ORAL HISTORY OF THE HONORABLE JOHN FERREN

Sixth Interview
February 13, 2003

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 13th day of February 2003, shortly after noon.

Mr. Kapp: John, the last time that we were together we were talking about some of your prior legal experience and private practice experience and then we moved to talk about some of your experiences on the judiciary. And I'd like to start today, if I could, by asking you which of your colleagues on the bench do you feel you most admired?

Judge Ferren: Bob, I think I am correct that I have served with 24 judges over the 25 years that I've been on the D.C. Court of Appeals. And I don't want to give these in any particular order. I'll probably omit some that I regret, but among the more senior judges, in fact, those who are currently acting as senior judges, I would mention Julia Cooper Mack, whom I've always admired for her conscience, her sensitivity to the human problems that come before the court, always reminding us that those problems - not just legal rules - not just legal rules are central to the analysis. She was a wonderful colleague and a very inspirational person. Jim Belson is another one that I respect enormously for his conscientiousness and his hard work and his attention to detail. Jim has been a more conservative jurist than I, but that makes me a better one when I have to deal with his approaches, and I think that his integrity is high . So I'll include him. Ted Newman, who was chief when I joined the court, is brilliant, quick of mind, very penetrating in his analysis, and a very

liberal-minded judge for the most part. I'll include Ted among those that I have admired most. I would also include Catherine Kelly, who is no longer living. Catherine was bright, liberal, concise, witty, and a delightful colleague. I think I've also mentioned earlier my enjoyment of and respect for Frank Nebeker, Bill Pryor, John Terry, Emmet Sullivan, and Judy Rogers.

Among my more recent colleagues, I would name John Steadman, Mike Farrell, Frank Schwelb, Willie King, Vanessa Ruiz, Inez Reid, Eric Washington, and Steve Glickman. John Steadman, who was a professor at Georgetown before he joined the court, is about as meticulous in his approach as any judge could be, looking for every conceivable angle and issue - and wrestling with it. John is a real educator and one who is extremely careful about everything. And he will drop everything to help you at any moment, a very selfless fellow.

Mike Farrell, who used to be head of the Appellate Division of the U.S. Attorney's Office, is probably the quickest judge I've ever worked with. He could do his work on a one-half-time basis, I'm sure; and he is very careful as well. His contribution to the court has been an ability to bring people together to arrive at some kind of consensus when the views are so disparate. He is outstanding at fashioning a remedy or an approach that people can sign onto in a very divided or a difficult case. You will recall I mentioned that Mike, in my judgment, was one of the finest oral advocates from the prosecutor's office who has appeared before our Court in my time there. I admire him greatly. I've enjoyed him personally very much.

And then there is Frank Schwelb- a most interesting fellow who had been head of the Housing Section of the DOJ Civil Rights Division, is a former Superior Court judge, and has a real passion for his work. He loves the job; he's a very caring human being; he shows a fierce sense of justice in every case. He is not as predictable as others; he's ad hoc in the best sense of looking at the facts of the case and asking, "Where does justice lie?" He writes all of his own opinions, including every comma and every period; he doesn't even delegate to a law clerk the responsibility for a first draft of the facts as far as I know, and yet, he is an extremely efficient judge. And Frank has a great sense of humor.

Willie (it's really Warren) King is, I believe, a native Washingtonian who was for years a fine Superior Court Judge after serving at high levels in the U.S. Attorney's Office and teaching at Antioch Law School. He is a man who has more law in his head than most of us and has great practical judgment. And I particularly enjoy our conversations about baseball, which he knows as well as he knows the law.

Vanessa Ruiz, a former private practitioner and D.C. Corporation Counsel with a quick mind and very special sense of humor, is a favorite of mine because she always asks all the questions that others believe have been answered, and she will put a special twist on a problem that helps those who are willing to make the effort see new angles and issues that have to be resolved before a case is finally decided. She cares deeply about how people are affected by the law. I have known Inez Reid since college days when she debated for Tufts and I debated for Harvard. She is also a former Corporation Counsel and not only is a bright, very

hard-working judge but also is a dedicated teacher. She teaches undergraduates at American University and teaches her law clerks as a major part of her calling. Inez is the only judge I know who would keep on for a second year a clerk who had been slow to catch on during the first, in order to help that young man or woman get ready for practice, even though the cost in additional work for Inez herself would be substantial. I admire her very, very much.

Eric Washington and Steve Glickman came onto the court just as I was rejoining it in senior status and spending part of my time working on a biography of Justice Wiley Rutledge, so I have not yet had the opportunity to work with them as much as with the others I have mentioned; but both Eric and Steve strike me as very capable judges and fine colleagues, and I look forward to sitting with them in the years ahead.

Mr. Kapp: Other than Mike Farrell and his talents as an oral advocate, as an advocate, do you have any observations to make about other judges, other lawyers who have presented cases to you before the Court?

Judge Ferren: I think I have mentioned some of these. Frank Burgess, who now is on the Superior Court, was head of the Appellate Division of the Public Defender Service. I would put Frank as one of the best criminal defense appellate advocates I've heard. Of course, there are many others who are truly outstanding. I've mentioned others earlier, including Jim Klein, who's head of that division now and is a truly outstanding advocate. But Frank Burgess is not only as smart as they come, but also you'd ask him a question, and with that soft southern voice he'd express his opinion. Sometimes you'd ask him a question, and he'd look you in the

eye and say, "Judge, because it's the right thing to do." There aren't many oral advocates who do that. I guess he knew me well enough to know that I want to do right, just as everybody else does, and he had that marvelous combination of intellect and passion and compassion and common sense that sometimes is magical in court. Earlier I also mentioned Walter Smith, a former colleague of mine here at Hogan & Hartson with whom I worked at the Corporation Counsel's office. He was my special deputy. Walter has a mind that can grab a case and shake it and pull out the essence and present it in a way that makes you really have to dig hard to find out what's wrong with Walter's case - if there is a weakness. He presents a case with such confidence that you almost have to feel you're stupid if you don't go along with him. He has a compelling presence. And there are many, many others.

Mr. Kapp: Can you talk a bit about your law clerks? What have you looked at in selecting law clerks, what have your relationships with them been, who are some of the outstanding judicial clerks that you've had, and what kind of influence do you think you've had on them?

Judge Ferren: Oh my, that's a very large question. I think in the years I was an active judge I had 41 law clerks - 41 instead of 40 over 20 years because, when I was Acting Chief Judge briefly, I was given a third clerk. Right away I must say that I would hire every one of them again. Each was terrific - bright, loyal, helpful in anything I asked, a good friend. I have mentioned Jim Tomkovicz, who was one of my first two clerks when I joined the Court back in 1977. Jim was a graduate of USC Law School and had been clerking for a Federal District Judge in San Diego and

wanted an Appellate clerkship. He somehow found out I was looking for clerks as a brand new judge. Jim was truly an expert on the criminal law. I knew very little criminal law when I came to the court - and that's more than half of our work- so Jim taught me criminal law. He's now a professor of law at the University of Iowa.

