Oral History of Elizabeth Sarah ("Sally") Gere

This interview is being conducted on behalf of the Oral History Project of The Historical Society of the District of Columbia Circuit. The interviewer is Barbara Kagan, and the interviewee is Elizabeth Sarah Gere. The interview took place on Monday, June 15, 2020, over Zoom. This is the third interview.

MS. KAGAN: Hi Sally. We should return to finish our discussion of the *Snepp* case. You were going to provide some more information on that.

MS. GERE: Good afternoon, Barbara. It has been a while since we talked about *Snepp*, and there have been many changes in our lives and in our world, and one of them is that we now are doing this interview virtually as opposed to sitting together at the table in your home because of the COVID-19 pandemic. So we will make our adjustments and go forward.

So, last when we spoke, we were talking about the Frank Snepp case. I mentioned, I think, the trial during which we were successful in presenting the case for the United States to obtain an injunction to require Mr. Snepp to submit any further writings that he did based upon his time at the CIA to the agency for pre-publication review. We also had asked the court to impose a constructive trust over the proceeds of the sale of Mr. Snepp's book and to turn such proceeds over to the US Treasury. The case then went forward to the Fourth Circuit, the United States Court of Appeals for the Fourth Circuit. Mr. Snepp, obviously, since the government had been successful on all counts in the case, it was Mr. Snepp who sought an appeal from the Fourth Circuit, and the government and Mr. Snepp briefed the case. We had oral argument in Richmond, Virginia. As I think I mentioned, the way that the Justice Department was structured at that time, and I believe probably still is,

the Appellate Section argued anything that went forward in an appellate court, so I did not get to argue the case, nor did any of my trial-level colleagues. Instead, it went to the appellate staff.

The argument was very interesting in part because the Fourth Circuit was at the time, and I think it still has, the tradition of the judges coming down off the bench after oral argument and shaking hands with counsel. It's very civilized. I was, although not arguing the case, sitting at counsel table in the event the appellate lawyer needed advice on any of the facts or anything that happened at the trial.

So it was very interesting, and in 1979, I can't believe it was that long ago, but in 1979, the Fourth Circuit issued its opinion in which it upheld the injunction that had been entered by the District Court but did not agree that imposition of a constructive trust was the appropriate remedy, and so it was kind of a split decision. The government was successful on what was the more critical piece of it, which really was the enforcement of the contract to obtain pre-publication review, but the remedy, the Court ofAappeals found that a more appropriate remedy for something that was partially a contract issue and somewhat a fiduciary trust issue was the government could seek nominal damages, and, in an appropriate case, perhaps punitive damages. So that left, frankly, both sides unhappy. Snepp, because the injunction remained in place, and the government, because it viewed removal of the constructive trust as really taking away the financial power of the requirement of review. In other words, if the only thing that was going to

happen to you was you were going to have nominal damages of, you know, $5,000 assessed for selling your book without pre-publication review, that did not seem to be much of a deterrent.

MS. KAGAN: No. I would have hoped they would've at least made it whatever the profit he made off the book.

MS. GERE: Well, and that's essentially what the imposition of a constructive trust would be. That was sort of our argument. The punitive damages are extraordinarily difficult to obtain, and you'd have to prove things that were going to be very difficult to prove.

MS. KAGAN: But he was still able to continue selling the book?

MS. GERE: Yes. He was able to sell the book, but he could not depend that he would be keeping any proceeds. So by the time it got up on appeal, I think the proceeds were in the neighborhood of $140,000 as his profit. Obviously, the book had gotten a tremendous amount of free publicity. The case got a lot of comment in newspapers, magazines, and law review articles, which probably boosted the sale of the book.

I should say that the Fourth Circuit decision on the injunction was on behalf of all three of the judges. It was Judge Winter, Judge Phillips, and Judge Hoffman, who was a District Court judge, and he was sitting by designation. As to the constructive trust, Judge Hoffman dissented and said the government should be allowed to have a constructive trust as the measure of damages. So the government had some good language in the dissent to support our position on constructive trust, but there was some concern, at

levels above mine I'm quite confident, given that I was the lowly trial lawyer in the case. But, by the time the decision got to the Solicitor General's office, and that's where the decision would be made as to whether the government was going to seek certiorari and have a further review by the United States Supreme Court, I can remember a lot of discussion back and forth about whether it would be appropriate to seek certiorari. Part of the concern was if we sought certiorari, perhaps the Supreme Court would on our instance look at the entire case then and reverse on the injunction. And so how much of a risk was there if we ask the Supreme Court to review just part of it. As it turned out, that sort of became somewhat moot because Snepp sought certiorari, and once he sought certiorari, then the United States filed a conditional cross-petition for certiorari. So Snepp was seeking review of the injunction, and we were seeking review of the measure of damages.

