ORAL HISTORY OF THE HONORABLE JOHN FERREN

Fourth Interview
February 5, 2002

This interview is being conducted on behalf of the Oral History Project of the District of Columbia Circuit Court. The interviewee is John M. Ferren. The interviewer is Robert H. Kapp. The interview took place at the offices of Hogan & Hartson L.L.P. on the 5th day of February 2002, shortly after noon. This is the fourth interview.

Mr. Kapp: John, the last time that we were together, we talked about your role in the Harvard Clinical Program, and I know that in 1970 you accepted an offer from Hogan & Hartson to become a partner and to head its Community Services Department (CSD). Can you tell us how that came about?

Judge Ferren: Yes, I think it was in the fall, maybe October of 1969 that I received a letter from Seymour Mintz from the firm of Hogan & Hartson saying that the firm was going to set up a full-time cadre of lawyers to do community service lawyering. They wanted to have a partner in charge, a mid-level associate who would be assigned to work with that partner for approximately two years before someone else came in, and then a younger associate who would be part of the firm's rotation program and serve for four to six months. The idea was that this department would take on a variety of community service projects in the name of the firm, of course, and also would generate projects to involve other lawyers in the firm. I read Mr. Mintz's letter, thought it interesting, and threw it in the wastebasket. My wife asked what that was, and I told her, explaining that I had become pretty cynical about large law firms, having worked at one. And many of the students at Harvard at the time were turned off by large corporate practice, and, indeed, there was

picketing going on, I knew, in Washington of at least one firm by people who felt that the firm should not be involved in South Africa, if I recall correctly. And, in any event, I just didn't really believe that a firm could be truly serious about such an enterprise. I was very happy doing what I was doing at Harvard.

But I later fished the letter out of the wastebasket. I had called Mr. Mintz and thanked him for the letter and said I was not interested. I read the letter a few more times and began to think that if this firm means what it says, this is quite a breakthrough in terms of public interest lawyering by major law firms. So, after thinking about it a little longer, I called up Mr. Mintz again and said, "You know, I think this sounds very encouraging, and I think I would like to talk further about it." So, as a result, I flew down to Washington and met with Mr. Mintz; with you, Bob, as Chair of the committee that was putting together this program; and with Tony Harrington, Sally Determan, Peter Rousselot, and Carl Taylor. There may have been others, but I think that was the committee. When I met Mr. Mintz, who was the head of the Tax Department and, really, the head of the firm at that time, I was struck by the fact that he was wearing a tweed sport jacket with elbow patches. I saw somebody else that Seymour identified as a partner in the Communications Department, Howard Roycroft, in a yellow sport jacket. I remember at Kirkland, Ellis in Chicago one of my associate's being sent home for having inadequate attire, and so I thought, well, maybe not all law firms are quite as stuffy as I had thought.) To make a short story of it, I spoke with the committee; I also met Ed McDermott and Merle Thorpe, who were on the Executive Committee at the time, and Barrett Prettyman. I was very impressed

with everybody that I met and became convinced that the firm was really serious about its proposed commitment. After thinking further and talking it over with others, we eventually worked out an arrangement. We moved to Washington, and I joined Hogan & Hartson, around the 1st of June of 1970.

Mr. Kapp: What is it about the initiative that interested you?

Judge Ferren: Well, I think it was the opportunity to take the resources of a firm that was well known in the community and well respected and bring those resources to bear on behalf of low-income people, civil rights plaintiffs, people who ordinarily are not represented by a firm like that. The weight of good legal resources could be brought to bear for people who normally went without counsel or perhaps with very weak counsel. And I believe that firms had a professional responsibility to devote a portion of their resources to serving people who couldn't afford counsel, and I thought that if the firm was serious - as it appeared to be - this Community Services Department could demonstrate that commitment, which hopefully would be replicated by other firms around the country. Second, the program would involve lawyers in the firm outside the department. I didn't want this to be a project that did all the pro bono work for the rest of the firm. To the contrary, it should be a force that would generate business, pro bono business, and centrifugally spray it around the firm and involve other partners and associates, depending on their interests and expertise. As you know, Bob, you and I and Allan Ashman and others had evaluated Piper & Marbury's pioneering effort up in Baltimore to open up a neighborhood office, an antipoverty law office, and I had great respect for what that firm was doing there. Hogan was making a judgment

that having a program within the firm, rather than in a neighborhood, would give greater flexibility in terms of the projects it could take on, and I tended to agree with that. Hogan's would be a way of testing a new model that might have tremendous implications for improving legal services for the low-income community, ultimately throughout the country. And Hogan reinforced its commitment by proposing to put a partner, not an associate, in charge.

Mr. Kapp: Can you describe the nature of the work that was done by the Community Services Department during the period of your tenure?