I have a good friend at Harvard Law School, Professor Andrew Kaufman, who almost every year would recommend someone to me as one of the two clerks that I ended up taking. I did not take a clerk from Harvard every year, but quite a few have come to me through Andy's good offices. For whatever reason, the percentage of outstanding applicants who were women tended to exceed in large measure the number of outstanding applicants who were male. Again, I have had truly outstanding clerks every year, for whom I am most grateful. I would enjoy reminiscing about my experiences with each, but of course that would take a very long time.

As to your question about our relationships. One of the best parts of the job was to spend a year with two really willing, capable young people. Frankly, I tried to find the smartest law clerks I could find because I figured my strength was in experience and judgment, so I looked for clerks to augment the brain level of the office. And we worked as a team. After conferring about the case, I would use the law clerks to draft opinions. Then I would work on them and give them back to the clerk for reaction. And back and forth. It was a real joint venture, and we would argue back and forth. We were on a first-name basis; I insisted they call me John, and we became very, very close friends. We've had clerk reunions every few

years, and I trust they will continue even into my dotage. A lot of them now have children that are getting quite old. Some of the law clerks now are in their fifties. It's been a wonderful kind of family, really. I would say that Pat Milone, who was my secretary for 16 of the years, has been a central part of this family, as has Gale Rivers, Pat's successor, so it's been a very, very close kind of relationship. I sense from the fact that the clerks stay very much in touch with me that they valued the experience; and, to repeat, the relationships with my clerks have been a high point of the job.

Mr. Kapp: You say that your mode of operation typically was for them to do a first draft of your opinions?

Judge Ferren: Yes. And that, of course, suggests the question, Who writes the opinions? I hasten to say right now that I don't believe any law clerk of mine, in a room with assurances of anonymity, would say that they wrote the opinions. That's because a first draft, which begins with a statement of facts and issues and then proceeds to analysis, initially reflects a discussion that we have had about how the opinion ought to be shaped and the decision reached. All the clerks have been very, very capable of doing a draft. But then I start digging at it, asking for additions, cutting material out, and rewriting the opinion in my own way. So it's truly a joint product, and it becomes better because we've been wrestling with it right down to the end. Often the opinion as it comes out, compared to how it began, barely shows a resemblance. So it's a joint product, but I think the style over the years 1s consistent. You can identify judges who don't write their own opinions, because

the opinions stylistically are different from year-to-year-to-year. I think if you look at mine, however, you will say the same person has been writing them.

I think an important question is: How can you use law clerks most efficiently? I think one of the best ways is to have them work on draft opinions. I know some judges who have them write memoranda, and then the judge uses the memoranda as a basis for writing the opinion. I see a lot of redundancy in that, a lot of wasted time. I do not ask law clerks to write memoranda, what judges call a "bench memorandum" on cases. I could read the briefs; I knew what the issues were. I might ask a clerk to check an issue out and write a little one-page blurb with some Xeroxed cases attached to it. "Give me a kit," I would often say, to help me get through this case and make the decision. But I see some judges using law clerks in ways that I think are not productive, and as a result those judges can get behind in their work.

Mr. Kapp: We talked in some of our earlier sessions about your efforts in respect of providing legal services to the poor, and I wonder if you could talk a bit about what you've done in that area following your appointment to the judiciary?

Judge Ferren: Well, Bob, I'd have to go back and look at dates. But, while I was on the Court, I continued very actively in the American Bar Association for quite a few years into the early eighties. As I've mentioned, I chaired the Committee on Public Interest Practice and later chaired the Consortium on Legal Services and the Public. In that latter capacity, during the period when President Reagan was trying to dismantle the Legal Services Corporation, the American Bar Association really had to step up and press hard to keep that from happening. Our Consortium,

working with the President of the ABA, Reese Smith, and others, really stood tall in that effort, which largely was successful. During that period, too, I chaired the District of Columbia Judicial Conference Committee on Civil Legal Services, encouraging law firms to donate pro bono time to compensate for federal cutbacks after the Carter years and after the Bar referendum - which our court, I am sorry to say, upheld- forbidding the use of mandatory Bar dues back and forth. It was a real joint venture money to provide legal services to the poor. It seems to me that a judge has a responsibility to advocate reforms in the legal system. When a judge sees individuals hurt because they don't have adequate legal services, I think a judge has a responsibility to speak out; and if, as I believe, there is a federal responsibility to make funds available to ensure adequate legal services to the poor on the civil, as well as the criminal, side, then I'm going to speak out.

I'd like to back up and elaborate. We have a unified bar in the District of Columbia, which means that all lawyers are required to join and pay dues to cover a disciplinary system and other core functions of the bar. For years the Board of Governors approved the use of these mandatory dues for a variety of activities, including continuing legal education, a lawyer referral service, and, of great importance, legal services to those who could not afford a lawyer. In 1981, however, in a referendum called by members of the bar to challenge some of these activities, the bar's membership voted to ban the use of mandatory dues for any kind of legal aid to the poor (as well as for a lawyer referral service or even continuing legal education of the bar). The results of this referendum, approved by our court of appeals, was a real blow to the availability of legal services which

had become indispensable to the administration of justice in the District of Columbia -- especially because, just as our bar was pulling out, the Reagan administration was beginning to take steps to reduce federal funding of neighborhood legal services through the Legal Services Corporation.

In order to address this imminent gap in service, I suggested to Chief Judge Newman that the court establish a Committee on Civil Legal Services under the aegis of the court's annual Judicial Conference of lawyers and judges. I agreed to chair this effort and immediately called John Douglas, a lawyer at Covington & Burling who had been head of the Civil Division in the Kennedy Justice Department, and Erwin Griswold, who had been Solicitor General and Dean at Harvard Law School. Both agreed to help. The result was a large press conference, attended by representatives of most of the major law firms in Washington. I welcomed everyone then asked John Douglas and Dean Griswold to speak, both of whom asked publicly for the firms to contribute major sums to replace the loss of bar dues for legal services. The result was heartwarming. It was not only financially successful but also the beginning of an effort that eventually converted mandatory giving into substantial voluntary giving for legal services financed through a new D.C. Bar Foundation.

Mr. Kapp: Is your sense- where do you think the limits are in terms of the role of a judge in respect of nonjudicial activities?

Judge Ferren: I got immersed in such issues in 1990 as the first chairperson of the court system's Advisory Committee on Judicial Conduct, which drafted our first Code of Judicial Conduct in 1995. Long before that, when I was at Hogan & Hartson, I had

become deeply involved in matters of professional ethics as a member of the first Disciplinary Board - now called the Board on Professional Responsibility - appointed by the D.C. Court of Appeals to help adjudicate charges of professional misconduct. So I had a background and interest in professional ethics and was pleased to be given the opportunity to address issues of judicial conduct.