It was a very interesting time to be working with the Solicitor General's office to help craft a cert petition. There were a lot of different views on how the case should be presented, what the argument should be, what the likelihood of success was going to be, but there were cross-petitions for certiorari. To everyone's astonishment, the Supreme Court granted certiorari and issued a ruling on the merits based solely on the certiorari petitions. So there was no full briefing on the merits and no oral argument before the United States Supreme Court. Yet the Court issued a very comprehensive and fairly lengthy decision upholding the injunction and reversing the Fourth Circuit on the constructive trust.

MS. KAGAN: Nice.

MS. GERE: So, in essence the Supreme Court reinstated the District Court's opinion and order because that was the District Court's initial ruling in the case. That caused quite a lot of controversy and comment by lawyers and by commentators about whether what the Supreme Court had done was appropriate. It certainly did what it did, and I think that remains a pretty extraordinary step. Not that I've gone to any great lengths, but I don't believe the Court has done such a thing again, both substantively and procedurally. The Supreme Court decision was per curiam in 1980. There were three Justices who dissented. Writing for the dissenters was Justice Stevens, and he was joined by Justices Thurgood Marshall and William Brennan. As one might expect, there were, depending on which side of the case you were on how you looked at it, this was a significant First Amendment issue question for some people. The government, of course, had tried to stay away from that and make it simply a breach of contract. You signed an agreement to submit any manuscript, you didn't do it, you violated your contract. That's not First Amendment. That's essentially employment contract law.

So it was very interesting, and kind of as a side note, I, many years after that, ended up buying an apartment in the Woodley Park Towers condominium building. That very apartment had been the home of Justice Brennan for many years, and so it was kind of interesting to go from, here I

am a lawyer to now I'm a homeowner and I'm taking a shower in the same place that Justice Brennan did. Or having dinner or whatever.

At one point, again, many years later when I was teaching at Georgetown Law School, my husband and I were at some kind of a reception for the law school professors. Justice Brennan had an honorary teaching position. I believe he was teaching a course for one semester at Georgetown, so he happened to be at this reception. My husband and I were talking with him and his wife and saying it's a small world. We live in the apartment where you used to live, and then Mrs. Brennan, who was his second wife, said, "Oh my goodness, I wonder what you did with that kitchen in that apartment. I hated it. So when I married the Justice, we moved out of Washington, and we moved over to Virginia." I said we redid the kitchen. She said I'd love to see what you did to it. So my husband said, "Why don't you come over for dinner." Did we just invite a Supreme Court Justice over for dinner? Yes, we did. And so we actually had the Justice and Mrs. Brennan over for dinner.

MS. KAGAN: Wow. What year was that?

MS. GERE: That would have been, I'd have to go back and look, but probably 1994 or 1995. We were very close friends with Barrett Prettyman, a renowned Supreme Court advocate at Hogan & Hartson and mentor to Chief Justice John Roberts. Barrett had clerked on the Supreme Court and obviously was a very well-regarded Supreme Court advocate. Barrett knew the Justice and his wife quite well, so our dinner included Barrett Prettyman and his wife,

Noreen, the Justice and Mrs. Brennan, and we sat in our dining room and just listened to him tell stories about living in the apartment, about the Court. That was the only time in my life that I ever had a dinner or any other meal catered, but I didn't want to spend time worrying about what I was going to serve for dinner.

MS. KAGAN: And running back and forth to the kitchen.

MS. GERE: Right. By the end of the evening, the two young men who had been sent to cater the dinner by the company were ready to pay us for having had the opportunity to serve a Justice of the Supreme Court and to hear half the stories. It was definitely a memorable evening.

MS. KAGAN: Yes.

MS. GERE: Another one of those Washington is a small world stories.

MS. KAGAN: Yes. That's terrific. I guess we can continue to go on until Zoom kicks us off.

MS. GERE: Okay.

MS. KAGAN: So I know that was your first big trial, and what a big trial that turned out to be. Not just some small potatoes kind of let me get my feet wet. You were totally immersed.

MS. GERE: Right. It's not many times that your first trial is covered by Dan Rather and others.

