Oral History of Honorable John Bates

Eighth Interview
April 14, 2022

This interview is being conducted on behalf of the Oral History Project of The Historical Society of the District of Columbia Circuit. The interviewer is John Cooney, and the interviewee is Honorable John Bates. The interview took place on Thursday, April 14, 2022. This is the eighth interview.

MR. COONEY: Judge Bates, we have three decisions of yours from 2017 to 2019 to discuss, as well as the work you did on two major committees of the Judicial Conference, the committees on Civil Rules and the Rules of Practice and Procedure, both by appointment of Chief Justice Roberts. Do you have a preference on the order in which we should launch into these topics?

JUDGE BATES: I think we should do the cases first and the rules last, but before we do those three cases, I have one other thing to talk about.

MR. COONEY: Fine.

JUDGE BATES: Alright. So I'll launch into that. It's also in the same time period, it was in 2017 and went a little bit past that, not in terms of my work, but the cases. And that is, I did sit in 2017 on the Ninth Circuit. I'm asked from time to time to sit on circuits, principally the Ninth Circuit, and I've rarely had time. I've declined or something else has prevented me from doing so, but I did sit on the Ninth Circuit in 2017. There are only two circuits now that have visiting judges, the Ninth Circuit and the Eleventh Circuit. This one occasion on the Ninth Circuit, I thought I'd give a little bit of a

review of since it is part of what I've done as a judge, and an interesting part.

I sat for two days. We did twelve to fifteen cases, although many of those did not receive argument. I'd say about half. We probably did about eight arguments during those two days. Fortunately in the Ninth Circuit, the judges on a panel share bench memos, so that cuts down the work a little bit. It's a different experience, obviously, working on a court of appeals and on a panel because you have to convince others. You're not deciding things by yourself. It's an enjoyable experience, more of a collaborative experience among judges, but one that I've enjoyed doing on the few occasions that I've done it.

On this occasion, the judges agreed on most of the cases, as is usually the case. I made one compromise on a case that I sort of was leaning the other way, but I decided to go along with the flow and uphold the district judge because it was such a close call in my mind. But I did dissent twice from decisions. One was in a criminal case dealing with a sentencing guidelines question, but it was a small, relatively unimportant issue in the big picture of things, and so it's just a dissent that has gone into the wastebasket of time.

There was another case on which I concurred. This was a fairly significant, not huge, but fairly significant immigration case. There was an issue that we all agreed on that was in my view the only issue that we needed to reach. It resolved the case, and we needed to go no further. The

other two members of the panel, however, wanted to address this issue, perhaps within the Ninth Circuit. They wanted to lay down a marker or get their views out, but I did not, and I didn't quite agree with them, and so I wrote a concurring opinion that simply said we shouldn't be reaching the second issue.

And then on one case, the name of the case was *Ross versus Williams,* and the other members of the panel were Judge Sandra Ikuta and Milan Smith. They're both fairly conservative judges, so I was probably the least conservative member of the panel. This case dealt with the application of Federal Civil Rule 15 and Habeas Rule 2 regarding a relation back issue, the relation back of an amended habeas petition that was filed after the statute of limitations had run. I gave deference to the pro se petitioner, as we do in many pro se settings, and dissented from the panel decision that the amended petition did not relate back and therefore the panel dismissed the petition. I interpreted Civil Rule 15 a little more liberally than the other panel members did. It was interesting. At that time, I was the Chair of the Civil Rules Committee, and Judge Ikuta was the Chair of the Bankruptcy Rules Committee. We knew each other well, and there we were, two chairs of rules committees disagreeing on the interpretation and application of rules.

I got a call from at least one, I think only one, Ninth Circuit judge shortly after the opinion saying that she agreed with me, but she was confident that the court would not take the case en banc. Well she was

wrong. The Ninth Circuit did take the case en banc, and they vacated the panel decision and agreed with me, and Judge Ikuta and Judge Smith, who were members of the en banc panel – I'm not obviously – were only able to get one other Ninth Circuit judge to agree with them, so the vote was 8 to 3 to vacate the panel opinion. I had limited participation. I wrote a couple of memos because I was asked to in terms of my view on the issues and sent those to the en banc court, and that was that. It was an interesting experience sitting on the Ninth Circuit, but also an interesting experience being part of that en banc process that eventually went the way of my dissent on the panel decision.

So that's all I wanted to say about the Ninth Circuit or sitting on circuits. It's a nice thing for judges to do. We can't do that in the D.C. Circuit because there's only one district court, and the circuit judges feel a little bit uncomfortable with having a member of the District Court sitting on cases reviewing colleagues on the District Court, and I think that is a good reason to be cautious. It used to be some time ago that district judges here would sit once or twice on the circuit, but no longer is that the case. And most circuits now do not have visiting judges. They have judges from within their own circuit sit, but because there are multiple districts, they're able to avoid the problem that I just described. And that's a good thing, I think, in terms of developing collegiality and knowledge of each other, but that can't happen here in D.C.

MR. COONEY: Did you get a sense of a difference in approach with the en banc panel in the Ninth Circuit as opposed to what you've seen in the D.C. Circuit?

