anybody else, would find interesting. I think she tried to read books that were brand new, so I suspect the number that were worth reading was a small percentage of them.

Her husband, Harold, who had been a pharmacist in New York, was not a great businessman, and I think didn’t have that close a relationship with the Schenck family, but the Schenck family at least felt some obligation toward their less-fortunate relatives and they gave him a job as a manager of a movie theater on Pico Boulevard in Los Angeles, which he operated I think until close to his death in 1947.

MS. FEIGIN: Did you know both of these grandparents?

MR. KOPP: Yes. I was very close to my grandmother, who lived to be 92. I also knew Harold, and I actually have memories of Harold because – I must have been 5 or so – I remember him telling me stories about what life was like in Russia. They
were benign stories, the type of stories you would tell to a child, and I was intrigued.

MS. FEIGIN: So not about pogroms.

MR. KOPP: Not about pogroms.

MS. FEIGIN: Anything worth sharing about life in Russia that this generation would find amazing?

MR. KOPP: No, because I can’t quite tell with the passage of time whether what he told me bore resemblance to what really happened or whether it was more like telling me stories like *Peter and the Wolf*. But that is one of my earliest memories, his telling me these stories. I did know my great-grandmother, Sonia, and she must have lived to be close to 100 or so. I just remember her as a very old lady living with my grandmother, and she would read newspapers in Yiddish, although she did speak English. My memory of her is basically of somebody extremely old. She must have at that point not been terribly communicative. Like with my grandfather, I don’t have that level of memory.

MS. FEIGIN: So they’re out in California.

MR. KOPP: Harold and Frances had two children. One was my father, Robert, but whom everybody called Bob. To avoid confusion because all the recent males in our family seem to be called Bob or Robert, we’ll call him Bob because that’s what everybody else called him. Bob had a younger sister, Hermione. Both of them were absolutely brilliant. Now before Harold and Frances came to Los Angeles, they lived in Syracuse for a while.

MS. FEIGIN: Syracuse, New York?
MR. KOPP: Yes. They grew up in Syracuse, and Harold and Frances sent my father, Bob, to Columbia College to be educated and then to Harvard Law School where he was on the Law Review. He was apparently somebody who was very comfortable in that environment. He told lots of jokes, including sometimes jokes in class in response to his professors. At one point I think Professor Byce said something trying to illustrate a point, and my father, who was getting all excited as the answer was spelled out, said, “That’s nice, Professor Byce” (laughter). He had a sort of pleasant naïveté about him which almost everybody who met him loved.

MS. FEIGEN: Before we get onto your father’s career, do you know from your dad what Columbia or Harvard were like in those days?

MR. KOPP: My other dad was able to pass that down to me more. I think one of the things looking back that I sort of feel very bad about is that my father talked all the time when they had friends over at home about law school, and since I was a young boy at the time, I didn’t even have an idea what law school was. I had heard what college was, but I didn’t have a clue as to what a law school was, not to speak of any appreciation of the stories that he was telling. Everybody agreed that he was a great storyteller, so all those wonderful anecdotes sort of just passed me completely by. My father was very famous among everyone who knew him for his humor and his ability to describe all sorts of interesting and amusing incidents.

MS. FEIGEN: So he graduated from law school.

MR. KOPP: When he was at law school, he developed a friendship with a colleague on the Law Review, and that colleague was Arnold Raum. Arnold was to become a major force in my life, because when my father died in 1953, a few years later,
Arnold became my step-father, which we can talk about in a few minutes.

My father’s sister was Hermione, another lawyer in the family. The extraordinary thing is that although everyone considered my father to be brilliant, and Arnold to be brilliant, Arnold certainly thought that Hermione was the most brilliant lawyer of them all. I suspect my father would have readily agreed if he had lived.

Hermione was never slowed down in terms of anything she did in her life by the fact that she was a woman. She went to law school. When she and her husband were stationed in Washington during World War II, she went to George Washington Law School, and then when they moved back to California, she finished up at USC and became a great lawyer. Her specialty was trusts and estates. She became very active in the California Bar Association, and there is an oral history of her that the Bar made which is absolutely fascinating. So I think one of the things that sort of influenced me growing up was that there were a number of really extraordinarily brilliant people in the family, more intelligent than I ever considered myself, and in hindsight, it probably gave me the ability to feel comfortable with people who were much, much smarter than I was, and that was very good preparation for the type of law practice that I was going to be involved in many years down the road.

MS. FEIGIN: Tell us about the practice that your father set up.

MR. KOPP: My father graduated from Harvard Law School in 1934.

MS. FEIGIN: This was in the midst of the Depression, and they were financially secure enough that he could pursue his education?
MR. KOPP: That’s right. He obtained a job in Los Angeles with the law firm of Loeb & Loeb, which was a big Jewish law firm.

MS. FEIGIN: Perhaps we should explain why there had to be Jewish law firms.

MR. KOPP: The legal business at the time was very much divided on the basis of religion—not to speak of race—which was sort of obvious to people of that era. Jews were not wanted at most of the big-time law firms, so they went out and formed their own law firms. Loeb & Loeb, as I understand it, was one of those firms in Los Angeles. With Loeb & Loeb, my father’s work included handling their accounts with the movie industry. In a few years, my father then moved from Loeb & Loeb to the MGM legal department, and he worked directly on behalf of that studio.

Now I guess we should back up at this point and talk about my mother because her family and her brother come into play in terms of my father’s development as a lawyer. So we’re now jumping to my mother’s side of the family. My mother, Violet Gang, was somebody who also, like on my father’s side, came from a Jewish family that strongly believed in the value of education. Her father was Adolph Gang, and her mother was Fannie Kopper, which is sort of an interesting coincidence considering that my mother married a man by the name of Kopp. Kopp and Kopper were completely different families.

Adolph Gang and his wife Fannie Kopper both left Eastern Europe as teenagers and came to this country before the turn of the century. I’m not sure whether they married in the United States or before they came to the United States, but they came here at the turn of the century, and they settled down
in Passaic, New Jersey, where Adolph operated a furniture store, and there the family had six children. My mother was the youngest in the family. In the 1920s – I’m not sure of the exact time, some time in the 1920s – they moved to Los Angeles. My mother, who was born in 1912, spent much of her life growing up and living in the Los Angeles area. Adolph lived until 1939. He died two years before I was born, so I never knew him. However, from everything that I’ve heard about him, he must have been an absolutely remarkable person. He was a strong believer in the value of education. He believed that it was really critical to getting on and surviving and advancing in the world. And he insisted that all of his children – five girls and one boy – had to be educated to as high a level as possible. His son, Martin Gang, received a very fine education. Martin went to Harvard College. He got a PhD at Heidelberg in Germany. He then went to Boalt Law School at Berkeley, and became a lawyer. Martin’s sisters were also given a college education. My mother didn’t want to go to college in California the way her sisters had. She wanted to go east and ended up at Wellesley.

MS. FEIGIN: We should add that Wellesley is another one of the Seven Sister Schools.

MR. KOPP: My mother’s father also not only was somebody who believed in education, he was also a very smart businessman, and somewhere in his life he must have earned enough money to carry out his ability to bring up his children with the type of support that he gave them. In New Jersey he ran a furniture store, and then when he moved to Los Angeles, he invested in real estate, and he made sure in his will that each of his children, including all his daughters, would get a large enough inheritance so that they could live comfortably after he died. He left a
house to each of his daughters because he felt that in this world, a woman needed a solid source of income to be able to survive on her own. While his daughters did marry, he was concerned that if they became widows, they would have the need to support themselves, so he provided for them by giving them the minimum base of a house that they could use and live in. Some of these houses were apartment houses so they could rent them out and have a good source of income.

As I mentioned, I never knew Adolph, although to some extent, in a family of very interesting people, he may well have been among the most interesting of them all. I don’t know whether he had a formal education or whether he taught himself, but he viewed himself as a writer with a knowledge of economics, and he must have acquired his skills somewhere. He wrote a series of pamphlets on economic topics, and this was during the Depression. He consolidated them all in a little booklet of about 150 pages or so called *Monetary Reform and Federal Insurance*. This was a book that he wrote which gave his thinking on the causes of the Depression and his proposals for how to solve it.

**MS. FEIGIN:** Did he self-publish?

**MR. KOPP:** I don’t know whether it was self-published or not. It was in the Library of Congress, and on the other hand, it wasn’t a big mass seller. I know my cousin, George Melnick who lived in Los Angeles, about every ten years or so happened to go to Washington, D.C., and he always made a point of going to the Library of Congress and signing out the book (laughter) so that it was a matter of official record that people were reading the book. I’ve browsed through the book, and it’s basically Adolph’s thinking on the causes of the Depression and how to solve it.
He attacks the gold standard, planned economics, communism, fascism, and he advocates a very broad version of social security. Adolph was not a shy person apparently, and he sent a copy of his draft to some of the economists and leaders in the country. He sent it to the Treasurer of the United States, the Chancellor of the Exchequer, and recipients of the book seemed to have taken the book quite seriously.

MS. FEIGIN: The Chancellor of the Exchequer in England?

MR. KOPP: In England. John Maynard Keynes wrote him back a note that said, “With the ideas underlying your central theme, I am in considerable sympathy.”

Roger Babson, who some of the people who are reading this may know, was the founder of the Babson Institute in Boston, replied to Adolph, “I agree almost 100% with what you say in the first 50 pages of the book.” Now the book was over 100 pages (laughter).

MS. FEIGIN: Either he didn’t read the rest or he didn’t agree with the rest (laughter).

MR. KOPP: Exactly. And looking at the book today, it sort of seems to be a combination of the utopianism that was very common in California in the 1930s and some very modern sensitivities where Adolph seems to hit upon the same things that are still at the center of our thinking today. For instance, he writes, “Organized society has become an institution chiefly for the making of laws and the protection of privilege and has failed to afford the individual the security which his deepest instincts demand.” He writes also in the book, “There should be compulsory life, health, old age, fire and accident insurance.” So Adolph hit upon a lot of the issues that we are grappling with today.
Now, returning to my mother. She graduated from Hollywood High School, which was her local public high school in Los Angeles. As I mentioned earlier, she did not want to go to college in California, and remarkably, her parents consented to her desire to go to Wellesley College in Massachusetts. It was quite extraordinary in 1930 for a West Coast girl to want to go east by herself to college.

MS. FEIGIN: It was probably a trek to get there. No planes.

MR. KOPP: It was a trek to get there, and no planes. She would go either by train, or at least on one occasion, she went by boat through the Panama Canal.

At Wellesley, she was assigned a roommate who was a brilliant girl only 14 years old, and that girl was Hermione Kopp, who was my father’s sister, the daughter of Frances and Harold Kopp. My mother dated on occasion a nice Harvard law student from Los Angeles, a gentleman called Louis Brown. Hermione introduced my mother to Hermione’s brother, Bob Kopp. The relationship developed only slowly, but after the women graduated, it turned out that Hermione married Louis Brown, and my mother married Hermione’s brother, Bob Kopp.

Now, as I mentioned earlier, my father went on after law school to practice law in Los Angeles, and he also, by marrying my mother, became close to her brother Martin Gang. Martin at this point becomes sort of a significant player in my family’s history because Martin at one point was in the law firm of Loeb & Loeb, which was the firm that my father also had been at. But Martin was unhappy in Loeb & Loeb and decided to strike out on his own and set up his own
law firm in Hollywood, and he asked Bob Kopp to join him as a partner. So they set up a law firm and then they picked up a third attorney, Norman Tyre. That firm became known as Gang, Kopp and Tyre, and because of the fact that Loeb & Loeb was a Hollywood law firm connected with the movie industry and the Schenck family was obviously a part of the movie industry, both Martin and my father had very strong Hollywood connections. They developed a very successful business as Hollywood lawyers and represented some of the very top Hollywood stars and writers at the time – people like Bob Hope, Gene Autry, Marilyn Monroe, Elizabeth Taylor, and many other people at that level. And the firm itself is still in existence and it’s thriving today. It’s now called Gang, Tyre, Ramer and Brown, with the Brown in the firm being Hermione Brown’s youngest son, Harold.

MS. FEIGIN: I can’t let you go on to the law without interrupting here and asking whether you yourself know, either through your family or your memory, do you have memories of these stars that would be interesting to share with us.

MR. KOPP: This gets to the point where I was told all these wonderful stories that went in one ear and out the other (laughter). What was remarkable about one aspect of my growing up is how little of what went on in certain environments sank in. I never really knew these big stars. There was a famous writer, Robert Ardrey, who lived on the same street we lived on, about three or four houses away, so I knew he was a good friend of my parents and had written books. But that was basically the extent of it. And I’m sure also I was introduced to some of these movie people,
but to a boy growing up, 10, 12 years old, none of this made much of an impression.

MS. FEIGIN: But Gene Autry was a cowboy! (laughter)

MR. KOPP: I know, but there were just some parts of my environment that I just wasn’t interested in. In hindsight, there were all sorts of interesting things that I missed.

But as I said, Gang, Tyre, Ramer and Brown is today an extraordinarily successful law firm, and for lawyers who are in private practice and reading this, they may be interested in knowing that one of the things that Martin Gang felt was essential and that the firm has carried on was that the size of the law firm must be limited. As I understand it, the law firm has always kept itself to under 15 attorneys. That’s a very interesting fact about this law firm which sort of seems like an anachronism today. But I guess if you have the right clients, it doesn’t matter.

MS. FEIGIN: We should probably talk a little more about Martin Gang because he became pretty well known as a lawyer himself.

MR. KOPP: Martin was a very significant Hollywood lawyer. As I mentioned, he represented a lot of the Hollywood stars, and he also became a center of quite a bit of controversy himself during the McCarthy Era. He was a lawyer who believed that his duty was to represent his clients’ interests. During the McCarthy Era, Hollywood was one of the central points of attack by people like McCarthy. The movie industry was very much on the defensive. They were very frightened of the McCarthy Committee, which developed a blacklist of people who were accused by the McCarthy Committee of being communists or communist
sympathizers. They couldn’t get work in Hollywood, and a lot of actors and writers were scared to death of the McCarthy Committee, and the Committee kept its focus on Hollywood which made life very unpleasant.

People in Hollywood without any communist sympathies at all found themselves on the blacklist. It was an era that, looking back at it, was one of the low points in American history. So my uncle Martin Gang was there with a clientele consisting of actors and writers who were being made uncomfortable and called as witnesses before the McCarthy Committee, and Martin Gang’s approach to his job was to represent the people that came to him. He would ask his clients, “Well, did you do anything wrong?” and they would say “No,” and he would say, “Well you should go before the Committee and tell the truth.” And so he advised them to go and testify, and he said since you didn’t do anything wrong, you shouldn’t take the Fifth Amendment. Well this, in fact, became a very controversial thing in Hollywood because by telling the truth and not taking the Fifth Amendment, a good number of these people ended up naming names and answering questions the Committee asked them. This made the Committee’s net in terms of people it was interested in wider and wider. So Martin’s practice became very controversial within Hollywood. But he viewed himself as doing what a good lawyer would do when taking his client’s interests to heart and giving them the representation they deserved.

People who didn’t want that style of representation went to other lawyers. So he became known as sort of the person that you go to if you were going to simply go there and answer the Committee’s questions. I’m sure that with time
Martin knew that what he was doing was quite controversial, but that didn’t bother him. There’s an anecdote told in several places that at one point he went to some party in Hollywood, and there were 20 or 30 people in the room, actors and writers, and he went into the room and looked about him, and he said to his host, “I got every one of those sons of a bitches off” (laughter). So that was my uncle Martin at that stage in the development of his law practice.

MS. FEIGIN: That jumped ahead to the McCarthy Era. What happened to the law firm during World War II?

MR. KOPP: The war, of course, interrupted everybody’s life, and as we discussed earlier, I was born in 1941, November 29 to be exact, and for the adults in the world, and particularly Jewish adults at the time, 1940-1941 were horrible and terrifying years, even if you lived in the United States. In 1940, my aunt Hermione Brown, who I have mentioned, had a baby boy, my cousin Larry, and Hermione, in the oral history she gave to the California Bar, relates that when her father, Harold Kopp, learned that she was pregnant, he became terribly upset, and he didn’t talk to her for nine months, because he felt that it was absolutely wrong, with Hitler in power and all the awful things that were happening in Europe, it was just wrong to be bringing a child into the world. By the time I was born on November 29, 1941, apparently he had calmed down somewhat because there are no stories with respect to his being unhappy with my being born, and in fact, during much of the war years, my mother and I ended up living with my grandfather and my grandmother Frances, and they provided a loving home to the two of us.
Meanwhile, with the coming of the war, my step-father was working in the Department of Justice in Washington, D.C., and by that time, he was a Deputy Solicitor General. In fact, he was the Deputy Solicitor General, and on Sunday, December 7, 1941, as he often did, he was working over the weekend and was alone in his office. Apparently he was the highest-ranking person in the Department of Justice building that day, and he got a phone call. It was from an admiral in the Navy who asked to speak to the Attorney General, and my step-father said that the Attorney General wasn’t there and that he was the top official in the building at the time, was there a message he could take, and the admiral said, “Yes. Please tell the Attorney General that the nation is at war.”

MS. FEIGIN: Unbelievable. People down the road will not, I think, be able to comprehend that there was no way to access somebody other than at his desk (laughter). Just to make this clear in terms of your history, at this point he was not your step-father.

MR. KOPP: No, he was not my step-father, and of course I was only eight days old.

MS. FEIGIN: I just don’t want to get that part of your life confused. So what happened to the law firm and your dad during World War II?

MR. KOPP: The law firm continued, but my father joined the Army, or I guess what actually today would be considered the Air Force, and the military sent him to be educated at UCLA to be a weatherman. After he was taught how to study the weather, he was assigned overseas and served in Greenland. That was at the time of the Normandy invasion, and I have no idea whether he personally played a role or not in terms of predicting the weather at the time of the Normandy invasion, but as I understand it, places like Greenland were giving significant input into the decision
about the weather that was made at that time, and so I like to think that he was involved in the judgment decisions that were made in evaluating the weather and Eisenhower’s decision as to whether the Normandy invasion should go ahead or not. It’s one of those things I’ll never know, whether he had a personal role or not. He really didn’t talk much about the war after he returned, and probably given how I missed so many important stories, I probably wouldn’t have remembered had he discussed it.

In any event, after the war, he returned to the practice of law and to the firm of Gang, Kopp and Tyre, and for a few years before he got sick, he was a critical part of that law firm. I remember that they were located at Hollywood and Vine. Part of the reason I remember that is that when I had to get braces, there was a dentist located in the same building at Hollywood and Vine.

MS. FEIGIN: We should probably say, because this may not be true down the road, that that was the key corner in Hollywood.

MR. KOPP: Hollywood and Vine became the symbol of Hollywood. I do remember a couple of times visiting the law firm. I think my dentist’s office was on the 12th floor and I sort of remember the law firm was probably on the 7th floor, and I do remember that there were books strewn all over the place and it was sort of a mess (laughter). At some point at that time, another partner joined the law firm – Hermione Brown, who was my father’s sister. Hermione in her own oral history writes that her joining the law firm actually created a mini family crisis for her because her husband, Louis, was a lawyer in a significant law firm, and when his law firm heard that she was going to become a practicing lawyer in another law
firm, they said, “Well, if she’s going to practice law, then you can’t be in our law
firm.” So Hermione’s husband Louis said, “Well then that’s fine. I’m leaving.”
Hermione joined the firm that became Gang, Tyre, and Brown, and her husband
Louis moved over to a different firm, Irell and Manella.

MS. FEIGIN: That’s one, I think, we’ll find of many examples of feminism in your family
history, leading all the way through to you. But that is to come. Do you want to
continue at this point, or is this a good point to break?

MR. KOPP: We’re about half-way.

MS. FEIGIN: Half-way to the beginning of your career? Okay, we’ll finish this part of the
family history next time and then move on to how you continued on to the family
business of law. Thank you very much.

MR. KOPP: Thank you. This was fun.
ORAL HISTORY OF ROBERT KOPP

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 Judy Feigin, and the interviewee is Robert Kopp. The interview took place at the home of Robert Kopp in Bethesda, Maryland on Thursday, August 15, 2013. This is the second interview.

MS. FEIGIN: Good afternoon.

MR. KOPP: Good afternoon.

MS. FEIGIN: When we left off last time, your aunt had just, in a very feminist way, joined a law firm, and her husband had stepped aside, and we’re now ready to move onto the next part of your history.

MR. KOPP: The next significant part of my history, and in a way I think the most significant event in my life, was that in 1953 my father died of leukemia at the age of 41, and this was clearly a huge trauma for me, not to speak of for my mother and my grandmother. Fortunately, I was part of a large, close-knit family on both my father’s side and my mother’s side, and that helped us get through that very difficult period. Also my father, almost with a sense of knowing what the future might bring, was quite prescient back in 1936 when he and my mother got married, because he felt that she had to have an occupational skill. He insisted that she go to law school because he was concerned that at some point in her life she might have to support herself on her own. At that time, he had no idea that he had leukemia, but 15 years later, that proved to be absolutely critical. So she applied and got into USC law school in Los Angeles, which did admit women, and she graduated on the Law Review and number two in her class.

MS. FEIGIN: Do you have any idea how many women were in her class?
I think there were maybe four or five. Not a large number, but USC did admit women and was one of the relatively small number of law schools in the country at that time which did do so. George Washington University also did so, very important in terms of my Aunt Hermione’s education. But women going to law school in those days was quite rare.

So she graduated from USC, and then along came World War II, and she was able to get a job in the District Attorney’s Office in Los Angeles. But for her, it was not a very pleasant experience. She had to endure what today we would consider to be a type of sexual harassment that would get a superior officer discharged. Her boss would chase her around. She just had very unpleasant experiences and memories of that. When my father returned at the end of the war, she was very happy to stop practicing law. But once he realized that he was dying, he insisted that she resume the practice of law. Fortunately the family now had a law firm, Gang, Kopp and Tyre, so she started to go to work again and worked at Gang, Kopp and Tyre. She thus was back into the practice of law at the time that he died in 1953. It was something that was very important to her at the time, not merely because it brought in some money, but emotionally it kept her preoccupied during what was obviously the worst period of her life. But she hated it. She did not like law practice, and after she remarried and moved to Washington and lived in a world filled with lawyers, she had no need to practice law, and she let her bar license lapse.

We should say that by the time your father died, she was the mother of three.
MR. KOPP: Yes, she was the mother of three. I had two younger sisters, so when we moved to Washington, DC, my stepfather was married not simply to my mother, but a family of three, consisting of me in the midst of being a teenager and my younger sisters who would be at that stage in a few years, and for him, it was a shock (laughter) in a very different way.

I had mentioned earlier that my stepfather, Arnold Raum, had been a law school classmate of my father, Bob Kopp. Arnold had grown up in Massachusetts, and he was the son of poor immigrant Jews and had grown up in a part of the state where religious tensions were considerable.

MS. FEIGIN: How so?

MR. KOPP: He remembered that when he would go home from school, there was always a gang of Catholic boys that you had to watch out for while you were on the street and if they caught you, you’d get beaten up. Those were some of his less pleasant childhood memories, and I think when he applied to college, he was also at that stage sensitive to the fact that there were quotas in terms of the number of Jews that schools would take. It was sort of well-known, for instance, that Harvard College had quotas on the number of Jews it would admit. However, he was sufficiently smart that he did get into Harvard, and in fact academically he did very well, graduating summa cum laude. But he always thought his experience at Harvard was a very mixed experience. Academically, obviously, he did well, but he bridled at the discrimination that he perceived against Jews and people who were poor.
MS. FEIGIN: I think people down the road may not understand that many of the Ivies were gender-segregated. Were there only males at Harvard, and was Radcliffe entirely separate, or had they integrated by that time?

MR. KOPP: Radcliffe at the time was entirely separate, I believe, although I haven’t looked this up. It was physically on the campus that it was on when I was at Harvard which was separated by quite a few blocks from the Harvard yard, and it really was a separate institution.

So my stepfather got into Harvard Law School which he liked and thrived in that environment. He was on the law review. One of his colleagues on the law review was my father, Bob Kopp, and they stayed in touch after graduating from law school, and that was one of the reasons that Arnold was in touch with my mother after my father died. When Arnold was in law school, he knew a good number of members of his class who were eventually to go into government to work in the New Deal, and he was very close to Professor Felix Frankfurter.

MS. FEIGIN: Can you tell us any stories about Felix Frankfurter from that era?

MR. KOPP: Frankfurter was somebody who was always very sure of himself. At one point, and I’m not sure if it was when my stepfather was at Harvard or shortly afterward, he decided to write a completely made-up article and give it to Frankfurter. Whether it was a law review article or something else I’m not sure, but it was a completely made-up article by my stepfather, and he brought it in to Frankfurter and said, “I just discovered this very interesting article (laughter). Can you take a look at it and tell me what you think?” So Frankfurter went over the article and was very impressed by it and said, “This is really interesting. Maybe I should
look into it further.” And then my stepfather told him it was a gag. My stepfather liked the idea of goading Frankfurter a little in terms of his own view of himself.

MS. FEIGIN: Frankfurter was on the faculty then?

MR. KOPP: Yes.

MS. FEIGIN: And you said your stepfather was also friends with several people who became prominent in the government. Tell us what they did.

MR. KOPP: When he came to Washington, he moved into an apartment house on Q Street, and he had roommates who basically were people whom Professor Frankfurter had encouraged to come to Washington and look for jobs in the New Deal, although my stepfather came to Washington actually at the end of the Hoover administration. These graduates recommended by Frankfurter kept coming to Washington, and my father moved into a house on Q Street with some of them, and that included people like Robert Stern, Phil Elman and Paul Freund, all of whom ended up like my father in the Solicitor General’s Office. There were others, and I don’t know whether they actually lived in the Q Street house or not, people like Abe Fortas and David Kreeger, who worked on the legal side of the New Deal at the time, and who were socially part of the Q Street group.

MS. FEIGIN: We should say who David Kreeger was.

MR. KOPP: David Kreeger is a whole big story in himself. He went into the government and was in the SG’s Office for a while. He then came to the Civil Division, and during World War II he was head of a small unit of about five attorneys in the Civil Division which handled appeals. That unit eventually became the Appellate Section and then the Appellate Staff of the Civil Division.
Kreeger decided he saw a good investment out in the business field in a company called GEICO and so he took all the funds he had, plus he borrowed, and made a very large investment in GEICO. GEICO essentially for forty or fifty years or so was a terribly profitable company, and Kreeger became very rich, and for those of you who don’t live in the Washington area, you should know that he ended up living in a very nice house which he contemplated would be an art museum and he filled it with art, and it did in fact become the Kreeger Museum.

MS. FEIGIN: Skipping around a little bit, but because of Arnold Raum becoming your stepfather, did you get to know some of these people as part of your stepfather’s social world?

MR. KOPP: Yes, I met them, and I had this unfortunate characteristic of meeting my stepfather’s friends and seeing them occasionally, and very few of them, however, actually became part of my world. There were a couple that I became close to. John Pickering, for instance, was a close friend of my stepfather’s and we became very close. My wife and I became very close to John and then his daughter Leslie, so that was something that actually did sort of have an impact on my social life. But most of the time I would just meet these very interesting people, and I met Kreeger a few times, and it didn’t really impact my life much, and now of course I’m very sorry.

MS. FEIGIN: Did you interact with Frankfurter at all?

MR. KOPP: No.

MS. FEIGIN: We should say who Pickering is.
MR. KOPP: John Pickering was one of the founders of a law firm which became Wilmer, Cutler & Pickering, and now has merged and become a super law firm, Wilmer Cutler Hale & Dorr. It has over a thousand attorneys and is a very different place than it was when John Pickering became one of the founders.

MS. FEIGIN: But it was a big player in D.C. Did you interact at all with Abe Fortas?

MR. KOPP: No, I just heard stories about him, and in particular, his wife, Carolyn Agger, because she was, according to my stepfather, one very tough lady and she was the type of woman who would go around and physically wrestle anybody and win (laughter). She was a real powerhouse in terms of whatever she did.

MS. FEIGIN: She was a lawyer too.

MR. KOPP: Yes, she was a lawyer too, and I gather a very successful one.

MS. FEIGIN: Any stories you can share about Abe Fortas himself?

MR. KOPP: Not really. I never actually met Fortas, and of course his time on the Supreme Court was cut short by his own behavior.

MS. FEIGIN: So back to your stepfather.

MR. KOPP: After he graduated from law school, my stepfather got a job with the Reconstruction Finance Corporation. I’m not sure that he necessarily came to Washington because he was interested in working in government. He came in 1932 when we were still in the Hoover administration. He was a strong Roosevelt Democrat so there wouldn’t have been anything in the Hoover administration that would have attracted him, but it was very hard for Jews in those days to get into the top law firms, so I suspect that the reason that he came to Washington was that the government didn’t present any barriers. He got a job at the
Reconstruction Finance Corporation, and then a year later moved over to the Tax Division of the Department of Justice.

MS. FEIGIN: The government didn’t have religious barriers, but it did have racial barriers.

MR. KOPP: There were racial barriers, and I don’t know whether people even thought about having barriers based on sex in 1933; there just were at that time no women lawyers around. Some of them began to come into the Department during World War II when all sorts of positions opened up to women, and the government really never had the barriers and the obstacles to women that were out there in private practice. In 1932, barriers even for men existed, unless you were in certain social or religious circles.

MS. FEIGIN: So here he is working for Reconstruction Finance, and then what happened?

MR. KOPP: In 1933 he was hired by the Tax Division, and so he went there, and then in 1939, he moved on to the Solicitor General’s Office where he after a few years became the Principal Assistant to the Solicitor General.

While he was in the Tax Division, he argued cases in the courts of appeals. In those days, the Solicitor General’s Office was very small. It consisted in the neighborhood of five or six attorneys and used attorneys in the Divisions on Supreme Court briefs. So my stepfather was often assigned to argue Supreme Court cases, and in 1935, in fact while still in the Tax Division, he had a case that was the first case ever argued in the Supreme Court building which was then brand new. I never knew that until fifty years later they had a ceremony commemorating the Supreme Court building and a picture of him there, so then he told me about it.
MS. FEIGIN: What were some of the significant cases he argued in the Court?

MR. KOPP: I think he told me that he argued something like 50 cases or so in the Supreme Court during his career in the Department. I’m not sure of the exact number. I know these days it’s dwarfed by people like Larry Wallace who have argued well over a hundred cases, but at the time, I think it was probably one of the larger number of arguments that had ever been made in the Supreme Court. Since he was an expert in tax law, being in the Tax Division, and some of the most important New Deal cases involved tax law and came up from the Tax Division, he was involved in cases like the challenges to the constitutionality of the Social Security Act, which included *Helvering v. Davis* in 1937, where he wrote a substantial portion of the brief, and the companion case, *Steward Machine Company v. Davis*. The Court, of course, did uphold the constitutionality of the Social Security Act, and my stepfather always viewed that as one of the proudest accomplishments of his career.

One of the things I kept saying to myself a few years ago when I was working on the healthcare litigation involving the constitutionality of the Affordable Care Act was that I felt that I was sort of treading in my stepfather’s footsteps and I hoped that the result will prove to be as successful as was his work on the Social Security Act.

MS. FEIGIN: He also did some interesting prosecutions outside the Supreme Court. Would you tell us about some of those?

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MR. KOPP: Yes. In the 1930s, Huey Long was essentially the boss of the State of Louisiana, and then in 1935, he was assassinated. The federal government began to look into the corruption that what was called “Long’s Gang” had brought to Louisiana as he had had strong influence in terms of getting many of those people into very high positions in the state. My stepfather in 1939 was assigned to look into whether any crimes had been committed, and he ended up having a grand jury bring indictments against a former governor of Louisiana, the president of LSU [Louisiana State University], and other significant individuals in the state. The governor and the head of LSU ended up in prison as a result.

MS. FEIGIN: Were these tax crimes?

MR. KOPP: As I understand it, basically the tax law was one of the key elements of being able to establish a violation of criminal law. I don’t know whether that was the litigation that started the use of tax law as a way to successfully prosecute criminals, but it obviously was one of the ones where the Tax Code was very helpful.

After my stepfather returned to Washington, he was transferred to the Solicitor General’s Office. World War II then came along, and attorneys in the Department of Justice who had been defending the New Deal now found themselves defending the war effort. Part of what the government and the Justice Department was defending was the mass removal of Americans of Japanese ancestry from their homes, and my stepfather worked on and played a key role in the very greatly criticized Japanese exclusion cases, Hirabayashi\(^3\) and

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\(^3\) Hirabayashi v. United States, 320 U.S. 81 (1943).
Korematsu. It’s safe to say that those decisions, as well as the government’s litigation strategy which my stepfather was involved in, have not stood up well under the test of time. Korematsu and Hirabayashi are obviously today viewed as contrary to what we think are our basic principles. But he was part of the government’s legal effort and he had to live with the criticism.

MS. FEIGIN: Did he argue the cases?

MR. KOPP: No.

MS. FEIGIN: Did you get to talk to him about how he viewed it in retrospect?

MR. KOPP: As a practice in our family, we found it very difficult to argue with my stepfather. He was a judge, and actually he sort of had the type of personality where he was a judge even outside the courtroom, and if you therefore argued too hard, he would essentially do the equivalent of bringing down the gavel and you wouldn’t get anywhere. So in our family we generally didn’t argue much with him. But once in a while the Japanese exclusion cases would come up in discussion and then our family would give him a lot of flak. I remember in the earlier times when they came up that he would defend the result in those cases and explain that in war when you are faced with an imminent danger, there are things you had to do that you couldn’t do elsewhere. But his view of those cases began to change I think as he got older, and in later discussions, he refined his position to being that as a government lawyer you had to provide the best argument you could for your governmental client. So I think with the passage of time he began to change his views on the merits of those cases.

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MS. FEIGIN: That leads to the obvious question that you as a career government attorney had to have had cases which might have been difficult. What was your view on that kind of thing, if at the time you had problems?

MR. KOPP: When I first came to the Department of Justice in the late 1960s, Hirabayashi and Korematsu seemed so foreign to me. But we in our office got involved in, of course, defending the government in terms of the legal principles in the various wars that it was involved in during my career, and I began to realize that sometimes you get into these cases and not only can they be very controversial, but you keep hoping that history isn’t going to prove you wrong and that you end up being on the wrong side in terms of the judgment of history.

In our office, we have been involved, for instance, in the Guantanamo litigation. Awareness of my stepfather’s experience made me sensitive to the fact that I hoped we were doing the right thing in terms of defending the government’s position and that we were presenting the best arguments that we could and that the judgment of history would be that that’s something that the government legitimately had to do to protect the public. It seemed to me that being a government lawyer and representing the government position, that’s part of the job and that you have to do the best you can and hopefully be able to shape the government’s position in a way where it does in fact stand not only among contemporaries but in history as well.

MS. FEIGIN: We’ll probably get to some cases that you may have shaped in certain ways, but just as a proposition, did you ever decline to work on a case because you felt uncomfortable with the position the government was taking?
MR. KOPP: There were actually very few that I did, and part of it was that by the time some of
the most controversial of these cases did come up, I was more a manager than just
an attorney arguing a case. As a manager, my job was to make sure that the work
in our office was properly assigned and staffed. If I was asking one of my
attorneys to work on a case, it seemed to me that there was a very strong
presumption against my then saying well, I can’t help in terms of your work on a
case although I’m the one, after all, who asked you to work on the case. So I
really didn’t recuse myself on some of the litigation which a lot of my friends
outside the government found to be very unattractive litigation.

MS. FEIGIN: Getting back to your stepfather. Before we have him leaving the SG’s office,
were there any other cases you want to bring up that he worked on?

MR. KOPP: Well, he was extremely proud of what he did in a case called the United States v.
California⁵ in the Supreme Court which involved whether state governments had
title to tidelands. The Supreme Court held that the land belonged to the federal
government and therefore things like the oil royalties belonged to the federal
government, not the states. I found in my stepfather’s papers an article he kept
from a newspaper dating from around 1990 which said that with the passage of
time, that decision had led to the United States collecting more than $100 billion
in royalties, and he wrote a little note that said that he feels he made a significant
contribution to reducing the public debt (laughter).

He was also involved in the landmark civil rights case in 1947 of Shelley v.
Kraemer⁶ where the Supreme Court held the judicial enforcement of racial

exclusions in real estate violated the Fourteenth Amendment, and that decision was one of the key decisions in a series of cases that led up to Brown v. Bd. of Education.

MS. FEIGIN: Did he ever talk about the politics of that case or how the government came to take its position?

MR. KOPP: No, he didn’t, and actually I hadn’t known of his involvement in it until I was doing some research online and came across a very interesting episode involving my stepfather and Shelley v. Kraemer. It was something that Justice Ginsburg talked about in a speech. Phil Elman, who worked in the Solicitor General’s Office and was the number two person when my stepfather was the number one person, writes about it in his book, and it’s picked up by a lot of people. It’s an episode that is very illustrative of how far as a country we have travelled since 1947. In that case, the United States filed an amicus brief in support of the black families represented by Thurgood Marshall who were being evicted from their homes due to racial exclusions. And that was a subject my father was personally very sensitive on. He was very disturbed by the racial and religious covenants on property which were widespread at the time in the Washington area and barred blacks and Jews from purchasing real estate.

The brief in Shelley was drafted by Phil Elman in the Solicitor General’s Office and three other attorneys. Consistent with the Office’s tradition, in addition to the name of the Solicitor General, who was Phil Perlman, the draft cover page of the brief included the names of the four attorneys who had worked on the case. Since the case was so important, it also included on the cover page
the name of the Attorney General, Tom Clark. My stepfather, who read over the brief, noted to Phil Elman that all four attorneys working on the brief happened to be Jewish, and he said to Elman, “It’s bad enough that Solicitor General Perlman’s name has to be on it, to have one Jew’s name on the brief, but you have also put four more Jewish names on it. That makes it look as if a bunch of Jewish lawyers in the Department of Justice put out this brief.” So he crossed out all the names on the brief except for that of Attorney General Clark and Solicitor General Perlman. And that episode, I think, just shows you how different a world it was back in 1947.

In the Truman administration, my stepfather had been considered as a candidate for appointment to the D.C. Circuit, but he was competing with another Justice Department official, David Bazelon, and Bazelon was the individual who got nominated and appointed to that position. Looking back, it’s interesting to speculate on how the law in the country and the D.C. Circuit would have developed had my stepfather been appointed instead of Judge Bazelon. While my stepfather was a New Dealer, he was in many respects quite conservative. Sometimes around the house he said in the privacy of his own home what he thought of some of Bazelon’s opinions. My stepfather would have been a very different D.C. Circuit judge than Judge Bazelon.

MS. FEIGIN: Did he ever talk about the politics of that appointment, how it came to be that he lost out to Judge Bazelon?

MR. KOPP: He did say that he wasn’t very good at building alliances and winning supporters as was Bazelon. And I think, since I knew him well, that’s easy to see because he
was much more of a take-it-or-leave-it type of person in terms of personal relationships. It can help a nominee to have political as well as legal skills, and he wasn’t really very good at doing things that required him to win support.

MS. FEIGN: Were he and/or your mother politically active?

