December 7, 1998

This is the sixth oral history session with Circuit Judge Patricia M. Wald of the U.S. Court of Appeals for the District of Columbia Circuit. Present are Judge Wald and the interviewer Stephen J. Pollak. The interview is taking place on Monday, December 7, 1998, commencing at 10:23 a.m. in Judge Wald's chambers. 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 Wald.

Judge Wald: Good morning Steve. Nice to have you back.

Mr. Pollak: Nice to be back. This is your session so why don't you start off. Maybe you want to say what gave you the thought that you might want to augment your oral history.

Judge Wald: Was it 1995 when we concluded the last session?

Mr. Pollak: It was. We had five sessions. Time passed. You served on the court additionally. We saw each other and you said you might like to pick up . . .

Judge Wald: I may live to regret that, but let's say that two events triggered a kind of judicial nostalgia. One was that when I finish this term I will have spent 20 years on the court which is not nearly as long as some of the old veterans who have done 30 and 35 years. I doubt I'll ever be in that category, so 20 seems to be a point at which you stop and think. Second, of course, we're heading in another year into the Millennium which I haven't thought much about. Originally, it sounded more hype than reality to me, but recently I've begun to think about it. I felt it would be kind of interesting to still be on the court, God willing, at the time that we switched over into the new century. That further provoked my thinking about the past 20 years.

Mr. Pollak: Could I make a comment? I think you assume this, but we went through all those other interviews, you edited them and placed them under a seal until you died or left the court. I have always treated what you said as confidential and that's how I approach this morning's interview. I don't talk to anybody about it and my secretary who transcribes these materials doesn't either, so I hope you'll feel free to put on the record what you'd like the record to hold.

Judge Wald: Okay. I can't remember most of what I said in the other interviews.

Mr. Pollak: I don't think that matters.

Judge Wald: No I don't either.

Mr. Pollak: You can repeat or as you wish.

Judge Wald: I'm really just going to say a few things about the last several years. So let's say the 1990s, rather than the precise moment at which our last interview concluded. I can't remember what I was talking about at that point.

I think that the decade of the '90s, which is almost over now, has been interesting on the court for the reason that in a sense it's been like a third court for me. I now think of myself as having served on three courts. First, the court that I came on with in 1979 which had Wright and Bazelon and Robinson and McGowan and for a short while Leventhal; Bazelon had just taken senior status and Spotts and all of those other people I mentioned plus the three new people that came in during the same year that I did. Then, second, there was the court of the early years of the '80s going through the early '90s which was a court that gradually became dominated, in numbers certainly, by the appointments of Presidents Reagan and Bush. We saw the cycling out through death or attrition of basically all the judges that had been on the court when I came in,

except for the three that came in simultaneously with me, Bazelon, Wright, Leventhal, McGowan all died off, Wilkey left the court, Robb, Tamm and MacKinnon died off. We had the advent of Bork, Scalia, Thomas, Starr, Silberman, Buckley, Williams, Sentelle, Henderson, and Randolph. And, of course, some of those appointments themselves cycled in and out in that period, Bork, Scalia, Thomas, Starr. So after we entered the '90s, basically from about the time of the Clinton administration, we had, as it were, a third court. First of all, within a couple of years, Ruth Ginsburg was appointed to the Supreme Court. Ab Mikva left in 1994 for the White House Counsel position. He had to retire of course from the court in order to do that. We had three new Clinton appointments – Judy Rogers, who had headed up the local court, Dave Tatel and Merrick Garland. So the dynamics of the court are now different. The Reagan/Bush appointees still have a majority. They don't all vote monolithically, nor do we, but if you're looking first in a snapshot fashion you'd say we are now basically a six-five court because, of course, we only have 11 judges.

Mr. Pollak: Six-five with the Reagan/Bush court having six.

Judge Wald: Yes, having six. There being Harry Edwards, myself and the three new appointees. Now, we don't, I have to emphasize, always vote that way as anybody who reads en banc knows. That means two things. It means that it isn't just when we all vote together that we may have a six-five. You have a greater chance of pulling somebody over, one person over on the other side, and winning, certainly, than you did during the '80s in many en banc cases. But also the panels are different. You're more likely to have one or two other people who will think like you do on some issues, not all, than you did during the '80s. So that you have more play in the joints. The dynamics are different now. This might be illustrated by the fact that late

last year we had two en banc. I ended up writing both of them for a seven to four majority on the court. It's been a long time since anything like that happened. Now I did write some en banc in the '80s but they were usually on issues that were pretty procedural or non-substantive value oriented . . . The issues in the two recent en banc were a little bit more in the center of where you would expect controversy. One was on standing which has always been a very controversial issue, the other on Title VII.