JUDGE BATES: Well it's a fundamentally different approach in that they take so many cases en banc. I don't think that the panel process, necessarily, was different than it is in D.C. There are little things about courts of appeals like when you meet after the argument who speaks first and things of that sort and do you share bench memos. So there are different process things, but there is not a great deal of difference in terms of how you approach the case. In D.C., more cases get argued proportionately. In the Ninth Circuit, fewer do. It still leads to many more arguments in the Ninth Circuit because there are so many more cases, but a smaller percentage of the cases actually get argued. The en banc process is different because so many cases go en banc in the Ninth Circuit, and when a case goes en banc, it does not go to the full court. It goes to eleven members of, I think, a 25-member circuit court, so it's an en banc decision. It's not actually a decision of the full court.

MR. COONEY: That's very interesting.

JUDGE BATES: So we'll get back to D.C. in this 2017 to 2019 time period. It's interesting. Changes in Executive Branch administrations and presidential administrations do have an impact on the district court docket, sometimes greater than other times. It's an impact that is seen most often in policy changes that affect things like environmental cases or antitrust cases or consumer cases or criminal cases sometimes. So there's often a subtle

impact that is felt maybe a year or two into the new administration. But with the Trump administration, the impact was more dramatic and quicker, a much more acute impact with the Trump administration. Things like FOIA, Freedom of Information Act, cases, ballooned during the Trump administration, so much so that our court got really overwhelmed with FOIA cases. There were so many of them. It even led me as a senior judge to limit the number of FOIA cases I was willing to take. That was one of the categories that I cut back on. But there are also things like government programs and other policies, immigration cases, that there really was a fundamental change in our docket engendered by the change in the administration in 2017.

The cases I'm going to discuss, all three of those, fall into that category because they all happened to be cases that dealt with challenges to policies that were implemented by the new Trump administration, and they were therefore cases that were greatly influenced or impacted by President Trump's policies and approaches. And the first of those, and the most important of them, started in late 2017, and it went, for me, through 2018, so not a very long run, but a very intense run. I worked on what are known as the DACA cases, and that stands for Deferred Action for Childhood Arrivals, a program within the Executive Branch in terms of immigration policy.

The cases before me were brought by the NAACP, Princeton University, Microsoft, and a number of other plaintiffs. These were a

challenge to the Trump administration's recission of the Deferred Action for Childhood Arrivals program. There were several cases across the country, and ultimately, this went to the Supreme Court and was decided by the Supreme Court in June of 2020.

Along with the *Shelby County* case dealing with the Voting Rights Act and one or two others, I would say that this falls into the most challenging and impactful of the cases that I have had before me. And as I said, there were parallel cases in the Northern District of California, in particular, ultimately in the Ninth Circuit, and in the Eastern District of New York on its way to the Second Circuit. There had been two earlier, during the course of these cases, two earlier Supreme Court decisions. One, a decision on the shadow docket, at least that's the name given to the recent phenomenon of the Supreme Court deciding many things outside of the traditional briefs in fully argued cases. Two times the Trump administration had brought aspects of these cases to the Supreme Court. One succeeding in getting a stay of discovery, not in my cases, but in other cases. And two failing to get the Supreme Court to take the issues at a very early time.

My cases, but they were consolidated, so it was a single case in effect, was in the APA framework. There was no discovery. No discovery was sought. And it really had a procedural focus, and ultimately I concluded that the Department of Homeland Security, the Secretary's decision, a memorandum which was aided by a letter from the Attorney

General, that that failed adequately to explain the conclusion that the DACA program was unlawful, and it failed because there was a limited legal analysis and unconvincing assessment of litigation risk. I wrote, I hope, a thorough decision dealing with complex issues. There's always standing in these cases, John. Standing issues and reviewability issues, and ultimately remedy was a real issue as well. It really did turn on traditional concepts of administrative law applied in a somewhat unique and somewhat difficult setting, but they were fairly traditional concepts, the basic one being that an agency has to give a sufficient explanation for what it is doing. In this case, rescinding a prior policy of the agency that had also been created through an Executive Order.

So, remedy, as I said, ultimately was one issue. I did give the Department of Homeland Security another chance to support its reasoning in the decision it had rendered. That was a difficult decision to do that, but I decided that was the right thing to do. So I had vacated the decision but gave them 90 days to further consider it. One might have expected that they would have gone in a different direction, but they did not. It was a new Secretary by that time. The Secretary of Homeland Security issued a second memorandum along the same lines as the first memorandum, with a little bit more explanation and some policy reasons thrown in. I still found, however, after analyzing that, in the second opinion that I issued, that it was deficient under the Administrative Procedure Act, and I

vacated the recission of DACA as a final decision by me in that second opinion that was issued, I believe, in August of 2018.

One of my main concerns, and I discussed it in both opinions, but one of my main concerns was what is called the reliance interest, the reliance by these DACA beneficiaries on the program and the benefits of the program and making decisions along the way with respect to their lives in the context of that program and the availability of that program. And that reliance factor, the reliance interest, was important to me. HHS had ignored it completely, and that was inconsistent with several Supreme Court cases.

Now, of course, I also found the legal argument unconvincing in part because they relied on the Fifth Circuit case regarding a similar program, DAPA, rather than DACA, the DAPA program, that really was not the same set of issues, and they relied in part on the fact that that case went to the Supreme Court. But what the Supreme Court did was affirm the Fifth Circuit by an equally divided court. There were only eight members on the Supreme Court at the time. I think it was following Justice Scalia's death, and they divided 4 to 4. That has no precedential value, but nonetheless, the Attorney General and the Secretary of HHS thought that that was important.

But ultimately, as these cases always are, my decision was appealed, and in the meantime, the Ninth Circuit had decided the case arising out of the Northern District of California and had followed my

reasoning on several points, as much as they followed the district judge, who was a great district judge, by the way, in the Northern District of California. They also followed me explicitly on several points.