There are canons of judicial ethics that permit judges now to participate on the boards of charitable organizations, for example, or to respond to questions by the legislature with advice that touches upon the "administration of justice." That's a broad term that people can define elastically. Judges cannot support political candidates or take stands on political issues. That, of course, is where the complications arise. For every person who, like Judge Ferren, would say that the federal legal services program concerns the administration of justice, which judges can ethically support by speaking out, there are others who would say that federalized legal services is a hot political issue - that the federal government shouldn't be involved in the delivery of legal services- and that a judge who works for that is violating the code of judicial ethics. So there is an ethical gray area where people will differ.

A judge certainly cannot practice law; he or broad term that people can define elastically. Judges cannot support political candidates or take stands on political issues. That, of course, is where the complications arise. For every person who, like Judge Ferren, would say that the federal legal services program concerns the administration of justice, which judges can ethically support by speaking out, there are others who would say that federalized legal services is a

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A judge certainly cannot practice law; he or she cannot advise other than family members on legal matters. There is one area, where I feel very strongly, that others don't see a problem, namely, attendance at events sponsored by specialty bar associations.

There's nothing wrong with a judge attending D.C. Bar functions or the private bar associations where the organization itself does not have a particular axe to grind. But I think it is inappropriate to attend dinners, or accept awards, at a bar association of defense attorneys or a bar association of plaintiffs' attorneys, or some other groups that the public would say have a particular legal or political point of view. I don't think a judge should allow himself or herself to be associated with a group publicly in that way. But I think you will see judges making different judgments about all these invitations. Finally, of course, a judge cannot make political contributions or contribute to litigating organizations that not only represent causes but also may appear before the judge. Thus, a judge should be very careful not to allow the judge's name to go on a charitable fund-raising letter or brochure. I once was embarrassed to see my name appear in a brochure for a charitable event, when I'd sent in a contribution for a dinner but had forgotten to tell the new executive director, whom I hadn't met and who didn't know me, not to include my name among the sponsors. So, it's something you have to be careful about.

Mr. Kapp: In terms of attendance at events that you mentioned- where would you put an organization like the Lawyers' Committee for Civil Rights, for example?

Judge Ferren: I think I would personally err on the side of not participating in a Lawyers' Committee-sponsored event, dinner or otherwise. There are enough cases before our court that either are brought by the Lawyers' Committee, or are brought by others advocating the same views as those of the Lawyers' Committee, that it gets very sticky. I can't say I have honored that rule all the time. I can give you an anecdote that suggests a similar concern. One of my friends, Alan Morrison, was the head of the Public Citizen Litigation Group, the Ralph Nader organization. I did not attend any Public Citizen events, but I had no problem going with Alan to a Redskins football game when he supplied the ticket- he was very generous and I would drive and buy the beer and the peanuts. Well, after several such games with Alan, a case came across my desk brought by Public Citizen. I don't recall what it was, and I don't think Alan was an attorney in the case. But I called up Alan and said, "You'll have to give the ticket to someone else." Then and into the future as well.

Mr. Kapp: Can you talk a bit about your views with respect to lawyer responsibilities in respect of pro bono representation?

Judge Ferren: I believe that every lawyer has a personal, professional responsibility to donate a portion of his or her time to pro bono legal service for clients, not just money to charitable organizations, but a portion of time representing clients who cannot afford representation otherwise. And I'd go further to say that, unless the lawyer includes in that some individual clients who bring a lawyer into touch with

realities that are going on in the lives of people and how the law and the legal system impact on the individual, that lawyer will probably not be donating the kind of pro bono time that is expected. I have no problem. I certainly participated in our project here at the firm- bringing major class actions, working for large reform organizations that would have a multiplier effect on helping people. But there's something important about one-on-one pro bono representation that is so lacking in this society - and I think it is so good for the client and the lawyer- that I consider individual pro bono representation to be part of the lawyer's responsibility in taking the oath as a member of the Bar. I wrote several articles about that in bar journals.

Mr. Kapp: How do you feel the profession overall is doing in that respect?

Judge Ferren: There are peaks and valleys. You have to keep re-educating lawyers, and, of course, educating all new lawyers, about these obligations. In Washington, the law firms and the unified Bar have been truly outstanding over the years in making resources available for people who cannot afford lawyers. We have very strong pro bono programs here. But we have to keep reminding. I think the American Bar Association has done a very good job in keeping the pro bono responsibility alive around the country.

I think the main problem has been that the conservatives in Congress have continually hounded the Legal Services Corporation by putting restrictions, limiting the kinds of cases legal aid agencies with federal funding can take and cutting their budgets. It's shocking. It does appear that the private bar has stepped forward to fill many of the gaps created by the federal pullback. I don't have a

perspective today that I can tell you with any certainty that, on balance, we've kept up or fallen behind in legal services for the poor. I'm pretty sure we've fallen behind; the private sector probably can't fill in entirely for federal cutbacks. I think overall the profession has done a good job. If you look at the President's page of the D.C. Bar Magazine *Washington Lawyer* or the President's page of the *American Bar Association Journal*, each new holder of the top office regularly admonishes lawyers to provide pro bono service. So I think the profession has pushed hard for pro bono over the last quarter century.

Mr. Kapp: Can we turn to your judicial opinions, John, here? I wonder if you could describe what you believe to be the most significant opinions that you've rendered in your years on the bench?

Judge Ferren: Oh dear. I probably should leave that to others. I think that to date I've written well over 500 published opinions for the court, including a substantial number of en banc opinions, plus another 100 concurring opinions and approximately 125 opinions in dissent. I can mention a few opinions that I know have had some impact, or have aroused my own emotions. Early on I wrote an opinion in a case called *Ibn-Tamas*, which was the first in the country, I'm told, to recognize a defense called "battered spouse syndrome." In that case, a woman who had been physically abused by her husband raised the defense that she had seen him coming at her with what she thought was a gun. She then ran, got a gun, and killed him. The facts, as I recall them, showed that her husband did not have a gun, and yet perception, her anxiety, was such that our court held the trial court had erred in refusing to allow Mrs. Ibn-Tamas to put on evidence that might

justify raising that defense. I think that defense has been picked up pretty much around the country.

I dissented, partially, in a 1981 case called *Edwards*, an en banc case which considered whether there was a constitutional right to bail, or instead pretrial detention without bail passes constitutional muster. I agreed that pretrial detention without bail did not violate the Eighth Amendment prohibiting cruel or unusual punishment, but I dissented on the ground that the D.C. statute permitting so-called preventive detention violated due process. There was too much reliance on hearsay, and the standard was probable cause rather than clear and convincing evidence. As I think about it, probably the cases I am most proud of have been dissents or concurrences, for that matter, which came out differently from the court majority, particularly in the support of rights under the First, Fourth, and Fifth Amendments.

I also dissented in a case called *Graves*, in which a majority of the en banc court held that somebody who had been arrested then tried three and a half years later had not been denied his constitutional right to a speedy trial. That just amazed me. This isn't to say that the majority didn't have precedent and a coherent approach weighing the factors the Supreme Court had held relevant in a case called *Barker v. Wingo*. But I thought that our *Graves* decision was profoundly wrong; to me the *Barker* factors, when properly applied to the facts, should have led to a different outcome in *Graves*, and I said so. If you want to pick one case out of all my cases in 20 some years, I think that has been the one that got me the most riled.

