

July 28, 1992

This is the second oral history session with Circuit Judge Patricia M. Wald of the U.S. Court of Appeals for the District of Columbia Circuit. It is taking place on Tuesday, July 28, 1992, commencing 9:45 a.m. Present are Judge Wald and the interviewer Stephen J. Pollak. The interview is being conducted as part of the Oral History Project of the Historical Society of the District of Columbia Circuit.

Mr. Pollak: Good morning. Judge, we covered in March the period through law school and I would like to pick up this morning with your recollections of your move from law school into the world of lawyers and judges and clerking in the practice of law. What do you recall of those experiences and how you steered yourself and what opportunities you sought to pursue?

Judge Wald: Well, let me start with the clerkship when I got out of law school. In those days the process was not nearly as organized as it is now for students applying for clerkships. Frankly, I didn't even think about clerking until two of the law school professors approached me to ask if I was interested in a clerkship with Judge Jerome Frank on the Second Circuit. One was Boris Bittker and the other was Fred Rodell, whose writing class I had been in. Both of them were good friends of Jerry Frank. Of course, I was enthralled with the prospect and as a result of their intervention I talked to Frank, very informally in the hallway of the law school. It was not a formal interview and lo and behold he offered me the clerkship. Now it was pretty unusual in those days for a woman to be offered a clerkship; not totally unheard of, but pretty darn unusual. As a matter of fact, Jerry Frank was way ahead of his time in that respect because he already had had a woman clerk, a woman called Kim Ebb, a few years prior to the time that I

was his clerk. Subsequently through the '50s, until he died, he had other women clerks from Yale. That was, needless to say, very unusual. There were no other women clerks on the Second Circuit when I clerked there. This all happened in the spring of my third year of law school and I was going around with my future husband, Bob, who also was recommended for the same Frank clerkship by Fred Rodell. I guess he liked us both.

Jerry Frank seemed to be a bit taken with the fact that we were going around together. At one point, he wanted to see if we could both be law clerks, one of us in place of the courtroom deputy, but it couldn't be worked out with the Administrative Office, so he made a strong recommendation on Bob to Irving Kaufman who was then a new district judge. In the end, Bob ended up clerking for Judge Kaufman downstairs in the district court during the year that I was clerking upstairs, except he got called back into the Navy during the Korean war in the middle of the clerkship year.

Nowadays, there might be ethical questions raised about a court of appeals clerk sitting on decisions of a district judge when her fiancé was working for that judge, but people didn't even think about those things then. And, anyway, it made for – at least the first half of the year – a very pleasant year. The two judges liked each other; they both knew about the romance; we were living and working in Manhattan and until Bob got called back in the Korean war – I remember it as one of the most pleasant periods of my life.

Now, working for Jerry Frank was very exciting and a little erratic. Frank was a very prolific, talented writer on his own. He used law clerks a bit differently from the way I and a lot of my colleagues use them. If he was very interested in a case, then he would just sit down and scribble out the whole opinion including footnotes about the language of the Hopi Indians and all

sorts of esoterica, and he would give the draft to you and say, "look at this and tell me if you think anything ought to be done with it." If he wasn't that interested in an opinion then he would pretty much put his stamp of approval (obviously, we would have talked about the result) on what the law clerk wrote. So, despite all this talk we have now about how things have changed so dramatically and law clerks are now writing drafts and they never did in the old days, in my own case, and by word of mouth from some of my fellow clerks about other judges in the Second Circuit – back in those days judges – even though they only had one law clerk – relied a great deal upon that law clerk, especially in the routine cases that they did not think required their imprimatur on every sentence.

Looking back, we worked on 58 opinions during my clerkship. That number is interesting in comparison with now. In an average year, in the 13 years I've worked on the court, I work on about 40 published opinions a year. But those were much less complicated cases back then than we have down here in the administrative law cases. The opinion style now is also very different from Frank's style. Many of his opinions then were only three or four pages and some only one or two pages and many don't even have a statement of facts in them. Of course, by the time I clerked, he had been on the court several years, and had his own style. His opinions just went, "one-two-three-four." They read like what we would now call a memorandum opinion, an unpublished memorandum opinion, of which we turn out hundreds every year. They were really very brief, almost staccato; you would have to go back to the record in the case to figure out what the facts in the case were. Still, I'm not sure they weren't sufficient unto the purpose in most cases, and, remember, everything was published then.

Now, out of those 58 opinions, there were several that made their way up to the Supreme

Court, and had jurisprudential consequences. There was one about constitutionally required notice that was called *In re New York, New Haven & Hartford Railroad*, and provided an interesting illustration of relationships between judges and law clerks. The railroad board was defending a judgment it got by default against a railroad that was never served with individual notice of the proceeding. The board said, "Well, we published a notice in the paper and that was good enough." I mean, surely officials of the New York, New Haven & Hartford Railroad read the paper, and I, as a young law clerk thought that made sense. They could be expected to know if some proceeding that involved them was going on if notice was published in the paper where all such proceedings were published. But Judge Frank was a great one for notice and due process, and he said, "no, no, that's not good enough." So, of course, we wrote a dissenting opinion his way and it went up to the Supreme Court, and in fact, his view was adopted.

One of the other cases had a different history; it was called *On Lee v. The United States*. In *On Lee*, the government had wired up an informer and sent him into the business place of On Lee, who (not knowing the visitor was an informer, of course) made some disclosures which were recorded. The question, unsettled at the time, was whether or not that recording device fell under the kind of search and seizure ban that applied to wiretaps. The majority of the court said, "no, it didn't." Frank dissented. We worked long and hard on that dissent. It, too, went up to the Supreme Court, but, in this case, Frank was not vindicated. But it was one of those cases that did mark a certain bend in the road for the law as to how far you were going to go in Fourth Amendment protections. The prevailing case at that time said that if the government put a spike in your wall to which a microphone was attached, and it penetrated your wall even a tiny bit, it would come under the wiretap ban. After *On Lee*, if the government wired up somebody who

walked into your store or your house and then recorded conversations, it didn't violate the Amendment. That's still the law.

Mr. Pollak: – Because you invited the man into your store – ?

Judge Wald: Yes, because you let him in –

One of the other cases that we had that was quite interesting was *Field v. United States*. This was the very first case that I ever worked on with Frank. It involved the prosecutions of the communist leaders. Some of them had jumped bail and the question was whether those that put up bail for them could be called in, subpoenaed, and questioned about the whereabouts of the leaders who had absconded without being allowed to raise the privilege against self-incrimination. Had they waived the privilege by putting up bond and making an implicit assertion to the court that they would stand behind these people? Judge Frank, as I said, had a habit of scribbling things out on yellow pages. Then he would hand it to you and say, "now, tell me what you think of this," and the first time he did that in the *Field* case I read it over and I worried about it. I worried about whether or not you really did waive the privilege against self-incrimination by the mere fact of being a bailor, and we talked a lot about it, and he eventually changed his position. He wrote a dissent saying that they hadn't waived their privilege. He had originally been supposed to write the majority opinion but his switch turned it around to a dissent. Now, nothing happened immediately. I believe the Supreme Court denied *cert.* but several years later, the Supreme Court, in a completely different case, came around to his position. So, sometimes you have to wait a while.

Probably, the most well-known case that came up my clerkship year, and the most troublesome case for him, for me, for everybody, was the first appeal in the *Rosenberg* case.

There were many more proceedings which would come later on but this was the first direct appeal from the conviction itself. My husband-to-be, by the way, had not been working for Irving Kaufman at the time of the *Rosenberg* trial; the trial occurred the year before his clerkship.

Mr. Pollak: To clarify, he wasn't your husband at the time?

Judge Wald: No. Frank didn't want to write the *Rosenberg* opinion. He came back from the conference and said, "I knew I would have to write it"; I think Judge Swan was the presiding judge. He said, "I knew I was going to get it and I don't want it," and he did say to me he thought that the fact that he was Jewish had been an element in assigning him the opinion. He was Jewish – Irving Kaufman was too – and the Rosenbergs were Jewish. So, he worked hard on the opinion; I worked hard on the opinion. It was probably the longest opinion that we wrote that year. We didn't have any major disagreements on the substance of the opinion, but we went methodically through all the arguments for and against the conviction itself and he never expressed to me any serious doubts about upholding it. He was, however, very upset by the death sentence that the Rosenbergs had received. He did not think the death sentence should have been given in this case. As a result, in the opinion he wrote a long statement about why the Supreme Court should take an appeal from the sentence even though it was jurisprudentially settled at that time that you couldn't appeal from a sentence unless the sentence was illegal. He wrote anyway on why the High Court should look at the death sentence on the merits, why it was important enough for them to take an appeal, and I think he really had some hopes that perhaps they would. They didn't, of course, and the case went through many *habeas corpuses* after I left, before the Rosenbergs were finally executed.

Frank also dissented on the conviction of the other defendant. He said Sobel, who was a

co-conspirator of the Rosenbergs, should have been severed and given a separate trial and that he was prejudiced by being tried along with the Rosenbergs. At any rate, the whole case caused him a lot of concern – there were demonstrations in New York, not against him particularly, but the whole thing, I think, bothered him, especially the point of their being Jewish which was made much of at the time. His wife, Florence, was upset about the case and she was worried about personal threats to him. I don't know that there ever were any specific threats but they did get hang-up phone calls which upset her.

There was one follow-up to the case I found interesting, though disturbing at the time. Frank's papers were eventually sent to the law school library at Yale and a biography based on them was written by Professor Glennon, who was then at Wayne Law School. I talked to Glennon a bit while he was writing it but not about the Rosenberg trial particularly. He was nice enough to send me a copy of the galleys and as I looked through the Rosenberg chapter just out of interest I found an amazing statement to the effect that Frank's law clerk had sent him a memorandum saying the Rosenbergs' conviction should be reversed because of evidentiary problems. I knew that was not true and I was the only law clerk at the time. So I called Glennon up and he was gracious enough to send me a copy of the memorandum which I immediately recognized as not being my own – it wasn't my writing style at all. He took my word and took the attribution out of the book in its final form. We then debated among ourselves – it was almost thirty years after Frank's death – as to where the memorandum might have come from. Our best guess was that in those days the strictures were just not that rigid in terms of a judge not speaking to any confidante about a proposed opinion and that Frank either talked to a fellow faculty member or maybe to an old clerk, because he wanted a second opinion about so important

a case. As it happened, the "second opinion" raised serious questions about the evidentiary underpinnings of the case. I didn't agree with the ultimate conclusion of the memorandum and in the final analysis Frank didn't either. We never knew for sure who its author had been; it was an unsigned, undated memorandum.

Now, as to what kind of man he was, he was full of energy way into his sixties, when I knew him. He ultimately died, about six or seven years after I clerked for him, of leukemia, which he kept a secret from everybody up until just before he died. In those days, of course, treatment was much more elementary and consisted of blood transfusions. He apparently went to the hospital secretly to get the blood transfusions. One of his former clerks on the faculty, Dick Donnelly, was the only one who knew about the leukemia until very, very close to the end. But, when I knew him he was full of vitality. There was a tinge of sadness sometimes. I felt at times that he really longed for a more vital daily life than judging. I could be wrong. I never had this conversation with him. He had just moved to New Haven. We used to ride down together on the New York train to Foley Square for the week of sittings every month. I usually stayed with an old law school roommate and several other women who had an apartment during the week I was in New York and they always had lots of things going on, so if I wasn't working at night at Foley Square I would go back to the apartment and there would always be some kind of social gathering. I still remember at the end of one day he said, "well what are you doing tonight," and I said, "well, we're actually having a small informal dinner party with young people." And so, as a last minute thought, I added, "would you like to come? We would love to have you," and he said, "yes, I would." He grabbed up his brief case, and came back to the apartment with us. There must have been about ten of us. Needless to say, the young lawyers among them were

thrilled. I remember we were sitting down on the floor – it was your typical New York career girl-type apartment – and he just got down on the floor too and he regaled everybody with stories. Next day he told me he had a wonderful time.

Frank had one daughter, Barbara, who was quite talented, but she had a basic chronic endocrine disorder of some kind. She and he wrote a book together toward the end of his life about innocent people who were wrongfully punished for crimes they didn't commit. I had the feeling he was the sort of man who would have liked to be surrounded by 15 grandchildren and lots of things going on, and that there was a little sense of loneliness about him. He did, however, have a wide circle of friends and he kept up this enormous correspondence with legal philosophers like Edmund Cahn, I think Robert Hutchins, too. Now that I am of a comparable age with him, and in a comparable position, I wonder at his energy because I don't take quite the delight he did in just having all these correspondences going back and forth with all of these thinkers.