Mr. Pollak: Do you remember the style of the case, the name of the case?

Judge Wald: Yes, *Animal Legal Defense Fund v. Glick man*. It had to do with standing of people to challenge the treatment of animals on exhibition, but it had all of the elements of a classic standing case which a few years before we had lost, I think, eight to three. Ironically, as the *Legal Times* pointed out, the earlier case had been written by Dave Sentelle (it was a Florida Everglades case, I can't remember the exact title) and I had been the dissenting view. This time, I wrote for the majority and Dave wrote the dissent. The cases were not on all fours but they had a lot of the same elements, as the commentators were quick to point out. Now, that illustrates not only that you have a better chance statistically of winning, we couldn't have won it with just the five of us. We got two people from the other camp. So things are more fluid now.

The other en banc was an employment discrimination case. Such cases are often the subject of much controversy. The issue here was who has the burden of proving what in a prima facie case and rebuttal in an employment discrimination case. How do you get over summary judgment to trial.

Mr. Pollak: And what was the style of that case?

Judge Wald: Yes, *Aka v. Washington Hospital Center*. So I say, these two en bancs may not be portents of a trend, but they say to me that we are operating in a somewhat different atmosphere. So that's one interesting change that has taken place in the '90s as it were.

The other of course is – I left the chief judgeship in 1991. We covered this in the earlier part of the biography. I left early so that Judge Mikva would be able to serve as Chief Judge before his 65th birthday. Now he did serve for three and one half years. He left in 1994 to become Counsel to the President and Harry Edwards took over. I think courts do reflect, to some degree, differences in Chief Judges. So for that reason I think it has been different. Harry is a very dynamic, energetic would be an understatement, Chief Judge. He's made a lot of changes and I think by and large I agree with all of them.

Mr. Pollak: Why don't you describe them.

Judge Wald: I will. Operational changes. Harry is a real, I won't say computer nut, but let's just say he really understands computers and software and their potential. So he's introduced some very innovative online procedure things I could never have done or Judge Mikva; we didn't have this degree of computer expertise. He has introduced a lot of changes in the way we operate through making every conceivable kind of computer program available. We now vote by computer. We have something called "Team Talk." We vote on en banc and on motions by computer. I would guess, without knowing, that we're the most technologically advanced appellate federal court in the country. We, of course, do a lot of communication by e-mail now. There are a lot of things necessary to operating a court that take time and parts of them might be better handled by other personnel. For instance, in C.J.A. cases, we have always had to

okay the appointed counsels' vouchers. He now has one staff person who does the pre-screening work on that. The judge must still sign off and has final judgment, but this one staff person goes through it all and sets the options up for you, instead of the judge having to look at the number of hours that somebody spent on this and that. This introduces an element, whose absence had always bothered me before, of uniformity into the process. I have always had a very different philosophy about compensating counsel, than certain of my colleagues did. I think as a result if counsel wanted to get excess compensation, the administration of the C.J.A. compensation program was quite erratic among different judges. Whereas now it doesn't prevent a judge from taking issue with the recommendation by the one staff person, who is, incidentally, very good. But it means that everybody starts off with, at least, uniform criteria being involved in the recommendations. So there are things like that Harry has introduced which make certain peripheral aspects of the judges' job easier. He's done some good stuff on having seminars once a year to introduce counsel to how the Clerk's office works.

Mr. Pollak: Right. Can I ask one question about these reforms or changes in respect to utilization of computers? Would you say that they conserve the time of judges so you have more time to address other duties? Would you say that they affect in any way the substantive performance of the judges?

Judge Wald: Well, it's interesting that you should ask that Steve, because as I mentioned to you earlier I have just given a talk a week ago to the Cosmos Club Legal Committee. I had a section here (referring to the copy of remarks dated December 2, 1998, attached to this transcript) dealing with changes that I thought had taken place in the court in the last couple of years and one is technology. I think that convenience-wise, technology has been a

good thing. The e-mail, the voting, etc. But what little research, and it is by no means scientific, I've done does not suggest to me that these changes have helped us to produce more opinions or better opinions. In fact the numbers, which are not controlled by whether we have technology or not, suggest we are putting out fewer opinions every year. That is due to a dramatic decrease in the last couple of years in the number of filings. The number of filings has gone down such that we have now canceled five or six sitting days this year.