Judge Ferren: Well, anecdotally, I'd have to start off with the fact that Ralph Temple, who was the local executive director of the American Civil Liberties Union, was probably more cynical about Hogan's commitment than I was initially when I got Seymour Mintz's letter. Ralph was lying in wait for me. I had been in town in the office for about 24 hours, and maybe it was even the first day I was at the office. He walked in and said, basically, if this commitment is real, you will take the ACLU case that I have for you to represent the Black Panther Party against the D.C. Police Department, which has raided Panther headquarters and beat up a few of its members. We'd like a civil suit to recover damages against the D.C. Police. I swallowed hard and said I'd get back to him. I'm sure I talked to you, Bob, and to others. I guess I figured that my bargaining power in the firm was probably at its highest on day one. I thought I might diminish as more cases like this came along, so I pushed for the case. It was actually two cases. I think a lot of other lawyers swallowed hard, but Harold Himmelman, Lang Keith, and I took the case, and we actually recovered damages for a group of individuals who had been beaten up

pretty badly by the D.C. Police. I think that this case, in a way, got us going and convinced the cynical community, like Ralph Temple and others, that the firm was quite serious and was not going to duck a case just because it was likely to be controversial.

We took other large cases over the years. We brought one representing the Community Action Agencies, the OEO Community Action Agencies. Howard Phillips, the head of the OEO under the Nixon Administration, was trying to dismantle the poverty program administratively, and we brought an injunction action, *West Central Missouri Rural Development Corp. v . Phillips*, to stop that before Judge William Jones in U.S. District Court here. The case was joined with one brought by the government employees' union, which managed to have the lead caption in the case, *Local 2677, AFGE v. Phillips*. The case was filed in February 1973 and was decided by mid-April. We succeeded in enjoining the dismantling of the poverty program. I was in court with Allen Snyder, it seemed, every other day as various issues came up. In fact, government employees were literally slipping hot items under our door that they weren't even giving to their own government counsel showing how the Nixon Administration was breaking the law right and left trying to scuttle the poverty program. So it was a very successful case and, again, the firm stood tall.

We had another large case early on. We didn't always take cases in the District of Columbia. We worked with the University of Detroit Law School (after its key staff attorney had left) to continue a suit against HUD and the U.S. Department of Transportation and the City of Hamtramck, Michigan, which had

been using federal money for urban renewal that would remove all of the African-American families in town by just mowing down their houses. In *Garrett v. City of Hamtramck*, Allen Snyder, Phil Larson, and I obtained a mandatory injunction to requ1re the replacement of that housing according to site plans we proffered with the help of a pro bono architect from Detroit, a city planner from Philadelphia, and a community organizer from the University of Detroit law school clinic. The case was successful, for the most part, upon remand by the Sixth Circuit when the case was appealed. (I've got to say, parenthetically, that by the time this process was ended, most of the families that had been displaced were long gone and could not be found; I guess that shows the limits of the court system in correcting injustice through mandatory relief like that.)

There is another major case I should mention. David Tatel, Allen Snyder, Walter Smith, and I represented the NAACP in the Port Gibson case, *Henry v. First National Bank of Clarksdale*, in which a Mississippi chancellor had awarded 1.25 million dollars in damages and attorneys' fees against the NAACP and its affiliates for leading a boycott against white merchants who were discriminating against African-Americans. Specifically, our lawyers obtained a federal court injunction barring enforcement of a Mississippi supersedeas bond requirement pending appeal to the Mississippi Supreme Court. Had this requirement been enforced, the NAACP would have had to post a bond totaling 125 % of the judgment to avoid immediate seizure of its bank accounts and other assets - in other words, financial ruin. The NAACP had no way of raising that kind of money to protect its right of appeal, so the federal injunction we obtained against the

bond requirement was crucial. And that injunction was affirmed on appeal through the good efforts of Allen and Walter in the Fifth Circuit. While we were keeping the bond requirement at rest in federal court, lawyers from Wilmer, Cutler, and Pickering were pursuing the defendants' appeal to the Mississippi Supreme Court. That court affirmed the Mississippi chancellor, but, in the end, the U. S. Supreme Court reversed, thereby vindicating the boycott against the Port Gibson merchants.

After mentioning these large cases, I want to be sure to emphasize that, at the same time, we did not believe that the purpose of our Community Services Department was exclusively to bring big class actions or major lawsuits. It was important for us to do that so that the firm's resources could bring cases that only a large firm like this, like ours, could handle; but we involved lawyers throughout the firm in small cases - whether it was a landlord/tenant dispute, or a consumer matter, or a local fair housing organization or a program to assist drug addicts, for example. We also drafted legislation that, with the help of Senator Eagleton who chaired the Senate District Committee, created the pathway for restoring the right to vote to ex-felons in the District of Columbia.