I can think of several other cases I have written that I think are important. There was *Frendak*, which modified the rule that the trial judge had discretion to impose the insanity defense over the objection of a defendant found competent to stand trial. This decision led to common use of a "Frendak inquiry" in the trial court. And I recall *Boyd*, which held that when a mentally ill and incompetent patient asserts her First Amendment right not to receive psychotropic drugs on religious grounds - when not necessary to save her life - the trial court must use a "substituted judgment"approach, deciding the course of action the patient herself would choose if capable of making a competent decision.

There was our 1987 en banc decision in the *Georgetown Gay Rights Coalition* case, where in partial dissent I wrote that the D.C. Human Rights Act required the university to grant student gay rights groups not only access to the facilities and services available to other student groups, as a majority of the court held, but also "recognition" of their status as a student organization - an action that, in my judgment, would not violate Georgetown's claimed "free exercise" rights under the First Amendment. I also dissented in part from the court's 1995 decision in *Dean*, which held that the D.C. statute governing marriage did not permit marriage by same-sex couples. I concluded, instead, that a trial was required to consider a constitutional issue: to determine whether same-sex couples comprise a class entitled to either "strict" or "intermediate" scrutiny of the government's denial of their right to marry. I added that if, as a result of the trial, the court were to decide that same-sex couples do comprise such a protected class, the court would then be required to determine, on the basis of evidence, whether

the District had a "compelling," or at least a "substantial," governmental interest in limiting marriage to heterosexual couples. In reaching these conclusions, I strongly suggested, based on case law and relevant literature, that same sex couples who wished to marry were a constitutionally protected class, and that the government did not have an interest strong enough to discriminate against them by denying that right. I would mention several difficult family law cases where I wrote for 2-1 majorities. There was *R.M.G.,* a case of competing petitions by white foster parents and African-American grandparents to adopt an African-American child- a case raising equal protection issues. *R.M.G.,* I think, has received a lot of attention in the literature and at law schools. Next, *H.R.*, sometimes called the first Baby Boy C. case, held that the trial court must apply a preference in favor of a fit, unwed father seeking custody of his child as against the claim of unrelated, adoptive parents. *H.R.* was particularly interesting because it concerned a contest between the father, H.R., a well-connected lawyer from Zaire, and American adoptive parents who had received the baby through an agency representing the natural mother, a Peace Corps volunteer, who, after returning to America from Zaire, had told H.R. that she would have an abortion- a misrepresentation that affected his pursuit of custody. Thus, one of the questions presented was whether the father had sufficiently grasped his constitutionally protected "opportunity interest," a kind of liberty interest protected by the due process clause. There also was the *M.M.D.* case holding that D.C. law permitted adoptions by unmarried, same-sex couples living together in a committed relationship.

I also wrote the *Brown* decision governing the ethics applicable to attorneys who go through the "revolving door" between government and private practice. And I would mention the *Kopff* case spelling out the deference - the statutory "great weight" -- that courts must accord to actions by local Advisory Neighborhood commissions. I wrote a number of opinions, some for the en banc court, interpreting the Home Rule Act, such as *Convention Center Referendum Committee*, *Washington Home Ownership Council*, and *Barry v. Bush*. And I wrote the court's en banc exposition of the rules governing the interpretation of statutes in *Peoples Drug Store v. District of Columbia*.

I was pleased early on to be able to write opinions in cases such as *Rosser*, *Lewis*, and *Tabron* that interpreted the government's obligations under the Jencks Act, the Supreme Court's decision in *Brady v. Maryland*, and the Superior Court's criminal rules to provide broad discovery rights to criminal and juvenile defendants. As a result, in common parlance now, are defense submissions of a "Rosser letter" requesting evidence from the prosecutor and trial court hearings on a "Lewis inquiry."

Some of the commercial cases I wrote were particularly challenging, such as the *Brandon* case on arbitration and the *Consumers United Insurance Company* case concerning a jurisdictional dispute involving the Full Faith and Credit Clause between the Superior Court, which had awarded damages to a D.C. landlord, and a Delaware receiver, which claimed the tenant's assets. That reminds me that even common landlord and tenant disputes over housing can present very interesting and difficult issues involving the interplay between our Rental Housing Act and

the common law, such as the *Habib* case concerning a notice to quit, a protective order, and alleged housing code violations.

Another very challenging case would be of interest only to tort lawyers, and almost defies stating the issue, but in a medical malpractice case, *Berg v. Footer*, we considered this question: when the parties stipulate to a settling defendant's liability in a common law tort action, is the settling defendant a joint tortfeasor for purposes of determining the credit allowable to a nonsettling defendant against whom the jury has awarded full damages for the plaintiffs injury; and, if so, is the credit calculated pro rata or pro tanto when the settlement exceeds half the jury's verdict? That case stretched all our brains on the panel to the point of occasional headaches before we were done! But we enjoyed it.

Several other cases are worth noting. I've written a number of opinions concerning court involvement with internal church disputes, such as the *Bible Way Church* case, in which we held that the court lacked jurisdiction over a complaint alleging failure to report and account for church finances. We concluded that, on the particular facts, the court would have become embroiled in an ecclesiastical dispute, an involvement forbidden by the free exercise clause of the First Amendment. I also wrote the court's opinion in *Sandidge*, in which a defendant charged with various weapons offenses defended on the ground that the D.C. firearms statutes violated his Second Amendment right to "keep and bear arms." We rejected that defense, holding that the Second Amendment guarantees a collective, not an individual, right protecting only the state's right to raise and regulate a militia against congressional interference.

In addition to those I've already mentioned, I wrote several dissents that I felt especially strongly about. In *Phillips v. The Evening Star*, a defamation case, I rejected the majority's ruling that a private individual who is neither a public figure nor a public official may recover damages by showing no more than the media defendant's negligence; I would have adopted the actual malice standard established by the Supreme Court in New York *Times v. Sullivan*. Then, in *Williams v. Baker*, a medical malpractice case, I dissented from the en banc majority's decision that a mother could not recover for emotional distress caused by witnessing her child suffer from the doctor's negligence unless the mother herself reasonably feared for her own safety at the same time. I would not have limited recovery to situations in which a plaintiff who witnesses the injury is in the zone, or within the range, of physical danger herself. This case, incidentally, is a perfect example of a situation in which judges, as they have for hundreds of years beginning in England, make law - that is, make the common law - when no statute covers the subject. And thus in *Williams* our court, by majority rule, decided what was the best policy to govern the scope of recovery for claims of emotional distress from a bystander who witnesses a defendant's negligence. The majority imposed a zone-of-physical-danger-limitation; I would not have done so, as the mother's emotional distress, caused by the doctor's actions in her presence, was no less severe simply because the doctor's negligent actions had been directed at her child and not, specifically, at her as well. The bystander mother's emotional injury from the doctor's negligence was just as foreseeable as the physical injury to her child.