MR. KOPP: I knew him only when he was a judge. After losing out for the position that went to Bazelon, my stepfather was nominated by President Truman to the Tax Court, and he was confirmed and began his service in 1950 and served on that Court for 48 years until his death in 1998. Although he took senior status in 1976, he continued virtually full time until his death in 1998. In the 48 very prolific years that he was on the Tax Court bench, he was a key force in the development of the tax law.

MS. FEIGN: Are there any cases that you think are worth mentioning from that era?

MR. KOPP: Since I’m not a tax practitioner, I’d hate to go into that. I know that at some of the receptions that I would go to in his honor, his colleagues and other people who practiced tax law would be very flattering in terms of what they would say about him and his influence on the law, and he won many citations and honors during his career as a judge.

MS. FEIGN: So I guess we should talk a little bit about him and your mother.

MR. KOPP: My mother started dating Arnold Raum after my father died in 1953. The Tax Court, while it’s based in Washington, is one of those courts where the judges go out and ride circuit, and so my stepfather was often assigned calendars in Los Angeles, and that sort of assisted the dating relationship.
MS. FEIGIN: Kind of what happened with you and your wife down the road. But we’ll get to that (laughter).

MR. KOPP: And in 1957 they got married and our family moved to Washington, D.C.

MS. FEIGIN: What was your reaction to that?

MR. KOPP: Well at the time, I was in high school, in the middle of 11th grade, and I was quite satisfied with the high school in Los Angeles that I was in, so I wasn’t terribly happy to begin a new semester with a move to Washington. My mother and my stepfather were quite nervous about how I and my sisters would react to the move, not to speak of also having a brand new stepfather just a few years after the death of our father. They enrolled me in the local high school in Washington, D.C., which was Western High School. Western was a fine high school. It many years later became a special school for the arts. When I moved to Washington in 1957, it was one of the top high schools in the city, and both of my sisters after me went to it and they got a very good education there. However, I was a boy, and in 1957, all D.C. high schools had a rule that male students were required to take Junior ROTC [Reserve Officers Training Corps]. So when I got to Western, I found myself spending an hour a day in ROTC which looked to me like it was strict military training, and I had never experienced anything like that. When I had been in high school in California, no one there had thought that military training was important enough to be a required subject in high school, and I was not terribly happy about taking that course. My parents were very concerned about my reaction. In those days, one could transfer from the District of Columbia school system to Montgomery County school system by paying $500,
and my parents decided that it was worth the $500 to make that move and keep me happy. So I ended up going to Bethesda Chevy Chase High School, which is actually not terribly far from where I live today in Bethesda.

MS. FEIGIN: I understand from the family lore that there was a bit of a bribe to you to get you to move to D.C.

MR. KOPP: Yes. As I said, I was not very happy about the move to Washington, and my uncle Martin Gang talked to my mother and they decided that it would make things easier for me in the move if we had a color television, which was not common in 1957.

MS. FEIGIN: I would just interject here to say that I myself did not have one until the 1970s, so that was quite a novelty.

MR. KOPP: So the color TV did help a little bit (laughter), although it turned out that was a stage in my life where I actually was starting to watch less and less of television, and it probably ended up being something that my sisters actually appreciated more than I did.

MS. FEIGIN: We should also say, for putting this in historic context, in those days most shows were not telecast in color, and if they were, my recollection is, and correct me if I’m wrong, that it was specially noted in the TV section because it was unusual. So even having one you did not see that many shows in color.

MR. KOPP: That’s right.

MS. FEIGIN: Do you want to talk a little about life in D.C., or would you like to use this as a stopping point?

MR. KOPP: I think we might as well stop at this point.
MS. FEIGIN: Okay. Next time we’ll pick up with life in D.C. and on to your career. Thank you very much.
MS. FEIGIN: Good morning.

MR. KOPP: Good morning.

MS. FEIGIN: When we left off, you were just about to start at BCC [Bethesda Chevy Chase High School]. But before we continue with your teenage years, I want to backtrack to learn just a little bit more about your stepdad. Two things: One is, you told us that he had been considered for the position that Judge Bazelon ultimately got on the D.C. Circuit, and what a difference that would have made to the Court. I wonder whether you yourself had any interaction with Judge Bazelon.

MR. KOPP: After Judge Bazelon became a judge, my stepfather did on occasion get invited to social events where Judge Bazelon was present, and so I did meet Judge Bazelon a few times socially. It was once every five years or so, and the first couple of times, he always was very cordial to me, but I do remember the last time, which was in the early 1970s, when Judge Bazelon was striking down a lot of government positions. The Nixon administration was challenging him on issues that were very near and dear to him in the area of criminal law and rights of defendants. I met Judge Bazelon at some affair, and my stepfather introduced him to me because he had completely forgotten who I was, quite understandably. The judge asked me what I was doing, and I said I was an attorney in the
Department of Justice, and he said, “Oh, I’m sorry to hear that” (laughter). I never quite figured out whether that was intended to be funny or not.

MS. FEIGIN: Second, in terms of other judges and judicial figures that your stepfather knew, I can’t help but noticing that in your den, there is a whole series of pictures of Supreme Court Justices with inscriptions – à la Hollywood pictures – to your stepdad. I wonder if you can tell us a little about those.

MR. KOPP: My stepfather argued more than fifty cases in the Supreme Court, and he became well known to the Justices over the fifteen years that he was with the Department of Justice. He also knew several people well from his time in the Executive Branch who became Supreme Court Justices. He had been particularly close, I think, to Justice Jackson and to Justice Reed. Both Jackson and Reed had been Solicitors General, and Justice Reed entered government in the Reconstruction Finance Corporation in 1932, which was the same agency where my stepfather himself entered the government. Reed went to the Justice Department, and my stepfather went to the Justice Department, and Reed was Solicitor General and worked very closely with the Tax Division where my stepfather was.

In addition to the picture of Justice Reed, I have a picture of a group of attorneys in the Department of Justice, including my stepfather, sitting around a long table bidding Stanley Reed farewell as Solicitor General when he was headed from the Justice Department to the Supreme Court. Although my stepfather didn’t talk to me much about Justice Reed, I think he was quite close to Reed when Reed was in the Department of Justice. I know my stepfather was close to Justice Jackson when he was Solicitor General as during that period my
stepfather was Deputy Solicitor General, what today would be called the Principal Deputy Solicitor General, and then Jackson became Attorney General. Before that Jackson had been Assistant Attorney General for the Tax Division when my stepfather was in the Tax Division. So the picture that is signed by Justice Jackson was quite meaningful to my stepfather.

In addition, there are in this collection two pictures of Justice Brandeis, one of which is from a death mask made after he died, and the other is a picture of him as a Supreme Court Justice. There’s also a picture of Justice Cardozo, and I think that those pictures are there because my stepfather felt very close to them just because of the fact that my stepfather was Jewish and they were Jewish Justices. I think, particularly in a world where there was a lot of discrimination against Jewish lawyers by the bar, that those two Justices felt particularly meaningful to him. Of course my stepfather does have a picture of Justice Frankfurter as well because as I mentioned in one of the earlier sessions, my stepfather had been close to Frankfurter at law school, and Frankfurter had recommended my stepfather for employment in the Roosevelt administration, and my stepfather was one of the attorneys that were called the “Frankfurter Boys” by the press at the time. So obviously at that time my stepfather had a close relationship with Frankfurter as a professor.

MS. FEIGIN: Did you interact with any of these Justices on a social level through your stepfather?

MR. KOPP: No. I never met Supreme Court Justices through him. I did meet several Court of Appeals judges because of him. As I mentioned, my stepfather had known Judge
Bazelon. My stepfather had also been quite close at one point to Judge Leventhal, and I did meet Leventhal socially a few times. The result was that when I did end up eventually in the Justice Department and arguing a few cases before Leventhal, I was always scared to death at the argument because I had this suspicion that if I made a mistake that somehow it might get back to my stepfather (laughter).

MS. FEIGIN: I assume that didn’t happen.

MR. KOPP: No. Actually one of the arguments that gave me most pleasure was an argument on an absolutely incomprehensible subject involving an oil company. The case was extremely technical and esoteric. Knowing first of all that it was a very difficult and technical area that I didn’t know anything about, and secondly, that it was in the D.C. Circuit where the judges were very smart, I prepared extremely hard for the argument and learned all sorts of things that I proceeded to forget within five minutes after the argument. But I think I was more prepared for that argument than I ever was, and it turned out that Judge Leventhal was on the panel, and it was just in fact a wonderful argument for me to give because he was about the only person in the world who could understand the topic. We had a conversation at a level in the court, the type of level that in theory you’re supposed to have but rarely ever happens, in terms of being the type of back-and-forth discussion that happens in a very good argument.

MS. FEIGIN: Is there anything before we leave these judges and Justices that you know about them from your stepdad that you would like to share with us, either personally or professionally, things he commented about?
MR. KOPP: As I indicated earlier, when my stepfather had a chance of becoming a Court of Appeals Judge and lost out to Judge Bazelon and ended up on the Tax Court, he became, with respect to cases in the D.C. Circuit and the Supreme Court, an observer as opposed to actually being a Court of Appeals judge. But the fact that he was an observer didn’t mean that around the house he didn’t have his own opinions of how judges and justices on those courts were ruling. I am not talking about tax law, on which he was very circumspect, but matters outside his jurisdiction.

I may have mentioned earlier that while my stepfather came up through a New Deal liberal background, he actually was very conservative in many areas, and he did not agree with some of the most liberal justices and judges who were well known at the time. For instance, he was very much of a different mindset than Judge Bazelon and Judge Wright on the D.C. Circuit. He did not think much of the opinions in the 1960s and 1970s of Justice Douglas. He was by that time sort of in the camp of people who when they were younger were considered liberal but professionally had become conservative in their older years. It could be that they didn’t change, the world just moved on, but it was very noticeable certainly in the private discussions in our home what he thought of the legal evolution at the time. I should add that I’m sure that since he had very strong opinions, he probably would have had many disagreements with the conservative side of the court as well because I think he always considered himself a liberal in the old sense. He really was somebody with his own opinions.
MS. FEIGIN: Back to teenage you. When we left off earlier, you were just starting high school. Give us the sense of what D.C. was like. You came here from California at a time when I believe the city was quite segregated, and probably very different from California in lots of ways. Can you give us a sense of what D.C. was like at the time?

MR. KOPP: We lived in Northwest Washington, west of the park, which was a very wealthy area and was a very white area. When I was a teenager, I went through life not looking too much beyond my own situation, so I was often quite insensitive to evolution in the areas of how people interacted in a broader sense. I wasn’t a social observer, but I did notice coming from West L.A., which even though it had its very wealthy areas, actually had at that time a good amount of integration. It did seem to me that the East – the parts of it where I was – was a much whiter place than L.A. had been. When I went to BCC, the school had only recently had any integration, so it was very noticeable even to me that it was a very white place at the time. I think looking back from today, we just live in a totally different, and I think in this respect a better world, than we had at that time. Diversity really was a foreign concept back in the Washington of the late 1950s and early 1960s.

MS. FEIGIN: Was there tension?

MR. KOPP: Again, I didn’t look at the broader social context of Washington, and in the narrow confines I lived, I didn’t see really that much social tension. But of course this was the late 1950s, and we read about it in the newspapers and read about what was going on in the South. At one point after we had moved to Washington, we went down for a visit to Williamsburg, it was about 1957 or 1958, and I was
shocked to go to Williamsburg and see that they still had segregated restrooms. I
don’t know whether they were actually segregated or they just hadn’t gotten
around to changing the signs on the doors, but that was a shock for me to see that
there were these types of overt signs of major discrimination.

MS. FEIGIN: What was high school like for you?

MR. KOPP: I found BCC to be a great high school for me, basically because while I had a
number of teachers who were not that exciting, I did have a few extraordinarily
great teachers. One teacher that I will always remember was an English teacher
named Mrs. Casey, and she taught her English class on a college level. When I
went to college, based on an exam I had taken and the fact that I had a course like
Mrs. Casey’s, I passed out of the requirement to take English. I don’t think I
suffered for that because Mrs. Casey was just an absolutely terrific teacher. She
taught students really how to read and the type of critical reading that is essential
both to life in general and to becoming a lawyer, and she taught us writing in a
way that I had never been taught before in the school system. I think that helped
me enormously when I became a lawyer who would write and then eventually
edit briefs. I can’t really thank her enough for all of what she taught me. I think
just about every one of the students in her class felt the same way about her.

MS. FEIGIN: You graduated from high school when?

MR. KOPP: I graduated in 1959.

MS. FEIGIN: Tell us about how you decided where to go to college.

MR. KOPP: That was an interesting process because my stepfather wanted me to go to
Harvard College, which in hindsight I find very interesting because while he
really enjoyed Harvard Law School, his experience at Harvard College was very mixed because there was in fact a lot of very noticeable discrimination with respect to Jews at the time that he was at Harvard College. He always would draw this distinction between the College where he had this mixed experience and the Law School, which he thought was a wonderful place.

MS. FEIGIN: How was that discrimination manifested?

MR. KOPP: Because the clubs were discriminatory, the Jews and the non-Jews didn’t mix socially. And of course the rich and the poor didn’t mix, and my stepfather came from a very poor background and he was always counting his pennies and making sure he had enough. So I detected that he really had bitterness in terms of the way that there was this social segregation at Harvard College. At the Law School, on the other hand, he felt comfortable there. Perhaps it was in part because he did very well and was connected with the top professors and was on the law review where you had people who were terrific and there were a good number of Jews on the Harvard Law Review. He just felt that Harvard Law School was a wonderful place.

In any event, to go back to my going to college, my stepfather did want me to apply to Harvard College, but I really had very little interest in it. I was not interested in being part of a big high stress university, notwithstanding the fact that he had gone there. One day in high school I saw on a bulletin board an article about a small college in Ohio called Oberlin. This was part of an article that described the best small co-ed schools in the country. I read that article and was very interested, so I learned more about Oberlin, and I became more interested, so
I applied there, and I was accepted. Now to placate my stepfather, I had also applied to Harvard, but I think my lack of enthusiasm probably came out during the interview, and I did not get an offer from Harvard. This actually was quite helpful because it meant that I didn’t have to get into a fight with my stepfather about where I would go to college, and in fact since I didn’t get into Harvard and I did get into Oberlin, everybody in the family was very happy that I got into Oberlin and it made things very nice.

MS. FEIGIN: How was it for you to be in the Midwest?

MR. KOPP: I don’t know about being in the Midwest, but I know about being in Oberlin, that it really was the perfect college for me. I think looking back, I probably feel even more strongly about that now than I did at the time since I’m now more familiar with how other schools in the country operate. I wasn’t very interested when I was at Oberlin in many of the things for which Oberlin is well known. For instance, it has a wonderful conservatory, but I wasn’t that interested in music, and now in hindsight, I’m very sorry I didn’t take advantage of many of the musical performances that did take place on campus. Oberlin, of course, is well known for its student activism, but I didn’t take any part at all in it. And Oberlin had very strong left-wing politics. A lot of students were very much into that type of political activism and support, but actually most students on the campus weren’t all that left-wing. Certainly I was much more toward the center or even the conservative side if your world was confined to Oberlin students and I found plenty of people there that were just normal people like me. So even though I
didn’t take advantage of some of the well-known characteristics at Oberlin, I did feel extremely comfortable there.

MS. FEIGIN: You were there during the presidential election, Nixon/Kennedy. What was that like? Did that impact you?

MR. KOPP: Yes. First of all, it impacted me because I entered school in the fall of 1959 and Oberlin had a tradition at the time of having mock political conventions. In the spring of 1960, we had a mock convention which did nominate John Kennedy. Even though I was just a delegate – I wasn’t a leader in any of the convention events, I was assigned to the Louisiana delegation – I found it a terrifically exciting and stimulating event.

Then of course during my years at Oberlin this was the time that there were lots of events going on internationally. It was the time of the Cuban missile crisis, it was also a time where John Kennedy was trying to do something about segregation in the South and there was massive resistance, and even though I didn’t personally get involved in the activities, a good number of students from Oberlin actually went to the South to help the black demonstrators, sometimes at risk of their own lives. I more or less participated vicariously, but nonetheless it was the type of activity that Oberlin students were involved in that I think everybody on campus felt glad was happening, notwithstanding that they weren’t personally participating. So it was a time of a lot of social excitement and turmoil, and Oberlin students felt they were really playing a part in it. And as I say, even though I was not personally active, I sort of socially and psychologically felt I was very much a supporter of what was going on in terms of
students’ efforts in the South and of course the government’s efforts to do something about the South as well. All of this helped make me somebody who became very interested in government, and my interest in government was encouraged by the fact that I had some very interesting government classes when I was a freshman, and I had some interesting history classes. With the government itself taking actions that were very much in the news, I became more and more interested in government during my years at Oberlin, and I became a government major.

MS. FEIGIN: Where did you think your career would head?

MR. KOPP: When you’re a freshman or sophomore, you really have no idea where you’re headed, but I eventually developed a sense that I would go on to graduate work in political science. That was where my professors were encouraging me to go, and government just seemed to me so important to everything that was happening in the world that I assumed that with a background in government and a graduate degree in government, I could do something like go into the foreign service or get some important job in government, but in college I had a very fuzzy concept of where I was headed. I just knew I was very interested in government and I was also interested in history.

A wonderful thing about Oberlin was even though you might be interested in certain subjects, Oberlin actually required you to take a broad diversity of courses regardless of what you were interested in. I found that in areas like religion and philosophy, for instance, there were interesting things to study. Biology courses at Oberlin were interesting. Math courses were good, and I
began to appreciate that there were a lot of intellectual fields that in a sense I
hadn’t thought about that were interesting. I really liked being at a diverse school.

MS. FEIGIN: Was it diverse in terms of the student body?

MR. KOPP: For its day it was very diverse. But it turns out, looking back, compared to what
schools are like today and what Oberlin is like today, it wasn’t that diverse.

Oberlin had played a very important role historically with respect to the rights of
minorities and blacks and had been involved in the anti-slavery movement, and
that history was always tremendously respected on the Oberlin campus. At the
time I entered Oberlin, there were enough minority students to be noticeable on
campus, and so in light of my limited background, I had the idea that I really was
on a campus that had a lot of diversity. But looking back, I was at my 50th
reunion just the past year and I noticed the reunion class had a relatively small
number of minorities that were in the class, notwithstanding Oberlin’s very liberal
and progressive reputation. It just struck me that the world really has changed.

Today, Oberlin is a far more diverse place than it was at the time that I was in
college. But at that time, Oberlin did seem to me to be a school that was very
progressive in terms of being diverse, and I think for its time it was.

MS. FEIGIN: We know that you did not wind up pursuing a graduate degree in government, so
what got you off to law school?

MR. KOPP: By the time I became a senior was really the first time I began to think seriously
about what my next steps would be. To that time, as I mentioned, I sort of
assumed I would go on to do graduate work in political science. My stepfather,
however, had always been talking about how it would be good for me to become a
lawyer. In part perhaps because he had wanted me to go to Harvard College (laughter), and I had not wanted to go to Harvard College, and I believed that I had made the right decision in not going to Harvard College and going to Oberlin instead, I listened to him politely with the thought going in one ear and out the other in terms of his encouraging me to be a lawyer. But by the time I became a senior in college, I began thinking more seriously about the question, and I began thinking that well, hey, you know, you do have to get a job after you graduate from whatever academic environment you’re in, and by the time I was a senior in college, the graduate schools really had more than enough PhD candidates. I think a good part of that was due to the fact that we were now involved in the war in Vietnam, and because of the way military deferments worked, there were very large numbers of PhD candidates because as a PhD candidate, you could have a deferment and a PhD degree takes a good number of years to achieve. So there were very large numbers of people getting PhD degrees. And I began to read that even though they were getting PhD degrees, at least in the fields I was interested in – history or political science – it was becoming extremely hard for these graduating PhDs to get jobs. Meanwhile, I began thinking about the fact that in the government courses I’d been taking, I had been learning about law.

In my freshman government class, I had a wonderful introductory course on American government and a good portion of that had focused on studying Supreme Court cases, and I had found that very interesting. And since I became a government major, I noticed that discussions of law and law cases always kept coming into what we were studying. I also was very interested in history, and I
noticed that Supreme Court cases kept coming into what we were studying in history. There was one professor that I really disagreed with on just about everything that he taught in his American history course. He was sort of a radical socialist, and I was somewhat turned off by him, but he really started challenging my views. He did make me think, and he kept having these sessions where he was talking about Supreme Court history and Supreme Court cases, and basically his theme was that the law is whatever the Supreme Court says it is, that there are no guiding principles. It’s just whatever five Justices think the law should be. I was very turned off by this approach because it was contrary to the way I had been brought up and to what I had learned in other courses. Yet I found it very challenging and interesting to have somebody present a thesis that way in trying to make you think that the law is just whatever five Justices say that it is. So notwithstanding my negative reaction to the course, it was something that did make me very interested in learning more about the law.

I also began to pay more attention to my stepfather’s stories about his own career and began to realize that he had had an absolutely fascinating career as a litigator in the Department of Justice and had been involved in all sorts of interesting and important activities, and for the first time, I began to pay attention to his stories. I realized the impact that a lawyer in the Department of Justice could have.

My father had also been a lawyer, and one of the reasons I had not originally been interested in the law was that I didn’t find that my father’s law career had been that interesting. He was a Hollywood lawyer, and Hollywood
lawyers went to the Brown Derby and had lunch with their clients and they then worked out deals on behalf of their clients. After the family moved to Washington, we kept going back to Los Angeles and staying in close touch with family members who were in the family law firm, and so I was able to keep in touch with what was happening in their law business, and it just seemed to me that it was something that was in one sense very interesting, but it wasn’t the type of thing that I could see myself doing. I’d go to the Brown Derby with my aunt Hermione and my uncle Martin Gang who were both partners in the law firm, and I would sit there and listen to some fascinating stories that they would tell about their adventures representing various movie stars, and it was all very interesting. It was even particularly interesting when my uncle Martin was telling me that one of his clients was Elizabeth Taylor and he was going out to visit her and she answered the door in her nightgown (laughter). But while these stories were absolutely wonderful, and my aunt and uncle were among the most fascinating people I ever met, and my aunt throughout my life was one of my greatest heroes, I just didn’t see myself doing that professionally. I wasn’t interested in movies and had no interest in facilitating the stars’ business deals. It became apparent to me when I was in college that even though I had grown up in the heart of Hollywood, as an adult I had no interest in Hollywood and I would be going off in other directions.

MS. FEIGIN: How did you come to go to Harvard Law School?

MR. KOPP: I applied to law school. I didn’t do that well on the law aptitude exam, but I did quite well academically at Oberlin. Because of my high rank in the class, I was
able to get into Harvard Law School. Looking back, I think it was very good for me that I did go to Harvard Law School. It taught me basic skills that made me into a lawyer. On the other hand, my reaction to Harvard Law School, at least as it existed in the time I was there in the early 1960s, is that it’s a really great law school to have graduated from (laughter). You really do get a good legal education and you learn to think like a lawyer. Further, they had some truly great professors there, some of the best in the world. On the other hand, I had gone to Oberlin, and at Oberlin, I felt that a very large number of the faculty members that I had classes with were great teachers. They also were great people and they gave easy access to students. You could always go talk to them whenever you wanted, whether in class or out of class, and the small class size, I think, really helped all that. On the other hand, at Harvard Law School, you were in a large class of 150, and the professor oftentimes just wasn’t that interesting. Sometimes they were, but the number of professors that were interesting and you felt you could communicate with at Harvard Law School was much smaller in my view than at Oberlin where just about everybody was either a good or a great professor and you could just talk to anybody. So I felt Harvard Law School was the type of experience where you could learn a lot, and in fact I did learn a lot, but it wasn’t the most pleasant experience in my life, even though it was probably one of the most useful experiences in my life, because it did help me to become a lawyer in a way that had a very great impact on me. So it was successful in that once I had gone through law school, I felt it was a good experience for me. But it wasn’t pleasant at the time.
I know now that Harvard itself has greatly changed the way it teaches. Subsequent to the time I was there, the process has been reexamined, and Harvard has adjusted with the times. I think it has become a much better place today than it was at the time when I was there when it was a school that was sort of based more on teaching legal tradition as opposed to making changes that needed to be made to keep up with the times and have a stronger impact on students.

MS. FEIGIN: What was the makeup of the class like?

MR. KOPP: Harvard at the time was just starting to be aware of the need to bring women and minorities into law school. The best I can say is that there were at the time some of them there. With respect to women, I was sort of shocked how few the number of women in law school because both my mother and my aunt had gone to law school and become lawyers. It never really occurred to me until I was at a place like Harvard Law School how difficult it was for women to get a legal education at the time. In my class of over 600 students at Harvard Law School, only about 25 of them were women. I don’t know the number of minorities, but that number, however, was I’m sure quite small. At my 45th reunion, I became aware of how white my law school class was compared to the way classes are today. We really have made a lot of progress in terms of having a much more diverse society.

One of the stories about one of my professors at Harvard Law School today has become well known and is sort of a symbol of what was the role of women in law school at the time. I had a first-year Property professor who was quite a character in many ways. One of the things he did was to institute something called “Ladies Day,” and as he described it, he felt that the women in
class would be greatly inhibited from talking and answering the questions posed by the professors, so what he did was have one day every semester that would be designated as Ladies Day. On Ladies Day, he would call on the women of the class and that way they would have plenty of notice and therefore be prepared in class, and the rest of the time, he wouldn’t be calling on them so they could be relaxed and wouldn’t be nervous and worried (laughter). Of course, this Ladies Day became well known and is today a symbol of the way many people back in the 1960s looked upon women lawyers. The professor was one of the role models for the television series on Harvard Law.

MS. FEIGIN: *The Paper Chase.*

MR. KOPP: *The Paper Chase.* But at the time, sorry to say, people in the class weren’t shocked by this. They sort of bought into the professor’s notion that he was doing a favor to the women in the class.

MS. FEIGIN: The young ladies (laughter). The 1960s, at the time you were there, it still wasn’t at its most turbulent, but it was getting more turbulent. Was there any sense of that on the campus? You were there during the assassination of President Kennedy.

MR. KOPP: I was there. That was the type of event that everyone remembers where they were and what they were doing. That was my first year at law school. I was in a legal writing class at the time taught by a student faculty member, and in the middle of class, we got the news. The teacher kept trying to go on with the class, but nobody paid any attention. So finally he adjourned the class, and everybody went
back to the dorm and sat around the television sets and just felt extraordinarily distressed.

Most of us at the time had felt very excited about the Kennedy administration. It was bringing in a young new president that we could connect with. People like me even felt closer to the Kennedy administration because we sympathized with what it was trying to do politically. When John Kennedy had said, “Ask not what your country can do for you but what you can do for your country,” it resonated with people like me who had an interest in government and what government could do to help people in the country and the world. I was particularly distressed.

At the time I entered college, people were very optimistic in terms of the way the world was developing. Integration in the South was occurring. There was just a new spirit in the 1960s, and John Kennedy was connected with it. We were all extremely distressed with the assassination. I think in life I always have remained an optimist, but the assassination of John Kennedy and then the subsequent assassinations of Robert Kennedy and Martin Luther King made me and many others realize that the real world is a difficult place. We wanted a better world and needed to see it happen.

MS. FEIGIN: Was there a lot of student activism on campus, and were you part of it?

MR. KOPP: Compared to Oberlin, Harvard Law School, particularly at the time, was not a very active place in terms of things like politics. People at Oberlin were very interested in politics, debating all the time. People at Harvard Law School were just too busy. There were some legally connected clubs, but in general when you
were at Harvard Law School, you were there for the business of learning the law. It did take a huge amount of time, at least for me, to absorb what was being taught.

Since we were learning to be lawyers, we dressed formally, and we wore coats and ties to class. I think by comparison to other law schools at the time, it was a fairly formal place. The attitude was your business is learning the law, and Harvard at the time didn’t have many practical programs. You basically learned law by going to class, taking good notes, and then you would re-digest your notes afterward since you couldn’t absorb in class all that was being thrown at you. Many people would just retype their notes after class, to articulate what they had learned and to try to absorb that, and I did some of that too.

For somebody who went to a school like Oberlin, it was somewhat of a shock to suddenly be thrown into sort of the world of business. Harvard Law School at the time was a much more business-oriented place than it is today. And the business of learning the law meant that you had come to learning the law as though it was a job.

MS. FEIGIN: You said there wasn’t much diversity among the students. What about faculty? Were there women? Were there minorities?

MR. KOPP: There were a handful of women faculty, but I never had a female professor. I think the number of women faculty members was one or two or three. It couldn’t be much more than that, and the number of minority professors, I just don’t know. If there were any, they were not a significant presence on campus. My guess is, at
least in terms of the Harvard professors themselves, there probably weren’t any. They just weren’t visible if there were minority professors at the time.

MS. FEIGIN: Once you got through law school, the draft must have been looming for you, so how did you deal with that?

MR. KOPP: The war in Vietnam, of course, was becoming more and more active during the time that I was in law school, and going into my third year at Harvard, in 1965, the war in Vietnam was on everybody’s mind. All the students were thinking about what they would do next and how the ongoing war affected their plans. So as I entered my third year of law school, I decided the best timing for entering the military would be right after I graduated from law school so that it would not interrupt my legal career. Thus when the law schools and government agencies came to Harvard to recruit in the fall, I paid little attention to the recruitment and the fact that there were going to be people from law firms and government agencies on campus. I also wasn’t interested in applying for a judicial clerkship either. The reason I wasn’t interested in any of this was because I had made my decision that the sensible thing for me was that after I graduated from law school, I should go into the military and get military service out of the way before I started practicing the law. However, there was one position as a lawyer that I noticed on the bulletin board that was sending a recruiter to the campus to meet people, and it looked so interesting to me that I decided that even though I would be going into the military service, I really should go to the interview and learn what this position was all about. The position was in the Honors Program of the Civil Division of the Department of Justice. As I said, I felt that this was
something that might be of interest to me after I did military service so I might as well find out now about it and see if my interest in it really was worthwhile. So I signed up for the interview and went to the interview.

I was confident they wouldn’t extend an offer to me since I was about to go into military service, but I looked upon the interview as sort of an information-type of interview for me. So I went into the interview with that attitude, and as a result, I did something which I certainly wouldn’t have otherwise done at the time and which I know never happens with law school interviews today: I went into the interview completely relaxed (laughter). I also had, with hindsight, what turned out to be another amazing stroke of good luck for me. The interviewer was Morton Hollander, and Hollander was head of the Appellate Section of the Civil Division. I saw myself as more interested in appellate law than trial practice. I had some difficulty envisioning myself as a trial lawyer, so I always thought of myself as more interested in appellate law than trial law, and here I was being interviewed by Morton Hollander who was head of the Civil Division’s Appellate Section.

Mort and I just hit the interview off in a perfect fashion. I found myself getting more and more interested in what he was telling me, and I could tell that he was getting very interested in me, and it was just a fabulous experience I think for both of us. And I think that actually came through to him as well as to me. At some point, I asked him whether his office would have any interest in me since I was going into the military. And he explained that the Department’s policy was to extend offers without taking into account the fact that somebody might be
going into the military. Offers would remain valid until after a serviceman returned. I was shocked at first, because this was something I hadn’t expected would happen in the real world. But I was obviously extremely delighted, and told him well if that’s the case, I was certainly very, very, interested in the Civil Division and was very interested in appellate litigation, and I began to have a sense from the fact that my interview was just going so well that I might actually get an offer. And indeed a few months later, I did get an offer from the Civil Division under the Honors Program, and I learned that I would be assigned to Hollander’s office in the Appellate Section. They also told me that I could begin work after I graduated from law school in the summer and then when my military service came, I could interrupt it and then return to the job after military service. So I found out that I had been very lucky by my instinct of going to the interview with the Civil Division of the Department of Justice even though I had assumed that I wouldn’t be going to practice law at all until after military service because, lo and behold, it actually resulted in an offer, and an offer that meant I could start work in the Justice Department as soon as I graduated and before military service.

I still had to figure out what I was going to do about military service. I applied to the various judge advocate general corps, but I knew that it would be very tough to get a job there. A huge number of graduating law students wanted to join the JAG corps, and the competition was ferocious for those positions. I also applied to the Air Force Officer Candidates School. Meanwhile I graduated from law school and began to study for my bar exam. One day in class I heard somebody near me mention that there was an Army Reserve Unit in
Prince George’s County, just outside the District of Columbia, that was accepting applications for a unit, and so I went out to that unit, I applied, and much to my amazement, I was quickly accepted. Furthermore, I was told that while I had to start going to Reserve meetings right away, there was a backlog in bringing in new members for training and it probably would be at least six months before I was called up for active duty for training. So suddenly it looked like what I never expected was going to happen, that I was actually going to become a government lawyer right away. Emotionally, I hadn’t prepared for that, and I was shocked and overwhelmingly pleased with the way things had turned out. In August 1966, I began working in the Appellate Section of the Civil Division.

MS. FEIGIN: That’s a nice upbeat note to end our session today, and I want to thank you very much.

MR. KOPP: Thank you.
MS. FEIGIN: Good morning.

MR. KOPP: Good morning, Judy.

MS. FEIGIN: When we left, you had just been hired to work in the Civil Division, Appellate Section. What was life like at that point in time?

MR. KOPP: When I started my employment, I knew that the Civil Division attracts lawyers who wanted to be litigation lawyers, and I also knew that there were strong similarities between what I would do in my job and what my law school classmates at private law firms would be doing at theirs. We had all been hired because of our potential abilities to be litigation lawyers, not because of our views on public policy.

MS. FEIGIN: Let me just interrupt you for a second. Was there any question at any point in the interview process as to where you stood politically?

MR. KOPP: No. One of the things that was a very strong factor in how the office operated was that it was a non-political office, and actually what I found interesting as I was there with the passage of time is that I generally didn’t have any great sense with most people of whether they were Republicans or Democrats. We had a few members of our office who eventually became judges, and it was only when they were appointed and knowing which administration appointed them could I figure out what party they belonged to. Sometimes people who I thought might be Republicans turned out to be Democrats, and sometimes it was the opposite way.
I think one of the things about the office was that we really were a very non-political office.

MS. FEIGIN: How was a new attorney assigned cases?

MR. KOPP: Basically they would start you off with preparing memos to the Solicitor General recommending for or against appeal in cases where the government had lost in the District Court. This was a basic part of our process. The Solicitor General was the official in the Department of Justice who had the responsibility for deciding whether the government would proceed with appeal or, if the case had been lost in the Court of Appeals, proceed to the Supreme Court. So new attorneys were started off with easy memos to the Solicitor General giving recommendations. These recommendations were done after soliciting views from the trial attorneys and the agencies and offices that were impacted by the decision. This was a basic Department process that has continued forth to this very day.

MS. FEIGIN: Let me get a sense of the setup of the office. Did you have officemates? How did it work?

MR. KOPP: The office when I arrived for work was on the third floor of the Main Justice building. I was assigned to an office that had a very nice view of Pennsylvania Avenue and somewhat dilapidated buildings on the opposite side of the street. The FBI building had not been built at that time, and there were shops and restaurants. I remember there was a camera store on the block that was eventually torn down to build the FBI building. I also remember that it was very controversial whether the FBI building should be built there. There was a big debate in Washington as to whether the Kennedy Center should be built there or
along the river. Rumor has it that J. Edgar Hoover put his foot down and said the FBI headquarters is going to be built here in the center of the city, and the Kennedy Center can’t have this property (laughter). At the time I know a lot of people thought it was outrageous because the Kennedy Center belonged right in the heart of downtown Washington.

MS. FEIGIN: I don’t think you discussed this previously, but the FBI was in the Justice Department at the time, right?

MR. KOPP: The FBI fit in the Justice Department at that time. J. Edgar Hoover’s offices were on the 5th floor of the building. They are now occupied by the Civil Rights Division. The Assistant Attorney General for Civil Rights sits down the hall from the Solicitor General’s office and has one of the greatest views in the city.

MS. FEIGIN: Was the lab in the building as well?

MR. KOPP: I don’t know about the FBI lab, but that sounds right to me because there is in the basement of the Main Justice building a warren of offices. It would make a great place for there to be a lab and also there was a shooting range down in the basement at that time, which I had nothing to do with of course (laughter).

MS. FEIGIN: So now there’s an entire building for the FBI plus of course Quantico.

MR. KOPP: That’s right (laughter). And the Department of Justice today extends across many buildings in Washington, in the city and the suburbs.

MS. FEIGIN: But at the time you came, it was entirely housed in that one building?

MR. KOPP: I’m not sure it was entirely housed there, but the Civil Division was housed in that building and only gradually through the years as the Division expanded did the bulk of it move out into neighboring buildings.
MS. FEIGIN: When you arrived, did you have an office of your own?

MR. KOPP: No. I was in an office where I had an officemate and also a secretary in the office with us as well. In the office next door to me, there were three attorneys and a secretary.

MS. FEIGIN: Maybe we should explain for people down the road who won’t really know what a secretary did for an attorney in those days.

MR. KOPP: (Laughter). It really is very interesting because of the great shift caused by technology. I’ve seen it happen before my eyes at a very gradual pace in the 45 years I was in the Department. In those days we were an office that had between 15 to 20 attorneys, and basically every two attorneys shared a secretary. Sometimes when we had vacancies in the secretaries, it was a 3:1 ratio, but at its core, the idea was that it was one secretary for two attorneys. The secretary was very important because only a few attorneys typed their own drafts, and the rest of them handwrote them, so the secretary was really essential.

My officemate was Bob Zener, who was a brilliant attorney who had been in the office for about four or five years at the time, and he strongly suggested that I should start typing my draft briefs, that that was a much more efficient way of doing it. So I took his advice and began to type my briefs, but I really wasn’t very good at it and made a lot of mistakes, and I was very pleased that I had easy access to a secretary. What I would usually do is make a stab at typing my own draft, and if I made a typo at the beginning of the page, I just took the piece of paper out of the typewriter and started over. But as I got down toward the bottom of the page, if I made a mistake, I was essentially stuck with it. It was just too
much work to have to go back and retype the whole page because of typos at the bottom.

MS. FEIGIN: We should make clear, because I think there will be people who may not be able to fathom this, that this was the day of manual typewriters and carbon copies, correct?

MR. KOPP: Yes. This was the time of manual typewriters and carbon paper. And of course when you were using carbon paper and you made a mistake, you had to throw away about five or six pieces of paper and start over again on a particular page.

Secretaries really were important because, like my secretary, Clara Greenberg, they just were very, very good, and there was no way I could do any of the things that they could do and use my time efficiently as well.

MS. FEIGIN: They also answered phones, didn’t they?

MR. KOPP: Yes. They were very good at answering phones. We didn’t have voicemail or anything like that.

MS. FEIGIN: Your secretary, and I don’t think she was unique, she actually, as I understand it, had been trained as a lawyer?

MR. KOPP: Yes. I didn’t know that when I was there, but it didn’t surprise me when I learned that because there were a lot of women in the Department at the time who had come into the workforce during World War II and they stayed on and a lot of them became secretaries even though some of them had the type of educational background where today one would think they would have the potential to be very competent in the professional workplace.
MS. FEIGIN: Before we get to what it was like when you were there, there’s a fabulous story about what the Section was like in its early incarnation when David Kreeger was the head of it. I wonder if you can share that story with us.

