

THE RULE OF LAW ORAL HISTORY PROJECT

The Reminiscences of

James Robertson

Columbia Center for Oral History

Columbia University

2013

PREFACE

The following oral history is the result of a recorded interview with James Robertson conducted by Myron A. Farber on January 29 and January 30, 2013. This interview is part of the Rule of Law Oral History Project.

The reader is asked to bear in mind that s/he is reading a verbatim transcript of the spoken word, rather than written prose.

VJD

Session One

Interviewee: James Robertson

Location: Washington D.C.

Interviewer: Myron A. Farber

Date: January 29, 2013

Q: This is Myron Farber on January 29, 2013, interviewing James Robertson at his home in Georgetown for Columbia University's oral history project on Guantánamo Bay and related matters.

Judge, you were appointed to the federal district court here in Washington by President Clinton in 1994.

Robertson: That's right.

Q: And you took senior status in December of 2008?

Robertson: I think that's right.

Q: —and retired fully in September of 2010.

Robertson: I think it was June of 2010.

[INTERRUPTION]

Q: But you were on the bench from 1994 to 2010?

Robertson: Yes.

Q: Can you give me some idea of your background, Judge? Where were you born? And when was that?

Robertson: I was born in Cleveland, Ohio in May of 1938. My family moved out to a little college town called Oberlin when I was two or three years old. We lived there for ten or twelve years.

Q: Oberlin, Ohio?

Robertson: Oberlin, Ohio—the college town. Then my father changed jobs and moved to Dayton, Ohio, where I went to school for a couple of years. But Dayton was foreign to northern Ohioans, so my parents arranged to send me to a little prep school in northern Ohio called Western Reserve Academy, which I attended for three years before I went to Princeton [University].

Q: You went to Princeton in 19—

Robertson: —1955, the fall of 1955. I graduated in June of 1959.

Q: Both of my children went to Princeton. Did you enjoy that?

Robertson: What's not to enjoy about Princeton?

Q: Well, I don't know what it was like back in the 1950s. There weren't very many women around then.

Robertson: No, there weren't. You'd travel a long way for women in the 1950s. But Princeton was a great experience. My father had gone to Princeton and my son went to Princeton, and my granddaughters, both of them, are applicants for Princeton for next year. So there's a lot of Princeton in—

Q: When did your son go there?

Robertson: 1982.

Q: Backing up for a moment. Your father—what kind of work did he do?

Robertson: My father was a banker, basically. He grew up in Wabash, Indiana where his father was a banker, and he used to call himself a banker and an SOB, for “son of a banker.” [Laughter] He was with the Cleveland Trust Bank for a while. He was with a little investment bank in northern Ohio, got out of that and went into private consulting, and ended his career as a procurement specialist for the Air Force in Dayton, Ohio.

Q: What is that film with Jimmy [James M.] Stewart where the banker *is* an SOB? *It's a Wonderful Life*?

Robertson: *It's a Wonderful Life*. Yes. The banker *is* an SOB. Lionel Barrymore is who it is, I think.

Q: I think so.

Robertson: In a wheelchair.

Q: Right. But Wabash—I don't want to break into song here, but isn't there something about "on the banks of the Wabash?"

Robertson: Yes.

Q: What am I thinking of?

Robertson: "The moonlight's bright tonight, along the Wabash, in the fields," etc., "I can hear my mother in the doorway singing songs, something of long ago."

Q: But we're talking about the Wabash in Indiana.

Robertson: Yes. The Wabash River, Wabash, Indiana. My father rode to Princeton on the same train that Cole [A.] Porter rode from the next station down the line. Cole Porter went to Yale [University], my father went to Princeton and they rode on the train together when they went back and forth. He was born in 1891.

Q: I'll have to find this. There's a wonderful passage by [F.] Scott Fitzgerald—I forget now which book—in which he recollects taking the train back to St. Paul in the winter time, across the plains there. It's very, very evocative—he was coming from college—which actually was Princeton, I think.

Robertson: If it was Fitzgerald, yes. It was Princeton.

Q: Right. In any event, you got to Princeton. Did you have to declare a major there, at that time?

Robertson: You did, but not until the end of the second year. My major was something called the Woodrow Wilson School of Public and International Affairs, which was generally thought to be a prelaw program at the time. There was a sort of mix of politics, economics, sociology—but I used to say that I majored in committees because the drill for the Woodrow Wilson School was that in your junior and senior years you participated in kind of joint decision-making exercises in each of two semesters. In your junior year you were a gofer and wrote papers. In your senior year you were an organizer and a plenipotentiary and you supervised the juniors writing their papers. We wrote position papers on things like nuclear power, private nuclear power. I've forgotten what the others were. But it was an exercise in group decision-making and, literally, committee

work. It's strange to think about it now, but that was what the Woodrow Wilson School did then and I think still does do. It's their teaching method, rather like the Harvard Business School teaches the case method, the Woodrow Wilson School teaches task force decision-making, which is interesting.

Q: Did the school have then, at that time, have the pond behind it?

Robertson: The University?

Q: No, no, the Woodrow Wilson School.

Robertson: No. Did you say your two sons—?

Q: My son and daughter—

Robertson: —went to Princeton.

Q: —in the late 1980s, early nineties.

Robertson: By that time they had rebuilt the Woodrow Wilson School in that building that we called radiator gothic.

Q: Yes, that's right.

Robertson: The pond is behind that. It wasn't there when I was there.

Q: To the extent you can recollect, what were you interested in doing with yourself at that time?

Robertson: Well, I really don't think I knew. I'm fond of recalling a major moment in my Princeton career when Edward Bennett Williams came to speak on the campus—and he was then, I think, representing Jimmy [James R.] Hoffa. He was sort of the poster boy of the criminal defense lawyer in the United States and he gave a talk to a group of students and it just blew me away. I had never heard anybody talk about the importance of a proper criminal defense in an adversary system and how even the worst criminal needed the best lawyer. I got all excited about that. I also interviewed with advertising firms when I was a senior, but I was committed to three years at sea in the Navy because I was there on a Navy ROTC [Reserve Officers Training Corps] scholarship. So I knew I was going to go to sea for three years and I didn't quite know what I was going to do after that.

Q: Did you go to sea?

Robertson: Oh, yes. I served on a destroyer for three years.

Q: Let's see. This would have been 1959 to 1962.

Robertson: Yes. I never heard a shot fired in anger. It was what we called a "white shoe Navy" at that time.

Q: You may not have even heard a shot fired!

Robertson: Well, I was the gunnery officer. I heard a lot of shots fired. [Laughter]

Q: And you weren't angry at anybody yourself.