MS. KAGAN: Right. But was the book allowed to continue to be sold.?

MS. GERE: Yes. I believe it's still available, but Snepp is not allowed to keep the proceeds. He challenged the injunction again probably ten years later, long

after I left the Justice Department, but I know other people at Justice defended the injunction, and it remains in place. Meaning if he writes anything about the time while he was employed by the CIA, it has to be reviewed before he can publish it.

MS. KAGAN: What's the penalty for breaching the injunction?

MS. GERE: Well that would be up to whatever court in which the government sought to bring an action for enforcement of the injunction or some sort of damages. I don't know. Fortunately he didn't do that.

MS. KAGAN: Right. I was thinking perhaps someone in the future who doesn't care about the proceeds and just cares about getting the book published.

MS. GERE: Well you may find out soon enough if former National Security Advisor to President Trump John Bolton publishes his book in the next few weeks. I think it's already been delivered to bookstores. It's embargoed until the release date, but as of last week, according to accounts in the *Washington Post*, his lawyer was still engaged in discussions with the White House because he still had not gotten approval for publishing it.

MS. KAGAN: A lot of people are waiting on that book.

MS. GERE: And the same thing happened to Snowden with his tell all book. It's a ruling that retains its clout.

MS. KAGAN: Well good for you.

MS. GERE: Anyway, it seems like another lifetime ago.

MS. KAGAN: It's a positive that you've had many lifetimes since then.

MS. GERE: That was certainly a very exciting time period and an exciting case to work on, and one that I thought at the time would be hard to ever exceed the excitement and the notoriety and the challenging legal issues as *Snepp* was, but I learned not too long after that there was another case right around the corner, and one that I was also asked to work on as a trial lawyer.

MS. KAGAN: How long afterwards was that?

MS. GERE: Let's see. We actually filed suit in the *Progressive* case, that's the *United States v. The Progressive Magazine* in 1979, so the Supreme Court issued its ruling in *Snepp* in 1980. They sort of came back-to-back, although the trial in *Snepp* was 1978, so it took a while for it to get up through the Supreme Court.

The *Progressive* case was another interesting lawsuit because the United States was dealing with an issue again that was one of first impression in many regards. Basically what it involved was an author who was a freelance writer, a man by the name of Howard Morland, who wrote an article about how to build a hydrogen bomb. The article was going to be published by *Progressive* magazine, which was a long-lived publication in Wisconsin. The Department of Energy got word of the publication and there was a flurry of effort by a lot of people above my paygrade to try and convince the magazine that it should not publish the article because of the national security implications of doing so. The magazine would not agree. There had been, as I recall, contacts with the *New York Times*, the *Washington Post*, and others to ensure that if somehow they got a copy, they would not run it because of

the national security implications. Because the magazine was unwilling to agree to withhold publication, the Justice Department decided that we needed to file a lawsuit to prevent publication of this article. Of course, then people began looking at it is this another Pentagon Papers case because the government is trying to stop publication, and that is obviously a very difficult standard to meet. We brought the suit, and my recollection is we primarily brought it under the Atomic Energy Act. There was a provision prohibiting the release of restricted data that might injure the interests of the United States. "Restricted data" was a technical term in the statute, and essentially it was the information used by the Department of Energy engineers and scientists, so it's kind of secret information, if you will, that was afforded this special protection under the law. The lawsuit was filed in Wisconsin because that's where the magazine was.

MS. KAGAN: How broad was the magazine's audience?

MS. GERE: I don't recall how, I'm sure I knew once, but the point really was more frankly foreign states getting copies of it, and at the time, I can remember the person, the demagogue, that people worried about at that point was Idi Amin, a Ugandan despot, and there were some other foreign powers that would not be good to have a hydrogen bomb in their arsenal, so to speak.

So we ended up filing suit in the Western District of Wisconsin. The initial judge to whom the case was assigned recused himself. I've forgotten, he had some relations I don't know whether with the lawyers or the publication. I'm not sure. It ended up before a judge by the name of Robert

Warren. We had a hearing before him in 1979, I think March maybe, out in Milwaukee. I was one of the trial lawyers. Our team was led by our Deputy Assistant Attorney General, a lawyer by the name of Tom Martin. Another trial lawyer by the name of Bob Cattanach, and I were the trial lawyers on the case. Later on, another lawyer named Keith Werhan became part of the team because the issues kept expanding as we were going forward. In any event, we had this big hearing before Judge Warren. He wrote a decision shortly after the hearing and entered an injunction prohibiting publication of the article. That caused, back at that time, there were editorials in the *Post* and the *Times* about whether this was a good thing or a bad thing, considering what the legal issues were. The argument that the *Progressive* editors and Mr. Morland made was that the public needed to know how to build a hydrogen bomb in order to have an informed conversation about the use of and the wisdom of the use of nuclear weaponry.