One day Chief Judge Greene from the Superior Court called up to say, "I have 75 juvenile cases for the firm; we've run out of Criminal Justice Act money." I somewhat grudgingly took those cases, not because I didn't want to help defend juveniles but because it was clearly a public responsibility to pay for criminal defense work, and the private sector shouldn't have to bail out the public fisc that way. But, in any event, we took the cases, and I literally went around and dropped

them on the desks of partners and associates. I remember that one of our senior partners, Lee Loevinger, went down to court- fortunately, with Ray Vickery to assist him- and Lee was so outraged at what he saw going on in the Superior Court in that case that he raised his voice perhaps a little too loudly. The judge stopped him cold. I don't know if the judge held Lee in contempt initially, but the judge at least was very close to it. Ray had to rescue Lee, and I later thought: if we could bottle the outrage that Lee felt about the system and somehow let everybody drink some of it, there would be much more pressure to reform the system. So we handled small cases as well as large ones.

We also worked for community organizations in the District of Columbia. For example, on referral from Steve Pollak, who chaired the Washington Lawyers' Committee for Civil Rights Under Law, I represented the Housing Development Corporation, led by the Rev. Channing Phillips, in connection with its Clifton Terrace Project.

Mr. Kapp: And you also, did you not, represent the Welfare Rights Organization in its early days?

Judge Ferren: Yes. Well, not in the early days so much, but George Wiley, the leader of the National Welfare Rights Organization, NWRO, and related organizations, had plenty of volunteer legal help from other sources to bring various welfare rights cases. But his organization, which had a bunch of nonprofits, required some, shall we say, reorganization and tax advice. So I became counsel to NWRO and George for charitable exemption purposes and for "non-profit law," so to speak. I spent hours and hours and hours trying to make sure that their house was in order,

because money came, money went out, and sometimes you wondered whether you could keep this all assembled in proper form. We spent a lot of firm time working with the Welfare Rights movement in that way.

Mr. Kapp: How would you describe the attitudes of the lawyers within the firm, particularly the partners within the firm, to your initiative? Was it smooth sailing all the way, or were there bumps along the road?

Judge Ferren: Bob, we had a system called the four-day rule, or was it the five-day rule?

Mr. Kapp: Four-day.

Judge Ferren: Four-day rule; I remember. For every case that came in, we would write it up and circulate it to the partnership. If a partner had a problem with the case, the partner would contact me and the firm's Executive Committee. We obviously couldn't take a case that involved a consumer problem that a banking client of the firm was involved with, so this was a way of making sure we had no conflict. But the policy also was included to let the partners know what we were about, and, indeed, if there were objections for any number of reasons to have it out and discuss the proposal and find out what the firm should be doing. I can't remember how many partners we had at the time. The firm was around 85 lawyers, or no more than 90, when I came - and no more than 130 when I left. And I suspect we had 40 or 50 partners of that number. With the exception of 2 or 3 or 4 partners who I think probably never supported the idea of the department, all of the other partners were supportive to very supportive, and I was very pleasantly surprised. I, of course, didn't know them all when I came, and I spent a lot of time going around and getting acquainted and hearing ideas and giving my own. And I would

have to say that the partnership overall was very accepting. Sure, there were cases sometimes that I wanted to bring that some people had feelings against, and we worked those things out. But as I sit here, I really cannot think of a nonconflict case that I wanted to bring that the partnership turned down, and it was the Executive Committee that would make the final determination. We didn't have a partnership vote. The Executive Committee really supported this program, and I think the committee was willing to stand up to a partner when the committee believed there was not a good reason to turn a case down. And, of course, we had no trouble getting as many partners and associates involved as wanted to participate.

Mr. Kapp: And how long did you function in that role as the head of the Community Services Department?

Judge Ferren: I was in charge of it for the seven years I was with the firm, but about halfway through, late in 1973, the firm - which had functioned, its management had functioned, exclusively through the Executive Committee - decided to set up an administrative partner who would administer the firm on a day-to-day basis and particularly initiate improvements that all of us realized needed to be made in our insurance programs, our accounting reports, and so forth. We were just at the threshold of automation; we needed more carefully drawn personnel policies. The firm asked if I would be willing to be the administrative partner on a part-time basis, and I said yes. So at my urging we brought in David Tatel, who had been directing the National Office of the Lawyers' Committee for Civil Rights Under Law, to help run the CSD. David came in as an associate, and eventually became

a partner. Probably from the time I took over as administrative partner, David took most of the initiative in operating the Community Services Department. During that period, we expanded. By the time I left in 1970, we actually had five full-time lawyers. My view had been that the department ought to expand as the firm expanded. I still stayed on top of everything that was going on, and I think ultimately made the decisions that the department made. To put it the other way around, the department didn't move unless I was on board with it. So David and I joint ventured the CSD, but he was really the initiator of most things, beginning probably in early 1974, if I recall correctly.

Mr. Kapp: And how did he come to your attention?