Two other dissents have been particularly important to me. In 1980, in the *Kerr* case, the en banc court held, 8 to 1, that the D.C. statute governing lawyers must be interpreted to say that, if a lawyer is convicted of a crime involving moral turpitude, that lawyer must be disbarred permanently, with no opportunity for reinstatement based on a clear and convincing showing of rehabilitation. I was the lone dissenter. Twelve years later, in 1992, the en banc court, composed entirely of new judges except for me, voted 8 to 0 in the *McBride* case to overrule *Kerr* and thus create the possibility for reinstatement of such a lawyer, after five years from disbarment, upon a proper showing of rehabilitation. There is another important area in which I've differed from most of my colleagues. In a case called *Anders v. California*, the Supreme Court said, in dictum, that when a criminal defendant's counsel on appeal can find no non-frivolous issue on which to proceed with an appeal, counsel may so inform the court after addressing potential issues and explaining why they are wanting, and thus essentially abort the appeal by filing with the brief a motion to withdraw. Our court, therefore, has accepted so-called *Anders* briefs from counsel on appeal whom we have appointed under the Criminal Justice Act. In the *Gale* case, in which the court affirmed a conviction after reviewing an *Anders* brief and granting counsel's motion to withdraw, I dissented on the ground that there were at least two non-frivolous issues on which the defendant was entitled to have heard and resolved on appeal. Further, I added a policy ground for reversal, saying that the Supreme Court did not require the states to accept Anders briefs and arguing that our court should not do so- that the system is better served by having counsel make the best

argument or arguments that counsel can think of on the appellant's behalf, rather than proffering those arguments then, ultimately, confessing that the appellant has no case. The appellant deserves an advocate, period, however weak the case may turn out to be. Otherwise there is a strange role reversal, where the counsel essentially becomes the judge and the judges scrutinize the *Anders* brief on the appellant's behalf as though they were defense advocates. I've participated in a number of appeals where we have rejected *Anders* briefs, and appointed new counsel, on the ground that the first counsel had overlooked or underplayed a plausible argument. I think that the opportunity for counsel to file *Anders* briefs is an incentive to pull punches rather than make the strongest possible case for the client.

In another policy judgment, I concurred in a negligence case, *WMATA v. Jones*, which had been defended with alleged contributory negligence, and countered by the plaintiffs under the last clear chance doctrine. I pointed out in a separate statement that the legislatures or courts in three-quarters of the states had adopted the doctrine of comparative negligence; I cited authority supporting adoption of that doctrine by the courts as their common law responsibility; and I then suggested that the District of Columbia would benefit from that more enlightened approach. I have had no takers, and even those colleagues who are sympathetic with my suggestion are more likely to prefer leaving such a decision to the legislature rather than have the court make the decision. Moreover, I've heard from lawyers that they are used to the present system, know how to litigate under it, and don't like change. So we'll probably never see comparative

negligence in the District of Columbia, even though most lawyers and judges familiar with negligence cases believe that comparative negligence is fairer to the parties than a contributory negligence regime, all things considered.

Finally, I've forgotten to mention the *Jones* and *Clifford* cases on admissibility of scientific evidence and expert testimony that I think have contributed to the law of the District. I'll stop now- I've gone on too long- but of course there are scores of cases that I, as well as my colleagues, have written, reflecting the wonderful variety of our work. They cover lawyer discipline, judicial misconduct, civil and criminal procedure, rules of evidence, double jeopardy, First Amendment rights and other civil liberties, right to counsel, a criminal defendant's right to an interpreter, recantation of confessions, racial discrimination in jury selection, collateral attacks on criminal convictions for ineffective assistance of counsel, *Miranda* rights, search and seizure, eyewitness identifications, reasonable suspicion or probable cause to stop or arrest, expungement of arrest records, treatment of juveniles in detention, the insanity defense, civil and criminal commitment, consumer credit, wills and trusts, defamation, medical and legal malpractice and other personal injuries, tax sales and other tax cases, public utilities, unemployment compensation, workers' compensation, disability cases, choice of law issues, and zoning.

Mr. Kapp: What about your dissent in the *D.C. Bar Referendum* case?

Judge Ferren: Oh yes, that brings us back to pro bono. There was a case. Well let me back up - for a while, as I think I mentioned, mandatory dues under our unified bar structure were devoted in part to pro bono legal services run by the Bar. The Bar held a

referendum in 1981 asking for a vote on whether lawyers should be compelled to pay mandatory dues to cover free legal services for poor people. A majority of the court, sitting en banc, agreed that the referendum was valid under the law governing the unified Bar. And there were those who believed that the use of mandatory dues for legal services violated the First Amendment rights of the lawyers. I dissented. I don't think you can cite the First Amendment, or any other constitutional right, to avoid a responsibility that is inherent in the privilege, the license to practice law. But I lost that one, and to this day mandatory bar dues are exempt from pro bono services. To the credit of the Bar, volunteers have contributed money to the D.C. Bar Foundation and other projects so that the D.C. Bar pro bono program is alive and well. And the IOLTA program - interest on lawyer trust accounts used for legal services - has helped a lot.

Mr. Kapp: If you had to identify your single most difficult case on the bench, would you have a reaction to that?

Judge Ferren: Bob, I don't think I can pick one. I can say that there have been many cases where the police have interrogated someone without a lawyer, or searched the house without a warrant, that have troubled me because it seemed that there was overreaching, often because the defendant was not suff1ciently informed of his or her rights. All those cases were very hard because I can't just impose my own views or sensibilities; one has to apply established constitutional law. So I would say that the cases that have been the hardest for me have been those applying constitutional law when the justices had begun to pull back from Warren Court days.

I don't want to forget to add that two cases that came during my first year on the court went to the Supreme Court. I should begin by saying that I had become acquainted with Justice Brennan when he spoke at a dinner for our CLAO students at Harvard and later when we attended a small dinner in his honor after he received an honorary LL.D. at Harverd. So, when I was appointed to the Court of Appeals, Justice Brennan was kind enough to invite me for lunch in his chambers. During lunch he said something like, "Now don't worry, Johnny, we leave your court alone; we don' t want to meddle in the District's business." Well, in the *Crews* case, I wrote for the en banc court holding, by a 7-2 vote, that the trial court had erred in failing to suppress an in-court identification obtained as the result of an unlawful arrest. The Supreme Court reversed, 8-0, in a narrowly crafted opinion written by Justice Brennan! Justice Marshall had recused. I discerned that Justice Brennan had written the reversal in part as an effort at damage control, as five justices appeared to conclude that a face can never be suppressible as the fruit of an unlawful arrest.