The case in the Eastern District of New York had been appealed to the Second Circuit, and the Second Circuit had not yet acted. So the Supreme Court did jump in at this point and took the cases, therefore, they took my case without the D.C. Circuit being able to render an opinion. So my case was reviewed directly by the Supreme Court in this collection of cases that they dealt with. That was unusual. It was a little different for me having my case and not having gone through the D.C. Circuit before the Supreme Court took it for direct review. I think it turned out that my case was a little bit better vehicle for the Supreme Court to deal with because first of all, I did not wind up dealing with the Constitutional claims because partial summary judgment had been sought before me by the petitioners, the plaintiffs in the case, only on the APA claims. I didn't have the complexity of discovery issues, and I was able to deal with remedy without having to face the question of a nationwide injunction, which is a very touchy issue and was becoming more touchy with the Supreme Court. So I think my case wound up being a little bit better vehicle for the Supreme Court to deal with the case, at least as far as it came out.

Now for the argument, the plaintiffs decided to get Ted Olson to represent them in the Supreme Court. You can come up with a number of

reasons why they chose Ted. He's obviously a very esteemed Supreme Court practitioner, although perhaps arguing fewer cases then than he had previously. I think this is the last case he's argued. But I think that they chose Ted because they thought that having someone with conservative credentials representing DACA beneficiaries would sell well. It's the same thing that happened on an earlier occasion when David Boies and Ted Olson joined up on one of the California provisions. But my view is that that doesn't have any impact on the Justices. Choosing someone to argue because of who they are or what credentials they have has very little impact on the Justices. Perhaps some Justices are a little more polite to certain practitioners than to others, a little bit more polite, but I think it has minimal impact, and in this case, I think it had no impact as far as I could tell.

Now the argument was interesting in terms of the oral argument. It did reference, I don't know that Ted Olson did this, but the other presenter who was from the NAACP, did do it quite a bit, really stressed certain things that I had decided and really flagged them, and I think used my name a couple of times during the argument. That, too, I think has little impact on the Justices the Supreme Court. Yes, I happen to know several of them. I know some of them fairly well. I think that has no bearing on the outcome of the case.

But as I said, this case turned out to be a little cleaner vehicle because it was APA, not constitutional. It didn't have the injunction issue,

and ultimately the Supreme Court decided the case 5 to 4 in an opinion by Chief Justice Roberts in favor of the DACA beneficiaries and affirmed my decision in full, relying quite heavily on the reliance interest. That was one of the key elements of the decision by the Supreme Court. As I said, they affirmed the judgment in my case in full. In the other cases it was more mixed because of the way they had come up procedurally and because the court did not agree on one issue that had been before them but not before me dealing with constitutional questions.

Before the Trump administration really attempted to cure deficiencies, since this decision came out in the summer of 2020, there was the election in 2020, and with that, a change of administration and change of policy. So that was the end of the line for the DACA policy, at least for the time being. Congress hasn't been able to get its act together to do anything positive, so it remains as it was prior to the attempt to change the DACA program by the Trump administration.

This is one of those cases, John – there aren't that many on a big-picture level in every case, that I feel that I have an impact and might make a difference, even if it's just in deciding how to sentence a criminal defendant or resolving a discrimination claim. But this is one of those few cases where I really felt that I made a difference in the case, that I worked hard on it, in the way I approached it, in the opinions I wrote, and they were helpful to one higher court. It did not go through the D.C. Circuit, but to the Supreme Court, and so I look back on this case as I do on the

Shelby County case as one of the highlights of my judicial career and one of the things I'm most proud of.

MR. COONEY: If I could make just a couple quick points. Two of my colleagues were approached by the plaintiffs in the case when it came to the Supreme Court, and they were asked to brief the reliance aspect of the case, and they certainly believed that your opinion on the reliance issue hit the ball out of the park. They used as much of it as they could, and it turned out very well in the final opinion.

JUDGE BATES: It actually wound up being something that the majority of the Supreme Court thought was an important aspect of the case.

MR. COONEY: One other point. I had a case in the early 1980s that was taken by the Supreme Court where the state of Texas had banned undocumented alien children from having a free public education in the schools. You had a case that was something like that but at a much higher level. You changed the lives of 800,000 people, and it must have been a wonderful feeling to know that if your teachers and parents were still alive, they would have understood that all the effort they put into training you paid wonderful dividends for the good of the country.

JUDGE BATES: I think it did make a difference, so I look back fondly and proudly.

MR. COONEY: Well you should.

JUDGE BATES: So should we move on to these other cases?

MR. COONEY: Yes. Let's keep going.

JUDGE BATES: They're not as important, but they posed legal challenges for the Trump administration and the policies that the Trump administration was adopting. Now across the country, and in my court in particular, this was true. There were a lot of cases that were brought. There were challenges to the Trump administration policies, and my court dealt with lots of them. For the most part, the challenges were successful. I think there was a fairly high level of success in the lower courts in these types of cases, not as successful in the Supreme Court, but still, there were some notable successes. The census case is a notable case of a successful challenge. The DACA case is another one. But these two cases that I'm going to discuss are two more examples, but neither of them has gone anywhere beyond my decisions. One of them not being appealed, the other one being appealed but held in abeyance, and I'll explain that in a minute.