Judge Ferren: Well, I had known David. He had been a strong leader of the Lawyers' Committee for Civil Rights and he had also had private firm experience with Sidley & Austin in Chicago. I think for a time he'd been with the Sidley & Austin office in Washington. So he had had both private practice experience and public experience, and, therefore, I certainly felt he would be the right person for the job. But, of course, he was welcomed and easily sold himself to everybody else. I didn't really have to persuade anybody to bring David in; we were all thrilled.

Mr. Kapp: And who were some of the other people who served in the department in various full-time positions while you were there?

Judge Ferren: At the outset, Harold Himmelman, who had been with the firm in the Litigation Department, was the middle-term associate, and Harold was absolutely terrific. He knew the local court system; he was a very, very good lawyer; and he left to join the McGovern Campaign in 1972, early 1972. At that point, we were very,

very fortunate to recruit Allen Snyder, who was then clerking for Justice Rehnquist, to come to the firm at the end of his clerkship and serve in the CSD full time for two years. Allen and I worked right next door to each other as soon he came from the Court. Frankly, we used the CSD to recruit Allen. And I don't know that Allen would have joined the firm if he could not have had the front-end opportunity to work in the CSD. As you know, Allen was one of the finest lawyers who has ever been with the firm, and even though he did not have a lot- did not have any practical outside experience beyond being President of the Harvard Law Review- he stepped right in as a very able and practical-minded fellow. The fact he had no practice experience meant nothing; we were lucky to have him, and Allen was one of the lawyers who always made me look good. Allen's ability to frame matters clearly, his judgment in selecting the most appropriate approach, his legal skill in presenting a case, his wisdom in dealing with sticky situations, and his calm manner and kindness day-to-day were a godsend to me, to the firm, and to every CSD client. That's how I feel about Allen. After Allen, Sandy Berger came into the department for a while. Philip Larson also served as a rotating associate, as did Lang Keith, who became a judge in Fairfax County.

Mr. Kapp: Well it's quite a brilliant cast when you look back.

Judge Ferren: Yeah, incredible.

Mr. Kapp: When you look back at that period of time, John, how do you assess the Community Services Department initiative? Successful? Not successful?

Judge Ferren: I think it is enormously successful. I mean in the first place, it still exists. This department is going strong on an expanded basis, and we started in 1970. It's now 2002. So what are we saying? Thirty- two years that the firm has had this department. And I think, as I mentioned earlier, that by taking some pretty controversial cases at the beginning, the firm showed it was not simply taking cases that were easy. It was willing to stand up and be counted on the side of cases that the firm normally wouldn't find itself on. I think it has been very useful to the firm in recruiting good lawyers. I would have no doubt about that, and I'm sure that that had to be at least part of the motivation in setting it up, although I was convinced when I came that that was not what was driving the idea. I think public service was driving the idea, and, in fact, to be very blunt about it, when people asked, "Why do you think it was successful? Why did you believe in it when you came?" I said, "I think Seymour Mintz talked to young people." I think basically it was a situation where people running this law firm were in touch with issues of social injustice and realized that there was a professional responsibility that required involvement for a clientele broader than the firm usually was serving.

Mr. Kapp: Can you talk about your sense of the influence of the initiative on other law firms or on the Bar generally?

Judge Ferren: I think it has had a very strong influence. It has been very visible around the country, and although I think relatively few firms, at least for a long time, were willing to have a group of full-time pro bono lawyers operating the way we were, it's clear that firms all over the country- certainly in this city, but I know in others, and many in response to the example of Hogan & Hartson - set up pro bono

committees, designated a partner, not just an associate, to be in charge of the pro bono program devoting a substantial portion of that partner's time to it. And the pro bono movement really, really took off. I ended up as Chair of the American Bar Association Public Interest Practice Committee. I guess I was selected for that job because of what I was doing at Hogan & Hartson. We used the ABA as an additional vehicle for touting public interest law around the country with great success. When I chaired that committee, we formulated and published a proposal articulating a formula for public interest practice that we encouraged all lawyers and firms to adopt. I asked Erwin Griswold to advocate adoption of our proposal on the floor of the ABA House of Delegates, which he did. The motion for adoption passed, and this was, I think, the first time that the ABA or, as far as I could tell, any bar association actually quantified a suggested commitment to pro bono service. After my term ended as chair of the so-called "PIP" committee, I chaired the American Bar Association's Consortium on Legal Services and the Public, which was a consortium of ABA committees in the field of legal aid, public interest practice, legal assistance to members of the armed services, and other similar committees. So I think Hogan influenced the ABA, which used its pulpit to preach this good word. I think there have been other firms around the country that have set up departments, but I don't know of any firm that has been anywhere close to being in it as long as Hogan on such a substantial basis. I could name other firms in Washington that I think do an awfully good job and they probably would have done so, but you never know. I think our influence was pretty great.

Mr. Kapp: In 1977, you were appointed to the District of Columbia Court of Appeals.

Judge Ferren: Yes.

Mr. Kapp: Can you tell us how that all came about?

