April 6, 1993

This is the fourth 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, April 6, 1993, commencing at 9:30 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: You were going to speak about your experiences as Chief Judge of the United States Court of Appeals for the District of Columbia Circuit. What was the period of your chief judgeship?

Judge Wald: It began in July of 1986 and lasted until mid-January 1991. Let me give a little bit of background on chief judgeships. In my time as a lawyer, Dave Bazelon was the Chief Judge for around 15 years. He went from the early '60s when he became Chief Judge, until he stepped down in 1978 in order to let Skelly Wright become Chief Judge. Skelly would not have been able to become Chief Judge a year or two later because he would have been over the 70 year mark. Dave did step down and Skelly had about two years as Chief Judge. Skelly was the Chief Judge when I came on the court.

After I had been on the court about a year or so, he stepped down when his 70th birthday came and Carl McGowan was Chief Judge, but only for five months. Carl McGowan became 70 after about five or six months, so it was really more of a symbolic chief judgeship, although I think he would have been a fine Chief had he been allowed to remain longer.

Then Spottswood Robinson was Chief Judge for approximately five years between 1981 and 1986. He stepped down when he became 70 by operation of law. As you know, the statute now is that you cannot become chief judge if you are 65 or over, and you can only stay until you

are age 70. Even within those age parameters, you can only stay for one term of seven years.

I was the most senior person on the court after Spottswood. When I became Chief Judge, I had been on the court for seven years. That's on the low side for most Chief Judges, but probably not unprecedented. However, I didn't feel unprepared in the sense that I had been here seven years and actually for a year or so, maybe a year and a half, before I became Chief Judge, I was doing a lot of the routine Chief Judge things. Spotts had had a series of illnesses –

Mr. Pollak: What do you consider being prepared to be Chief Judge?

Judge Wald: I think being prepared is understanding how the court operates. You can have some brilliant ideas about what you want to change. Courts are slow-moving institutions by and large, and what we do is pretty much set out for us. We're not like the executive or the legislature, we don't go off on brilliant new policy-making initiatives. We can make incremental changes in the way we do things that may make the operation more efficient. But we're not going to be doing something completely different from year to year. We're not going to be changing the health care system or the economic system, so I think knowing how the court operates makes you feel reasonably comfortable, knowing the people in the support structure of the court, in the clerk's office. You may want to change some things, but just knowing the personnel, who does what in the clerk's office, who does what in the circuit executive's office, the district judges downstairs, how our court relates administratively to the district court is vital before you do anything. I think in that sense, being around the court for several years before, you don't feel as though you're walking in the door to a brand new job.

In my case, Spotts had been very gracious, a year or two before, to make sure that I was brought into any meetings that he had in which he was acting as Chief Judge. Actually, I took

some of the work burden off of him. I did a lot of the routine orders and some other things for a year or two before becoming Chief Judge.

When the exact date came, the way these things happen in the judiciary, there's no ceremony or anything, at least we don't have it in this circuit, and I think that's a good thing. There are some circuits which have a big to-do when one Chief Judge steps down, the next steps up, they have a little coronation of sorts. We could do that, and the question has been raised whether we should. I somehow like the notion, and it certainly follows through with the precedent that I inherited, of not doing that. One day one person is Chief Judge and the next day the next person is Chief Judge and life goes on. I think it has a certain amount of dignity that way. Spotts was always a "to the letter of the law" kind of person, one day he was Chief Judge and the next day he wasn't. That next day, they started delivering everything to my desk instead of his. As I say, it was one of those things where it felt sort of natural moving from one phase to another.

Mr. Pollak: Certainly a judge must wait a certain number of years to become at ease with hearing, deciding, writing opinions in cases before assuming additional burdens of the chief judgeship. Is that a factor?

Judge Wald: I'm not sure. What I'm always surprised at is with what energy and enthusiasm new judges jump in. In fact, it seems that they are much more aggressive in their early years. There's usually a pattern of new judges asking for *en banc* on many more cases than some of us older types who kind of pick our shots very carefully and realize that there are years and years and cases and cases and so – I have never noticed any reticence on the part of any of our newer judges to jump in as far as case deciding goes. Rarely would you have a chief judge

who just got appointed to the court because it is done by seniority.

Actually, I think seniority is probably the best way. This is not to say that on occasion you won't get some hot rods as Chief Judges and then some very laid back types as Chief Judges, but the nature of the court is that we deal with each other so intensively and on such substantive issues, that it's better the Chief Judge be selected objectively. If you had a popular election, which I think the Tax Court does, and there are also state courts where the judges elect their chief judge, I think it would cause a lot more dissension, polarization, politicization of the court than everybody knowing that X will become Chief Judge, and the reason that "Y didn't" was simply that the years didn't work out mathematically. So there's neither the anointed aspect to a Chief Judge, nor the rejected aspect to somebody who doesn't become Chief Judge.

The pattern is occasionally altered. Sometimes a Chief Judge steps down early, which I did, in order that the person coming along next, who would not be able to become Chief Judge because of age disqualification, gets a shot at it. As I say, Bazelon had done that for Skelly and there are several other precedents. Bill Feinberg did that for Jim Oakes in the Second Circuit. I ended up cutting off two and a half years at the end of my term for Abner Mikva so that he could take it just before his 65th birthday.

The reason I did it, I assume it's the reason most people do it, is out of a sense of – fairness is not exactly the right word, but something like that. We came on the court at the same time. It was really the luck of the draw that I happened to be confirmed first and had a month or two seniority. I think early on I said to Mikva, of course I will do this. I felt I should. It was the right thing to do. I also said I was going to do it and although it couldn't be enforced, you just don't go back on your word.

I have to tell you, I really liked being Chief Judge and I did part with it with some sadness, certainly I had mixed feelings. I would have liked to stick around for the last two and a half years, but I think on balance it was the right thing to do. I would feel worse if I hadn't done it.

To get back to what actually happened when I was coming on, as I say, Spottswood Robinson, who was my predecessor, was a man of the law in the truest sense. He's spent enormous hours, here until 2:00 in the morning, working on his cases. I think it's no secret he took longer to get his cases out than most of us do. He put in an enormous amount of painstaking effort and that was where his heart really was, in parsing the law.

He did his judicial administration conscientiously, but I don't think it was a job that he loved. He told me in fact that he was really quite happy to be leaving. I think many times he felt it was more of an irritant interfering with his pursuit of what he really felt his primary function was.

As a result, when I became Chief Judge, there were a fair number of things sort of waiting to happen, waiting to be done. I'd like to think that I was able to take hold of many of them, right off the mark. To mention some of the things we did, we started a new case management plan at the tail end of Spotts' term, but got it really going once I became Chief Judge. Harry Edwards was very good at this kind of stuff conceptually. He'd been head of a committee that worked up this new case management plan which we've been operating with since, and I think by and large it has served us well. I'm sure there are always glitches, but it had some good innovative factors. What it did was move the argument calendar scheduling up so that people knew, when they filed an appeal, roughly when they were going to get to oral argument. The briefing schedule was also pushed forward so that rather than doing the briefs right away and having them sit on a shelf for

months before the oral argument, your briefs were not due until just before the oral argument.

There's a window period there for people to file the motions, preliminary motions, like motions to dismiss, things that might throw the whole case out. We even started telling people, which we still do and it really hasn't worked to our disadvantage, who their panel is very early in the game.

There was some worry that lawyers would try to argue too much ad hominem (or ad womanum) once they knew the panel, but outside of finding a lot of cases written by judges on the panel cited in the briefs, we really haven't found that to be too much of a problem. I think lawyers like it. At least that's the feedback we get. I don't think anything suffers. In fact, we had hoped that when people saw who was on the panel early, there might be a bigger settlement rate. It's turned out not to be true, either insofar as we can separate out that factor from things like the introduction of the mediation program and other things that might affect the settlement rate. It doesn't seem to have had any effect. We changed our sitting dates, we changed the pattern of many of the other parts of our operation, including a much, much greater emphasis on the Chief Staff Counsel's office. It used to be called Motions Panel in the early days of the court when I was here. Now it's called Special Panel duty. Originally, it included only motion for stays and the kind of technical motions like time extensions that come up with cases. If you were sitting that week, you and the other members of your panel would get a bunch of those motions and nobody paid much special attention to them. You kind of did them one day before or after the panel sitting. There were motions clerks who were like law clerks, young people just out of law school who had good records but for one reason or another had not been selected to be chambers clerks, who drafted memoranda and orders for the motions.