Robertson: No, no. Actually, that was my introduction to Guantánamo Bay because we went to Guantánamo Bay. In those days, all the ships on the East Coast went to Guantánamo Bay for what was called Battle Efficiency Training. We went down there to test the crew, how the ship was doing, and if the ship could shoot straight, and if it could steam straight, and if everybody knew what they were doing. I made a couple of trips to Gitmo, which I knew mostly because the officers' club was cool and had cheap drinks and dice cups. That's what you learned when you were in the Navy in the fifties—late fifties or early sixties.

Then I came back to Washington, went to law school here, and stayed in the Navy for two years and went to night school. Because by that time I was married and had two children, and no visible means of support, so I needed to stay in the Navy. I was in the Pentagon doing administrative work in the Office of Naval Intelligence for two years.

Q: You never thought of going back to the Midwest?

Robertson: Yes, I did. When I was in law school I interviewed a couple of Cleveland firms, mostly because my family knew some of those people and it was home, more or less, although I hadn't been there for years.

Q: Isn't Jones Day a Cleveland firm?

Robertson: Jones Day is a Cleveland firm. It used to be Jones, Day, something and Reavis [Jones, Day, Reavis & Pogue]. Jack Reavis, the old man, was a drinking buddy of my father's when they were both bachelors back in the early thirties. So I met Jack Reavis.

Q: You know there's a popular idea that Midwesterners are the soul of America.

Robertson: I believe it.

Q: Oh, you do?

Robertson: I'm committed to it.

Q: Well, then, perhaps we should end this interview now. [Laughter]

Robertson: Well, you're a New Yorker.

Q: I'm actually from Baltimore.

Robertson: Oh, you are? Oh, really.

Q: You've been pulling my leg, though. Well, what part of the Midwest are we talking about? Are we talking about Chicago? Are we talking about the countries?

Robertson: Well, if we want to know the epicenter of the soul of America, it's actually not Ohio. It's not Illinois. It's Iowa. There have been so many great people come from Iowa. I don't know what's in the blood out there, in the water, but—

Q: Tom [Thomas R.] Harkin is going back there, isn't he?

Robertson: Tom Harkin is going back—a Princeton man, I think.

Q: Well, can he go back home again?

Robertson: He'll probably stay here. I don't know.

Q: A lot of these senators and congressmen do end up staying here, right.

So you subscribe to this ethos of an American Midwestern heart?

Robertson: Yes. I'm not sure if the heart is beating quite as strongly as it was fifty, sixty, seventy years ago when I grew up there. America seems to be emptying out toward the coasts and industry is all falling apart out there. If you look at Cleveland and Detroit—god forbid, Detroit—it's rough today.

Q: Well, in any event, would you say going to law school was a hard choice? Or was it something you fell into? Or something that maybe some words of Edward Bennett Williams lingered in the mind? Why go to law school? Why did *you* go to law school?

Robertson: I'm not sure I have an intelligent answer to that question. The Williams thing clearly triggered an interest in going to law school. As I said, I literally did interview with a couple of New York advertising firms because when I was in college, as I told you, I was a wannabe journalists. But I wasn't a journalist in college, I—

Q: I'm sorry. You were a wannabe journalist?

Robertson: I was a wannabe journalist. When I was in prep school I ran the newspaper.

By the way, going back to Johnny Apple—my English teacher in the prep school, the guy who—

Q: I'm sorry. Are you talking about R.W. Apple of the [*New York*] Times?

Robertson: Yes, that Apple. R.W. Apple, Jr. was three or four years ahead of me at this little school called Western Reserve Academy in Hudson, Ohio. Both of us had the same English teacher, a man by the name of Reardon—whom we all called Jiggs Reardon because he looked like the comic strip character, Jiggs. You remember Jiggs and Maggie?

Q: I'm not sure the transcriber of this interview is going to know who that is. [Laughter] She's probably twenty-two, or eighteen!

Anyway. He looked like Jiggs?

Robertson: He used to have the staff of the newspaper—we had a weekly lunch together in a little private room and the rule in that lunch room was if anybody mentioned the word Franklin Delano Roosevelt, we all had to stand up. Franklin Reardon was Johnny Apple's—R.W. Apple, Jr.'s—Johnny Apple's teacher and mine. I've forgotten why I drifted off on that path.

Anyway, I was a wannabe journalist, but when I was at Princeton what I did was run the humor magazine—of all things—and did a lot of writing and thought of myself as a pretty good writer. I thought, "Well, what can I do with that?" The advertising firms were interviewing on campus and I went up and interviewed with some of these firms that are now quite recognizable from the show *Mad Men*. I was smart enough not to do that.

Q: Was this before or after you went into the Navy?

Robertson: This was when I was a senior in college, before the Navy. Then I went off to the Navy and I got married.

Q: Well, if this was before the Navy, you didn't know how to drink yet. That's all they do in *Mad Men*.

Robertson: Remember, I went to Princeton.

Q: There's a lot of drinking in *Mad Men*, at all hours of the day.

Robertson: I know. I never saw that and I'm not sure I believe it. But I'm sneaking around to answering your question about why I went to law school. I think some combination of Edward Bennett Williams, and deciding against the advertising thing, and the Woodrow Wilson School experience, and something about the times just said to me, well "I'm going to law school." So I did.

Q: Did you know Johnny Apple at school there?

Robertson: No, because he had left the year before I got there. I did get to know him, very slightly, at Princeton, because my freshman year was his senior year—which he never finished, as you may or may not know.

Q: I don't recall that.

Robertson: He flunked out of Princeton because he was the chairman of the *Daily Princetonian* and never went to class.

Q: Right, well it didn't hold him back, did it?

Robertson: No, it did not. [Laughter]

Q: Of course nothing held him back, including the next meal.

Robertson: Well, that's for sure.

Q: No, he became something of a legend, Johnny Apple. At one time, the *Times* had sent me to school to prepare for a foreign assignment and at that time Johnny Apple—who had been in Africa—was regarded as the very model of a foreign correspondent. The legend was that Apple never spent two nights in the same country as he roamed Africa. Not all foreign correspondents were as adventurous as he. But that's a different story.

So when did you go into law school? In the early sixties?

Robertson: In 1962. I finished my sea duty and I came to Washington, enrolled in GW [George Washington] law school in the night program and spent two years in the night program. Then I finished—

Q: And during the day?

Robertson: I was holding down a desk in the Pentagon.

Q: Eventually, law school has to come to an end.

Robertson: It does.

Q: What did you do after that?

Robertson: The day after I graduated from law school—literally, the day after I graduated from law school—I went to work for a small, newish Washington law firm, then called Wilmer Cutler & Pickering. I was the twenty-sixth name on the letterhead in that firm.

Q: It's hard to believe that that was a small firm.

Robertson: It had only been founded in 1962 and I joined it in 1965.