Judge Ferren: I can assure you I had never, ever, thought about being a judge of any kind, and by that time I had resumed my full-time role in the Community Services Department. I had given up the job of administrative partner after three and a half years; Gerry Gilbert took it over. This was around the beginning of 1977, and I was happily settling back in and working with David Tatel and the others in the department. I believe it was in February of 1977, when Judge Fickling of the D.C. Court of Appeals died. Not long thereafter, I got a call from Fred Abramson, whom I knew a little bit. He was with Sidney Sachs's firm and was Chair of the Judicial Nomination Commission. He asked if I'd be willing to be interviewed by the Commission for the D.C. Court of Appeals. At the time, I didn't really know much about how the local court system was organized. I learned that under our new home rule scheme that began in the early 1970s, we had a Missouri plan for judicial selection, which is a merit selection system where a seven- member commission made up of lay and law persons- including, in our case, one Federal District Judge- would nominate three individuals to the White House. The President, under the legislation, was duty bound to pick one of those three as either a Superior Court Judge or a Court of Appeals Judge, depending on the vacancy. Missouri started it, and, of course, its commission would nominate to the governor, who made the selection. But in our situation, it was the President and not the Mayor. I said I'd think it over. Later, I called Fred back and said I'd like to

know more. I came down and met with the commission, and as a result of that I was one of three individuals whose names went to the Carter White House for selection for the D.C. Court of Appeals. The others were Judge Sylvia Bacon, who was a very fine trial judge on the Superior Court, and Richard Medalie, a highly regarded lawyer in town. By the middle of May, I got a call from the White House saying that President Carter had checked a box nominating me for the judgeship.

Mr. Kapp: And can you describe your earliest experiences as a judge?

Judge Ferren: I deferred getting sworn in until after Labor Day. In 1977, to take a little vacation and to get a couple of law clerks. I was fortunate to get Jim Tomkovicz, who was then a clerk for a Federal District Judge in San Diego and knew the criminal law. I had not handled that many criminal cases, and criminal law is about half the caseload or more on the D.C. Court of Appeals, and so Jim was willing to come to be a clerk. And I got Ken Miller, who was a recent graduate of Harvard Law School and was very good in economics, among other things, and in accounting. I think the court was lying in wait for me, because the very first case I got assigned to write was a utility rate case, which was a huge undertaking, and Ken was very helpful in particular in that. Jim Tomkovicz basically taught me the criminal law as we went along. I was excited. As I said, I'd never thought about a judicial career, I'm still not sure why I was willing to give up the best job in town as head of the Community Services Department to be a judge. In fact, I think I'd only been in the D.C. Court of Appeals once. We had one, no we had two cases in the D.C. Court of Appeals in the seven years I was with the CSD at Hogan. In any event,

Chief Judge Newman was extraordinarily kind and helpful to me. Every member of the court was. A former partner of mine at Hogan & Hartson, Stanley Harris, was on the court. So it was something that I just plunged into with great gusto and really felt good about doing, and it seemed to suit me quite well. I felt honored to have been chosen to participate in finding justice - in determining just results - in all kinds of cases, large or small. I knew that I cared about that very much. Also, the court offered a wonderful academic experience, which I, of course, always enjoyed - the research and writing - but it also had consequence. It wasn't just writing an article; you actually made a decision that affected people's lives, and so that combination I felt suited me well.

Mr. Kapp: How would you describe the transition from lawyer to judge? Is there a difficulty in the transition? Or is it a natural transition or what?

Judge Ferren: Bob, it felt more natural than I thought it would be. I don't think in practicing law as an advocate I ever took a position without asking myself, "Well, what is the right position?" What is the answer? How is this going to turn out, and can we responsibly take the position we are taking? So I think I was deciding cases all along when I was acting as an advocate, even though one is never quite sure how they are going to turn out. So I did not find the transition difficult at all. I found it very natural, and I guess I just allowed the more academic side of me to take over.

I'd been spending a lot of time as a people person running committees and politicking with my partners and all of that, and it was kind of nice in a way to come into an environment where I could just roll up my sleeves and do legal research and writing and expand that side of myself. That isn't to say there aren't

politics on a court, believe me there are. But it was a quieter involvement, and, as it turned out, I felt comfortable making that change.

Mr. Kapp: How were you received by your new colleagues?

Judge Ferren: Very well. I had just a wonderful reception from every one of them, and the court was pretty evenly divided philosophically. It was a nine-judge Court and on tough issues - by which I mean Bill of Rights issues, Fourth, Fifth Amendments-type issues, criminal law issues - there were a lot of 5-4 decisions when we sat en banc. A lot of panels were 2-1, and I was on the liberal side of the Court, as people would characterize it in most of those gut issues. But I never felt that those who disagreed with my position lacked respect for me, and I respected my colleagues with whom I disagreed. The court in those early days, nonetheless, was a more contentious environment than it has been more recently. But it worked.