MS. KAGAN: That's seems to be a stretch.

MS. GERE: Judge Warren was not too taken with that argument. He was, however, impressed with the affidavits that the Justice Department had obtained to support its request for an injunction. Much of the case was litigated under seal because in order to have a full and complete discussion of what was in the declarations or the affidavits, one would have to have a security clearance to be able to do that, and so, again, it was one of those issues that puts the government in an awkward position of trying to enforce a right without increasing the harm that results from an attempted enforcement. The

decision by Judge Warren was written publicly. I can recall the briefing was extraordinarily interesting for me because I wasn't a nuclear scientist, and trying to figure out how to draft a declaration that made the points about national security and the potential impact of this disclosure was quite a lesson in how to write a persuasive declaration without knowing all the nuances of the detailed information.

At one point there was some fear that an organization, a publication in Australia, was going to publish the article, and we sent a Justice Department lawyer to Australia to invoke, they have a Government Secrets Act or something like that, I can't recall. I do remember that the lawyer who was flying to Australia with these very highly classified documents traveled with an armed FBI agent who had the briefcase handcuffed to his wrist.

MS. KAGAN: Oh my goodness.

MS. GERE: This was not something to be trifled with that was being discussed in these various declarations. In any event, the publication did not come about in Australia, so that was good. But the case did continue forward in the United States in Wisconsin.

I should go back and say that a lot of what was filed was under seal because of its classification. We wrestled with how to accommodate the need for the lawyers on the other side to be able to see what the government was saying in order to make their legal arguments in opposition. So we ultimately worked with the Department of Energy and probably the FBI to obtain security clearances for a number of the lawyers who were assigned to

defending the magazine and the author. So that's kind of how they were able to continue to litigate.

MS. KAGAN: Do you remember what law firm it was?

MS. GERE: Yes. I do. The *Progressive* magazine was represented by a local Wisconsin law firm with a terrific history. The first name in the firm was LaFollette. I think he was the governor at one point. It was a firm of high esteem in the state, and so they represented the magazine. On behalf of the author, the freelancer, Paul Friedman, now Judge Friedman of the District Court, represented the author. That was one of the early opportunities I had to get to know Judge Friedman. It was one of the, unfortunately I can probably put on one hand the number of cases where over the years I would say that I developed not just a professional appreciation of opposing counsel, but a personal appreciation. In my view, a case can be fought as hard as can be, but it does not need to involve ad hominem attacks or making things personal, just stick to the law and stick to the issues. It's been what, forty years, and I'm still close friends with Paul Friedman. That was, like the *Snepp* case, sort of a side benefit. I made a good friendship with Judge Friedman as the result of working on this case, despite the fact we were on opposite sides and in a very highly contested and very emotional case for a lot of people.

So, the injunction was issued, and not surprisingly, the judge who was very much of a pragmatist, said honestly, I do not think that this is a case that a court should get involved in, and why don't you parties, why don't you go

talk and see if you can't reach some kind of a compromise, and then I won't have to issue an opinion. The idea, I think, in his mind was that there would be a negotiation in which the magazine and the Department of Energy would agree upon what was permissible to say publicly. That did not work. The *Progressive* then appealed to the Seventh Circuit and attempted to get the injunction overturned or set aside or whatever their ultimate wording was. I can't remember. I do remember very vividly going out to Chicago and having the oral argument. Again, I did not argue the case because it was at the appellate level. Happily, however, the person who was permitted to argue was the lawyer, Tom Martin, who had been working on the case right from drafting the complaint because he was the Deputy Assistant Attorney General. But he had been, prior to that time, a Deputy Solicitor General, so no one could say Tom didn't know what he was doing in an appellate court. He was a fabulous lawyer. The argument was I want to say in September of 1979. A few short days later, the article, well first the substance of it and then essentially the article itself, were published in violation of the injunction. But, of course, the injunction ran only against the *Progressive* magazine or any one of its agents. So the publication was done by, I think some publication in Wisconsin and then in California.

MS. KAGAN: Where would they get the article from?