We changed that operation to make the Special Panel much more the focus of dispositions and a more important part of the entire appeal process. First of all, we now take people who have had a couple years of experience either in the government, or sometimes in private practice, and we have 10 or 11 staff attorneys. Another thing, we do a lot more dispositions up front with the Special Panel. Three judges, the same three judges, sit on Special Panels for two months at a time and then in the summertime we adjust for vacations, but there's always a Special Panel going on, and it's usually going for a period of two months at a time. There's some regularity to it. The Special Panel meets every couple of weeks and we not only now do motions, which we always did, but we now do summary dispositions, summary affirmances and summary reversals and we do these threshold motions that come in in the first 45-day window period, motions to dismiss.

It's sizable work. I'm on Special Panel right now and last week we had a conference that disposed of 30-35 matters. They're more carefully done now, I think. The court law clerks were very good, but the whole thrust of the operation was not as professional as it is now.

Mr. Pollak: Now you have two to three experienced lawyers all under Mark Langer, the Staff Counsel?

Judge Wald: Right. He has two excellent assistants, Marty Tomich, who has years of experience as a public defender, and Gail Reizenstein, who was over in EEOC. It's much more of a professional operation. It's also turned out to be a good place for young mothers to work. While I was Chief, Mark Langer came up with the idea that we try splitting some of the jobs, because it is the kind of work that, except for the occasional emergency motion, you really can plan your time around.

Mr. Pollak: So you may have two people filling one job.

Judge Wald: We've been doing that now for several years. It works out. At one point, I think it's still true, we had four young mothers splitting two full-time jobs. My guess is we're getting more than double, each one of the four is probably doing two-thirds of a full-time job.

Mr. Pollak: On summary dispositions, do you write opinions?

Judge Wald: On summary dispositions, we always write something, whether it's a published opinion or not will depend upon whether any new law is involved; usually it won't be. There are occasional published opinions that come out of this kind of practice.

One interesting thing that's emerged in the new plan is that the government, which is a prime litigator in this circuit, has gotten a lot more of its cases disposed of up front. In all frankness, there are a lot of *pro se* cases that aren't going to go any place. We always look and hope that we will find the *Gideon* one in there, but most of them are not *Gideon* ones. Most of them are subject to fairly prompt disposition. Our staff lawyers do not – I assure you – give them the back of their hand; they really look carefully. In most cases, there isn't anything there. Now the government doesn't have to drag them on to some kind of a merits hearing. They can move for summary affirmance and usually get it. I don't have the figures in front of me, but at one point we were disposing of up to 500 or 600 cases, 700 cases a year in the Special Panel.

That's turned out to be a very important part of our operation, but it sort of shifted the balance. The notion is that you will dispose of open-and-shut cases there rather than carrying them onto the merits calendar. Therefore, the merits calendar will be reserved for the cases which, pretty much, you're sure have real substantive issues in them, and it will be easier for

those cases to get onto the merits calendar because they won't have been shoved aside by some of the other less debatable cases. It's a tracking system, basically.

Mr. Pollak: I have the feeling that this whole bag of reforms that you've been describing – changing the calendaring process – all serves to point up the more major cases which the court actually calendars for oral argument and the relevance of the briefs which are not out of date.

Judge Wald: One of the things that our judges were getting increasingly irritated about, that led Harry Edwards and this committee into coming up with some of these reforms was that briefs were filed six, seven months ahead of the oral argument and things would be happening in the interim. As you know, if something happens after you file your last brief, you have to file one of these yellow supplementary briefs (they have a yellow cover). We were getting truckloads of the yellow briefs on top of the regular briefs and it was annoying. As soon as you put down the initial brief, there were three yellow briefs to catch up on. That kind of thing has pretty much been eliminated. The reply briefs now are generally just due about a couple weeks before the argument.

At any rate, it took us a couple of years to work into this system. We're always fine-tuning it of course. As I say, I give Harry a great deal of credit, but we worked on it together and we put it into effect when I came in as Chief. The amount of time that it takes for a case to go through the court of appeals is actually a function of many factors, but at least for a period, we were getting cases out from the time of docketing to time of disposition at a faster rate.

Another big factor in the speed-up is the advent of a lot of new, relatively young, enthusiastic judges. In the period I've been on the court, there have been at least 15 switch overs.

But just during the period that I was Chief Judge, there were seven or eight new judges in just those four and a half years. So every year, we had a couple of new judges.

Mr. Pollak: And your experience is that the newer judges move it?

Judge Wald: Yes, in general. Certainly they tend to be faster than the older generation of judges which sort of ended with Spotts. I think Mikva, myself, Edwards and Ruth Ginsburg will move as fast as anybody, as any of the newer judges. There was a widespread belief on the court that the most important thing about judging was the kind of scholarly opinions that you produced. Sometimes, although very laudable, that kind of feeling results in no sense of urgency. There's a little residue of that still on the court. You had a sense that some judges didn't always think, I'm sitting on somebody else's case. These are real life people that need a real life dispute settled. They need to go on with their lives and it is important to them that they know what the answer is here, be it a little case or be it a big case affecting industry or consumers. There wasn't always that sense. It was, rather, if we have to take two years or even more to get this thing really settled in a way that's intellectually satisfying, then so be it.

My feeling always was that if the Supreme Court can get all its opinions out by July 1st, so can we. One should at least make an effort to get the opinions out by the beginning of the next term. I know how frustrated we were during the many years when I was a member of the bar with having cases hanging on a couple of years. That really doesn't happen anymore. It would be the rarest case that an appeal would be around that long anymore; it would mean we'd been waiting on a Supreme Court decision we knew was pending or a question had been certified to a state court. Even the biggest, what we call our complex cases, all come out within usually five, six, seven months.

That's another thing I didn't mention about our case management plan. We now have three tracks. A summary track, the regular merits track and then we have something called the complex track, which is an interesting innovation. This track consists of really big cases, maybe a dozen cases a year. These huge cases usually deal with regulations that take up 50 pages of the Federal Register and they come up primarily in the environmental and energy fields; a few extremely complex white collar criminal cases also get put in this track. A panel is picked at the very beginning, i.e., when the appeal is docketed to hear the case, again by random luck, but it represents duty over and above the regular merits and special panels. A panel is picked and that panel manages that complex case from beginning to end. In other words, those cases tend to create a lot of pretrial, pre-argument motions and scheduling problems and disputes about what goes in the appendix. The same panel manages all that and eventually sets the case for argument. Those arguments often go on for hours and hours and hours because they are set specially and because the cases tend to be so big. They're not confined to 15 minutes or half an hour. We've had many oral arguments of several hours and in one case it lasted two days.

Mr. Pollak: Do you recall the two-day case?

Judge Wald: Yes. I recall the two-day case; your firm was involved in it. It involved the Surface Mining Act. Tom Flannery downstairs had sat three years on a set of regulations which was just enormous. By the time we got it there was something like 46 separate statutory issues, none of them frivolous. There were standing issues all over the place. There were federalism issues too and your esteemed senior partner, Warner Gardner, argued for the industry. In each issue there were three parties--industry--the environmentalists and the government. We had scheduled a long day of argument, maybe 4 or 5 hours. There were some

important standing issues involving the status of some of the challengers and that, of course, in this court increasingly has become a focus for all kinds of internal disputes, legal disputes about who has standing to sue.

At any rate, we were arguing standing, and I asked the government lawyer a few questions. I considered them what you call "soft" lobby questions to try to establish something on the record, since the government was not opposing standing. He looked at me sort of peculiarly and I thought, What is it? Am I not making myself clear? And then suddenly he just keeled over in the courtroom. He went down and hit his head and the whole place went into shock. I and the other judges rushed down from the bench. I was presiding. He was out cold. At that point, we said something ludicrous, like, "Is there a doctor in the house?" It was a very crowded courtroom. It turned out there was a young lawyer from the Interior Department who had learned how to give resuscitation in the Viet Nam war. Meanwhile, I said to the courtroom deputy, "Call 911," at which point she said it's busy. So I sent two law clerks to two different phones and we ended up with two ambulances. The young man who was attempting to take his pulse said, "I can't find any pulse." When the ambulance did get here, the Clerk of Court rode over to the hospital in the ambulance with him. I attempted to locate a doctor, his doctor, myself by paging Georgetown Hospital. This is all going on in the courtroom. He had had a minor heart attack and he recovered and came back and thanked us all.