To illustrate the closeness of difficult cases at the time, I believe that the Chief had seven or eight petitions for rehearing en banc waiting for me where the vote by the other eight was 4 to 4. It takes five votes to go en banc. I had a lot to learn- and decide- very quickly.

Mr. Kapp: Any of those colleagues who you feel had a particular influence on you as a judge?

Judge Ferren: Well, they all did in different ways. Certainly Ted Newman as Chief did because he made it his business to show me the ropes, and so from the point of view of time spent with a colleague I think Ted was extremely active with me. Judge Julia Mack became one of my closest friends on the court, and I respected her enormously. The judges with whom I disagreed most were Frank Nebeker and my

former partner, Stan Harris. We would have very, very strong disagreements, mostly on constitutional interpretation, but they made me a better judge by making sure that everything I proposed was tested by their views, and I think, in turn, I made them better judges by challenging the way they might come out. I think it's terribly important that a court have a group of diverse views represented, and our court, I think, was strong because we did have so many varied viewpoints.

You'll recall that, four years after I came onto the court, another Hogan alumnus, Jim Belson, who had been on the Superior Court for quite a few years, was named to the Court of Appeals. Jim is a moderate fellow, in philosophy and temperament, and one of our former partners once joked that if the three of us from Hogan - Stan, Jim, and I - had ever formed a panel together, the vote would have been 1 to 1 to 1.

Mr. Kapp: Did you think that you had an influence on those people whose views were so dramatically different from your own?

Judge Ferren: I don't know Bob. I don't know, I can't recall that I ever- on what you would call a really tough Constitutional issue- caused anyone who was dug in on the far-right side of the court to change his mind. I say "his" because the two women on the court, Catherine Kelly and Judge Mack, tended to agree with each other and with me more often than not. But I certainly think that, over the years, every judge influences his or her colleagues by working hard and trying to be persuasive in what one writes, but it's not for me to say how much influence I may have had.

Mr. Kapp: Can you describe the process a bit? For example, if a case 1s assigned to you to write an opinion, would you write it and then circulate it among your colleagues or what would you do?

Judge Ferren: Here's the way it works. We have what we call a preassignment system. That is to say, if three cases are being argued, each judge tentatively is assigned in advance to write one of those cases. One can criticize that system on the ground that a cynic would say it leads to one- judge decision-making, preparing only the case you are tentatively assigned to write - don't worry about the other two. But that's not the case in our court. We all prepare all three cases, but the system does make sure that at least one judge, at time of argument, is especially well geared to deal with the case in asking questions and so forth. In any event, you knew that for every sitting of three cases, you would write at least one opinion, and for every sitting for six summary cases, you would write two.

Assuming that you're not dissenting and having to change that assignment to somebody else, you will write one of two kinds of opinions. If it's a unanimous affirmance, it's not making any new law, a fairly slam-dunk kind of decision, we write an unpublished memorandum opinion and judgment. That's usually two, three to four pages at most, and you just send those around to your colleagues pretty quickly. It's rare that a colleague would make major suggestions. And those go out to the parties directly from the Division. Judges who did not participate do not see the opinion before it goes out. These opinions cannot be cited in another case. In contrast, a published opinion is one where the law is applied to a set of facts, not of a kind addressed by the court before, that will help the bar understand

more fully what the law means and how far- or narrowly- it reaches. In some cases the interpretive context is so novel that the decision may best be characterized as establishing “new law." You draft an opinion and circulate it to the Division, and, of course, the other two judges will make suggestions. You may even have a dissent, and so you are constantly fine-tuning and adjusting. Once the Division has approved the opinion, it is circulated to the full court for a week for any comment by the other judges who did not participate - the reason being that that opinion is going to bind all nine judges, even though it comes from a three-judge panel. Once it clears the "five-day rule" (this five workday rule takes a week), then, as I say, it goes out to the parties. But you get a lot of helpful comments during that period, too, before publication. So the five-day rule improves the product of the Court.

The way I would work most of the time would be to have a law clerk do a first-draft opinion, and then I would start fiddling with it and rearranging paragraphs and asking for more material and so forth. Finally, I would give the draft back to the clerk with my rendition, and then a clerk would indicate what she or he found wrong or would want to improve. So we'd go back and forth until there would be an opinion that usually wasn't close to what the original draft had been, but was one that felt right. Then it would be circulated to the Division.

Mr. Kapp: Would you say you have a particular judicial philosophy? And if so, how would you describe it?

Judge Ferren: I always would approach each case, at least try to approach each case, to find the right result based on the facts presented. I don't think I look for a case to be a

vehicle for some larger principle. But with that said, if we are talking, for example, about a criminal law case where there is a question of unlawful police conduct, such as an allegedly unlawful search of an apartment, or issues under *Miranda* where there is a question of interrogation without a rights warning, I put myself among those who are quite sensitive to those issues. Probably if one looks at the work I've done over the 20 some years I have been on the Court, one would say that I have a philosophy that is very committed to enforcing the Bill of Rights. But I have tried very hard to follow the law correctly, as I see it, and to decide each case on its merits with whatever result the law required. I'd really have to address individual cases to explain why I may have come out one way or another.