Both of these cases are statutory interpretation cases. They have statutory interpretation issues. One is brought under the APA, as many of these cases are, but the second of the cases that I'll discuss was brought under what's known as FACA, which is the Federal Advisory Committee Act. But let's talk about the other case first, *State of New York versus Department of Labor*. This was an attempt, I'll describe it in the way I found it, an attempt to end-run the requirements of the Affordable Care Act for what's called Association Health Care plans by changing the definition of employer in ERISA, and that's because the definition from ERISA applies in the Affordable Care Act as well. It's a pretty

complicated setting, although the rule change itself was not that complicated, but the assessment necessary of the rules change under provisions of ERISA was fairly complicated. I found that the rule that had been promulgated was an unreasonable interpretation of ERISA, and I think this was decided in the spring of 2019.

This came about because of an explicit direction through an executive order by President Trump for the Department of Labor to expand access to these Association Health Plans, to that status, in order to avoid the requirements of the Affordable Care Act for smaller business entities. So the Department of Labor followed that direction that they were given and came up with this route to do so. But I found that the route they took, this definitional change to who was an employer, was inconsistent with the governing provisions of ERISA that the rule was purporting to interpret and apply. Again, there were preliminary standing issues in the case. In this instance, they were issues relating to the standing of a state – it was more than the State of New York; there were a couple of other states that joined in – to challenge this governmental decision under the APA. But I found that there was standing. A little bit of a close question, but ultimately not really a close question, and once I got beyond that standing issue and got to the merits of the question, I found pretty clearly against the Department of Labor. I gave very little, if any, deference to the Department of Labor's interpretation of ERISA. Normally you would give some deference, but I gave little to none

because this was in my view plainly an unreasonable interpretation of the ERISA provisions at issue. Indeed, it was really an effort that was at odds not only with the text of those provisions, those governing provisions on how you assess whether one is an employer, but also at odds with the purpose of ERISA by dramatically expanding who would be an employer within ERISA. The simplest way to describe the expansion was that it would expand through the use of this association health care plan, it would expand the definition of employer to include basically sole employer entities. It would make an individual who was in business for herself both an employer and an employee under these provisions and therefore make them come within this association, the Association Health Plan rubric, and that seemed to me to be at odds with what ERISA was all about as well as failing the statutory tests under ERISA. So I vacated the provisions of this rule from the Department of Labor. There was a severability clause in the provisions and that meant that the rest of it survived even while I vacated these particular provisions dealing with the employer definition.

There was an appeal filed, but this was another one of those situations where the appeal was late in the game in terms of an administration, and ultimately that appeal was filed, but it was promptly post-2020 election stayed, and it remains stayed. The technical term is held in abeyance. The appeal has been held in abeyance. The representation from the Department of Labor has been that there's a new administration and they are reassessing the situation and what should be

done. That's been going on for quite some time now. But the appeal has not moved forward, and I don't see any prospect in the near future of it moving forward as an actual challenge to the decisions.

There are two sides to this issue from a policy perspective, and I'm sure there was some, I know there was some, push post-Trump administration, some push by some to allow greater access through some method, whether it be a redefinition of employer or something else, but to allow greater access to Association Health Plans or some means to avoid some of the most stringent requirements of the Affordable Care Act that fall on the small business entities.

A significant decision I felt. An important decision. It got some publicity when it was going on, but it's been pretty much below the radar since the time I issued the decision and with the appeal held in abeyance. But again, an Administrative Procedure Act question, statutory interpretation question, some complexity to it, some threshold jurisdictional or justiciability issues, particularly standing, and a demanding but fascinating case that is the kind of case that we get here in D.C. more than anywhere else, and that I in particular enjoy dealing with, these statutory interpretation questions, sometimes with constitutional issues, sometimes without, and often in the framework of the Administrative Procedure Act and the requirements of the Administrative Procedure Act. So that's that case.

MR. COONEY: I noticed that the Biden administration has been pretty aggressive in keeping abeyance cases from going forward.

JUDGE BATES: Yes. They have been on, it's a handful of cases, but a collection of cases that have been in that posture now for some time.

Now the last case that we're going to discuss, I think the last specific case that we're going to discuss, which leads me to say this. You know I'm not done being a judge, so if someone wants to come back and talk to me again five years from now, I may have some other cases to talk about or other experiences to talk about. But the last case we're going to talk about in this interview process is a case that I issued in October of 2020. A little bit higher visibility case. Again, came about because of the direction from President Trump through an Executive Order. Actually, this wasn't through an Executive Order. This was through a memorandum directing the attorney general to establish a commission to study issues regarding law enforcement and the criminal justice system. Now this occurred during 2020, which was really a year at the height of racial concerns in the context of the criminal justice system and the application of policing methodology and policies to African-Americans in particular, the *Floyd* case and other situations. This was really at the height of those racial concerns. Ultimately this commission was to make recommendations to the President for actions to be taken to address crime, increase respect for law, and assist victims. So the subjects of the recommendations were skewed somewhat towards the pro-law

enforcement ends by describing it as addressing crime, increasing respect for law, and assisting victims. But it really dealt with more than that in terms of law enforcement and the criminal justice system, and a challenge was brought to the creation of this commission by the NAACP Legal Defense Fund under, as I said, the Federal Advisory Committee Act. There were several issues that were raised, issues dealing with transparency, technical issues in terms of appointment of people, but the primary challenge was to the composition of the commission.