MR. KOPP: Sure. In the 1940s, during World War II, the office, which was then known as the Supreme Court Section, was a small office of about five or six people. In some sense it was very similar to the type of office that my stepfather was familiar with when he was in the Tax Division, where they had also very small offices. What would happen would be that the Solicitor General’s Office, which was itself a small office of about five or six attorneys, would turn to the relevant offices in the Divisions and have them assist in the preparation of Supreme Court briefs. So the section that David Kreeger headed, the Supreme Court Section in the Civil Division, was an office of five or six people, and the bulk of their work was preparing draft briefs for the Solicitor General’s Office, and every now and then they would do a Court of Appeals brief as well.

David Kreeger, who eventually became one of the great philanthropists in the Washington area after he left the office, was a very hard worker and became the head of the Supreme Court Section. This was during World War II, and one evening he was working at his desk very late at night on a brief, I think it was a Court of Appeals brief, but I could be wrong on that. Anyway, he was working on a brief that related to the war, and he got a call on his phone and it was President Roosevelt (laughter). Apparently a copy of the draft that Kreeger had been working on had gone to the President, and he had read it over and had some questions, and he got into a discussion with Kreeger about the brief. As Kreeger
would tell the story, he convinced the President that the way the brief had been
drafted was the correct way to do it, and the President agreed with his take on the
case.

MS. FEIGIN: In all your years at the Section, and you ultimately became head of the Section, do
you think presidents got copies of your briefs?

MR. KOPP: Not often, but once in a while they did. Of course, as the Department became a
bigger place, when I say a copy of our brief would get to the President, the brief
would get to the White House by going through a lot of other people before it
would ever leave the Department. So with respect to the DOMA [Defense of
Marriage Act] litigation or healthcare litigation, I’m pretty sure those briefs did
get to the President or certainly to someone very close to him. They would be
briefs that would have gone through many, many people in the editing process.
While in the time of David Lloyd Kreeger, I think the brief that got to Roosevelt
sounded like it was actually the brief that Kreeger had written.

MS. FEIGIN: Did you have many times that the White House, maybe not through the President
but through a subordinate, would get back to you about changing things?

MR. KOPP: That was extremely rare, and part of the reason that was rare was – I forget
whether it was in the Reagan administration or the first Bush administration, or
maybe the Carter administration – but at some point there was concern about the
White House dealing directly with career attorneys. So there was a rule that went
into effect that career attorneys couldn’t be in touch with the White House
directly. They had to get authorization before that could be done. It was basically
designed to protect career attorneys from White House influence without it going
through the proper political leadership. So it turned out to be very rare that attorneys in our office dealt with the White House directly.

MS. FEIGIN: It sounds like it had been a problem, maybe not for your office, but it had been a problem or they wouldn’t have instituted the rule.

MR. KOPP: I don’t know whether it was Watergate or things subsequent to Watergate but there were periodic, not scandals, but periodic questions raised about the influence of White House people, so this rule was promulgated. It made it more cumbersome if you were dealing with a case where you really did need to consult with the White House. We had cases involving the use of White House computers, for instance, and the Freedom of Information Act where the White House really was our client and you’d have to get authorization before you could deal directly with them. But in general, I think most people were quite happy that they had this layer of protection from having to deal directly with the White House.

MS. FEIGIN: For anyone interested in having an example, they can look at Alan Rosenthal’s history because he talks about John Dean in the Nixon White House trying to influence the way a case was handled. So that’s at least one time that it affected your Section.

MR. KOPP: I think the rule made it more cumbersome for us, but I think as career people, we really all, for the most part, were very appreciative of the layer of protection. Thinking back to John Dean and how the White House operated at that time, it’s easy to understand why as a career lawyer that type of protection is beneficial.
MS. FEIGIN: Getting back to your arrival at Justice, how diverse was the office that you entered?

MR. KOPP: By the standards of the time, I think it was more diverse than most of the offices in the Department of Justice. For instance, we not only had women in the office, we had a supervisor, Katherine Baldwin, who was a woman, and Mort Hollander, the head of the office, had fought long and hard to get her promoted to be a supervisor. This was at the time when Bea Rosenberg had become head of the Appellate Section of the Criminal Division, and of course that, I think – although I don’t know this personally – I’m sure that that must have helped Mort in terms of getting Katherine Baldwin promoted to become a supervisor. So we had, and this was in an office of 15 to 20 attorneys, a woman supervisor, and there also were several women attorneys in the office as well when I arrived. We also had a black attorney, Fred Abramson, who was a Yale graduate, and he was absolutely one of the nicest people, as well as being an extraordinarily smart person, that anyone would ever want to meet. He was in the office for about three or four years, which in those days was sort of the normal time that people stayed in the office. He left to work at AT&T and had a very distinguished career. He became president of the DC Bar, and then unfortunately he got AIDS and died of AIDS, which to everyone who knew him was a terribly sad event because Fred was such a wonderful person.

The office also when I arrived was very interesting because we had an office that ranged in diversity from people who were very conservative to people who were very liberal, and you sort of didn’t know this when you came into the
office. This was in the day when in the DC Circuit there was the Bazelon court, and of course the Supreme Court was presided over by Chief Justice Warren. Both courts produced decisions which were quite controversial among attorneys, and you after a while in the office began to have a sense that some of our people were very conservative because of their reactions to these decisions, and other people were quite liberal because of their reactions to these decisions. So while you never really had a sense of who was a Republican and who was a Democrat, you had a sense that there was a broad diversity in terms of people’s legal thinking, which made the office a very interesting place. When you’d go down to the cafeteria for lunch, you sometimes would get into very interesting discussions.

MS. FEIGIN: Since the office recommended whether a case should be appealed, what cases did the office personally handle as opposed to the U.S. Attorney’s Offices from whence they came?

MR. KOPP: The office had the authority to handle cases in the Courts of Appeals, and in those days, we could handle probably over 50% of the civil cases that made their way from the District Court to the Court of Appeals, which is very different from when I left the office when probably the percentage of cases the office had the capacity to handle was something well below 10% or 15%.

MS. FEIGIN: Just to understand this better, the office had burgeoned, so the office by the time you left was how much larger than at the time you came?

MR. KOPP: When I left the office, it was an office of 60. When I came, it was an office of 20.

MS. FEIGIN: So three times as large and yet it’s handling a fifth, because there’s so much more litigation?
MR. KOPP: Yes. There basically was a lot less that you could handle in terms of the proportion of the litigation than in theory you had authority to handle. The office had the authority to decide whether a case would be kept in the office or assigned back to the attorney who had handled it in the District Court. Attorneys who handled cases in the District Court often didn’t want to give up their cases when the cases went to the Court of Appeals. Mort Hollander, the head of the office, was generally very successful in asserting his authority and pulling into our office cases that he thought we should handle in the Court of Appeals. However, there was one U.S. Attorney’s Office, the U.S. Attorney’s Office for the Southern District of New York, which would never agree to our office handling cases in the Court of Appeals when that office had handled a case in the District Court. That office had a very fine reputation, and it also had people who had been in their office who were Second Circuit judges who would tell people in Washington what a great office it was and they really expected to see people from the Southern District arguing before them. So the U.S. Attorney thought it was an important part of his job to make sure that the U.S. Attorney’s Office continue to be able to argue cases before the Second Circuit. If our office gave any indication that it wanted to handle a case from Washington, the U.S. Attorney for the Southern District of New York was prepared to come down to Washington and argue to the Attorney General himself that the case should not be handled by attorneys in Washington and indeed the U.S. Attorney would resign (laughter) if this well-established tradition were to be set aside. Since the U.S. Attorneys from the Southern District were all very impressive people and the Attorney General
would never want them to resign, the Southern District had a very successful record in preventing our office from handling cases out of their office in the Second Circuit.

MS. FEIGIN: Maybe that’s why they were, in my understanding, jocularly – or maybe not so jocularly – referred to as the Sovereign District of New York.

MR. KOPP: I suspect that’s right (laughter). However, with other districts, Mort Hollander was much more successful in being able to decide himself whether a case should be handled by our office or remain in the trial office. With the passage of time, the number of cases that remained with the trial attorneys increased simply because our office, the Appellate Section, didn’t have the capacity to handle more than a relatively small percentage of the cases that were going to the Courts of Appeals.

MS. FEIGIN: What kind of criteria went into this process? Was it cases that you thought were significant nationally? What made a case one that the Appellate Section would want to hold onto?

MR. KOPP: The first question, and now I’m jumping to the way things were when I left the office as opposed to the way they were when I came, because when I came basically there was a very strong presumption that any case in the court of appeals would be handled by our office except for a relatively small number of cases. When I left, we really had a very different situation.

When I left basically, and I’m talking about how I viewed the process as head of the Appellate Staff, the first thing I looked at was whether the government was the appellant or the appellee. If the government was the appellant, both
because the government had lost in the District Court and the Solicitor General had authorized an appeal, that presumptively meant the case was quite a significant case because normally if the case didn’t have some significance, the Solicitor General wouldn’t be authorizing appeal. So if the case was a government appeal, I viewed it as a very strong presumption that we would handle the case in the Court of Appeals, and usually that was the way things turned out. On the other hand, if the government was the appellee, that was because the government had won below. You had presumptively the benefit of a trial attorney who had done a good and successful job in the District Court plus a favorable District Court opinion and so again, presumptively, when I would make an assignment, I would start with the idea that there was no reason to change the handling of the case unless there was some special issue or principle at stake or need for coordination with other cases.

I don’t have the statistics before me now, but I think if one examined the statistics, at least at the time that I left the office, one would find that well over 50% of the cases where the government was the appellant were handled by our office, while where the government was appellee, probably our office handled, and again I’m guessing at this point, probably 10% to 20%, but the numbers were such that one had to keep assignments within range of the capacity of the office. With the passage of time and the increase of the litigation case load, it was the appellee cases that more and more went back to the trial attorneys.

I should add that over the years our relationship with U.S. Attorneys’ offices became much improved from my early days in the office. There was a lot
of mutual respect that developed between our office and the U.S. Attorneys – including the Southern District of New York – and significant assignment disputes became quite rare.

MS. FEIGIN: When you began, how often would you have a case where you’d be arguing in court? How many arguments per year would you say?

MR. KOPP: When a new attorney came, it would take a while to have any arguments because you had to write some briefs. Mort Hollander would always make a point of making sure that a new attorney in their first year would at least have one or two arguments, and that was something that always continued in the office. When I was head, we would make sure that our new attorneys would at least get several arguments in their first year, and even if they hadn’t written briefs that had come up for argument, we’d find them spare arguments because getting an argument your first year was really an important part of the Appellate Section and Appellate Staff experience. So typically a new attorney might have as many as four arguments the first year, but sometimes less, and again we made it our business to make sure that they at least had a few in the first year.

In the second year, an attorney could have perhaps the largest number of arguments that they might have in their time on the Appellate Staff because at that point they would have written a good number of briefs, and those briefs would have reached the point where they would be coming up for argument, and again, since you’re talking about a new attorney, these wouldn’t necessarily be the most complicated cases in the office, so they could handle a significant number of arguments. So you might get anywhere from four to eight arguments in your
second year. And then the number of arguments you’d get would probably go
down some as the difficulty of the cases and the amount of time that you need to
spend doing a brief would go up. So later on in your career on the Appellate
Staff, the number of arguments you might present would probably range, for most
attorneys, from three to six. Sometimes attorneys had bad luck and the number
over a particular year would drop way down, and sometimes on the other hand,
you’d have a bunch of cases being clustered in terms of how the courts took the
cases up for argument at certain times and then an attorney might have to give up
arguments in some cases because he or she just couldn’t handle them all. So I
think for most attorneys who have been there a while, you’d have, as I say,
sometimes four arguments, sometimes a little bit more, sometimes a little bit less.
There’s a certain unpredictability, but one of the reasons people liked the office
and eventually stayed for longer and longer periods, was that they found oral
argument one of the most satisfying parts of their job.

MS. FEIGIN: We should say they went to all the circuits but back in those days there were only
ten circuits, and now there are eleven. This leads me to ask you, because you
have perspective on this, a wide view that most of us wouldn’t be able to have,
about the split of the Fifth Circuit into two circuits. There has been talk many
times about a split of the Ninth Circuit. Do you have any thoughts about whether
that would be a good idea?

MR. KOPP: Also, there’s the Federal Circuit. There’s actually in the Civil Division an office
which handles, for the most part, litigation in the Federal Circuit. Our office from
time to time does handle cases in the Federal Circuit as well.
I’m curious whether you think the split was successful and whether you think it should happen in the Ninth Circuit.

MR. KOPP: That’s a very difficult question because on the one hand, my experience with the Ninth Circuit is that it’s very hard for a court of that size to operate effectively. The judges have such a large caseload and they’re spread over such a large geographic area that it’s very hard for the judges even to know a large number of their colleagues and certainly to know them well. I think by not knowing your colleagues well as people, as opposed to just judges, there’s something that gets lost in the quality of the court. I think the courts where the judges see each other a lot, that promotes interaction and it probably promotes better decision making.

In the Ninth Circuit there is a very real problem that results from the very large size of the court. But the question is how do you split up the Circuit in a way that makes things better. The basic problem there is California is just so huge that to split the Circuit you either have to split California, which has a lot of downsides, or make California basically a circuit by itself or a circuit with some small state, which isn’t going to want to be a little state in a circuit that is dominated by California. In my professional lifetime, people always started out with the idea that the Ninth Circuit was too big and had to be split, but they could never figure out a way to do it.

I should mention, by the way, that in addition to the eleven circuits, there is also the Federal Circuit. There’s actually in the Civil Division an office which handles, for the most part, litigation in the Federal Circuit. Our office handles a significant number of cases in the Federal Circuit as well.
MS. FEIGIN: Let’s go back to your early years. As you said, the cases in the beginning were simple so they probably weren’t the most interesting of your career, but at least in one specific area, your career started in one way and ended in a very different way, and I wonder if you could tell us about that.

MR. KOPP: When I joined the office, the way you got assignments is they would start you off with cases that were basically routine cases. We had many issues in the office that were reoccurring types of issues. For instance, we had suits under the Federal Tort Claims Act, we had some admiralty cases, we had suits where people would seek some form of injunctive relief to stop the government from doing something that either they felt was injurious to them or kept them from doing something they felt they should be able to do, and among the types of suits, litigation, that we had were cases involving government employees where there was some type of disciplinary action taken against them that was then reviewed by the Civil Service Commission. If the government employee didn’t like the decision of the Civil Service Commission, they would seek judicial review in the courts.

There was a whole range of conduct that employees might do that would result in disciplinary action against them or discharge. Among that was that if you were gay and involved in what at the time was commonly characterized as lewd conduct, that was something that you could be discharged for. When I came into the office, one of the types of cases that was a very common type were people suing to get a determination that they should not be disciplined or fired because of their conduct for being someone who had been involved in seeking a companion of the same sex. These cases for the most part were quite cut-and-dry,
and the courts, at least at the time I arrived at the office, pretty universally accepted the fact that if you were involved in solicitation for gay sex, that was something that you could be fired for. There were a number of those cases that made their way to our office, and they were pretty much viewed by everyone as cut-and-dry. The attorneys who represented the plaintiffs often themselves bought into that notion and didn’t get much into the conduct that their client had been involved in but instead presented their cases based on various technical points, such as the Civil Service Commission had failed to do such and such in terms of reviewing the case or had overlooked some procedure. There was a lot of emphasis in some of these arguments by the plaintiffs’ attorneys on very technical issues that permitted them to avoid a challenge to the prevailing principal that if you were involved in gay solicitation, that that was lewd, immoral conduct for which you could be fired. That was just accepted at the time.

MS. FEIGIN: Can you tell us about a case you had in the Ninth Circuit. You also had a case in the D.C. Circuit on that issue, and they went differently. Can you tell us a little about them?

MR. KOPP: As I say, at the time these cases were basically viewed as very much cut-and-dry, and there were always a few of them that were in the office and they were essentially assigned to new attorneys as more or less of a training vehicle. At the early stage of my career, I ended up handling a few of them, and one of the first arguments I had was in a case where somebody who was gay was fired by the government. The Civil Service Commission upheld the firing, and the plaintiff appealed. I did the brief and the case was in the Ninth Circuit. I went out and
argued the case. The presiding judge was Chief Judge Chambers, who had,
before he became a judge, a career in the Navy, and at the oral argument he spent
a large part of the time cracking jokes and telling old Navy stories, and didn’t
really seem to be very interested in the arguments, certainly not the argument by
the plaintiff, and not that much interested in my argument either. Then the case
came down and it was an easy win for the government. This was in 1968. That
was sort of an extreme instance I think of the attitude of the courts and the
government.

MS. FEIGIN: Were his comments crude?

MR. KOPP: Yes. For somebody on the bench, they were unusual comments to say the least.
Several years later, I had another case involving someone who was gay, and this
was in the D.C. Circuit. I prepared the brief, and the argument came up at a time
when the Johnson administration was ending, and there were some people who
were working in the Assistant Attorney General’s Office who because the
administration was ending didn’t have that much to do. They were interested
before they left the Department in having an oral argument in the court of appeals.
So one of the really nice bright attorneys who had been working for Assistant
Attorney General Ed Weisl came down to see me and asked whether he could do
an argument in a case I had briefed called Norton v. Macy. I said I’ll check with
my supervisors, but I’m not opposed to your doing the argument. So I checked,
and contrary to the way they normally would react – because the office generally
jealously would protect its oral arguments in cases that it had briefed – they didn’t
have any objections to this attorney arguing the case. We told him sure, he could
go ahead and argue the case. It was just another simple case involving a Civil Service Commission decision upholding the discharge of someone who was gay. So the front office attorney ended up arguing the case.

He did a fine job on the argument. However, he drew a panel that consisted of Chief Judge Bazelon, Judge Wright, and Judge Tamm, and it resulted in a 2 to 1 decision in favor of the employee. The majority decision caught something that we hadn’t picked up on in our brief, which was that the person who made the decision to discharge the employee said the employee actually was doing a perfectly fine job in his work but he still had to fire him. The court picked up on this and said the standard for firing government employees is when their conduct impairs the efficiency of the service. The work that this employee was doing was conceded by the firing official to be fine so the firing can’t stand because it doesn’t impair the efficiency of the service. At the time in our office we were very surprised by the decision and the Solicitor General authorized rehearing en banc. It was denied, and at first we just thought the decision would stand as sort of a fluke, but in fact it became one of the very important decisions in terms of the advancement of gay rights, and a few years later, the Carter administration basically changed the policy with respect to discharges of someone because they were gay and made it clear that there had to be impairment of the work relationship. That really was a major step in terms of the advancement of gay rights.

At the very end of my career, I ended up in the Obama administration working on the *DOMA* case where we argued that the Defense of Marriage Act,
which defines marriage as being between a man and a woman, was unconstitutional with respect to federal statutory law. I kept thinking back. I had started off my career arguing one way and now here I am doing something that is on the other side. It showed the evolution that has happened in terms of how we look at gay rights in terms of the law. Add to this the Clinton administration and gays in the military, which was an important intermediary step in terms of the advancement of gay rights even though at the time it was a compromise policy designed basically to limit gay people in terms of their ability to be in the military. That’s a story we will want to talk about later.

MS. FEIGIN: You’re welcome to talk about it now if you’d like.

MR. KOPP: We can wait, or you can splice it together when we get to it later on (laughter).

MS. FEIGIN: Let me go back one minute because you talked about the Ninth Circuit and Judge Chambers. There’s a story about Judge Chambers and the Appellate Section involving Neil Koslowe. Can you tell us that story?

MR. KOPP: Neil Koslowe was one of my colleagues and an Orthodox Jew, and by the time he was in the office, I was a supervisor. He had an oral argument in a case that we had briefed set for the Ninth Circuit and it was set to be argued on a day which was a Jewish holiday. I’m not sure in terms of the timing, let me check it and we can discuss it later on.

MS. FEIGIN: Okay, we’ll do that next time. Let’s see if we can begin to talk about when your career started to kick into high gear and you started getting more high visibility cases, although actually the gay case in retrospect had more visibility than expected. But when you got cases that you knew were high visibility.
The first high visibility case that I handled was a case under the Federal Tort Claims Act which was not your routine tort case. At this point I had had a few routine cases under the Federal Tort Claims Act. The Tort Claims Act was a basic source of a lot of the litigation that was in the office. But this case was very different because it involved a large test by the government which involved supersonic flights over Oklahoma. The flights had caused sonic booms which had startled the residents of Oklahoma City and then people began to get very upset about the sonic booms. Some of them noticed cracks in their houses which they thought had been caused by the sonic booms. More than 70 residents of the Oklahoma City area brought suit against the government under the Federal Tort Claims Act claiming that the sonic booms had damaged their homes. The District Court there set up a number of test cases to adjudicate in those cases the liability issues with the idea that then the other cases would use those cases as models and hopefully there wouldn’t have to be additional litigation, just settlement. But in any event, the idea was to start off with some test cases.

In these test cases, the District Court ruled in favor of the plaintiffs and awarded them damages based on the cost of repairing the cracks in their homes. The case generated a lot of publicity, particularly in Oklahoma, and when I was assigned the case, I was very excited because Mort Hollander, the head of the office, and the supervisor on the case, Alan Rosenthal, both stressed to me how important the case was and how they felt confident that I was the right person to handle this. For a young attorney, this was the type of thing that was very exciting to hear. So I went to work on the case and wrote an appeal memo. The
Solicitor General authorized the appeal and then I began writing the brief.

As I wrote the brief, I did what should happen when you write a brief. You convince yourself that your position is absolutely right and I became more and more convinced that we were right. I noticed that there was evidence that said that people have cracks in their houses all the time and typically they don’t notice them and then suddenly something happens and all of a sudden they look around their house and they do see cracks. I went home and looked around my house and saw cracks I had never seen before and thought, hey, there’s a lot to that. So I very eagerly wrote the brief for the appellant in the case and went out to the Tenth Circuit after having an extensive moot court in the office.

A moot court is a practice that our office always had before arguments. I had the moot court and I felt that I really knew the case and I was very excited to be doing the argument. At the argument, it was hard to read the court because the Tenth Circuit in those days didn’t ask too many questions, but for me, the fact that the court wasn’t asking a lot of questions and we were the appellant, I interpreted as a good sign. I figured that since our position would probably be unpopular with people in that part of the country that there would be a lot of hostile questions. When I didn’t get that hostile questioning, I felt that was a good sign. So I went back to Washington very excited about the argument and I was even more excited when I got a copy of the Oklahoma City newspaper and there was a big write up on the case. It was the first time I had ever seen an argument that I had presented in the newspaper. I actually thought we might win the case. However, a few months later, the decision came down and the court noticed that
this was an appeal that turned ultimately on questions of fact, and the decision of
the District Court was not clearly erroneous and that was the end of the matter.
Since the decision of the District Court judge turned on factual questions, the
clearly erroneous rule was dispositive.

MS. FEIGIN: That often works for the government (laughter).

MR. KOPP: That’s right. That often works for the government as well. And actually, not long
afterward, I had a case where that was exactly what happened. This was a very
tragic case where a pilot had been taking his family on a trip in a small private
airplane, and the plane had crashed, killing his wife and daughter, but the pilot
survived. The pilot, thinking the crash had occurred because of negligence not by
him but by the air traffic controllers, brought suit against the government. I
prepared the appellee’s brief which, of course, clearly reminded the court of
appeals of the clearly erroneous rule because the government had won the case in
the District Court. We argued that the case was factual and since the government
had won the case in the District Court, the District Court having found that the
accident was the plaintiff’s fault, that that decision should be affirmed as not
clearly erroneous. The argument was in Chicago, and I went out to Chicago to
argue the case. As I was sitting in the courtroom waiting just before the judges
came in, opposing counsel came by and introduced himself and then said to me,
“I’d like to introduce you to my client,” and the client, of course, was the pilot of
the airplane that had crashed, killing the pilot’s wife and daughter. I was taken
aback by the fact that here I was about to present an oral argument where
somebody had been killed and I was being introduced to the plaintiff in the case.
So I said hello to the plaintiff and I said I was very sorry about what happened to his family, and then I had to refocus myself to think about presenting the argument.

When the case was called, I presented our argument, reminding the Court of Appeals of the clearly erroneous rule, and I pointed out the District Court had found that the cause of the crash was the negligence of the pilot, the man who, I didn’t point him out, but the man who I knew was sitting in the back of the room probably very upset with what I was saying. My argument was that this gentleman had done all sorts of things which were negligent, and the District Court was not clearly erroneous in finding that the accident was his fault. A few months later, the decision came down and the court did find that the District Court ruling wasn’t clearly erroneous and that the accident was the pilot’s fault. I thought that was the right result, but I still felt sorry for this gentleman. It brought home to me that even though as an appellate lawyer you tend to look at cases abstractly and in terms of legal principles and what’s in the record, you’re still litigating cases that involve people and their lives and often their tragedies and that litigation ultimately is all about human beings, not just abstract principles.

MS. FEIGIN: Before we close out today’s session, let me ask you a couple of follow up questions to the stories you just told. You said what happened when you did the case with the cracks in the ceiling is what should happen, which is that you convince yourself that you’re right, but there must have been times, or were there times, when you were unable to convince yourself that you were right, and if so, how did you handle that?
MR. KOPP: One of the big advantages the government has in the litigation process is the procedure by which we prepare memoranda for the Solicitor General that recommend for or against appeal. This is a process where we solicit recommendations from the trial attorneys, from the agencies that are involved, and from trial litigation sections in the Civil Division, and we prepare a memorandum to the Solicitor General recommending for or against appeal. That memo goes through the Assistant Attorney General who usually, but not always, accepts our recommendation. It goes to the Solicitor General’s Office and the Solicitor General’s Office then assigns one of its staff attorneys to the case who does a short memo of his or her own, and that memo then goes to a Deputy Solicitor General who makes a recommendation to the Solicitor General. This is a process which I think is very effective in terms of weeding out weak cases. As a result of it, in the government appeals that I handled I never had a case which I felt uncomfortable arguing because the process helps wash out cases that are really weak. It doesn’t mean that you can’t appreciate how others can look at the case differently, but it does mean that you can latch onto an approach to the case that is arguable and a reasonable argument.

MS. FEIGIN: But that’s if you lost the case below. You could be an appellee who might think the case shouldn’t have been won by the government. Has that ever happened to you?

MR. KOPP: Well let me again go back in terms of timeframes because as I mentioned, in later years, this was when I was a supervisor and then head of the office, the number of appellee cases that we ended up handling in our office went down because we
didn’t have the resources. So we would handle in our office the appellee cases that had significance and we thought the government should win even though there might be a significant risk of losing. The appellee cases sort of became very much like the appellant cases. Also in these in later years the settlement process became more and more significant. The courts started having mediators and there were often ways that unattractive cases could be settled that in my early years in the office weren’t there. The mediation process, in some cases, did make a big difference as the courts of appeals got more and more into that. As for my early years in the office as a staff attorney – in the appellee cases – there weren’t any assigned to me that I thought weren’t arguable, and my job as a lawyer was to find the angle on the case that I thought was the most attractive to the court.

Normally the government would win a very large percentage of the cases that it litigated in the Court of Appeals. In our office, we would win, depending on how you counted them, often well over 80% of the cases that we argued.

MS. FEIGIN: I know you argued a lot of big ones, so when we meet next, I look forward to hearing about those. Thank you very much for today’s session.

MR. KOPP: Thank you.
ORAL HISTORY OF ROBERT KOPP

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 Judy Feigin, and the interviewee is Robert Kopp. The interview took place at the home of Robert Kopp in Bethesda, Maryland, on Tuesday, April 1, 2014. This is the fifth interview.

MS. FEIGIN: Good morning.

MR. KOPP: Good morning.

MS. FEIGIN: Before we continue with a discussion of some of the cases that you handled, we talked a little bit last time about Judge Chambers in the Ninth Circuit, and there was another story that you wanted to add to that.

MR. KOPP: Judge Chambers was for me a character from a different era. We had – this was in the mid-1970s – a case where one of our attorneys was going out to argue in the Ninth Circuit. He was an Orthodox Jew, which meant that he couldn’t travel on Saturdays. He got a notice of oral argument, and the oral argument was set for a Friday in the Ninth Circuit. I think it was San Francisco, and that meant that after the argument, he would have to be traveling on the Sabbath.

MS. FEIGIN: We should say that Sabbath for a Jew begins after sundown on Friday.

MR. KOPP: Right. So the attorney contacted the Clerk’s office in the Ninth Circuit and asked whether it was possible to move the argument date. Apparently the judge got extremely upset and wrote a short little opinion, a paragraph or two, where he denied the request and said some unpleasant things about a Mr. K – the attorney involved. Like me, he had a last name that begins with K. It’s the type of thing that today hardly any judge would think was at all within judicial ethics to do something like that, but this was in the mid-1970s, and it was a different era, but I think it was out of order even for that period.
MS. FEIGIN: Was that order published?

MR. KOPP: It was a written order, and I’m told that it was set to be published but that the Attorney General requested that the Ninth Circuit not publish it.

MS. FEIGIN: That West not publish it?

MR. KOPP: That West not publish it. It would have been a huge embarrassment. If people would have found out what was behind it, it would have become a very big deal, I’m sure, at some point in time.

MS. FEIGIN: From what you’re saying, and I’ve read the order myself, is it fair to say that it appeared anti-Semitic?

MR. KOPP: Some might construe it that way. It certainly, in modern eyes, would seem to be a violation of basic respect for religious rights.

MS. FEIGIN: Back to your cases. Do you want to continue on with the next series of cases that you think were significant to your career?

MR. KOPP: Yes. The cases that we handled in our office typically were cases that were of broad significance, but sometimes we handled cases on behalf of individuals where Congress had given them rights under the veterans’ statute, and the cases by governmental standards were very small. But we regarded them as very important cases because we were representing veterans, and Congress had determined that the United States should be assuring that veterans get their reemployment rights after they came back from military service.

MS. FEIGIN: We should say for historical context that the mid-1970s, which is when I think you’re talking about, was a time when the whole issue of veterans was very
emotional. Vietnam was happening and there was a lot of anger against veterans in general by the anti-war movement. Is that fair to say?

MR. KOPP: That’s correct. I believe that the actual statutes here were a reaction to World War II and meant that an employer couldn’t deprive a veteran of seniority rights just because he had been in military service. So in our office we had a good number of these cases, and although the stakes were not typically large, they were the type of case where, at least I certainly liked handling them, because we were representing plaintiffs who had significant grievances against their employers in terms of rights that Congress had said they were entitled to and the employers weren’t giving them.

The case that I remember most was one of that series that didn’t work out terribly well. It was an unreported case that was in the Tenth Circuit. I was representing a veteran who was suing his employer to obtain some seniority credits for the time that he had been in military service, but the dollar amount of the suit could be measured in the hundreds of dollars. So it was a very tiny case, certainly by government standards and even by private practice standards. I went out to the Tenth Circuit to argue the case, and I felt that we had a very strong argument, but when I got up to argue, I got a lecture by the presiding judge, Judge Breitenstein, who basically said, “Don’t you ever come to this court with such a tiny case. We are a very, very busy court, and the small sums that are at stake in this case are really not the type of thing that we should be bothering with.” I tried to say that there’s a statutory scheme and Congress had intended the United States represent the veteran and the United States should do it even though there are
small amounts at stake, and he just wouldn’t listen to me. It was just a very unpleasant argument, and we lost the case.

MS. FEIGIN: So he convinced another judge?

MR. KOPP: So he convinced another judge. They just didn’t get the point that this was a scheme that Congress had intended.

On the other hand, I had some great times in terms of arguing some of these veteran cases. The Tenth Circuit case that I just discussed was one that we lost, but normally we did win these cases. One case in particular was a case in the Third Circuit, and it presented an issue that was fairly tricky. We had lost the case in the District Court, and I was assigned the case to do an appeal memorandum, recommending for or against appeal. I tried very hard to figure out a theory on which to appeal the case because the veteran’s situation seemed quite sympathetic, but I just couldn’t figure out how to do it. So I reluctantly recommended against appeal. The Division accepted that recommendation and forwarded it to the Solicitor General’s Office.

When the recommendation got to the Solicitor General’s Office, the Solicitor General, as is their practice, assigned it to a staff attorney to prepare a recommendation. I remember we had a conference with the SG attorney and his supervisor, and we worked out a theory that sounded arguable as we discussed the case. So the SG’s staff persuaded the Solicitor General, who I think was Erwin Griswold at the time, to determine in favor of appeal, and appeal was authorized. I then went forward and briefed the case, and as I briefed the case, I began to feel more comfortable with our position, and I went down to the Third Circuit and

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argued the case, and we won.

I felt very good about that result and also about the procedural process at the Department of Justice. Not only had the rights of a deserving veteran been preserved, but the process by which we would do written recommendations to the SG, and then the Solicitor General’s Office would look at the recommendations and come up with their own recommendations, had worked. The process had flushed out conflicting views and permitted discussion. It was a good example of the process working, and through the contributions of everybody involved, the theory that was worked out proved to be a successful theory. This is the way over the years that the process worked, and I think it’s one of the great advantages that the federal government has in terms of its litigation practice that determines whether to appeal after a very studied and exhaustive process that often works out theories that may not be self-evident when you first look at a case.

MS. FEIGIN: You mentioned the Solicitor General being Erwin Griswold. Can you give us a sense of him and maybe other solicitors general during your tenure and how changes in the solicitors general changed things or not.

MR. KOPP: Griswold was very interesting because I actually dealt with him at very different stages in my career. The first time I dealt with him was as a student at Harvard when I took his tax course. His style of teaching was mostly a lecture style. There wasn’t that much give-and-take with students, and since there wasn’t give-and-take and he was talking about tax law which didn’t inherently interest me at the time, I didn’t find it a terribly exciting course. I didn’t do very well in the course either (laughter). So my first impression of Griswold was not terribly
positive. Then he became Solicitor General. He was a Johnson appointee and was extended over into the Nixon administration for quite a while until eventually I think after three or four years there Nixon decided that he had to get rid of him because Griswold had a mind of his own.

I dealt with him a few times as a Solicitor General and he always seemed to me to be very intelligent. I also saw a couple of his arguments in the Supreme Court. His arguments were much more structured than most oral arguments are today. I think the best oral advocates today invite questions and the Court is active in addressing questions. When Griswold was arguing, he had this structured style, and the Court at that time was not normally terribly active in terms of its questioning. So his arguments, at least the few that I saw, bore some resemblance to the lectures from him when he had been a professor. Now that may be not true more generally because I saw only a few of his arguments, but that was my impression of the arguments that I saw.

Then I had contacts with Griswold much later on because I was at several judicial conferences where he attended. By that point he was retired and he had this wonderful wife that came with him who was a very lovely person. At that stage in his life, he was opening up. He was charming and witty. When I was a student at law school, he was the kind of person I’d be scared of, but he turned out to be a warm and friendly person, and a great person to sit next to at a dinner table and listen to his fascinating discussions and stories. So I really in my lifetime got three views of him, and I’m happy that the latest view was just terrifically positive of him.
MS. FEIGIN: For anyone who wants to hear about the end of his time as Solicitor General, they can look at Alan Rosenthal’s oral history. He refers to certain events that he believes led to the end of Griswold’s tenure as Solicitor General.

MR. KOPP: I read Alan’s history on that. Griswold was somebody who had a lot of backbone, and when he decided something was right and something was wrong, he stuck to it.

MS. FEIGIN: Do you think that is unusual in a Solicitor General?

MR. KOPP: No. I think that’s the way the system is supposed to be. The Solicitor General is in charge essentially of the government’s litigation, and therefore normally has a client that is a governmental agency and, ultimately, in a sense, the President. There’s always the question of how much weight do you give to the views of your client in terms of developing a position, and what do you do if you think your client is wrong, and how wrong becomes so wrong that it’s just unethical and inappropriate to do what the client wants you to do. I think different Solicitors General drew lines in somewhat different fashion on that. I will probably never know exactly whether people made some really wrong decisions, but at least my impression was that the Solicitors General that I dealt with were very conscientious and viewed as part of their job at some point that they had to say no to their clients.

MS. FEIGIN: Do you remember an example when you thought a Solicitor General did not show the strength that you think should be shown?

MR. KOPP: It’s hard to say. I do remember when Charles Fried was Solicitor General. He was a Harvard Law professor whom I indirectly knew of at Harvard. At Harvard
he was regarded as a very distinguished professor with a very strong personality, but as Solicitor General he conveyed the impression of being a person under a lot of pressure. At least when I saw him he didn’t seem to be enjoying his job. I began to suspect that in practice he had less independent authority than did his predecessors. I don’t know for sure, since in that era I rarely saw a complete picture of the decision-making.

MS. FEIGIN: What administration was that?

MR. KOPP: This was in the Reagan administration.

MS. FEIGIN: Can you think of one or more examples of any Solicitor General who really stood up under pressure in the way that you admire?

MR. KOPP: As I said, we are learning things about Erwin Griswold where he said no to President Nixon. But most of those types of incidents did not become known to the career staff. The insulation of the career staff from the White House and also pressures from the White House became more significant after Watergate as the system adjusted to insulate us more. I mentioned earlier about how David Kreeger when he was head of my office in World War II was sitting at his desk and President Roosevelt called. That could never happen today for no other reason than there are directives all over the place that say the White House doesn’t deal directly with career people. You have to go through a process of getting authorization and also the government has political appointees who are there to be consulted by the White House. So there usually isn’t any need for White House people to talk directly to the career staff. The career staff on the whole is much better insulated from the political pressures, at least coming
directly from the White House, than they used to be when the government was smaller and more informal.

MS. FEIGIN: So back to you and your life. What was going on in your life? It was the mid-1970s. Where were you personally?

MR. KOPP: Personally, it was about the time when I started dating the woman who became my wife. I think I mentioned earlier that my mother had gone to Wellesley, and Wellesley has a very active alumni club in various cities, and the Washington Wellesley Club was one of the most active. One year in the early 1960s my mother hosted an annual Wellesley Club party which the club had each year for both alumni and Wellesley students. My mother agreed to host the party at her house, and the co-hostess was Barbara Kornblith who also had been to Wellesley and who lived in nearby Maryland. So my mother and Barbara Kornblith were hosting this party, and Barbara’s daughter, Nancy, who was I think a sophomore at Wellesley at the time, came to the party. My mother introduced me to her, and she struck me as a nice person, but I didn’t really pay much attention to her because it was sort of a signal for me that if my mother was introducing me to somebody, it was probably somebody I wouldn’t be that interested in (laughter). However, I didn’t forget her, and I guess it was three or four years later, I started dating her and one thing led to another, and in 1968 Nancy and I got engaged. We got married in May of 1969 and we settled down to live in Montgomery County, Maryland.