Next, in the *Michael Jones* case, which had a complicated procedural history, I wrote for a 2-1 panel majority after a rehearing, but the en banc court reversed, 6-3, so I wrote the dissent. The Supreme Court then granted cert. The defendant, Jones, was a first offender who had stolen a coat from the Woodworth & Lothrop department store. His attorney - can you believe it? - pleaded him not guilty by reason of insanity. He was therefore committed indefinitely at St. Elizabeths Hospital. Silas Wasserstrom of the Public Defender Service argued that, as a matter of equal protection and due process, Jones could not be

incarcerated for a period longer than the maximum prison sentence he could have received - one year - without granting him a new proceeding to determine whether, at that point, he was well enough to be released or should be civilly - no longer criminally - committed, subject to a statutory right of review every six months. The Supreme Court, in an opinion by Justice Powell, affirmed, ruling 5-4 for the government, permitting indefinite criminal commitment until Jones met the higher standard for release under the criminal commitment statute. Justice Brennan and Justice Stevens wrote the dissents.

All this reminds me that it was particularly gratifying when I received the William J. Brennan Award from the D.C. Bar in 1999 in recognition of my public service. There was another case 1n which the legal issues were not terribly difficult, but the case was horrifying. It was *Khaalis*, the second Hanafi murder case. A group of Hanafi Muslims shot Mayor Barry and others at the District Building; shot people at B' Nai Brith headquarters; and shot still others at the Islamic Center. It was part of the fallout from retaliation against another group of Muslims who had butchered the children of the defendants- the assaulting parties - in this case. We heard argument all day. Never had a case raised so many issues. I was in my second year on the court, and I wrote the opinion affirming all convictions. That case was quite a strain. I would add that there were, of course, quite a few lawyers who appeared for the many defendants, including attorney Harry Alexander, who had been a Superior Court judge. But a young lawyer from the U.S. Attorney's office, John Fisher, handled the entire case for the government

most impressively. He is now the head of the appellate division of that office and is a superb advocate.

Mr. Kapp: As you look back over the year here, probably an unfair question, any decisions you think you'd like to do over?

Judge Ferren: There is one, Bob, that I feel ambivalent about. I dissented 1n *Hornstein v. Barry*, an en banc case upholding the constitutionality of a statute that barred the conversion of apartment buildings to condominium units unless 50% of the tenants agreed . The legislation was intended to forestall a wave of condominium conversion that would severely reduce the inventory of available apartments in the District. I was totally sympathetic with that purpose but concluded that the statute unlawfully delegated governmental authority to a private group of individuals, the tenants. I have come to question myself about that one.

I should add that on a number of occasions I voted to grant rehearing of cases for which I'd written the opinion, and, as a result, I've sometimes changed my mind. I've always wanted to "get it right" and never have been reluctant to change the result or narrow the ruling or, at least clarify the rationale if, on further reflection, I concluded that my first decision had been wrong or imprecisely stated.

Mr. Kapp: Would you say that your judicial philosophy has evolved in any particular way over time? Do you think you are a different judge today, philosophically than you were when you started?

Judge Ferren: I don't think so, Bob. I think I'm as concerned about the constitutional rights of citizens in making sure they' re not overridden as I was on Day One as a judge. I

tend to get very concerned, I guess that is the right word, when it appears to me that the court is bending over backward to affirm a conviction by rationalizing in the strangest of ways why a particular error was harmless, or a particular police interrogation or search was really not a violation at all. So I guess I still deal with these concerns. I will say that much of our constitutional law governing the Bill of Rights, particularly the Fourth and Fifth Amendments, has evolved in the Supreme Court so strongly contrary to my own views since I joined the court - that is, so many close questions have been finally resolved in a ways that differ from how I would have decided them -- that there is less room for dissent on these constitutional issues than there used to be. When I first came on the court, *Miranda* and pretrial detention, to name two issues, were very hot issues that could go either way in case after case. Right now, everybody is detained without bail, it seems, and *Miranda* rights have been narrowed. But mercifully, the Supreme Court did not throw *Miranda* out; Chief Justice Rehnquist saved it. But the threat is always there.

Mr. Kapp: You know, there's been a debate for a long period of time about judicial activism as contrasted with judicial restraint. Have you got any comments to make about that?

Judge Ferren: Well, the idea amuses me because one person's activism is another person's restraint and vice versa. If you take a Justice like Justice Scalia of the Supreme Court, he is probably more an activist from my point of view than any other Justice on the bench. I like to think that every judge tries - and I think most of us do try -- to apply the law correctly, whatever that means. I think those who say

that there are no cracks to fill, no forks in the road - that there are literal answers that always can be divined from the Constitution or from statutes or by applying other cases - are just wrong. There's always something new. There's always something that the legislature didn't come to grips with. And judges inevitably make law, whether it's the common law or constitutional law, and even when they are construing statutes. What you want to do as a judge is to recognize that you're always making law - however incremental it is - and to go about it in a responsible way, taking a look at the words of a statute, at legislative history, at past cases, at the arguments for public policy, and give it your best shot. My belief is that the ultimate answer is whether what you decide and write is coherent; whether the opinion you write acknowledges the arguments on both sides, or three sides, or four sides, of an issue, deals with them with honesty and integrity, not sweeping anything under the rug. I think those opinions that hang together and that are honestly acknowledging the conflicting forces and arguments are the right way to decide cases, and as new facts, new situations, come, those opinions will be modified as applied to the new situation.

Mr. Kapp: At some point, I know, you became a candidate, or were perceived of as a candidate, to become the Chief Judge of the Court. Can you tell us about that, what you think happened there, and how you felt about the result?

Judge Ferren: Well, let's see, I guess, it was 1994 and Judy Rogers was appointed by President Clinton to the U.S. Court of Appeals. I was the senior judge on the Court at the time, and under our statute I automatically became Acting Chief Judge . The Nomination Commission under the statute is charged with designating a Chief

Judge from among the active judges for a four-year term, and I put myself forward in 1994 as a candidate to succeed Chief Judge Rogers, as did Annice Wagner. If people were telling me the truth, I had the support of almost all the other active judges, and the *Washington Post* wrote an editorial endorsing me. But the Nomination Commission selected Judge Wagner as Chief. I feel fortunate, as it turned out, that in 1997 Mayor Barry asked if I would like to become Corporation Counsel. I retired to do that after 20 years on the court.

Mr. Kapp: Well, let's talk about your appointment as Corporation Counsel. How did that come about?

Judge Ferren: Bob, it came just. out of the blue. A highly respected lawyer in town, Pauline Schneider, whom I knew and who was a friend of Mayor Barry, called me up and asked whet her I would be at all interested in succeeding Chuck Ruff as Corporation Couns l. Chuck had become White House counsel, and no successor had been appointed for a number of months. My reaction to Pauline was, "You've got to be kidding; thank you." And I politely ended the conversation. I then spoke with Linda about it. She said, "Well, why don't you at least find out what that's about?" So I called Pauline back and asked her to tell me more. And she said, "Why don't you let me have Michael Rogers, the City Administrator, come over and talk to you?" So Michael Rogers did. He impressed me very much, and I liked him very much. He said, "You know, Chuck came and really helped turn around the office. This is an interesting time because the Control Board is in charge but the Mayor has prerogatives. Why don' t you let me arrange for the Mayor to meet with you?" I said, "All right," and the next thing I knew Mayor

Barry's people called up and he came right over to my office with an entourage. I think people at the Court were standing around with their mouths open watching the Mayor traipse in. But, in any event, he came to the office and we really hit it off, and I began to think about making the change. I had seen attorneys from the Corporation Counsel's office appear in Court many, many times, and that office had a strong appellate section. I knew their resources were greatly in need of updating, and so I thought about it a little bit more and in the end agreed. It took close to three months over the summer of 1997 to make up my mind .