FACA, the Federal Advisory Committee Act, requires a fair balance in viewpoints that are represented on a committee that is subject to FACA. But here the commission members all came from a law enforcement background. Some of them were current law enforcement officials, others were past law enforcement officials, but they all came from a law enforcement background. There were no civil rights representatives, no criminal defense representatives, no community organizations or any other perspectives other than the law enforcement perspective that were represented on the commission. So this case was pretty strongly litigated, aggressively litigated. I don't mean that in a derogatory sense. Aggressively litigated by both sides. It was another administrative law case, although not under the Administrative Procedure Act but instead under FACA, and a case where the relevant language, the language of the relevant statutory provisions, was important.

Now I will note that it's not hard to identify a policy problem with having a commission, particularly during these sensitive times, to look at law enforcement and its relation to the rest of the players in the criminal justice system when that commission is made up only of law enforcement representatives. There's a policy question there. A policy problem, perhaps. I noted that in my opinion but quickly went on to say that's not my responsibility. It's not my job as a judge to assess and decide whether that's good or bad policy. My job is to assess whether laws are being violated, procedural or otherwise, in the creation of this commission in this instance.

Now what were the first issues? No surprise. Standing issues, and they had to be decided. The fair balance challenge, that claim to the fair balance of the commission, posed an interesting standing question, but I found that there was a sufficiently concrete harm that arose from the denial of representation for the NAACP. Not that they were entitled to be on the commission, but that their viewpoint and the viewpoint of non-law enforcement perspectives should have been represented, therefore there was a concrete harm from the denial of that representation.

Beyond standing, there were other justiciability challenges based on the absence of what I would call judicially manageable standards. These issues were not easy issues either. They were fairly close issues, but I agreed with most courts that the provisions were justiciable. It was interesting. There was a D.C. Circuit opinion where, the way it played

out, it was a concurring opinion, took a fairly strong contrary view, and you had to parse the other two judges' opinions fairly closely to understand where they were coming out on this question. But I decided that these provisions were justiciable.

That brought me to the biggest issue in the case, a statutory interpretation issue, and that was whether this commission was exempt from FACA under a separate statutory provision that had created an exemption from the Federal Advisory Committee Act. I found that the commission's meetings, both as to their purpose and as to their participants, did not satisfy the statutory test for the application of this exemption, so that this commission was not exempted from FACA. That was a fairly novel question as it was presented, and an interesting parsing of the statute was necessary. But ultimately, that was the conclusion that I reached and that's pretty much the end of the game because the government had not offered any defense on the merits. In other words, if FACA applied and these plaintiffs were appropriate to bring the challenge, in other words, they had standing, then the government was basically conceding that FACA had been violated, that they had not complied with FACA in several regards, even with respect to the fair balance issue because they made no real defense of the selection of the commission members in the face of that challenge under the FACA fair balance provision.

But again, sometimes remedy can be a problem, and remedy was an issue here, and it was a fairly interesting issue. In these kinds of settings, one thing that a court can do is impose what I will call a use injunction. In other words, what comes out of this commission cannot be used. I decided that that was relief of the last resort and should not be employed here, I guess really for two reasons. I may not have stated this completely, but one of the reasons was that in effect I would be enjoining the President from using information that this commission brought to his attention, and I thought it was a little bit uncomfortable to, in effect, enjoin the President from using the information. The other reason was that there were First Amendment implications here in entering the use injunction that prevented the use of this information. So with those concerns in mind, I decided not to impose a use injunction but instead said that whatever came out of this commission had to have a very clear and express disclaimer or caveat, and I crafted the language for it and required that that be on any copy of any report that came out of the commission, that it would have to include this very clear disclaimer and caveat saying that a federal judge had found that this was in violation of the Federal Advisory Committee Act. And that disclaimer was put on all of the copies of the report that came out. And I think that report has pretty much withered on the vine, if you will. I don't think it has been utilized very much. Now one could say that there hasn't been all that much done by the current administration with respect to these questions of law enforcement

policy, criminal justice policy, but I'll leave that for someone else to discuss in some other context. For my purposes, it was an interesting case, one that had some pretty interesting issues that I felt could have an impact. I didn't know what the commission would come out with. I suspected, but I felt that the failure to have a balanced commission really was an important consideration, and under FACA, was a determinant consideration. I'm happy that I didn't enter a use injunction because I think that would have been a bad precedent. Maybe it wouldn't have gotten appealed. This case did not get appealed, in part because of the election and the change of administrations. After all, the report was due to come out October 28th of 2020. I issued my opinion October 1, 2020. It was important to me to get the opinion out before the report came out, and the election occurred a week after that October 28th date.

Anyway, so what came out of the commission has been, as far as I can tell, of very little impact in considering these important issues of racial justice and our criminal justice system.

So that's the last case I'm going to talk to you about. Do you have any questions on it?

MR. COONEY: It's been fascinating to hear about your approach to all these different decisions from your early days on the bench through modern times.

JUDGE BATES: I don't want to harp on the Trump administration, but I do think it's fair to say that there's one other major impact from the Trump administration. Don't get me wrong. I'm not making some determination of President

Trump's role. That's up to others to assess, both in Congress and perhaps in the criminal justice system. All I'm saying is that the January 6 cases that we have as a court, hundreds of them now, are another major fallout from the Trump administration and have a substantial impact on the functioning of my court. They've impacted the criminal docket immensely in unprecedented ways. The first way is just the volume. The number of cases, it's increased our criminal caseload severalfold and made the last two years very, very busy for the judges of our court. And the scope of the cases, they have such a broad range, from fairly minor trespassing-type incidents to major conspiracy or assault on police officer allegations, the criminal offenses and the volume and scope of those cases is really, really tremendous. There have been lots of issues, some of them because of the media and public focus on these cases. There are articles, sometimes several daily, in *The Washington Post*.