Q: What do you think the size of that firm is today?

Robertson: Two thousand. It merged with the Boston firm of Hale & Dorr. It's now Wilmer, Cutler, Pickering, Hale & Dorr—or WilmerHale, for short.

Q: I didn't know that. So they took a chance on you, or you took a chance on them?

Robertson: Oh, definitely the former. At the time, this was Lloyd [N.] Cutler's law firm—the famous lawyer. I don't know whether you know who Lloyd Cutler was back then, but he was the super lawyer.

Q: I do know.

Robertson: Even then, it was well on its way to becoming a pretty high-powered entrant into the Washington legal scene. They didn't have anybody in that firm who had not gone to Harvard [University], Yale, [University of] Michigan, [University of] Virginia, [University of] Penn, maybe Stanford [University], maybe one person from Boalt [University of Berkeley]. They took a chance on a guy from GW law school. I remember one of the partners in that firm was a lovely guy—who was, by the way, married to Scott Fitzgerald's daughter.

Q: Oh, my heavens. Who was that? What was his name?

Robertson: His name was [Samuel] Jack Lanahan.

Q: Of course.

Robertson: He was married to [Frances] Scottie Fitzgerald.

Q: Yes, his daughter, Frances Lanahan.

Robertson: Scottie. Yes. They were divorced, I think, shortly after I got there. But Lanahan was a great guy and a joker. He said to me, "Well, Robertson, you got pretty good grades at GW, arguably, you could have done well at a good law school." [Laughter] But I was first in my class and editor of the law review, and they took a chance on me. I didn't think it was much of a chance. And, a college classmate of mine had preceded me in that firm by a couple of years because he didn't do military service. He went straight to law school. He was in that firm and introduced me to them.

Q: With regard to military service, was service in the Navy instructive in any way in terms of life lessons?

Robertson: Oh, immeasurably. Yes. I'm one of those people who moan the end of the draft. I think everybody ought to do military service or some kind of public service when they're young. It's a homogenization process, particularly if you have an Ivy League education and you think you're among the chosen few. You leave with some sense of entitlement and you find yourself with "the people," with the hoi polloi, with the whole country—with everybody mixed up together. You learn a hell of a lot very quickly. And if Congress has decided you're an officer, even though you're twenty-one years old and you're ordering men around who are old enough to be your father and know twice as much as you do about everything you're doing—that's a teachable moment for a young man. [Laughs] It teaches respect for the system, but it also teaches

sort of an appropriate understanding of what you know and what you don't know, what you can do and what you can't do. It was a fascinating experience. I don't regret a minute of it.

Q: But you really did it because they gave you a scholarship to college.

Robertson: Of course. They gave me a full scholarship to Princeton. The full boat—tuition, room, board, uniforms, and \$50 a month.

Q: That's when \$50 probably meant something.

Robertson: It didn't mean quite enough, but it was helpful. [Laughs]

Q: Right. Later on in life, I was involved in a case in Illinois—the murder of a United States senator's daughter—

Robertson: [Charles H.] Percy's daughter?

Q: Yes. At the time she was murdered, Percy put out a \$50,000 reward. When I was brought into this picture, thirty years later, I thought, "My god, that's pretty cheap." I didn't appreciate that \$50,000 then was much better—

Robertson: —a lot of money.

Q: —a lot of money.

In any event, you went to work at this then-small firm. Did you actually see much of Lloyd Cutler?

Robertson: Yes, I did. It was a very small firm. Actually, I was not one of Lloyd's chosen. There were people in the law firm who worked more closely with Lloyd than I did. But no—we worked together on some cases. I got to see a lot of the way Lloyd operated. I learned a lot from watching Lloyd.

Q: And the kinds of things you did. What did you learn? You were there from 1965 to at least 1969, right—?

Robertson: Right.

Q: —when you became involved, as I understand it—the Lawyers' Committee for Civil Rights under Law.

Robertson: Correct.

Q: Were you still—what is that expression?—“wet behind the ears”? Did you emerge from those four years at Wilmer, Cutler & Pickering if not a super lawyer but a hell of a lawyer?

Robertson: No. But there's a long answer to that question. Do you want the long answer, or do you want to ask a shorter question? [Laughs]

Q: Well, I'll stop you. If you'll start the answer, and I'll stop you when I think it is.

Robertson: All right. One of the first things that happened when I got to the firm was that Lloyd came back from a meeting one day saying that he had been hired to represent the Automobile Manufacturer's Association, which was then in a death struggle against Ralph Nader—*Unsafe at Any Speed* Nader. General Motors had put a tail on Nader. Nader had embarrassed General Motors and the whole industry was in trouble, and Nader had put them in trouble. The government was getting around to passing the [National Traffic and] Motor Vehicle Safety Act. I've forgotten the full name of it, but the Motor Vehicle Safety Act of 1966, I think. The industry needed counsel because they needed to get all the members of the industry together in committees—by the way, you remember I had a degree in committees—[Laughter] to develop and propose safety regulations to the government. But you couldn't put American Motors, and Ford, and General Motors, and Chrysler all in the same room and have them propose safety regulations without being at risk of violating anti-trust laws. So Lloyd deployed damn near his whole firm to Detroit, where we became prophylaxis, really, against anti-trust violations.

For a period of some fourteen months, I think, I got on a plane on Monday morning, flew to Detroit, sat in meetings for five days a week, got back on a plane Friday night, came home, and spent an exhausted weekend with my family. I did that forever. We turned out not to be so much anti-trust prophylaxis—because that was easy. What we really turned out to be were translators,

interpreters, between automobile engineers and the government. We were able—I was pretty good at this, if I do say so myself. I was able to listen and get a sense of what the government was saying about this safety regulation or that safety regulation and help them translate it into proper English and argue it to the government. That went on, and on, and on, and on.

Also during that period of time, the firm decided that I knew something about ships—which I did—and they had a big shipbuilding case for Bethlehem Steel Corporation in which W.R. Grace Line had bought four banana boats from Bethlehem, which turned out to be too small. They didn't carry enough bananas and there was a big lawsuit that became known as the Banana Boat Case. Well, for four years Myron—may I call you Myron, if you call me Jim?

Q: Yes, of course. Well, you can call me Myron.

Robertson: For four years, my best recollection is that I spent most of four years doing automobile industry stuff and banana boats. Was I a super lawyer? No.

One morning—I'm continuing this long story. In April 1968, Martin Luther King, Jr. was assassinated. I happened to be on the street that morning and I could literally smell the tear gas from our offices on what was then 17th Street. This is a true story. I started kind of following my nose toward the tear gas. I don't know why I did it, but I wound up down at Superior Court, volunteering to take the cases of people who had been arrested for rioting and stealing what they called smoky scotch from the broken shop windows that they had just broken, etc. I almost involuntarily jumped right into the middle of the whole urban unrest problem of the sixties. Then

Bobby [Robert F.] Kennedy was shot in June. You remember this if you were in graduate school in 1966. The country was in turmoil.