Mr. Pollak: He also taught at Yale?

Judge Wald: Yes. He taught a course on fact-finding.

Mr. Pollak: He also taught ethics, I think, or equity . . . ?

Judge Wald: It was fact-finding in my law school time which was a Friday night seminar; it consisted really of getting to know Jerome Frank. It was all about interesting anecdotes and experiences he had had, but well worth taking for the glimpse it gave you into a worldly fertile mind. Later on while I was clerking he was very friendly with J.W. Moore. He had an office in New Haven in the law school where we worked most of the time except for the time we were actually sitting in New York. Moore convinced him to teach a course in federal

procedure. Maybe by your time it had turned into Equity, but in my time, I had to prepare all the course materials. I remember I hated that chore. I just hated it.

Frank liked being around the law school. He liked all the people and all the intellectual ferment and activity. He was very fond on his own court of the two Hands, Learned and Augustus. He loved Learned Hand; perhaps two people could not have been more different in background and in personality, but they liked each other and spent time with each other. Somebody once said to Learned Hand, "Now, how can you sign on to all those opinions of Jerry Frank's – they are full of irrelevancies, full of non-legal references, speculations," and Hand replied, "I just look at the bottom line and if it's okay, I don't care about any of the rest."

He also got along very well with Swan. He and Charlie Clark had a very distant, stiff, I guess almost antagonistic relationship. I got only a snapshot view of it during the one year. Charles Clark was always extremely nice to me, though I didn't get to know him well. In the book *Learned Hand's Second Circuit*, the author points out that despite the fact that Clark and Frank might have been expected, both being Roosevelt New Deal appointees, to become allies on the court, they never did. The same book quotes other judges having to intervene in their disputes to the effect of, Will you two stop feuding so that we can get this opinion over and done. They just rubbed each other the wrong way.

The other clerks that year were also from my class at Yale – Bill Rogers, now at Arnold & Porter, was clerking for Charlie Clark and Ed Snyder, a wonderful person who later devoted his entire life to the American Friends Service Committee, was Tom Swan's clerk. The clerks used to act as go-betweens all the time because the amount of direct communication between the two judges – Frank and Clark – was minimal. And, actually, they weren't that far apart on most

substantive issues, with the exception of summary judgment. Jerry Frank was very reluctant to bring anything to summary judgment if there was any possibility that there could be any dispute on the facts, whereas Charles Clark, who was very instrumental in putting the federal rules into their initial shape, thought it should be used more often. That's not the kind of thing that would divide people who liked each other but it was almost as if they were programmed to oppose each other. It was too bad.

One last thing that I remember about that year is the different way in which we handled arguments and briefs: we had a week's sitting in New York once a month. We never got the briefs ahead of time. When I would ride down on a Monday morning on the train with Jerry Frank, the two of us would go to Foley Square. He'd have arguments that day, say, from 10:00 on. The packets of briefs would be in the New York office and they would be delivered on the bench to the judges. The judges would not have read the briefs before the oral argument. I can't conceive of working that way because now we get our briefs a month ahead of time. We spend our entire time for weeks reading the briefs in order to cull out of them what we want to hone in on at oral argument. But these eminent judges would just go in cold and listen to the oral argument and then afterwards they would read the briefs. The two parts of the pre-decisional process – briefs and argument – didn't work in tandem at all.

Another thing that is quite different from our practice now is that the clerks were not encouraged to and rarely did go to oral arguments. I think that the year that I was down in New York I probably went to only a couple of oral arguments. If you heard by grapevine of someone who was a terrific arguer, you might go listen. But you did not go automatically as part of your preparation process. Now, in every case you have a clerk in the courtroom taking notes on the

oral argument even though it is being transcribed. You talk with the clerks later about their reactions as well as your own to the oral argument. Not so then. I would be back in the chambers reading the briefs at the same time that Judge Frank was listening to the argument. Then, at the end of the week, the judges would have a conference. But, prior to the conference, they would circulate memoranda which the clerks would help to prepare. So I would prepare a draft memorandum on the basis of the briefs and ask if anything had come up in the oral argument that I should know about, and he would take the memo and maybe add to or change it. Then they would meet on that Thursday afternoon or Friday and the cases would be assigned for opinion writing. At any rate, it was quite a different process then from now.

Mr. Pollak: So, when they took their preliminary vote at the conference, would they have read the briefs?

Judge Wald: Presumably, because that would be at the end of the sitting on a Friday, so in between the oral arguments every day, they were supposed to read the briefs, but I can't guarantee that every judge read every brief, certainly not before argument. In retrospect, it seems like a strange system. But who's to say whether the 58 opinions rendered that year were any less correct or learned than the ones we turn out now.

I would say, except for the few cases I mentioned, most of the docket was fairly simple. When I look back at the administrative cases then, they would tend to be single-issue cases involving the NLRB or the ICC. We were not yet in the age of the administrative agency. You didn't have super-complex cases like we do now, where it takes 25 pages just to lay out the prior proceedings and the facts. You didn't have national regulation to anywhere near the extent you do now. So it was a different ball game.

Mr. Pollak: Did the court sit in two panels?

Judge Wald: No, I don't think so.

Mr. Pollak: Just a couple extra judges and they would filter in and out?

Judge Wald: Yes. That's my memory.

Mr. Pollak: You think you had any en bancs?

Judge Wald: We had no en bancs my year. We had a few petitions for en banc but they were denied. I remember we struggled over one or two but it's nothing like now. I mean, now, in every case of any serious proportions you get an en banc petition and I would say that during the course of a year we get at least 100, maybe more. But, of course, the history of the Second Circuit has always been one of extremely sparse granting of en bancs. Many of us on the D.C. Circuit marvel at the restraint of the Second Circuit judges as compared to our own en banc record, which is 6-10 a year. The tradition, the culture, there was not to have en bancs.

Mr. Pollak: Two questions. One, any comment you may have on the civility of the bar, and two, the caliber of the papers that you saw that year, and the role the lawyers played?

Judge Wald: As I say, I didn't see that many oral arguments. I went to see the *Rosenberg* argument and I went to see one or two others when Frank would say, "This is a really good lawyer. You ought to come see him." The papers I don't remember much about except they were vastly fewer than we have now. They were much shorter too. I think the whole process was simpler, except if you got into some particular issue that Frank really cared about, he would research and write with a passion sometimes interminably. For instance, he was one of the very early people who worried about pro se litigants, giving people access to the courts. There was no appointed counsel system then, even in criminal cases. He thought we ought to pay

much more attention to pro se-ers to make sure there wasn't some real issue among their papers and appoint counsel for them when we thought there was a real issue at stake. So he was especially careful to give pro se cases a hard look. In many cases of the garden variety, however, his attitude was, Let's just go straight to the guts of this. If you look at his opinions you see something you never see now in an opinion, at least in our circuit. He starts right in, he doesn't say, "This is an appeal about X, Y, Z and the following issues are raised and we come to the following conclusion," the usual interlocutory format followed by ten pages repeating the arguments of both sides – "The appellants said that they did not receive enough evidence in the course of this proceeding. We do not think this is right under the doctrine of blah, blah." His opinions read more like our unpublished memoranda, one, two, three, over and out. There was not a lot of posturing or attempts to show how learned he was in the ordinary opinion.

Now, today, we have this dichotomy of published and unpublished opinions which we didn't have then. For the roughly 50 percent of our opinions that are published, judges tend to treat them, perhaps too much so, as a kind of academic exercise. We must show that we understand all facets of the problem and everything must be complete and documented to the teeth. It takes an enormous amount of time.

Well, those are my memories of the year. I ended up liking Frank very much as a person. He had his erratic qualities. I mean, he would come in to you, throw something at you and say, "now work with this," and then you would work with that very diligently and the next day he would have had a brainstorm overnight and you would sort of have to start all over again. But I've met a lot of people like that over my lifetime, and withal he was a very decent, kindly man. He treated me very well, indeed. He was also very nice to Bob. I never saw him go off in a wild

explosion of anger or do a casually cruel thing. He might get irritated but he never did a basically uncivil or personally unpleasant thing to me or anyone else around him. As I said, I always felt there was a little tinge of sadness about him, but he was a man of extraordinary vitality and talent. And, as I say, there were not many women clerks at that time, and I felt extremely privileged to be his.

Do you think we skipped anything or not?

Mr. Pollak: No, I think we can move on. Did you consider clerking on the Supreme Court?

Judge Wald: Nobody ever suggested it to me, and I never formally applied to anyone. To my knowledge, these opportunities were almost exclusively feeder-type operations between Justices and judges or professors they knew. In our year Bill Rogers did go on to clerk for Justice Reed. At that point, to my knowledge, only one woman had ever clerked on the Supreme Court and that was Tommy Corcoran's daughter who clerked for Justice Black.

Frankly, I didn't think about it very much. By the end of the clerkship with Frank, Bob was in the Navy. We got married that June and drove to the Pennsylvania Naval Yard where his ship took off on an operation and I came back to Washington to work and await his return. There was lots going on.

Mr. Pollak: So, you took a job with Arnold, Fortas & Porter?

Judge Wald: Yes. A little bit of background on that. When Bob went in the Navy and we realized we were going to get married, Washington seemed the nearest place that I could find legal work that was within commuting distance to Norfolk, Virginia, where his ship was coming in and out. No one thought of Norfolk as a place where a woman lawyer could get a

job at that time. When I decided to work in Washington, I said to the judge, "I've got to go look for a job and would you write me some references." He said, "Of course." He knew people down here. He knew Frank Shea, of Shea & Gardner, and wrote me a reference to him. He knew both Abe Fortas and Thurman Arnold. I was expecting him to write the kind of reference that we all write, that gives some background on the person and says the usual nice things. I think he may have told me, "Put something down on paper and give it to me." I think I did try to put down something but ended up telling him even a sentence he wrote would be worth much more. Then, he went and grabbed a piece of stationery (I remember it very well) and wrote, "Dear Abe: this is the best law clerk I ever had. Jerry." That was it. It was extremely flattering, if somewhat unique as references go. I hope none of his other terrific law clerks ever saw it but it was the way he did things. Obviously, it opened doors down here. I interviewed with not just those two firms (Shea & Gardner and Arnold, Fortas & Porter) but several other firms, too. I had an offer from the government to work in the Paris AID office, but I didn't want to go to Paris while Bob was on a ship out of Norfolk, so I was happy when the offer came from Arnold, Fortas & Porter. I'm sure I got the offer on the basis of Frank's recommendation.

Mr. Pollak: How big was the firm?

Judge Wald: During the year I was there the firm had 12 or 13 people. Three associates; the other 10 were partners. This was about five years after the firm got started. Among the partners were Arnold, Fortas, Porter, Bill McGovern, Milt Freeman, Norman Diamond. There were three associates: Bud Vieth, who had been there a year or two ahead of me, George Bunn, who later went on to teach and worked on the Disarmament Commission, and me. It was very formidable to be an associate in a firm with all of these legal lions.

I was terrified of Abe Fortas. He couldn't have been more courtly but I was absolutely terrified of him. I remember he once gave me an assignment, not a huge one, to go out and research, something to do with what happened if the juror did x and y in a case. I really killed myself. I stayed up all night doing the memorandum and then I was afraid to give it to him. He had forgotten he ever gave me the assignment and so I waited about three days. He never asked me for it and I was just scared to give it to him. I thought it might go away. Eventually I turned it in and it turned out not to be terribly important in the case. He never even commented on it. By the time I gave it to him, the need for it had gone away.

I remember I once used the word "damn" in front of him, something that was really innocuous by modern standards, but he said he never wanted me to use language like that and I felt very chagrined. Actually, he was quite protective and considerate toward me at all times, and he and Carol had me over to their house, but I was still scared of him.

Now, on the other hand, Thurman Arnold was sort of like a big lovable teddy bear. I worked a fair amount with Arnold on the *Owen Lattimore* case. As I say, I went into the firm in July and I left the firm in March or April when I was within a month or so of giving birth to my first child.

Mr. Pollak: In what year?