I don’t want to go off and talk much about her life because if I did it would dominate this whole discussion, so I really just want to mention a few basic
things. When Nancy had been a student at Wellesley, she had participated in Wellesley’s Washington summer program and had obtained through the program an internship working for Representative Edith Green of Oregon. Edith Green’s chief of staff was Wesley Barthelmes. After Nancy married me, she maintained her interest in politics and got a job as a staffer working for the Montgomery County Council where she was working for the whole County Council. One day in 1974, she came home from work and told me that she had heard that there was a vacancy in the state legislature for somebody from our district. It would be an open seat in the election, and she said, “I’m probably not going to end up running, but I’m starting to think maybe I should consider that and maybe I’ll go talk to Wesley Barthelmes and see what he thinks of it, but it sounds like a long shot and I probably won’t do it.” The way she said it, I didn’t think too much about it because it certainly sounded to me like it was something that was a long shot and she would decide not to do. But a few days later she came back and she said she had had an interesting discussion with Barthelmes and he had encouraged her to run. So she decided to do that and she ran and she won and that started her legislative career. She ended up being in the Maryland House of Delegates for 27 years and served in a significant leadership position. She also had what I think of as a very remarkable place in history, although I don’t know whether there are records to prove this, but it’s my understanding that she was the first female legislator in the country – in 1976 – to have had a baby while she was in office.

In 2002, there was a vacancy for the position of State Treasurer for the State of Maryland. That’s a position in Maryland that is elected by the legislature,
and so she decided to put her hat in the ring for that position and the legislature elected her as State Treasurer and she has been reelected since then four times, and at least as of this discussion, which is in 2014, she has been there 12 straight years. I’m not going to get more into her career if for no other reason than it will probably be a lot more interesting than this oral history, so she can deal with that herself (laughter).

MS. FEIGIN: It is an astonishing career. Let me just ask something about that career that intersects with yours in a way that I think is significant. When she served in the legislature, the legislature is in Annapolis, and I believe there was a period of time that you actually commuted from Annapolis. Is that right?

MR. KOPP: That’s right. In those days, a lot of members of the legislature during the legislative session, which was 90 days, would rent apartments in Annapolis. We got a very good babysitter who actually ended up staying with us for more than ten years. While Emily, our first child, was a baby, Nancy and I and the baby moved to Annapolis and our babysitter came with us and also lived in Annapolis, and things worked out very well. Eventually, after several years, life got too complicated so I didn’t any longer commute from Annapolis. I stayed here at home. But there were about three or four years, when Emily was young, that I was basically operating out of Annapolis. At that time, they had bus service from Annapolis to downtown Washington so it wasn’t as hard to commute as it is today.

MS. FEIGIN: I bring it up because there is a sense that that experience may have shaped some of the decisions you made as head of the Appellate Section. In particular, I’m
talking about how supportive you were in many instances of alternative work
schedules and things that accommodated dual career families. I wonder if, it’s a
little tangential, but this is a good point to mention it, if you could discuss your
view on that and how you handled that within the office.

MR. KOPP: Some of my reactions to the role of women and family members in the
government workplace were just that I thought there should be room for everyone
to work. But much of my reaction was also just practical. We did a very good
job of attracting some really wonderful people to the office. The salary scale of
the government meant that it paid its lawyers a lot less compared to what those
same lawyers could get in private practice. So we had an office where just about
anybody in the office, if they found the workplace an unattractive place, could get
up and leave and double their salary and do even better in the long run. As
somebody who wanted to keep our attorneys for as long a time as we could, I
realized that part of my job was to do what we could do other than pay them more
money – which we couldn’t do – to keep them in the workplace so that they
would want to stay. They would find that it had attractive advantages for them
that they couldn’t get in private practice. Now, one of the advantages that we did
have is we did a lot of absolutely fascinating work, of the type that most private
law firms don’t regularly do, so we did have the advantage of really attractive and
significant work. But I also thought we had to do what could be done so that
working parents could feel comfortable working in a place like ours. Fortunately
this was at a time when people higher up in the Justice Department had already
started figuring this out and there were efforts at government-run daycare centers --

MS. FEIGIN: What administration are we talking about when this happened?

MR. KOPP: I don’t remember whether this was under the Ford administration or the Reagan administration. I think it happened before the Clinton administration. Just Us Kids was the key daycare center. I know it became very important to people working in the Justice Department and the only complaint I think people ever had about it is it became too popular. At the time I left, that was a real problem, the lack of adequate daycare downtown.

We would permit people to take leave when they had child issues. A lot of our work, if you came in at 10:00 instead of 9:00, it didn’t matter, so people could make some adjustments in their hours on a day-to-day basis if that was necessary. So our office had more flexibility in terms of running the workplace than some of the other offices in the Department.

MS. FEIGIN: I don’t know if you were the first, maybe you would know, but you were early on in letting people do telecommuting.

MR. KOPP: Yes. Telecommuting was something that we permitted. We weren’t the first, but we did permit telecommuting fairly early on compared to most offices. I remember what was sort of a big development in terms of telecommunicating for us was when there was a huge rainstorm, I think it was at some point in the 1990s. The Main Justice building flooded and was declared unusable for about six months, so we all had to move out. We were moved into quarters at the building that the Justice Department was leasing at 11th and L, I think it was called the
L Street Building at the time. The only problem was there wasn’t enough room for everybody. Only about half the office could be present at any one time. So suddenly telecommuting became something that had to be done because there was no place for people. By that point, the technology had gotten to a point where telecommuting had become feasible. So for about six months, we were in that situation, and once Main Justice was cleaned up and we moved back in, telecommuting really had become a permanent part of our work environment.

MS. FEIGIN: I understand, and I believe this is under your tenure, that some people actually were not even in D.C. People moved to points far away and were allowed to remain part of the Section. Is that true?

MR. KOPP: I don’t think it’s quite fair to say it was my idea. It was the type of thing that every now and then there’d be somebody who wanted or needed to leave the office because maybe a spouse had a job elsewhere and it occurred to a couple of them to ask for the ability to work from a different location and periodically come down to Washington at their expense. Those requests, I actually had somewhat mixed feelings about them, particularly the initial ones, but we raised that with our administrative office and we got approval to go ahead and do that. At first we did have a mixed experience with that type of situation. Not all of it was good. But eventually it became something that there were often one or two people who were doing that and that did seem to work out.

MS. FEIGIN: What changed? What made it go from not-so-good to okay?

MR. KOPP: I don’t know. I think the people who wanted to do that, it requires the person’s willingness to be flexible, to come down to Washington when you need to, and I
think the first people who did that, it was a little, everyone was sort of figuring out their way and what they had to do to make it work. As I say, at the beginning, it didn’t actually work that well, but I think everybody began to understand the flexibility that it took, particularly the flexibility of the person who was working outside the office. Also the technology was improving.

When we first started, the technology, use of emails and things like that, weren’t what they are today in terms of ease of use, and as the technology improved, it became a lot easier to work offsite. I know after I left, the office went through this period when they were in this long hiring freeze and there were people in the office who, because of their own situation, just couldn’t stay in the Washington area. They had to leave and I think by that time there had been enough experience with people working offsite in the Division that they were able to get authorization to have a number of people work offsite. I think that helped the Division very much get through things like an extended hiring freeze. Again, I should add that there were other components of the Division that probably in terms of permitting people to work offsite were a step ahead of us. Federal Programs and maybe the Office of Immigration Law, I think, experimented more with it earlier than we did.

MS. FEIGIN: So back to your cases. There’s Nancy in a political position. Did that impact you work-wise?

MR. KOPP: Actually that was sort of interesting because one of the areas that I had had cases in involved the Hatch Act which is a statute which restricts government employees from participating in political activities. At the time, it was
significantly more restrictive than the laws are today. Before Nancy indicated her interest in politics, I had worked on some cases involving the Hatch Act and had been defending the Hatch Act against constitutional challenges. One of our cases went to the Supreme Court, and in a 1973 decision, the Supreme Court reaffirmed the constitutionality of the Hatch Act.\(^8\) So I had some experience in knowing where the line was for what government employees could and could not do in terms of political activity. I knew that when Nancy went into a political career there were severe limits on what I could do. But I thought that was actually quite fine. She could be the one in our family who was the politician and engaged in politics, and I could be the spouse who was barred by law from participating in politics, and I thought that was fine (laughter).

MS. FEIGIN: You didn’t have to do fundraisers.

MR. KOPP: I didn’t have to do fundraisers, and there were all sorts of things I could beg off having to go to, so I thought it was a good resolution (laughter). And it made it very easy to just draw a clear line down the middle in our family.

MS. FEIGIN: Moving along in time, are there any other cases that developed for you that you think are worth discussing now?

MR. KOPP: Yes. I think in this particular period that we’re talking about, which is the early 1970s, it was a time when I began to notice that my assignments in the office were becoming more and more of consequence. I mentioned the Hatch Act litigation and the fact that we had been defending the Hatch Act in the Court of Appeals and the Supreme Court, but there were other significant cases that just seemed to come more frequently.

One day I had just returned from a period of leave, and I found a new assignment on my desk. This was in the middle of the time period of the war in Vietnam, and of course the war was a hugely divisive issue in the country. There on my desk was this case called *Commonwealth of Massachusetts v. Laird* where the Commonwealth of Massachusetts was seeking to get the Supreme Court to decide that the war in Vietnam was unconstitutional because there hadn’t been the proper declaration of war. When I saw this case, and again it was in the early 1970s, it just seemed to me about the most important case I had ever heard of. As I said, the Commonwealth had done the unusual thing of bringing its suit in the first instance in the Supreme Court. They did that by filing a motion to file a bill of complaint because it was permissive whether the Court would permit them to proceed. The case was assigned to the Civil Division and our office so we could prepare the initial draft of what the Solicitor General would file in the Supreme Court.

I was assigned the job of drafting our filing, and I got deeply into the issues and quickly learned that there really were significant hurdles for Massachusetts. One is that they were suing the United States on behalf of their citizens, but the citizens of Massachusetts were also citizens of the United States, and there was a doctrine called *parens patriae* which basically meant that you couldn’t have both the State and the United States suing on behalf of its citizens at the same time, that if citizens of the state were also citizens of the United States and if the United States was involved, the United States was the dominant player and the state couldn’t sue on behalf of its citizens. At least there were some
relatively old Supreme Court decisions that said so. So I developed the argument based on *parens patriae* that Massachusetts could not sue on behalf of its citizens in this context.

Then there also was a very significant political question argument presented, that this was the type of issue that was inappropriate for the courts to decide. Thus, we argued in the draft brief that I wrote that the suit couldn’t be maintained because Massachusetts couldn’t bring the suit on behalf of its citizens and because the case presented a political question that was beyond the capacity of the courts. I put a lot of effort into that draft brief, and Bob Zener, my reviewer, put a lot of effort into it, and when we sent that draft to the Solicitor General’s Office, I felt it was the best legal document I had ever done.

When it got to the Solicitor General’s Office, it was assigned to a staff attorney there who was Bradford Reynolds. I knew that he would be getting heavily into editing the brief because it was obviously an extraordinarily important brief, but I didn’t have that much experience in terms of working with the Solicitor General’s Office on major Supreme Court cases so I didn’t have a sense of how deeply they would get into the case and how freely they felt they could just take a draft that came from the Division and rewrite the whole thing from the very beginning. So when I saw Reynolds’s revision of the brief, which had basically used our draft more as a thought piece (laughter) rather than as something that you edit, I was shocked and at the time I’ll admit I was not totally convinced that the changes were improvements. However, Solicitor General Griswold approved the brief and filed it and the Supreme Court did what it asked,
which was that Massachusetts be denied leave to file the complaint. The vote was 6 to 3, and Justice Douglas wrote an opinion in dissent.⁹

As a footnote, I should note that Brad Reynolds, during the Reagan administration, became the head of the Civil Rights Division and had a very controversial tenure there. One of the interesting things about working with the Solicitor General’s Office was that it was such a professionally run office in terms of everybody there viewing themselves as government lawyers with a particular job of looking at cases as litigation lawyers look at them. Like us in the Civil Division, the Solicitor General’s staff normally wouldn’t be involved themselves in making policy. Thus, when you work with people in the SG’s office, you don’t necessarily have any idea how they would be in a policy position. From my working with Reynolds, I knew that he was a very good lawyer. I wished he hadn’t edited my work as much as he did (laughter), but I did know he was a very good lawyer. But I had no idea that he would in a different position become such a controversial figure. The Solicitor General’s Office, in my entire experience, has been such a very professional office.

MS. FEIGIN: Someone reading this who doesn’t know who he is will be curious, so maybe we should give a sense of what the controversy was about him when he went to the Civil Rights Division.

MR. KOPP: When he went to Civil Rights in the Reagan administration, the Civil Rights Division since the early 1960s had viewed its mission as the expansion of civil rights, particularly for minorities, but had also begun to think of expanding civil rights more generally. Today the Civil Rights Division deals with disability rights.

and there’s been homosexual rights, so with time, historically, the mission of the Civil Rights Division has been expanding. When Reynolds was head of Civil Rights, I think he felt that in some areas the expansion had gone too far and he began to adjust some of the positions of the Division in a way that was cutting back on positions that the preceding administrations had taken, and this caused a lot of turmoil, both in the Division and more broadly. There was a lot of controversy connected with Reynolds’s changes. I was watching this from afar so I can’t really give you specifics at this point, but I know that this generated an awful lot of controversy, and in the Clinton years I think there was significant undoing of what Reynolds had tried to do.

MS. FEIGIN: So back to you and the cases that you were doing. Now you’re in the thick of the biggest political issue there is, the war. Were there other cases of similar stature coming your way?

MR. KOPP: Not necessarily cases of similar stature. It’s interesting because Commonwealth of Massachusetts v. Laird did not produce a Supreme Court opinion. As I said, Douglas wrote a dissent but it actually didn’t produce a Supreme Court opinion, so it’s one of those tremendously important cases that is largely lost to history because there’s no opinion. But if the dissenters, the three justices that would have voted to permit the complaint to proceed, had had two more votes, it would have been one of the really major, major decisions in our history. None of the other cases that I handled in this era I think were in this league, but some of them were of considerable significance.

One case that I handled in the early 1970s was a case called
Ralph Nader v. FAA. I don’t know if it was the first but it was one of the first cases involving a challenge with respect to smoking on airlines. Nader’s theory was that smoking on airlines was so dangerous to people’s health that it constituted an emergency.

MS. FEIGIN: Second-hand smoke?

MR. KOPP: Yes, this is second-hand smoke. Because you’re in a confined area on a plane and the air conditioning system, of course, isn’t adequate to sweep up all the smoke that a smoker may generate, so Nader’s theory in this case was that smoking was such a threat to health that it constituted an emergency and the FAA should issue an immediate ban. The case was assigned to me and I defended the FAA’s position that an emergency wasn’t presented and that the relief for Nader should be denied, and the panel of the D.C. Circuit, which consisted of Judge Leventhal and Judge Robinson and a visiting judge, didn’t have any problem with our position.

At the time I thought the case wasn’t that difficult a case for us because Nader’s suit was based on the theory that there was an emergency and the Agency’s position was that it had acted reasonably in not declaring an emergency, and I thought that was a fairly easy position to defend. Of course today I think Nader’s position was the opening gun in the litigation and administrative battles with respect to smoking on airplanes. We now know that Nader was right in terms of his evaluation of smoking, and eventually the government came around to agree with him and in much more recent years, the government has been on the side opposing tobacco companies in various types of litigation, and our office has

10 440 F.2d 292 (D.C. Cir. 1971).
been involved in litigation against the tobacco companies. So as you look at the passage of time, it’s interesting to see how the policy side of some of the cases that we were involved in totally shifts to the opposite side of the policy spectrum.

**MS. FEIGIN:** As happened with gay rights.

**MR. KOPP:** That’s right. There was also another case at the time, in the early 1970s, that I didn’t think was that difficult a case, but looking back at it from the viewpoint of history and the development of the law, it’s a case that I’m sure would be enormously controversial today and probably might have a very different result in the courts today. This was a case called *Two v. U.S.* ¹¹ and it was a case that we had in the Ninth Circuit. There was a statute with respect to the military that required the honorable discharge of female lieutenants who are not promoted within thirteen years, and the statute did not apply to men. There were different rules that applied to men. We filed a brief which argued that if the Navy concluded that it needed disproportionately more male than female officers at the next-higher rank, that that was the kind of military judgment that was constitutionally within its discretion.

You can imagine what controversy would happen if that was the government’s position today in the courts. However, our brief also presented the less conceptually based argument that the plaintiff had not shown that the rule for women in practice was more adverse to the plaintiff than the counterpart rule for male officers, and since even accepting her position she hadn’t theretofor been able to show discrimination, that she should lose on that basis. That was the argument

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¹¹ *Two v. U.S.*, 471 F.2d 287 (9th Cir. 1972).
that the Court of Appeals accepted. So once again another one of the areas where in history you see that over the years things change significantly.

MS. FEIGIN: I think we have time for one more case, so pick among your many.

MR. KOPP: There’s another case that I handled in this era which was one of significance, particularly when you think what might have happened if it had come out the other way, a case called *Holmes v. Laird*\(^\text{12}\) in the D.C. Circuit. There were two American soldiers who were stationed in Germany, and there were Status of Forces agreements between the United States and Germany and there were treaties which permitted German courts to try certain types of cases against American servicemen, and this was that type of case. While the German proceedings were going on, determining whether the two American soldiers should be criminally convicted, they left Germany without authorization and returned to the United States. The Army, in an effort to comply with the United States’ obligations under treaty and the Status of Forces Agreement, attempted to return the servicemen to Germany, which at the time was West Germany. The soldiers brought an action in the District of Columbia to enjoin their return, and when the case got to the Court of Appeals, I briefed and argued the case. In an opinion that was written by Judge Spottswood Robinson, the Court held that the Constitution does not bar the United States from surrendering an American serviceman to a foreign country pursuant to international agreements between the United States and that country, even if the country does not provide all the criminal law safeguards that are afforded by the U.S. Constitution. The court also ruled that American courts have no power to

review the fairness of the German proceedings. And at least in that context, the case is a very significant precedent.

MS. FEIGIN: It is.

Well thank you very much. An amazing array of cases, and next time I’m sure there will be more. We have discussed some of the Solicitors General. Maybe next time we can discuss some of the Assistant Attorneys General, because you worked with a lot of people in that position. Thank you very much.

MR. KOPP: Thank you. It’s a real pleasure.
MS. FEIGIN: Good morning.

MR. KOPP: Good morning.

MS. FEIGIN: We left off at the end of the turbulent 1960s, and a lot was going on. Do you want to fill us in on how it looked from the Justice Department?

MR. KOPP: Sure. In 1969, of course, Richard Nixon was sworn in as President, and I was a career employee of the Department in the Civil Division. With Nixon’s election, I was pleased that there didn’t seem to be any concern among my colleagues as to the fact that there had been a change from a Democratic to a Republican administration. Everybody was confident that the Civil Division, which had a strong tradition of being non-political, would continue quite as before. Indeed Lyndon Johnson’s Solicitor General was Erwin Griswold, former Dean of Harvard Law School, and Griswold continued in his role as Solicitor General.

So the transition, insofar as the Civil Division was concerned, appeared to be a pretty smooth one. As a relatively new attorney, I had not had much contact with the senior Department officials. I didn’t work that much with people in our front office or the higher levels of the Solicitor General’s Office, but with my old professor Erwin Griswold in a high place, I thought I knew a bit more about them. I had had Griswold as a law professor at Harvard, and he had taught taxation there to me. As I said before, my taxation course was not terribly successful, and of course I didn’t become a tax attorney. In any event, with the change to the Nixon
administration, I started paying quite a bit of attention to what was going on in terms of major appointments in the Department. Eventually, in the Civil Division, President Nixon appointed William Ruckelshaus as the Assistant Attorney General. Ruckelshaus was a very intelligent person who had good rapport with everybody who saw him. He quickly came across to the career people in the Civil Division as a really fine appointment. Unfortunately, after a little over a year, he left the Civil Division to become the first Administrator of the Environmental Protection Agency.

Ruckelshaus’s replacement was L. Patrick Gray, a former Navy combat captain. I was still not senior enough to have that much to do with him personally, but I didn’t see anything in him which caused me any concern. As a Navy man, he was known to be a bit stiff, but he seemed to be quite dedicated to running his job properly, and moreover, Gray made some very good appointments in my view for his assistants.

At the time Gray came on board, my officemate was Barbara Herwig, a bright, young Honors Program attorney out of Stanford, and in our office she got off to a very fine start as an appellate attorney. Gray, when he came in, appointed her as one of his assistants. Gray also appointed as another assistant Daniel Armstrong, who had been a classmate of mine at Harvard, and I was very pleased that Gray had made that selection because I knew Daniel would be a very fine young attorney.

However Gray did not stay too long as Assistant Attorney General because Nixon made him the Acting Director of the FBI to replace J. Edgar
Hoover. Gray moved over to the FBI with the rest of the people from his front office, including Barbara Herwig. In that move, Barbara became Gray’s Special Assistant, and she occupied what was then the highest post in the FBI ever occupied by a woman. Of course, the idea when Gray moved over to the FBI was that he would become the Director of the FBI, but at that time Watergate was starting to become a serious problem for the administration, and Gray had the misfortune to be involved in it, particularly in an unfortunate incident involving destruction of certain materials. Gray, of course, never became Director of the FBI. Daniel Armstrong has done an oral history, and I found his description of Watergate and Pat Gray’s sad story to be quite gripping.

Gray’s replacement was Harlington Wood, and I participated in a number of meetings with Wood. He always struck me as a very intelligent, friendly person, and I, and I think most people, were very happy to have him running the Division. In 1973, he was nominated to be a district court judge, and eventually he was appointed to the Seventh Circuit. The Civil Division’s career attorneys apparently made a great impression on Judge Wood because after he left the Department and became a judge, when he would come back to Washington to attend meetings, he would always make a point of stopping by at the offices of his former colleagues, like me, and he would pop his head in and say hello. He was just a very friendly, impressive person.

At the time of the Nixon administration, I had been in the Office about four or five years or so and I began to think about leaving the Appellate Section. The general expectation among the attorneys in the office was that a job in the
Appellate Section was the type of job that one stayed in for three or four years, but after that, it was time to move on. The office was a good starting point for a career, but very few people then thought of it as the place for a long-term career. And indeed there had been much turnover in the office. When I joined in 1966, the number of attorneys in the office had been about 18 or 20 or so. I think at its maximum, it rose to 20, and then it dropped down to 13. And then eventually it started to rise some, but turnover was a significant concern within the office. Nonetheless, I figured it was time for me to start looking around since that seemed to be what everybody else did at this stage in their career.

I didn’t make any serious job applications, but I had interviews at a couple of law firms and several government law offices just to figure out what would be involved if I did make a move. I distinctly remember that one of the interviewers asked me why I was contemplating a change in jobs since my job seemed to be much more interesting than any job that his office had to offer. After I finished the interview, I began mulling that statement over. I decided that he was right, and not only about the jobs in his office, but about any of the other jobs I had been exploring. So I went to see Mort Hollander, and I told him that while I had been looking at some other jobs, I now realized how good a job I had in the Appellate Section and that I planned on staying for the long term. He said he was overjoyed, and it wasn’t too many years after that that I was promoted to become a supervisor.

In these early days in the Department of Justice, it was a very good time for me personally. But for the country, these were times that were quite difficult
and very troubling. I remember in particular April of 1968 when Martin Luther King was assassinated, and days of rioting followed in Washington. Buildings were set on fire, federal troops were called out. I remember one beautiful spring day when I was going to work, the flowers were in bloom, the cherry blossoms were out, forsythia were out, and over in the distance, you saw smoke on the horizon from buildings that were burning. It was really a very disturbing time.

After several days of the riots, we in the Civil Division were called in by our Assistant Attorney General who at the time was Ed Weisl, and he explained that even though most of us in the Civil Division knew nothing about criminal law, we were going to be assigned to various spots in the city, including police stations, to be observers. The thought was that having neutral observers of police would cool passions on all sides. When Weisl spoke to us, he was obviously very nervous, and his unease and concern came across in the way that his voice sort of crumbled as he said these things. It was an experience that none of us had ever gone through before, and Weisl was clearly disturbed by the situation. He admitted he didn’t really know how things were going to turn out, and we could only hope for the best. I was given one of the assignments that was handed out, but I must admit that it was probably the most insignificant one in the entire city. I was assigned to be in a police station in Georgetown, and I spent a large part of a Saturday night there. Not only was there no questionable conduct that occurred by either the police or anybody brought into the station, but essentially nobody was brought into the police station at all.
There was, several years later, another very memorable event which also was a reflection of the turmoil that was in the country at the time, and this was May Day in 1971. I remember the day before May Day I was home that evening after having been on vacation for a while, and I got a call from Len Schaitman. Hollander had set up a telephone tree so that if events came to a certain point, he would be able to call all the people in the office through the telephone tree. Len Schaitman called and said that our instructions were to get to the office by 6:00 a.m. in the morning because there was expected to be disruptions of traffic, and if you didn’t get in early, you wouldn’t be able to get in. So I duly came in at 6:00 a.m. in the morning. By the time it was lunch time, I decided to go out to lunch, and there were massive numbers of anti-war demonstrators surrounding the Department of Justice building. The Department of Justice building was a huge focal point for the demonstrations.

MS. FEIGNIN: We should say for people reading this years hence that in those days, there was no Internet, so, of course, no email and no cell phones. A telephone tree was a way to get a message out relatively quickly. There was a list of names and telephone numbers. The first person dialed the second, the second called the third, and so on until the end of the list. But back to the events of May 1971. Did you have any trouble getting through? Were you frightened?

MR. KOPP: No, I wasn’t frightened. There was nothing personal about this. But when I returned from lunch, it was very difficult to get back into the building because there was almost no room on the sidewalk, and the last thing you wanted to do was be in a situation where you bumped into people or worse stepped on
somebody, so you had to be very careful. Some of the demonstrators did sort of leave room to get into the door, so I was able to get back in, but it was an unsettling experience.

As is well known, the demonstrations that day in Washington led to thousands of arrests. The demonstrators were detained in places like stadiums, and thousands of people were arrested, and the number of people who were arrested was so large that one of the attorneys in our office was drafted to help process the demonstrators. He had no expertise in criminal law, but the Department was desperate that people who weren’t criminal attorneys were called in to help with the demonstrators. Our attorney, Mike Stein, returned from that assignment very discouraged about the chaos and the processing procedures that were followed, and, if I recall correctly, that led to years of litigation. Eventually very few of the demonstrators actually were convicted of anything.

MS. FEIGIN: Considering the Mike Stein incident, his wife I believe worked then as an attorney in the Civil Rights Division. Do you know whether when he responded to the call for help, did it come through the Civil Division, or was he responding, as I believe she did, to a call through Civil Rights?

MR. KOPP: I don’t know. It could well be that because she was in Civil Rights that they asked him as well.

MS. FEIGIN: They may have asked for volunteers, and he may have responded to the general Civil Rights request.

There must have been a lot of interesting litigation during the Nixon years, and given your position and the fact that you were becoming more involved in
significant cases, I suspect you had a role in some historic litigation. Can you tell us about that?

MR. KOPP: Sure. The first thing that relates to this was that in the Spring of 1973, Mort Hollander called me into his office and said that he was going to promote me to become an Assistant Chief in the office, and the job of an Assistant Chief in the Appellate Section included reviewing draft briefs done by staff attorneys and arguing some of the biggest cases in the office.

MS. FEIGIN: Couldn’t have been a better time (laughter).

MR. KOPP: No, it couldn’t have been a better time, and I was both flattered and overwhelmed by the new responsibilities. And it wasn’t too long before I was assigned an extremely controversial case to supervise. Those who were around at the time may recall that the question of the authority of the President to impound funding Congress had required to be spent was one of the big issues of the day. The argument was often framed in constitutional terms. Congress had the power to appropriate funds, but the President had full discretion whether to spend them, even if the statutory authority was framed in mandatory terms. And when Nixon was being examined for the possibility of impeachment, the House committee drafting the Articles of Impeachment explored his conduct with respect to the impoundment issue, although the Articles of Impeachment that were passed did not include the impoundment issue. However, while the Civil Division got involved in the impoundment litigation, it turned out that the cases which we actually litigated did not so starkly present the question of the President’s constitutional authority.
MS. FEIGIN: You said earlier that post-Watergate there were walls set up so the White House couldn’t speak directly with you on these issues, but this was earlier than that. Were these cases that you were feeling political pressure on?

MR. KOPP: I don’t know what would have happened if we hadn’t found that we had a decent theory on which to argue the case. When I first learned that we were going to be involved in the impoundment litigation, I was a little bit worried because I had only been reading about the impoundment issue in the newspapers, and it looked to me like it might be very difficult if a statute said that in effect money must be spent and the President refused to spend it. There might not be a reasonable argument to present on behalf of the President. However, the case that I got into as a supervisor was a case called Commonwealth of Pennsylvania v. Lynn,13 and it was a case where the Secretary of HUD had ordered the suspension of millions of dollars for federal housing subsidies and eventually terminated the programs. As I began to study that case, it became apparent that we actually did have reasonable arguments. The statutory authority was not so air tight that the Executive Branch had no discretion whatsoever and so it was possible for us to make an argument that in the circumstances there was authority for the Secretary of HUD not to go forward with spending the money.

I became convinced that we had quite a reasonable argument based on the statutory scheme. The District Court, Judge Richey, had concluded that the Secretary had violated the statute and unlawfully withheld the funds. The Solicitor General, who I think at the time was Robert Bork, authorized an appeal, and the Appellate Section wrote the brief in the Court of Appeals.

As was the standard practice, we circulated the draft brief to our agency clients. At the time, HUD was one of the most difficult agencies for us to deal with because they had a tradition of wanting to do things in litigation their own way. We spent a lot of time haggling with them over the brief and in particular haggling with them over the language of the brief. The main problem was that they would have written the brief to use a lot of their technical language, but for people who weren’t totally immersed in HUD’s culture it would make the brief incomprehensible. HUD attorneys used very technical language to talk to other people in the agency, and no one outside the agency who was not terribly familiar with this language really could understand what they were saying.

As Justice Department lawyers, we viewed our job as framing a brief which took the points that HUD wanted to make but articulating them to the judges – who after all were generalists like ourselves – in a way in which they could understand what the agency was doing and didn’t have to make a translation of technical language to figure out what the government’s point was. So eventually we reached an agreement with our clients on the language in the brief, and we went ahead and filed it.

When the time came for oral argument, Mort Hollander made it clear to HUD and everyone else that I would be the one arguing the case. I went through a very intense period of preparing for the oral argument. I also spent a day at HUD where they tried to explain to me all the very fine points of the program so that I would be prepared for any question that came from the court. I found my visit to HUD to be quite a painful experience because the HUD people kept
talking in their technical language and I had to strain very hard to figure out what
they were saying. Nonetheless, it was a good experience for me because, by the
end of the day, I felt that I had not only mastered their language, at least insofar as
relevant to the case, but I could also explain to the court in non-technical terms
what HUD’s point was.

I then proceeded to make our argument in December 1973 to a panel of
the D.C. Circuit consisting of Judges McGowan, Tamm, and Leventhal, and in
July 1974, the decision came down unanimously in the government’s favor. In a
carefully constructed opinion by Judge McGowan, the court concluded that the
statute gave the Secretary sufficient discretion to terminate the programs when
they were not operating to achieve Congress’s purposes, and further the court felt
that the Secretary had reasonably concluded that the programs were not achieving
those purposes.

MS. FEIGIN: Was it a lively argument?

MR. KOPP: Yes. In the D.C. Circuit with judges like McGowan, Tamm, and Leventhal, it’s
quite a very hot bench in terms of argument, very similar to the way D.C. Circuit
arguments are today. That wasn’t always the case with other courts of appeals.
There were a number of circuits out there where you would go to present
argument and if you got two to three questions, you considered yourself lucky.

Meanwhile, President Nixon won reelection in 1972, but no sooner had he
won than the Watergate scandal began to warp everything else that was
happening.
MS. FEIGIN: Before we get into everything that happened after the election, John Mitchell, who was in the midst of the Watergate scandal, had been Attorney General. Did you have any sense of him as Attorney General and how he was perceived?

MR. KOPP: No. The thing about many Attorneys General, not all of them, was that there was sort of a disconnect between attorneys in the Civil Division and the Attorney General because the Attorney General didn’t seem to have much to do with the work that Civil Division people were normally involved in. The Civil Division rarely, at least in the work I was involved in, had work that involved the Attorney General. The important people for us in Appellate were the Solicitor General and sometimes the person the Solicitor General reported to, who at the time was the Deputy Attorney General. Eventually when the position of Associate Attorney General was created, the Associate Attorney General in major cases was sometimes involved. The Attorney General was somebody who was at the top of the Department but, at least to us Civil Appellate litigators, seemed to be somebody who had no direct influence on the Division.

MS. FEIGIN: Did Mitchell have a reputation as being a good Attorney General?

MR. KOPP: I think people were wary of him, particularly once we got into Watergate. People became very nervous about him for reasons which history has shown as correct. As everyone knows, in June of 1972, before the election, there had been a very strange break-in in Democratic Party headquarters in the Watergate building, and Woodward and Bernstein of The Washington Post and other reporters began exploring what had happened. Bit by bit, news began to trickle out as to what had happened at Watergate and then proceedings before Judge Sirica began, and
by the time we got into the period after the November election, there began to be a significant trickle of news about Watergate. For the next 18 months or so, the trickle began to be worse and worse in terms of what the public was learning and eventually this led to impeachment proceedings against President Nixon and his resignation in August of 1974. But of course in 1972 and 1973, very few of us thought that this was actually going to become so bad that the President would have to resign.

Obviously, the White House knew what was going on, and as we went into 1973, the White House became concerned about what Americans were thinking about them and made some personnel changes at the top. In May of 1973, Elliot Richardson, who had only been appointed as Secretary of Defense a few months earlier, was appointed to become Attorney General, and William Ruckelshaus, who had been the head of the Civil Division a while ago, was appointed as Deputy Attorney General. President Kennedy’s former Solicitor General, Archibald Cox, was picked by Elliot Richardson to become a Special Prosecutor for the events arising out of the Watergate break-in. And like just about everybody else in the Department, we thought that these appointments were outstanding appointments and it seemed to look at the time like the administration was going on the right course.

However, a few months later, everything exploded as we went through one of the most disturbing events about Watergate, the so-called Saturday Night Massacre. What happened was – and this is obviously well known – Special Prosecutor Cox learned that the White House had secret tapes and he sought
access to them. President Nixon, on Saturday, October 20, 1973, directed Attorney General Richardson to fire Cox. Richardson refused and instead resigned. The President then directed the next-highest person in the Department, Deputy Attorney General Ruckelshaus, to fire Cox, and Ruckelshaus refused and also resigned. Then the third-highest DOJ official, Solicitor General Bork, did fire the special prosecutor, and this all occurred on Saturday.

On Monday, October 22, 1973, everybody who came to work in the Department that day was not in a position to think about anything related to their work. They were all thinking about the events of the weekend, and everybody was shocked and disturbed over what had happened. I remember that about 11:00 in the morning, we heard that Richardson and Ruckelshaus would be speaking in a few minutes in the Great Hall. My office was only a few doors away from the balcony part of the Great Hall, so I promptly walked down there to see if I could find a seat, but even though I walked down quite quickly after I heard that Ruckelshaus and Richardson were going to speak, I couldn’t find a seat anywhere. Not only was the Great Hall itself completely filled, but the seats in the balcony were filled too. However, there were a few file cabinets about six feet high or so in the corner of the balcony, and there were several of these file cabinets, and I figured out, and several other attorneys figured out the same thing, that if you climbed on a chair, you could then climb on top of the file cabinets and have a good seat to watch the speakers below. So I climbed up and watched from the top of a file cabinet as Richardson and Ruckelshaus talked. They explained what their disagreement with the President was in very eloquent terms, and at the end,
everyone in the audience was just very emotional and they gave Richardson and Ruckelshaus a long standing ovation. Those of us who were precariously perched on top of the file cabinets did not join in the standing part of the ovation, but we applauded loudly but very carefully from the top of the file cabinets.

MS. FEIGIN: Were you around for the announcement when Agnew resigned?

MR. KOPP: I was, but Agnew is somebody who just didn’t seem to have any connection with the Civil Division and our work.

MS. FEIGIN: Was the announcement made at the Justice Department?

MR. KOPP: I don’t know. It just didn’t have any of the impact on me that the firing of the Special Prosecutor did. Some of it was that Archibald Cox was a person of the highest reputation, and when Nixon had appointed Richardson, and Richardson had appointed Cox as the Special Prosecutor, it looked like the administration really was serious in terms of investigating Watergate. It was such a shock to everyone when Cox was fired. The Agnew matter didn’t involve people that at least I had any connection to; it was just one of these shocking things that you read in the newspaper. What was shocking for us, people who lived in Maryland at the time, about Agnew, of course, was that Agnew, before he became Vice President, had been our Governor. Although he was a Republican, and it was then very unusual for there to be a serious Republican candidate in Maryland, just about all of us Democrats voted for Agnew when he was running for Governor because his opponent was an outright, very expressed, racist. Agnew being indicted and resigning was in a very different way than Watergate an unfortunate
surprise to us, but it was something that just didn’t have the same impact on me as Watergate, which involved people you knew directly.

MS. FEIGIN: Was there a sense of pride at the Justice Department because your leaders had stood up to this or was there a sense of dejection because your former Attorney General was so involved in this? What was the mood at Justice?

MR. KOPP: The mood at Justice again was when Richardson and Ruckelshaus came in and Cox was appointed, everybody thought that events were on the right track. People felt the system was working in the way it was supposed to, and then with the Saturday Night Massacre, I think people’s attitude went to the exact opposite; really something terribly unfortunate and unsettling had occurred and suddenly it no longer looked like the President was doing the right thing. At the time, I don’t think most people thought Nixon was implicated, but people became very concerned and said, “My goodness, how high up does this scandal go?”

MS. FEIGIN: So back to your part of the Justice Department. At this point, there’s been a lot of movement. Who’s now head of the Civil Division?

MR. KOPP: Harlington Wood had left just before Watergate. He was our Assistant Attorney General, and then he had been appointed to become a district court judge. It took a while before he was replaced so we were under the control of an Acting Assistant Attorney General, who was Irving Jaffe, who was a long-term career employee. He served five or six months or so until early in 1974 when Carla Hills was appointed as Assistant Attorney General, and she was a terrific selection. She was an extremely intelligent person, and she of course was just starting what became a very distinguished career in high public positions,
particularly in the Republican administration. Her appointment began to give us, people in Civil, confidence that maybe the government was getting on the right track again, and we felt very fortunate to be working with her. She also was somebody who in all her contacts with us career people, she gave us a lot of respect and she was just a wonderful person to deal with. By this time, I now dealt much more with the front office than I had before I had become a supervisor, so it was important to me to be having somebody in the front office who was the type of person I wanted to work with.

MS. FEIGIN: Was the Appellate Section involved in any of the Watergate litigation?

MR. KOPP: We gradually ended up in it. As you know, at the time Congress was getting heavily into Watergate and eventually impeachment charges would be instituted at the end of July of 1974 against President Nixon. I initially had the sense that we were being appropriately kept out of doing anything in terms of the various litigations that were starting so that we would avoid doing politically-influenced filings in support of Nixon. However, there was one Watergate filing which occurred early in 1974, and it happened during a time when Carla Hills wasn’t on board, or at least she wasn’t on board in a way where she was responsible for the case I’m going to talk about.