One morning in late 1968 or 1969, I woke up—I forget whether I was still going to Detroit or not—and I said to myself, "What am I doing in this law firm? I have no experience of being a lawyer other than being in this law firm. I need to get out of here and see what else there is to do." So I began nosing around, and believe it or not I came fairly close to going to work for Pierre [E.G.] Salinger, who had an offshore mutual investment trust somewhere in the Caribbean, some stupid thing—I had no idea what I was thinking about. But in those days—I think I may have been the first person ever to leave Wilmer, Cutler & Pickering—and maybe I started the tradition—but I made it a tradition of going around to speak to every lawyer in the firm and tell them I was leaving. They said, "What are you going to do?" I said, "I don't know. Maybe I'm going to go to work for Pierre Salinger and his offshore mutual investment fund, real estate something." I came to Louis [F.] Oberdorfer. Now Lou Oberdorfer was Bobby Kennedy's assistant attorney general for tax. He was in charge of the federal troops at the University of Mississippi when [James H.] Meredith was entering. He was involved in a lot of the Kennedy—he was part of the Kennedy mafia. He'd just come back to the firm from the Justice Department a couple of years earlier and I had worked with him on several cases. He said, "Well, why don't you go to Mississippi? We need somebody to run our litigation office in Jackson."

Q: The firm's litigation office?

Robertson: No, the Lawyer's Committee. Lou Oberdorfer was then co-chairman of the Lawyer's Committee.

Q: When you encountered him, it wasn't at Wilmer, Cutler?

Robertson: It was at Wilmer, Cutler. He was partner in the firm and he was also co-chairman of the Lawyers' Committee for Civil Rights.

Q: Gotcha. So he made that suggestion.

Robertson: He made that suggestion.

Q: We should say on the record here that Pierre Salinger had been press secretary for President Kennedy in the early sixties. In any case, Oberdorfer made that suggestion to you.

Robertson: Yes. And I said, "You've got to be kidding. I've got a wife and three children. I'm not going to Mississippi." And he said, "Well, why don't you just go check it out." [Laughs]

Q: This is 1969.

Robertson: March or February of 1969.

Q: Had Medgar [W.] Evers been killed yet?

Robertson: No. Well, wait a minute. Yes. He had been killed. Medgar Evers had been killed.

Q: And [James E.] Chaney and [Andrew] Goodman—?

Robertson: —Chaney, Goodman, and [Michael “Mickey”] Schwerner had been killed three or four years earlier.

Q: Yes. In 1964. Right. But there was still a presence of the Lawyers' Committee down there in Jackson?

Robertson: Well, there was more than "still a presence." Let me back up a minute. The Lawyers' Committee, the mythology of the Lawyers' Committee—which happens to be truth as well as myth—is that after George [C.] Wallace [Jr.] pulled his routine in the schoolhouse door in Alabama and Nick [Nicholas D.] Katzenbach went down to confront him, there was a meeting between Bobby Kennedy and his brother in which the president said to Bobby, "Where the hell are all the lawyers? Why aren't the lawyers doing something about this?" That question led to more questions being asked, which led to the formation of a group called the Lawyers' Committee for Civil Rights. Somebody had to put "Under Law" in there to be sure it wasn't a radical group. It was founded by the real establishment of the American Bar Association [ABA]—Bernie [Bernard G.] Segal of Philadelphia, former president of the ABA; Whitney North Seymour of New York, former president of the ABA; George [N.] Lindsay, brother of John [V.] Lindsay, in New York; Henry [T.] King of Winthrop Stimson.

Q: Cutler, too, I think.

Robertson: Absolutely, Cutler. And Oberdorfer was still in the government at the time. But when Oberdorfer came back to private practice, he was a natural. He was part of the group that pulled everything together from within the government and helped Bobby Kennedy pull it together. The first thing the Lawyers' Committee did, once it got itself organized, was to open a litigation office in Jackson. The Committee was founded in 1963. It opened the Jackson office in something like 1966, and there were a couple of chief counsels down there. My mind is geared up to this because, as it would happen, just the other day I was in California visiting my son, and his wife had put together a history week at their kids' high school. They asked me to come out and talk about civil rights, then a week later I got an invitation from a group called the Mississippi Center for Justice asking me if I would be their honoree this year. So I've been thinking a lot about rehashing a lot of these memories.

Well, long story a little shorter—my wife and I got on a plane and went to Mississippi. I was promising her, "We're not going to do this. We're just doing this for Lou. We're just going to have a nice little trip." But I was snakebit when I got there. It was just something I had to do. So I came back, left the firm—

Q: You mean that was a short trip?

Robertson: It was a two day trip. I came back, left the firm, and went down to Mississippi. My wife and family came down a few months later and I became the chief counsel of this office in Mississippi.

Now what prompts this whole long, long, long answer is your question about whether three or four years at Wilmer, Cutler & Pickering had made me a super lawyer. The answer is no. I didn't know squat. One of the reasons that I decided I had to leave this firm was that I wanted to be a trial lawyer, and you didn't try cases in big firms in those days. Other people tried cases. I wanted some trial experience and didn't have any. I knew about how to work with committees of automobile engineers. I knew how to put together a case about banana boats. But I wanted to be what I thought was a real lawyer.

So I was sent down to Mississippi to run this office. Why was I put in charge of this office? A guy with not much experience of any kind at being a real lawyer? Because I was the delegate from the establishment. I came from a recognized firm. I wasn't a radical. I wasn't a long haired hippie. I understood authority and how it worked. I'd been in the Navy. So I was an okay emissary. At that time the Lawyers' Committee was having a big problem with the Mississippi bar, which wanted to throw us out of the state. So I was sort of a diplomat, but I was also a civil rights lawyer. I really only spent—boots on the ground in Mississippi, I was only there about eighteen months. But it was the most important eighteen months of my whole career, until I went on the bench, because I did learn how to try cases. I had a staff of four or five people, most of whom knew more about civil rights law than I did. But I understood that experience from being in the Navy and having—

Q: What was a typical case?

Robertson: A typical case. Well, I'll tell you—I'm not sure "typical" works, but we were doing a lot of work at that time in First Amendment work—marching and picketing in the various little towns around the state—where people were picketing, and boycotting, and marching, and getting arrested for it, and we would get them out of jail. That would be one case. Another case would be—we brought some of the first Title VII employment discrimination cases. We famously represented the NAACP [National Association for the Advancement of Colored People] and its members in a case that was brought against it by the merchants of Claiborne County because they were hurting badly from a boycott in Port Gibson. There was a damages suit against the NAACP, which went all the way to the Supreme Court. We handled that case. We represented the families of people who were injured and killed at the Jackson State [University]—Jackson State was sort of obscured by Kent State [University], but they happened about the same time—police shootings at Jackson State. Then there were some miscellaneous cases.