Judge Wald: I went in in 1952 and came out in '53 so I was not there long, although I will say the period left a very strong impression on me: Washington as it was in the early '50s, moving into a law firm with such strong personalities and being the only woman; being pregnant almost from the time I got there. I came to the firm in July, I got pregnant in September and was away from my husband most of the time until my daughter was born. When

the ship came in to Norfolk I would go down and spend the weekend but for a while I lived with a couple of young women I had known from college in a house on Woodley Place. It was a very hectic period. Bob's younger sister was in Washington and I lived with her some of the time. In that one period from July until I left Washington the following April, I lived in about six places because I couldn't honestly sign a year's lease, knowing I would be leaving soon. A couple of times between rentals I lived with guys I knew from law school for a week at a time. At one point I remember Abe Krash, Jim Heller, and some other now-eminent senior-partner types, had a house on Harvard Street, which is now not the most terrific part of town but was then sort of a young career-type place. They took us in. Bob's sister and I lived in one of the bedrooms in that house for a week or two until we could find another rental.

It was a gypsy-like existence for someone 6-8 months pregnant. Fortunately, I had a fairly uneventful pregnancy except for the first month or two when I had the usual morning sickness. I hadn't told anybody about my pregnancy; I was in a car pool and I still remember stopping to pick somebody up and leaning out of the car and throwing up in the gutter. I was also extremely sleepy a lot of the time, as often happens. I was working on a complicated regulatory memorandum for Norman Diamond at the firm and I would excuse myself from the firm's library, go across the street to the Homeowners Loan and Bank Board Library and I would just put my head down on the table and go to sleep. In retrospect, I mean, no husband, very pregnant, nausea and sleepiness, only woman associate in the firm – by modern standards I guess I should have been more stressed out than I was. But there was no alternative -- you just kept going. People in the firm by and large were very nice to me. If there were any signs of gender discrimination, I was either too busy or too dumb to see it. I worked quite closely with Thurman

Arnold and Joe O'Mahoney, the former Senator from Wyoming, who was brought in as counsel on the *Lattimore* case. In that seven or eight months, despite everything else, I worked on some good stuff. I worked on both the motion to dismiss and what we then called the bill of particulars, a motion to make more specific the allegations in the indictment. Ultimately the indictment was dismissed by a courageous district judge, Luther Youngdahl.

Abe Krash and Bill Rogers came in just as I was leaving. It was unclear whether Bill Rogers or Abe Krash took my place, so we used to say it took two men to replace me. Abe picked up my place on the *Lattimore* case, on which I had done a great deal of groundwork as the only associate working on the case.

I also worked on a libel case in which Abe Fortas and Bud Vieth were defending Neiman Marcus from two columnists who wrote a column in the '50s called "Inside America" that were always getting them into legal trouble.

Mr. Pollak: It wasn't Drew Pearson?

Judge Wald: I don't remember. Anyway, in this case they said that all of the models at Neiman Marcus were call girls, high-class call girls and so a libel action was brought by Nieman. There were all sorts of interesting legal questions involved – if you said all or almost all call girls but didn't name specific names, for instance, was it libel? I also did some background on several McCarthy-era cases. Interestingly enough, Dorothy Bailey, whose case went up to the Supreme Court on the validity of the loyalty program inside the government –

Mr. Pollak: The loyalty oath?

Judge Wald: The loyalty program. She had been the plaintiff. Of course, the firm represented her, but had ultimately lost the case in the Supreme Court. She was a very fine lady

so they hired her as the administrator in the firm. She was in the firm the whole time I was there. I later met her in 1974 in Kenya, Africa. She had married a man who did overseas educational work for the Ford Foundation. She had just lost her husband to a heart attack in Kenya after they worked there for many years. It was very interesting after 20 years to hear her impressions of the McCarthy period in Washington.

Several loyalty cases were going through the firm at the time because, of course, Arnold, Fortas & Porter had gotten a reputation for defending people against those accusations. It was a strange time. Although I didn't work for the government, I did have some classmates who came down here from Yale Law School to work for the government, usually the NLRB, which was one of the prime employers of women lawyers at the time. In one case, a classmate's loyalty was questioned based solely on ACLU work in the chapter that was started while I was in law school by Tom Emerson. That person ended up resigning rather than go through the hearing. I remember being with the person at the time and seeing the agony of that young person's situation. I mean the charge was completely without justification. It was one reason why I never really thought of the government as a viable alternative for me at that time. I was pretty turned off.

The final comment on Arnold, Fortas & Porter is I thought they were all extremely gracious while I was there. By March or April I felt more comfortable around the big-name partners. I was pretty well accepted. They gave me a bonus at Christmas time and indicated that they were pleased with me. Of course, in early January I had to tell them (it would soon be apparent) that I was pregnant and I was going to go down and have the baby on the naval base. By that time Bob had been reassigned to a judge advocate's position on the base. They were very good about that and they said I surely could come back. I was welcome to come back after the

baby was born.

Of course, I didn't. My first daughter was born in May 1953 and we stayed down there in Norfolk until the end of that year. Then, Bob's term was up in the Navy so we debated about where to go. He came from the Boston area and had taken the Massachusetts bar. On the other hand, I had made all these friends in Washington. I think the feel of law practice in Washington was more attractive.

I didn't think too much at the time about going back to work. Once I had the baby I knew that I didn't want to leave her. I remember coming back on a visit to Washington after a few months and seeing people at the firm. Abe Fortas was pretty smart. He said after I got about four sentences out that "You don't want to come back, do you," and I said, "No, I don't." He said he understood. It must have been plain to everyone. I didn't want to go back, just then.

Mr. Pollak: I have a question about the role you would attribute to your first practice experience in your early career. Did the people you worked with, the type of problems you dealt with, did the excellence or lack thereof of the products that you saw – did they provide models for you later on?

Judge Wald: Models, I don't know. Here's the impression they left me with: that the practice of law could be exciting; that it could be fun. It was not boring. They left me with a desire, I suppose, to be around exciting, productive, charismatic people such as Arnold and Fortas and some of the other people who were there.

Mr. Pollak: How did they compare with Jerry Frank?

Judge Wald: A lot alike in some ways but very different in others. Abe Fortas was a meticulous craftsman; Jerry Frank was the brilliant thinker of this thought and that thought,

and out of 25 of those thoughts, maybe four were brilliant and the other 21 should quickly be disregarded. But the four brilliant thoughts were more than a lot of people have in their lifetimes. Fortas, who was a good friend of Frank's, was much more organized and logical in his thinking. Arnold was a bit more like Frank, an intuitive person. But all of them were people that you remember; they were not dull, pedantic, or banal. You knew that wherever they were, there was going to be excitement and that they were basically strong, bright people. They were not poseurs. There was something behind them. Exposure to them left me with the notion I wanted to be around people that were making things happen. That's the kind of law to be involved in. I didn't want to be in a back room some place doing pure legal research. In one sense, it gave me a unique eye into Washington practice because nothing I worked on was ordinary, like writing a legal contract or a sale of a piece of property. It was either a prosecution of national importance like the *Lattimore* case or a novel question of libel law arising out of a syndicated column. It had some kind of policy dimensions to it.

One interesting thing on the *Lattimore* case: it turns out there was a young person in the Department of Justice whose name appeared on some of the pleadings, my counterpart as it were, named Robert Kennedy. I did not, however, meet him at the time.

Mr. Pollak: So you left the practice and went home to Norfolk for a period with a first child . . .

Judge Wald: We had a weatherized cottage down in Virginia Beach. Sarah was born in May. It was very nice. I mean we were on the seashore. I was a full-time wife and mother. By the time Bob got out of the Navy and we moved back to Washington, I was already pregnant with our second child. So that's another reason why I didn't think about looking for a

job again. Actually, when he got out of the Navy, we had a period until he found a job (he couldn't do much job-looking while he was down there) when we lived in this perfectly awful, horrid, rented place in a housing project out in Alexandria; we had no furniture of our own, and this awful place had paper curtains like a bordello. When I took Sarah out in the stroller there was a slag heap down at the end of the street. Anyway, it was kind of depressing, not the best period in our lives. Bob was looking for a job; we were living in this perfectly awful place; we had no money except his pay from the Navy and I was pregnant again. Nonetheless, after a few months, he ended up at the Federal Trade Commission, and we moved to a better apartment.

So to put a lot into a little period of time, Doug was born the next year. Then a couple years later we moved to a house in Hollin Hills. Our third child was born in 1956, Johanna. The fourth child, third daughter Freddi, was born in 1958 and our last child, Tommy, was born in 1960. During that period I was very busy and we lived in Hollin Hills for a few years and then we moved into a bigger house out in Chevy Chase. So, between 1953 and 1960, we had five kids. That kept me very busy. I really didn't think much about going back to work. That pattern was not atypical for my generation even for career-minded women.

As I said earlier, there were several other women in my class at law school. I stayed friendly with many of them; Jody Bernstein, who married the same year I did, and had three kids, was my closest friend. She had been on the law journal with me; she, too, was out of the workforce for roughly the same period I was. There were others who did the same thing. So, I didn't feel any terrible sense of isolation or loss. I always assumed that I was going back, someday. I didn't know how, I didn't know when, I didn't know where. I just assumed I would go back. I didn't feel under terrible pressure to do it this year, that year, or even next year. I

think, perhaps, I was helped a lot by the fact Bob was a lawyer and we moved in legal circles. Our social circle consisted of many friends from our law school class – Dan Freed and his wife; the Aggers; all sorts of people. So in socializing I heard a lot about the law. There would be legal talk at dinner parties we went to. We would go to a lot of those Yale alumni meetings that were held at people's houses. I remember Felix Frankfurter speaking at one of them. So, I didn't feel totally cut off from the law during those 10 years. I didn't read *Law Week* or cases, but I felt I still had contact with the profession.

In 1959, Doug, our oldest son, had a very bad medical experience in which he almost died and Bob and I lived at Children's Hospital for a month, I mean 24 hours a day. We spelled each other to sleep. Part of the time we had somebody home with the other kids. Finally, we gave up and sent two of the kids to his mother for a couple of weeks and my mother took the youngest child, because Doug had four episodes in which he nearly hemorrhaged to death from a staph infection he had gotten from an ordinary tonsillectomy. He ended up with a tracheotomy, transfusions, and ambulance rides in the middle of the night, all at the age of four before he could read or write. So, that was enough to keep me pretty focused on the essentials of life, the kids staying well. For a period of years that was the primary thing I cared about.

Doug's illness was in 1959. I had another child in 1960 so it was 1963 or '64 before I even thought about doing anything outside of the home. In 1962 or '63 I had an opportunity to do some background research for a lawyer who had been commissioned to write a book about the Federal Rules of Criminal Procedure as part of the J.W. Moore series. Moore was the basic editor but different volumes were written by different people. Anyway, another woman and I did a lot of the background research for this volume. It turned out to be an almost useless effort

because the guy in charge of the volume, a somewhat strange character, although employed at the U.S. Supreme Court at the time, never put it together. The other woman and I had a terrible time getting paid. He basically disappeared and we were, I guess, exploited in a very garden variety way. However, I don't look back at it as a totally bad experience because it was a chance to move into the field again. What I did was, the one day a week my cleaning woman came, I would go to the Federal Bar library and work all day. I produced a lot of chapters for him although they never got published and so I don't know how good they were because he never critiqued any of them. Eventually, he lost his job up at the Supreme Court, and the whole thing kind of fell apart. But at least I got back into the habit of organizing and doing research. The other woman was Louise Trubeck who went out and started a public interest law firm in Wisconsin and is well known out there now, so I suppose the first try was some kind of a spur to us both. At the time it seemed a dead end.

Actually, Dan Freed provided my real re-entry into the profession beginning around 1963 (the Freeds were friends of ours socially and our kids were the same age). I had known Dan quite well back at the law journal; he was now in the Antitrust Division. Bobby Kennedy, the Attorney General, had gotten interested in the relationship between poverty and criminal justice at the department. Dan was commissioned to do something about it but with practically nobody to help him. I mean just Dan and a secretary (actually, the secretary, Estelle, is now my secretary) were supposed to put together some kind of commission or task force to do something about this problem of poverty in the criminal justice system. As I recall, they were to focus on three aspects of the criminal justice system; establishing a system of appointed counsel for indigent accuseds which led eventually to the Criminal Justice Act. A second was insuring transcripts for criminal

appeals, and the third was bail.

Dan managed to get the department to give me a part-time consultant's contract and I helped them put together the Bail Conference of 1964, and he and I wrote a book called *Bail in the United States* as the conference publication. We worked closely with Herb Sturz up in New York City who had recently started the Manhattan Bail Project and later the now much-esteemed Vera Foundation for whom I worked part-time and later served on its Board.