Mr. Pollak: That surprises me.

Judge Wald: It's there. It's gone way down. This year will be the least number of sittings in my entire 20 years. Not just me, everybody else on the court has had whole days canceled. They don't know why at the Clerk's office. There's a decrease in agency cases. It might be temporary. Over the years we've had many up and downs.

Mr. Pollak: Do you know whether the docket of the district court has dropped?

Judge Wald: Yes.

Mr. Pollak: It has dropped too?

Judge Wald: I understand so, but this is only by hearsay. There's been a real question as to whether the district court can support the number of judges, for very long, that it already has.

Mr. Pollak: It's interesting because you can't attribute the drop then in sittings to ADR because ADR attaches.

Judge Wald: No. The numbers are not due to ADR. I mean there are nice ADR numbers and ADR has been a very helpful supplement, but, no, it couldn't begin to account for the drop. . ..

Mr. Pollak: Because ADR attaches after cases are docketed.

Judge Wald: Anyway, in terms of the computer, I suppose you might say that the technology is there. So if it's there, you might want to avail yourself of it. It is easy, for instance, to run over to the computer. You can see exactly where the voting is on a particular motion or a particular en banc case, but does it mean that we now produce a lot more opinions or we produce better opinions, the latter, of course, is subjective, but I don't think so. I had an interesting statistic. Last year the court put out 290 published opinions. Now, as you know the trend over the last 20 years has been for us to do more and more of our final dispositions by unpublished order in the special panels, occasionally by unpublished order in the regular panels after oral argument. We're probably somewhere between 50 and 60 percent dispositions by unpublished opinions. That's low for the country. In many circuits, the big number circuits, it's at 76 percent. So published opinions are now a minority mode of disposition. That certainly is a change from when I came on board. When I came on the court 20 years ago, I don't think more than five percent of our final terminations, not motions, but final terminations, were unpublished but now it's well over 50 percent. Anyway, last year we put out 290 published opinions on the merits. In 1986, we put out 304. Now that's not much difference, but it shows we aren't called upon nor do we publish a greater number of opinions. Perhaps, I didn't check the figures on whether we're getting them out faster, but if so, except for one or two problems we had in the old days with a particular judge being slow, my notion is that if we get them out any faster it's a matter of a couple days. So I guess what you have to say is, if we take full advantage of the technology, it probably aids us in a certain amount of convenience, but I'm not sure that it changes or has remarkably improved either the quality and certainly not the quantity of our work. I do see a

downside which I treat in my speech to the Cosmos Club. A downside is that so much of the work can be done by computer, i.e., we put out our comments on en banc petitions by computer even if they're just a couple of paragraphs, that I think the amount of actual interaction between the judges has gotten less, for a couple of reasons. One, there are some judges who literally do a great deal of their work at home and that means out of the jurisdiction in some cases. They're not in the courthouse except when they have to be here for an argument, maybe an occasional judges' meeting, a special panel. But they literally are not there a lot of the time. You do not see them for months at a time. You can communicate with them by e-mail or by phone, but you literally don't see them. Now that used to be the case, of course, in other circuits, lots of other circuits, which cover several states and lots of territory. Judges only see each other when they meet at oral argument. That supposedly has been one of the advantages to this court. We were all in the same building, but I would say that our actual physical contacts have gotten less by and large. Because you don't even need the phone anymore. You don't need the interaction of human voice. A lot of it is done –

Mr. Pollak: On e-mail?

Judge Wald: On e-mail. The second thing is that, I think again this is just an impression, you're able to make decisions faster either as a panel or as an en banc court through this device. You know it used to be that you voted on a sheet of paper and a messenger came and took your sheet of paper and he took it to the next chamber, took copies and then somebody else's came – and just from the pure mechanics of the situation it took a couple of days minimally to arrive at a decision. You can vote an en banc in an hour now because you just go to the machine and you can see where everybody else is. It doesn't always happen that way, sometimes

it takes days, but I have seen things go very fast. It's a click of a mouse now. You certainly can't say in the old days it took more thought and reflection to check a box and wait for the messenger to come, but there is something about the new medium that militates towards very fast reactions. I'm not sure that's always the best way to do things. It's interesting. On the other hand, the technology is there and Harry has helped us to avail ourselves of it totally. I mean he has all sorts of programs that are in there if you want to plan your time and calendars. I don't use any of those. I'm not very computer literate. Until a year or so ago, I was totally illiterate, but I realized you just have to be in the computer mode now or you can't even interface with your law clerks or your colleagues. You can't do anything. So I went to computer school. They have a school for judges in San Antonio which is a very nice operation. You go down there for a week. At least when you come back, you know how to do computer-assisted legal research. You know how to do e-mail and you know how to use – you don't have to get your secretary to enter everything when you are voting by computer. So that was an interesting experience.