At first we had to deal with the detention questions. Normally these are decided by our magistrate judges, but because of the volume of them, many wound up going to the district judges, and these posed some challenging, close questions at times, as to whether to detain individuals for their conduct on January 6th. I've gone both ways on detention questions. Those have been difficult and demanding questions.

The biggest issue and delay in the cases, I guess there are two big delay issues. The first biggest delay is because of the volume of discovery. This is the largest criminal case effort that the Justice

Department has ever undertaken, and it's the largest discovery problem and issue and undertaking that the Department of Justice has ever faced. The number of videos, number of reports, the witness statements, just such a tremendous volume of material, and collecting, organizing, being able to search that material, producing it to the defense, both the case-specific material that obviously dealt with the individual defendant, and the global discovery, which may be of importance in some cases and is important for the government to fulfill its obligations by making it available to the defense. Those have posed numerous and very complicated discovery issues. I will commend the Department of Justice, the U.S. Attorney's Office in particular, and the Federal Public Defender for the collective efforts in marshaling the forces to deal with those discovery issues. They've done a good job under very difficult circumstances, but it has been a slow process. There's no question about it.

The other delaying factor has certainly been COVID. It has made it difficult over the course of the last two years to deal with these cases and certain aspects of the cases and certainly difficult to get cases to trial. So that has been a big issue. There are lots of legal issues regarding the application of some of the statutory provisions to the defendants, whether those are really appropriate statutory offences. And then there have been the issues regarding getting the cases to trial and sentencing people, either post-trial or post-plea. Lots of issues have come up.

Some of these cases involve what I'll call cause attorneys, attorneys who are really defending the cause that lies behind the January 6th events. The work on these cases is continuing, both by me and by other members of my court, and I have to say that I am extremely proud of my colleagues on the district court and the magistrate judges for the tremendous efforts that they have made on these cases and the work they have done on these cases. It's really much like the Guantanamo detainee cases. It's really a situation where unique circumstances made very heavy demands on the judicial officers, district judges, and magistrate judges involved. From my perspective, the judges have conducted themselves extremely well in handling these cases and ensuring that the criminal justice system works from both ends, both with respect to the interests of the government, but also with respect to the protections that need to be afforded to the defendants.

MR. COONEY: What percentage would you say of the cases go to jury trial and how many are tried by a judge?

JUDGE BATES: Well that's an interesting question, and the book is still open on that. There have only been less than a handful of cases that have actually been tried so far. It's just three or four, and one of those opted for a bench trial and was tried by a judge. But that's a small sample of the overall volume of cases. So I don't know how that will eventually play out. Statistically, nationally, 98% of cases get resolved short of trial. Some get dismissed, most get resolved by pleas, but a very small percentage, around 2%, go to

trial of criminal cases. I think it'll be a little higher percentage for these cases. Certainly some issues need to be tested, issues that are both tested before juries and that are tested in the courts, so I expect there will be a little higher percentage of cases that go to trial, but it's not going to be, at the end of the day, a very high percentage. I'm confident we're not going to see 20% of these cases go to trial because once you get a feel for what the juries are doing with the cases, that will educate both sides, and maybe some different compromises will be presented and reached. But whether more cases will go to a bench trial remains to be seen. The one bench trial, as you no doubt know, did result in an acquittal. That happened last week, I guess, and that may lead to more defendants asking for bench trials. Each judge is different, but I do know of one occasion where in the last couple of days that a defendant has asked for a bench trial before a different judge, not before me. But you would expect that there might be a few of those happening, and I don't know whether there will be a wholesale move to bench trials as opposed to jury trials.

MR. COONEY: This does sound like the Guantanamo cases taken to the nth power.

JUDGE BATES: It really is. The uniqueness particularly. There were unique and difficult issues in those cases in terms of the process, in the discovery, and there are similar issues, different but similar issues, with these cases. Although these cases, the volume is an additional problem to overcome. We're dealing with several hundred cases, and that's far more than the Guantanamo setting had. But as I say, this is continuing, and it will be a

part of my life for the next few years at least, as it is for all the judges on this court.

Should we gallop right along and move to rules?

MR. COONEY: Yes. That will be very interesting. It's also very interesting to see how at the start of your career the criminal docket was a large percentage of your work, and now it's off the charts.

JUDGE BATES: There's no question about that. I've said to my law clerks several times over the past year that we've spent more time on criminal cases, some of it just status calls and the routine stuff that happens in criminal cases and sort of pushing on discovery, but more time on criminal cases than percentage-wise has been true in most years. I did observe, I think with you, in an earlier time that, from my experience, we used to try more criminal cases than we have in the recent years, not just because of COVID, but because the criminal docket has gone down, and we've tried fewer criminal cases. But this influx of January 6 cases is changing that. There are more trials occurring and that will occur. I would expect that I will have two or three January 6 cases go to trial this year, and the book's still open on what will happen thereafter. But, on to Rules.

MR. COONEY: On to Rules.

JUDGE BATES: So, after I finished my term as Director of the Administrative Office, the question was raised how would I like to contribute to the Judiciary, because people in power knew that I liked to be a contributor to the overall federal Judiciary and wanted me to continue to be a contributor. And so

the resolution of that was that I would take over as, and by take over, I mean assume the reins in the normal course of things, as another judge finished their term, as Chair of the Civil Rules Committee. It's technically called the Advisory Committee on Civil Rules.