MS. GERE: Good question, and there was an FBI investigation opened to determine how it was leaked or where it came from. To my knowledge, nothing came of it. And then the decision for the Justice Department was what do we do and

essentially we didn't have a lot of options left other than to move to dismiss the appeal as moot. I don't even remember whether we were the moving party or whether the *Progressive* was the moving party. So that was a very exciting case.

MS. KAGAN: Who was the author? What kind of background did he have?

MS. GERE: As I said, Howard Morland was a freelancer.

MS. KAGAN: But how did he figure out how to build a bomb?

MS. GERE: That was the other part of their argument was that this could not be as secret as the government argued that it was because he had found out his information simply by going to public sources. So going to libraries that had declassified DOE documents. We ended up, I remember this too, I ended up going to a lot of the nuclear installations around the country that had libraries both to see what was in the library and to talk with employees about what in their view was in the public domain. There were a lot of issues that we had to come to grips with on that argument.

The government's position was that, first of all, I don't think we ever conceded it was all on the public record, and even if it had been, there would have been no way that he had the ability to put all this together without the assistance of a scientist. Sort of an eye-opener, or more of a door opener, into a different world, and that was one of the scientific community for me because there were very strongly held views after we dropped the atomic bomb about what United States scientists should be doing, what should be disclosed to the public, what should be withheld, and so it was hard to tell

from whom Morland might have gotten additional information or guidance. I'm really stretching my memory here, but I want to say that Morland, his first name was Howard, and I think he had a brother who was a lawyer in D.C. at the time with one of the firms, and I don't remember any more than that. I'd have to look it up and see if I can find him. I don't know that I've ever asked Judge Friedman how he happened to come to represent Morland. I don't know.

MS. KAGAN: What did Judge Friedman say about the magazine going ahead and publishing it?

MS. GERE: He was, of course, his position was that Howard Morland had a First Amendment right to express his views in an article and that it should be published.

MS. KAGAN: But while the proceeding was going on?

MS. GERE: While the proceeding was going on, that was the subject of a lot of the argument back and forth about whether it was in the public domain, should it be, what in fact was the risk to the United States of publication. All of these issues, looking back at the Pentagon Papers, there was an extraordinary burden to meet to have the publication withheld. I don't know what the Seventh Circuit would have done. We'll never find out. I don't even remember honestly if there was a sense of the panel, from any of the questions, I don't even recall.

MS. KAGAN: But there was an injunction in place?

MS. GERE: Yes.

MS. KAGAN: So, he went ahead and violated the injunction?

MS. GERE: No. He did not. Somebody else published it.

MS. KAGAN: Oh right. But they could never tie anybody to it.

MS. GERE: Right. No one ever tied the *Progressive* to it, which would have been the strongest case we could have had. But really the injunction, as injunctions are, are directed to certain parties who are under their enforcement.

MS. KAGAN: That was very interesting.

MS. GERE: Yes, it was very exciting.

MS. KAGAN: And then what happened?

MS. GERE: And then after that, this now takes us up to 1980, just about, or the end of 1979, beginning of 1980, and at that time, my then-husband and I moved to Cincinnati, Ohio, from Washington in the summer of 1980. My husband was from Cincinnati and very interested in going back home to practice law. His parents lived there. He had an offer from a law firm. He had been working at the Justice Department as well with me. He had an offer from a firm that was really, in our young lives, too good to be true, so we did not pass up the opportunity to move, and that was all terrific for him. As Mark Twain said, "when I die, I want to be in Cincinnati, Ohio because everything happens there ten years later." As I found out very quickly upon trying to get a job myself in Cincinnati, there were very few, very very few, women who were litigators or went anywhere near a courtroom. I sent out many resumes. I don't recall exactly, I might have had some nibble, but not much. This is despite coming off two extraordinary successes in the courtroom.

MS. KAGAN: But it was Cincinnati.

MS. GERE: So what did happen, though, was that with the change of administrations, there was a new U.S. Attorney for the Southern District of Ohio. I don't even remember how I happened to learn that or think about it. So I applied to the U.S. Attorney's Office where there was an opening. Apparently this U.S. Attorney thought it would be really helpful to the Office, which was the Southern District of Ohio, and included Cincinnati, Columbus, and Dayton. So some pretty big cities in Ohio. He thought it would be beneficial for the Office to have someone on its staff that could talk to people in Washington at the Justice Department because every U.S. Attorney's Office needed to be in good stead with the Department because the Department itself had such control over the U.S. Attorney's offices. I did not disabuse him of the fact that I really did not think I had a direct phone line to the upper echelons of the Department.