Mr. Pollak: Judge, I wonder whether the speed with which these functions can be performed and the use of the computer in any sense changes the judge's approach to the briefs or the oral argument. Is it just the same or is there a change?

Judge Wald: We generally don't get into the computer mode until after we've read the briefs and the papers. So I don't see any difference in that respect. It will be interesting when we get into electronic filing to see if that makes a difference. I see the computers making some difference in the way judges interact with each other. Now, so far the lawyers are concerned, we're still getting hard copy of everything and we're still going to court and hearing their oral argument. So I don't see any difference in that way. Now when that becomes more of

a computer activity, I simply don't know. But I would speculate that it's hard to think you could make that big a change and not have there be some difference, but right now I don't see any. But again, we're deciding more than half of the cases with no oral argument.

Mr. Pollak: And those are identified by the Clerk or by the judges or by God?

Judge Wald: [Laughs] Well, who says that judges aren't God? If the case is a so-called 34J, that's the rule number, the staff in the Clerk's office makes a recommendation for decision, but the recommendation has to be agreed upon by whatever special panel is sitting. As you know, you sit for three months or so on a special panel and meet every couple of weeks. The special panel decides a lot of cases. We have to okay anything that goes on the 34J list and any one judge on that panel can say, "No, I think this ought to go to oral argument." We do that occasionally, but the fact remains that well over 90 percent of the recommendations that are made for 34J go to 34J. There is a procedure whereby counsel are notified that their case is being considered for 34J treatment and can make a plea by paper. "No, no, this is the most important case that's come down in the last 10 years and you can't do it." Occasionally that works, but by and large the things that are siphoned off for 34J treatment by the Clerk's office staff get to the panel on that basis, are decided by the panel, result in unpublished opinions and that's the way. But as I say, we're low, I mean if you look at the Fifth, Ninth and the other circuits, they are up in the 60 and 70 percent.

Mr. Pollak: Is the lead recommender the Clerk, Mr. Larger, or the Counsel to the Court?

Judge Wald: It's somebody in the Clerk's office. Mark Larger can't do everything. No, actually it's the Legal Division. Marty Tomic heads that. It used to be Mark

was Staff Counsel and then he became the Clerk and now it's the Legal Division of the Clerk's office that's headed by Marty. Now who exactly does it up there, I don't know. As I say, occasionally we'll pull a case out and say we think there's more to that, put it on the regular argument calendar and it only takes one judge to do that. It may be that if our filings keep falling and we can't fill the number of days that we're used to sitting, needless to say, the criteria for deciding what doesn't need oral argument, is going to adjust to that and more cases that we might have said don't need oral argument, we'll go ahead and give them oral argument.

Mr. Pollak: I'm a little unclear as to whether it's one judge of the full court or one judge of the special panel?

Judge Wald: No it's one judge of the special panel. The whole development has been something which is paralleled across the whole federal judiciary. As I say, we are not one of the leading circuits because we are not an overwhelmed circuit the way some are. Some of them treat up to 76 percent of their cases this way. So, gone are the days of Atticus Finch and Clarence Darrow. The parties have to convince us initially from their papers that the case is really important enough to get on the argument calendar and later on not unimportant enough so that it will be taken off the regular argument calendar before you even get a shot at us. So I think, we're a unique circuit. For most of the federal appellate courts, case filings have gone way up over the last 20 years. We're aberrational that way. I think filings have multiplied 10 times since 1950 across the country, so that we are clearly in a spot here, a different spot, than almost any other circuits. There may be one or two other circuits that have seen their filings decline.

Mr. Pollak: Well, it sounds like it's essentially food for one or more research projects. It may well stem from a change in the federal government's approach to issues and

decision of issues.