So it was fairly unusual for someone who had not been on that committee to take over as chair of the committee, but I had a lot of knowledge of the committee work. I had worked a little bit with the committee as Director of the Administrative Office. I had worked with the Chair of the Standing Committee on some issues, and so I was a known commodity, so it wasn't totally out of left field. I did attend one or two meetings of the Civil Advisory Committee before I took over as Chair, just sort of as an observer, so I eased into the role as Chair.

Now, these Rules committees are also a unique animal. They're a little bit different than most Judicial Conference committees, and as I may have said before, there are 26, I believe, Judicial Conference committees. These rules committees have a legislative approach. There's no other way to describe it than as a legislative role. They promulgate the Rules of Procedure in five substantive areas, civil, criminal, appellate, bankruptcy, and evidence. In evidence, it's the actual Evidence Rules. In the other four settings, it's the Rules of Procedure for those types of cases. It's a process that is very much legislative in its nature. It's very intellectual because you're dealing with complicated legal and procedural issues and

even sometimes beyond that into historical questions and other fascinating areas.

It's not the administration of the courts, which was an area where I had a lot of experience. Not only had I been on the Committee for Court Administration and Case Management, but I had been the Director of the Administrative Office, which is at its core an administrative function. But this was different.

The Rules Committees have a special place in the Judicial Conference committee structure. They have a statutory basis, unlike the other committees, and there's a particular set of statutes. The Rules Enabling Acts, which is the vehicle by which rules are promulgated and that creates or dictates that there will be at least a standing committee on rules, and the way the structure exists with congressional approval is a standing committee with five advisory committees reporting to that standing committee.

The process, I'm going to give you the process in a nutshell just because it's good to bear it in mind. With a rule amendment that has any complexity to it, the likely process is that this is raised with the relevant advisory committee. It may come from a member of the bar. It may come from a member of the committee. It may come from another judge. It may come from an academic. There are any number of sources of proposals for rule amendments. It comes to the advisory committee which

grapples with it. They may grapple with it through the appointment of a subcommittee or otherwise.

From the advisory committee, there are reports for each standing committee meeting, but ultimately, there is a recommendation from the Advisory Committee for a rule amendment that goes to the Standing Committee. If there's any complexity to it, it's not unusual for the Standing Committee to have some questions, have some concerns, and to send it back to the Advisory Committee. The Advisory Committee will grapple with it further and bring a recommendation, perhaps the same, but perhaps a modified recommendation, back to the Standing Committee. Ultimately, the Standing Committee will approve, sometimes disapprove, but more often approve the recommendation of the Advisory Committee, and that will enable the proposed rule amendment to go out for notice and comment. Publication and the solicitation of comments from members of the public turns out usually to be some academics, some judges, some organizations, and you get that public comment, and based on that public comment, the Advisory Committee considers the matter again, may make adjustments, and sends it forward to the Standing Committee for final approval of a proposed rule amendment. If the Standing Committee gives that final approval, and, again, it may be sent back for further tweaking, but once the Standing Committee gives that final approval, the proposed rule amendment goes to the Judicial Conference for its approval and to the Supreme Court for its approval and then to Congress. Basically if

Congress doesn't act on the rule amendment that is proposed, then it goes into effect in December of that year, absent any action by Congress. That's what we hope for. We basically send it over to Congress, and we hope that the fall leads to no activity by Congress with respect to the particular rule amendment that has been proposed.

So Civil, which is where I landed, is very active. It's probably the most active of the Rules advisory committees, although that varies from time to time, but very active on some broad issues as well as more focused and sometimes even technical issues. Some of the big issues concerned discovery at the outset of my tenure, class actions, which changed Rule 23, the discovery issues dealt with some expansions of some of the rules and have been very well-received by the bar, and the same has been true of the class action provisions that have gone into effect and have been in effect now for a couple of years, those have been very well received and applauded by the bar.

There have been some other big issues. One that's currently being grappled with is whether to have rules for multi-district litigation cases, and that's been an on-going project now for the last three or four years.

Sometimes the process does take many years. I think the normal cycle is pretty much a three-year cycle from submission of the proposal, wherever it comes from, through the December 1st date of whatever year that the rule would go into effect is, for a normal matter, a three-year

process. The more complicated matters, sensitive matters, it can be much longer, and it has been.

The membership of committees is a little bit unique. The Rules committees are unique in that sense too because they're made up not just of judges, but also of representatives of the Department of Justice, academics, and private practitioners. The representatives of the Department of Justice are the senior Justice Department officials, the deputy attorney general is a representative with respect to the Standing Committee, and the heads – various assistant attorneys general – are representatives for the other committees. They can be very active participants and important participants. But this is unique among the Judicial Conference committees because there's a much higher non-judicial representation on these committees. This work has enabled me to work closely with not just the members of the committees but also with the bar, with other judges, and it has been a very rewarding experience. It's important for the Judiciary to get it right because these rules govern the justice system, whether it be the criminal justice system, the civil justice system, our bankruptcy system, our appellate process, we really need rules that work and that are sensitive to all the issues, and I have found that the committee members are extremely sensitive to getting the right rules in place and doing so through a fair and open process.