MS. KAGAN: That was going to be my next question.

MS. GERE: Or that there was some secret language or handshake that I had that was going to be helpful. I wanted the job, and so I said, of course I'm the perfect person for establishing that relationship with Washington, D.C. I laugh about it now, but it was another one of those serendipitous things that turned out to be just terrific. I loved being in the U.S. Attorney's Office. It was a whole different experience from being in the Justice Department. The Justice Department, at least the work that I did, tended to be more, I want to say cerebral and dealing with issues of legal import, first impression, notoriety,

precedent-setting, whatever all those big words were. But being in the U.S. Attorney's Office was, at least at that time in the Southern District of Ohio, was like going to a general practice law firm. You not only had to be cerebral, but you had to be able to run up to the courtroom on five-minutes notice and do whatever it was that some judge wanted you to be there to talk about. So it was a very different experience, but one that I really enjoyed. It gave me a lot more time in the courtroom and trial work that I would not have had had at the Justice Department.

MS. KAGAN: That lucky streak probably couldn't continue forever.

MS. GERE: Right. So the work ranged from—I did a lot of medical malpractice because there were military hospitals under our umbrella, so I did wrongful death. I did bankruptcies.

MS. KAGAN: Some of that you need to develop a certain amount of substantive expertise or at least working knowledge.

MS. GERE: Yes. And I had to, of course, first of all gain some working knowledge of a court, the office I was working in, and the lawyers who were my opposing counsel. That was an experience because virtually everybody in the Office when I joined it, they were all from Cincinnati. They all had some kind of political tie to the U.S. Attorney or the Office or somebody, and so I was definitely a fish out of water. When it came to the judges, there were three active judges when I went to the Office, one of whom had a hearing on the census that had just been taken, either it was in the process of being taken and it was being challenged. That was one of the first arguments, as I recall,

that I had in the Office. The judge wanted to have the hearing in his chambers as opposed to in the courtroom, which I didn't quite understand, particularly because there must have been twenty lawyers at least who were involved. All these different parties that were challenging the census or had some stake in how it was being conducted. I don't remember all the ins and outs. So we got the judge's chambers, and I sat down, and the judge called on me. I started to talk, and he said, young lady, I could hear you a lot better if you'd come and sit on my lap, at which point I pretty much thought get me out of this place.

MS. KAGAN: Wow. Were there other women attorneys in your office?

MS. GERE: Yes. In the Office. One was, I can't remember whether she was there when I got there or whether she started shortly after I arrived, but women were definitely the exception. There were no, at this hearing with all these lawyers, there were definitely no other women in the hearing. I can remember going home that night and saying I don't know if I'm going to be able to practice here because this is just a different world. My husband at the time said oh, it's the same world, it's just that people in Washington learn to be more subtle about it. I thought I'm not sure this is a big improvement. Maybe. I don't know.

So that was one of my early introductions to the judges.

MS. KAGAN: You were handling that case by yourself? No team?

MS. GERE: Yes. Usually in the U.S. Attorney's Office, in that office, most of the person power, I was going to say "manpower" because most of it was, but most of

the emphasis was on the criminal case load. At that point, Cincinnati was on the raceway up from Mexico to Detroit and Chicago on the drug delivery speedway, and so we ended up with a fair amount of drug-related cases and that took a fair amount of the office's resources.

MS. KAGAN: How many attorneys were there in the office?

MS. GERE: I would say there were, well in Cincinnati there were probably a dozen maybe, fourteen maybe.

MS. KAGAN: And everybody handled whatever case came to their desk.

MS. GERE: Yes. Until I got there, and then gradually we developed a specifically designated civil division, and so there were lawyers that did only the civil work, and then others that did the criminal work. And that held true. We then kind of had to bring all of the three offices (Cincinnati, Columbus, and Dayton) together so that everybody was handling things the same way, so that would have been the folks in Columbus, which at that point was a smaller office. I think after I left, a couple of U.S. Attorneys have actually sat in Columbus as opposed to Cincinnati, and then that kind of shifts the personnel.