Judge Wald: I just wanted to correct something. I just checked my paper. Since 1950, federal courts of appeal merits decisions have multiplied more than 20 times. Here's another interesting statistic again and that is, of course, as they multiplied 20 times, the Supreme Court's docket has been halved through their use of certiorari. When I came on the court and for many years thereafter, the Supreme Court was putting out roughly 150 cases a year. Now they are down to what, between 85 and 90 now. Something like that. That, of course, is a conscious choice on their part. When Justice Scalia was on this court, he was a proponent of Article III judges spending more of their time on selected important cases. Now he's in a position to put that into operation. You can't do that on any other federal appellate court. You have to handle every case that comes somehow, but, of course, the way we've reacted here and in most of the other circuits is to create a track system. The track I've just talked about, where a case gets truncated briefing, no oral argument, is decided by a panel of three judges who decide 20 or 30 cases in a couple of hours that way.

Mr. Pollak: It's the 34J track?

Judge Wald: Yes. Those decisions, I should be frank with you, are basically edited versions of the Staff Counsel's memorandum. In other words, they are not written in the same mode as something on the regular calendar that gets assigned to a judge: In calendared cases, you come back, you work with your personal law clerks and then you produce a decision. That whole mode is not used for the 34J cases. In a 34J, you get the staff clerk's memorandum along with the briefs but you get 20 or 30 of those for one sitting. You read them through. If you agree with the staff memorandum, you may want to edit it a little bit or make some changes, but

basically it becomes the unpublished decision. Then, of course, we have our very small complex track for those mega cases which come in, usually big administrative agency cases, sometimes multi-conspiracy cases, criminal cases, which go to special complex panels. Not the 34J panels but special ad hoc panels. So all of that is certainly a change from the old days. In the old days, there were no special panels. When I first came on the court, the day before your regular sitting you had one day in which you would get mainly orders and stays and you'd go through them. The orders were usually perfunctory. Occasionally, you might get a stay, but no case of any consequence would be put through for summary disposition.

Mr. Pollak: Have these events or the change in the make-up in the court of the '90s changed the recourse of the court to en banc sittings?

Judge Wald: It seems to me that the number of cases we take en banc over the last few years is pretty stabilized at four to six. There was a period in the late '80s, middle-to-late '80s, when I think the court was sort of in equipoise. Sometimes, then we had more en banc. That's sort of quieted down. I think last year we had four. So far, we have scheduled two for January. It's rare, certainly rare, that any case that was 34J would be the subject of an en banc. The 34J status practically guarantees that it won't be. If you're on that track, forget it. I would think that is true for the Supreme Court too unless it's some terrible manifest injustice. The fact that you don't even get a published opinion virtually guarantees that's the end of the track for you. No en banc or upstairs. I don't know what effect it has, if any, on the cases that go to regular argument. The voting on en banc, in the last several cases has been close. I mean they've been six to five, seven to four. Not the en banc itself, but the voting to en banc.

Mr. Pollak: I see. Whether you'll have it at all.

Judge Wald: They haven't been all unanimous, not unanimous. Usually the panel will resist. But they've been close. They could have easily gone the other way; they've been cliffhangers waiting for one judge at the end to decide which way either he or she will go.

We had started to get into collegiality a little bit and I'll come back to it, but we did have our famous or infamous experience with the Gender Bias Task Force which is worth noting certainly. I don't think it was an entirely pleasant experience, but I suppose there are probably useful lessons to be drawn from it. I don't want to spend a long time on it except to say the impression I derived from it was the following. The task force itself composed of outside lawyers and law teachers, people like Vicki Jackson and Todd Peterson, did a really fine, academically creditable job. There might have been a rough edge or two, but I saw no qualitative difference between what we did and what the Ninth Circuit had earlier done. In fact, the same Rand Corporation study consultants who did the Ninth consulted on the methodology for ours, and I think our report wasn't markedly different from the 35 or 40 state court reports. In fact, the task force stayed away from some of the areas that the state courts, even the one across the street, the District of Columbia court system, went into. You recall the task force got a very negative reception from several of my colleagues up here who promptly disassociated themselves from it. I think this was part of a bigger movement which was going on in the country to try to stop the whole inquiry in the federal system as being tied somehow to an attempt to get preferences for women and minorities, which of course it wasn't. I often said that report was so mild that in the '60s and '70s you and I would have been reluctant to sign it because we would've have thought it didn't go beyond what was almost commonplace. Suddenly it became controversial, but that was part of this bigger move that was then taken up by the GAO study which, I will say frankly here, I