This was one of the funnest periods of my life. We really had a good idea for changing the system, and with backing first from Bobby Kennedy, and after that, from both his successors, Ramsey Clark and Nick Katzenbach, I was right smack in the middle of things which was where I wanted to be, at the same time that I was still home most of the time with the kids. I wrote the book out of the house. I took a lot of materials that Herb Sturz in New York had gathered, empirical materials, bail surveys around the country. I just took them home and stacked them up by my typewriter and started working. I would bring in the script every few days and the script would be typed in Dan's office. Dave McCarthy, the former Dean of Georgetown Law Center, was running a Bail Project here in Washington, like Herb's in New York. There was a small nucleus of people in the field from whom we could get lots of information. A few of us put together the Bail Conference which was quite a success, bringing together leaders of all of the bail projects in the country. Chief Justice Earl Warren gave the opening address. So all that year – 1963-64 – we worked on the book which was given out at the conference, and we worked on planning other aspects of the conference and I think of it as one of the happiest periods of my life. I really had everything during that period. I was doing something I thought was going to make a contribution to society. I had the excitement of colleagues and teamwork and I had my family at one of their most attractive periods. By this time Doug was out of his

medical problems and the other kids were coming along fine as well. It was just a great time.

I didn't earn a great deal of money; I was paid by the hour. But it's interesting that even in that period, the people in charge of the department had the flexibility to do that because I could never have worked full-time. I think they got their money's worth.

The Bail Conference led to a similar book that I did on civil law and poverty for Legal Services. The OEO and DOJ were getting ready to have a national Legal Services conference . . .

Mr. Pollak: It must have been early '65 –

Judge Wald: Yes, and Jack Murphy and Bruce Terris were working on the conference and somehow through the networking that always goes on in Washington they decided they, too, would like to have a book on Law and Poverty written for the conference. My name came up because I had just finished doing the bail book with Dan Freed. I took this assignment on by myself without a co-author.

I ended up talking to a lot of the people in order to get the basic material for the book. I had a lot of energy at the time. We did not have full-time help or anything like that. Although by this time, the older kids were in school, Tommy, my youngest, was still at home and I would have to write at nap times and work until two or three in the morning. My husband, Bob, was terrific. He would take the kids sometimes for the whole day on Saturday and Sunday. He would just put them in the car and go so I could have the whole day to work and the book got done. It gave me a great deal of pleasure to accomplish that.

Mr. Pollak: Did you have anything to do with Shriver?

Judge Wald: Not really. I worked most closely with Jack and Bruce. I really didn't get into OEO operations much. But here's the interesting thing. In just writing about the

legal services program and visiting a lot of projects, the Mobilization for Youth Program in New York, run by Ed Sparer, and Earl Johnson, who was running the local D.C. Legal Services project—

Mr. Pollak: Community action project —

Judge Wald: Yes, people who were in the heart of early legal services, like Gary Bellows, I was sufficiently excited by it that I felt, I don't just want to write about this. I don't want to be the person back there writing. I would like to do it. Now, it took me a few years before I ended up doing it, but the thought was installed. Toni Chayes, an old classmate at Yale, was also in the legal services mainstream at this time. I remember talking to her and she said, "No, I'm not interested in actually doing legal services. I'm interested in the education aspect." And I said, "No, I'm interested in bringing the cases. I want to bring the cases."

Mr. Pollak: So that Legal Services assignment really then was the direction you later took?

Judge Wald: Yes, but it took a little bit of time. The next stop I made was the D.C. Crime Commission. One thing led to another. I had done these two things, bail and legal services. So, I knew a lot of key people in the Department of Justice by now. Warren Christopher was over there as Deputy Attorney General. I also did a research project with Dan Freed for the D.C. Judicial Conference on criminal discovery. So I had this research and writing background but no hands-on experience in trying cases. But you know how appointments are made —

Mr. Pollak: So you were named to the D.C. Crime Commission —

Judge Wald: I don't remember now which attorney general was in charge then,

whether it was Ramsey or Nick.

Mr. Pollak: I think it was still Nick –

Judge Wald: Yes, that's right; he and Dan Freed were quite close. Nick had come to a lot of the bail meetings. Also, Lee White worked in the White House and Bob knew him, and I think he was instrumental in my getting appointed. Also, Chuck Roche, who was a well-known White House lobbyist for both Kennedy and Johnson, had moved two houses down from us. Chuck had been one of Bobby Kennedy's ushers. Chuck was a political, not a cerebral type, but both he and his wife, a lovely woman, were good friends with Bob and me. Our kids (they had nine) were constantly together. I think, though, that it was Bob, my husband, who put my name about for the job. Quite frankly, I never said to anybody, I want to be on the D.C. Crime Commission. I mean Bob acted as a sort of John the Baptist for me. Whatever it was, it worked. I had no reason to believe that plum should just fall in my lap. I'm sure there were a lot more worthy people who might have gotten appointed, but that's the way life is in Washington.

Anyway, that was a great experience, too, for two years. We brought out the report in 1967. We were a very congenial group of commissioners. The points of view were not always the same. If you remember, Jack Miller was the head of the commission, and there were people on it like Marjorie Lawson, an ex-juvenile court judge, Clyde Ferguson, who was the Dean of Howard Law School, now gone, Bill Rogers, the ex-Secretary of State.

Mr. Pollak: Ex-Attorney General –

Judge Wald: Yes. Abe Krash was there from Arnold, Fortas & Porter, and Fred Ballard, who was then president of the D.C. Bar. The head of the local gas company and Judge Pine of the district court.

Mr. Pollak: Howard Willens was the head of the staff –

Judge Wald: Jack Miller brought him over from the Criminal Division. Sylvia Bacon and Peter Wolf, both of whom were later judges in Superior Court, were also on the staff. Old Judge Pine was our most conservative person on the commission. I had an advantage on that commission. My advantage was that at the time I was not holding down a paid job (this was a non-paying commission). Everybody else was a juvenile court judge or the Dean of Howard or the president of the bar or a practicing lawyer, starting a new law firm, as Jack Miller was doing at the time. I was taking care of my kids, yes, but I spent probably more time on commission work than any other member because I had the time to spend. It was my only outside activity. So I got to know the staff, and I did a lot of staff work myself. I drafted two chapters of the report practically from beginning to end, and worked extremely hard on several others. Howard Willens was the final editor but basically when things went really wrong and staffers didn't work out, we just moved in and wrote the whole thing. So I really had hands-on experience in practically every aspect of the commission's report. I knew all the staff people intimately and I would spend whatever time I had during the day working on the report (the meetings were always at night). I was operating as much as a commission staffer as a Commissioner.

So that lasted two years. I learned an enormous amount about the way Washington's criminal justice system worked in those days, and met most of the cast of characters involved in it.

I also worked in conjunction with the National Crime Commission which was going on simultaneously. If you remember, there were two, the big and the little commissions. Nick Katzenbach – then the Attorney General – started out being the chair of the national

commission until he got switched by President Johnson to the State Department. Jim Vorenberg was the Executive Director. Jim had come to Justice from Cambridge – Harvard Law School. As it turned out, we're now very close friends with the Vorenbergs and have been for many years. In the beginning I remember he seemed quite formidable. When Dan Freed took me to lunch with him I had the feeling that I was quickly dismissed, as somebody who was a part-time worker and couldn't be of much use in staffing a project. However, when I went on the D.C. Crime Commission and Jim was given the National Crime Commission to run, the two commissions had to work closely in some areas with one another, and we did a fair amount of collaboration. Jim ended up asking me to do two writing assignments for the national commission. One on poverty and the criminal justice defendant. One on the citizen's role in policing. As I said, we ended up being close social friends.

This, too, was a great period for me. The feeling in the middle of the Johnson era was, We can solve problems. It sounds naive and it was. "There can be community corrections." "We will be able to reform the juvenile justice system." That, I think, was one of the saddest lessons I learned from experience. I was very heavily into the juvenile field then. Perhaps there was some connection to the fact that I was bringing up kids and felt a certain simpatico to this area of the law but I got very involved in the local juvenile court system, both on the D.C. Crime Commission and the National Crime Commission. Later on, I picked it up in Legal Services.

We really did think that men and women of intelligence and good will could sit down together and produce the answers. The juvenile corrections system, as I see it now, is fully as bad or worse than it was at that period. I don't think we made a dent in it for all our work. Not to say it wasn't worth trying but we really did have that notion: We can solve the corrections

problem; we can solve the court funneling problem; we can solve the community policing problem and professionalization of the police. And some incremental gains were in fact made, but we didn't begin to solve the basic problems. Rarely will you ever solve deep-rooted social problems by commissions.

Mr. Pollak: The D.C. Crime Commission report must have come out early in 1967 –

Judge Wald: It came out in January 1967 –

Mr. Pollak: Right, and then I had responsibility for implementing the recommendations with respect to the police department from the White House and there were many reforms that were put in place that I think were successful then and must still have the legacy –

Judge Wald: Yes, the professionalization of the police forces in many urban cities, I think, was one of the stronger recommendations in these reports that got done. I think corrections did the least best, especially as to helping the juvenile offenders go straight, and there is a real question of how well the court reforms did in overcrowded metropolitan courts, how successful were they. Maybe they're somewhat better but I don't think we made any qualitative leap in the way cases are disposed of.

As to prevention, I don't think we did anything significant in prevention. That's, of course, a problem of the whole society.

Mr. Pollak: What do you think was the source of the inadequacy of the approaches to the juvenile problem? Did the commission recommend that – ?

Judge Wald: Well, I don't know that what we recommended was wrong. But

sometimes, in retrospect, we were naive, I think.

*In re Gault* came out in this period. That was a big legal case which decided that even in juvenile court young offenders have certain basic legal rights before they can be sent away. Abe Fortas was the author of the Supreme Court opinion. There was a great preoccupation, perhaps an over-concentration, on the legalization of the process. I think it was necessary but not enough to bring about better results.

There had been much too much sloppy sort of, "in the best interest of the child we can do anything we want," before then in the juvenile courts. But the harder question was, once you go through the nicer legal process of finding them guilty, what do you do with these kids who don't have any kind of decent family background; who don't have any education or skills; who don't get along in school, are out on the streets most of the time; for whom there aren't any meaningful employment opportunities, most of whom are already in trouble with the law? The services for juveniles that were available then were bankrupt, whether they were the training schools, the so-called breeding schools for crime, or the relatively pallid kind of social work services that existed in the community. There was nothing to grab these kids.

There's obviously nothing original about that conclusion. Both the D.C. and the National Crime Commissions had long reports about the variety of social services that would need to be set up for juvenile offenders and I don't think we were necessarily wrong about any of our prescriptions. Actually, I don't know if we were wrong because they never got set up. They had to compete for limited budget resources with every other need of the community and they never got done. The social services for troubled kids, from what I read in the paper, are no better now than they were 30 years ago, when we were writing those reports. I still have an honest doubt in

my mind about whether a child who is really deprived in the earliest years of any kind of close meaningful relationships with parents, or parent substitutes, can be compensated by any at-distance professional-type services, the "kindness of strangers," as it were, even if we were willing to pay for those services. I mean, I don't know. In the meantime we have had the whole drug epidemic which just brought things to a climax. The juveniles we used to be worried about back in those days stole cars and broke into schools, or shoplifted. They didn't do heavy drugs, crazy, bizarre assaults, murders or horrible rapes, gang killings. There were gangs but I don't think they committed the amount of gratuitous violence, almost the kind of "Clockwork Orange" escapades that you now see in so many juvenile crimes.

The 1960s was basically a hopeful period. Jim Vorenberg was perceived as a conservative person when he took over the National Crime Commission. I remember his reputation was not as an outpouring, bleeding-heart liberal, but rather as a tough boss. But yet the National Crime Commission report turned out to be quite a liberal, progressive document, and at one point Jim said that when you got down to it, the conservatives had nothing to offer. Now, I will say the conservative philosophy came roaring back in the '80s, and they did have something to contribute like sentencing guidelines and "just desserts" punishment. Conservative ideas like that became the order of the day, so in fact they were not bankrupt. Whether their ideas were right remains to be seen.

The crime commissions ended in 1967. Then I worked out of Dan Freed's office for the next year, trying to implement various recommendations in the D.C. Crime Commission report, including trying to work on the juvenile recommendations. We had endless meetings trying to

get the local juvenile services in some kind of alignment with our recommendations. Most of it never came to pass, but we did work at it.