I love to tell—my two favorite war stories have to do with cases that were not big cases at all. In one case, a minister, a black minister in Mendenhall was charged with contributing to the delinquency of a minor because he appeared at the door of the jail with his Sunday school choir to ask about a black man that he had heard was being beaten in the jail. The jailer then arrested him and his whole choir, put them in the jailhouse upstairs, maced them through the bars of the jail—they opened the windows and started singing "We Shall Overcome," crowds gathered in the courthouse, the highway patrol were called in to keep order, and the denouement of all this

was a charge of contributing to the delinquency of a minor, a twelve year old girl—to wit, by "causing her to be in a bad place," namely, the jail. That case, believe it or not, went to trial. And, of course, the minister was convicted, but we got it reversed on appeal.

The reason for doing that case was the reason we did a lot of things around Mississippi—it was sort of a catalyst for community organization. All civil rights movements are local. They were at that time. They were town by town, county by county. And if a civil rights community began to coalesce around people or an issue, the lawsuit was often the catalyst for bringing people together.

There was another case of, kind of a rogue sheriff's deputy in a little town called—I think it was Yazoo City, I'm not sure—who was in the habit of driving around the black community and harassing the young girls on the weekends. He got into a contretemps one day with a woodcutter, the end of which was the woodcutter wound up shot in the lung and the constable wound up with his neck cut—not killed, but a deep cut in his neck—and, of course, the black guy was charged with assault on a police officer with intent to kill. We defended him and I had a chance to do some real Perry Mason stuff in the courtroom. We got a hung jury in that case, because—it had nothing to do with Perry Mason; it had to do with jury selection. We got two blacks on the jury. At the end of the trial, they said to the white people—this was about Thanksgiving—they said, "If we have to be here until Easter, we're going to be here until Easter. We're voting to acquit." Finally, they out-waited the white folks. Actually, it was an acquittal. It wasn't a hung jury. The white folks all said, "Oh, to hell with it. We'll vote to acquit." [Laughs]

So it was big cases, small cases. We also filed a rather important case called *Green v. Kennedy* [1970], designed to deny tax exempt status to the so-called segregation academies that were springing up all over the state in resistance to school desegregation. Whites all took their kids out of schools and put them in these little private academies and then they wanted tax exempt status. We said, "That's not charitable. You can't grant them tax exempt status." We wound up winning that case after the court of appeals.

Q: You're saying that you saw yourself as being on the side of the angels down there.

Robertson: Absolutely. Of course, I was.

Q: Okay. But when you were involved in this automobile engineers' case, involving Ralph Nader, were you on the side of the angels then?

Robertson: No. [Whispers]

Q: Oh. I'm not sure. I don't know—

Robertson: You have to answer that question with an audible answer. [Laughter] No.

Q: I wanted to ask you—

Robertson: "Counsel, the court reporter needs an answer."

Q: That's right.

Robertson: Well, let me put it this way—

Q: What I really wanted to ask you—at the time you were doing that and Ralph Nader was on the other side—and I'm not speaking of the Ralph Nader of the year 2000 but the Ralph Nader back then—did you ever think to yourself, "Gee, you know, I've worked on this case pretty assiduously, but you know, that guy Nader, maybe he's got a point"?

Robertson: Well, we were never actually working against Ralph Nader, but I will not deny that I had mixed feelings about Ralph Nader. At one point in my life I would have told anybody who would listen that Ralph Nader was one of the ten men in America who had made more difference than anybody else in his life's work. He blew the whistle on the coziness between the regulated and the regulators, and the so-called fourth branch of government, which is the regulated—well, *you're* the fourth branch of government. The *Times* was always the fourth branch.

Q: Give it another number.

Robertson: Another number, right—but the regulatory state was and may still be the captive of the industries that it regulates, and Nader, more effectively than anybody else, demonstrated how that was so. So he made a real difference. But Nader was a jerk. He was always a jerk. He's still a jerk.

Q: Well, I don't mean the modern Nader. I mean back then.

Robertson: Well, he was a jerk back then.

Q: Oh, really?

[INTERRUPTION]

Well, you know, as a lawyer, you know better than anyone that you can be a jerk, but you can be on the right side.

Robertson: Of course. And that's why I have always—I spent most of my private practice life basically working for corporations. I'm jumping to a subject that's a little off your point, but I went to the bench from a practice that was pro-corporation. The plaintiffs' lawyers were very difficult people. The jury system was of questionable efficacy. Corporations are afraid of juries, and I went to the bench with that in my head.

Q: We're getting ahead.

Robertson: I know we are.

Q: Actually, there may have been a few members of the Mississippi bar who thought you folks were jerks.

Robertson: They did.

Q: Undoubtedly. But you were there on the ground, perhaps around eighteen months?

Robertson: Yes.

Q: And your wife and children were living down there?

Robertson: Yes.

Q: Your children were in school there?

Robertson: Yes.

Q: How old were they then?

Robertson: My older son was in the fourth grade, my youngest child—we have three kids—the youngest, I think, was not in school yet. He may have been in kindergarten.

Q: And this is the Jackson public school?

Robertson: Yes.

Q: Segregated?

Robertson: No.

Side story—the kids started school down there in late August of 1969. It was the first year of school desegregation in Jackson and they began school desegregation by moving teachers before they moved children. Our son Steven was in the fourth grade at McLeod Elementary School and there was a young black man, a teacher assigned there. I keep telling people that was when Mississippi came to understand what a disaster school desegregation had been, because this teacher didn't know anything. He was terribly educated himself and had been educated in the segregated public schools of Mississippi. Now he was a teacher, and oh, my god! The white people began to understand, by teaching a whole two/three generations of blacks in poor schools without resources. This teacher was terrible.

Q: Perhaps it was a harbinger of what they were going to have in schools.

Robertson: I'm sorry?

Q: It foretold, perhaps, what would happen to their children's education.

Robertson: Yes.

Q: That's a very interesting story. Did you have any sense, or your wife, of any physical danger down there in Jackson?

Robertson: Complicated story. The short answer is no, not really. But it was never far from our minds. Our kids did not have a very happy experience in school. I wouldn't say they were ostracized, but we tell the story of Steven being bullied—Steven's the older one—being bullied. Although Steven was a pretty good kid himself, he didn't take much bullying. Peter got in some fight with some neighbor who stuck a garden fork up his nose, causing his nose to bleed.