At that point, I decided we needed a protocol for emergencies in the courtroom and so we installed one. What exactly everyone should do in a situation like that? I haven't been present, but there have been a couple of other people who fainted during oral argument. In their cases it was usually either nervousness or heat prostration.

Mr. Pollak: We all worry about it as you stand up –

Judge Wald: Yes. It was in the middle of that complex case. That young man did not come back. We rescheduled that oral argument. That was a two-day oral argument.

These complex cases sometimes end up in opinions 100-150 pages because they have so many issues in them. We evolved a technique now which is that in most of those cases we split the writing chores among all the judges on the panel. If one judge should write the opinion, it would take that judge and his or her law clerks the whole year practically. So almost invariably the panel splits up the opinion and that's why sometimes you see these per curiams and there's a little star down there and it will say Judge X wrote parts 1, 2 and 3. You'd have one law clerk and yourself tied up for months on one opinion otherwise. This way, the clerks work together. They get together, we have a conference, we assign out parts of it and the clerks get together and make sure the whole thing is logistically and stylewise put together and these really quite big cases get out promptly.

Mr. Pollak: When you are sitting on a case of that nature, long argument, potential of splitting up the issues for opinion writing, what do you do to retain what you want out of the argument? What's your procedure and do you use the recording, do your clerks use the recording of the argument?

Judge Wald: Often they do. This is the way I operate and it's probably similar to what most judges do. I can't take any kind of decent notes while I'm presiding because I'm senior now on any panel unless Mikva is presiding. You're watching the lights, you're watching the various speakers. You're listening to the content, you're participating in the questions, so I don't even try to take notes. My law clerk, whoever's assigned to the case, generally takes notes. We

do use the recording, especially in any complex case or especially in any case where the lawyer may have said something that we want to retain, whether it was a concession or something that hadn't been fully explained in the briefs.

We had this one really bad experience where the recording machine didn't work and the lawyer had made a concession. We had to reconstruct the concession from notes. You learn from experience. After that case, we instituted another new procedure and that is before any hearing now, the courtroom deputy has to go in there and do a trial run on the machine and make sure that it's operating. It sounds simple, but we really had this big, complicated environmental case and a very important point was made at argument and when we went to listen to it, the whole thing was blank. We do use the tape. Not to say we listen to a whole tape for every argument, but we do use it when we need to.

We got a new microphone system in while I was Chief Judge and so the taping is better. It used to be you could hardly hear the thing, and now it's pretty good.

Mr. Pollak: Did you restaff or change staff in any way that you want to comment on?

Judge Wald: I'm going to. After I had been here about a year, we had to get a new Clerk of Court. There was a search for that. We ended up with Connie Dupré, who had been a clerk to Judge Edgerton a long time ago, and more recently in the EEOC. She made a lot of changes in the clerk's office too. We got a management study of the clerk's office which was done during the period that we had the search committee going, which resulted in a lot of changing of the paper flow. I've got to tell you, overall, having been on the court for 14 years, and having been in the government for a couple years before that, it seems to me that you have so

many changes in organization every time a new head takes over that I'm never sure whether you're really making progress or just spinning wheels. We went through that process. I think the best personnel decision that I ever made was the selection of our present Circuit Executive, Linda Finkelstein.

Actually, there'd been a Circuit Executive who'd been chosen I think in Spotts' last year, Karen Knab, who left after a year, year and a half, and went on to become an administrator in a private law firm. We had some excellent candidates for her replacement and we were hard-pressed, actually, to make the choice. The more traditional candidate was a very excellent young man who was the Assistant Circuit Executive in another Circuit and he was actually recommended by the members of the search committee. Linda Finkelstein was also a candidate. I'd known Linda a little bit when she worked for Sterling Tucker on the City Council, and then she ran the mediation programs over at Superior Court. She was also active in several women's groups around town. I knew her, I wasn't an intimate friend of hers. But I just had a sixth sense that she wanted to succeed so badly and she wanted so much to make the move over to this court, that she would be a wow. Sometimes you just get that sense that even if somebody's paper qualifications are not necessarily the absolute best of the bunch or somebody else might look better on paper, you get that gut instinct that you want to go with the person who will give it everything they've got. I had that sense with Linda and I think that was probably the best personnel decision I ever made – to take her, not over anyone's objections, because other people liked her too, but they had picked the more traditional candidate. She turned out to be a lifesaver for me. Not only did she become a good friend, but she just sort of took over an awful lot of loose ends that were hanging, when her predecessor left. Linda turned out to be just terrific.

Probably the biggest single thing that she and I had to work on immediately was the courthouse cafeteria. Food service sounds very prosaic, but as it turned out, I think I spent more time as a Chief Judge on that project than anything else. The old cafeteria vendor had just said, "No more, no way, we're losing money, etc." We couldn't get any bids or anyone to come in to take it over. GSA couldn't care less. They didn't think we had enough people in the building to merit a cafeteria. "Why couldn't we go to the Labor Department or Superior Court?" But, you know, there are judges, there are jurors, witnesses who need someplace to eat. The judges also wanted to keep their dining room upstairs. But it was really an effort to get the money. Linda immediately established contacts with the Administrative Office even though she hadn't worked in the federal system before. She was able over a period of two years to do things like find pockets of money up there, establish relationships, and believe me, you do need to be a political operative to work with the Administrative Office. You have to know who's got money left in the budget. They have to like you, tell you about the money that's left in this pocket or that one. She went out and found a wonderful woman who is a private consultant on cafeteria design, and got the money from the AO to hire her.

We also managed not to go through the GSA procurement process which is murderous. We got the advice of a very fine procurement lawyer who is on an advisory committee here at the court who helped advise us on how to run our own procurement. Through a long series of almost impossible obstacles, which I certainly couldn't have hurdled without Linda, including many meetings in which Aubrey Robinson, the Chief Judge of the District Court, who was a terrific help, would just stare down all these GSA leisure suit-types and tell them flatly that we <u>were</u> going to have a cafeteria; actually we did end up with one. It might not be the best cafeteria in

the world, but I've got tell you, it beats a couple of vending machines which was all we had when I took over with cockroaches running all over them. It took just thousands and thousands of hours.

Before Linda, her predecessors had just thrown up their hands. They didn't leave me with any hope, with any leads, with anything. She created the thing out of whole cloth. Anyway, that was only one of her contributions. If I did nothing else during my term, I had the good sense to hire her.

One of the other things I feel good about was introducing the mediation program in the court of appeals. Linda and her crew also worked with the district court to introduce mediation and neutral evaluation programs down there. As it turned out, with the deluge of criminal cases which began to come in toward the end of my term as Chief Judge and has escalated since, and which has overwhelmed the district court judges in terms of their being able to get to their civil caseload, the ADR (Alternative Dispute Resolution) program turned out to be particularly valuable. Seven hundred cases have gone through the district court's mediation program, so far. Our program in the court of appeals is smaller and clearly our chances on appeal of successfully mediating a case are smaller as well than if you get the case at the very beginning in the district court. Even so, we are still maintaining a very respectable settlement rate of about 30 percent of the cases that go into our program. I think lawyers are pleased with the program. The government started out being really very skeptical and came into it practically kicking and screaming, and now they're enthusiastic participants. I think we did some pioneering work; people had always said, "Oh, you can never have a mediation program in your court with the government as the litigant, the government has no incentive to sue and you have all these

policy-type cases. You don't have commercial cases to the extent the Second Circuit does." But increasingly we're finding more and more kinds of cases that are amenable to mediation.

I'll just mention a few other things very briefly that happened during my period as Chief Judge. We got the history of the court going and that in turn under Ruth Ginsburg spawned the Historical Society, which created this oral history project. The basic written history of the court is about two-thirds done. It should be coming out in a couple of years. There were other small things. The D.C. Circuit really was not in the forefront of court administration. We didn't even have annual reports. You don't remember this, but I initiated the court's first published annual report.