thought was not professional or independent enough of those Congressmen who initiated it. I lost a fair degree of respect for the GAO in that process because I had always worked well with them when I was in the Justice Department and had respect and still do for some of their other studies. If I ever saw a cave, a report change between versions, under pressure, that was it. Also, then there was the attempt, successful in large part, to cut off the funding of other courts in the country which had embarked on similar studies based on the so-called bad methodology of our study, which was really, I thought, a totally bum rap. It was senseless. The same methodology had been used elsewhere. I thought the whole experience left a bad taste. I'll mention two other points. One is that fortunately it didn't stop the effort elsewhere. The Second Circuit went ahead and produced its report. The Third Circuit did an excellent job. I went up to the Third Circuit Judicial Conference when they presented their Gender Bias report. Theirs wasn't any more methodologically exacting than ours was, but yet they had a consensus among their judges, even the more conservative ones, and their report just went through. It was like a different experience. It was like being in two different worlds. I watched the presentation up there in the Third Circuit Judicial Conference. The Third, Second and Eighth Circuits adopted reports and so did some others, so the treatment of our report didn't stop the others in that sense. I think what was too bad was that really hard work and professionalism of people like Vicki and Todd were never acknowledged the way it should have been. When the report's quite mild recommendations got to the Judicial Council again, although we had the support of our district court judges, regardless of party or philosophy, and I give them a great deal of credit for that, including Norma Johnson who was not then the Chief Judge but who was a strong advocate of the report and Jack Penn who defended the report, we were able to get a limited amount of progress in adoption of the

sexual harassment procedures and grievance machinery changes. The Circuit Executive, then Linda Ferren, put through some staff training on discrimination and related staff problems. This was not as much as I thought we should have been able to do. The final note was that last year the courts' women law clerks got together on their own but with strong encouragement from Norma Johnson and put on a bunch of super programs in the courthouse in March, for Women's History Month. They got all the women judges together. They had one program that was historical about their impressions, the problems they had met. They had an overflow crowd in the courtroom. They did it at lunchtime, no budget, no anything and it was fascinating to me. I heard things, tales of the experiences of June Green and Norma herself that I had never heard before. There was a lot of spirit among them and it was well attended by some male judges as well as female judges and courthouse staff. Then Sandra O'Connor came down for another one of the programs and it was sufficiently successful so that they are going to do it again next year. So regardless of this disappointment one of the deep impressions I have gained over the last 20 years is that women have firmly established their place in the court administration. We now have three women judges on the court of appeals and four or five downstairs, on the district court. If you count the senior judges we have the two Judges Green, Norma, Gladys, Colleen, and Judge Magistrate –

Mr. Pollak: Robinson.

Judge Wald: Yes. And, our Circuit Executives now for the last 12 years since Linda Ferren came on have been women and their deputies too. We've had women Clerks of Court. We now have women running a lot of the divisions. When I came here women were clerks and secretaries. They ran nothing. Now, I think, it's pretty impressive they're running a

lot of the administration in the court and in their divisions. So I think that's been a change, a welcome change. Even if sometimes you have momentary setbacks like the task force episode.

Mr. Pollak: Well, it almost calls for a kind of a pull back to analyze over a decade or two decades quite what led to the opposition to the Gender Bias Task Force. It seemed as if it wasn't related to the caliber of the work or the issues or even the record that the task force would attest to?

Judge Wald: Well, that's why I think it was so unfair. The opponents grabbed onto this methodology thing and they got this one Harvard professor, Thernstrom, and he and his wife are very much, as they have every right to be, identified with anti-affirmative action sentiments. But for him to attack the methodology, I think, was just off base. But it was so quickly picked up. When you looked at the colloquy on the floor of the Senate between several conservative Senators who I believe had close contact with some of our own people down here, they would say, "in light of the bad methodology," which was wrong. When they talked about, I always laughed at this, the "divisive impact of the studies in the D.C. Circuit," we were used as the bad example for why they shouldn't give money to any other court in the country for this purpose. The divisive impact, of course, was as much a reflection of the proclamation by the dissenting judges, as anything done by the task force itself. But anyway, our task force report was used as the whipping boy in order to cut off the funds elsewhere, which I'm glad to say, it did not succeed in doing. It caused Rya Zobel of the Federal Judicial Center some trouble because she was seen as having let the Center encourage these studies because her people had put out manuals on how to conduct the studies based on ours and the Ninth Circuit's studies. But in the end she survived. Although there was some support for us in the Executive Committee of the Judicial

Conference, this is my understanding secondhand of the Judicial Conference, when you got above that level there was no support to try and get back the money. Anyway, that is to some degree, past history. I think there were some good results, though limited, here in the circuit and more elsewhere probably due to the relentless perseverance of a lot of people like Judy Resnik who writes about these task force inquiries and their importance. I think, that it didn't slow down anything nationally.