[Laughs] I don't know. There were no murders, lynchings, or overt acts of violence in Mississippi during the time we were there. That's what confirms me that Medgar Evers was shot before we got there. But there was always a sort of paranoia about being there. We lived in a white neighborhood. Our neighbors on each side were civil to us, nice people, but not very close to us. We always thought our phones were tapped. Do you know what the Mississippi Sovereignty Commission was? Did you ever hear of it?

Q: Sure.

Robertson: Sort of the Stasi of Mississippi.

Q: Right. A lot of these records have come to light.

Robertson: Five or six years ago they opened the records of the Mississippi Sovereignty Commission and I had an old friend go down there. I said, "Pull my file. I can't wait to see what's in the file." He called me back a couple weeks later and said, "Jim, I don't know how to tell you this, but there is no file on you." [Laughs] I was so disappointed.

Q: It's like not having an FBI [Federal Bureau of Investigation] file. Right. But the white citizens' councils—were they active?

Robertson: Yes, the councils were active.

Q: The [Klu Klux] Klan?

Robertson: The Klan was active. That's another long story, but there was a young Baptist minister by the name of Ken Burns in Mississippi, who was acting as the director of something called the Mississippi Council on Human Relations, a do-good, can't-we-all-talk-together group of people. He called me up one day and said, "I want you to meet somebody." Jumping ahead a step or two, Berit [S. Robertson] and I—my wife, Berit, and I—went over to Ken Burns' house that night and met a young Klansman who wanted a lawyer. He wanted a civil rights lawyer. He had been involved, with several other Klansmen, in an FBI sting operation. The Jewish community in Meridian, Mississippi wanted some help putting an end to their harassment by the Klan. They first wanted the local police to contact the mob and get the mob to wipe these people out, but the police said, "We don't do mob down here." So the FBI finally agreed to do something, and the FBI—as I remember the story, I have an indistinct memory—it's written

down in a book. I think Jack Bass wrote a book about this. The FBI went out and intimidated a bunch of Klansmen and got them to agree to go plant a bomb at the home of a prominent Jewish business man in Meridian. This young Klansman that I met had been involved I think in making the bomb or getting the materials for the bomb, but he didn't actually plant the bomb. When the two Klansmen showed up with their girlfriends to plant the bomb at the home of—I've forgotten his name now, the business man—flood lights came on, the FBI popped up from behind trees and started shooting, and killed the girlfriend of one of the Klansmen and killed one of the others. I've forgotten who was killed. This guy was going to be prosecuted for being part of this conspiracy—which he maintained was not his idea and he was entrapped, and it was a sting operation, and he wanted some help.

Well, we listened to this guy talk all night long, until three or four o'clock in the morning, and I called John [M.] Doar, who was then the co-chairman of the Lawyers' Committee and my boss—and John said this couldn't have happened. He thought the whole story was made up. He couldn't believe it. It was not in his canon that the FBI would do anything like that.

But whether John believed it or not, I came to the conclusion, independently, that there was no way I could represent a Klansman in Mississippi. It would mean the end of my practice. I had a clientele in Mississippi that was all black.

Q: Well, it *was* a sting operation.

Robertson: It was a sting operation. He did deserve legal representation. I just couldn't do it for him.

Q: What ever happened with them?

Robertson: You know, I have kind of a moral curtain in my mind on that one. I'm not sure I know what happened to him. I think he pleaded and did some time. That's all I know about it. I didn't stay involved in the case after that. I had to say "No, we can't represent you."

Q: Why did you leave that job down there?

Robertson: Well, to be honest with you, it was too hard on my family. It really was. There was a discomfort factor down there. That's about half the real story. The other half of the real story is that the Lawyers' Committee asked me to come up and take over the job of being national director of the Lawyers Committee. They promoted me to the Washington job.

Q: Not the John Doar's job?

Robertson: No. There was a guy by the name of Milan [C.] Miskovsky—Mike Miskovsky—who was the director. He was a former general counsel of the CIA, I think. A lovely guy. But Miskovsky was leaving and they were looking for a new director. They asked me if I would come up and do the job. It was uncomfortable enough to be in Mississippi—I mean I loved it. I

was in my element. I would have stayed there for a long time, but I had other obligations and I just left.

Q: You came back, then, to Washington.

Robertson: Yes.

Q: Back to the firm?

Robertson: Not immediately. I was executive director of the Lawyers' Committee.

Q: Oh, that was a fulltime job then.

Robertson: Oh, yes, a fulltime job.

Q: And how long did you do that?

Robertson: Let's see. I left in 1969 or 1970—about another eighteen months.

Q: Now would you say that the service you performed in Mississippi was useful to others and useful to yourself?

Robertson: Well, I hope it was useful to others. Those were heady times for people who were doing what I was doing. We thought we were going to change the world through litigation. We didn't change the world through litigation, but there was a lot of big talk and theorizing about high profile cases, important cases, and test cases. John Doar told me this one time—he said when he was at the Justice Department, “I thought if we desegregated one Mississippi jury, all the other eighty-two counties in Mississippi would follow. I didn't figure on the fact that every county—you had to fight it county, by county, by county, because in every county you would come in, show them the law book, and the county commissioners would say, ‘We can't do that voluntarily. You're going to have to take it away from us. We won't get elected next time if we just follow the law. You've got to sue us.’”

Q: You mean some were amenable to being sued?

Robertson: Oh, yes, of course. “Sue me and then I'll do it. If I have to do it, I'll do it.”

Q: It wasn't, “Sue me and I'll fight you to the end of the earth?”

Robertson: It was a little bit of both. Not too much "I'll fight you to the end of the earth." I went up to Columbus, Mississippi to file an employment discrimination suit in a case that came to be known as *Carr v. Conoco* [1970]. It was kind of a funny case because it involved women working at a Conoco Plastics garden hose factory. The job in question was to pull an extruded hose off a machine, fasten a brass fastener on it, wind the hose up, tie it with tie-ties, and throw it in a box. For that job, they made the women take written intelligence tests. We said, "That's

illegal. You can't require intelligence tests for a job like that."

Q: These were black women, white women?

Robertson: All black women. The woman we thought was going to be our client was Grozelia Carr. We went up to visit her—we finally met her on the day of her deposition. She was born with a deformed hand. There was no way she could do the rolling up of the hoses, and the case began to stand for the question could she, nevertheless, be a class action representative? A big legal question. But the lawyer up there was a very nice guy. He was very civil to us. We were having lunch together—

Q: The lawyer for?

Robertson: The lawyer for Conoco Plastics [Robert B. Fitzpatrick]. We were having lunch with him one day and I said to him, "Bob, why are you so nice to us?" He said, "Well, it's the first time I've had a client pay my full fee in years." [Laughter]

Q: I suppose history will judge whether you made any real contribution down there in Mississippi, better than even you could—but in terms of the education of James Robertson—?