Another thing that we made great progress in, this probably would have come inevitably, but Linda's certainly responsible for keeping it on track, was automation. Before 1986, only two judges in the courthouse had a computer. Spotts, strangely enough, was one of them. Again, by begging, borrowing and stealing (not literally stealing) at the AO for several years we were able to gradually get everybody computers, including law clerks. Now we are one of the pilot courts for computer networking.

Insofar as there are tangible legacies left of being a Chief Judge, those are some of them.

Being Chief Judge also means that you represent your court in the bigger judiciary picture. That meant being part of the U.S. Judicial Conference, which was certainly an interesting experience. I knew some of the other judges just from going to other circuits for their conferences, but you really get to know them better in the Judicial Conference.

Mr. Pollak: Have you sat on other circuits?

Judge Wald: None. Since I've been here, no active judge on our court has been

allowed to sit elsewhere.

Mr. Pollak: You've got too much to do here?

Judge Wald: We don't really have too much to do here. It's one of those things where the ground rules are laid by the Chief Justice and for many years now active judges are allowed to sit in other circuits only under special circumstances. Senior judges can move around, but active judges are not allowed to sit outside their circuit unless the circuit is in a position where it never borrows from any other court, either. For many years we did have visiting judges during periods when we had vacancies. We really haven't had them for the past couple of years. Even so, our judges can't go elsewhere. Once in a while an exception is made like when Florida had a backlog crisis on drug cases, and a call for help went out and some of our district judges, like Lou Oberdorfer, went down and tried some drug cases there, or if some circuit has all of its judges disqualified they may have to bring in out-of-circuit judges for one case, but I can't say, “Gee,” to Cliff Wallace on the Ninth Circuit, "I'd like to come out there."

A couple of observations on the Judicial Conference, which is the governing body of the entire judiciary. The first meeting I attended was Warren Burger's last meeting as Chief Justice. It was a very, kind of folksy, slow, ambling meeting. People got up and talked and they rambled a little bit. It lasted two and a half days. I can't remember there being anything critical on the agenda.

The next one I went to, the transition had taken place and Bill Rehnquist had become Chief Justice. It was really quite a different operation. It lasted only one day. He only stayed there for half a day and then turned it over to whoever was Chair of the Executive Committee. Bill Feinberg, from the Second Circuit, would take over the rest of the day. There were two

calendars. A consent calendar and an argument calendar and if you didn't call in a week ahead of time and take something off the consent calendar, it would never come up for discussion. Talk about lawyers preparing for oral argument. You better know exactly what you were going to say and be ready to say it and say it very quickly and sit down because if you started to ramble, the Chief would tell you to sit down. I remember in the first meeting one of the old buddies of Warren Burger got up and began to talk. I think he was like 40 seconds into his thing when the Chief Justice leaned over to him and said, "Will you kindly say what you want to say and sit down." And this poor old guy, he was not used to being treated that way. Rehnquist was really a very efficient chair, sometimes a bit sharp. He made his views known quite well, but on the whole he was fair in terms of letting viewpoints be expressed. He was out of there by noon. We were out of there by 3:00 or 4:00 in the afternoon and believe me the old buddy, buddy stuff was quickly gone.

Let me mention the two most important, most controversial things that happened during the Judicial Conferences that I went to. By and large, most of the work of the Conference is done in committees and the committee reports are by and large approved. A lot of the Conference business is approving requests for new judgeships or deals with the budget. We did have a big fight over habeas corpus reform and the Powell Committee report. At the time I came in 1986 and during the years I was in the Conference between 1986 and 1991, Carter appointees were just beginning to ascend to chief judgeships. I was among the first Carterites that became a Chief Judge, but gradually, several more came along in the next few years.

So you were getting Carter liberals becoming the Chief Judges of the circuits, who, of course, are members of the Conference. The other members of the Conference are Chief Judges

from one of the district courts inside each circuit. Many of them tended to be older and much more conservative. In the habeas corpus fight, the votes were pretty evenly divided between the circuit chief group that wanted to make several "liberalizing" amendments to the Powell report, and the district court judges who wanted to okay it as it was.

I was a member of the liberalizing group. So was Leon Higginbotham who was chief of the Third Circuit for a year. Bud Holloway, in the Tenth Circuit, was a member. Gil Merritt was a member. Don Lay in the Eighth Circuit, Ted Goodwin in the Ninth.

Mr. Pollak: Wasn't Merritt the Sixth Circuit?

Judge Wald: Yes. Jim Oakes in the Second Circuit and Sam Ervin and before him Harrison Winter, also in the Fourth Circuit, were all Carter appointees. So I say it was quite evenly divided and we actually won a couple of amendments on the habeas front, but then we had this strange situation where the vote would be maybe 14-13 in favor of our amendment. The Chief Justice would then vote himself, bringing the vote to a 14-14 tie and declare we lost because we didn't have a majority. He did that on three or four amendments. I'm told that the rules of the game allow that, but it seemed procedurally strange at the time.

We also had to vote on the recommendation for impeachment on Judge Alcee Hastings in the Eleventh Circuit, which was a tense experience. In general, I enjoyed the other Chief Judges. We generally met after each Judicial Conference and we'd pick one topic of court administration and exchange our experiences, whether it was judicial councils, case management or something.

Mr. Pollak: Did you learn from them?

Judge Wald: Yes. They were all gracious and interesting. Don Lay from the Eighth Circuit was a real leader and very liberal to boot. Everybody was very anxious to be

useful, to be helpful to other people. In general, I found them a very compatible bunch. The one other thing I'll say about judicial administration. I thought that Chief Justice Rehnquist did a very good thing in the beginning of his tenure in 1987-88. Most of the committees of the Judicial Conference under Chief Justice Burger, I think it's fair to say, consisted of a handpicked bunch of old-timers. The same people would show up on all the committees and they were sort of an old boys' network; there was no question about that. There were only two women who would appear on all the committees, and they were the same two. One was Cornelia Kennedy in the Sixth Circuit, very well liked by the Chief Justice, and then there was Amalya Kearse, a Black woman judge from the Second Circuit. For whatever reason, she and Cornelia appeared on several committees and no other woman ever got tapped for anything. When Rehnquist came in, he completely redid the committee structure. He did a good thing in the sense that he set up a general presumption that people would only serve on one committee for at most two terms. Some other people would get their chance to serve that way, and most committees would have a representative from each circuit on them.

Mr. Pollak: How long was a term?

Judge Wald: It depended on the committee, but usually a term was three years. Some of them are two. For instance, I got appointed to the Code of Conduct Committee, which I really enjoyed and they had completely reconstituted the committee so that there were five-year terms and three-year terms, and that I ended up with one five-year term. Some people had two three-year terms. The revamping of the committee structure did mean that there were far more people involved in the Conference committees. Still, if you look at the present committee membership, the important committees are headed by people that I think the Chief Justice feels

closer to than others. The pity of it is, I think there's some terrific people in the judiciary who aren't necessarily on exactly the same wavelength as the Chief and we don't get the benefit of their potential.

Mr. Pollak: Do you want to name any of them?

Judge Wald: Ruth Ginsburg has never been on a substantive committee. I think she's only been on the Bicentennial Celebration Committee. I feel lucky to have had that one term because the Code of Conduct Committee was important and I enjoyed it very much, but I never got any other committee assignments. I just think there's some very good people who have to find other ways to use their talents. You have to do something besides your job and you find other ways to use your talents. I'm not sure the government or the judiciary gets the full benefit of all our judges.

Given that any leader of any institution is always going to pick people he or she feels most comfortable with, whether it's philosophically or because he knows them through other networks, I don't know how that can be avoided. It's only a comment.

In the beginning, I thought women were totally unused. There were only two women on committees, Cornelia and Amalya. Rehnquist has improved that some. There are now a moderate number of women, still not as many as there should be, but there are a larger number. I also think the judicial institutions have really not kept pace – there are no women in any positions of power, authority, in either the Federal Judicial Center or the Administrative Office. Among the women, it's sort of a scandal.

Mr. Pollak: Has anybody said anything to Ralph?