One of the other things that I recall about being in Cincinnati and the difference in practice, certainly from the Justice Department and in most of the cases that I handled, because they were pretty sensitive cases, and everybody wanted to make sure everything was appropriately documented, there always was when you reached an agreement with an opposing counsel, you always reduced it to writing just to confirm that you and I talked and

agreed to something. These are the days before email, of course, but just so that everything was documented. When I got to Cincinnati, and one of the first cases that I worked on, again I don't remember which one it was, but I think I must have asked the opposing lawyer, or he asked me for an extension of time to file something, I don't know, whatever, an answer or response to a motion, and we had a nice conversation and he said okay, I agree let's do that. I very dutifully wrote him a letter and said this is what we agreed, and he picked up the phone and said I know you're new to this legal community, but you really don't want to do this because it will essentially set you apart, and he said lawyers here, if they tell you they're going to do something, they'll do it. You can depend on their word. I thought, what a novel concept. It's different from what I had been accustomed to, but, of course, at Justice, I was litigating with lawyers from around the country, and everybody had different ways of doing things, and you could know people not nearly as well as if you were in a relatively small legal community, kind of what goes around comes around. So after that, I stopped sending letters and relied upon people's word. Until I couldn't, when somebody crossed you, and then obviously you'd know.

The other kind of story that, well a couple of them, that were I think interesting and reflective of being a woman in a smaller city in the early 1980s when women were not very numerous in the bar and certainly, as I say, not in the courtroom. One of the judges had this system where he would have what he'd call settlement conferences. Of course one question is should

the trial judge be overseeing a settlement discussion in a case over which he was presiding. Anyway, the judge had this whole system that he referred to as the Lloyds of London system. Every time for the first, I don't know, couple of years that I was in the U.S. Attorney's Office, every time I would go to one of these things, the judge would turn to me and say, "Counsel, maybe because you're new to the community, maybe you don't know Mr. So-and-So, but he is an outstanding lawyer." He was always kind of putting me in my place, that whoever was across the table was the hometown hero.

MS. KAGAN: And all three judges?

MS. GERE: Well the third judge, the story about him was that his goal for a new lawyer who was a woman was to make her cry during a trial. That was his goal.

MS. KAGAN: Did you know about that in advance?

MS. GERE: I knew about it partway through my first trial in front of him when he was just very difficult, exasperating. He used to refer to Washington, he would always say to me, yeah but you're from Washington, Baghdad on the Potomac. Anyway, he was definitely difficult, and he was the chief judge. Partway through my first trial in front of him, his then, I can't remember whether she was his courtroom clerk or deputy, we were on a break, and she came up to me and said, "Don't do it. Don't cry." And I said, "Cry? I'm not going to cry." And she said, "He's going to make you." No he's not. So it was like this game of cat and mouse.

MS. KAGAN: It wasn't his law clerk, it was his courtroom clerk?

MS. GERE: Yes. It was I think she was his courtroom deputy. So she'd seen it all. Anyway, I had my work cut out for me just kind of fitting in with the court and the rhythm of the office. There were two women who did criminal work, one who was there I think when I started, and the other one I think, as I said, she came shortly after I did, but the guys that did the criminal work all teased me because most of the civil work, if it went to trial, it was a bench trial, and so they would forever be teasing me about oh, you civil people, you don't know how to stand up in front of a jury. They teased me and called me the Main Skirt because I was the Chief of the Civil Division. So one day I remember saying to them, okay, give me some of your cases. Let me try some of your criminal cases. So for the next probably three years, I did some criminal work as well. I probably did a half a dozen criminal cases, prosecuted them. It turned out that I did way more than anybody had anticipated because one of the cases involved a female lawyer in Cincinnati who set up this ring with her mother and her coterie of boyfriends. They set up all of these staged automobile accidents and thefts to collect insurance proceeds. So we indicted her, her mother, and her then-current boyfriend who was the lead guy among the boyfriends. The judge granted a motion to sever, so we had three trials instead of one. So I did some criminal work, and that convinced me that what I really loved was civil litigation. The whole notion that you couldn't game things out and take depositions and look at documents beforehand was not my cup of tea. I can remember these criminal trials, I co-tried them with one of the more senior male lawyers in the office.

I remember the first trial when it came to be the defense part of the case and he looked at me and he said okay whoever comes through the door, I'll cross them, and you take the next one. And you would have no idea who was coming through the door next. You didn't really do a lot of *Brady* disclosures back then. So whoever walked in the door, that was who you were going to cross-examine. That was for me—I am sure exhilarating for a lot of people to do that and find it exciting—but I found it too nerve-wracking. So I became the chief of the civil division, which is for what I remained for the five years that I was there.