Mr. Kapp: Are there any judges out there either past or present that you most admire and feel most express your own judicial philosophy?

Judge Ferren: Well if you'll allow me to include the Federal Bench as well, I think Judge William Bryant of the Federal District Court has always impressed me as a great judge. He would always teach from the bench, a man of great compassion, a man of great integrity, and a very, very bright, wonderful judge. And Judge William Jones, whom I was before in the *OEO* case, was one of the quickest, smartest Federal District Judges that I ever appeared before as well.

In the D.C. Court of Appeals, I have mentioned Ted Newman, an extremely bright, able judge, Chief Judge. Ted had been a partner at Houston, Bryant, & Gardner, then a Superior Court judge, before coming on as Chief of the Court of Appeals. Judge Mack, my dear friend, who had had a high position at the EEOC, is a very compassionate and capable judge. I have enormous regard for the

care and integrity with which Jim Belson has worked on the Court. Judge Nebeker had been head of the Appellate Division of the U.S. Attorney's Office, and although he and I have disagreed with each other a good deal, I have always respected and enjoyed Frank- a judge with a great sense of humor who was very welcoming and helpful to me when I joined the court. He has always made me think more deeply about all sides of a case. He has made me a better judge, and has always been friendly and personally supportive of me in many ways. Bill Pryor, a former Assistant United States Attorney, was a wonderful Chief Judge after Ted Newman. Bill is a careful, sound judge and a model colleague with a warm smile. Catherine Kelly was smart, cheerful, a wonderful colleague. And John Terry, another former head of the Appellate Division of the U.S. Attorney's Office, has set the standard for thoroughness and clear writing, as well as being an enjoyable colleague. Emmet Sullivan, after serving on the Superior Court, was with us, I think, for three years before his appointment by President Clinton to the U.S. District Court. Emmet, too, was an excellent colleague and a felicitous writer. After Bill Pryor, Judy Rogers, who had served as D.C. Corporation Counsel, was our Chief, and she was outstanding. In more recent years, I have come to respect, admire, and enjoy my newer colleagues: John Steadman, Michael Farrell, Frank Schwelb, Willie King, Vanessa Ruiz, Inez C. Reid, Eric Washington, and Stephen Glickman.

Before talking about them, I want to go back to the beginning, I don't want to overlook three senior judges. I felt privileged to sit once with Andy Hood, a former chief judge, who holds the record for his 33 years as an active judge.

Judge Hood was most gracious when I arrived and complimented me on my first published opinion because it was short. Had he lived longer, he would have learned that that particular compliment did not foretell a trend. Andy Hood, George Gallagher, and I sat on an appeal that presented the question of how far, if at all, someone had to retreat before shooting in self-defense. The three of us had not resolved the issue before Judge Hood died, and another judge was selected to help reach the decision. Judge Gallagher, by the way, was a former Justice Department lawyer and a very good judge. He was most enjoyable, especially in relating his experiences as a member of General Patton's army. George, of course, was an active judge when I arrived.

The other two seniors were former Chief Judge Gerard Reilly and Judge Hubert Pair. I sat several times with each and enjoyed these experiences immensely. Hubert had been a former D.C. Corporation Counsel and was well versed in D.C. law, a solid judge and most friendly gentleman. Gerry Reilly was a courtly man who had been a renowned labor lawyer, the Solicitor of Labor, then a member of the National Labor Relations Board. Gerry knew the history of Washington better than anyone I have known, and many of us will remember standing with him in front of a mural of Farragut Square, when he asked us to pick out houses and he would recite the history of every family who lived there.

Also when I joined the court Judge John Kern was welcoming and helpful and a solid, moderate judge - although a radical Princetonian! John had served in the DOJ and the U.S. Attorney's Office, as well as worked in private practice. Walter Yeagley was a delightful and interesting fellow. He had been head, I think,

of the Internal Security Division at the U.S. Department of Justice. When I first met him, I noticed a photo of Richard Kleindienst on his wall, hanging upside down. Kleindienst had been responsible, I gather, for Walt's appointment to the court but, in inscribing his photo, had not noticed that he had done so on the bottom upside down. So Walt had the choice of hanging the photo right side up, with an unreadable inscription, or hanging the inscription right side up, with the photo hanging down - and he preferred the inscription right side up, as well as the dig at Kleindienst that his display represented. Walt also was a campaign button collector and informed me that a button collection that I'd hung on my office wall had a much higher auction value than I'd ever dreamed of. Walt was a very good, fair-minded judge.

I think I've served with 24 judges from 1977 to date. And they've all been good colleagues.