Now, to move from the task force to collegiality, things have been really quite peaceful over the last six or seven years apart from the task force. I think our judges seem to get along. There are no major or even minor feuds going on. I feel that some of my own rough edges have perhaps worn off with age. Some of the rough edges of my colleagues have too. So, except for this incident, things have been relatively peaceful, I would say. I suppose what it teaches you is how, if you're on a court and you're in a close knit community and you care about something very much, it's bound every once in awhile to result in people rubbing each other the wrong way. Although I was disappointed that that happened in this circuit, to the Gender Bias Task Force report, and it didn't happen in any other circuit to my knowledge –

Mr. Pollak: I'd like to push you to say what rough edges are in a judge who has served a long time.

Judge Wald: I think in earlier years when you first come on the court you are so anxious to do things right or to bring about a result you think is the right result that you perhaps harbor notions that you can persuade other people by the pure dint of the merit or even the intensity of your argument. Perhaps you tend to write more in a, not a dismissive, but a harsh critical way when you don't succeed. If I look back on my own early stuff it probably could be

said that I felt or perhaps even wrote that way on occasion. In turn, I was written about in that way, so it wasn't one sided. I think that sometimes when you look back after 20 years you realize that you don't always know what's right and when the other side is automatically wrong. You may think so, but you don't always know the significance, the unintended consequences of decisions and so perhaps you become a little bit more tolerant as you move along. I don't say you change your mind in the face of opposition and cave in on everything. But you do recognize that maybe I have to be a little more tolerant to the other side because you don't always turn out to be right. I have to tell you on the other side, people that you assumed were your allies and you assumed that they would be there when you needed them, are often not. So you gradually get more self-reliant in the sense that you don't see people as your friends or your opponents anymore. You go your own way trying to do the best you can and, as I say, being a little more tolerant of other people and maybe not even expecting after many disappointments that other people will always see things the same way you do. That sounds a little bit vague but that's the best I can do.

Mr. Pollak: It's helpful to have.

Judge Wald: Everybody leads her own life and everybody, even over the course of 20 years, changes and ultimately, in my own case, I think you depend more upon your independent view of things. At the same time you're more tolerant of other people's views of things.

Mr. Pollak: Would you care to express a view on whether the substantive outcomes benefit from the process of greater experience?

Judge Wald: I don't know. I really don't. I can see two sides to that. There's no

question that, if you have a great deal of intensity and you are willing to throw yourself with a great deal of energy into something, you may produce a very good product. You can hope that other people will see it the same way as you. They don't always. It's quite possible that judges in the early part of their careers do their best work. I wouldn't be surprised if that is true. Even though it may not always elicit unanimous acclamation. It's not to say that some of our older judges don't do fine work, but I think it's like every profession, there's no question the amount of energy that's poured into something is going to change with time because the human body and mind change with time too. On the other hand, I think, it is possible that as you move along and you're less sure about or you're less intense about winning or having the opinion be exactly the way you want it, line by line, it is possible to get consensus in more cases to do, maybe not the perfect, but maybe the best that can be done in that situation. Rather than to have an up/down majority/dissent. No matter how brilliant the writing is on both sides, two polar ends, sometimes it's preferable to get a less brilliant product everyone can agree on. Also, I must admit, my own views about the body politic and about things generally, not just court decisions, are now much less allied to causes than when I was younger. So maybe some of that carries over.

Mr. Pollak: Is that a function of age, experience?

Judge Wald: I think it's a function of the times. Who am I to say. I think the last several years have made me much more independent, less allied or affiliated with anybody in my thinking about issues in the national body politic.