Robertson: Priceless.

Q: Priceless?

Robertson: Priceless. It's like that Master Card ad. Just to channel myself as a young, arrogant lawyer just returning from Mississippi thinking I had all the answers in the world, I used to tell people that I thought that—first of all, for me, I considered it to be what I call a “crash course in racism.” Because racism was on the surface in Mississippi in a way that it was not in the North. You could feel it, smell it, touch it, talk about it—it was right there. But I also thought then—and I think history has borne me out—that the South would, if not solve, at least work on solving its racial difficulties long before the North did. Because in the South, in the deep South like that, black and white people really know each other. They live near each other. They partake of one another's cultures. Their children play together. Sure, they separate at a certain age and they go to separate schools, but they are part of each other's lives in a way that we're not in the North. We're separated here by geography—you know, east of the park and west of the park, and Harlem is up there, Manhattan is down here, and so forth. Black and white people are more strangers in the North than they are in the South.

Q: But you came back to the Lawyers' Committee. You had that job for a year or so and then went back to the firm. Is that correct?

Robertson: Yes. I had a call from Oberdorfer sometime around the middle of 1972 and he said, "Jim, if you're ever going to come back to the firm you need to do it pretty soon because you can't stay on a partnership track if you're gone for this long." I was not sure I wanted to go back to the firm. What I thought I wanted to do was start my own firm but I don't think I had the energy or the guts for it. I knew that I wanted to keep doing some of this civil rights work. I

wanted to keep my hand in—because I was up to my eyeballs in it by the time I left the Lawyers' Committee and I knew that if I tried to start my own firm, I'd spend all my time hustling business and I wouldn't have any time for it. The firm made a pretty attractive offer that if I came back I was going to be a partner within about a year. So my friends in the civil rights community I think were sure I was a sellout, but I went back to my old firm.

Q: And you were back at the firm, if I understand, until you were appointed a judge.

Robertson: Yes.

Q: So that's literally from when to when?

Robertson: 1972 until 1994.

Q: Okay. That's a good chunk of time. Without getting into too much detail, what kinds of work, what kinds of matter did you handle in that twenty-some year period?

Robertson: Well, remember I told you I wanted to learn to try cases. I came back to be a litigator. I don't know if you follow the legal profession very much, but litigation—

Q: I've been thrown around by it.

Robertson: Of course. Of course, you have! We're going to talk about that after you turn the tape off. [Laughs]

But litigator. There is a famous trial lawyer out in Wyoming by the name of Gerry [Gerald L.] Spence who makes the word "litigator" sounds like a dirty word—"Li-ti-ga-tor. You li-ti-ga-tors are not real trial lawyers—you're li-ti-ga-tors. You file motions and you take depositions, but you don't really try cases."

Q: Well, actually, Spence was quite a trial lawyer, wasn't he?

Robertson: He was. That's why he looked down his nose at people he thought were mere li-ti-ga-tors.

Q: Is he still alive?

Robertson: I don't know. Well, I was a li-ti-ga-tor. I didn't try that many—I did try some cases, but in Washington, if you're a litigator you're sort of doing the case du jour. I spent a long time working on securities class actions. I spent some time doing just general commercial litigation. I spent some time doing insurance coverage defense, which is awful work. That's when—a friend of mine once said the insurance companies are in the business of collecting premiums and denying coverage. Well, if you're the ABC Casualty Insurance Company and you have one of twenty-six policies covering a company that makes plastic pipe that exploded, then you've got twenty-six companies all trying to sort out who's responsible for what part of the liability

insurance—don't get me started. It's not much fun. As a matter of fact, at one point—I can literally remember the day I decided that litigation was—that I was either too old or too bored to do litigation. I was in a conference room in a big Houston law firm, in one of these big tort insurance coverage cases, and there were about thirteen insurance companies represented there and about twenty-five or thirty suits. All of them were young enough to be my son. I looked around and said, "No. I've got to do something else." So I put my hat in the ring shortly after [William J. "Bill"] Clinton was elected, and became a judge.

Q: Well, were you active in politics before?

Robertson: The straight answer to that question is no. Believe it or not, I did a little advance work for Hubert [H.] Humphrey [Jr.] in 1960, whatever it was—1968. I never got involved in politics, really. My major extracurricular activity was the Lawyers' Committee, which I stayed involved in on the board; then I became co-chairman. I resigned six months early from my job as co-chairman because of the Robert [H.] Bork nomination—which I'll tell you about if you want to know about it.

Q: You resigned from the Lawyers' Committee because of the Bork nomination?

Robertson: Yes.

Q: I think there's a gap there.

Robertson: Well, I'll explain that. I'll get back to it in a minute.

I was active in the Lawyers' Committee for twenty years. I also got involved in the D.C. bar. And about the last five or six years of my private practice I was involved in the bar, as president of the bar, and then I got my appointment. But politics—talked about it, interested in it, never really was a player in politics at all.

Q: Well, Lloyd Cutler was, wasn't he?

Robertson: That brings about the Bork story. I, like so many other people, were horrified by the Bork nomination and got quite active with a group of people who wanted to put together the research that had to be done to oppose his nomination. But I was co-chairman of the Lawyers' Committee, and the co-chairmen of the Lawyers' Committee were always one Republican and one Democrat. The Lawyers' Committee was determinedly nonpartisan. I decided that what I was about to do, in opposing Robert Bork, could not be classified as nonpartisan, so I thought the right thing for me to do was to step down early as co-chairman of the Lawyers' Committee, which I did. I put together, or participated, or helped to organize and lead a team of very dedicated researchers who basically put together all the stuff that Erwin [N.] Griswold used to speak against Bork. Bork was defeated.

Q: This is 1987.

Robertson: Yes. Bork was defeated and Doug [Douglas H.] Ginsberg was nominated. Oh, and Cutler was a big supporter of Bork. It's a Yale thing. Cutler was more Yale than he was Democrat.

Q: Yale Law or Yale College?

Robertson: Both. So Cutler was a huge supporter of Bork and was pushing for Bork, and here was this young partner of his who was pushing back the other way, and organizing people, and doing research. And we had this big firm meeting to decide whether it was appropriate for us to be taking polar opposite positions like this. Basically, Lloyd wanted me to stop and I said, "I ain't gonna stop. This is a free country. You're not representing Bork as a lawyer. There isn't a conflict of interest. It may look a little embarrassing to the outside but it's not a conflict." Well, we finally resolved it, more or less amicably, by saying that Lloyd could do his thing and I could do my thing. So we kept on with this, Bork was defeated, and a week or so later Ginsberg was nominated. Lloyd Cutler showed up in my office and said, "Now are you happy?"