The cases that stick out most for me were the swine flu cases. So back in the late 1970s or early 1980s there was a fear of a swine flu pandemic. The United States indemnified all of the makers of the vaccine. When people became ill after they got the swine flu shot, they would sue the United States. There were hundreds of cases around the country, and they were consolidated into a multi-district litigation panel and a general set of discovery done, but then at the end of that, each of the cases would be sent back to its home jurisdiction for trial.

For whatever reason, the Southern District of Ohio had a disproportionately high number of cases. The chief judge decided he would assign all of the cases to the newest judge to handle them. He was the one who had this "let me tell you about your opposing counsel who's so home-towny." He was assigned all the cases, and as the newest AUSA, I was assigned all of the cases. I got to know the judge quite well, and the cases

were fascinating as medical issues, legal issues, and how to handle MDL litigation. They were complicated, and I had a lot of them. Several of them went to trial. I traveled around the country doing depositions, getting expert testimony lined up. So that was a real education.

MS. KAGAN: How many cases did you have?

MS. GERE: I think we had at least a dozen. Probably more like eighteen. As time went on and people watched what was happening, some people voluntarily dismissed, and other people would come up with creative medical causation proof, and others would say well I've come this far, I'm just going to roll the dice and hope for the best.

The sign that I had finally arrived in the office was in connection with one of these, I believe it was one of the swine flu cases. We had one of these settlement conferences, and the lawyer was from Columbus, not Cincinnati, who was my opposing counsel. He was a very well-known lawyer, but when we got to the conference, the judge turned to him and said you may not know Mrs. Whitaker (my married name), but she's an outstanding lawyer. So I knew that I had turned the corner and finally was going to be part of the home-town team.

MS. KAGAN: About time?

MS. GERE: Yes. About time.

MS. KAGAN: When you had your jury trials, because you were a woman, did the defense tend to excuse female jurors?

MS. GERE: No. I did not get that sense. Cincinnati was much more, people decided who they wanted as jurors based on their zip codes. This was all kind of news to me because I wasn't from Cincinnati. They didn't mean anything to me. I got the impression that jurors were very interested in seeing a woman in a courtroom because I don't think that was the day of women on TV law shows. That definitely was in its infancy. I remember, though, after one of the criminal cases that I tried, I was shopping for shoes at a women's shoe store near the courthouse, and I was in there just kind of browsing, and all of a sudden this woman came up to me in the store and said I just knew you bought your shoes here. I thought, Who are you? I don't recognize you. I don't know you. She said, I was a juror in one of your cases, and we used to talk about your clothes, and I always thought this was where you bought your shoes. This was a lesson on so many levels, that how really focused jurors can be and how they look at and take cues from lawyers. I always used that story when I was teaching at Georgetown, that you are kind of walking a tightrope. You want jurors to pay attention to you, and you be the reliable guide in the courtroom, but you can't be a distraction from your client. To me, that meant I wasn't going to go in with big gold chains on and a bunch of fancy loud clothing. At that point I thought that would make me the focus instead of my client or that it was not necessarily consistent with what I was trying to convey to a juror that I was the people's lawyer. I represented them, the taxpayers, the United States.

MS. KAGAN: I have been told that women attorneys should wear dresses in front of a jury rather than a suit, that that appealed to jurors more.

MS. GERE: I think that so much has changed on that score. When I was in Cincinnati, one could not wear pants to court. When I was at the Justice Department, nobody would have even thought about it because that wasn't part of what the attire should be. As I taught, though, at Georgetown over the twenty-year period, I always made it a point of talking to my students, male or female, about the importance of being neat, the importance of not being distractingly dressed, the importance of being comfortable because you're going to be sitting in a chair and then up and moving around and you can't have on shoes that hurt your feet, you can't have on something you worry is too short. And so I would tell people my preference was for women not to wear pants, but if they wore pants, it should be a whole coordinated pantsuit, not a plaid jacket and blue jeans or whatever. But boy over the years as I continued to practice at the Attorney General's Office, that was not even an issue anymore. Women wore pants all the time to court. Jurors now have seen so many lawyers on TV in pantsuits they've decided that's okay.

MS. KAGAN: Right.

MS. GERE: Over the years, I've appeared before a lot of judges. One judge in Columbus, Ohio banned open-toed shoes because that was beach attire. There were judges before whom you could not wear pants. I think there were judges that would not look kindly upon men who wore earrings or a stud in their ear.

Just again sort of the whole distraction factor. You don't need to call attention to yourself.

MS. KAGAN: That's interesting.