I wonder about the law schools, I mean, as more and more of the academics seem to me to be more and more engaged in their own life, their own academic life, whether it's on TV [laugh], we've seen a lot of that recently, or in their intra-academic disputes in the law reviews that can't

have any interest to anybody who isn't in the middle of them; sometimes I wonder whether or not the students haven't become for a lot of them like implementors, their legal research assistants. They write an exam or they write a paper and I have no idea how much attention that paper or exam gets from the faculty. The students in turn reflect that their aim seems to be to get through this or that professor's class with a minimum of disruption. My God, I mean, I remember what a wonderful experience just to have sat in on Harry Shulman's labor law class. What a sense of a man who had worked in the field and this overall feeling you got for an area of the law and how much it meant if it went one way rather than the other. I don't have that clear a sense about the faculties or students today. That's my own impression, of course. God knows, they can whiz around with the computer, but straight out of law school many don't seem to be able to transcend the material. It's as though nobody really engaged them. I hope the clerkship does that. There are obviously exceptions. I read the law reviews and since all of the authors there went to law school it must mean some of them got up into that higher realm of cerebral thinking. Between these, I see two extremes, the thinking which doesn't really have any relationship to what the rest of us are doing in the world or a kind of inability to say much more than this argument is better than that argument.

Mr. Pollak: Do you see this manifested at all in the younger attorneys that you –

Judge Wald: I can't tell, Steve, they come in and argue their case. I don't expect them to give me their philosophical views, so it's impossible unless you happen to be in some other milieu where you can engage them in conversation.

I think again I'm going beyond my competence here. I'm just guessing. I see a current obsession, in the legal profession as well as elsewhere, with celebrity status. I see it infecting the

academic, the legal academics. I mean you have to be on this committee, you have to be there when they have the congressional hearing, when they have this, when they have the TV thing you have to be there. That becomes, I think, for many of them, for the younger ones particularly, more important than, or just as important as teaching or thinking. You have to have your article in the *New Republic*. My guess is that a lot of them spend more time on that than they do on working with individual students by a long shot. I think there's some of that – let me see how I can say this – a little bit of that even with some judges. There's a kind of a need to be out front, judges have always been ambitious, don't kid yourself, there have always been judges who want to go from here to there to up there. That's the nature of the game, but I think there's more emphasis on getting in the forefront and in the public consciousness, more than 20 years ago. In the old days, the Bazelon and the Wrights were well known but they were well known for what they had done. The old notion was whatever you do, do well. I think, the old notion was of a judgeship being the culmination and the capping of a career; doing your work and assuming your reputation would come from the quality of your opinions, etc. Of course, judges, a lot of them tend to be much younger now. You can't cap your career at age 37. Many more judges now cycle in and out of the judiciary and I think that the notion is not entirely absent in their calculus that you may be the next X in this administration or Y in that administration, etc. There's more of a sense of keeping your name in the main stream. It's an atmosphere sort of thing.

Mr. Pollak: So how does this make you feel as you look to the turn of the century?

Judge Wald: Well, I don't know, I've got another year and a half. No not a year and a half, just another year to try to bring that to closure. I'm now the most senior person active

on my court. In other courts, some judges have done 30 and 35 years. I think there are great joys of the job (this will be my closing) and if I had my life to live over there's probably nothing else I could have done at the end of my legal career I would have liked better. For one thing, I couldn't have replicated elsewhere the independence aspect of it. Independence in the sense that you don't always get your way in the end, but nobody can tell you have to do anything. I mean the Supreme Court can lay down a rule, but on an individual case nobody can tell you can't say this or you have to do that. Although I had my brief periods of working in the practice, I don't think I would have liked forever having to get out there and say what somebody else told me to say or take a position that somebody else told me to take. So I think that's one of the great joys of the bench. I think, though, sometimes you think you're working in a dark forest that nobody knows or cares about. I'm not saying this in a plaintive sort of way, but I'm now in my 800s in terms of the number of opinions I've written and you just have the feeling, "Well things come and go," and the opinions you wrote in the first couple of decades are probably, basically, many of them obsolete now. Events have overtaken them, like the old Carl Sandburg poem, "Why does a hearse horse snicker when he hauls a lawyer's bones?" An architect builds buildings and an author produces books or poems and sometimes I have that sense of "Was I just sort of an elaborate tinkerer?" There are always enough cases to look back and say, "Well maybe that did make a difference." But it is largely an anonymous job. It's a little bit like the blind dart thrower. You're throwing the darts and you're never sure whether they hit home or whether they don't. So you're never sure whether you get any better or whether you get worse.