One of the interesting sidelights was that under the govern1ng statute, by retiring on my pension, it would mean I would have to serve as Corporation Counsel for free, because the pension was to be offset against the Corporation Counsel's salary and that salary was set lower than the pension I would receive. I didn' t feel that I should donate my time . Totally unknown to me, Mayor Barry and Michael Rogers got together with Councilmember Kathy Patterson (I didn't know her at the time). They convinced her to put a bill in the Council that would exempt judges from the offset. It passed. Then they told me. Well, that would mean that I would be double-dipping and making more money than any official in government. I thought that would be totally wrong. But I was coming to think the job would be interesting, so I said, "Why don't you pay me the difference between my pension and what I would make as an active judge, so that I' m not making any more money by moving, but I'm not losing any money, either?" That's the arrangement we made; I thus partially waived the exemption. I have to say that, soon thereafter, full double-dipping was going on all over the city. But that doesn't

matter. I thought it was a fair arrangement, and so I came on board. I would add that with the Control Board, the Mayor, the Council, and the Congress all involved in decision-making about the city, it was going to be interesting to figure out who the client was. I soon concluded that an important commitment was to help preserve the Mayor's prerogatives under the Control Board regime. And it was really important to get resources for an office that didn't even have a functional computer system at the time. It was shocking.

Mr. Kapp: Can you go back and tell us a bit about your conversations with Mayor Barry?

Judge Ferren: They were entirely informal. I had met Marion Barry in a barrio in Los Angeles back in 1970 when I had just come to Hogan & Hartson and was planning to bring some cases against the police.

We both were attending a national seminar on litigation against police departments. Barry was there, and I met him briefly, but I didn't really get to know him then or even later. I was well aware from the newspapers of all the travail that he had gone through and put the city through, and my friends were saying, "Why would you ever go to work for Marion Barry?" But he was in the last couple of years of his term, and I thought it was important that the Mayor have sound counsel, especially vis-a-vis the Control Board. One of the things the Mayor made very clear to me was that he was looking for a legal voice for the city, and so I got the impression that I would be listened to. And we hit it off. It was just a lot of informal talk. He asked about my background, and we talked a little about civil rights. I think he was looking for somebody he felt personally comfortable with. That seemed to work, and the chemistry between us always was good.

Mr. Kapp: Did you have any discussions with him regarding your independence?

Judge Ferren: Yes. I made it very clear to him that I was going to give the advice I thought was sound, and that if he wanted to do something I believed was unlawful or even questionable, I was certainly going to tell him. He was quite insistent that that was his position, too. He wanted somebody, he said, who would make sure that all the T's were crossed and the I's dotted. I think he went out of the way to anticipate that concern and to assure me that he was interested in having someone, like Chuck Ruff, who was seen to have integrity. He obviously wanted whatever prestige went along with appointing a judge to that position; there was something in it for him just from that point of view. So he gave me all the assurances that I wanted to hear. I was in a position, of course, where I could leave the next day. I didn't need this job, and I took it with the idea that if it lasts a week, it lasts a week. There was nothing in it for me other than making the office a better office by virtue of getting resources it needed and trying to hire and attract really good lawyers. So I saw it as a personal mission. I talked with Dan Rezneck, who was General Counsel of the Control Board. I met with Steve Harlan, who was a member of the Control Board. I also knew Connie Newman, who was on the Control Board. I got a sense from everybody that there would be great support from the Control Board for additional resources. The one condition I did give the Mayor for my acceptance of the job would be a commitment to the necessary resources- I can't remember the dollar figure I used - but that so many dollars would be made available. He said yes, absolutely, although I realized that without the Control Board he couldn't guarantee that.

Mr. Kapp: How did your relationship with him evolve? I mean, can you tell me a bit about that?

Judge Ferren: He would call me practically every day. We had a hotline between our offices. If I needed to talk to him, I could see him instantly if he was in the office; if not, he would get back to me. There was just regular communication. Most of it had to do with legal issues, although sometimes he'd ask my judgment about something else. One of the things that surprised me was that it was apparent to me almost from the time I got there that the Mayor had begun to lose heart that he had any real authority left. I guess the Control Board had beaten him down. He had picked fights earlier, and he had been defeated by the Board because they did have authority. I sometimes found myself in a position where I was saying, "You have prerogatives to assert that you are not asserting," and there were times when I urged him to take positions that he declined to take because he was not up to the fight. My concern was not Marion Barry; it was the Office of Mayor. One didn't know how long the Control Board would go on, and it seemed to me that it was the Mayor and the Council who were being run over by the Control Board in areas where they should have been much more involved. And so much of the time I saw myself as Counsel to the District versus the congressionally mandated Control Board, and to my surprise, as I say, the Mayor seemed less interested in fighting that good fight. Members of the Council were interested in maintaining Home Rule prerogatives, and I worked with them, too. I gained enormous respect for the members of the Council; I think it was the strongest Council I'd ever seen since I've lived in the District.

Mr. Kapp: Who were the key players In that regard on the Council?

Judge Ferren: Well, it depended on the area, but Kathy Patterson is one of the most tenacious and bright, capable workers. Her agenda was vast. I worked with her a lot, if only because I couldn't avoid it. Kathy was on the phone all the time, and I respected her enormously and still do. Jack Evans was very concerned about police community relations and I worked with him on that. Sharon Ambrose is a very bright, committed woman from the Capitol Hill area. Linda Cropp is a wonderful Chair of the Council. She had a way of getting people to work together; she's smart, well organized, and was a very important person in all this. David Catania was a real addition to the Council. He has a lot of smarts and is tenacious. He and I didn't get off to a particularly good start. I can't remember what the issue was, but he came to me and said mea culpa, and we began to work closely together. I worked with Kevin Chavous a good deal in education; he's a good man. And I enjoyed working with Sandy Allen on health issues. I think Harry Thomas was in his waning years. Carol Schwartz was always very vocal and bright, as was Jim Graham, who came along later. So it was a good group of people.

Mr. Kapp: Going back to the time of your appointment, you mentioned your discussions with Michael Rogers and the Mayor. Did you consult others as well, for example, did you discuss it with any of your predecessors or any of your colleagues?