We were headed only by our career Acting Assistant Attorney General and we did get involved in making a filing that can be criticized as being a pure political filing. That was in a case brought by the Senate Select Committee headed by Senator Ervin.\(^\text{14}\) As you, of course, remember, the Senate Select

\(^{14}\) *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974).
Committee issued a subpoena to President Nixon requiring him to produce the tapes of five taped conversations between the President and John Dean.

MS. FEIGIN: We should say John Dean was counsel to the President.

MR. KOPP: Right. For those under a certain age (laughter). The President asserted executive privilege and refused to turn over the materials to the Senate Select Committee.

At this time the District Court had recently ordered disclosure of the tapes to the Special Prosecutor, but the court declined to order disclosure to the Senate Committee, finding that the Committee’s need for the tapes did not override the need to safeguard pending criminal prosecutions which was the task that the Special Prosecutor was looking into. The Senate Select Committee took an appeal from that ruling and the D.C. Circuit considered the appeal en banc, with Chief Judge Bazelon presiding.

MS. FEIGIN: En banc from the get go?

MR. KOPP: En banc from the get go.

MS. FEIGIN: That’s unusual.

MR. KOPP: Watergate was an unusual time (laughter). The Department of Justice had not participated in the case in the District Court, but we did file an amicus brief in the Court of Appeals, and the brief had on it the names of Acting Assistant Attorney General Irving Jaffe, myself, Tom Wilson, my staff attorney, and very unusually, the name of the Attorney General himself, William Saxbe. Today it’s not totally clear to me how we got to the place where an amicus brief was authorized.

Under Department procedures, before the Department of Justice files an amicus brief, the relevant Division prepares a memorandum to the Solicitor
General, and the Solicitor General decides whether to authorize the filing of an amicus brief. I do not remember whether we actually did a memorandum for the Solicitor General in the case, but if the Civil Division did one, it wouldn’t have been very meaningful in the context of a case with such enormous political consequences because Civil at the time had only a career official, Irving Jaffe, as its Acting Assistant Attorney General on the case. So as a practical matter, we would not have had any weight in the deliberations on a case with this huge political impact. Formally the decision had to be made by the Solicitor General, who at the time was Robert Bork, although in a case like this, he must have been consulting, obviously, with higher officials in the Department. It’s somewhat unclear to me exactly who the higher officials were because this was a time of transition in the top levels of the Department because of the Saturday Night Massacre. Laurence Silberman, Judge Silberman, was confirmed as Deputy Attorney General on February 28, 1974, I believe, which was sort of in the middle of this and I don’t know whether he actually personally played a role or not. Carla Hills was confirmed at the beginning of March, but on the brief that we filed, she apparently didn’t participate, so the Assistant Attorney General on the case was Irving Jaffe, who was our career person, and he was on the brief as Acting Assistant Attorney General.

A beleaguered White House at this time was almost on a daily basis being shocked by bad news on Watergate. It was obvious that the White House desired some form of support from the Department in the context of the appeal by the Senate Committee to the D.C. Circuit.
What I do remember is that we attorneys in the Civil Division were given explicit instructions, probably they were delivered by Irv Jaffe, relaying instructions from either the SG’s Office or the Deputy AG’s Office, as to how to draft the brief. Defending the District Court’s denial of the Senate Committee’s subpoena, our brief included the point that there was an interest of the President in protecting the confidentiality of presidential communications, and in this case it outweighs the needs of the Senate Committee. As stated in the brief, the President must preserve a climate in which his staff can communicate freely with him. While asserting this delicate and important position, however, the brief was very limited in terms of any legal substance. The most amazing thing about the brief was that it was a five-page brief, and our legal discussion in the brief consisted of two pages.

MS. FEIGIN: For people who might be reading this history and are not lawyers, let’s give a sense of how extraordinary that is. I think it’s fair to say that in a normal brief the facts alone would generally be more than five pages. What would a typical brief length be?

MR. KOPP: Amicus briefs today can be thirty pages, and I think at that time they could also be that long. So there was plenty of unused space that was not used in the brief.

The en banc court came out issuing a very narrow fact-based decision against the Senate Select Committee, holding that they had not made out a case of sufficient need for the documents, particularly since by the time the Court of Appeals decided the case at the end of May, most of the information that the Senate Committee was seeking was available to the House Judiciary Committee.
In preparing for this talk with you, I pulled out the brief that we had done in the case, and looking at it some forty years later, I felt that it was really a very unusual brief that we filed. Normally, in all the other amicus briefs that I’ve ever been involved in, the key thing that the Department of Justice tries to do in the brief is discuss the legal issues, and here in this brief you might say we discussed them. But it was basically two pages in which we discussed them, the type of thing that might make a good summary of argument, but it certainly wasn’t the type of legal discussion that a court would expect in a government amicus brief.

MS. FEIGIN: It sounds like you’re a little uncomfortable with this brief that has your name on it. Is that fair to say?

MR. KOPP: Looking back at it, I am a little bit uncomfortable with it. I think at the time I actually had a different attitude because I personally was not terribly wild about getting into Watergate at all, and when we were given instructions and told that it was to be a very short brief, and you only had to put it together in a couple of days, I think I was personally pleased that we really weren’t going to get that deep into Watergate. But as I say looking back, I find it a very strange brief. A five-page brief on extraordinarily important issues and citing only four cases in the brief.

The decision itself is a case which provides the government in future cases with some support and it’s been cited by both Republican and Democratic administrations in litigation subsequent to Watergate. I should add that the position that we took in our two pages in the brief is something that most people would think is consistent with the type of position that you would expect in
government briefs. So it wasn’t that what we said in this brief was necessarily controversial or the type of position one might say was out of place. Rather, the strange fact was that there were only two pages of argument in one of the most important Watergate briefs of its day.

Looking back at this brief from today’s viewpoint, I am trying to think what was happening in that brief. Why in such an important case, where obviously the White House wanted to get something from the Department of Justice to support them, were we only coming up with this very cursory, short brief? Was it just the fact that the Court of Appeals had set the case on a very expedited briefing schedule, and given the short time, five pages was all that could be put together? In our office, we put together briefs in less than a week that are full fifty-page briefs.

Or was the brief some form of compromise? Some in the leadership of the Department of Justice were very reluctant to get involved in the litigation but could accept a short filing consistent with traditional executive branch position? Was the brief some sort of compromise at a very high level in the Department? A brief which provided a vehicle to show the Attorney General supported the President in this context but the brief otherwise said little? Why was the support so little? Was that a signal that maybe the Department of Justice wasn’t all that strong in its support? Looking at the brief from the perspective of history, there’s a lot here that historians may want to go over at some point when they go back and explore once again Watergate because I think there are all sorts of things that were happening and we career attorneys had no idea what was going on.
In any event, the result was that we filed this short little brief which in a very narrow context supported the argument of the President and was also more or less consistent with what the Special Prosecutor was saying as well. The result was an affirmance of the District Court position, which was the side of the case that we were on. But the brief obviously didn’t give Nixon what he needed. On July 24, 1974, the Supreme Court decided *United States v. Nixon*, 15 which was the Supreme Court decision involving the criminal proceedings brought by the Special Prosecutor against John Mitchell. The Court indicated that the tapes had to be turned over in the criminal proceedings, and shortly after that, of course, the House Judiciary Committee voted for impeachment, and at the beginning of August, Nixon resigned.

MS. FEIGIN: So did life return to normal?

MR. KOPP: Life turned to a different type of world. I think the post-Watergate world was not the same for anybody in government as the pre-Watergate world, and I think the world that we lived in and worked in was very much for the better after Watergate.

MS. FEIGIN: Do you want to describe what you mean by that in terms of DOJ?

MR. KOPP: To start with, we ended up with Ed Levy as our Attorney General. Ed Levy had been President of the University of Chicago. He was someone that not only had a great reputation, but he was not a political person. I think under Levy the reputation of the Department of Justice probably reached as high a point as it has ever reached. Of course President Ford took over for Nixon, and for the Civil Division this meant that Carla Hills was to leave the Civil Division to become

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Secretary of HUD, and Rex Lee became our Assistant Attorney General. Rex was just a wonderful person. Everybody who worked with him liked him enormously. In the Reagan administration, he became Solicitor General, and unfortunately he got sick and died prematurely. His early and untimely death was really a great tragedy.

Most of the political people I worked with, while they were political appointees and involved in political issues, they interacted very well with career people and often I didn’t have much of a sense of what their personal political views were. That was quite true with respect to Rex Lee. When I worked with him in Civil, I had no idea what were his political views. He was just a very good lawyer who took very reasonable litigating positions and was very highly respected by the career staff, and that was also true when he was Solicitor General. Obviously, particularly when he was Solicitor General, people came to figure out that he had some very conservative views, but he was just the consummate professional in terms of dealing with us and dealing with his job.

So the fallout from Watergate not only led to the departure of President Nixon under duress. It led to some wonderful people coming into the Department. The departure of Nixon and Attorney General Mitchell left the Department a much happier and successful place than it had been during the Watergate Era.

MS. FEIGIN: That’s good. At this point, where were you in the hierarchy?

MR. KOPP: I became the Number 2 person in the office because the person who had been the Deputy to Mort Hollander left. The position was open for a while, and Hollander
then moved me into it. My predecessor left because he thought that the position would be upgraded to a GS-16 position which was a very high level in the government pay scale. But getting positions changed to higher levels is a very difficult proposition in the government, and Hollander wasn’t able to get the position upgraded to a GS-16 while my predecessor was there; finally he got frustrated and left. Eventually the position in fact was upgraded to a 16, and I became a 16 as a result, and subsequently the position was converted into the new management system called the Senior Executive Service.

MS. FEIGIN: Well that’s a happy note to end on I think. Thank you very much for another fascinating session.

MR. KOPP: Thank you.
MS. FEIGIN: Good morning.

MR. KOPP: Good morning.

MS. FEIGIN: We left off gripping our seats over Watergate (laughter) and then I assume things calmed down a little bit and you got back to a more normal pace.

MR. KOPP: Whether it was a more normal pace or a different pace, I guess one can debate.

One of the underlying currents at the time was something which eventually would morph into a major field of litigation involving suits against government employees, and ultimately was to keep the Supreme Court workload at a significant level for decades to come. That happened as a result of a case called Bivens v. Six Unknown Named Agents,16 which was decided by the Supreme Court in 1971. I wasn’t involved in that litigation at all, but several of the attorneys in our office were involved in it. The government’s position in that case, that government employees couldn’t be sued as individuals, was rejected by the Supreme Court in a 5 to 4 decision, the Court holding that the plaintiffs did have a cause of action to sue the employees. I remember hearing our lawyers on the case talking about it and saying that the legal world as we know it has suddenly turned upside down with all these suits against government employees and this was going to be a major field of litigation for the future.

MS. FEIGIN: Was there worry that you attorneys could be liable?

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MR. KOPP: I don’t think that was the chief concern. I think the concern was that because government employees would be subject to suit and be called to be witnesses and the like that that would impact their behavior as employees. It would reinforce a tendency that one thinks is a characteristic sometimes of bureaucracies anyway, that people are too timid to act and take action that needs to be done. It was the type of thing that could have a lot of effect on government. Basically employees at all levels would be very hesitant to do something.

MS. FEIGIN: In terms of attorneys, I think in U.S. Attorneys’ Offices attorneys were worried.

MR. KOPP: Over the years there has been a lot of interest and a lot of concern in this area. As I said, back in 1971 when the decision came down, the attorneys for the government who had been involved in the litigation – the Supreme Court’s decision was 5 to 4 in favor of the plaintiff, the case could proceed – those attorneys just felt it was a really big decision. But from my viewpoint as a relatively new attorney at the time, I heard them talk about it and then it looked like nothing was happening. It took quite a few years before our office did see Bivens-type cases. In fact the first case in the area, at least that I paid attention to, was the Supreme Court’s decision in Scheuer v. Rhodes in 1974, which was not a U.S. government case. It was one of the cases arising out of the tragic shootings by the Ohio National Guard at Kent State.

MS. FEIGIN: Maybe we should say for people perhaps not familiar with the event, why the National Guard was shooting at Kent State.

MR. KOPP: There were anti-war demonstrations and the National Guard was called out. They weren’t very sophisticated in terms of how to deal with demonstrators, and they

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were shooting and students were killed. The case went up to the Supreme Court. The U.S. government often, even then, would participate as amicus in the Supreme Court to indicate what the federal government’s view of the law was. But we didn’t participate as amicus in the Kent State case. I think under the Solicitor General’s practice today, the federal government would have had no choice but to participate because the federal government almost universally participates in major Supreme Court cases that have an impact on the government. But in those days there wasn’t as strong an assumption as there is today that the government will participate as amicus, and we didn’t participate. I don’t recall that there was any formal decision that we would not participate as amicus. I think nobody ever asked us in Civil to do a memo, and at least my own view was the case was such an atrocious case that I was perfectly happy not to be involved in it. My guess is that maybe people above me viewed the case in the same light so the federal government didn’t express its views.

But the decision in *Scheuer v. Rhodes* was, again in the context of state National Guard personnel, that government employees could be liable for violations of clearly established constitutional rights and that they were not protected by absolute immunity if there was such a violation. Once the decision came down, it was pretty apparent to a lot of us that even though that was a decision involving states, and our client was the federal government, it would be very difficult to confine the principle in *Scheuer v. Rhodes* to state officials and not to federal officials. However, for several years that was our litigating position.
In 1976, a couple of years after Scheuer, a libel case came up against the Smithsonian where one of its employees had criticized the plaintiff’s abilities as an archaeologist. This was about as far removed from Scheuer v. Rhodes as one could get, just a completely different situation and also there wasn’t any violation of constitutional rights in the case. A D.C. Circuit panel, however, which consisted of Judges Leventhal, Wilkey, and a visiting judge, when they first heard the case, felt that the case should be remanded to the District Court to develop some of the facts in the case, to give the plaintiff an opportunity to show that he had been the subject of libel by the employee. At this point, the Department of Justice became, at least from my perspective, very sensitive to suits against government employees and what they could mean for the government and its employees. We were concerned that if there was factual development on the record the door would be open to harassing suits against federal government employees and their behavior could well be affected. They might start being very timid in terms of actions that they take, or in this case, which was a libel case, of things that they said in dealing with fellow employees. So we filed in that case a petition for en banc review. The Court granted the petition, and I argued the case.

MS. FEIGIN: Was this your first en banc argument?

MR. KOPP: This was my first en banc argument. And we won.

MS. FEIGIN: Was it a lively argument?

MR. KOPP: Yes. The D.C. Circuit was very well known to be one of the most active courts in the country in terms of questioning. I go in there for an en banc argument and, as I expected, I did get lots of questions. At the end, when the opinion was written,
the Court largely agreed with the government’s position and ruled that since the employee was acting within the ambit of his discretion he could not be sued.\(^{18}\) However the Court also stressed that the case was not a constitutional case and left that issue and the question of what happens when there is a violation of constitutional rights, very much open. This was a wise thing for the D.C. Circuit to do because the question of what happens under allegations of violation of constitutional rights turned out to be one of the trickiest issues for the Supreme Court in subsequent years. And indeed I was soon involved in a key Supreme Court case. There was a case in the Southern District of New York that was handled by the U.S. Attorney there.

MS. FEIGIN: Of course (laughter by both).

MR. KOPP: It was called *Butz v. Economou*. The Second Circuit held that the plaintiff suing government employees could proceed to develop the facts in that case where the plaintiff was alleging that he had been improperly prosecuted for violation of his constitutional rights. The Solicitor General authorized the government to seek en banc. However, the petition was unsuccessful.

MS. FEIGIN: Unsuccessful in that they didn’t hear it en banc or that they lost it en banc?

MR. KOPP: Our petition wasn’t granted. The Solicitor General then authorized cert and the Supreme Court by a 5 to 4 decision rejected the government’s position.\(^{19}\) To some extent *Butz v. Economou* was the federal government counterpart of *Scheuer v. Rhodes* in the sense of starting down the road towards there being significant litigation against federal employees that the Supreme Court had to straighten out.

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time and time again. The principle that stood out to me from the decision in *Butz v. Economou* was the Court’s reliance on the *Scheuer v. Rhodes* case involving state employees. The Supreme Court in *Butz* said there should not be different rules of immunity for state and federal officials, and so where we had not participated in *Scheuer*, we now in *Butz* had the consequences perhaps of our not participating in *Scheuer* and coming up with some theory that would have protected federal government employees. The Court didn’t see any difference between federal and state employees in *Butz*, and that ruling stimulated a significant number of suits and appeals involving federal government employees.

After *Butz*, we were in a situation where it was very difficult to figure out qualified immunity for government employees. The Supreme Court every couple of years has had to take one or two of these cases to clarify the law. The Supreme Court just recently [in 2014] decided a qualified immunity case which actually was kicking around when I was still in the office and involved the Secret Service.\(^{20}\) I should add that although the law on qualified immunity has produced lots and lots of opinions and litigation, at least from my experience involving the federal government, there are very few cases where the plaintiff actually has attained a favorable judgment. It’s often the type of litigation that goes on, takes time, takes effort, but at some point the plaintiff typically loses. Once in a while there’s a settlement. Once in an even more rare situation, there might be a judgment for the plaintiff, but the number of litigations where a plaintiff is successful is very, very rare in terms of the amount of time and effort that is put into that litigation.

MS. FEIGIN: There have been some cases where Attorneys General have been worried about this, I believe.

MR. KOPP: That’s right, and I know that at least one of the Attorneys General went out and hired his own private counsel basically to monitor the cases that were being handled within the Civil Division that were being brought against him. The Attorney General was sufficiently concerned since it was his own personal liability and he wanted to have his own lawyer at least plugged into and knowing what was going on. It turned out with respect to that Attorney General that there was no cause for concern. He was at no risk whatsoever from the cases that were brought against him.

MS. FEIGIN: Do you want to share with us who that was?

MR. KOPP: I think it might be protected.

MS. FEIGIN: Okay. It has also led to the whole field of government attorney insurance.

MR. KOPP: That’s right. Most of the attorneys that I knew and worked with didn’t go out and in fact buy attorney insurance, but I did. I felt that since I was going to be involved in doing work in that area, it was a wise thing to get the essential malpractice insurance even though the risk was de minimus. In fact, I never was sued until just about a couple of months before I retired. There was an extraordinarily frivolous suit that was brought against me and a lot of people above me who were much more distinguished than I was (laughter). Nothing ever happened.

MS. FEIGIN: What was the issue?
MR. KOPP: I don’t even remember. It was utterly frivolous. But I figured that it was good that I had that insurance. The suit wouldn’t have bothered me anyway, but having spent the money, I felt at least I was getting some comfort from having spent it for all those years (laughter).

One of the fascinating things about Butz v. Economou for me personally had nothing to do with the subject matter of the case. Butz gave me what was probably the worst day in my entire legal career. This occurred when we were dealing with the U.S. Attorneys’ Office in the Southern District and trying to get the Solicitor General to authorize the filing of a petition for rehearing en banc in the Second Circuit. The U.S. Attorney could do that only if the petition was authorized by the Solicitor General, and the Solicitor General gives that authorization only after receiving the views of the affected government agencies. Those views would be collected by the Appellate Section, and the Appellate Section would do its own memorandum to the Solicitor General, and then we would get the package approved by our Assistant Attorney General and it would be forwarded to the Solicitor General who would then make his decision. For reasons that escape me now, we were quite late in getting our memo to the Solicitor General. In fact it only got to the Solicitor General about three days before the petition for rehearing en banc was due in the Second Circuit, and indeed two of those three days were part of a weekend (laughter).

We got our memo to the Solicitor General on a Friday, and the petition was due I’m not sure if it was Monday or Tuesday, but anyway it was really tight. Frank Easterbrook – the Deputy Solicitor General at the time – as soon as the
package got to him, set up a meeting for the next day which happened to be a Saturday morning. The staff attorney in Appellate and I went to the meeting that Saturday morning. The first part of the meeting was very productive. We discussed the case and Easterbrook indicated that he would agree with us. It was a very rational and civilized meeting. And then when that part of the meeting was over, Easterbrook – and he’s now been a Seventh Circuit judge for many, many years – stood up. He’s a very tall individual. I would guess he is about 6’ 4” or so. My staff attorney and I were sitting there in our chairs. He stood up and he absolutely towered over us. Then in a very controlled fashion, he started screaming at us. The thrust of what he was saying was basically, “Don’t you ever do this again. This is not the way this office expects you to operate. We are not just a rubber stamp and we have to have time.”

I must admit that the lecture made quite an impression on me. I can’t say that during the rest of my career our office was never late in getting a memorandum to the Solicitor General. I had always known that we had to be aggressive about getting memos to the Solicitor General, but after that meeting – which occurred when I was by then a supervisor – I made it a point to do whatever we could in Civil to get our memos to the Solicitor General on time so that at least it wouldn’t be our fault that the Solicitor General didn’t have the time that he needed. Eventually our office and the Solicitor General’s Office developed a series of protocols which greatly improved the process.

I should add that over the years I began to notice that while Civil Division sometimes was at fault in terms of when a delay occurred, the Solicitor General’s
Office also was just as often the cause of delay in the process which helped, I think, make everybody mutually try to do what they could on both sides of the Solicitor General’s Office and our office to improve the process. I think, at least by the time I left, the process had been very significantly improved in terms of timeliness and efficiency from the way it was when I was a young supervisor.

MS. FEIGIN: When you’re talking about their being recalcitrant, you mean they didn’t give you enough time after they authorized appeal? You wanted more time to write the brief?

MR. KOPP: Yes. There was delay over the years in the Solicitor General’s Office in getting back to us. There’s nothing like a meeting like that with Easterbrook (laughter) to make you both sensitive of your own delay and also to delay from anyone else in the process.

MS. FEIGIN: Have you since argued before Judge Easterbrook?

MR. KOPP: I argued before him I think at least once, maybe twice. At the time I recall we had strong positions and I didn’t get any flak from him whatsoever. An opponent, however, who wasn’t an experienced appellate advocate, got quite a bit of flak from him. Easterbrook was one of these judges of the school that encourages good lawyering in the courts of appeals. About your only way of encouraging that was to be nasty to lawyers that weren’t prepared or weren’t competent and discourage them from appearing in the court of appeals again. Easterbrook, I think, at least the few times I saw him, fit into that mold. I should add that I eventually for seven years was on the Federal Appellate Rules Committee working with a group of judges which included Judge Easterbrook, who was a
significant member of that committee. Working with him in that context, he was a pleasure to work with. Quite an impressive person.

MS. FEIGIN: So you learned your lesson and moved on (laughter).

At this point you were not arguing many cases, or fewer cases I suppose because you were a supervisor, but you did get to do a case in the Supreme Court. Would you tell us about that?

MR. KOPP: That’s right. When Mort Hollander had been younger, he had gotten a number of cases that the Solicitor General’s Office had assigned to him to argue in the Supreme Court, and he always viewed that as a very significant part of his job, understandably. With the passage of time, the practice of the Solicitor General’s Office of assigning arguments to attorneys in the Divisions died out. Eventually, after the argument that I had, there were just a couple of other cases that came down to our office for argument, and then about 30 years ago the practice completely died out. The reason why there was this evolution was because in the 1960s and going into maybe the beginning of the 1970s, the Supreme Court had been taking an increasingly large number of cases. It then started taking a much smaller number where it granted cert. So there was a significant decrease over time in the number of cases where the Supreme Court was holding argument. The Solicitor General’s Office function was to present briefs and arguments to the Supreme Court, and of course attorneys were attracted to that office in significant part by the fact that they would be arguing in the Supreme Court. As the number of cases that the Supreme Court was taking for argument began to diminish, the Solicitor General’s Office became very protective of the number of arguments
that would go to its own attorneys. This meant that the number of arguments that would be assigned to be handled outside of that office, such as in the Divisions, became fewer and fewer. In the mid-1970s, there were very few cases that were assigned to the Divisions. But every now and then fate would intervene.

I forget exactly what the circumstances were in 1975 when fate intervened and sent an argument down to the Civil Division. I’m not sure whether it was the attorney who was on the case in the Solicitor General’s Office had left or it may have been that he broke his foot or something like that, but there was some type of incident which meant that the Solicitor General’s staff attorney couldn’t present the case. There was this case, *United States v. United Continental Tuna*, an extremely technical case involving the intersection of the Suits in Admiralty Act and the Public Vessels Act that needed to be assigned, and so they offered the case to the Civil Division for argument. Mort Hollander just leapt at the opportunity for his office to argue the case because he had really been upset about the fact that the Supreme Court arguments for the office had been disappearing. He called me into his office. I was the supervisor who had been working in the Appellate Section on the draft brief in *United States v. United Continental Tuna* with Neil Koslowe, our staff attorney. Hollander called me in and he asked me whether I wanted to argue the case. The whole thing came out of the blue to me. It was the first I had heard that an oral argument was going to be available so I was totally surprised when he called me in.

The case was a very technical case. When I had been reviewing the draft brief I had found the case a very difficult case to review because of the

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complexity of what was involved. However, I knew there was only one answer to Hollander’s question, and I quickly said yes, of course I would argue it. I just insisted that I have enough time to prepare for the argument without being interrupted by any other duties – a luxury by the way that when I was Director of the Appellate Staff I would not have agreed to if any of my attorneys came in and said I only want to work on preparing for oral argument uninterrupted for two weeks (laughter). But Hollander said yes, which was a good thing because I’m not like many of the attorneys in the office who tend to be natural oral advocates. My style was that in preparing for oral argument I felt I just had to know everything I could know about the case, relevant or not, and only when I had that type of knowledge in me did I feel that I had the confidence to present a good argument. So I spent tons of time in preparing for this argument, much more so than I had done in any other case including the impoundment case involving HUD a few years earlier.

All during the time I was preparing, I had this nagging feeling that this was really wasted time. I was just wasting government time doing this because the case was so technical that the Supreme Court just wouldn’t be asking any questions. This was at a time when the Supreme Court often didn’t ask much in the way of questions at oral argument and I felt that the odds of few questions were terribly high. I was doing all this work on government time, and it would come to naught because I might get one or two general questions. But when I got to court and started to talk – as I said, this case was in a complex area and if I tried to explain it to anybody today it would probably be incomprehensible both
to me in terms of my own memory (laughter) and to my listener – the Court just came alive. I started getting all these questions. It was just like what happens at oral arguments today where the Court is a very hot court and asks tons and tons of questions.

What I think may have happened was they may have sensed that I knew what I was doing and the Court wanted help in terms of thinking through this case, figuring out what it was about. Reading the transcript later, it seems to me that they asked all sorts of good questions; I must have been answering them in a way which encouraged them to ask more questions because they were just sort of thinking out loud and trying to work their way through this very complex case. After the argument I felt that I had provided a useful service to the Court, and, sure enough, when the decision came down a few months later, the government won 8 to 1, and I could see that my argument had in fact given them some help in how to think through the case. The opinion was written by Justice Marshall.

MS. FEIGIN: Did you buy a morning coat for this argument?

MR. KOPP: I rented a morning coat. Given the rarity of Supreme Court arguments trickling down to our office, I didn’t think necessarily that there would be a second time, and there wasn’t. Doug Letter in the office did get a Supreme Court argument, maybe even two, in the 1980s, but after that, the practice just dried up completely. It dried up for us, it dried up for the other Divisions. It also meant that the SG’s Office couldn’t expand in size to deal with its own workload; it needed the attraction for its junior attorneys that they would get at least one argument a term or the SG’s Office felt that the quality of the people who it was recruiting would
diminish. Over the years it was sort of interesting to watch that process as it evolved.

MS. FEIGIN: So now we’re in the Carter era.

MR. KOPP: So now it’s the 1976 election and Carter won. One of the priorities that he had was to return the Panama Canal to Panama. As one might expect, a decision like that was very controversial. The Canal was scheduled to be returned to Panama in 1978, and the Senate was in the process of considering and ratifying treaties which would do that. Sixteen members of Congress brought suit at that time to enjoin the return of the canal to Panama, arguing that it could not be disposed of by treaty. It had to be disposed of by statute which would involve the House of Representatives in the process. So the Congressmen brought suit in the District of Columbia. Relief was denied by the District Court.\textsuperscript{22} The plaintiffs appealed on an emergency basis, and the government sought summary affirmance. This all occurred shortly before everyone expected that the treaties would be approved and it would be time to turn the canal over to Panama. So the Court of Appeals quickly scheduled the case for oral argument.

The papers that the government filed were basically the papers that had been worked out in the District Court. I was assigned the case to argue, and in my very short preparation time for the argument, I worked closely with the Federal Programs attorney, Steve Frank, and his supervisor Brook Hedge. Steve later became an attorney in our office, and Brook Hedge became a judge on the D.C. Superior Court. I educated myself on the case and went in and presented argument. We won, 2 to 1, with the result that the Panama Canal was turned

over to Panama.

The panel consisted of Judge Fahy, Judge McGowan, and Judge MacKinnon. As people who argued before Judge MacKinnon know, he sometimes liked to ask questions that were a bit off the legal topic at issue. During the course of my argument, he began asking me about the Battle of San Juan Hill in Cuba (laughter). When I drew a blank, he then began explaining to me about the Battle of San Juan Hill (laughter) and some other military matters. It was really very hard for me to figure out how to answer his questions on this interesting but totally irrelevant topic. When the decision came down 2 to 1 in favor of the government’s position so that the Canal could be turned over to Panama, Judge MacKinnon wrote a 50-page dissent.23

MS. FEIGIN: Did it involve San Juan Hill?

MR. KOPP: No, it didn’t (laughter). Speaking of history, I noticed a common judicial practice of the pre-computer era while I was preparing for our meeting. I had gone back and pulled from my files the copy of the opinion that had been circulated from the D.C. Circuit, not the one that appears in the Federal Reporter or other reporters but the actual opinion that came from the Court. The opinion consists of different typescripts, basically being Xeroxed and pasted together, and that was the way that the Court at the time handled cases that were on an emergency basis in terms of the technology. An opinion would be cut and paste and issued before it was cleaned up and typed.

MS. FEIGIN: Cut and paste from what? From briefs?

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MR. KOPP: Judges basically had different typewriters and different Xerox machines and when they were deciding quickly – I can show you afterwards, this isn’t television so I can’t show it to the record (laughter) – and opinions had to be put together quickly, the court’s opinions were often cut and pasted together from different items. You noticed for instance that the majority and dissent here were different typefaces and the like. I think I recall this happening in other situations. That was just the practice in terms of the Court taking advantage of the technology but it’s obviously not modern technology.

MS. FEIGIN: We will make a copy of some of the pages and put it on file with the D.C. Court Historical Society because people might find it interesting to see.

So you can take some credit for the Panama Canal being turned over. You also got involved in some other controversial litigation during the Carter administration.

MR. KOPP: Yes. What’s interesting is when Carter was elected of course he had a lot of support from the liberal side of the country, but during his administration, and certainly in the litigation that I was involved in, we ended up taking some positions which I think did not go over well with people looking at the government from the liberal side. Our office became immersed in some huge cases involving the intersection of national security and the First Amendment, some of which one might say foreshadowed some of the huge discussions and controversies that we’ve had here in the 21st century concerning the balance between national security and the First Amendment.
One of the cases was United States v. Snepp. As tersely summarized by the Court of Appeals, “The United States sued a former employee of the Central Intelligence Agency (CIA) alleging that defendant breached a secrecy agreement with the CIA by publishing a book about the activities of the CIA in South Vietnam and elsewhere without the prior permission and approval of the CIA. The CIA does not assert that the book disclosed classified information or information that defendant had no right to publish.” The Civil Division sought to enforce the agreement and to prevent further breaches and to impose a constructive trust on profits. While the Civil Division was headed by an Assistant Attorney General at the time who was quite liberal, as far as I knew there was no question about the Division coming in and vigorously litigating the case. We strongly defended the CIA procedure in the District Court and prevailed.

MS. FEIGIN: Since this involved sensitive material, was it difficult to write the brief or was it difficult to make arguments, because you couldn’t say or write certain things? Was it submitted under seal?

MR. KOPP: The book had already been published, and the government litigated on the basis that the book didn’t need to involve classified material. Rather, the suit was about the fact that Snepp had signed an agreement that the book would be cleared and then hadn’t followed through and had breached the agreement. The government was seeking an injunction against breaches of the agreement and also to impose a constructive trust so that the profits from the book would come to the government.

In the Court of Appeals, I supervised the preparation of the brief in the case. We worked in close cooperation with the trial attorneys, and then I argued

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the case. This was in the Fourth Circuit, and the Court upheld our position that the agreement was valid and that the government could enforce it, although the Court of Appeals also said that, at least in the circumstances, the government could not impose a constructive trust on the existing profits.

MS. FEIGIN: So he would keep all the money?

MR. KOPP: He would keep the profits from the sales of the book. The Fourth Circuit decision was nonetheless a substantial victory for the government. Snepp, therefore, sought certiorari. He filed his petition and the government then, to protect its position on the constructive trust, filed a conditional cross-petition. At this point, usual Supreme Court practice would be that the Court would grant certiorari and set the case down for briefing and argument. But the Court simply took the remarkable step of just taking the case and deciding it without full briefing or argument. It completely ruled for the government, not simply upholding the Fourth Circuit’s decision on the validity of the agreement, but also upholding the remedy of the constructive trust which would take away Snepp’s profits from the book. The vote was 6 to 3 with the three dissenters strongly criticizing the process of deciding the case without full consideration. 25

MS. FEIGIN: Do you have a theory as to why it was handled this way?

MR. KOPP: One can only speculate. There were opinions, significant opinions, that were written by both the majority and the dissent. A major part of the dissent was criticizing the process by which the Court decided the case. I don’t know whether the majority just felt it was an open-and-shut case and that there should quickly be

a decision that resolves the situation. The dissent however had a completely
different view and very great concerns about the process.

MS. FEIGIN: Was it a liberal/conservative divide, or how did that play?

MR. KOPP: The dissenters were Stevens, Brennan, and Marshall.

MS. FEIGIN: So it was.

MR. KOPP: Yes (laughter).

MS. FEIGIN: That wasn’t even the most dramatic national security case you had during that era.

MR. KOPP: No. There was another one which was really quite extraordinary, *United States v. The Progressive.* For those who weren’t grown up at the time, *The Progressive* was a magazine and they had an article that they were going to publish about the H-Bomb, the hydrogen bomb. The article was entitled, “The H-Bomb Secret: How We Got It, Why We’re Telling It.” The government, when they learned of this, quickly went into District Court and obtained a preliminary injunction barring the magazine from publishing the article, and the magazine of course appealed. This occurred at a time when I was running the office, so I assigned our top litigation attorney to the case, Mike Hertz.

MS. FEIGIN: Did he or you have to get special clearance to work on this case?

MR. KOPP: I don’t remember. I think by that time both Mike and I must have had a level of security clearance that was sufficiently high to work on the case. So I guess the answer to your question is, yes, we did have the appropriate level of clearance.

Mike was an absolutely remarkable attorney who could do anything you

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asked. He had a brilliant career, and he eventually became the Civil Division’s top career official, my superior, operating out of the front office and often being the Acting Assistant Attorney General when we were in a period when we didn’t have a political Assistant Attorney General. Mike was just a wonderful attorney. He prepared a brief which explained that notwithstanding that the First Amendment obviously was involved here, that this was just one of those extraordinarily rare cases where the government could get an injunction against publication of a news article; the First Amendment did not protect this type of disclosure. This was in the Seventh Circuit, and the Court set the case for argument, a public argument. This was at a time when, unlike today, courts weren’t that sophisticated in terms of how you deal with cases that have classified material. So they had the case argued completely in public, which in a case like this limited greatly the amount of discussion which could take place at the oral argument. However, while the Court was preparing its decision, basically it happened, as can happen, it became apparent that the information involved was out there in public. The point of the government’s position therefore became moot and the government dismissed the case.

MS. FEIGIN: “Out there” where?

MR. KOPP: It’s unclear to me exactly what happened first. There was a government library where some information may have been public. There were also magazine articles that came out, and where they got their sources I haven’t really researched. It can happen in a First Amendment case where someone is seeking
an injunction. It wasn’t the last time that something like that happened or the first time either.

MS. FEIGIN: Was this a Department of Energy library?

MR. KOPP: There was a Department of Energy library that was involved.

MS. FEIGIN: That’s pretty embarrassing.

MR. KOPP: Yes. As I say, this is what can happen.

MS. FEIGIN: So the suit got dismissed.

MR. KOPP: The government voluntarily dismissed the case.

MS. FEIGIN: One more thing that was going on at that time was another headline case involving Iran. Would you tell us about that case?

MR. KOPP: This was one of the most dramatic cases that I think I’ve ever been involved in.

In 1979 the Shah of Iran was overthrown. Iran at that time was in a total state of turmoil and embarked down a road of great hostility to the United States, and today in 2014 our relationship with Iran is obviously still very much on edge.

After the Shah was overthrown and the hostilities between Iran and the United States began to ramp up, some militants in Iran, who described themselves as students, stormed the United States embassy on November 4, 1979, taking U.S. citizens hostage. In response, President Carter directed the Attorney General to reexamine all Iranian student visas in the United States and deport from the United States Iranian students whose visas had expired. Regulations were issued requiring Iranian students to report and provide the necessary information by December 14. Certain Iranian students and groups challenged the government’s action and brought suit in the District Court in the District of Columbia. The
District Court judge, who was Judge Joyce Hens Green, concluded that the government’s actions were unconstitutional because they were directed to a single nationality. So on December 11, 1979, she entered an injunction. The Solicitor General the same day, and I believe the Solicitor General at the time was Judge McCree, authorized an emergency appeal.

MS. FEIGIN: Does that mean that you didn’t even get to write a memo?

MR. KOPP: That could be right. This just happened so quickly because of the need to act. I don’t know whether a memo was done after the event or not. We were probably too busy to worry about things like that. The Solicitor General authorized an emergency appeal and seeking a stay the same day, and on December 14, three days later, the Court of Appeals granted the stay.

MS. FEIGIN: Did you file the papers for the stay?

MR. KOPP: I don’t recall the stay papers, but my guess is that we did. It was one of these things that happened so quickly. The Court on December 14 directed the parties to file simultaneous briefs by December 19, five days later, and the Court set the oral argument for December 20. So in this short period of time we put together a team of attorneys in Appellate. We must have been four or five attorneys working on the case, and we worked closely with Federal Programs obviously. We drafted a brief which I quickly reviewed as did our Assistant Attorney General, Alice Daniel, and we filed the brief on time.