Now, comes the election of '68. Have I got my years right?

Mr. Pollak: You have –

Judge Wald: Okay –

Mr. Pollak: Johnson drops out. Humphrey runs –

Judge Wald: Right and Nixon wins. Okay. Dan left the department very shortly thereafter and went on to Yale. Don Santerelli came in to head what used to be Dan Freed's Office of Criminal Justice. I think it kept the same name but it became a kind of think tank for the Justice Department and they went off in several new directions, including, interestingly enough, the Court Reorganization Act of 1970 which was designed, among other things, to separate the two court systems to get rid of the Bazelonian influence on criminal justice and to leave the local courts to go their own way. That law, though, also created the D.C.-integrated bar with which I had strong connections in the '70s when you and I worked together. It also laid the groundwork for a reincarnation of this court as a new national administrative law tribunal, by taking away the criminal justice *certiorari* jurisdiction from the local courts which had been a kind of centerpiece of this court's jurisdiction. Getting rid of the local court review left a vacuum which Congress began to fill by giving the D.C. Circuit Court of Appeals sometimes exclusive but almost always concurrent jurisdiction in the whole batch of new environmental and consumer legislation that came in the '70s. Anyway, I no longer had any connection with the new Justice Department.

Mr. Pollak: Under John Mitchell –

Judge Wald: I did not. In fact, that period marked one of the big switches in my professional life. If you live in Washington, you often think of your life in terms of administrations; it isn't simply whether or not your favorite candidate is in but your whole circle of colleagues, your whole professional working relationships change. I certainly was no longer an "in" person in the Department of Justice so there was a real question of what I would do with my life at that point.

My kids by now were all in school. I didn't really have professional roots anywhere. The D.C. Crime Commission, my prior work on bail, had all been episodic.

I remember this time as a low point in my life. I remember sitting on the beach at Bethany in the summer of 1968 feeling I don't know what I was going to do and I couldn't not do anything. I didn't really know where to go. I had nothing to offer in private practice at that point. Who's going to take a woman who was 40 with no experience in private practice? Quite frankly, I didn't have any great yen to go back to private practice, anyway, but the government was no longer an option. There was this feeling of, What am I going to do now? It was the summer of the famous 1968 Democratic Convention in Chicago.

Anyway, what I finally ended up doing was going back to square one. I volunteered to become a regular part-time – part-time in the beginning although it quickly developed to full-time – legal services attorney. No special privileges or positions. I didn't even know the people working in the D.C. office. They were all 10 and 15 years younger than I was. The Neighborhood Legal Services Program had a test-case unit which was run by a very bright young man named Larry Silver who now works with the Sierra Club Legal Defense Fund. There were about seven or eight litigating lawyers in it; I certainly did not have any comparable experience.

The only time I had been in a courtroom since I got out of law school was in the '68 riots when they asked lawyers to come down and represent people arrested for looting. I represented two criminal defendants who were picked up in the riot, but only through arraignment. In one case, I got the charges dropped because I checked the records in the precinct where he was arrested and the policeman had gotten him mixed up with somebody else so they dropped the charges, and in the second case, I got the defendant released on his recognizance but they indicted him and since I did not feel capable of defending him at trial, I found someone who was. That was the sum total of my courtroom experience.

So, I volunteered to do part-time work for Legal Services and I remember people like Dan Freed saying to me, "Why are you doing part-time Legal Services? You've been on the Crime Commission. You've written two books." Well, the question was, was I going to do that kind of policy writing for the rest of my life or was I finally going to get some hands-on legal experience? Nobody asked me to edit Supreme Court briefs or anything like that so I really had to go back to square one. And going back to square one then, as I say, meant working with people 10 and 15 years younger than me; I was sort of an anomaly.

But, anyway, I did it. Larry Silver, the head of the Law Reform Unit of NLSP, thought that my coming was a good deal for them. I came pretty cheap and he was a nice guy. He had been wanting to do some kind of systemic reform work as part of the test-case unit. So the first couple of things I did – this was in '68 – I looked at the whole truancy system (they had a lot of those kind of cases in legal services then) to see what the enforcement practices and remedial services were. I also did some work on subpoena fees for poor people called as witnesses. Basically the kind of empirical legal research I knew how to do. By now, I did know how to

write a report. But gradually I managed to maneuver myself into real courtroom work. I went to the main NLSP office and just did anything they wanted me to. I didn't have my own office. We were on Fifth Street above the bail bondsmen. I had a desk over in the corner with three other people. No secretary either. But I got to know the people and what was going on. Florence Roisman was there. She was doing housing reform. Mary Beth Halloran was doing consumer cases. This was the era when legal services was bringing first-wave cases and winning them. It was pre-'70 court reorganization and although you had to bring these cases up through the local courts which were then quite conservative, you could petition for review over here in the federal system.

Mr. Pollak: The circuit court –

Judge Wald: Yes and this was the era of Judges Bazelon, Leventhal, McGowan, Robinson, Wright, okay. All of our good cases got taken up over here.

What happened within months is I got onto the real work of the office. The office was obviously understaffed. There were five or six good, juicy, wonderful test cases which I volunteered to help out on and although at first I had to ask people how to file a paper in Superior Court, pretty soon I was doing it routinely. I loved that period, too. I loved working with Florence, Mary Beth, Maggie Ewing, who was over there in health law; it was just a wonderful bunch of people and we had such highs during the two and a half years I worked in Legal Services. By the end of the first year I was arguing over here in the court of appeals the first test case challenging the fee requirement for indigent women in divorce cases. We won it over here. Remember Joe Ryan who used to be a judge of the Superior Court; he had ruled no woman could get a divorce in forma pauperis. They would not waive fees for a divorce, only for a separation.

And Legal Aid would not represent a woman for divorce, only for separation. So when Legal Services came in this was the first time that poor women could be represented free of charge to get a divorce from husbands who had abandoned them years before. The Superior Court rule we challenged required them to pay a \$100 fee up front, deposited with the court, to pay the fees of the other attorney in case the court required her to pay the other side's costs. So, even if you had a Legal Services attorney representing you, in case you lost you had to lay down a deposit for the other side's attorney and Joe Ryan would not waive it. So we brought that test case. I argued it here in the court of appeals before Judges McGowan, MacKinnon and Robinson and won it and MacKinnon wrote the opinion. This was back in '69. Anyway, that period was great.

I also worked with Florence Roisman on the warranty of habitability case. I didn't argue it but I wrote a lot of the brief. We also got the residency requirement for St. E's declared unconstitutional by Gerry Gesell on a three-judge court. And then there were lots of more minor kinds of cases I worked on.

It was a high in the sense that I thought it was great to be working in the poverty program, to be actually having clients, hands-on experience. I loved the people I was working with and I got a kick out of walking into that really impoverished office where people had posters stuck on the wall. I think I did well. I earned my keep. Anyway –

Mr. Pollak: Did you think that you were inhibited in performing by this long period in which you really were not part of the adversary process?

Judge Wald: Well, only to the extent that I had to do a lot more running to catch up. I did not feel that my basic intelligence had rotted and I knew where to go to do legal research, although, let me tell you, we had no library over there and Warren Juggins, who is now

our Assistant Circuit Librarian here at the court, used to be the D.C. Bar Librarian. Remember the D.C. Bar library was here?

Mr. Pollak: Yes –

Judge Wald: I used to come over here and write my briefs at the back tables here because we had no kind of library over there at NLSP. Warren always let me do it and we still joke about it. He knew what I was doing; I would just go to the back bench and write my whole brief over here in the court of appeals library.

Mr. Pollak: In long-hand –

Judge Wald: Well, I shared a secretary with three other lawyers over there plus we only had the old mimeograph machines for making copies. We were always rushing to file at the last minute. But the caliber of our work was good. Florence was tops. Maggie Ewing was tops. Larry Silver was an excellent lawyer. Still is. So it was that wave of Legal Services where you had the best and the brightest. A lot of the attorneys out in the field were very good, too. Susan Shapiro had gone from being Jim Vorenberg's assistant at the National Crime Commission to running one of the neighborhood offices out in the field. Roger Wolf, who now teaches at the University of Maryland Law School, ran one. Dick Wolf, who was Vic Kramer's assistant at Georgetown for their public-interest program, ran one of them. You just had very good people.

That was my first hands-on experience in the law and in retrospect it was probably one of the smartest decisions I ever made to move out of policy and into actual practice. Among other things, when the time came much later for me to apply for this judgeship, certainly for the ABA evaluation, it was very important whether you had actual courtroom and litigation experience.

Mr. Pollak: Whether you've handled cases?

Judge Wald: Yes, whether you handled cases. It may not have been a *sine qua non* but it was awfully important. The only persons I know around my vintage for whom exceptions were made were one or two academics, like Lou Pollack, the former Dean at Yale. I think being a woman and coming from my background, it was really good to have had actual case experience and NLSP was the way I began to get it. Still, I was always having to explain to people why in my forties I was doing this really low-level, nitty-gritty stuff –

Mr. Pollak: Mostly a courageous thing to do –

Judge Wald: But it was one of those things that I never regretted and very quickly it turned out to be fun and exciting –

Mr. Pollak: It took you through 1970 or into 1970?

Judge Wald: Into 1970; at that time there was a very restless period going on with the whole poverty program in Washington. It spilled over into Legal Services, unfortunately. You would have hoped that, like the Public Defender, the poverty program would have tried to isolate the legal branch from local politics, but that didn't happen. There was a lot of ferment going on about who controlled the program, which community elements controlled the program. There was always a community leader of the Legal Services program, who was not a hands-on lawyer. Junius Parks from Howard Law School was one such and he was fine. But NLSP changed hands around 1970 and there was a push for local community people to take over this program. And the fact was that we didn't have a lot of Black lawyers in the program. I didn't do the recruiting for the program, so I can't tell you whether they were available in sufficient numbers or not. But there was a heavy push to get more Black lawyers into the program and to take over the leadership of the program, to make sure it happened. While I agree the goal was

understandable, the way in which it was carried out was not so nice. There were, it was fair to say, some rabble rousers who came in and started libeling, really libeling, some of our best lawyers. They talked about getting rid of all the "white bitches" in the Law Reform Unit, and it is true there were a lot of white women like myself in the staff of that unit. I was never targeted personally by any of this, but it was not a pleasant atmosphere to work in. They had meetings in which people blew smoke in other people's faces, and shouted, and called names. Anyway it got to be a very ugly scene. So the head of our program (by then Larry had left and Dick Carter, now working for the ALI, had taken his place) resigned and several other top-notch lawyers in the program resigned as well. The notion was that, "If you want the program, okay, take it over, etc., and also, I don't need to be subjected to this abuse."

Just about this time when all my friends were leaving, I was asked to do something else, as well. I had been doing some work for the Ford Foundation with whom I had had no previous contact at all. It started with Herb Sturz, who was head of the Vera Foundation. I was already sitting on the board of the Vera Foundation, coming out of our work together on the bail reform program. I worked with Herb on several of his other programs, including an alcohol rehab program, and a methadone maintenance program. Herb was a great person for organizing, taking an idea and making it happen. He had contacts with all of the New York people, including the courts and the police department. Pat Murphy was then the Chief at the New York Police Department. Frank Thomas, the current president of the Ford Foundation, was up there as his Deputy, and Judge Botein was head of the state court system, working closely with Herb.

Why I was useful, was that Herb was not a paper person. He would get an idea for a reform in the justice system and he would make the contacts for support and figure out how to

make it work and pick the right people to do it. But you always had to have a protocol. You always had to have a piece of paper explaining the background of why you're doing this project and what you hope to accomplish, especially for the funders. But also to take with you to the meetings to give to people so they can talk about it and write articles about it. So you know, I did a lot of this. Burke Marshall was the Chairman of the Vera Board, and Dan Freed was on it. Anyway, Herb had connections to Mike Svirdoff who was the vice-president of National Affairs of the Ford Foundation. Mike was looking for some kind of project for the foundation in the field of drugs. We were moving into the so-called heroin epidemic of the early '70s. Herb, in talking to Mike, said, "Why don't you talk to Pat and Peter Hutt." Peter had done the chapter on alcoholism in the National Crime Commission Report and knew a lot about alcoholism and addiction. He successfully brought the *Easter* case challenging arrest for public intoxication in the District of Columbia.