Judge Wald: I haven't said it directly to Ralph, but I've talked with some other

people and I think the message has gotten through to Bill Schwarzer, for example, whom I like very much and who also has responsibility here. The only woman that's ever been at the Federal Judicial Center in a management position was Alice O'Donnell. She died last year.

Let me say a few words about the judicial council, the governing body of the circuit. The judicial council, by statute, is composed of an equal number of members of the circuit court and the district judges. That's recent, about two years ago, Congress legislated that. Before it was up to the circuit to decide what the balance was between district and circuit judges. That's very important because for many years before I as Chief Judge took over the council, all circuit judges were members but only a small group, I forgot whether it was 6 or 8, of district judges were members, so they were often out-voted. Not that everybody votes as a block. Now it's even.

What we do up here is we rotate council memberships between the judges on two-year terms. Downstairs the Chief Judge or a meeting of district judges decides who will be their council representatives. The council in each circuit is supposed to make any internal rules or regulations, sit on any appeals from the Chief Judge's dismissals of judicial complaints or conduct investigations of those he does not dismiss, and deal with anything else involving circuit governance that comes up.

Mr. Pollak: It did the Alcee Hastings thing in the 11th Circuit?

Judge Wald: Yes. We've never had anything that dramatic here. The Council became of increasing importance during the years I was Chief Judge, and has continued to be so. Aubrey Robinson was the Chief Judge of the District Court during the entire period of time I was Chief Judge. He was grandfathered by the legislation back in 1982 that gave the rest of us seven-year terms. He was already in place when I came on. Thus, his term transcended a whole decade.

I enjoyed very much working with Aubrey. I think we worked very well together. He was direct, to the point, he was supportive. We never really got into any turf fights and I think that what the district court needed, we tried to accommodate. He was understanding about it; he was reachable. He too felt, I think, that way about me. Aubrey liked administration, and, indeed, he had inherited a court that needed administering. Perhaps it had not been administered to its fullest before, so he set about doing what needed to be done and he enjoyed it. Either you like it or you don't. I liked it, he definitely liked it. I think he enjoyed the notion of getting things accomplished, getting an operation going, getting the cafeteria, producing results. He, of course, was the leader of his delegation to the council.

Now the AO and various parts of the Judicial Conference are encouraging councils to do much more of the work that courts did in isolation themselves, everything from space planning to automation, to become a much more centralized locus for that kind of planning, and some of that is happening here in this circuit too. We will always be a peculiar circuit in that we are all in one building. Judicial councils in other circuits, like the Ninth Circuit, have got to administer God knows how many dozens of district courts. Even the First Circuit which is small and a comparable size to us, where Steve Breyer is the Chief Judge, has several district courts out in the states; we have one trial court. The full potential of management by judicial councils will never come to fruition in our D.C. Federal courts because we can pick up the phone and call each other or see each other in the hallway. But even for us it's a useful mechanism for getting more formal things done.

Mr. Pollak: I have two questions about the chief judgeship. Maybe they relate to one another. The first is: Was it your experience that the Chief Judge has any role or function or actually in other ways influences other judges on the court substantively? And secondly, what is

the Chief Judge's role, or as you experienced it, in relation to *en banc* handling of cases.

Judge Wald: My experience is that Chief Judges have absolutely no influence in case outcomes over and above their own vote and powers of persuasion. I have never seen the likes of an Earl Warren or any other Chief Justice reputed to be able to bring the court together, in the D.C. Circuit. I have never seen a Chief Judge, be it Skelly, Spotts, myself or Mikva, able to use their status in any way to influence the results of cases. Maybe it's the culture here or maybe it's that this court is more sharply divided than some other courts, but I have never seen a Chief Judge perform any bringing-together function in substantive decisionmaking. I do think that in the way a Chief Judge presides over an *en banc* court or judges meetings, she can try to keep a climate that is free, at least, of personal nastiness or vendettas or incivilities; she can try to calm things down when the going gets rough. But in terms of creating consensus, bringing people along to your point of view because you're Chief Judge, I have never seen that happen. When the young judges come on this court, they already have their own point of view. I'm not suggesting that their views can't be changed, but I've never seen one of them vote with a Chief Judge because he or she was the Chief Judge.

You have to remember the period that I was Chief Judge. There were four of us Carter appointees and then counting the people that came and went like Bork, Scalia and Starr, there were 10 or 11 new appointments from a very different place on the philosophical spectrum than we were. It was not likely that they were going to look for some kind of role model in us. If anything, the most prominent or the most articulate spokesmen of the conservative point of view were the new appointees on the court. A Chief Judge is one vote, period. He or she just has the benefit of his or her own persuasiveness. A Chief Judge's function in an *en banc* is to preside and

try to make sure everybody has their say, it's just that. I know of no instance in Skelly's term, in Spotts' term, in my term, certainly in Ab's term, where warring factions have been brought together through the intercession of the Chief Judge. In fact, if you looked at the number of times the Chief Judge ends up on the dissenting point of view in the *en banc*, I think that would probably give you a pretty good clue. I do think that a Chief Judge has a duty to try to keep the waters as calm as possible, and certainly not to contribute to their roiling. We all know of instances that don't have to be named, in other courts where Chief Judges, if anything, have exacerbated factionalism by wielding power in arbitrary ways or making people feel they're excluded, which makes things worse. I don't think that's happened here.

There is of course the whole problem of trying to keep the administration of the court separate from the substantive differences between judges. I will say that most of my colleagues were very supportive administratively and there were only a few times where I felt perhaps the philosophical differences had spilled over into administration.

In one instance, though, the two did overlap. There was a move against using visiting judges. The neutral argument was made that if you have a split panel, and the visiting judge has to throw his or her weight on one side, you have a very shaky precedent because the visiting judge is off some place else. Nobody knows if that is a real precedent or the next time it will get knocked down: is it really the law? In the early days, the Chief Judge used to pretty much decide who were the visiting judges, and I have to admit in Bazelon's days, the visiting judges tended to be people he thought were likely to be very supportive of his views. There was some resentment about that.

During my period as Chief, when we did have some visiting judges, we always sent the

list around to all the judges and let them either add to it or, if they had any unfortunate experiences, subtract from it. So they were ones that were agreed upon by everybody, and their philosophical bents varied widely from Hugh Will of the Seventh Circuit to Alex Kozinski on the Ninth. I know Alex is an active judge, but he had some business where he had to be in the east and so the Chief Justice let him sit with us. But basically most of our judges didn't want any out-of-circuit judges participating in making our law.

The other issue that came up concerned judicial disclosure of affirmative action efforts. Way before I became Chief Judge, the Judicial Conference had adopted a resolution saying that courts – it was not absolutely mandatory language, but certainly was strong encouragement language – should file statistical affirmative action reports annually. How many people have you interviewed for jobs in each chambers, each court office, how many minorities, women, do you have, how many did you interview? That went along, and the reports were published in aggregate form by the AO, but nothing much happened. Then we had a really strong revolution a couple of years ago and certain judges said they thought it was an infringement upon their Article III rights to disclose such information. They didn't believe in the whole concept and they said we won't comply, and they didn't. So most of our reports, if you look at them, have these little stars down there saying this doesn't include the chambers of Judges X, Y and Z. The Administrative Office is scared of taking Article III judges on.

Let me talk briefly about two things, and then maybe we'll get into the cases.

One is, I don't know if I've emphasized the enormous importance in the life we lead here on the court of our law clerks. Not just for the duties they perform. They do perform a lot of important duties. But in some ways it's a unique kind of job that these bright young people

perform, who come directly from law school into positions of such responsibility. I do not mean, of course, that they make our decisions for us. But although I'm told there are still some holdouts, some certified geniuses like Judge Posner on the Seventh Circuit, and maybe other people, who write every word of their own opinions, that doesn't happen in most courts, not to my knowledge on ours. The clerks have a lot a responsibility, though not for writing every word of the opinions, because I think most final drafts end up reflecting a large portion of the judge, whether or not the judge takes somebody else's first draft and reworks it, or writes his own first draft and gets a lot of clerk input later on in the process. There's just no way we can do all the cases; we handle 120 cases a year apiece, and get it right most of the time without help. I know we make mistakes sometimes, but to get it right most of the time, get a hold of complex material, make sure you haven't omitted anything in the record, you really have to have hardworking and very, very bright law clerks. They also perform a socializing function in the court. We don't often call up another judge in chambers and say, Well, what do you think of the case we're going to hear two weeks from next Tuesday. You could; it just doesn't happen. But your law clerks will get information from other law clerks as to what's bothering them in that chambers, what they are worried about. By the time you go into oral argument, you have some sense of whether this is going to be a highly disputed case or not. You still get some surprises, but not as many as if the clerks weren't talking. And when you actually prepare a draft, very often the law clerk will get a lot of small things that are bothering other chambers worked out with the other law clerks, so that when the recipient judge writes a memorandum to another judge, it will be two paragraphs long, and it will just go after some very basic substantive point, not be filled with a lot of little things which can be worked out ahead of time by the clerks.