I was assigned the argument and while all this was happening, I was trying to prepare myself for the argument. I then went and argued the case. The panel turned out to be a good panel for arguing a case like that. It was quite a
conservative panel. It consisted of Judge Robb, Judge Tamm, and Judge MacKinnon. At the argument the Court of Appeals appropriately asked lots of questions. They seemed satisfied with my answers. By the end of the argument, it was quite apparent that the government was going to prevail. The plaintiffs then sought en banc. The Court was a nine-member court. Plaintiffs got four votes for en banc, and the vote for en banc revealed a sharp liberal/conservative split. The four most liberal judges on the D.C. Circuit voted for en banc, Chief Judge Wright, Judge Mikva, Judge Wald, and Judge Robinson. They wrote that they were not necessarily of the view that the government’s actions were unconstitutional, but they felt that the matter was one of exceptional importance which merited en banc review. The conservative side of the court – and I would put in that Judges MacKinnon, Robb, Tamm and Wilkey – voted against en banc review. Judge McGowan, who for those of us who remember litigating in the D.C. Circuit at that time, often was a swing vote on such splits like this, did not support en banc review, so the judgment in favor of the government stood. The case is *Narenji v. Civiletti*; the Supreme Court denied certiorari.\(^\text{27}\)

MS. FEIGIN: We should probably not end this session without finishing out the Carter years with something that struck home, which was not a case in the court but the viability of the Section itself. Would you tell us about that?

MR. KOPP: While we were in this era doing quite well in the courts, during the Carter years, and this is really in the first half of the Carter years, the office ran into serious bureaucratic problems, and it almost disappeared as a result. At the time the Carter administration came into office, the organization of the Civil Division was

\(^{27}\) *Narenji v. Civiletti*, 617 F.2d 745 (1979), certiorari denied, 446 U.S. 957 (1980).
something that had developed haphazardly. The Division was organized into about a dozen sections, some of which were quite small. There were a lot of overlaps where it wasn’t clear what belonged to what, and also because there were small units, it was easy to have a situation where one unit was badly overworked and another unit didn’t have as much work as the others. So the organization of the Division at the time the Carter administration came in was ripe for somebody to reorganize the Division.

I think in hindsight the fact that the incoming administration came in and decided it had to reorganize the Division was clearly a correct judgment. Most of the overlap occurred at the trial level, but even at the appellate level there was some overlap. There was a Special Litigation unit, for instance, that handled both trial and appellate cases. So when the new administration came in, the incoming Assistant Attorney General, Barbara Babcock, decided that there had to be a reorganization.

Reorganizations in government are typically the type of thing that, whoever is doing the reorganization may decide that it’s best to not publicize the reorganization widely until it happens because reorganizations can generate all sorts of bitter internal struggles as soon as the news comes out. So we in the Appellate Section did not really have any idea of what was going on. There were rumors afloat that there might be a reorganization, but that was about the extent of our being plugged in to what was happening. And then the Assistant Attorney General announced that there would be a reorganization and that the reorganization would entail the dissolution of the Appellate Section. Attorneys
would be transferred to trial components, and those components would do both trial and appellate work, so attorneys with appellate backgrounds would still be able to handle some appeals, but they would be doing it out of trial offices.

As you might imagine, Mort Hollander was absolutely furious about this reorganization, and of course everyone in the office was extremely upset. We were very disheartened that even though the office had been very successful in handling appeals and attracted extraordinarily talented attorneys who specifically wanted to handle appeals, we would be dissolved. To talk about this reorganization, Hollander convened a meeting of his supervisors, but he held it off premises so it couldn’t be said to be part of his government work. So I made my house available.

MS. FEIGIN: You were a conspirator (laughter).

MR. KOPP: Yes, I was in that sense a conspirator. With the supervisors one evening we met at my house to discuss the reorganization. A large part of the meeting was spent just venting our frustration and talking about how it made no sense. We never came to any conclusion as to what we should do, although Hollander did point out at the meeting that he knew that many of our alumni were aware of the reorganization and he said that some of them had contacted the Attorney General. Indeed long after the event I learned that it had in fact been true that alumni had been contacting the Attorney General’s Office. I think Alan Rosenthal’s oral history, which is part of the historical record of the Society as well, goes into this in more detail because I think Alan knew a lot more about what was going on than I did.
The Attorney General at the time was Griffin Bell. Griffin Bell was a very different person from Barbara Babcock. Bell was quite conservative. Our Assistant Attorney General was quite liberal. And apparently, according to Alan’s oral history, nobody had mentioned to the Attorney General that there was this reorganization that was going on, and he got quite upset when alumni of the Appellate Section as well as some judges began contacting him to complain about the proposed dissolution. Apparently the Attorney General was irritated enough that our Assistant Attorney General decided that she should not pursue that part of the reorganization.

MS. FEIGIN: Do you think a factor in all of this was that Griffin Bell himself had been an appellate judge and therefore had a different perspective from Barbara Babcock?

MR. KOPP: That would only be speculation, but it certainly makes a lot of sense because one of the things that I consistently noticed over the years was that Court of Appeals judges were very concerned about the quality of advocacy in their courts. They were often subjected to arguments by people who were trial attorneys who didn’t have experience or training in appellate advocacy. Their case that they handled at trial would go to the Court of Appeals and so they simply assumed that since they were a litigating lawyer they could handle a Court of Appeals argument as easily as a District Court trial. These kinds of lawyers were quite common in the Courts of Appeals, and I think Court of Appeals judges were quite sensitive to the fact that a lot of these attorneys didn’t know that appellate argument was a very different thing from trial argument.
Court of Appeals judges were continually doing their own long-term advocacy; whenever off the bench they would talk or meet attorneys to get the point across that appellate advocacy really is a specialty. It probably didn’t take much for Judge Bell, if my speculation is true, to be very sympathetic to having organizations like the Appellate Section. So what you mentioned is very good speculation. He was probably very unhappy to hear about dissolution of the Appellate Section because he was a former appellate judge and appellate judges are very sensitive to the quality of advocacy before them.

MS. FEIGIN: We should say he was on the Fifth Circuit so your office had argued before him.

MR. KOPP: That’s right. Our office had argued before him many times. In later life, when I would go to some judicial conferences and hear panels of judges talking about appellate advocacy, they would almost always make the point that appellate advocacy is not trial advocacy. I remember one conference I went to where then-Judge Breyer of the First Circuit [now Justice Breyer] was speaking and that was one of the points that he was making. This was something that I think was a very common understanding among court of appeals judges.

MS. FEIGIN: I suppose the flip would be true too. If the reorganization had gone into effect, the appellate attorneys would be expected to be trial attorneys and that might not have been so good either.

MR. KOPP: That’s certainly true. It certainly would have been true in my case (laughter), if I had been a trial attorney. What’s interesting is none of this was happening in other Divisions. Each Division had an appellate section, and if we had been reorganized out of existence, we would have been the first. And of course later
on, it happened in private practice that you began having an increasing number of appellate boutiques and sections of law firms developing appellate specialties. The trend in private practice was in terms of having appellate specialists, so the idea of dissolving the Appellate Section really was an idea that I think in hindsight particularly was a bad idea, and it was a good thing that, maybe perhaps fortuitously, it got killed.

In other parts of the Division, though, I should add that the reorganization was at least in very significant parts successful because it created the Federal Programs branch out of a grouping of small litigation units that litigated about government programs. Whatever else you might say about Babcock’s reorganization, I think the creation of Federal Programs was a tremendous step forward. From my viewpoint, there you have, sort of looking back objectively, a reorganization which what it was doing to Appellate was an extremely bad thing, but at the same time it was a tremendous step forward in terms of modernizing the Division at its trial level with respect to Federal Programs.

MS. FEIGIN: Any consequences for people in the office?

MR. KOPP: As you might expect with something like what happened, it caused a significant degree of bitterness. Mort Hollander realized that his relationship with Barbara Babcock was extremely strained and that he really didn’t have any influence with her. Obviously she didn’t look upon him as one of her favorites either. But by the time this all happened, the United States was now in this crisis with Iran, and the United States had been blocking the export of Iranian assets from the United States. There were many cases that the United States had an
interest in that were being brought in European courts with American companies making claims against Iran, and the Department of Justice needed someone responsible to monitor and coordinate that litigation. Hollander indicated to the front office that he had an interest in that litigation, and the front office felt that was a fine idea to move Hollander – after all Barbara Babcock still had respect for Hollander – to move him to London and put him in charge of monitoring and coordinating the Iran litigation in Europe. So he was there in London for the last two years of his very distinguished career, and I think he found his stay in London to be a very satisfying ending to his career. As far as I was concerned, miraculously all of this battle over the reorganization didn’t seem to negatively impact my relationship with Barbara Babcock.

MS. FEIGIN: Maybe she never knew about the meeting at your house (laughter by both).

MR. KOPP: That could be, but you know there are no secrets when things like this happen. We in fact did retain a decent working relationship, and when the Senior Executive Service was set up, I became a charter member of the SES. And after Hollander left, I was Acting Director of the Appellate Staff. Barbara Babcock went back to Stanford as a professor, and over the years I began noticing that we were getting a lot of very good attorneys from Stanford applying to our office and almost all seemed to comment that Barbara Babcock encouraged them to apply to Appellate. So in the long run, from my vantage point, things worked out very well.

MS. FEIGIN: They did. And maybe that’s a good note to end on, a very upbeat note. So thank you very much for another fascinating session.
MR. KOPP: That was fun.
ORAL HISTORY OF ROBERT KOPP

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 Judy Feigin, and the interviewee is Robert Kopp. The interview took place at the home of Robert Kopp in Bethesda, Maryland, on Tuesday, October 28, 2014. This is the eighth interview.

MS. FEIGIN: Good afternoon.

When we left off, Barbara Babcock had taken over and you had weathered a potentially rocky transition. What changes did she bring about?

MR. KOPP: I talked about how the Appellate Section barely survived the reorganization as a unit, but it did survive. Its name was changed to the Appellate Staff.

MS. FEIGIN: Why do you think that was?

MR. KOPP: I think it was intended to be an adjustment in status. It’s a little bit unclear whether it was something that just happened fortuitously or was intended to indicate something. My own theory would be that since there was a reorganization and there were lots of names being changed, Appellate Section didn’t quite fit. So they came up with a new name, and Appellate Staff was appropriate.

MS. FEIGIN: When you say it might reflect a change in status, as a diminishment?

MR. KOPP: In theory as a diminishment. It could be interpreted that way, and I think at the time a lot of people thought that, but I think history shows that it didn’t work out that way.

MS. FEIGIN: What was different for the Appellate Staff from the way things had been before?

MR. KOPP: The first thing was that this occurred when Mort Hollander was head of the Office, and after this struggle – we got into this some in the last session – Hollander I think correctly felt that his relationship with Babcock was not a
terribly good one. When the appointment to go to London came up, she made the position available to him, and he took advantage of it and it was a great solution for both him and for her. I effectively became head of the office at the time and I was very fortunate that the bad blood that there was between Mort and Barbara really didn’t spill over to me. I had a very cordial relationship with her.

We talked about the reorganization battle which was unpleasant, but there was something that she had instituted which at the time a lot of us had some skepticism about. Given that it happened at the time of the reorganization, a lot of my people thought it was something that was intended to harness in the Appellate Staff, but in fact with hindsight I think it was a very good idea.

The Civil Rights Division had an area of subject matter that overlapped with that of the Civil Division and in particular with that of the Appellate Staff. The Civil Rights Division was involved in civil rights litigation, and we in the Appellate Section were involved in civil rights litigation. The difference was, of course, that the Civil Rights Division was bringing suits on behalf of individuals who had been discriminated against, while the Appellate Staff and the Federal Programs Unit were defending civil rights suits that were brought challenging alleged discrimination by the government. Both the Civil Division and the Civil Rights Division were deeply immersed in civil rights law, but we were coming at it from very different vantage points because the Civil Rights Division clients in fact were people who claimed they had been discriminated against, and the Civil Division’s clients were agencies who were charged by plaintiffs with discrimination. So there was a certain tendency both by the Civil Division and
the Civil Rights Division to argue the law in a way which was most advantageous to their clients.

Barbara Babcock and the head of the Civil Rights Division, Drew Days, identified this situation and felt that it was important that the Civil Division and the Civil Rights Division work out their differences in terms of how they look at the case law, not necessarily the facts of a particular case, but you couldn’t have the different Divisions arguing that a provision of the statute means X if the government is supporting the plaintiff and it means Y if the government is defending an agency. So she and the head of the Civil Rights Division, Drew Days, set up a committee that would get together and discuss various issues and attempt to work them out. The Solicitor General’s Office was there so that if a dispute couldn’t be worked out, it could be escalated to the SG’s office through the appeal memo process. But a lot of the things that we had to deal with weren’t matters that would necessarily be the type that you wanted to take up to the high level of the SG. So this committee was set up, and we would meet about once a month or so and talk over significant issues in the civil rights area where we in the Civil Division as defense counsel were pushing in one direction, and the Civil Rights Division as plaintiff’s counsel was pushing in the other direction.

I will say that at the time, particularly since this came right after the reorganization, some of us in Civil who were participants did look at this process a little bit skeptically as something that would restrain us in terms of our ability to defend our clients. But the process, in fact, I thought, worked out pretty well. We would talk through issues, and on most issues we actually didn’t have that much
of a disagreement or we were able to work through our disagreements and, at least at the level of what the legal principles were, we were able to reach agreement.

MS. FEIGIN: Do you remember any examples of disagreements that occurred?

MR. KOPP: At this point I don’t remember specifics except we would just go through things like scope of review and construction of certain statutory language and see if we could reach agreement. At the necessary level of generality we pretty much were able to reach agreement.

The committee eventually was dissolved, in part because it had made its point that there had to be coordination; even without the formal setup of a committee in future administrations, the process tended to be carried out anyway in terms of coordinating and talking to people in Civil Rights. It also brought home to me that this wasn’t just a question of working things out with Civil Rights; we in Civil dealt with all sorts of components in the Department, and it was important to be coordinated with them on legal positions. The Department of Justice couldn’t go into court and argue one thing in a Civil Division case and argue a different argument on legal construction of the same statute in a civil rights case or an environment case or criminal case. There had to be coordination with the relevant Divisions in the Department. Through the years that coordination became one of the hallmarks of our office’s way of looking at things. Civil Division comes into contact with just about every part of the Department sooner or later, and we can’t ignore the fact that we think the law is X if some other component is going to be arguing Y. The process of coordination just worked into being a standard part of what everybody in our office was thinking,
that if you see that another Division is arguing something differently or has an interest inclining it to argue differently, then we better work things out before we get there and start taking positions.

MS. FEIGIN: It’s hard to believe this hadn’t happened earlier.

MR. KOPP: It is. And I think part of that was because the Department was a smaller place 20 or 30 years earlier, and it wasn’t into as many things, and these types of overlapping issues weren’t there. The Civil Rights Division of course in the 1960s and 1970s was quite a new Division. The Lands Division was transformed in the 1970s into the modern Environment Division. We in Civil had been around for a while and we just knew that we would get called on by the court sooner or later if we were arguing different positions.

MS. FEIGIN: So Hollander goes to London and you’re the head.

MR. KOPP: I become the Acting head. Hollander, when he went to London, gave up his position as head of the office, so I was made Acting Director. Then with respect to my position, nothing happened. Hollander went to London in 1979 and for the rest of the Carter administration, there was no appointment of me or anybody to become Director of the office.

At first, I wasn’t particularly concerned about the delay because my feeling was that if I wasn’t appointed and the person who was appointed was somebody I liked and respected, I would be happy to stay in the position that I was in. Indeed, I heard that our professor-in-residence,28 Walter Dellinger, had been considered for the job, but he had not been interested. Since I would have been delighted to work for Walter, I felt quite pleased that people like him were being considered. I

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28 See page 189.
felt enormously flattered when I heard he had said that I would make a better
Director for the Appellate staff.

MS. FEIGIN: There’s always this feeling in D.C. that your clout comes with your title, and the
fact that you were Acting, did you think it in any way diminished your ability to
make your voice heard when it needed to be?

MR. KOPP: Actually I didn’t have that sense. Now maybe with hindsight I should have had a
little more of it and maybe it was a little bit that this was sort of a post-death
experience (laughter) in terms of the Appellate Section. I was so happy to be
there and have our organization intact that maybe I was too focused on the
dangers that we had just passed as opposed to the danger that lay ahead. In any
event, I eventually began to realize that the delay was causing a serious morale
problem in the office. I learned that attorneys in the office – I am told it was all of
them – had signed a petition to our Assistant Attorney General to make me
permanent.

When there was a change of administration and the Reagan administration
came in, the new Assistant Attorney General was J. Paul McGrath, and one of the
first things he did when he came on board was to end the suspense about who
would head the Appellate Staff and appointed me as Director.

MS. FEIGIN: Did you have to interview with him?

MR. KOPP: I talked to him some. He actually had been a classmate of mine at law school,
although he was one of those people you sort of know is there but you don’t really
meet, which is something that happens a lot at Harvard (laughter). He knew who
I was, although he hadn’t at law school had anything to do with me. And if I
recall correctly, we talked a couple of times, and then he appointed me as Director.

MS. FEIGN: For people who don’t know how this works, was there any discussion whatsoever about politics? You’re obviously from a different place politically than he probably was.

MR. KOPP: No. Once I became a supervisor and saw how Hollander operated, I began to pick up both how Hollander operated as head of the office and some sense of Hollander’s personal views in terms of how he looked at the world as an individual citizen. I learned very quickly that his own personal political leanings had nothing to do with how he ran the office. He strongly believed in the tradition that the head of the office was and had to be a very non-politically inclined person. That was one of the first lessons that I picked up, and so I always viewed it as an important and essential part of my job that I be strictly non-political. I was there to assist the people above me including the political appointees. On decisions that had a significant political or policy cast, it was important for them to make the call. It was my job to help them make those decisions by providing them with the necessary information. But as a career officer, it was not for me to make the political decisions.

MS. FEIGN: But unlike Hollander, whatever his private views were – probably most people didn’t know them – you were married to a woman who was politically active and liberal and a known quantity. That never was an issue?

MR. KOPP: No, that never was an issue, and part of the reason I think it never was an issue was because it was so obvious that with her being heavily involved in politics –
she was at the time in the Maryland State legislature – that it was obvious that I,
just because of my connection with her, had to be very non-political to begin with.
So my own personal circumstances reinforced the wisdom of why it was so
important that I be very non-political. I will say that over the years I had just
about as many bosses who were in Republican administrations as in Democratic
administrations, and I think they all very much respected the fact that I was very
non-political, and the fact that I lasted 30 years in the position I think confirms
that.

MS. FEIGIN: The Reagan administration is in, and you’re in. Did they bring any changes, new
direction?

MR. KOPP: Yes. There was a very important change that came in the Reagan administration.
Up to that time, we had reported to a Deputy Assistant Attorney General in the
Civil Division’s front office who was a career employee but had a number of
components, mostly trial components, reporting to him as well, so we were just
one among many in terms of reporting to him in terms of our next level of
supervision. But when the Reagan administration came in, they decided that the
Appellate Staff should report to one individual who would be a political
appointee. I think it reflected the fact that in the Reagan administration, appellate
litigation was viewed as extremely important. It is after all where legal principles
are made, and they had a very high view of the importance of appellate practice,
so they appointed for us just one person who would be the person we reported to.

MS. FEIGIN: You’re the only group reporting to this individual?
MR. KOPP: We’re the only group reporting to her, and the individual was Carolyn Kuhl who was appointed to the position of Deputy Assistant Attorney General in charge of the Appellate Staff. Carolyn was an important step forward for us in many respects.

There’s an interesting story I can tell about when Carolyn was being considered for her position which indicates what a different era we were living in back in the early 1980s. Paul McGrath had just been appointed as the Assistant Attorney General, and he hadn’t made the appointment of Carolyn Kuhl to be our boss yet. Prior to her being appointed to be our boss, Paul called me into his office and he told me that we would be getting a new Deputy Assistant Attorney General to be in charge of us and that I would report to her. Then he sort of delicately and politely sounded me out on how I would react to having a female as my boss. I think Paul thought it was going to be an awkward conversation (laughter). At first I was a little bit shocked that he was proceeding this way. I knew first of all that who the Reagan administration appointed as a Deputy Assistant Attorney General was not going to turn at all on my reaction to her, but my major reaction was one of shock that in this day and age it would be necessary for an Assistant Attorney General to sound out his subordinates on how they would react to a female boss. This occurred at a time when the Civil Division had already had three women as Assistant Attorneys General, and they had made a serious effort, a successful effort, to bring a number of women into the Civil Division, so it wasn’t that women in significant posts were unheard of in the Civil Division.
I suspect that Paul McGrath – his prior job had been at a Wall Street law firm – and I think he was interacting with me maybe the way he would interact in his law firm if he were appointing a woman to some significant place where she would have subordinates. He was sounding me out in terms of whether he would have any problems in terms of her having men working under her. But in any event, from my viewpoint, it was easy to set his worries aside. I explained to him that I had grown up in a family where not only the men but the women had been lawyers, and I think he stopped worrying at that point.

When Carolyn came in, although I was very happy to meet her and I was happy to have a female boss, I did have some concerns because in the early Reagan administration she had been a political appointee in the Attorney General’s Office. I had concern that her coming in would give a political element to the way we looked at our cases and that there would be a political impact in terms of how the office and the career attorneys were supervised by her. But it turned out that she was a wonderful boss and operated the office in a highly professional manner I think any lawyer running a successful operation would want to emulate. First of all, she was a brilliant and extraordinarily capable lawyer. When you dealt with her, you knew you were talking to somebody who was intelligent and smart. She was very supportive of her staff. I think we all liked working with her, and being the first person in that position, she set a very high standard that I think subsequent appointments and appointees all strived to meet.
MS. FEIGN: Did the other components in the Division have the same thing, a political person to report to?

MR. KOPP: They did, but I think what made our situation uncommon is that we had only one person to report to where the more common arrangement was that you would have a lot of components reporting to a single political appointee.

MS. FEIGN: So it’s not just that you had one person to report to, it’s that she had just one person to listen to.

MR. KOPP: One component. I didn’t quite appreciate it at the time because as indicated I was worried in the beginning that we would have a politically run office, but the fact that we had only one person to report to and that person then reported to the Assistant Attorney General turned out to be extraordinarily significant. It gave us a lot of clout in our front office.

Over the years my having the ability to talk to a political appointee who had the ear of the Assistant Attorney General gave the office a lot of influence. It was very important when you were doing things like hiring, for instance. I noticed that after she came on board, our recommendations as to hiring, which sometimes had not gone anywhere when they got to higher levels, suddenly they almost universally were successful. In fact, close to 100% successful. I’m pretty sure now that if that type of arrangement had happened five or ten years earlier, there never would have been this question that the Appellate Section should be dissolved because we would have had the strength bureaucratically to ward off that thought at the very beginning.
It also turned out with the passage of time that another reason it was very important to have a single deputy that we report to is because of the number of big cases that had enormous political consequences, for instance, most recently, matters like healthcare and the Defense of Marriage Act. Cases of that significance obviously were enormously important not only legally but in the political world as well. It was just very important that the person we reported to within the Civil Division had the clout to persuade his or her political colleagues. That type of leadership would not be appropriate for a career appointee when you’re dealing with explosive issues that came up like healthcare, or Defense of Marriage Act, or national security issues such as Guantanamo. Those are issues where you really did want the political appointees to be significantly involved from the very beginning. The fact that we had this type of deputy leading Appellate gave us a lot of strength in some of the disputes and debates that occurred afterwards.

MS. FEIGIN: You wanted the political appointee to shield you from politics, ironically.

MR. KOPP: That’s right. The political appointee was a buffer for us. I think I mentioned to you earlier the time during World War II that David Kreeger, who was then the head of the predecessor component of the Appellate Staff, was sitting at his desk and President Roosevelt called him up. Well, the President stopped calling (laughter), and I think as a matter of having a well-run non-political office like ours, that was important because our Deputy both understood how career people operated and were supposed to operate, and she understood how the people above her, who were all political people, operated.
MS. FEIGIN: Has that continued through the years? She was the first one and you had a home run.

MR. KOPP: That basically continued over the years. Some of our deputies are a little bit more effective or less effective than others, but that was really a process that I think was very successful. That was true not only on major issues but on more mundane things where it’s important to have a lot of clout and influence. Concerning our memos, for instance, when there was a dispute with other components, we had a lot of weight in the internal debates, and I think most of that was due to the logic of the positions that we articulated. But it certainly helped to have the person at the top in terms of authority arguing vigorously in support of the position that was in our draft memos. So sort of imperceptibly, this change in the Reagan administration made a very significant difference to the future of the office.

MS. FEIGIN: I think the Solicitor General’s office changed during the Reagan administration as well, right?

MR. KOPP: In the SG’s office, there was one change that I think happened that was quite significant, although at the time it happened, it was one of these changes that nobody notices or even knows is happening. That is when the Reagan administration came in and the Solicitor General’s Office became more interested in Supreme Court cases that didn’t involve the government. They picked up the idea that the United States has the ability to file an amicus brief whenever it thinks appropriate. In the past, the government had filed quite a few amicus briefs, but we often stayed out of cases and didn’t file amicus briefs. I think I mentioned earlier the case of Scheuer v. Rhodes which was a case involving
immunity for state government officials, the officials being those in charge of the National Guard that had killed people at Kent State, and then who were being sued. The United States didn’t participate in that case, I think in large part because it was such an unattractive case. I have mentioned that I was among those who were quite happy that we were not involved in that case. But the Supreme Court in Scheuer came down with a significant ruling that impacted government employees, not simply state government employees but also federal government employees, and the Reagan administration began to pick up that what happened in the Supreme Court, even in non-government cases, could be extremely important. The Solicitor General’s office began asking us to prepare memos in just about all the cases in the civil area that the Supreme Court was granting cert in because they wanted us to explore the cases where the government should participate as amicus. So we got heavily into writing amicus memos, and with time it became clear that in the Reagan administration, there now was an implicit presumption that if the Supreme Court granted certiorari in a non-government case that there still probably was an interest of the United States that would merit amicus participation. During the Reagan administration the number of amicus filings by the government and by our office went up significantly, and ever since the government has much more heavily been involved in amicus filings in the Supreme Court than it used to be.

MS. FEIGIN: Do you see this as a positive development?
MR. KOPP: I think it is a very reasonable development because the fact is that a lot of the decisions of the Supreme Court do impact governments and the United States government, and if we’re not involved, we can still be impacted.

MS. FEIGIN: One other big thing that happened during that era involved the Honors Program. Can you tell us a bit about that?

MR. KOPP: That is something that was quite important to us. The Honors Program I think formally started in 1953. As I understand it, it was developed by the Department as a way to avoid political influence with respect to bringing new attorneys fresh out of law school into the Department, and the idea was to have a set process of interviews and evaluations that were not influenced by political influences. It was under this program that I was hired.

I was hired in 1966 when the Department sent senior attorneys out to the various law schools to interview. The person who was assigned to Harvard happened to be Mort Hollander, head of the Appellate Section. At the time, I was only interested in appellate law. I didn’t think of myself as a potential trial attorney. Mort and I just hit it off at the interview very well. He liked me, I liked him, and that basically was why I got hired and ended up in Appellate. If the interviewer had been someone from another component in Civil, say one of the trial components, there might well have been a different chemistry at the interview, and I wouldn’t have gotten an offer or wouldn’t have ended up in Appellate. That was a situation where fate intervened in a very favorable way for me.
The Honors Program at that time ran in a way where people from Washington would go out to the law schools and interview. There might be an attorney from the Civil Division who would go to schools in Boston and New York, and another would go out to interview applicants on the West Coast. So the person who was doing the interviewing was extremely significant. And the process continued that way for many years. In the Reagan administration, it was changed. Richard Willard was the Assistant Attorney General at the time, and he felt there was a better process for hiring which would be that the top applicants would be brought to Washington. They would be interviewed by the components that were interested in them, and where the applicants were interested in those components, you would have people on both sides of the interviewing process involved in interviews where each was interested in the other.

MS. FEIGIN: When you say they were brought to Washington, does that mean the government paid for them to come?

MR. KOPP: The government paid for them to come. I will say that the government was somewhat of a cheapskate. They paid the bare minimum you could get with airfare, and the interviewees often had to go back in a very short period of time so the government got the benefits of bargain rates. But the process worked in that it meant that interested applicants were talking to interested employers. In our office, we quickly perceived that if we had a hiring committee, all the people on the hiring committee could actually meet the applicants. This meant that our hiring process became very successful. One might say that under the old hiring process, it worked about 80% of time; this way it worked about 95% of the time.
or so. So over the years, our hiring just became very, very good, and I know that as somebody hired in the old procedure I became very impressed by how well the new process worked. I was very glad that I hadn’t been involved in the new process (laughter) because the people we kept drawing into the hiring process from the law schools kept getting better and better and I suspect that had I applied in later years, I might not have gotten an invitation to come to Washington.

MS. FEIGIN: The Honors Program went off the rails a bit in Bush II. Can you tell us about that?

MR. KOPP: The Honors Program over the years was working very well and better and better, and then in the Bush II administration, it, at the Department level, ran into a big problem because in that administration, there were some political appointees connected with the Attorney General’s Office who didn’t understand how the Honors Program was supposed to work. Maybe they weren’t interested in how it was supposed to work, but they began looking at the program from a political viewpoint in terms of hiring. This eventually came out in public. The Inspector General of the Department investigated, and some of the people involved were alleged to have seriously abused the process and brought political influence into the process where political influence was not supposed to be.

Curiously, this scandal to some extent was to the benefit of the Civil Division because our Assistant Attorney General at the time, Peter Keisler, very effectively resisted pressure from these high-level political appointees, and the Civil Division process under the Honors Program was never implicated in the scandal. This became known among law school applicants who were interested in
the Department. The Civil Division had always had very good Honors Program applicants, and while the rest of the Department seemed to be having serious problems with the Honors Program, the applicants to the Civil Division kept being at a very strong level. The Civil Division, for people in the law schools who were interested in the Department, didn’t have the adverse baggage that the other components did, and as a Division, we did extremely well at a time that the Honors Program otherwise was under a big cloud with people who were interested in the Department. One indication of what this meant was that until the scandal, Civil Division often gave offers to the same people who had offers from the Civil Rights Division. So you had very good applicants with an outstanding offer from each Division, and it used to be very predictable for the applicants in that position to select the Civil Rights Division over the Civil Division.

MS. FEIGIN: Why?

MR. KOPP: I think these were obviously the people who were interested in civil rights.

MS. FEIGIN: But that wasn’t an era when civil rights was high on the agenda.

MR. KOPP: Civil Rights was still doing important things. The nuts and bolts of government goes on from administration to administration, and in the Civil Division, civil rights law is just one small part of what the Civil Division does, and also if you’re interested in practicing civil rights law, you’re probably interested in it because you’re interested in the plaintiffs and not the defendants. So Civil Division would almost always lose out to the Civil Rights Division when they both gave an offer to the same person. After these scandals broke, I began to notice that suddenly if you had someone who had an offer from both Civil and Civil Rights, they would
come to Civil. After that period, I stopped worrying about Civil Rights hiring away our top Honors Program applicants. The Civil Division, by doing well in what was otherwise a bad period for many Department components, had enhanced its reputation in the law schools, and at least from the viewpoint of our office, seemed to have the ability to maintain that step up in status with law school graduates.

MS. FEIGIN: Speaking of who you’re hiring, can you tell us about the professor-in-residence program because that seems unique.

MR. KOPP: It was an interesting program. It wasn’t actually unique. We instituted it because I had heard about it being done from time to time in some other components. It was often done not so much as a program, but a professor would indicate he would be interested in coming, and you had to figure out what you were going to do with him and where he would be, so you made him a professor-in-residence. We took that and tried to create the program as an institutionalized program. We would save a slot every year for a professor-in-residence who would stay with us for a year and work for us and then go back out into teaching. Having people like that in teaching would help attract students to the office in the future. We did hire under that program some very distinguished people. Walter Dellinger from Duke was hired under that program. He was our first professor-in-residence, and he ended up being in the Department in Democratic administrations. He became the head of the Office of Legal Counsel, and then he was Acting Solicitor General in the Clinton administration. We also brought in under that program Linda Silberman from NYU Law School who was a leading expert in Family Law, and
surprisingly we found that a significant amount of our case law actually involved family law, and it was very helpful having a professor-in-residence with a strong family law background in the office. We also had as a professor-in-residence somebody who had been in our office earlier, John Rogers, who eventually became a judge on the Sixth Circuit. So we had the professor-in-residence program for probably 10 or 15 years or so and it brought in some very good people, and then they’d go out and teach and that would help the office in the future in terms of getting people interested in us.

Eventually we decided we couldn’t justify continuing the program because one thing about professors-in-residence is they would only stay for a year. Our regular hires were developing a track of staying much longer than that. When I came into the office, we had people staying on the average three or so years. That stay began to get longer and longer, and we just couldn’t justify to ourselves bringing in people for one-year positions when there were people who we wanted to hire who would stay with us for an extended period.

MS. FEIGN: From their point of view, they’d get to write briefs but might not get to argue only being there a year. They’d be lucky to get an argument.

MR. KOPP: There was a process by which if you had somebody who had written a brief and then they left, you could make a temporary appointment for a week or so so that they could prepare for the argument and go out and present the argument. We thought we were going to have problems with that kind of arrangement, but we actually found that there was flexibility in the system to avoid that.
MS. FEIGIN: We haven’t gotten to any of your big cases today, but there was so much going on in the Department that today we’ll get all that done and next time get into the major litigation that you were so involved with. Can you tell us about the committees you served on and the administrative positions you were given because of your position as head of the Appellate Staff?

MR. KOPP: I was on a number of committees that I found to be a very worthwhile experience for me, and I hope the committees involved found it equally worthwhile. In the 1980s, I was appointed and then re-appointed to the D.C. Circuit’s Advisory Committee on Procedures. I was on that committee, I forget whether it was six years or eight years, but I was on that committee for quite a while. We would examine the rules, and lawyers would write in and say that this rule wasn’t well written and should be revised, and so our committee would come up with proposals for changes in various rules. We made a number of changes to simplify and clarify those rules, and I learned from that experience that it’s not easy to write court rules in a way that they are going to be uniformly understood. I learned also there’s a process in any institution like court rules that when a problem comes up, often people just plug in a simple fix to a sentence or paragraph. When that’s done, the rule as a whole may suddenly have a bigger problem than it had before. For instance, inserting the word “and” somewhere in a sentence somehow can change a lot more things than just what it was intended to change. So I had a good lesson in how delicate a process it can be to write rules.

MS. FEIGIN: Who was on the committee? Were judges on the committee with you?
MR. KOPP: Essentially it was a committee of appellate lawyers with a D.C. Circuit judge as a liaison. I believe it was Judge McGowan and then Judge Edwards who were the judges that were the liaison with the committee when I was there. My first chairperson was John Pickering. I was just a member.

MS. FEIGIN: Who appointed you? How did you get to be on the committee?

MR. KOPP: John Pickering knew me and recommended me. I assume he recommended me to Judge McGowan, and I got appointed. At the time this was not a very visible committee, and I don’t think I had any idea of what I was getting into. It turned out to be very interesting, and a lot of impressive people were on it.

MS. FEIGIN: Can you tell us some of the changes you made so people can understand how different it is now from the way it was perhaps when you first started.

MR. KOPP: When I was on that committee, I think essentially what happened was that lawyers would write in and say here’s a problem with such-and-such a rule, don’t you think the Court should do something about it? It would be looked at by somebody who would say that this is really a problem. Let’s circulate it to the full committee and see if we should recommend something to fix the rule. Later on, and I think this process started toward the end of the time that I was on the committee, the process became more structured. The Court would ask, isn’t it time that our rules should be redone, they have all these strange things in them that are redundant and confuse people. Shouldn’t we start rewriting the rules so that they fit together in a more comprehensible way than before? That more organized process started before my time on the committee was over.
After I got off that committee, the Solicitor General’s office needed a representative to work with the Federal Advisory Committee on Appellate Rules, and the Solicitor General’s Office appointed me. The Solicitor General was a member of the committee but he in fact almost never went to the meetings. He always went through a proxy, so I became the proxy for the Solicitor General and was on the Federal Advisory Committee for Appellate Rules for seven years. During that period, there in fact were some very significant changes to the rules. The committee would study the problem, and they would come up with a proposal to fix the problem. It would then be presented to a standing committee. If the standing committee approved, then the rule was circulated and if it survived the comment process, it would be approved and become a change in the Federal Rules of Appellate Procedure. In my early years on that committee, there was a situation where each of the Courts of Appeals had their own rules on some very important aspects of appellate practice, such as the format of the brief, what to put in a petition for rehearing en banc, and other very important aspects of the process. One of the first projects the Advisory Committee handled when I was there was to come up with rules that would take the major aspects of appellate practice, like briefing times and en banc procedures, and come up with a proposal that would apply to all the circuits and effectively preempt the local rules. So we did that. Our recommended rules changes went over very well with the courts because for the most part the idea of having major rules identical in all the circuits made a lot of sense to just about everybody. So these early things that we did brought a lot of uniformity to the practice of appellate litigation. The circuits still
have room for local rules but the local rules now deal with the finer points, and the major points of appellate practice are the same in the various circuits.

The committee while I was on it also had another significant task that dealt with the appellate rules. The committee was assigned the task of being the first advisory committee to rewrite the rules in a consistent style because the rules had up to that point been written at different times for different reasons, and as a style matter they were not consistent. Style, when you’re talking about rules, is more than just something that looks nice. If you have words that in one rule are written in a certain style and in another rule the same words appear but they’re in a different style, lawyers are going to pick up the difference and start finding substantive reasons why one rule should be construed one way and one rule the other way. So when you’re writing rules, having a consistent style is actually quite important because it can spill over and have substantive impact.

MS. FEIGIN: This must have given you real sympathy and appreciation for your wife’s work in legislative drafting (laughter).

MR. KOPP: It did. It was very similar to that. I knew as an appellate lawyer that what you say and how you say it is obviously very important, but what I didn’t realize until I started to have this experience was just how many meanings a particular word could have, and it was for me an eye opener. Sometimes you sit down and you write something and after many tries you realize there isn’t any way you can write something with a perfectly clear meaning and that it be the only meaning of what you write. It’s just a very, very hard experience. The committee had the advice of people with significant expertise in legal writing. Dean Carol Ann Mooney of
Notre Dame Law School was the first person to lead the committee as its staff expert, and Brian Garner was the second on the committee as an expert. I learned a lot about vocabulary from the experience of being able to work with them.

During this period I was also on the D.C. Circuit’s special task force on gender equality which was a task force set up to study how the court was doing with respect to gender and seeing that people didn’t run into problems that you run into in society when women are being treated differently. There was a special task force on race, which was a counterpart to that committee. I was just on the gender committee.

MS. FEIGIN: Was there one for gay rights as well?

MR. KOPP: I don’t remember one. This was back in 1992 to 1995. Our side of the task force, the one studying gender, came up with a recommendation that while the D.C. Circuit was probably one of the more advanced courts in terms of seeing that the litigation process before it was not burdened by disparate treatment of people because of gender, there were still improvements that had to be made. There was a group of twenty or so attorneys on this task force and most of us were assigned specific areas to look at. I remember looking at the area involving the court’s internal EEO process for the staff of the court. We looked at the cases and had the benefit of some surveys, and we had access to a staff member on the committee who prepared material. I remember that in that particular area, the court’s internal EEO process, there were concerns that it wasn’t as effective a process as it should be, largely because the court was a very small place. Having a formal EEO process in a small institution becomes difficult because everybody
knows everybody. There are fewer secrets that are kept in such an institution than in a larger one.