Peter and I worked up a very brief, top-of-the-head description of a state-of-the-art policy study project that Ford might do to influence public policy on drug abuse. Mike was very grateful and the board bought it. Then, they decided they wanted us to do this study. Peter was at Covington & Burling and he was not about to quit, or even, to take a leave of absence to do this. But he wanted to do it, so we decided to work together on this. At this point, Legal Services was coming apart so this was a convenient harbor to sail into. So Peter and I and Jim DeLong set up office. Peter would work on the project part-time at his office. Jim and I did it full-time. It marked the first time I ever got decent wages for a full-time legal job since I left Arnold & Porter almost two decades before.

Peter, Jim DeLong and I put together this book called *Dealing With Drug Abuse*, a

credible effort and well-received. This was 1970, but it attempted to take a rational look at what was going on then in interdiction, prevention, treatment, education and what we knew about the various addictive drugs and their effects. The *New York Times* said it was one of the best analyses of the problem that year. The Ford Foundation had us go all over the country and visit drug projects and talk to experts and field people.

In the course of this, Mike had Peter and I come up to brief the board of the Ford Foundation about the project, and their wives as well. At that point, the Ford Foundation used to have special events for the wives. Subsequently, when Dorothy Marshall and I went on the board, they were abolished.

Mr. Pollak: They were really for spouses, or just the women?

Judge Wald: Spouses were women until Dorothy and I came along. And our husbands were not too interested in spousal events. And Mary Bundy, by now this was the early '70s, said, "Look I've got a career, too. I'm going to social work school. I think this is silly. I'm not going to do it any more." But that came later. We wrote the book. The book got nicely reviewed. It suggested setting up a drug abuse council which was subsequently done. I knew I did not want to run that. I didn't want another long-range study project.

The board apparently liked me from the brief appearance and Peter Hutt acted as a very good advocate for me and without even really running for the office, I was asked to join the board of the foundation. At this time, 1972, the Ford Foundation decided it had to have some women on the board. Their first choice was Shirley Hufstedler. There was a ruling from on high, whether from Chief Justice Burger or from the Code of Conduct Committee, I'm not sure, that she couldn't do it as a federal judge. Even though Charlie Wyzanski had been on the board

the last 20 years while he was a district judge. Charlie offered to resign when it was said Shirley couldn't do it and Justice Burger wrote him a letter saying, "Oh, no, you're part of history, Charlie. It's okay for you to stay on but Shirley can't go on." We always referred to it as "The Rule in Shirley's Case."

I don't know the other people they considered. They ended up with me and Dorothy Marshall, an educator, a very good woman whose area was foreign affairs, Latin America, and who was a vice chancellor at the University of Massachusetts, having previously been at Bryn Mawr. We were the two first women board members in the foundation's history.

That was a part-time avocation through the '70s with the board, but it was an intense experience.

Mr. Pollak: How long did you serve on the board?

Judge Wald: Five years. I left when I went into government service in 1977. This was a terrific experience for me because there were a lot of very impressive people on the Ford Foundation Board. Mac Bundy was the director, Alex Heard was the chair of the board; he was the chancellor at Vanderbilt University. Bob McNamara was still on the board. Henry Ford, III himself was on the board. Bill Donaldson, who is now head of the Stock Exchange and ran the Yale School of Organization and Management. Dorothy, who came on the same time I did, was a really fine person, and a good friend. There was one of the heads of a Black college down south, Vivian Henderson. Andy Brimmer was on for a while. These were heavy hitters. And Charlie Wyzanski and I eventually got to be very good friends.

Mr. Pollak: How often did you meet?

Judge Wald: We met for four days, four times a year and you were not absent.

This was a board you didn't not come to.

Mr. Pollak: Did you have committee responsibilities, too?

Judge Wald: A lot. We met for four days at a time. There was an immense amount of homework beforehand but it was fascinating stuff. We were all on a couple committees. I ended up going to more meetings and being ex-officio on more committees than I was actually assigned to. I was on the National Affairs Committee. I later led the Environmental Committee. They put me on the Finance Committee. I cannot imagine why, perhaps because it looked good to have a woman on the Finance Committee. I really was not up on investment finance; Roger Kennedy was the head of finances, he has since been head of the Smithsonian Institute of Science and Technology, and is now Director of the National Park Service.

Actually, I ended up playing kind of a useful role on the Finance Committee because I would ask all the dumb questions which everybody else assumed the answers to, and as to which occasionally there were not good answers in reality. A couple of times I undid golden handshake deals, or at least raised questions about them. Also, the proxy fights came up in that committee. The business about how to vote our proxies and whether we made investments in South Africa, I ended up chairing a small proxy committee which decided how we were to vote our proxies which in some cases were of considerable importance, due to the size of our portfolio. I also got quite involved in the International Committee. I was not placed on it originally because my background was not international. The sum of my international experience was a trip to Europe one summer as a student. Dave Bell, who had been budget director, and had worked closely with Carl McGowan in the Adlai Stevenson campaign, was the chair of that committee. It turned out to be the most interesting committee of all because Ford was spending the majority of its

money on foreign projects. I took a trip in the summer of '74 for five weeks going around the world visiting Ford Foundation projects in the underdeveloped countries. Starting up in Niger and the Sub-Sahara and –

Mr. Pollak: Sounds fascinating –

Judge Wald: Then to Nigeria and down to South Africa. We were supporting what reform efforts we could find in the Union of South Africa, all-Black projects or projects that were trying to integrate. And a few free speech-type projects. I also went to Kenya, then over to India, then to Thailand, South Vietnam where I spent a week during the window period after the American troops had left. The summer before the North Vietnamese came down and took over. Japan –

So the Ford Foundation was a great experience. For one thing it gave me a lot of confidence. I found out I could work compatibly with these people who were leaders in their fields, and certainly not all bleeding heart liberals; I could hold my own. Admittedly, my job was not dependent on them, but they had respect for me. I also liked them. I learned that really great people are not arrogant people. Irwin Miller was one of my favorite people on there, from Cummins Engine. Actually, as I was leaving the board, he asked me to go on the Board of Cummins Engine but I could not because I was going into government then in '77.

But I enjoyed my stint with them and I grew to like and respect Mac Bundy a lot at that period in his life. I must say I know only what I read about what he did before in the Kennedy-Johnson administrations, but I do think he tried to lead the foundation into many areas where it would be on the cutting edge, and make a difference. This was the period we

were the main support of the public interest law movement. In many cases, we were practically their sole support.

Mr. Pollak: Right. I'm aware of the support that came for the Lawyers Committee for Civil Rights, for example –

Judge Wald: And environmental firms before they got on their feet and for many years the Children's Defense Fund.

Mr. Pollak: Do you have much consciousness of the foundation today?

Judge Wald: Very little, very little. For a few years afterward, I went to the annual ex-trustees' dinner in December in New York, but it always turned out to be the same time as the ALI where I've become much more active. I don't know anybody on the board anymore. Bundy and his lieutenants left in the early '70s. I knew Frank Thomas in his early career but haven't seen him much. Nobody is now left on the board from my days. The last two years I went to the dinner, I had that feeling you get at various times in life, I just stayed at the dance too long.

Mr. Pollak: Sure, I know it.

Judge Wald: I got the distinct feeling –

Mr. Pollak: I cut out of those things –

Judge Wald: Yes. You can't go home again.

Mr. Pollak: You passed sort of without comment the time you were at the Center for Law and Social Policy –

Judge Wald: Yes, that's the remaining piece. I should say first that in '72, for the record, I got called by Jim Flug. This was the McGovern-Shriver campaign and Jim Flug was

working for Ted Kennedy then. He had also clerked for Judge Fahey. During this entire period – I'm sorry to have so many strings here – I was in that coterie of Bazelon speech writers. There were people out in the community that he was always calling on for speech drafts and we got to be this extended family. Bazelon was interested in some juvenile law matters, so I drafted a couple of speeches for him. Jim was his colleague Judge Fahey's clerk one year, I think around the time of the D.C. Crime Commission. Anyway, our paths had crossed.

In the summer of 1972, Shriver had just come on as a vice presidential candidate because Eagleton had been dropped. I had no contact with McGovern, as such. Jim called me up one night and said Sarge Shriver is interested in getting a group of people to talk to him about issues out at his house this weekend. So I went out with Jim; lots of other people out there too. Out of that meeting came an offer to run the issues office of the Shriver campaign. Doris Kearns did it for a month or so in the summer but had to get back to her teaching, so I came in and relieved her in August and went on through the campaign.

That too was an interesting experience. Mickey Kantor was heading up campaign activities. Lee White was there, and Tersh Boasberg. But they were in the front office. They were the people with the line to the plane. I was in issues, getting out the briefing books and speech drafts, among other things. People in my office were interesting. Let me just mention, because of what they've gone on to do later. I did not hire them. They were already there when I took over. It was clear they wanted a woman to run the office for political reasons; even back then I think they may have offered it to Toni Chayes but she, at this time, was going back to square one in her own career as I had done earlier and was clerking for Charlie Wyzanski as a prelude to practicing law, even though she too was in her forties. She too had five kids, had been

through various career and mother incarnations and was now looking to get back into actual law practice.

But among the people in the '72 issues office were Rich Parker, now a professor at Harvard Law School, Jonathan Marks, who runs EnDispute, Mark Furstenberg, who bought and ran a steel company and now –

Mr. Pollak: runs the bakery. He had been at OEO.

Judge Wald: Yes. George Frampton, who's since been the head of the National Wildlife Federation and is now a deputy to Bruce Babbitt at Interior, Nick Eddes, who was my counterpart in the Labor Department in the Carter administration; and a woman, Courtney Adams, who became, during the Carter administration, the head labor economist, and Bill Maynes, who was our foreign affairs person, who heads up the Foreign Relations Council now. It was a high-powered group.

Now, I've got to tell you, one always has jobs in life where you feel you didn't really do as well as maybe someone else could have. I felt like that during the Shriver campaign period for the following reasons. I worked like a dog. I worked 24 hours a day. I really didn't have the kind of specialized policy background in a lot of fields I probably needed. I was pretty much at the mercy of the experts unless something just didn't make sense on its face. There was no way I was going to be able to second-guess Bill Maynes on foreign policy or Courtney on labor statistics, so I always had the feeling you have sometimes in new jobs where stuff is coming in front of you that you're understanding it at one level but not really as deeply as you should. You just don't have the time to get into anything far enough. We're talking now about a 3-month campaign period between August and November and a losing campaign at that.

Mr. Pollak: Right. But, were they using your product?

Judge Wald: Yes, they were using our product, but I never felt it was my product, particularly. I did a few speech drafts on my own and I did edit, review and organize others' material, but I never felt that I was in control the way I had been in previous jobs where you're doing the concepts, research, and drafting yourself, when you're writing the brief, or you're running the operation. It was more like a managing, like a traffic cop kind of thing. I guess it's called administering.

Mr. Pollak: You were a second-story operator –

Judge Wald: Yes. I never felt ground-floor. Sarge was very pleasant, but I basically never saw him. He would get on the plane on Sunday night and go on these trips and he wouldn't be back until the next Friday and then we would have some weekend meetings. The people who were on the plane had a much closer relationship with him. Jerry Shastack, the ABA lawyer, Novak, the conservative Catholic columnist, were on the plane. I was never a plane person. That wasn't my job. My job was to get the briefing books ready back home.

But I did get an understanding of what is involved in running a campaign and they say everyone has one good campaign in them. I knew I could live and die happy if I never went through another campaign. I mean the place was chaotic. We were losing bad. There was literally a "bomb" scare at national headquarters every other day. We were at 1701 K, the main headquarters. It was just wild. The candidate would meet somebody someplace in Oklahoma and say to the person, You're wonderful, you're terrific. Would you write a speech for me? The person would ship the speech to us and we would have to handle the rest. If it didn't get used – and most didn't – we had to explain why or take the blame.

By November, it was really looking black. One Sunday near the end, they went out to pick up Sarge at that estate they had off Rockville Pike to drive him to the plane and he was in his pool and he looked up and said, "I'm not gonna go." I mean that was the mood in the last couple weeks. He said, "I'm just not gonna go." Of course, he eventually did go but the notion of getting on the plane and going out and doing it all over again in the face of inevitable defeat even got to him. Everyday, stories of new disasters would come back.