I think they are enormously important. I've been very lucky. I think every judge I know would say the same thing. It's fun to watch them. It's now into my 14th year and so I have my ex-clerks all over the place, in practice, academics and government. One of my early law clerks was Secretary of State Baker's number one deputy and ended up being the Deputy Chief of Staff in the White House in the past administration.

Mr. Pollak: Who was that?

Judge Wald: Bob Zoellick. On the other hand, I also have several clerks in policy jobs in the new administration. Nine or ten that are teaching in law schools, some are successful practitioners, some who've gone into other kinds of public service, a few have become legal service lawyers. It gives one a good feeling.

Mr. Pollak: What has been the division between men and women of your clerks, approximately?

Judge Wald: I've had a high percentage of women. It must be approaching half. I think there was only one year, through some freak – one of those years where we tried to manage the law clerk selection process, that I ended up with no women. Most of us pick our three law clerks on a package theory. You want to have some diversity among the three law clerks. I've always, except for that one crazy year, had one woman and often two out of the three. Even in that one crazy year, I made an offer to a woman, but she didn't take it. That's only one year out of all 14. There's no dearth of good women.

It's interesting. Most of my woman clerks have gone into teaching. I had one who has just become a partner at Miller, Cassidy; I have a couple in the government. An awful lot of them, I've watched go through the same thing I went through and my daughter is going through to

try to balance career and family. A really terrific woman law clerk I had in my first year here has been working eight years part time in the Justice Department while she brought up her three sons. I think now she'll graduate to full-time. A lot of those problems of women in balancing careers have not been solved as yet.

At any rate, the law clerks are very important because they really are the only people during the course of the year that you can speak freely and candidly to. So far, to my knowledge, I've never been betrayed. I lay down laws that anything I say to them, or if I get impatient with another judge or something, is absolutely confidential; such confidences are not clerk talk. Were I to find out that a confidence had been violated, that clerk would never be the recipient of any confidences again. You do work on things that consume you, consume your intellect, occasionally consume your emotions, that you are not able to share with other judges. Either they don't have the same cases or sometimes they are just different personalities that you wouldn't be that likely to form a close friendship with. The kind of camaraderie that you would get in a law firm or you would get in a government office or in a public interest office, you simply don't have.

Mr. Pollak: So you get it with your clerks?

Judge Wald: You can never get it entirely in this job. There's always going to be a difference in status and there's always going to be a difference in age, but it's the closest you can come.

Mr. Pollak: Do you change your clerks at the same time each year?

Judge Wald: Yes, in the summer.

Mr. Pollak: Is it an uncomfortable time when the new ones are in and you don't have that experience?

Judge Wald: It is but it's probably a good thing because you can't ever get totally dependent on them. Some of them you hate to see go, but of course, if they're really good, that means that it's more important for them to get out and be their own persons. Again, although I've never had anybody I had to fire, there are occasions when both of you are happy when the year is over. It doesn't quite work out the way you wanted.

Yes, there is that initial period each year of "getting to know" each other. It takes a month or two to figure out how their personalities mesh with you and also what they're good at. Some clerks can be very bright and are rotten writers, and after a while you know you're going to have to rewrite every word just to make it intelligible. Then, once in a while – and you cannot tell this ahead of time because the written work they give you has either been edited or you're too busy to read a 100 different manuscripts at interview time – sometimes you get a really good writer. I have one this year. She's terrific. She was Walter Dellinger's protege and she worked on the Hill. I had a Yale guy a few years back who had been an English teacher for six years and wrote like a gift from God. Other times, you will get these really nice kids who are bright but write a sentence which is the most obtuse thing, with clauses hanging out all over and their basic style is deadly boring. They never use an unusual or interesting word. Anyway, it takes you a while to get used to them. There are different kinds of law clerks. I'm not saying that one kind is bad or one kind is good. There's a very straight kind of law clerk that really just is interested in the workproduct, in doing the research, in getting ideas down and working everything through. And there's a kind of operational law clerk who's getting ready to operate in the big world, they pick up all the gossip in the corridors, they know everything that's going on in the courthouse, they have little ways of manipulating and dealing with people. You say, "Is the draft done yet, Joe, and he says, "I just

have to do this one source check," but it will be three days later before you get the draft in hand. You get used to all the little devices that have managed to get them through law school, served them well in the outer world. They are already into their operation mode. There's no question after you've had 40 or so clerks, if somebody asked you right off the top of your head to name the best six you could do it pronto; it doesn't mean that most of the others weren't very good. But there are always those rare ones whom you feel you've been privileged to have at your beck and call for a year – real talents.

Mr. Pollak: Are most of your clerks in their twenties, and does age make a difference?

Judge Wald: I've had several women in their thirties. Women who went to law school later in life. I must have had seven or eight women who tended to be on the older side. We'll talk about advocacy and then maybe the cases and then maybe we'll be done soon.

Mr. Pollak: I was just going to say that you might spread out advocacy to both oral advocacy and written advocacy, the relation between the two and also something about the human beings you've seen as advocates.

Judge Wald: Let me put your question in my perspective. Yesterday I got in the mail two requests. One from Martindale-Hubbell and one from the American College of Trial Lawyers asking me to rate two lawyers. I couldn't remember either one. That doesn't mean that they weren't great, and I'll go back and I'll try to find out the cases they worked on, but what I'm trying to say is that from a judge's point of view, only the most outstanding advocates stand out. When I used to argue a case, because I had worked so hard on the case, I had given it my all, I knew so much about it, I assumed that somehow the judges would be as caught up in that case as I was. It isn't and can't be true.

Mr. Pollak: I always assume the same thing.

Judge Wald: It sometimes came as a surprise to me as an advocate when you got – even from a good judge – a totally dumb question. I would think, Oh my God, how could you ask that question? But I now realize how it can happen. With 120 cases and two or three lawyers on each side, even with a few repeats, like the U.S. Attorneys, you have a hard time remembering them.

I would say in general the level of advocacy in the court of appeals is, except for some CJA lawyers who really are submarginal, generally good and competent. The government rarely sends in an incompetent person. It may send in a naive person once in a while, and he or she takes some hard licks from the questions, but it rarely sends in somebody who's incompetent. Same way with anybody who's got a stake in a civil case. But the number of advocates that you can remember when you look back over 10 years, people that stood out in a case, is not that great. Usually the outstanding performances come in high-powered cases where they throw in the absolute first team. Actually it may be those cases are the ones you're going to remember anyway and the lawyer gets a free memory ride in the case. There may be lots of splendid lawyers who by doing such a competent job made you think it wasn't an important case, and thereby won, and you're not going to remember them, but they attained their real goal.

I have a few general impressions. When I first came on the court, we really didn't see that many women advocates. In the beginning, when a woman advocate appeared before some of the older judges, they would refer to her, if she didn't speak loud enough, as "another whispering canary."

Mr. Pollak: I have to tell that to the Gender Bias Committee.

Judge Wald: Well, the poor souls are long since gone now. As the years have gone by, that's not true anymore. It's rarely that you don't see a woman either arguing or at least sitting at counsel table. Very few of them are whispering canaries anymore. That's a good thing. As a woman judge, one likes to think that having women on one side of the bench could be some source of encouragement toward getting more of them on the other side of the bench.

Actually, in the beginning, there was sometimes a tendency to play it that blatantly. If some counsel knew a woman was going to be on a panel, if they didn't have a woman to argue, they'd have a woman sit at the table anyway. Now I believe there are genuinely more women legitimately appearing at counsel table on these cases. In evaluating what I think is good advocacy, let me do oral first.