At least at that time there were a number of people that felt that the D.C. Circuit and the District Court’s EEO process really weren’t working as well as they should be. A number of court managers felt the same way and so one of the recommendations was that the court focus on that aspect. I don’t think we necessarily came up with a solution. I’d be interested 20 years later in how much progress has been made. One of the suggestions was that in a small institution, you have to not only work on the formal process but work on informal ways of dealing with problems so that people who feel they have problems can comfortably find somebody to talk to and talk through what is concerning them without it becoming a big and unpleasant thing. If you don’t have someone you can comfortably complain to, you will end up suffering in silence and not happy about your job.

MS. FEIGIN: Before we close out, let me ask you one gender-related question because you were there at the time when many more women were in the office, and attire for women changed. Women started wearing pants and pantsuits, and there was a time when this became a real issue, how should women dress for court. Did Civil Appellate have any philosophy on this? Did you?

MR. KOPP: No, we did not, and part of the reason we did not is because our people I think instinctively knew how to dress when they were going to court or a significant meeting. At least it was never brought to my attention that there were any
problems in that area, and we felt that our people could be sensitive to the occasion and dress accordingly.

**MS. FEIGIN:** People reading this down the road may not understand that this was an issue, but women wearing pants was definitely a new thing. You didn’t care?

**MR. KOPP:** No, I didn’t care. Now my wife will tell you that there are certain areas where I just don’t notice things, and this could well have been one of them. In terms of getting any feedback about how our attorneys appeared in court, I never got any adverse feedback. There was some criticism that some attorneys dressed too casually in their offices.

**MS. FEIGIN:** Really? What?

**MR. KOPP:** We were located – and the office still is – on the 7th floor of the Main Justice building, out of the way where people who have an important appointment with an Assistant Attorney General or are going to the conference rooms will be wandering. The 7th floor is isolated from anybody going through except for those who have an appointment with one of our people, so people can become very comfortable in that type of environment. A number of the attorneys, and I think it was mostly men, but probably spread to some women as well, began to have their dress clothes hanging up on a hanger in the office, and except when they were meeting with people from outside of the office, they would dress comfortably. It didn’t look like Google, but it did become more informal over the years, and part of it was simply because the office was out of the mainstream of the Department and part of it simply was over the course of my working lifetime there was an evolution in what was viewed as permissible dress. When I went to law school
we wore a coat and tie. I think my law school class at Harvard was probably the last one that did, and after that point, in law schools things became much more informal and as people in law schools graduated, the notion of informality got carried more and more into law offices. The big private firms probably were the last to go, but the ones that weren’t run like private firms had the evolution happen much earlier.

MS. FEIGIN: Thank you very much. It’s been very interesting. Next time we’ll probably get more into cases, but it’s important to have the context so it’s really interesting to hear about your placement in the Justice hierarchy and the administrative framework.

MR. KOPP: Thank you.
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 Judy Feigin, and the interviewee is Robert Kopp. The interview took place at the home of Robert Kopp in Bethesda, Maryland, on Thursday, April 16, 2015. This is the ninth interview.

MS. FEIGIN: Good morning.

MR. KOPP: Good morning.

MS. FEIGIN: Last time we talked about life at the Justice Department, but we held off until today to discuss the amazing panoply of cases that you participated in either directly or as a reviewer. I know we won’t be able to get through them all today, but we should make a good start. Probably the best way to do that is to divide it among topics, so let’s start with the reason the Section first began, which was to protect the public fisc. Lots of cases on that. Want to tell us about some of the most interesting?

MR. KOPP: Yes. The Civil Division was originally set up as a Division to deal with monetary claims against the United States. With the passage of time the government has in an increasing number of statutory provisions waived its sovereign immunity with respect to suits over money, and the litigation load for the Division in this area has become more and more significant. In recent years, there have been suits handled by the Appellate Staff where the amounts of money at stake have been staggering, and they have also been very interesting suits. Sometimes they involve factual situations which someone who hasn’t been immersed in government litigation might think were not terribly attractive, but with the sums that were involved – and you consider that the sums at stake came from the taxpayers of the country – the defense of these suits was extremely important in terms of defending the
government and protecting its budget. For instance, one of the cases that our office was involved in during the time that I was the Director was a case called *Quiban v. U.S. Veterans Administration*\(^29\) which involved a suit brought by Philippine war veterans who had fought on the side of the United States in World War II, and their surviving spouses. They were seeking to receive from the United States some $2 billion in veterans’ benefits to be paid annually to them. The Civil Division and our office defended against those suits because we felt that the statutes did not authorize that type of payment, notwithstanding that the veterans had been risking their lives on behalf of the United States during the war.

**MS. FEIGIN:** Was this disability for injuries incurred during the war?

**MR. KOPP:** Yes. Basically disability that results from the war and also survivor’s benefits. It was not a terribly attractive position in terms of equities for us to be in, but the key thing about money coming from the federal fisc is that there’s sovereign immunity that bars it from being spent unless authorized by Congress. So if the authority waiving sovereign immunity isn’t there, the money can’t be spent.

**MS. FEIGIN:** In cases like that where the facts are really difficult, is there thought about settling the case just because it’s so ugly, or is the principal seen as the paramount issue?

**MR. KOPP:** It depends on what area you’re in and what the relevant statute says. In this particular case, we felt the statutory authority simply wasn’t there to make these payments. In fact, if you looked at the statute, there was one type of Philippine war veteran that did get payments because they were authorized by Congress, but other types were not. When the case got to the Court of Appeals, the D.C. Circuit, in an opinion by Judge Ruth Ginsburg, agreed with us that

notwithstanding the sacrifices of these war veterans, the authority simply wasn’t there to make the payments. In that situation, if you don’t have the authority, there’s nothing you can do about it. Eventually, Congress felt that something had to be done and changed the law and did permit at least some payments to these veterans.

Now talking about difficult situations, some of the worst cases that we had in terms of facts were those under the Federal Tort Claims Act where you had what we lawyers euphemistically call “damaged baby” cases, where there was an error by government medical personnel that caused serious and tragic damage to an infant, and the parents would sue the government. If you look at what happened, the government sometimes was not in the position of putting its best foot forward in terms of the facts of the case. A district judge in those circumstances could well be influenced by emotion and award damages far beyond what were any sensible limits. We would look closely at those cases in Appellate and make recommendations to the Solicitor General, and the bigger the sums were, the more we felt obliged to look very, very closely at them in terms of recommending appeal. Some of these cases involved really horrible facts where we succeeded in obtaining very significant reductions in the judgment. For instance, in a case called Dickerson v. United States, which involved horrible damages to a baby, we reduced the judgment in favor of the family from $45 million to $20 million. Obviously $20 million is still a substantial award, and we just felt that on the facts, you couldn’t justify the larger sum awarded by the District Court.

30 Dickerson v. United States, 280 F.3d 470 (5th Cir. 2002).
These suits over damages are brought under statutes like the Federal Tort Claims Act, and the Tort Claims Act is a waiver of sovereign immunity which is restricted by the time limits which are written into the law. If you are a plaintiff’s lawyer, you have to be very careful to bring a suit on behalf of your client within the statutory time limits, which in general are either two years to bring suit or six months after denial of an administrative claim, and if the suit isn’t brought within the statutory time, you’re just out of luck.

One of the most well-known series of cases involving statutes of limitations we were involved in were the cases that arose out of the activities of what is loosely known as the Whitey Bulger gang in Boston. That was a gang that was in existence for over thirty years. Bulger worked his way up to eventually become head of the gang and was assisted by a corrupt FBI agent who ended up in jail prior to Bulger’s capture and conviction. There were a good number of people who claimed damages because of activities of the gang in conjunction with what plaintiffs alleged was support for the gang by the FBI, but many of them were very slow in bringing suit. Thus as government lawyers, we felt it our duty to raise the statute of limitations as the defense, and in a number of cases, we were successful.

MS. FEIGIN: You say they suffered injury. Some people were murdered.

MR. KOPP: Yes. The thrust of these cases was what was the FBI’s role, and as I say, there was one person from the FBI office in particular whose conduct essentially moved from being a government agent to being a co-conspirator with the gang. But not all of the people who were suing ended up being barred by the statute of
limitations, and some of these cases were to prove quite costly to the government. Perhaps the worst of them was a case called *Limone v. U.S.*\(^{31}\) which arose out of facts from the 1970s but which was eventually decided by the federal courts in 2009. It involved four people who had been involved in a relatively minor role in various petty criminal activities. Prosecution against them for murder was brought by the state of Massachusetts. These four people were initially convicted. They served some thirty years’ time in prison. Two of them died while in prison. Eventually it was figured out that they had wrongfully been convicted. The FBI admitted it had not disclosed critical evidence concerning a key witness. The survivors were released and of course they and their family members sued the federal government. The District Court entered a judgment in excess of $100 million, and we just felt we had to appeal, notwithstanding that the facts were so bad. The First Circuit affirmed. The only consolation was that the First Circuit did say that it thought that the District Court judgment was more than the plaintiffs deserve but the First Circuit was an appellate court and the District Court had broad discretion in determining the amount of damages that were owed.

It was typical of these Boston gang cases that the underlying facts were extremely unattractive. For example, there were a number of cases involving two young women whom Bulger grossly killed.\(^{32}\) Again it was a situation where we felt we were obliged to defend, and while the sums were not in the $100 million range, they were significant. Notwithstanding the bad facts, we were responsible

\(^{31}\) *Limone v. United States*, 579 F.3d 79 (CA 1, 2009).

\(^{32}\) *Davis v. United States*, 670 F.3d 48, (1\textsuperscript{st} Cir. 2012).
for defending the public fisc and we felt we had a duty to pursue the cases through the Court of Appeals.

Our litigation in defending the public fisc was not confined to tort cases. For instance, the Tucker Act was a waiver of sovereign immunity permitting suits for contractual damages in the Court of Federal Claims and then appeal to the Federal Circuit. One of the biggest cases involved the cancellation of the A12 aircraft, which was a multi-billion dollar project, and the cancellation led to years of appellate litigation. We worked very closely with the trial team when the case reached the Court of Appeals. The government lost in the trial court, and we obtained a reversal and a remand in the Court of Appeals for the Federal Circuit.\(^\text{33}\) Because we had been faced with a multi-billion dollar judgment, our reversal of the Claims Court judgment changed the momentum of the litigation and eventually the case was settled for a much more reasonable sum than the multi-billion dollar judgment that had been entered by the trial court.

There were cases that had larger financial stakes than the A12 litigation. One of them was a case called \textit{Schism v. U.S.},\(^\text{34}\) which involved people who had served in the military during World War II and afterwards. The plaintiffs in \textit{Schism} alleged that when they signed up for military service, the recruiters had promised them that they would be provided with free medical care for life and they would be provided that medical care in military facilities when they left the military service. They brought suit, and a panel of the Federal Circuit agreed with the plaintiffs, that since the recruiters had promised them lifetime medical care for

\(^{33}\text{McDonnell Douglas v. United States, 182 F.3d 1319 (Fed. Cir. 1999).}\)

\(^{34}\text{Schism v. United States, 316 F.3d 1259 (Fed. Cir. 2002 \textit{en banc}).}\)
free in government facilities, they were entitled to it. However, we went for en banc, and Roy Hawkens and Barbara Biddle of our office convinced the full court that the recruiters had no authority to contract away the government’s money. That was something that had to be determined by Congress. If you were a recruiter, you just couldn’t go out and make a promise that would be binding on the government when there wasn’t statutory authorization for it. The en banc Federal Circuit agreed with us. It was I think easier for the court to agree with our position because over the years after World War II, Congress had been focused on issues like that and had enacted a series of laws which became much more specific in terms of what the rules were for when people who served in the military could get medical service in military facilities. So we won the case in the Federal Circuit. Had the litigation come out the other way, the cost to the federal government might have in fact been as high as $15 billion. Money was really something that was at stake in our litigation.

I should add a couple of big money cases which were unique. For instance, the government after World War II had all these military bases that it was operating, and over the years it was very expensive to operate these bases. Meanwhile, the government was owning land that was becoming more and more valuable for other uses. Starting in 1988, Congress adopted legislation for a procedure by which military bases could be closed. Essentially that procedure was to provide that under a very tight time schedule, there would be a recommendation from a Base Closing Commission to the President. The President would then decide whether to accept or reject the recommendation of
the Commission, and Congress then had a limited period of time in which to set
aside the President’s decision. As one might expect, the closing of just about any
military base could cause much opposition in a particular community, and these
base-closing determinations led to a lot of litigation. The litigation typically
would come up under very tight time tables because the statute had very tight time
limits written into it, and so our attorneys, who were experienced people like
Doug Letter and Scott McIntosh, would find themselves being presented with a
new appellate case on a very short timeframe. They only would have a couple of
days to prepare their brief in the case, file it and argue it. We were very
successful in the litigation in the courts of appeals. One of our cases, however,
did go to the Supreme Court. In a case called Dalton v. Specter,35 we succeeded
in having the Supreme Court rule that Congress had intended a process where the
courts would not be involved in reviewing the President’s decision. That was
quite a significant ruling and saved the government many billions of dollars.

MS. FEIGIN: I would note that Doug Letter now has your old job as head of the Appellate Staff.

His oral history is being taken for the Society, so for anybody looking at your oral
history who wants to follow up on some of these cases that you’ve said he’s
involved in, he may have discussed them in his oral history as well.

MR. KOPP: That’s very good because as I go through this, you may find situations where
Doug knows a lot more than I do on some of these matters.

In relatively recent years, by which I mean the 21st century, perhaps one of
our biggest, if not the biggest, case over money was the litigation which was
brought in Cobell v. Norton. That was a suit that was instituted in 1996 when a

class of over 300,000 Indians alleged that for essentially a century there had been an error by the federal government in terms of accounting for funds held in trust for them. The suit was initially handled by the Environment Division, which is the traditional Division for handling cases that are relating to Indians. On an interlocutory appeal from a District Court ruling by Judge Lamberth in the District Court here, the D.C. Circuit in 2001 generally affirmed the Court’s ruling that the government had failed on a massive scale in performing its trust obligations to the Indians and remanded the case for further proceedings.

MS. FEIGIN: Before you go on, you said this was one of the biggest cases financially. Do you have any sense how much money we’re talking about?

MR. KOPP: Eventually, and I’ll get to it in a moment, the case was settled for over $3 billion.\textsuperscript{36}

MS. FEIGIN: So we know it was more to start with. And I should also say that I believe Judge Lamberth’s oral history will be taken. I suspect this case will be a part of his story as well since it was major litigation.

MR. KOPP: As an aside, since Judge Lamberth is obviously at the center of this, I should add that when he was an Assistant U.S. Attorney, I worked very closely with him, and when he became a judge, I thought it was a very good appointment. I’ve always respected him, but that doesn’t mean that we didn’t take a good number of appeals from his rulings (laughter). Basically what happened in Cobell was that after the D.C. Circuit affirmed Judge Lamberth’s decision in 2001, he became

very unhappy with what he felt were the government’s actions in implementing the rulings, and he eventually, on the remand from the 2001 ruling, found that the government was not successfully moving towards an appropriate accounting, and he found the Secretary of Interior to be an unfit trustee and in contempt. Up to that point, the case had been an Environment Division case, but the Civil Division had started in the District Court to work with the Environment Division on the case.

Following the contempt proceeding, the case was transferred to the Civil Division. So we got into the case and we argued that the government had in fact started doing an appropriate task of accounting for what was owed to the Indians, but the District Court made a series of rulings that we found very troubling, and we felt that the court’s rulings were improperly interfering with the agency’s discretion to handle what was an incredibly complex task. Civil’s arguments did not go over well in the District Court in terms of the Secretary’s approach to how the accounting should be handled, and the District Court, in a series of rulings that had some very harsh language for the government, entered orders that we felt were not only interfering with what the government was trying to do to implement the accounting but were really counter-productive.

We took a series of appeals. Eventually, by 2006, we had taken eight appeals to the D.C. Circuit. On our eighth appeal, the Court noted that with respect to the eight appeals Civil had taken, each time the Court of Appeals had set aside the District Court order or other action against the government. Thus the
Court of Appeals at that point agreed that the case should be reassigned to a different trial judge.

MS. FEIGIN: These were obviously very harsh rulings by Judge Lamberth. He’s shutting down the computers, and I assume a lot of it was personally directed toward the Secretary. Did you have any sense of the Secretary’s personal response to all this?

MR. KOPP: I know that people in the Interior Department and elsewhere in the Executive Branch were very upset over what was happening. They felt that they were in good faith trying to achieve an appropriate accounting and that the rulings of the District Court – and you mentioned the fact that the judge at one point shut down the Department of Interior’s computers – that these rulings were just making an incredibly difficult task to begin with much more difficult. As I say, after we took eight appeals, the court directed a reassignment to a different judge. After the shift, the case still had one more trip to the Court of Appeals on the merits, but that one Court of Appeals decision set guidelines that led to the parties negotiating a settlement. Under the settlement, slightly over $3 billion would be distributed to the Indians. That distribution eventually was implemented, and it brought to an end one of the most unfortunate histories in the government’s relationship with the Indians.

MS. FEIGIN: Let me ask one more question about that case. I don’t quite understand why it got shifted from Environment to Civil. There must be a reason.

MR. KOPP: I was not plugged into what was the precise reason, so I can only speculate as to why. One might be that the case had become such a complicated and difficult
case that the people high in the Department felt that it really needed new blood. Another might be that the people in the Environment Division wanted new blood to come in. Also, people felt that the subject matter in terms of exotic remedial orders was something that Civil Division had particular expertise in. I wasn’t involved in the decision for it to come to Civil. I just knew that it came to Civil. The thing really was an extraordinarily challenging case. I felt looking back that we did very well because the basic eight appeals that we took set up the case in a way that, after the reassignment from Judge Lamberth, the case was placed in a posture where the District Court, the new judge, was able to analyze it in a way that set up the basis for one more Court of Appeals merits decision and eventually a settlement.

MS. FEIGIN: In all the cases you’ve talked about so far, you’ve been defending the public fisc, but I know you sometimes were on the other side, getting money for the government. Can you give us an example of that?

MR. KOPP: Yes. As you mentioned, the Civil Division principally was defending in terms of suits against the government for money, but it did have one component, in particular, which had the authority to bring suit as a plaintiff under the False Claims Act against people who were taking fraudulent actions against the government. The government was able under the statute, if it prevailed, to obtain treble damages. Over the years, thanks to people like Mike Hertz, who was head of the Frauds Unit and who had been in our office before he went to that position, the Frauds Unit became more and more successful in recovering large judgments. We handled some of their cases in the courts of appeals and were successful in
recovering some very large judgments, sometimes many millions of dollars. I must say that for an office that basically had the job of being the government’s defense attorney, it was very refreshing to also have cases where the government was the plaintiff and the office was able to bring in money to the government as well.

MS. FEIGIN: I assume mostly in those cases you’d be wearing the white hat.

MR. KOPP: Businesses on the other side of course wouldn’t agree to that, but in most of these cases we felt we were wearing the white hat. As I’ve mentioned, a lot of our cases did arise in facts that were not terribly attractive to outsiders, and it was nice to be in a case where we could win a judgment for millions and millions of dollars against a corporation where a court had found that it had been engaged in fraud against the government.

MS. FEIGIN: Does any one in particular stand out?

MR. KOPP: There were a lot of cases. There was a case, for instance, United States v. Rogan, where Doug Letter and Tom Bondy in our office obtained affirmance of a judgment of $64 million in favor of the government. You would have sums like that in these False Claims Act cases.

MS. FEIGIN: So beyond the fisc, you did other things (laughter).

MR. KOPP: Yes. We indeed did other things, and a good part of our job was simply defending actions taken by the Executive Branch and defending the authority of the Executive Branch to do those actions. For instance, one of the most important areas we were involved in was litigation concerning the census. As the end of a decade would approach, it would become very predictable that our office would

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37 United States v. Rogan, 517 F.3d 449 (7th Cir. 2008).
be involved in some way in significant litigation concerning the census. It was just very predictable that say in about 1978 or so somebody would be suing over the 1980 census. The pattern of suits starting in 1978 or 1979 or 1988 or 1989 was one that persisted through the decades. There were a significant number of these census cases. There still may be into the future a significant number of these cases, but maybe less serious ones in the future than there have been in the past because one of the most significant rulings that we were involved in was a census case that was decided in the 1990s which involved the enumeration of the census and the question of a statistical adjustment. The Supreme Court in that case – it was Wisconsin v. City of New York\textsuperscript{38} – agreed with the government position that the method of how you calculate the enumeration of the census was basically committed to the discretion of the Executive Branch and upheld the decision of the Secretary of Commerce not to make a statistical adjustment to the 1990 census. Had the opposing view been accepted, it’s very likely that future censuses would have been bogged down, at least for quite a while, in litigation over statistical adjustments and how you make them. Even so, there has been plenty of census litigation, and I’m sure that given the stakes, there probably will into the future be a significant amount of census litigation.

In a very different area involving the Executive Branch, we were involved in an interesting series of cases, appeals concerning the White House’s management of its computer system. This was a series of cases called Armstrong

At the end of the Reagan administration, plaintiffs, led by a journalist by the name of Scott Armstrong, brought suit arguing that the White House was not in compliance with federal recordkeeping requirements in the way it was handling its computers and the backup tapes on the computers. The practice at the time was that the White House computer system did conduct backup tapes but normally after a few months they were then not preserved, and the tapes were reused so you couldn’t say two years down the road go search for something and find what was on a backup tape. Armstrong was represented by some very fine attorneys, such as Alan Morrison, who I know many people in the D.C. Circuit and the District Court here are familiar with.

MS. FEIGIN: And I believe his history is also in the Society’s repository.

MR. KOPP: I haven’t looked at his history so I don’t know what he’s saying about this episode, but I will say if I can deviate a bit from the narrative, that Alan was an extremely good attorney. When I was at law school, he was in my law school class at Harvard, and we were in the same section. Harvard at that time had very large classes where you’d have 150 people or so in a class and most of us were absolutely terrified about talking out in class, but Alan was one of a small group who would talk in class, and he was just brilliant. I wouldn’t say he was one of my idols, but he was certainly one of the people in law school whom I admired the most. While as a government attorney I always tended to be on the other side from him, I always thought it was a pleasure to be in litigation with counsel on the other side being somebody like Alan. Certainly in the White House computer

tapes litigation, we saw some very good lawyering from Morrison’s side of the case.

The litigation over the White House tapes produced a number of appeals. What happened was eventually a mixed result. We were able to get a decision from the Court of Appeals indicating that the President under the Presidential Records Act could not be reviewed by a court, and we were also able to persuade the D.C. Circuit that the National Security Council was essentially an arm of the President and also not subject to review. But statutes like the Freedom of Information Act and Federal Records Act produced litigation that went on for years. Eventually the sides became more willing to work out settlements and agreements, and the litigation ultimately went away with both sides being able to point to accomplishments that made them think that they had been successful in the litigation. We felt that we had achieved good results with respect to the President. I think Alan’s people felt that they had achieved good results with respect to the agencies that were involved.

One of the interesting things about the litigation was that one of the people who worked on our team in the case was Patricia Millett, who of course is now a judge on the D.C. Circuit.

MS. FEIGIN: As we do this interview, there is a controversy brewing about the computer records of former Secretary of State Hillary Clinton. Do you think the Armstrong litigation would have any bearing one way or another? I’m not asking you to predict an outcome, but is that litigation relevant to the current controversy?
MR. KOPP: I am going to leave that question to others. I am sure enough will be written on
the topic. But I do want to make a generic comment that applies to the
government’s computer recordkeeping as a whole.

As we have to some extent discussed, there was in the late 1990s and the
first decade of this century a whole series of cases involving computer records,
the Federal Records Act, the Freedom of Information Act, and the role of the
Archivist. I think the government won its share of the cases, and the plaintiffs
won their share of the cases. As the litigation clarified the law, the government
did have a significantly enhanced respect for preserving records and having
systems for how you treat computerized material. Unfortunately, I think a lot of
the law that evolved during that time—not to speak of the necessary funding—
didn’t necessarily trickle down terribly well through all of the government. I
know even in the Department of Justice, which I think was much more advanced
than just about any agency in terms of treating government records, I felt that we
really weren’t doing enough to have our own systems in place the way they
should have been. If that’s the way things were at Justice, you can imagine how
they were at other agencies. So the transition to computerized recordkeeping has
been a slow one. I hope maybe today things are much better than they were when
I was in the government and we were litigating over this. But I think progress has
probably been a lot slower than one would have liked.

MS. FEIGIN: Another thing that’s in the news right now is executive orders and the power of
the President to issue them. I think that’s often a question, especially towards the
end of a presidential term. Is that something your office got involved with too, 
upholding the scope of executive orders or the right to issue them?

MR. KOPP: It probably was, but I don’t think it was at issue as much as it is now. There were 
a few cases about the President doing things by executive order, but I think it’s 
become a much bigger issue today because the deadlock within the government is 
so serious now. Even when there were administrations in the White House that 
were different than the majority in Congress, you didn’t really have the deadlock 
that you do today.

MS. FEIGIN: In terms of other cases that you litigated on behalf of the Executive Branch, any 
come to mind?

MR. KOPP: One of the most interesting ones was a suit that came up in the Bush 
administration, and it involved the President’s White House staff. Some of the 
people who are reading this may remember that at the end of the George W. 
Bush administration, there was a dispute concerning the White House and 
whether former White House Counsel Harriet Miers should testify before the 
Congress. As counsel for the Executive Branch, our duties included representing 
the White House in litigation, so we were in the litigation that was brought by 
counsel for the Congress against Harriet Miers. We defended against the 
litigation targeting her for refusing to appear before a committee of Congress to 
testify about the resignation, which apparently had been forced, of nine U.S. 
Attorneys. That was a big, controversial issue during the end of the 
Bush administration. The District Court ordered that Miers appear to testify, 
although the court said that she could invoke executive privilege in response to
specific questions. Also, White House Chief of Staff Joshua Bolten was ordered to produce relevant documents. We went to the Court of Appeals to get a stay of that order, and the Court had us do extensive briefing on the stay motion. It then granted us a stay. 40 By that time it was near the end of the Bush administration. The Court of Appeals, instead of expediting the case so that it could be quickly decided, apparently decided that while the issues are very important, they were not the type of issues that one should rush through, and it set the case down for regular scheduling. The Obama administration then came into power. With the change of administrations, the controversy over whether Miers and Bolten should comply suddenly became not so important, and the parties were able to work out a settlement, which permitted Miers to testify.

MS. FEIGIN: This was the D.C. Circuit?

MR. KOPP: This was in the D.C. Circuit.

MS. FEIGIN: I assume you think it was not an accident that they let this happen. This was their strategy to avoid having to handle the case?

MR. KOPP: Well, I hate to read what’s in a judge’s mind, but that was certainly the obvious consequence of putting the case down for briefing on the normal schedule.

MS. FEIGIN: I think people down the road who read this may not know so we should put this case in a little more context. Harriet Miers is not just anybody in the President’s office. President George W. Bush wanted her to be a nominee for the Supreme Court. In fact he put forth her name and she ultimately withdrew.

MR. KOPP: Exactly.

40 Committee on the Judiciary v. Miers, 542 F.3d 909 (D.C. Cir. 2008).
MS. FEIGIN: So she has a place in history independent of this case, but it made this case I think seem more important.

MR. KOPP: That’s right. She was somebody that in the second half of the Bush administration was very much in the news.

MS. FEIGIN: Also I should say I believe, correct me if I’m wrong, that the firing of the nine U.S. Attorneys was one reason that the Attorney General, Alberto Gonzales, ultimately stepped down. So that was not just an everyday happening.

MR. KOPP: There are lots of things going on obviously.

MS. FEIGIN: So these cases, put in context, loom large, because there was a lot of political swirl around the participants.

MR. KOPP: I think that’s right. Given how politically charged things are today, I think the Bush II administration was part of the time when the world in which we were operating involving the Executive Branch became a much more political place than it had been previously, even though, of course, you can never take politics out of the running of the government. But I think the attitudes that we have today – I’m talking in 2015 in terms of the political deadlock that we have in government today – came from seeds that were sown long before we reached the Obama administration.

MS. FEIGIN: And if we’re talking about political swirl, we cannot avoid President Clinton, who was of course impeached. One of the big cases, and I know the Office was involved so I have to ask you about it, involved Paula Jones. Do you want to remind people what that was and at least what the Office had to do with that?

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MR. KOPP: Yes. Paula Jones was a person who sued President Clinton for damages because of advances she said he made to her before he became President. President Clinton had his own counsel in the litigation. The United States filed independent briefs in the case in the Court of Appeals and at the Supreme Court level to present the case from the viewpoint of the institutional interests of the President.

When we were discussing what I would be talking about today, you asked me about the case and I drew a blank in terms of responding to it because I had completely put it out of my mind. It made such a small impression on me. Now maybe I just put it out of my mind because I didn’t want to think about it (laughter). But I really had very little memory of anything that happened about it concerning our office. Then I pulled the briefs in the Court of Appeals, and I saw that the names of attorneys from our office, Scott McIntosh and Doug Letter, were on the filings in the Court of Appeals and they were on the Supreme Court brief as well, so I began to question myself as to what was our role. I think, and I’m just speculating because I’m still drawing a blank, I think probably what happened was if you look at the Court of Appeals briefs, you’ll see that the names on the briefs include, in addition to Doug Letter and Scott McIntosh from our office, they have Deputy Solicitor General Edwin Kneedler and the name of an Assistant to the Solicitor General, Malcolm Stewart, on them. And I think what probably happened was that this was one of those rare cases where even though it’s in the Court of Appeals, the case became a Solicitor General operation. Even though our attorneys were involved, they’re more or less operating as a sort of appendage of the Solicitor General’s Office.
You mentioned that Doug Letter was giving an oral history. I would defer to whatever Doug has to say about it because as I say my memory of the Paula Jones case is really next to nothing. That doesn’t mean our attorneys weren’t involved in it; it just means that it somehow didn’t make much of an impression on me.

MS. FEIGIN: I assume the government’s position was he should not be sued during the time that he remained in the presidency.

MR. KOPP: Our concern, and I think it really is a very legitimate concern even though the Paula Jones case has so far been the only case where it’s been a problem, is that you could have a suit brought against the President while he’s in office for action taken before he became President, and it could be very time consuming in light of the time that it takes the President to focus on the case. And when you see all the things that happen in the world these days, you realize the President never has a moment that is truly a free moment. So I think there really is a legitimate concern about a President being required to defend a suit actively going on against him personally while he is the President. It’s hard to disagree with the way the Supreme Court came out, that the rules are the same for everyone, but I don’t think it’s a simple matter, particularly given the way people have become so combative in politics these days. You could see something like this down the road becoming a serious problem, but I’m not going to question the Supreme Court’s outcome.
MS. FEIGIN: We probably have time for one more category of cases. Let’s do immigration, which also happens to be on the front burner today in the news. It’s obviously been an important topic for Civil Appellate for a long time.

MR. KOPP: That’s right. We are not the office that normally handles immigration cases, but there were some immigration cases that became so complex and of such significant importance in terms of the government as a whole that we did become involved in them. I mentioned, for instance, one case when I was not yet head of the Office where I was involved which was the Iranian immigration case. Another huge immigration case where our office was involved concerned Haitians. This was a very tragic situation that was occurring at the beginning of the 1990s where there was political unrest in Haiti and a coup. Thousands of Haitians then sought to escape. They were so desperate that they took to sea in very flimsy boats, and they had the hope that they would reach Florida. They also hoped they would not drown at sea, which was something which did happen to a number of them. The Coast Guard was out there and when it saw them, it would pick them up at sea, but unless they were political refugees who had a potential claim to asylum, the Coast Guard and the government concluded that they should not enter the United States; instead, the U.S. government would repatriate them and send them back to Haiti. This was, of course, very controversial. The Yale Law School in particular decided it should do something about this.

MS. FEIGIN: Give us the timeframe. The 1980s?

MR. KOPP: We’re in 1991.

MS. FEIGIN: So they’re at sea in 1991?
MR. KOPP: Yes. Harold Koh was Dean of the Yale Law School at the time. He was somebody who in the Obama administration became State Department Legal Adviser and our office worked closely with him on State Department matters. But when he was Dean of Yale Law School in 1991, he was teaching a class where he had his students involved in litigation. He was so upset over what was going on with respect to the Haitian refugees that the class became involved in representing the Haitian refugees. I might add that they were quite good. We always did in our office over the years have a number of really great people that came out of the Yale Law School environment. This was the Law School’s pro bono project at that time in terms of providing representation. The Haitians who were picked up brought suit against the government, and in the litigation, they sought relief that would have them being released into the United States. They didn’t want to return to Haiti. They drew a District Judge who was very sympathetic to their position. In December of 1991, he entered what was essentially a preliminary injunction barring the government from returning them to Haiti. We felt that there was absolutely no basis for the Court’s interfering with the government in what it was doing outside the borders of the United States. We therefore took an emergency appeal to the 11th Circuit and at the end of December of 1991, we obtained a reversal of the injunctive decree. But the District Court was not convinced that the government was correct, and in swift succession, it entered three more injunctive decrees, and we took appeals from all of them. We had to do a whole series of briefs. The case was considered by the
11th Circuit on an expedited basis, and we got all the District Court orders reversed. 42

It was an amazing litigation. Our team was three attorneys, Ed Swaine, John Daly, and the supervisor was Mike Singer. On the other side there was this very large number of students from the Yale Law School Clinic. Our attorneys would joke about the fact that there were just the three of us on one side and over twenty people on the other side of the case. During the time that the case was in the Court of Appeals, I remember our attorneys virtually every night were in the office working on the case until the very wee hours. It was a very grueling experience from the point of our attorneys.

MS. FEIGIN: Having three of them on one case was for the government a lot.

MR. KOPP: Yes. Having three attorneys was a lot. Usually our basic pattern was one staff attorney and one supervisor. In light of the fact that this was a case that took a lot of resources, we had two attorneys and one supervisor. As I said, the government eventually prevailed and the Haitians were returned to Haiti. I found the case to be perhaps one of the most disturbing that I had been involved in over my career. I found it disturbing for two reasons. First, I thought as a matter of law the District Court was just dead wrong. The government’s legal position was correct, that since the Haitians had not entered into the United States, the government could pick them up at sea and send them back. But secondly, even though I thought the legal position was correct, I couldn’t help but be very sympathetic to the people involved and couldn’t help but wonder why the government, with

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respect to people who were so close to the United States, could not work out some policy that would be much more successful and humane. Of course, I’m saying this in 2015, and unfortunately you see that this type of problem was not something that was confined to that era and to those people. You see it now happening in the Mediterranean a lot where you have, I just read in the newspaper the last week or so, people trying to escape from the chaos in Libya being put on boats and the people in charge of them jump off the boats and escape after they get paid for having the refugees on board. These boats then sink and you have hundreds of people killed at sea. The world with respect to refugees is unfortunately a very unattractive and dangerous place, and actually by that standard, you look now at what’s going on in the Mediterranean, and what happened in Haiti was not nearly of that magnitude. The world for refugees has become worse.

MS. FEIGIN: Just to make it clear for people reading this, you’re not talking about the people in the Mediterranean trying to get to the United States.

MR. KOPP: No. They’re trying to get to Italy. That’s a very good clarification.

MS. FEIGIN: We probably have time for one more topic. Let’s discuss tobacco because we actually started with tobacco early in this oral history and I know more happened. You told us then that there would be more to come, so let it come now.

MR. KOPP: That’s right. When I was a young attorney, one of my first cases, as I discussed before, was defending against a suit by Ralph Nader who was seeking to have smoking banned on airplanes. The case that I handled – unlike a later case that Bill Kanter handled – was a pretty easy one because at the core of that case was
the notion that banning smoking on the airplane was an emergency. So I won my case. But many years later, the government began to wake up to the idea that smoking actually was a very serious and dangerous problem and that something did have to be done about it. HHS and the FDA in the Clinton administration began building a very extensive record with respect to the adverse effects of tobacco. Our involvement began suddenly one summer during the Clinton administration. Bill Schultz was our Deputy Assistant Attorney General at the time. He came into my office and asked us to put together a team to start doing research on tobacco in support of potential litigation.

MS. FEIGIN: We’re talking about litigation not in the appellate court at this point?

MR. KOPP: No. The litigation actually hadn’t yet begun.

MS. FEIGIN: Isn’t that extraordinary that you would be involved before anything is even brought in the District Court?

MR. KOPP: It was extraordinary. It did happen on occasion in really big litigation which we knew was coming. For instance, in the Obama administration we knew healthcare litigation was inevitable and was going to be big and resource-intensive so we tried to get involved even before the litigation started. That also happened in the Clinton administration with respect to tobacco. And there was a round of litigation where the government’s position was that tobacco was a drug and cigarettes a device and these were the types of things that could be regulated under the Food and Drug Act.
Eventually that issue went to the Supreme Court, and the government lost 5 to 4 in *FDA v. Brown and Williamson*.\(^{43}\) In 2000, the Court found it very hard to accept the government’s position that tobacco was a drug and cigarettes a device within the meaning of the FDA Act. But there was also a second theory the government had because, as you may recall from those days, the tobacco industry was very aggressive in terms of pushing the idea that tobacco smoking was not endangering people’s health. A lot of the information that they were spreading was eventually shown to be false and inaccurate and people helping the industry were working with each other in terms of spreading inaccurate information. So the government was able to work up a suit under the RICO Act – the Racketeer Influenced and Corrupt Organizations Act – and we were able to sue on a theory that for decades the tobacco industry had pursued a corrupt conspiracy to deceive the American public about the health effects of smoking and the addictiveness of nicotine. This theory prevailed in the District Court before Judge Kessler, and the industry, of course, then took an appeal to the D.C. Circuit. I assigned the defense of the appeal to a team that was headed by Mark Stern, Alisa Klein, and several other attorneys, and it was just a wonderful team. The team was totally unfazed by the fact that a very large number of the people above them in the Department, the type of people that normally on sensitive cases one would be consulting with a lot, had to recuse themselves.

**MS. FEIGIN:** Why?

**MR. KOPP:** It turns out that the tobacco industry over the years had been hiring a good number of the best law firms to represent them, and there was this very big

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collection of outstanding attorneys who when they joined the Department had a background where they had been in the top law firms. When these attorneys came into the government and there was litigation brought against the tobacco companies, they had to recuse themselves. So Mark Stern and his team had a very small number of people above him who were not recused in the case.

Ironically it turned out that I ended up having to be recused as well.

MS. FEIGIN: Why was that?

MR. KOPP: That was because my wife and I had a very tiny ownership in the stock of a company which decided it wanted to intervene in the litigation in the District Court. I think, actually, it was on the plaintiff side, as opposed to the tobacco companies’ side, but I’m not sure about that. So I recused myself. It was a very small amount of stock, and there’s a procedure in the Department where you can get a waiver when you have essentially a de minimis interest. I could have gotten a waiver so I could participate, but by that time, it was apparent to me that Mark and his team were doing so well in terms of managing the litigation that there wasn’t a point to my seeking a waiver, so I just let them go without my being involved and they did an absolutely amazing job.