I remember the Woodward and Bernstein stories were just beginning to break about "dirty tricks," which essentially led to the Watergate scandal. Nobody dreamed of the extent of the wrongdoing during the campaign. But we were desperate to find something that would unravel Nixon's winning streak. We were calling the journalists all the time asking for information. They, of course, behaved exactly as journalists should. They wouldn't tell us a thing, which was absolutely the right thing. We were scouring around on our own. I remember being up at the Library of Congress reading every newspaper trying to find clues that would lead to Nixon and his crew. We knew something was there but it was too early to get at it. In the end we couldn't get it. Remember this is November 1972. By March 1973 Nixon is making his famous navel-gazing Watergate speech.

I remember we all gathered the night of the election at what is now Chris's Steak House, but was then Augustino's. It was so bad. On the plus side, I did learn the ups and downs, just the terrible demands of political life, of a political campaign, even at my headquarters level. Although by now my kids were all in the upper grades and two were away at school, the ones at home finally said to me, "Listen. This is too much; we don't know what's coming or going." Fortunately, it was all over in November.

Mr. Pollak: That was November –

Judge Wald: '72. Right after the campaign, I went to work for one of the public interest law groups, the Center for Law & Social Policy, which then had people like Charlie Halperin, Bruce Terris, and Jim Moorman in it. I had talked to them years before when they first set up the Center and had almost gone with them then, but finally opted to go to Legal Services instead.

Mr. Pollak: Right. That must have been when it was a competitor for your services?

Judge Wald: Right. And so now, when I had finished with the campaign, I really had nothing going on and they said come on over to us. Joe Onek was just coming off the Brennan clerkship about that time. At various times Si Lazarus and Ben Heineman were there. Again, we were a cluster.

The happiest periods in my life have been the periods when I was working with clusters of bright and talented people whose values were basically the same as mine. I mean, you don't agree on everything, but you're working toward some goal that you all think is worthy of your efforts –

Mr. Pollak: And they're highly capable people –

Judge Wald: Highly capable people and fun to be around. I mean Charlie had his idiosyncrasies, but overall he had tremendous energy and enthusiasm and was good to work with. He really had a lot of chutzpah and he needed it to get the whole Center going. So, I went over there and to make a long story short, within a couple of years there was a spinoff from the Center, called the Mental Health Law Project, which I joined. One reason I did that was the Center was

getting Ford Foundation financing and, although I wasn't in government or anything, I had a feeling there might be a potential conflict there on my part, actually. So as soon as I joined the Ford Board, I relinquished my salary from the Center. So, when the Mental Health Law Project spun off, it was understood that it would not ask for Ford financing and they didn't, the whole time I was on the Ford Board. I never worked for a project that was getting Ford financing.

I started the *Mills* case originally at the Center for Law and Social Policy and then took it with me when we spun off the Mental Health Law Project with Paul Friedman and Bruce Ennis. We worked in conjunction with the New York ACLU. Mental health was very broadly defined for purposes of our docket. We had a lot of juvenile law test cases that I worked on which technically probably weren't mental health cases but no one objected. *Mills v. Board of Education* involved education for handicapped children. There had been only one case in the United States up in the Third Circuit in Philadelphia which ruled in the case of mentally retarded children, that they had a right to some kind of publicly financed schooling. They couldn't be kept out of the public school system because of their handicap. In *Mills* we also worked in conjunction with Stan Herr and Julian Tepper from the National Legal Aid and Defender Association which had a little test case unit that only lasted a few years. This was often the pattern in Washington in those years – people from several of these public interest law groups working together. There was enough work and credit to go around. We all sort of pooled our expertise.

In *Mills* we brought this very broad case seeking to establish that all children with any kind of disabilities, be they physical, emotional, mental, or retardation, had to have some kind of schooling that would realize some kind of potential growth or advancement for them. It sounds

like a fairly elementary proposition but it was totally unestablished in the law at the time. We drew Judge Waddy in the *Mills* case, who turned out to be a person who understood what was at stake.

I remember that one of the clients we had was 12 years old and had never been in the inside of any kind of school. Locked back in a room where his mother had a sign on the door saying, "Beware of child," or something equally awful. So we had some pretty far out clients and I can understand some of the reluctance of the school system on accepting responsibility for them. The school board here was pretty good, though. They did not violently oppose this lawsuit. They were the defendants technically but in all honesty they played their defensive role fairly softly. But the Corporation Counsel did defend the suit.

Mr. Pollak: And you were in Federal District Court before Waddy. Did you go through a trial?

Judge Wald: It was eventually decided by summary judgment, but we went through enormous amounts of depositions, pretrial discovery, and several courtroom hearings. First off, we had to argue against a motion for dismissal. John Suda, who is now a judge on the Superior Court, was the Assistant Corporation Counsel. Julian Tepper, Stan Herr, and I were the counsel for the children. We did, I think, a terrific work-up, of depositions, affidavits from the parents of all our clients, expert witnesses.

Mr. Pollak: Under what were you claiming?

Judge Wald: Well, we started out claiming both constitutional and D.C. statutory rights. Judge Waddy ruled basically on the basis of the statute, which was fine, because eventually the Supreme Court ruled there was no constitutional right to an education.

Mr. Pollak: But you were pursuing this well before there were any handicap laws?

Judge Wald: Oh, yes. Our case led the way into the federal statute. But there was a D.C. law on the books which appeared to apply to the education of all children, though candidly it was a bit of a stretch. We really worked hard and prepared a tremendous case. The thing I guess I miss most in the last 13 years is that sense of activity. The three of us were back and forth to each other's offices 15 times a day. That feeling of someone out there with you. We got *amici* from the National Association of Retarded Children and other mental health organizations. We had ongoing alliances with many of these professional organizations. They used us and we used them. We got our experts from them. If they wanted some kind of a legal principle tested, we would do it for them, presuming it made legal sense. This was a period when organizations that had been fairly passive were beginning to get active on litigation. We had the Orthopsychiatric Association, the American Psychological Association, sometimes the American Psychiatric Association, and the National Association for Retarded Children. We had stables of clients who would produce experts, honest experts.

Eventually we got a decision from Judge Waddy which said that the D.C. school system had to give some form of individualized education to all these children. And, the D.C. School Board never appealed it. This was a period, believe it or not, when people wanted to do the right thing. So in a couple of years the expenditure on so-called special children went from something like \$100,000 to \$12-13 million. It became an overnight priority. Some people might one day say it was at the expense of the mainstream children. I never had guilt feelings about it. These handicapped kids deserved some chance.

After the judge ruled in our favor, we negotiated a consent decree and set up individualized hearings with hearing officers to decide on the appropriate placements for these children. Some of these hearings are still going on.

After a couple of years, Representative Brademas began hearings on the Education for All Handicapped Children Act. I went up to the Hill and testified on it and talked about our experiences in the *Mills* case. By now, Tepper had gone into private practice. Herr had left his project as well and I was really left with the implementation burden of the case. I went to the hearings. I talked regularly with the master who was supervising the hearings in the D.C. school system. I talked to school groups, and parent groups, for a couple of years. Accounts of our experience along with Pennsylvania's produced a lot of the legislative history of that Act. When the Supreme Court came down with a key ruling on the Act years later, one I wasn't entirely thrilled with since it limited the scope of the Act, it talked about the act being based on the experiences of the D.C. and Pennsylvania systems. The Act itself was a good thing. It supplanted the decree to a large extent but it also picked up the whole individualized hearing process that we had been working with for several years and made it a condition of federal monies.

I'll just quickly mention two other cases from that '70s period. One was a St. E's case where we argued for the least-restrictive alternatives for mental patients. The aim of it was to get more public resources out of asylums and into community services by getting a ruling that people couldn't be kept in total asylum situations if they could be cared for out in the community without danger to themselves or others. At the time we brought this lawsuit, we were in the middle of a national backlash about letting too many people out of institutions when they weren't up to taking

care of themselves on the streets, even if medication left them relatively undangerous. The AFSCME, the labor union for institutional employees, was very much involved in that campaign. The AFSCME was generally a progressive union but represented all of the caretakers who were very much on the side of not prematurely letting people out of the institutions they worked in.

Actually, we didn't want to let them out on the streets with no services either, but we said there was a middle ground between keeping somebody locked up in St. Elizabeth's – not because they were a danger to themselves or others – but because there were no services out in the community to tend to their needs and dumping them defenseless into the communities. We thought that middle ground – insisting, then, the community offer them needed services – was the right way to go. But again, we're back in the same dilemma as with juvenile services. I think we may have had the right solution, but it never happens because the politics of budget-making don't allow for the money to be channeled that way.

Ben Heineman, who was one of the brightest young people I ever worked with, and was then straight out of his Supreme Court clerkship with Potter Stewart, was working at the Center. He and I brought the *St. E's* suit. He was great fun to work with. We're still good friends. We brought it before Aubrey Robinson in the district court and we won it. Now, winning a lawsuit, as you know, is like dynamiting a logjam. It just means some movement begins but the logs have a tendency to go off in all different directions and it doesn't mean that everything flows smoothly down line. So, for another seemingly endless period – actually it's still going on today in D.C. – we tried to get money for resources to implement the decree. We went up and testified at congressional hearings for more money for services in the community. A group was set up to monitor the decree. When I went into the government in 1977, I left the case and I only know

what I read in the papers, but it appears that community services for the ex-St. E's patients are still almost nonexistent.

We had a social worker at the project, Gail Marker, a wonderful woman. Her job was to make sure we weren't the sort of a test case outfit which forgets the welfare of its clients. She tended to their individual needs, as well as working with the city to set up a service network. She finally got so frustrated that she went out and got some private money and set up the Green Door which is now the best service in D.C. for discharged mental patients. Again, the end result fell far short of our dreams but I think the concept was good.

The next and last case I'll talk about from this period was the *Morales* case in Texas. Did I give you that chapter on *Morales* from Judge Justice's biography to read?

Mr. Pollak: No, I don't think so. I don't know that case.

Judge Wald: *Turman v. Morales*. To begin at the beginning: The Youth Law Center, which was a specialized OEO-funded legal services office that served juveniles in San Francisco, was run by a young man just back from the Vietnam War named Peter Sandmann who was contacted by a local Legal Services lawyer named Steve Bercu in El Paso. Steve Bercu represented kids in juvenile court who were being put into the state institutions by their parents, the so-called PINS category of runaways and kids who were out of parental control. In the process of that representation, Steve would follow through and go see the kids after they were put away, and he was appalled at the state of the institutions in Texas. He thought they were like concentration camps. He got in touch with Sandmann who ran the nearest sort of specialized legal service center for juvenile law. They went on a series of forays into the juvenile institutions around the state and came out with real horror stories. There was physical brutality, but apart

from the physical brutality, the most terrible deprivations. These institutions were all out in the sticks. In fact, the story was that each one of them was located near a town where a Speaker of the House of Representatives of Texas had come from. Places like Gainesville and Gatesville and Crockett.

At a certain point, they went into Wayne Justice's court. We're now at '71, '72, '73. Wayne Justice's courthouse in Tyler, Texas. And they managed to get some sort of a writ of entry because by now the state institution people were not letting them on the premises.

After a few more trips they decided it was time to bring a lawsuit challenging the lack of treatment the juveniles were receiving at the institutions. They wanted to bring a right to treatment suit based upon the fact that a juvenile court commitment was not a criminal commitment and so some affirmative help must be given the juvenile in exchange for his lack of freedom. The theory relied on the right to treatment cases written by Dave Bazelon in D.C. and by Minor Wisdom down in the Fifth Circuit. These cases said for mental patients that if you're committed not for crime then there has to be some attempt made to treat you so that if you are treatable you can be released. Sandmann and Bercu wanted this theory transferred over to the juvenile area, in theory that's a *parens patriae* type of operation too, so these kids should receive some kind of services designed to make them better since the whole underpinning of the juvenile court system is rehabilitation.

It turned out to be a four- or five-year effort. Our project started working extremely closely with Peter and Steve. They didn't have the resources to do it alone. At first Paul Friedman, who headed MHLP, worked on it with me but he gradually dropped out of it because he had other things going on. Larry Schwartz –

Mr. Pollak: By then, was he heading up your project?

Judge Wald: Yes. Paul was. Larry Schwartz, who had been a clerk to two juvenile judges here, to both Judges Miller and Ketcham and then gone to work at the Public Defender Service, had now come to the project. He had a lot of experience in the juvenile area. So Larry and I became the team and we worked very closely with Peter. Again, there was this marvelous teamwork because nobody was worried about money, there was enough credit, and everybody wanted the same result.