In a case of any significance, oral argument is very important because it's the last contact the judges have with a case before they go across the hall and vote. They may have read your brief two or three weeks before, along with all the other briefs they were reading for that session, 15 sets of briefs, one after the other. But when you get up there, you become the case. You are the living embodiment of the case, so that will be their main impression. People argue a lot about how often oral argument changes the outcome of the case. Most judges I know arrive at a figure which is somewhere in the vicinity of 10 or 15 percent. But in an even greater percentage of cases, oral argument makes a difference as to <u>how</u> the case gets disposed of. Cases that we thought we were going to dispose of with an order when we went in to argument, sometimes after oral argument end up with a full-scale opinion. Sometimes we think we can rely on one ground for decision and then that ground is dissipated in oral argument and we end up relying on another ground. Oral argument is satisfying in most cases to the judges for the following reasons and it's

necessary to them in a case of any significance.

You can get your preliminary tilt from reading the briefs, but you really need oral argument as a validation process. You can say, "Do I understand that you're saying that this is so? And what about this?" All the questions that a brief writer will purposely not answer in order to present his or her best case. In writing you can slide over a gap in your argument. We need the opportunity to get into that gap and see how meaningful it really is.

Mr. Pollak: The dentistry of oral argument.

Judge Wald: In your brief, you go from one sentence to another even if one doesn't logically follow the other. It's very hard to do that if somebody is really bearing down on you, pressing analogies on you in oral argument. The best oral arguers usually will concede a little, if some part of the argument isn't that good. Sometimes there are 15 arguments in a brief, and 12 of them really may not be that good. A lot of advocates, if they're good, will concede that this or that one isn't the best argument, or maybe there are two sides to that, and we're not really relying on that one.

The best ones also realize that the oral argument is for our benefit, not for theirs. It's not another showpiece for them to give a set oral argument, that their real function is to engage in a dialogue with us, to make us feel comfortable, or uncomfortable, about the lower court or agency decision. The best ones stand their ground. They don't wilt. You can tell right away when somebody is respectful but is telling you you're wrong. That's good; we are wrong sometimes. We sit on 15 cases in one session. We do get mixed up sometimes, we do miss something. We'd rather somebody straighten us out politely on oral argument than let us go ahead and then write one of those nasty petitions for rehearing saying this is the worst case ever decided in the history

of the court.

Mr. Pollak: Do you think that judges or yourself come to the bench with a point of view on the case?

Judge Wald: Yes.

Mr. Pollak: That's the result of doing the work necessary to get ready for argument?

Judge Wald: Yes. Not in every case, but in most. Let me tell you a little bit about the process that I use. Judges vary. I'll read the briefs. I usually try to read them several weeks ahead of time and before my law clerks read them. I read them and I take notes on them as if I were the only one who was going to be involved in the process. I put little notes to myself in parentheses like, Doesn't that contradict this? Then I put it aside, but I have to get through all 15 of those cases before argument week. Each law clerk will only have five cases to do. They go ahead and cover basically the same material. I don't talk to them about the case before they write their bench memos. I don't say, Well, you know, I think in X case I tend toward this. I make them go at it completely by themselves. Then they produce a bench memo and I read the bench memo, and sometimes it confirms what I thought, sometimes it goes the opposite way. Also, in the process, they will generally have done the corridor kind of stuff and talked to the law clerks in the other chambers and know not what the judge has to say, but what the law clerks are thinking. The day before oral argument we will talk out any differences and I will ask them if there's anything special they think ought to be asked at oral argument. There's usually no communication between the judges before argument. Not even the friendly ones.

You generally go in with a tilt after that process. There may be the occasional case where

you're genuinely pulled both ways, but you generally go in with a tilt. If anything, at oral argument you try to argue against the tilt, or at least question against the tilt, to see if the other case is maybe stronger than you thought, or to go after the side you're tilting toward to make sure you nail down any gaps or questions that remain.

Then, the conferencing goes on right after the oral argument. I don't know that it changes strongly felt feelings about a case, but there are a lot of marginal cases where it can sway a swing judge. Sometimes, quite honestly, if one judge feels very strongly on the marginal case, he or she can carry the band. It just isn't worth it to other judges to carry on. Now that won't happen in a case of high visibility or high philosophical content.

Mr. Pollak: I think you were going to comment on the written advocacy. Maybe you did?

Judge Wald: Now for written advocacy. As you know, in the last decade we've cut down on the number of pages of briefing to 50 per side – with 20 in a reply brief. I still feel in most cases it could be done in an even shorter number of pages. We're not currently considering doing that, but we have so many multiparty cases that the paper flow is really still enormous. Take one of these regulatory review cases, by the time you get all the intervenors and leaving out the appendices, which you look at selectively, you'll still be reading 500 or 600 pages. In the complex cases, you'll be reading at least 700 or 800 pages. Initially, I read every word, I don't have time to read the briefs through twice. What you do is use the briefs as an aid going in to identify the issues in oral argument. If you're given the case to write, you're going to go back and use the brief much more intensively as a resource. It serves two functions, to identify the issues for elaboration in oral argument and for voting purposes and then later on, it becomes a

resource for writing an opinion.

Mr. Pollak: To put it succinctly, you give it a read, you read a bench memo, you have oral argument, and you vote.

Judge Wald: And you have conference.

Mr. Pollak: And you have conference where you vote.

Judge Wald: Now, 99 percent of the time, you'll stick with your vote at conference right up to the time the opinion is issued. There is a small component of cases which you'll go back and think about and you might change, or your law clerk will come to you, and they do come to you, and they'll say, Gee, can I talk to you about this; it really bothers me. Occasionally, you will change your mind afterwards. Or it will worry you enough that you'll do some more research and you'll change your mind by yourself. And then you write a memo to the other judges and say, gee, after reflection I have this problem. Or you'll set out to write the opinion and you'll think it's fine and the other members of the conference will think it's fine and when you actually sit down to write it in detail, you will realize it doesn't work and you'll have to go back to your panel and say, "It doesn't work; either assign it to someone else or think about changing the result." People respect that if it happens infrequently. There have been some occasions, I'm not going to name names here, however, where a judge will vote one way in conference and then with frequency we get a memo the next day they've changed their mind. They've been "talked to" by their law clerks or maybe their colleagues. It's legitimate, if unnerving, but it's all part of the process.

I would say the best briefs are succinct. They put in only their best arguments. They don't put in 12 arguments which really don't hold water, because someone thinks one of them might

pick up a vote. That argument would have to get another vote; and if it's really a weak argument, you're not likely to pick up two people. One of my own criteria for best briefs is the creative use of language. I know it may not win cases, but I cannot tell you how refreshing it is to read a brief where somebody uses a different or unusual word, turns a nice phrase. If you read brief after brief after brief, you get boilerplate, boilerplate. And in the case of the government briefs, and I don't blame them because they have to turn out so many, you can close your eyes and recite the paragraphs about the scope of review, about *Chevron*, about – So if somebody occasionally has a nice phrase, uses a different word, her brief will really stand out.

Mr. Pollak: You don't have to name any.

Judge Wald: No, what I'm saying is, in many cases, an advocate will only have argued one case before you. You can say, I remember that case. In retrospect, you're not sure whether you remember it because you knew about him beforehand or whether he really did such a brilliant job that particular day or what. Let me just name a very few of the people whose arguments I remember. I remember in the *Scientology* case, Leonard Boudin represented one of many defendants to what I think he must have considered a hostile court, Judges MacKinnon, Robb and myself. Most of the defendants were caught pretty dead to rights on the charges. There were a lot of defendants appearing, so when the time was allocated, he had been given seven-and-a-half minutes. Seven-and-a-half minutes for Leonard Boudin. He wrote these letters to all of us saying he couldn't possibly manage in that time, and of course, the other judges stuck to their guns. What I thought was remarkable about his argument (he did not prevail for his client) was that he managed by the sheer dint of the force of his personality to turn his seven-and-a-half minutes to 35. It was 35 minutes before he sat down. That was a lesson in advocacy.

I remember that one of the best argued cases on both sides was the *Oliver North* case. Barry Simon did a splendid job and I thought Gary Lynch was very good. He was excellent.