So, I did the civil rules for four years, and then I was asked, and the Chief Justice appointed me, to take over as Chair of the Standing

Committee, which is the umbrella committee that all the rules advisory committees report to and through. It's got a much broader purpose and responsibility because of the breadth of the rules that it deals with. It deals with all the sets of rules, whereas each advisory committee is dealing with only one set of rules. Sometimes there's some overlap and coordination is necessary, but for the most part, each advisory committee is given only the one set of rules. The Standing Committee has reports from all the advisory committees and deals with all the sets of rules, so the breadth is much greater.

A lot of the work on rule amendments is done by the advisory committees, but final tuning does take place with the Standing Committee. Let me give two examples that the Standing Committee has been working with. One is the emergency rules that are currently under consideration. These are rules to deal with future emergencies like COVID-19 or different from COVID-19 that limit the ability of the courts to handle its responsibilities. We decided, and the Standing Committee was crucial in this, not to try to have rules that would change things in a non-emergency setting, but instead only to develop rules to deal with future emergency settings, and to give the responsibility for declaring that emergency to the Judicial Conference rather than having it remain with the Presidential declaration or having it be at a lower point in the pecking order with a court in particular.

That's been a coordination process that has been very interesting. Great work has been done by some of the reporters in that process, and they are an important part of this rules-making process as it goes along. They are academics who are very knowledgeable in their particular arenas and are of invaluable assistance to the committees as they do their work.

Another example of the sensitivity of things is something that the Appellate Rules Committee is currently dealing with, and those are rules with respect to amicus disclosures. This is something that came to us from the Supreme Court because congressional proposals were made as to the Supreme Court, and the Supreme Court doesn't really have a process for this kind of thorough examination with respect to the rules, so they asked the Standing Committee, and then the Standing Committee referred it to the Appellate Rules Advisory Committee, to look at these questions of greater disclosures regarding amicus briefs in the appellate courts primarily, but presumably to serve as a model perhaps for the Supreme Court. There are already some disclosures that are required, but this would be enhancing those disclosures in a very meaningful way.

So that's a little bit of an explanation of what I've been doing on the Rules. I have some time left as Chair of the Standing Committee, but it's been a good run for the last seven years or so working on rules issues and it is something that I've enjoyed and particularly enjoyed working with all the players in that process, both at the Rules office, which is staffed out of the Administrative Office of U.S. Courts, and then with the

committee members, other judges, academics, and members of the bar, and the reporters especially, who are crucial in the process, and we have really top-notch people who are in the academic arena who are reporters on the advisory committees and on the Standing Committee.

So, with that, questions?

MR. COONEY: Are there functions that are unique to the chair on the committees?

JUDGE BATES: Absolutely.

MR. COONEY: These do go to Congress, so is the Chair the liaison to Congress on these issues?

JUDGE BATES: A little bit. There's a process that works because this is so frequent and routine that there's a process that works that doesn't wind up with the chair having to do that much other than review things. But there are occasions where the Rules community has an interest in proposed legislation and then the chair of the Standing Committee gets involved and perhaps sending communications to Congress. I've done that, and my predecessor has done that. Sometimes I do that in conjunction with the chair of the particular advisory committee that is impacted. There are policy issues that come up in terms of how the committees function and concerns over issues that have to be resolved. Sometimes they're pretty complicated, and sometimes they're pretty sensitive. Something that the chair is intimately involved in, or at least I have been intimately involved in as Chair, and perhaps this is in part because of my past role as Director of the Administrative Office, it is in making recommendations for

membership on the committees. The committees' membership is determined by appointment by the Chief Justice, but he needs to receive recommendations, and I generate those recommendations through the Director of the Administrative Office and present the Chief Justice, shall we say, with a slate of possibilities for any particular vacancy. And sometimes it's difficult to find the right people for those positions. I think I'm not talking out of school when I say that the Chief Justice takes his responsibilities for appointment to all the Judicial Conference committees quite, quite seriously, but perhaps even most seriously with the Rules Committees, that he views are particularly sensitive in terms of the functioning of the federal judiciary. And indeed, he was on the Appellate Rules Committee. Justice Gorsuch was on the Appellate Rules Committee and was briefly Chair of the Appellate Rules Committee. Justice Kavanaugh was on the Appellate Rules Committee. The Justices of the Supreme Court, when they were circuit judges, frequently have been members of rules committees, and they have a sense of the importance of those committees and the work of those committees.

MR. COONEY: By the time they get to the Supreme Court, they're very well informed about how the judicial function operates.

JUDGE BATES: Absolutely. By the time they go into effect, these rule amendments, they are very thoroughly vetted, in part by the Supreme Court, which, as you said, has members who are very familiar with the rules process.

MR. COONEY: Well thank you very much. I don't have any more questions today, and I think we've now been through eight 2-hour sessions.

JUDGE BATES: We've only been at it for an hour-and-a-half. Let's not give us more credit than we deserve. But yes, it has been most enjoyable, John, in large part because of you. I appreciate the effort you've put into it and how gracious and comfortable you are and how enjoyable it has been just to chat with you about my career. I'm not all that comfortable with this concept of talking about myself, but you've made it easier and more comfortable, and I appreciate very much all the effort that you've put in.

MR. COONEY: Thank you. And as I've said several times, there are two audiences. One will be an immediate audience, and the other is history, so this is going to be very valuable on both fronts.

JUDGE BATES: Let's hope it's of some value. It certainly has been of value to me. It's been nice to relive it, and maybe now when my family members ask me about something, I can say go read these transcripts.