Initially we all took a tour of all the five juvenile institutions. We had a court order to do this as litigating *amici*, a peculiar type of status used in several of these institutional suits. The initial suit was brought as a class action and Steve Bercu was representing the kids and Alicia Morales, who was the named plaintiff.

Mr. Pollak: You toured all the places of incarceration?

Judge Wald: Yes. We toured every one of the five and I mean we flew little planes and drove through hundreds of miles of the Texas landscape to get to these little backwater places. The institutions – there were five of them – were really quite grim. I'd seen the juvenile institutions here in D.C. – the ones here just looked sloppy or dirty. But some of the Texas ones were much cleaner but there was kind of an organized objective cold cruelty to them. It really took your breath away and I'm not the only one to say this. There was a biography of Judge Justice which came out two years ago with a whole chapter on the *Morales* litigation. He took a tour. He came out with the same impression. The girls' institutions were so – you saw these young teenagers, most of whom had done nothing but run away with a boyfriend – there was no sympathy or sense of anyone caring about them. They were humiliated. They were made

to – they were left with no self-respect.

One of the great things that came out of this experience for me was meeting a marvelous woman who was also mentioned in the Justice book. I put her on the witness stand as an expert witness on juvenile rehabilitation and her testimony played a very heavy role in the judge's ultimate ruling. Her name is Gisela Konopka from Minnesota. She's still alive but she's retired now. She had been a young activist, German-Jewish girl in her twenties in Germany, with a bright career in education. Very early in the Nazi years she was put into a concentration camp because of her progressive ideas. She was part of that twenties period when a lot of new ideas were coming to the fore in Germany which were later called degenerate or radical. She spent, I think, several months in a concentration camp. At one point she told me – she and I got to be very good friends – that they made her dig her own grave and stand in it. She just waited to be shot and thrown in, but because of some technicality, they didn't shoot her. She was allowed to go back to her cell. Anyway, eventually – this was in the early years of Nazism when they still used to let some people out – she was released. This was before the total Jewish Holocaust had begun so when she was let out, she knew she had to get out of Germany. She was keeping company with a young man, so they got out of Germany together. They ended up in occupied France, she, a very cultured, very, very bright and educated young woman working her way acting as a cleaning woman across Europe in order to get eventually to America. They made their way to England where her husband directed the Allied bombers back to Germany during the war. Meanwhile, she got to America and managed to get a job and somehow work her way back to school and ended up heading the Department of Child Development at the University of Minnesota. In the 1970s she was head of the Orthopsychiatric Association and she was the

expert witness we used in the *Morales* case because her field was young women, the adolescent development of deprived children. And so, she traveled through the institutions with us. First we took her through all the girls' institutions and she said to me, "This is terrible for me because I'm dreaming every night of the concentration camps." But she was wonderful with the girls. She would go in and talk to them for hours. They would give her their poems. They had terrible isolation. Kids were just left, twelve and thirteen year olds, left in rooms with no clothes or nothing but a nightgown in a locked isolation room for the most minor kinds of rule infractions.

I don't know that it was vicious cruelty but it was so lacking in any kind of human perspective. The head of the Texas Youth Services, a man called Turman, had run all these institutions for a decade and actually they had a usually good reputation outside of Texas. You would hear them mentioned in these national child conferences. It was unbelievable, I mean, once you got inside them. The boys' institutions were the worst. There was outright cruelty there. They had isolation rooms in which the lights never went out at night. The food was passed through a hole, and they were run by gangs of the most vicious ones who would indoctrinate what they called the "fresh fish" into the ways of the institution. There was not only sodomy but there were vicious beatings going on among the inmates regularly.

Actually, one day during a deposition at one of the institutions, Steve Bercu went into the bathroom and was beaten up by a couple of these kids who it was clear had been set on him by the guards. The guards were big and thug-like and had obscene nicknames. It was clear they were beating the boys regularly. It was pretty awful.

With a year of depositions, I was back and forth to Texas all the time. First the institution people and even the Texas Attorney General's office who was defending them thought we were a

joke although they were worried because of Wayne Justice. After a few depositions and hearings they were worried and when they realized we were pretty good, they hired a partner from Baker, Botts named Larry York to lead their trial team. Actually, not a bad guy. He now heads up the Citizens Board on the Youth Commission, but I think the whole system is better now. Everyone tells me it's a lot better. Larry York acted like your sort of homespun Jimmy Stewart type of country lawyer but clearly head and shoulders above the average.

After the year of depositions, we got ready for trial. This was sophisticated stuff for the '70s. We got a writ from Judge Justice to put observers into the institutions, not disguised as inmates, but free to roam about 24 hours a day and observe everything that went on. We put three teams of experts out of the University of Texas in Galveston, experts in juvenile corrections and psychology. They lived in the institutions, in the same kind of rooms, ate the same food, followed the same routine as the kids for two weeks and then filed reports afterwards. Now, this was fairly new stuff. And to a person, the live-in experts were all appalled. They became our chief witnesses. We went through a five-week trial in Tyler. It started in early July and I remember – ever been to Tyler, Texas?

Mr. Pollak: Never. I've been to a lot of places in Texas, but not Tyler.

Judge Wald: Well, all I remember is a sun-baked square in the middle of town. It was also a dry town. No place to go at night even for a beer. You would have to bring your liquor up from Dallas or drink Coke. The Civil Rights Division had also come in too on the side of the plaintiffs and they had a couple lawyers down there.

I still remember Judge Justice would say every morning, "Are all the counsel ready?," and the DOJ lawyer, Mike Thrasher, who was a big tall Irishman, would stand up in the middle of the

courtroom and say, "The United States is ready, your Honor." I can't tell you the thrill it gave us to see the U.S. Government on the same side as these kids. It really did make me proud.

Five weeks we were in trial and the judge ran a tight courtroom. We were there before 9:00 a.m. The air conditioning was so heavy and I hadn't brought down sufficient sweaters that I was shivering all the time. This was purposeful to keep you awake until 7 every night and the trial went on on Saturdays as well. He never let up for a second.

Mr. Pollak: How did you get your witnesses ready?

Judge Wald: Well, first of all, for most of them, we already had depositions. Then we had them come down a day ahead of time to be prepared.

Mr. Pollak: Somebody else worked with them while you were in the courtroom?

Judge Wald: We would either do it at night or spell each other during the day.

Mr. Pollak: At night, after 7?

Judge Wald: We stayed up into the wee hours every night. But it got done. There was a constant back and forth with the witnesses, too. You were going to the airport, back and forth, usually driving from Dallas. It was heavy duty but exciting, fun, and the trial was going our way. It was great. Larry York was good sometimes but the facts he had to work with were terrible. This, I guess, was the most intense litigating experience I had. It was great fun but you had to be careful 'cause it could overwhelm you. You got so excited, you know, when you got a right answer out of somebody, or when you avoided a wrong answer that they were clearly headed toward. I began to understand how litigators could block everything in their lives out, rise or fall, live or die, with what happened in the courtroom each day.

We started off slow and I remember Justice turned to Steve Bercu after the first witness

and said in his Southern accent (Steve had no big time litigating experience either; he was a Legal Services lawyer), "Counsel, you will have to learn to woodshed your witnesses if you're ever gonna get through this trial." We were all worried that night . . . but we had things going for us: the kid witnesses were great. I mean, they deserve a lot of credit in retrospect, these kids had to go back to these institutions, and I suppose some people might say we put them at risk but in the end, it was worth it for their sake; they were so believable, especially the ones who had been maltreated. At one point in the middle of the trial, Judge Justice, at our behest, issued a decree that the juvenile inmates wouldn't be taken back to Mountainview which was the really cruel institution, but that they would be housed at one of the other institutions until the trial was over, because we were really afraid for their safety. Our experts also were great, especially Gisela. She apparently stood out in the judge's mind when Larry York leaned over her and asked, "How much are you being paid to come here," and she said, "Nothing but my plane fare."

Mr. Pollak: This was being tried to the judge?

Judge Wald: Yes. It was a Section 1983 civil rights action. It took about four to five weeks to get the plaintiffs' whole case on. We had very ambitious notions for a decree. This was back in the heyday of prison reform and people were not that worried yet about federal judges supervising the institutions. This was a whole state system, too. There were five institutions. At the end of our case, the state started to put on their case, and then something happened. It was the fifth week. They stood up and said, "We're not going to put on any case," and the judge kept saying in amazement, "You understand what the repercussions are? I've heard five weeks of steady testimony favoring the plaintiffs. You're not going to put on a case of your own?" They said, "No." So, at that point, the head of the Texas Youth Agency resigned and was

replaced by one of the younger people running one of the newer institutions that we had come to like and know, Ron Jackson, who seemed to be much more progressive.

So, we waited a couple months and Justice came out with a decree which ruled in our favor on all the findings but said, "I want you to sit down and work out a decree with the Texas Youth Authority." So we didn't get a rousing mandate to change. We got an order sit down and reason, which we did for another year.

Mr. Pollak: That was a lifetime work –

Judge Wald: For another year we negotiated and it was not that productive. It was clear that despite Ron Jackson, who was a good guy, they were still dragging their heels and, in a sense, they wanted to retry the whole case again. It was as though we were back to square one, or at least it seemed that way. There was an interim decree to stop the cruelty. In fact, they closed down one institution. They decided the culture was so terrible there, they just closed it down. But, on all the other fronts, we made progress very slowly; I did that negotiating for a year and a half. Finally, we got a kind of consent decree and then its implementation got stymied. By this time – we were now up to '77 – I was leaving to go into the Carter administration and the project put somebody else on it and continued to monitor the decree. They finally reached the point where they agreed enough progress had been made. Just a couple years ago, in the mid-'80s, they dismissed the case. I'm told the institutional picture is much better.

Mr. Pollak: A major activity of your life?

Judge Wald: It's been a big part. I don't know that the Supreme Court would ever endorse it these days, but it became a leading case in the juvenile field.

Now, Steve, I think maybe we should stop. I'll mention two other things I was doing in

the '70s and then I'm not sure but that we should call it a day. Just so they're on the record.

There was a seven-year effort by the Institute of Judicial Administration and the ABA in the form of a joint commission on juvenile justice standards. It was led by Judge Irving Kaufman, who really gave it his all.

Mr. Pollak: Yes he does. I've had that experience with him on federal juries.

Judge Wald: He pushed this project through the ABA and I worked extremely hard on it. I was on the Executive Committee of the Commission, and I worked on every line of every volume. It resulted in something like 15 or 17 volumes that went all the way through the ABA House of Delegates. Only one did not get through – the PINS volume which was still a good resource – but it was just so controversial with some groups. We got everything else through. They're still standard works. I don't say we've revolutionized the juvenile system but I think, on the whole, it was a commendable effort. I worked very hard on that. Janet Reno was also on the commission.

I also worked during this period on the Carnegie Council for Children which was a more broad, sociological kind of study of the needs of children in the '70s. Ken Kenniston headed it; Marian Wright Edelman was on it; I was on it. It resulted in a report. I can say candidly I don't know that it's made that big a dent, but it was an interesting group. And, in the course of that, I worked some with Hillary Rodham Clinton.

Mr. Pollak: You did?

Judge Wald: She was then Hillary Rodham. She was on the staff of the Carnegie Commission. I did not know Bill Clinton. He was still at Yale. She was one year ahead of him. They were not married but we all knew from Hillary that he was going to go down to Arkansas

and become Governor and someday President. Hillary, who's gotten some flack for her children's rights views, was writing at the same time I was in this field, and we knew each other and worked together a bit.

Mr. Pollak: What was the focus of the Carnegie Council for Children effort?

Judge Wald: The needs of children and family. We produced a book called *All Our Children*.

Mr. Pollak: It must have been a take-off for Marian Wright's Children's Defense Fund.

Judge Wald: Well, she was already into that.

Mr. Pollak: She was? I see. That's what brought her to the Commission?

Judge Wald: She got a lot of her funding from Carnegie. For me the continued focus on juvenile reform began back in the days of the Crime Commission, worked itself through Legal Services, through the public interest law time, and through the two major outside activities that I was working on in the 1970s.

I think that would bring me up to 1976.

Mr. Pollak: And the election and then your move into the federal government?

Well, you've done well but I think that for a thought as you go towards your holiday – the question I would like to put to you on this still turning record, as you look back on it, you had this slice of life, then, from the time as you move back from your children through '76 –

Judge Wald: Well, I went on into the federal government –