In 2009, they achieved what was a historic decision in the D.C. Circuit where the Court held that the tobacco companies were involved in a racketeering enterprise and that they should be enjoined from making false or deceptive statements and should issue corrective statements. That case was *U.S. v. Philip Morris USA*,\(^{44}\) and it’s a case that has had an enormous impact on American society. The funny thing is that even though I was recused from that case, I view

\(^{44}\text{United States v. Philip Morris USA, 566 F.3d 1095 (D.C. Cir. 2009).}\)
that decision as one of my greatest accomplishments as Director of the Appellate Staff because in that litigation we had on the other side from the government some of the best and highest-paid lawyers in the country, and the litigation was able to show off to the legal world just how capable were people on the Appellate Staff in handling litigation. Again, notwithstanding my recusal, I think I took more pride in this decision which I had nothing to do with (laughter) than most of the litigation that I was involved in over the years. It certainly was one of the most important things that the office did for many, many reasons.

MS. FEIGIN: It’s nice to end on a high note, and I want to thank you for a fascinating trip through some amazingly important litigation.
ORAL HISTORY OF ROBERT KOPP

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 Judy Feigin, and the interviewee is Robert Kopp. The interview took place at the home of Robert Kopp in Bethesda, Maryland, on Tuesday, July 21, 2015. This is the tenth interview.

MS. FEIGIN: Good morning.

MR. KOPP: Good morning.

MS. FEIGIN: We have covered a significant chunk of your legal career, but there’s so much more because it’s so vast. One of the things that is particularly interesting I think is the First Amendment work that you and your office did, so could you tell us about some of that?

MR. KOPP: Sure. One of the wonderful things about the office is there’s a great diversity of subject matter that we get into, and one just can’t sit down and describe the whole thing. It’s just so vast. But the First Amendment litigation was one of these constant subject matters that always was reoccurring, and during the course of the years our office was repeatedly involved in First Amendment cases. Sometimes it was where the government was a party, and sometimes it was where the government would come in as amicus. The First Amendment cases were just one of those constant diets that we had, and the litigation was often extremely important and extremely controversial.

I’m just going to give you a few samples of the types of First Amendment cases that we got into. For instance, in 1986, we were involved in a case that went to the Supreme Court, *Goldman v. Weinberger*, where the Supreme Court

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held 5-4 that an Orthodox Jew in the military service could not insist on wearing a yarmulke.

Another case from that era, which is very controversial, was *Marsh v. Chambers*. The government was amicus there. The Supreme Court upheld the constitutionality of a state legislature opening its session with chaplains giving prayer. The Court 6-3 upheld the practice, noting that there was a long historical practice.

More recently, we’ve had litigation involving the Secret Service and demonstrators who were trying to get close to the President. The case of *Wood v. Moss*, which was recently decided by the Supreme Court, involved a situation that arose in 2004 where President Bush was eating in a restaurant and a group of demonstrators wanted to be closer to the President than the Secret Service would allow. While I was in the office, we litigated that case for many years, and eventually, after I left, it produced a Supreme Court decision in favor of the Secret Service.

A lot of these cases are obviously very controversial with people that follow the Court as well as the general public. There are a couple of cases that probably are less controversial. One case which produced a Court of Appeals decision by Judge Sentelle was *Larry Flynt v. Rumsfeld*, where Larry Flynt and *Hustler* magazine were arguing that they had a constitutional right as members of the media to embed themselves with U.S. military forces in combat in

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Afghanistan. The D.C. Circuit held that there was no such right to accompany the ground forces; that was beyond what the Constitution requires.

Another First Amendment case that we were involved in, which I suspect is not terribly controversial for most people, is a case called *Mainstream Marketing v. Federal Trade Commission*,\(^{49}\) which was a case decided by the Tenth Circuit in 2004. There we and other government agencies like the FTC were involved. We successfully argued that the Do Not Call Registry, which is designed to limit unwanted commercial calls, did not violate First Amendment rights and was indeed intended to protect privacy.

MS. FEIGIN: We probably should say for people who may read this fifty years from now, that before this case dinner time was often havoc because you got dozens of phone calls from all kinds of organizations, and no matter how much you said, “Don’t call me,” they constantly called you back.

MR. KOPP: Yes. And I wish I could say that ten, twelve years later the situation has radically changed. I think the Do Not Call Registry is probably a first step towards dealing with the problem, and hopefully there are other solutions down the road.

MS. FEIGIN: In addition to the First Amendment, there’s so much to cover. 9/11 presented you with a lot of issues.

MR. KOPP: Yes. 9/11 presented all sorts of huge issues but I am going to leave them to other people who I know are being interviewed and were more involved in the post-9/11 litigation than I was. Administratively, 9/11 had a significant impact on the relationship between our office and the Solicitor General’s office by bringing the offices much closer together. The SG’s office after 9/11 got very heavily

\(^{49}\) *Mainstream Marketing v. FTC*, 358 F.3d 1338 (CA 10, 2004).
involved in Guantanamo and the other national security issues. They’re a small office, and they needed us very badly just because of the resource situation. In my view, the relationship between the Appellate Staff and the Solicitor General’s Office at that time made a shift from being two highly separated offices to two offices that were in effect a little bit like partners in a marriage where there’s a lot of squabbling but you’re all trying to reach the same goal and have a very common purpose. I know your son is in the SG’s office now (laughter), so I just want to say that in fact working very closely with the Solicitor General’s Office was one of the great things about my job.

MS. FEIGIN: That’s really nice. Let’s move on to healthcare.

MR. KOPP: The healthcare litigation, which started in the Clinton administration and then later on of course became the landmark of the Obama administration, was one of the most exciting and rewarding parts of my career. Healthcare was always a very significant part of our litigation. When I first joined the office in the 1960s, we litigated over Medicare, we had Social Security Act cases which would turn on medical judgments, and the Food and Drug Act produced over the years a large number of very significant cases. Then in 1993, the Clinton administration came in and they felt that the country’s healthcare system needed some fundamental reforms, so they set up a task force to come up with a proposal that they hoped they would get through Congress. This task force consisted of a number of cabinet officers and other top-level officials in the government who were to do a study and propose healthcare reform legislation. The First Lady at the time, who was Hillary Rodham Clinton, was named to head the task force.
There was an organization, the Association of American Physicians and Surgeons, who, because they were opposed to healthcare reform, brought suit to challenge the task force. The principal argument of the American Physicians and Surgeons was that the task force violated the Federal Advisory Committee Act, which is an open meetings statute. Their argument was that because Hillary Clinton was not a government employee, the Act required that the task force hold its meetings in public. Their suit was brought in the District Court in D.C. before Judge Lamberth, and on this particular issue, he agreed with the plaintiffs and entered a preliminary injunction in their favor. We then took an emergency appeal to the D.C. Circuit and obtained a reversal with respect to the aspect of the case that concerned the task force and the First Lady.

The D.C. Circuit, in an opinion by Judge Silberman, ruled in our favor that the task force could conduct its business in private without violating the Federal Advisory Committee Act. The Act exempted committees composed wholly of full-time officers or employees of the government. Judge Silberman concluded that in the particular context of this case, and given factors such as the need for confidentiality of presidential communications, it was appropriate to treat the First Lady as an officer or employee of the government. This decision is one of a very small number of cases which relate to a president’s spouse.

While the government won on this issue, that was, however, not the end of the litigation. The task force, which was a relatively small group, was supported by a large working group of several hundred people. While the working group as a whole seemed a bit more like what Judge Silberman called a “horde” than a

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committee subject to the Advisory Committee Act, Judge Silberman in his opinion observed that there might be subgroups which were subject to the Advisory Committee Act, and therefore the record wasn’t adequate on that subject. So the Court of Appeals remanded the case for further proceedings, including discovery.

The Clinton administration’s proposed healthcare reform died in 1994, and the merits of the litigation became moot. Nonetheless, that wasn’t the end of the case. It went on for years after there were no more Clinton administration proposals on healthcare. It went on for years because of disputes over sanctions and attorneys’ fees and eventually it came to an end I believe about five years later.

Apart from the legal issues involved in the case, the litigation made a very strong impression on me because twice during the course of the litigation, Mark Stern and I were called to brief the White House, and one of our meetings was with Hillary Clinton.

MS. FEIGIN: Can you tell us something about those meetings?

MR. KOPP: The first one was towards the beginning of the Clinton administration, and the Civil Division didn’t have an appointed political head. Indeed there were hardly any political appointees in the Department at all so that it was an interesting experience to be there and to in effect be temporarily one of the top officials in the Department just through fate.

The second White House meeting was right after the administration’s healthcare proposal had met the end in Congress. When I met Hillary Clinton,
you could tell that she was not happy with what she had just been through and I
must admit that I felt very sympathetic to her situation. It must have been
probably one of the worst periods in terms of her public life.

MS. FEIGIN: As we know there were some really rough periods. Did she seem totally on top of
the litigation?

MR. KOPP: Yes. She is very smart, very much plugged in. It was a little bit nerve-wracking
going and having a meeting with somebody you know had just been through a
very bad emotional experience.

MS. FEIGIN: Was she gracious?

MR. KOPP: Oh yes. She was gracious. She really looked forward to meeting with us.

MS. FEIGIN: That can be a story to pass down to your grandchildren.

MR. KOPP: Yes.

MS. FEIGIN: Healthcare obviously continued to be an important issue, and I know you worked
on other aspects of it, so can you tell us some of the other cases?

MR. KOPP: Sure. When Obama became President, healthcare was obviously one of his
important concerns, and I’m going to talk about the Affordable Care Act, known
as Obamacare, in a second, but one of the earlier actions of the administration that
took place concerning health should not be overlooked. This involved stem cell
research.

During the Bush administration, the government funded research to a
strictly limited extent on embryonic stem cells. By executive order, the research
was limited to approximately 60 pre-existing cell lines. The Obama
administration, when they came in, concluded that the controlling statute
permitted the government to fund more research than just on those pre-existing cell lines. President Obama issued a new executive order providing that the National Institutes of Health may support and conduct responsible, scientifically worthy stem cell research “to the extent permitted by law.” The National Institutes of Health then issued new guidelines, which contained specific ethical restrictions for research.

A couple of researchers who did not agree with the Obama interpretation then went to court. Judge Lamberth entered a preliminary injunction against the new guidelines, concluding that the Obama policy would violate the controlling statute and result in the illegal destruction of human embryos. The Solicitor General’s Office authorized an emergency appeal, and our litigation team quickly obtained a stay from the Court of Appeals. We then briefed and argued the case on an emergency basis, and our Deputy Assistant Attorney General Beth Brinkmann presented the oral argument. The court ruled in favor of the government. Judge Douglas Ginsburg in the majority opinion concluded that the administration’s construction was a reasonable construction of an ambiguous statute. Further, leaving the preliminary injunction intact would cause “certain substantial” hardship for researchers and their projects, and it was vacated.

I am no scientist, and I don’t really have a good sense of the medical developments that are happening, but I understand that what is happening in the area of stem cell research is very important in terms of new medical discoveries. Our avoiding the disruption threatened by this litigation may well prove to have been extremely significant in terms of what happens in medicine.
MS. FEIGIN: We should probably identify the case for anybody who wants to look it up based on what you’ve said.

MR. KOPP: It is Sherley v. Sebelius, and I should add that for our team’s success in setting aside the District Court’s ruling, the litigation team received the highest award from the National Institutes of Health. This ruling actually is only a reversal of a preliminary injunction. On remand, Judge Lamberth then entered summary judgment in favor of the government, and after I retired, that judgment of Judge Lamberth was affirmed and the Supreme Court denied certiorari. Now we get to “Obamacare.”

MS. FEIGIN: For people reading this years later, I think it’s fair to say it’s hard to exaggerate the importance of this issue during the Obama administration. It was huge.

MR. KOPP: That’s right. It’s as big a political issue as you can get, and I suspect that if somebody way down the road is reading the history of the United States at this particular time, one thing that they will probably know about are the political and legal struggles over “Obamacare.”

In any event, by March of 2010, the President, who strongly supported healthcare reform, was able to get through Congress and sign into law the Affordable Care Act which extended healthcare insurance to most Americans. It did not take long before the constitutionality of the statute was challenged in litigation. Obviously this was litigation which drew attention at the very highest levels of the Department, and high-level decisions were made that the Department would staff these cases a bit differently from the way that we handled other big

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cases. An Associate Deputy Attorney General who had previously been a partner in a law practice, Robert Weiner, was brought into the government and joined the Deputy Attorney General’s Office in order to supervise the healthcare litigation. Such an appointment was quite understandable given the significance of the case and particularly the fact that the Solicitor General at the time, Elena Kagan, had just been nominated to the Supreme Court.

MS. FEIGIN: It doesn’t seem that understandable to me because the government has huge cases and we have career people who handle them. I don’t quite understand why someone special had to be brought in.

MR. KOPP: I can only speculate on the reasons for it. The fact that Justice Kagan was leaving the Department meant that we had an Acting Solicitor General. I don’t know whether there was a sense that for something like this you had to have essentially, if not a presidential appointee, somebody sort of at that level. One can speculate exactly why Weiner was brought in. It struck me that it was unusual. We were used to the SG’s office making the big calls in the biggest cases that we were handling, so this type of new structure added to the pressure that we in the Civil Division felt; on top of having to litigate, we also had to adjust to a new working relationship. But eventually, I figured out that Weiner was working in well and that he was easy to deal with. We developed our legal positions, and I felt that we had developed some very strong positions. I was confident that we had a very strong position on the merits, and in particular I thought that we should win our case on the basis that the individual mandate of the healthcare law was a permissible exercise of authority under the Commerce Clause.
The courts, however, did not necessarily see the case that way, and there were split decisions in the District Courts and in the Courts of Appeals. By then it was December 31, 2011, and that was the date that I retired. After I was gone, given the conflict in circuits and the importance of the case, the case went to the Supreme Court and 5-4 the Court upheld the constitutionality of the law. They did it not on the basis of the Commerce Clause on which I had been so confident, but we won on our alternative argument that the government’s authority could be premised on the taxing clause. Nonetheless, even with what the Supreme Court did with respect to Medicaid in the case, this was just an enormous win, and I felt very happy that I had stayed in my job long enough to be able to see this historic legislation get on its way to success in the Supreme Court.

A future Congress, of course, might modify or replace the Affordable Care Act with a system that operates differently, but I think the most significant thing about the passage of the Affordable Care Act and its implementation is that the government has crossed the Rubicon with respect to the government’s responsibility to ensure that healthcare insurance is available to those who cannot afford it. Whatever the future may bring, I think that’s a step that people a hundred years from now are going to wonder why that was such a big controversy at all.

MS. FEIGIN: Do you think the way they rejected the Commerce Clause argument is going to have repercussions for other issues?

MR. KOPP: It could. You read the decision and put the pieces together and in litigation on different issues, there’s a lot in there that cuts back on some of the arguments the

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government likes to make in cases. The lesson I draw from the decision is if you’re a legislator in the future and the Supreme Court in this litigation has said what the law is and you’re writing future law, you have to adapt and write your statutes so that they fit within the guidelines of the law established by the Supreme Court.

MS. FEIGIN: Let’s discuss gay rights, which ironically is one of the first issues you handled when you were a brand new lawyer.

MR. KOPP: That’s right. Gay rights is one of those issues that during my career was often around in some form or another. When I came into the Office in 1966, the situation of the government’s relationship with people who were gay was almost as though these people didn’t exist or shouldn’t exist. It was a totally different world than we live in today. Slowly with the passage of time over years people’s attitudes began to change. I know my own awareness over the years has changed quite radically. People at the highest level of government began to become aware and become concerned about what was happening to people who were gay.

When Bill Clinton was running for President, he committed himself to doing away with the injustice of having military personnel discharged solely because they were gay. This set up, of course, a very big fight with Congress. It was an awkward time for the administration because it was in 1993 almost immediately after Clinton had taken office, and Clinton was unable to get his way with the Congress. The administration felt that it had no choice but to agree to a compromise solution concerning the military, and that was to adopt what became known as the Don’t Ask, Don’t Tell policy so that if a serviceman basically kept
his mouth shut and did not engage in homosexual acts while he was in the military, he would not be discharged.

I was involved in some of the meetings where the administration was attempting to do away with the discrimination against gay personnel, and I know the leadership was very disappointed in this outcome.

MS. FEIGNIN: Were these meetings with DOJ personnel?

MR. KOPP: There were a number of meetings that took place between DOJ personnel and DOD and maybe there were others in attendance, but obviously if the Clinton administration couldn’t sell its proposal to the Defense Department, it wasn’t going to go anywhere. At this point, I don’t really remember how much the Defense Department bought into the Clinton proposal, but certainly there were lots of people in Congress who thought that the military was very uncomfortable.

MS. FEIGNIN: If I remember correctly, Colin Powell, who had been Chairman of the Joint Chiefs of Staff, was opposed to the plan.

MR. KOPP: Yes. This was something that was obviously quite controversial.

MS. FEIGNIN: His opinion would have a lot of sway with the military.

MR. KOPP: That’s right. So the best the administration could do was to get this compromise called “Don’t Ask, Don’t Tell.” It lasted for a period of about seventeen years until the repeal during the Obama administration. While it was in effect, a good number of servicemen were kicked out of the military because they were gay. A number of them went to the judicial system and when cases got to the Court of Appeals, we were there on the other side opposing them.

MS. FEIGNIN: Opposing the servicemen.
MR. KOPP: Opposing the servicemen. And somehow the plaintiffs on the other side in the
courts of appeal always seemed to be impressive people. I suspect that the
lawyers who were representing them had started to do what the government as a
matter of practice does in its litigation strategy. When you can choose to go to the
Court of Appeals, you pick your best cases. A lot of these plaintiffs were the type
of people that, as I say, were just extraordinarily impressive. There was a certain
sympathy factor that over the course of the years became, I think, something that
began to sink in not simply with judges who had to decide these cases but with a
broader audience as well.

As I said, since we represented the Department of Defense in this
litigation, when these cases got to the Court of Appeals, we were responsible for
defending the existing Don’t Ask, Don’t Tell policy. The core of our argument at
bottom was that the courts should not interfere with the policies that involve the
management of the military. There is Supreme Court case law saying that judges
should not run the Army, and we were successful, at least in terms of general
legal concepts, although not necessarily in terms of factual applications, in
sustaining the legality of the Don’t Ask, Don’t Tell Act.

MS. FEIGIN: Meaning they might reiterate the principal but say it wasn’t properly applied in
this case?

MR. KOPP: Exactly. The key case was in 1994 in the liberal Ninth Circuit where that’s
exactly what happened. The Court upheld, conceptually, the Don’t Ask, Don’t
Tell policy, at least in some contexts, but then remanded because in the particular

context, the plaintiff could be right, that the military couldn’t discharge him.54 And there were a lot of things like that that would happen in our litigation over the years. Basically in terms of justifying the concept of Don’t Ask, Don’t Tell, we were generally successful, but the courts had remands and there was never really a definitive resolution of the law. This was so particularly after the Supreme Court’s 2003 decision in Lawrence v. Texas,55 where the Supreme Court, overruling a prior decision in Bowers v. Hardwick,56 held that a Texas anti-sodomy statute was unconstitutional when applied to consenting adults. The case didn’t have anything to do with the military, but the ramifications of it were sufficiently unclear that it stimulated a new wave of appellate litigation involving gays in the military.

While Don’t Ask, Don’t Tell, to me personally, seemed to be quite a cruel policy in terms of the dilemma that it put gay servicemen in, I suspect – and this is just my own personal view – that in one sense, Don’t Ask, Don’t Tell actually led to a very significant advance in gay rights. As a result of Don’t Ask, Don’t Tell, gay people were now in fact being taken into the military. I would guess that more and more people in the military began to realize that they had some gay colleagues and that they were normal people and could accept them and that they cared enough about their colleagues not to turn them in if they violated the policy. I think at one point I saw some numbers on people who were actually removed from the military, and the number struck me as quite low compared to what one might think it would be. My guess is that many people in the military just looked

54 Meinhold v. United States Department of Defense, 34 F.3d 1469 (9th Cir. 1994).
the other way and did not turn in a colleague who they liked and thought was a good soldier just because they were gay. So when President Obama began to first soften the application of Don’t Ask, Don’t Tell and then seek its repeal, the amount of resistance from the military to that development was much different than it was during the Clinton administration when a lot of significant people in the military, as we just discussed, were strongly opposed to bringing gay people into the military.

In short, I think an increasing number of people in the military began to know people who were gay and seeing nothing wrong with them, and that evolution had its impact. So in that limited sense, I think one can say that maybe Don’t Ask, Don’t Tell actually was a significant advance with respect to gay rights.

In the Obama administration, the gay community began to see that they had their best chance ever at major changes, and they began heightening the pressure on the Obama administration to do something about it. The challenges to Don’t Ask, Don’t Tell began to ramp up. One would think that since the Obama administration was sympathetic to the gays that therefore people might hold back from suing, but in fact the way that politics and litigation works is that if you have an administration that might do what you want, you apply pressure to them to make sure you get it, and the gay community began to seriously ramp up their litigation efforts. There are some extraordinarily good lawyers who supported the cause and there were impressive legal organizations that represented the plaintiffs.
During the 17 years Don’t Ask, Don’t Tell was in effect, the government in cases that were handled by our office in the Court of Appeals did reasonably well in defending the litigation. We in essence mostly won, or at least avoided squarely losing, just about every decision of consequence. However, there never was a legal knockout punch that could settle the law at the Court of Appeals level, and Courts of Appeals that had their doubts about Don’t Ask, Don’t Tell were able to at least find sufficient flaws in the government’s position which would require remands. Meanwhile, the cases that the government had won could arguably be distinguished in one way or another.

After putting the issue on the back burner for a long time, the Obama administration became willing to support legislation to repeal Don’t Ask, Don’t Tell. Many Americans had changed their attitudes towards homosexuals since 1993, and this seemed to be particularly true with respect to servicemen. In December of 2010 there were enough votes in Congress to enact legislation that would provide for a process to repeal Don’t Ask, Don’t Tell. The Repeal Act provided that repeal would become effective after the Department of Defense had conducted an administrative review and made necessary certifications. That happened at the end of the summer of 2011.

But the end of Don’t Ask, Don’t Tell did not come without a bit of litigation dramatics in a case involving gay servicemen called Log Cabin Republicans v. United States.57 The government had lost the case in the District Court, and the District Court had entered a broad worldwide injunction against Don’t Ask, Don’t Tell. We had obtained a stay from the Ninth Circuit. Then, a

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few months before the Repeal Act process was completed, the Ninth Circuit lifted
the stay, with the result that Don’t Ask, Don’t Tell would have been immediately
enjoined. People in government were very upset that a court – not a law enacted
by Congress – would be the engine that repealed or prevented Don’t Ask, Don’t
Tell from being operative. So our attorneys had to scramble to obtain an
emergency stay from the Ninth Circuit to preserve the status quo until after the
Department of Defense made the certifications required under the repeal statute.
That happened about two months after we obtained the stay. Once that was done,
the Ninth Circuit, recognizing the importance of what had happened, held oral
argument, and one of our attorneys, Henry Whitaker, went out and presented
argument in the Ninth Circuit. The Court then entered an opinion and order
vacating the District Court’s judgment, and remanding the case with directions to
dismiss the complaint as moot. So our litigation over Don’t Ask, Don’t Tell did
come to an end as did Don’t Ask, Don’t Tell.

MS. FEIGIN: And then an even bigger issue came.

MR. KOPP: Yes. After Don’t Ask, Don’t Tell and its repeal made some of our litigation with
respect to gay rights go away, our office became heavily involved in litigation
which involved the defense of the constitutionality of the Defense of Marriage
Act, which barred federal recognition of gay marriages. Under the law, for
federal purposes, a marriage had to be with a member of the opposite sex.
DOMA, as the Defense of Marriage Act is commonly called, had been passed in
1996 with wide support from both Democrats and Republicans and had been
signed into law by President Clinton. At the time, it did not generate much controversy.

In 2010, there were two suits brought to district courts within the First Circuit in Boston. One was *Gill v. OPM*, and in that case, gay plaintiffs lawfully married under state law won a ruling from the District Court that the Defense of Marriage Act was unconstitutional. The second was brought by the Commonwealth of Massachusetts against the United States and two cabinet departments challenging the constitutionality of DOMA. The government lost both cases in the District Court. As is our standard practice, once the adverse decisions came down, we had to prepare memoranda for the Solicitor General and present a memo of recommendation to the Solicitor General after consultation with the affected government agencies. We in our office were a key part of the process of making recommendations to the Solicitor General as to what should happen and other DOJ components, like the Civil Rights Division, for instance, were also very interested in the outcome.

MS. FEIGIN: Were there any others besides those two?

MR. KOPP: Yes. The Office of Legal Policy, I forget what it was called at the time, but that office was involved. This produced more than the usual number of memos, more than the usual number of meetings, and more than the usual number of people (laughter) at meetings. We had a good number of internal Civil Division meetings as well, and our attorneys in Civil Appellate who were working on the case met quite a few times with our Assistant Attorney General, Tony West. That

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caused me to think through carefully what exactly is my role in these meetings. Here we are on one of the hottest button political issues in the country. If I look at the case through my personal political thinking, I would come out one way, but that’s totally irrelevant to me as a career civil servant. My job was to make sure that there was an objective legal presentation to Tony West, that we make a careful study of the legal pros and cons of each alternative and present them in a way so that he, not me, but he, Tony West, could ultimately make a decision for the Civil Division as to what our recommendation should be. That recommendation, of course, would then be considered by the Solicitor General as well as others at very high levels. But we knew the Civil Division recommendation would be an extraordinarily important recommendation.

The key issue was whether the standard of review by which to judge DOMA was whether it gets analyzed under a rational basis standard of constitutionality or whether it was judged under the stricter standard of heightened scrutiny. If the standard was heightened scrutiny, it was much more difficult to defend the standard than if the standard was rational basis. And so, as I said, we did lots of memos, lots of meetings.

There’s one meeting in particular that I remember very well. It occurred the week between Christmas and New Year’s, a week when lots of people in the government and the Department of Justice would be out on leave. I was on leave, Tony West was on leave. We both actually were in Europe at the time. Tony was in Italy, and I was in Amsterdam visiting my daughter who lived there and who had just had twin babies. The rest of our team, which consisted of Mike Singer,
August Flentje, and Benjamin Kingsley, were back in Washington. Tony said we had to have a telephone conference that week, and so we had a very long and very frank conference concerning the DOMA case. Tony drew out from each of us our own personal views as to whether we thought the proper test by which the statute should be judged was rational basis or the stricter heightened scrutiny. I’m not going to go into what we said, but I can’t resist mentioning a quote from Tony that appears in a book called *Forcing the Spring*, which was about the litigation. Tony is quoted in that book as saying, “I was never so proud of those line lawyers as I was that night.”

Shortly before our brief as appellant was due in mid-January – this was after we had all returned from vacation and we were all back in Washington – we received the word from higher up that we should file a draft brief which we had prepared which defended the constitutionality of DOMA. That brief argued that under First Circuit precedent, DOMA was subject to rational basis review and DOMA satisfies rational basis scrutiny. The brief was based on law within the First Circuit. The names on the brief included myself and the attorneys in our office working on the case. That is Michael Singer, August Flentje and Benjamin Kingsley. When we were told to file that brief, I assumed that the decision-making process was over. However, it turned out it wasn’t.

After we filed the brief, meetings still continued to be held on the case and it quickly became apparent that a definitive decision remained to be made. Further, there were recent filings of DOMA suits within the district courts in the Second Circuit, and the Second Circuit had no controlling case law on what

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would be the standard of review with respect to a statute like DOMA. So people began to take into account that we couldn’t just go out there in the First Circuit and gracefully develop the position that was founded on First Circuit law on the standard of review when in fact the issue was wide open in the Second Circuit. If we were going to rely on the rational basis for review standard in the First Circuit, we’d better be prepared to rely on it in the Second Circuit, and if we were not comfortable with it, we’d better have a position that applied in both Circuits. A case within the Second Circuit was the case of Windsor v. United States, and that was the case which eventually was to become the critical Supreme Court ruling concerning DOMA.61

So there we were. We had filed a brief in the First Circuit, but the decision-making process in the Department was continuing. Indeed, eventually the decision-making went to not simply the level of the Attorney General but to the President. The President determined that heightened scrutiny would be the appropriate standard of review for classifications based on sexual orientation and that under that standard, DOMA cannot be constitutionally applied to same-sex couples whose marriages were legally recognized under state law. The Department of Justice then tendered the defense of the constitutionality of DOMA to the Congress.

MS. FEIGIN: How did you learn that it was the President himself who made the decision?

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MR. KOPP: First of all, we were told that, and then it was written out. There was a statement from the Attorney General describing what the President decided and a letter to Congress. So this was clearly a personal decision of the President.

With the President having made the decision and with the Department of Justice deciding that it couldn’t defend the statute and the defense of the law would be tendered to Congress, we asked the First Circuit to postpone further briefing until the Congress weighed in, at which point we suggested there should be totally new briefs. The House of Representatives did decide to intervene to defend the constitutionality of the statute, and the court granted the parties an extension of time for re-briefing. We then filed what we called a superseding brief in September of 2011 where we argued that DOMA was unconstitutional. As a result of that filing, I had the rare honor (laughter) of putting my name on two briefs filed in the same case where the second brief took a position opposite the position we had supported in the first brief. No one can say that being a government lawyer is not interesting.

MS. FEIGIN: Did the other side quote your earlier brief back at you?

MR. KOPP: At this point I don’t remember, but I suspect there was a little bit of it, although the House attorneys were very professional attorneys. It was a very high-class legal show. After I retired, the new Executive Branch position that the Defense of Marriage Act was unconstitutional prevailed in the First Circuit. And then 5-4 in the Supreme Court in United States v. Windsor. Three years later, in 2015, the

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63 The two district court cases (Gill and Commonwealth of Massachusetts) were heard together and the lead name became Commonwealth of Mass. v. HHS, 662 F.3d 1 (1st Cir. 2012).
Supreme Court, 5-4, determined that there was a constitutional right to gay marriage, and that case, which I didn’t have anything to do with because I was retired, was *Obergefell v. Hodges*. So during the course of 2011, all sorts of things had happened that were certainly at the top level of what I would consider to be the highlights of my career.

During the course of 2011, I had decided that retirement was getting close, and at the end of the year I retired. I had become 70, I had been in the same office for 45 years, and I had been its Director for 30 years, and I could envision nothing that would be as remarkable an ending to my career as the experiences I have just gone through.

MS. FEIGIN: I think that’s right. It’s an extraordinary career, and I’m thrilled that you shared it with us. Before ending this session, I want to turn this from your career to your personal life to round out the picture of you. You mentioned that your daughter had twins, but we don’t know anything about your children. We know about your wife because you talked about her astonishing political career, but can you tell us a little bit about your children?

MR. KOPP: My daughter Emily is in the news business and works in public radio. As I mentioned during the course of our discussion, she has twin children, a boy and a girl, who keep her extraordinarily busy. My son Bob, a professor, is a scholar in the field of climate change, which is a very interesting place to be these days. So they are staying very active.

MS. FEIGIN: Speaking of staying active, I know you have hobbies that keep you busy. Tell us a little bit about what takes your attention these days.

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MR. KOPP: I’ve actually been very interested in this particular project that you’ve been involved in because I found it fascinating to sit back and try to figure out the significance of what I have done in the past 45 years of working for the government. How meaningful was it in terms of it being a job that not simply was enjoyable, but also a job that really meant something, had consequences in terms of the law and indeed how the government operates? Looking back on it and thinking about the things that we were involved in, it made me feel that I had made the right choice back in 1966 when I decided that I wanted to go into law practice with the government, and the Appellate Section of the Civil Division had decided it was willing to take me. I never could have possibly dreamed at the time I signed up that it would be the type of career that in fact occurred.

As for the future, I am by my prior standards taking life easy, although I find that somehow taking life easy doesn’t mean that you aren’t even busier than you were (laughter). I’m involved in things like gardening and photography, but as I say, I am operating at a different pace now, or at least in a different area, than I was when I was with the Department of Justice. Indeed, there are days when I wake up and I say how could I have ever done what I did (laughter) under the pressure and the importance of what we were involved in.

MS. FEIGIN: I think that a good way to end this final session would be to get your ideas on what you would tell a young lawyer today. Looking back, seeing how your career evolved, seeing how the law has changed so much, what advice would you pass on to a young law graduate today?
MR. KOPP: That’s a very difficult question, which could require a whole new set of chapters
given all the changes that are taking place in both the legal profession and in the
government. I think I was extraordinarily lucky in how my career worked out. I
wasn’t at the very top of the class, but I did well enough to be very competitive in
terms of jobs that I applied for. I wasn’t interested in trial litigation and so when
an offer from the Appellate Staff came to me, I leaped at the opportunity to be an
appellate lawyer, and the more I stayed in that office, the more convinced I was
that I was an appellate lawyer, that I wasn’t a trial lawyer, and through a long
career which was supported by a lot of good luck and breaks falling in the right
way, I was able to have a very successful and exciting career. How that relates to
advice to people just entering the legal profession today is a very difficult
question. To some extent, no matter how much you prepare in law school for
what’s down the road and what you intend to do as a lawyer, life isn’t going to
turn out the way you expect it to, and fate is going to intervene. In my case I
think basically what I feel was I positioned myself in such a way in terms of
career development and working within the structure of the Appellate Staff and
the Civil Division that I got a few lucky bounces and my legal career worked out
better than I ever anticipated that it could.

I think in today’s world it’s a lot harder to know what’s going to happen in
40 or 50 years. Technology is changing so radically. It has affected the legal
field, both in a positive sense and – for people looking for jobs – sometimes in a
very negative sense. Maybe we don’t need more lawyers in the modern world,
and I think for people who are considering the law today, I think if you really
want to be a lawyer, you have to have your heart set on not just one career path as a lawyer, but have in mind that during the course of your lifetime you may have to have the flexibility to adjust to a series of career paths and legal areas. Above all else, I would think that part of your ability to adapt and do well is to develop a strong understanding of the technology behind computers and research and have a level of command over the modern technology that lawyers of my generation, and certainly I, never had. Being technologically adept is a critical skill for anybody who wants to be in any job of consequence in the future, and for lawyers, I think mastering the technology is necessary for being able to be a force in whatever part of the law practice you operate. I think that’s really just a critical skill for anyone today because there’s so much uncertainty in the world, and the technology is everywhere, and you’re just going to have to have a much greater ability to adapt than my generation did, and certainly than I did.

So if I say one thing to future lawyers, I would say you’ve got to master the technology, and those that master it well are going to have a heads up in terms of chances to be a leader in the future.

MS. FEIGIN: Thank you so much for sharing your career with us and passing on your advice to future generations.

MR. KOPP: Thank you very much for conducting this interview. It’s really been my pleasure, and as I say, looking backwards at what I’ve done is something which I have very much enjoyed.
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Two v. U.S., 471 F.2d 287 (9th Cir. 1972), 112

United States v. Philip Morris USA, 566 F.3d 1095 (D.C. Cir. 2009), 227
United States v. Rogan, 517 F.3d 449 (7th Cir. 2008), 211
United States v. Snepp, 595 F.2d 926 (4th Cir. 1979), 157
United States v. The Progressive, 467 F. Supp. 990; 486 F. Supp. 5 (W.D. Wis. 1979); appeals dismissed, 610 F.2d 819 (7th Cir.), 159
United States v. United Continental Tuna, 425 U.S. 164 (1976), 151
United States v. Windsor, 570 U.S. ___, 133 S.Ct. 2675 (2013), 251

Windsor v. United States, 699 F.3d 169 (2d Cir. 2012), 250
Wisconsin v. City of New York, 517 U.S. 1 (1996), 212

Statutes

Affordable Care Act (Patient Protection and Affordable Care Act), (P.L. 111-148), 29, 235-239

Don’t Ask, Don’t Tell Act, 10 U.S.C. § 654 (2007), 240-44, 246

False Claims Act, 31 U.S.C. §§ 3729-3733, 210-211
Federal Records Act, 44 U.S.C. Ch. 31 § 3101 et seq., 214-15
Federal Tort Claims Act, 28 U.S.C. Ch. 171, 80, 85, 201, 202
Food and Drug Act, 34 Stat. 768, Ch. 3915, 225, 232

Hatch Act, 5 U.S.C. §7321 et seq., 105, 106

Presidential Records Act (PRA), 44 U.S.C. §§ 2201–2207, 214
Public Vessels Act, 46 U.S.C. Ch. 311 §§ 31101-3113, 151

Suits in Admiralty Act (SIAA), 46 U.S.C. 30901, et seq., 151

Tucker Act, Ch. 359, 24 Stat. 505, 28 U.S.C. § 1491, 204
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Director, Appellate Staff, Civil Division, U.S. Department of Justice (Senior Executive Service), 1981-2011; Retired December 31, 2011

Acting Director, Appellate Staff, 1980-1981
Deputy Director, Appellate Staff, 1975-1981
Appellate Litigation Counsel, Appellate Staff, 1978-1981
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Department of Justice John Marshall Award for Outstanding Appellate Advocacy 1976
Attorney General’s Award for Distinguished Service, 1990 (“in recognition of his outstanding career as a Federal litigator, his excellent leadership and managerial skills, and the significant impact he has made on the development of the law and the ability of each Administration to carry out its programs.”)
Distinguished Executive, Senior Executive Service, 1992, 2005
Beatrice Rosenberg Award, D.C. Bar, 2000
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Member, Advisory Committee on Rules and Procedures of the D.C. Circuit, 1980-1986
Member, D.C. Circuit Special Committee on Gender, 1992-1995
Solicitor General’s representative on the Advisory Committee on Federal Rules, 1990-1997
Adjunct Professor, Howard Law School, 1996-1999
Panel member and participant in various Judicial Conferences of the D.C. Circuit.
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Oberlin College, B.A. 1963, magna cum laude
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Legal Historian, Office of Special Investigations, Department of Justice
Sept. 1999 – May 2005

Deputy Chief, Department of Justice Campaign Finance Task Force

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Appellate Attorney (11 years); Trial Counsel (4 ½ years)

Appellate Attorney, Department of Justice, Civil Division
July 1971 – May 1978

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PUBLICATIONS


Comment, Right to Counsel: Alleged Incompetent Held Entitled to Counsel at Civil Commitment Hearing, 43 N.Y.U.L. REV. 1004 (1968)


Solicitor General Story is Far from Dry, San Diego Daily Transcript, Jan. 20, 1988 (book review)

A Mother’s Dilemma: What to Do About Possible Case of Political Discrimination, Los Angeles Times (San Diego County edition), Oct. 18, 1987

How Infrequent Injustice in Courts?, San Diego Daily Transcript, Mar. 10, 1987 (written under pseudonym)

Separation of Church and State at Issue in Child’s Refusal to Read Poem, L. A. Times (San Diego County edition), Dec. 29, 1985

Family Holiday Concert Was Child’s Secret Hour of Dread, Los Angeles Times (San Diego County edition), Nov. 28, 1985

A Prosecutor’s Awesome Power, San Diego Daily Transcript, Aug. 20, 1985 (written under pseudonym)

Complexities My Sabbatical Taught Me, San Diego Daily Transcript, May 21, 1985

Sting of Sexism is Soothed by Innocent Motives, Los Angeles Times (San Diego County edition), May 6, 1985

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