Mr. Kapp: Just turning to the process here again. What is your assessment of the influence of oral argument? Does it win cases? Does it lose cases? Does it have any significant impact in your mind?

Judge Ferren: Oral argument, well let's put it this way. I think a case usually is won on the briefs. I try to tentatively make up my mind on the basis of the briefs, and then use oral argument to probe the areas where each side seems weaker- if there is a weakness. There are relatively few cases where the outcome has been affected, in my judgment at least, by oral argument. You tend to confirm your initial judgments through oral argument, rather than be changed by oral argument. That being said, there are occasions when the case has been complex enough, or the

briefs have been confusing enough, or however you want to put it, that oral argument has put a new gloss on the case or a new perspective that has led to a result different from the one that I went into the argument with. But I think most of us would say that that is the exception.

I will tell you that there was a case, the *Federov* case, involving a claim of selective prosecution, where I believed that the trial court should be reversed because the U.S. Attorney's Office had been using an unlawful double standard in enforcing the loitering statute. In other words, if you loitered to make a political statement, you'd get prosecuted, but if you were there simply because you were homeless, you wouldn't get prosecuted. That seemed to me to be a discrimination that was unconstitutional. I wrote for a majority in the Division, and the case went en banc. I figured that that case was going to go down 5-2 (the court had only seven active judges at the time), with my position on the losing end. But Carol Steiker from the Public Defender's Service came in and started arguing the position that I had accepted when she argued to the Division. And Bob, it's the only case I've ever experienced where I could physically feel the court changing - by which I mean the Court's body language, leaning forward to listen, shifting uncomfortably when the prosecutor spoke. By the time that that argument was over, Carol was so brilliant, so persuasive, and, of course, so correct, that when we went into conference, by the end of conference the vote was 5-2 in favor of my position- Carol Steiker 's position- that there had been unlawful selective prosecution. Well, I worried that that 5-2 majority would not last if I didn't get the opinion that I was assigned to write out really quickly, to get those votes locked

in. And sure enough: by the time I got the thing finally taken care of, I'd lost one of those votes. But the position I espoused prevailed 4-3, and I've never seen anything like it. Carol, by the way, had clerked on the Supreme Court; she'd been President of the *Harvard Law Review*; she's now a professor at Harvard Law School and is obviously an extraordinarily able person. It was fascinating to experience the court physically reacting in the way it did because the judges were so impressed by counsel's argument.

Mr. Kapp: So what do you think that makes for successful oral advocacy?

Judge Ferren: I think the most effective person is one who clearly understands the case, acknowledges the weaknesses as well as the strengths, and points out to the court why, despite the strength that the other side may have in a particular way or for a particular reason, the advocate's position should prevail for reasons (a), (b), (c), and (d). It also includes a requirement that one be intimately familiar with the record. Some of the most effective advocacy comes from a person who will answer every question by reference to the record in addition to a point of law, so that there is always a factual illustration as part of this case in support of the outcome that's being advocated. But it's candor, it's honesty, it's knowledge of the record. A counsel is weak who comes up and tries to snooker you, or to avoid what everybody should know is the real issue in the case, or who will pander to a judge by saying, "Well, you decided, you wrote an opinion the other year, or the other day, that said X." It's the honesty that is the most important thing.

Mr. Kapp: Other than Carol Steiker Wald, any other

Judge Ferren: Steiker

Mr. Kapp: Steiker. Other than her, any other lawyers who appeared before you whom you would single out as being particularly effective?

Judge Ferren: Yes, my colleague Mike Farrell on the Court of Appeals when he headed the Appellate Division of the U.S. Attorney's Office was an extraordinary advocate. He knew exactly where he was strong, he knew exactly where he was weak, and he knew exactly what judge to look at most of the time. Most of the time it was me -right in the middle. Mike was one of the finest, if not the finest, advocate for the U.S. Attorney's Office that I've heard. I would add that he has had some excellent staff attorneys who've worked there over the years, in particular, John Fisher, Ann Simon, Elizabeth Trosman, Elizabeth Danello, extraordinarily able advocates. Whenever I see one of them at the podium, I may say, "I take it you know you have a difficult case, because you wouldn't have been assigned to argue it if you had a sure thing." Mary Ellen Albrecht, who is a Superior Court Judge, was also an outstanding advocate for the U.S. Attorney's Office. Frank Burgess, now a Superior Court Judge, was among the finest criminal defense oral advocates on appeal that I have ever heard. Also outstanding are Jim Klein, now head of the Public Defender's Appellate Section, and Mark Rochon, David Reiser, and Gary Kohlman, all of whom used to be with the Public Defender Service. Another fellow, Richard Gilbert, is an extraordinary Criminal Justice Act advocate, as are William Rhyne and Douglas Wham.

Some of the Criminal Justice Act attorneys are very, very fine. Occasionally the big firms come down. Walter Smith, for years at Hogan & Hartson, is one of the finest oral advocates in a civil case I've ever heard.