I'll always remember the time Edward Bennett Williams appeared on the *Tavoularias/Washington Post* libel case. I thought the argument was a bit rambling. I think it was less than a year before he died. There's no question, again, he was one of your old-style courtroom personalities. He walked back and forth across the courtroom. This is probably something no other advocate could get away with these days. We'd probably say "stand still" to anyone else. He traveled far and wide, he talked about tooth fairies, he gestured. I don't think that's probably the coming style for oral advocates, but it was a memorable performance.

I remember your own senior partner, Warner Gardner, as being an excellent advocate for the following two reasons. One is the brief that he and Mike Greenberger filed in one of these absolutely dull, regulatory mining cases, because it had all these spritely phrases and writing in it. My son-in-law teaches legal writing, or he did, at Harvard Law School, and he asked me to collect at the end of the year examples of what I thought were best and worst in briefs. I sent him that brief. Warner had a way of using language that arrested your attention. It was like reading a good book; I enjoyed that.

As far as government lawyers go, one of the best arguments I've ever heard was from the judge who's gone onto the D.C. Court of Appeals, tall, skinny guy. He used to be head of the Appellate –

Mr. Pollak: Farrell. Mike Farrell. He was an English teacher for nine years.

Judge Wald: Yes. Mike Farrell argued the *Hinckley* case. Not the main appeal, that wasn't ever appealed. But there was a side question of Hinckley's constitutional rights when

they questioned him right after the assassination attempt, and later when they searched his prison cell. There was an interrogation question about whether or not they had to give him *Miranda* warnings when they were asking about his mental state. Vince Fuller argued for Hinckley and Mike Farrell argued for the government. Mike was a terrific arguer, respectful but firm. That's the only time he argued before me. I thought it was a loss to the advocacy profession when he went on the bench.

Mr. Pollak: But a gain in that bench.

Judge Wald: Yes. Well any other questions on that? Maybe we could go on to talk about some of the cases because I think that we have covered practically everything generically.

Mr. Pollak: Do you care to say anything about your own judicial conference? I don't suggest that you need to. This annual thing that you give. I mean, I don't mean to describe it that you give as a –

Judge Wald: I have always enjoyed them. I think it is a good opportunity for interchange with the bar, but it's more social than educational. I have to be frank about that. When I was Chief Judge we tried to liven up some of them, but I don't know that we were that successful. You know, you were chief arranger of one of those affairs. I think it's primarily an opportunity for people to get together, to see each other, to talk about common issues. In the '70s, as you will recall, in the '60s and '70s, it used to be a forum for actual confrontation as I recall. It seems to have receded from that function pretty much.

Mr. Pollak: Just picking a couple of miscellaneous points, although I don't mean to stand in the way of the cases. Do you have anything you want to say about the district bench as seen from your bench?

Judge Wald: Yes, I do. I often feel closer to or more simpatico with many of the district judges than to members on my own bench. Part of that is historical because as you know, the district judges are taken from the ranks of our own D.C. Bar by and large. So I knew a lot of them in former incarnations. You have carryovers from old relationships and old friends. Secondly, they don't have to constantly operate in relation to each other the way we do. They don't need each other for votes, so they can be better colleagues, even if there are differences of philosophy among them. They don't really have any need to ever get in each other's hair, so they have a generally friendly ambiance that cuts across all ideologies.

Also, judges in the district court are almost always picked from practicing lawyers who have been out in the field, have learned to compromise, rarely do you get an academic ideologue appointed to the district bench. Generally, they are kind of an outgoing friendly bunch, and I enjoyed working with them. I enjoyed working with Aubrey Robinson, whom I'd known since way back; he'd been a juvenile court judge in the '60s. In general I always felt more comfortable, I still do, in the company of the district court judges. A lot of them I consider good friends. I've known Harold Greene a long time, Lou Oberdorfer, I've known Joyce Green for a long time, I knew June Green for a long time. I've become very friendly with Stan Sporkin and there are others. In general, I've always kind of liked being around them.

Mr. Pollak: Do you ever eat lunch with them?

Judge Wald: Yes, all during the time that I was Chief Judge, I went up there frequently, not every day. We have some social occasions, a couple a year, or dinners. Then I just see them around the building. Some of them even have gone so far as to vent some of their own spleen about appellate judges to me.

Mr. Pollak: A la Judge Gesell?

Judge Wald: Gerry among others did vent his spleen on occasion in the judges dining room which was confidential territory. I just have the sense with so many of the district judges that we have a common history. A lot of them I knew, a lot knew me in earlier incarnations. I think it's harder to be a district judge than a court of appeals judge. You're on the front line. You can't run off and get your law clerks to research everything that happens. You have to make these decisions, but you are exposed to more of the real world than we are. You're exposed to lawyers, you have to deal with them. And witnesses, you see the real live parties. We sit up here with our stacks of briefs in piles and rarely do we ever see a party unless they happen to come to the oral argument.

I don't think I ever could have been a district judge. I had some litigation experience in the '60s and '70s, but I would have felt totally unconfident going into a district court room and running a trial. I suppose I could have learned. Learned Hand once said that the most agonizing six months of his life were the first six months he was a district judge because he felt totally out of control and every night he would be up until 2:00 or 3:00 trying to get ready for the next day. I think in many ways their job is harder, but in many ways, the atmosphere is lighter. They run their own courtroom and they can be friends with each other. Up here, we're very interdependent. We don't come from the same backgrounds since appeal judges are not picked from the district, a few might be, but mostly they come from all over. Completely different backgrounds. I like the district judges.

Mr. Pollak: Another itinerant question, which may have a short answer, is how the court relates to the media, both as seen from your chief judgeship and as seen as a judge.

Maybe it doesn't relate at all.

Judge Wald: It doesn't relate much, except through individual judges. I had some relations with the press while I was a Chief Judge. If they ask you about something administrative or you need them, you want to get some publicity on mediation programs and things like that. Or they ask you about neutral stuff, that's fine. Of course, we're barred from talking to them about cases. I think the really sticky part comes in as to whether or not you ever make remarks to the press, not about cases but about relationships on the court. Some judges do it, and I'm not just talking about our court, I'm talking about district judges. District judges seem to do it more freely than we do. Some talk off the record about things and people, not about cases. Some judges feel very strongly about staying away from any such off-the-record comments. Larry Silberman published this article last year that got a lot of publicity on judges who cater to the press, to the liberal press. He defended Clarence Thomas' present policy of never talking under any conditions to the press. I think it is a hard line to draw between being informative and saying too much because the press is dying to have you say anything that they can run with. We all have our usual bag of complaints that the only cases they cover are the cases that will make some kind of a sexy headline. Either the fact situation has to be bizarre even though the case is of no legal importance whatsoever, or they take any normal differences of opinion and build it up to a "bitterly divided court." I said once in a speech that it's all one word to the press. "Bitterly-divided-court" and "scathing dissent." They never separate the words out at all. Most of us do not take many press calls. I have this technique where, by now, my secretaries know the *Legal Times* reporters and so when they call, she'll say, well, what is it about. "You won't get to talk to her unless we know what it's going to be about ahead of time." Seeing how it operates at first hand and how "courthouse sources" and "friends"

report things that you never said, I now tend to be more conservative myself about whether I think judges really ought to be speaking off the record about other judges.

Mr. Pollak: What about academia? You speak a lot. You write a lot. You write an incredible amount besides your opinions. I don't know how you do it. Does academia influence the court other than in the footnotes?

Judge Wald: Not a great deal on a case-to-case basis. In the beginning, I thought, "Gee, if you are going to write a good opinion, you have to cite a lot of law review articles." But as I went along I found most law review articles are of no use to you whatsoever and it's ostentatious to be citing them just to show how scholarly you are. Occasionally, I might cite one, but I don't think we really are influenced much by them. I don't find a lot of law review writing that's terribly relevant. A very limited amount of it is useful, utilitarian. An article might sum up a field and provide a quick way to get into a field, but in terms of giving you something that you can really use in an opinion, an idea, a concept, I think that's extremely rare. I've used law review stuff less and less as the years have gone on.

Mr. Pollak: Do you think that's true of your clerks, except for the summarization that might be available, find a law review that's up to date that deals with a field?

Judge Wald: Harry Edwards has written a controversial article about this law review stuff getting more and more esoteric, and I tend to agree with him.