Judge Ferren: Yes; I spoke with Chuck Ruff twice. He invited me over to the White House once and then he came over and met me somewhere else for lunch. I talked with Walter Smith here at Hogan & Hartson, because Walter was a fellow I wanted to work with again. He was so eager to join the effort that I think Walter's interest in the

job was an impetus to my taking it. My colleagues at the Court didn't want me to go, and I had some other friends who were quite negative - again, "Why do you want to hook up with Marion Barry?" I never saw that as an issue. There was another fellow who came over to see me, a professor at Georgetown, who used to be involved with city affairs. He told me that, in one way or another, "Mayor Marion Barry will find some way to do you in, and you'll end up being tainted in this job." He felt that profoundly and he seemed genuinely concerned for me personally. But I just had a sense that I could protect myself, and I didn't see where the danger would come from. There was a Control Board; there were people who were watching the Mayor; and in the worst case I could quit. So I did not see the Mayor Barry danger that everybody else kept talking about.

Mr. Kapp: How about Chuck Ruff, was he encouraging?

Judge Ferren: Very. Chuck was very, very encouraging, and Chuck and I got along very, very well. Our instincts were similar about a lot of things. Chuck was a real salesperson who obviously had a good deal to do with satisfying me that becoming Corporation Counsel was something I should do. He obviously had worked with Mayor Barry and survived quite well, and so I think his experience counted a good deal with me.

Mr. Kapp: And tell us about how you found the office when you arrived there, in terms of resources and professional staff, problems on the horizon?

Judge Ferren: Let's talk first of all about people. Jo Anne Robinson had been the interim Corporation Counsel, and she had been Chuck's Principal Deputy. Jo Anne is an African-American woman of great talent and great knowledge of the budget, and

Chuck had encouraged me to keep her as my Principal Deputy. I could tell in meeting Jo Anne - who was the first person I called once I'd decided to take the job - that she was going to be solid. And she was. I mean, she handled the finances, the budget, she knew the city, she knew the agencies. It was great having as Special Deputy my friend, Walter Smith, a brilliant lawyer, whom I could use as a troubleshooter all over the office. But Jo Anne kept that office going. She was invaluable. I also was pleased that two of my former law clerks, Janet Robins and Elise Dieterich - both outstanding 1n so many ways – were willing to join our office in the Legal Counsel Division, where our legal opinions are developed and drafted. Elise and Janet became indispensable.

As I got to meet others, including the deputies of divisions and the section chiefs, I got a warm feeling about the staff and the people. I can say that just about everyone seemed to me to be a good person. I don't think I've ever been in any organization - and I am sure I never will be again - where there were as many people that I responded to, and responded to me, with such warmth and good feeling. I literally was in tears when I left that office, and if you looked around the room at the gathering, when I left the office, many others were in tears, too. It had been clear to me instantly when I joined the office that these folks needed a cheerleader. They had been battered around without resources, denigrated by federal judges and local judges alike, so often representing the District in cases that were not winnable. I decided my main job at the beginning was to get resources, a computer system, and a telephone system - and to set up a personnel system - that would let people know that somebody would be going to b at for

them. And when you start doing that, people respond. I guess I'm a people person anyway, but I'd go walking through the corridors on the 6th floor - my office was on the l0th floor - and people would say, "Well, what are you doing down here?" as though a Corporation Counsel is supposed to stay in his office.

And so I think there was a kind of family feeling that we all developed that helped get out the word that this was a good, or at least a promising, place to work. I was able to hire people who were really quality lawyer s, and you could just feel the office- kind of like this slumbering beast- getting up and sharpening up on everything. If somebody did something that a judge didn't like, that judge would call me up and we'd take care of it; I had a relationship with the judiciary that was unique for a Corporation Counsel, so that helped.

I probably should have said before now that when Walter and I joined the office, many of the public schools were closed, by court order, because of various building and safety code violations. This had resulted from a suit by *Parents United for the District of Columbia Schools*, represented pro bono by the firm of Steptoe & Johnson. Our first job was to resolve that case - which had been going on, including the shutdown, for quite some time – and get the children back to school. I'm pleased to say that we settled that litigation in a week or so, after hours and hours of negotiation.

Another thing we did was to take over the child support system from the Department of Health and Human Services. That added several hundred employees, more than doubling the size of the office and the budget. That was an enormous undertaking. And there were other things we did that were new.

Mr. Kapp: You talked about your relationship with Mayor Barry over the course of your tenure. Did you have dealings with Anthony Williams at the time as Controller?

Judge Ferren: I did; Tony Williams was the Chief Financial Officer of the District, and it became instantly clear that he did not like our office. I would see him from time to time, and it struck me that one of his goals was to get as much autonomy and authority away from our office as he could. He wanted his own legal staff. He once went to the Hill to get some legislation that would affect our office without even calling me. Immediately Congressman Moran's office called to find out what was going on, and I went up to confront Tony about that. I don't remember what his excuses were, but I must say that I did not appreciate his effort for an end run - an effort, I should add, that failed.

After his election as Mayor in 1998, Tony asked to see me on December 31. The reason? He wanted me to install one of his aides as my Deputy Corporation Counsel. I said that was not negotiable and declined, although I added that if he wished me to resign I would do so. He must not have wanted the uproar that my resignation would have caused under such circumstances, and probably, with the voting rights litigation in progress, he didn't want me out of the case. So he backed off. Word got around the office- not from me - what had happened, and everyone appreciated that I had rejected the Mayor-elect's request.

Mr. Kapp: And what about the Control Board? How would you describe your relationship with the Board?

Judge Ferren: The Control Board respected what I was trying to do. They instantly saw the importance of the office and of getting the resources. Steve Harlan, Connie

Newman, Chairman Brimmer , Joyce Ladner. Eugene Kinlaw- they all were very, very supportive. Dan Rezneck and I met regularly. I guess we had lunch every couple of weeks, and we were on the phone together all the time. I mean, if I had a hot line with Barry, I also had one with Dan Rezneck.

Mr. Kapp: Dan was at that time the Counsel?

Judge Ferren: General Counsel of the Control Board, and we got along very well. I think that Dan and I were able to function in a way that smoothed out wrinkles that were developing from time to time between the Control Board and the Barry Administration. I think that served a useful function.

Mr. Kapp: What about relationships with Inspector General Prettyman? Did you have dealings with Barrett at that point?

Judge Ferren:I had relatively few substantive dealings with him, but I take some responsibility for Barrett's becoming Inspector General. The opening developed at a time of special concern about the integrity of the police department. I was part of an enlarged group that included the Control Board, which was created to nominate a new IG, and names were being mentioned. One was William Webster, former head of the FBI, whom we did interview. I suggested Barrett Prettyman. Another was Jake Stein. Webster was not interested . Stein was, and he and Barrett were interviewed. They presented very different visions for the Inspector General's role vis-a-vis the police at the time. Police Chief Soulsby had resigned under fire and Jake said he foresaw taking a few weeks to get to the bottom of the problem. Barrett, I think, realized that the job would bring a broader responsibility than that

and seemed willing to consider a longer commitment. He made an extraordinary impression on the Control Board. And so Barrett was selected.

I heard him give a speech, once saying, "If John Ferren calls you up, the first thing you say is no." I think Barrett did a very, very fine job - no, an extraordinarily fine job. He was highly respected for his work by everyone concerned, and he obviously enjoyed his new role.