Q: Well, but Ginsberg didn't make it either.

Robertson: Ginsberg didn't make it either. That's right.

Q: But Bork, who died very recently—last month, I think. Two questions. One is, why were you opposed to Bork? And two, looking back on it, was Bork qualified to be on the Supreme Court?

Robertson: I was opposed to him for quite simple reasons. I thought he was an extremist. If Bork had been nominated before [Antonin G.] Scalia—

Q: Was Scalia on the court?

Robertson: Scalia was first, and then Bork.

Q: Was that right?

Robertson: Yes. If it had been the other way around, they would both have been on the court. But Bork was clearly the swing vote. He would become the swing vote. Scalia was already there—everybody knew about Scalia. Scalia had charmed the pants off everybody. Everybody loved Nino—or did then. But Bork was not lovable, and Bork was vulnerable, and Bork was the swing vote. And those of us who thought we needed to have a court that was not ideologically committed to the right were opposed to Bork. Bork wore his ideology on his sleeve. I was a young lawyer and I thought Bork had to be defeated, and he was.

Now, the second part of your question is, looking back on it, was he qualified? Looking back on it, I regret my whole Bork activity.

Q: Oh, really?

Robertson: Mostly what I regret is the multigenerational feud that it began, because Bork became a verb. It became okay to oppose Supreme Court nominees, or any judicial nominees, on the basis of some Law Review article he'd written, or some position he'd taken, or something they'd done early in their lives. Bork was superbly qualified to be on the Supreme Court, and I now confess, on the record, that he should not have been defeated for the reasons that were put forward to defeat him. And the sequellae of that whole Bork episode have been so damaging to the judiciary—I felt it myself. It was a huge mistake.

Q: Having said that, if he had ascended to the court—he was a judge on the D.C. Circuit at that time, was he not?

Robertson: He was.

Q: If he had ascended to the court, it really would have made a difference in the lives of Americans. It's a tough nut. [Anthony M.] Kennedy, I think, after Bork, and then Ginsberg was nominated and failed over the marijuana business—

Robertson: Yes. And then it became Kennedy.

Q: —and then Kennedy became—. Now I think most observers would agree that however unpredictable Kennedy may be, he's not the hard-right ideologue that Bork was, and that Bork really and truly had a profound impact upon people. For example, people like to talk about the end of *Roe* [*v. Wade*, 1973]. Would that not have been the end of *Roe*?

Robertson: It might have been.

Q: That's another thing. It's a very interesting question of what should have been done about Bork. I think most people would agree, on an intellectual basis, Bork could easily have been a Supreme Court Justice.

Robertson: Yes—although, you know, there was a lot of sort of quiet smirking about Justice [Sandra Day] O'Connor—that she was not quite up to it, that her opinions weren't intellectually perfect, that she sort of took each case as she found it and didn't really have any center of gravity. Well, I'd rather have judges like that, thank you, than judges like Bork, Scalia—

Q: [Clarence] Thomas?

Robertson: I don't know about Thomas. It's hard to figure out Thomas. But Thomas would be one of them. But Bork and Scalia, I put both of them in the same camp of people who are so besotted with their own intelligence and their own intellect—there's an intellectual arrogance about them that, in my idea of jurisprudence, does not belong to a judge.

Q: At one point, I think actually in the eighties, Scalia called himself a "faint-hearted originalist," a faint-hearted originalist. Whereas Thomas seems to have become the embodiment of the determined originalist. He's more extreme than Scalia. Sometimes it seems Scalia sort of tries to disown himself from Thomas. [Laughs]

In any event, you did that, and you were president of the D.C. bar. And there comes along a time, you say, when you “threw your hat in the ring” for a federal judgeship, so to speak. Now was there a vacancy?

Robertson: There were five vacancies.

Q: On the federal district court here in Washington.

Robertson: There were actually four at that time.

Q: When you say you “threw your hat”—how do you do that, Judge, to become a federal judge?

Robertson: Well, you know, the famous Frank [M.] Johnson [Jr.], the Alabama judge who would handle some of the civil rights cases, wrote sort of a pompous autobiography in which he said he didn't know anybody who had ever applied to be a judge. Well, guess what. Everybody—you don't become a judge without letting somebody know you'd like to be a judge. Nobody just calls you out of the blue and says, “I've had my eye on you, Robertson, and I'd like to make you a judge.” There are a lot of people who would like to think that's the story, but it's mythology.

In my case—remember, there was a twelve-year, pent-up demand for Democrats to go on the bench, because we'd had twelve years of Bushes, or twelve years of Republicans. It was a long time before any Democrats had been appointed to the bench.

Q: Well, you had [Ronald W.] Reagan also.

Robertson: Yes. So, when Clinton was elected—well, that's right—1980 to 1992. When Clinton was elected it all of a sudden became possible.

Now Clinton cut a deal with Eleanor Holmes Norton, who was the nonvoting representative to Congress from the District of Columbia. How she managed to bring this about nobody knows. She got Clinton to cut a deal with her that she would have something like senatorial privilege for the appointment of district judges, U.S. attorneys, and U.S. marshals in the District of Columbia. Then, to her credit, she appointed a committee, a commission, to receive and vet applications for people who wanted to be in any of those jobs. The commission was chaired by a woman by the name of Pauline [A.] Schneider, who is an African American lawyer in town, very well respected, and who succeeded me by a couple of years as president of the D.C. bar—and whom I championed as president of the D.C. bar. It didn't hurt. And a lot of people on that committee I happened to know—but at the time there were four vacancies.

Now this being Clinton, and this being Washington, we needed diversity on the bench. So everybody knew that we needed at least one woman, at least one Hispanic, at least one African American, and that left one white male position. Gladys Kessler was everybody's choice for the woman, Ric [Ricardo M.] Urbina was everybody's choice for the Hispanic, Emmet [G.] Sullivan was everybody's choice for the African American, and it was down to two of us—Paul [L.] Friedman and myself—for the white male position, and Friedman got it. He deserved it. He's a

very politically astute, an active, smart guy—had clerked on the court, had also been president of the bar, and has, by the way, become a very, very distinguished judge. My old friends at the law firm called me up and said, "Don't worry about it, Jim. We're about to need judges in the new jurisdiction of cyberspace, and you can be a judge in cyberspace. You won't have to wear a robe." [Laughs] This is one of my visionary IT [information technology] partners who is into computers.

At any rate, another vacancy opened up about six months later—

[INTERRUPTION]

Q: Judge, can you spell your wife's name for me?

Robertson: B-e-r-i-t.

Q: And does she use the last name Robertson?

Robertson: Yes, she does.

Q: So another vacancy opened up, and you got it.

Robertson: Yes.

Q: Right. Now just so it's absolutely clear—seventy-three years from now, when somebody is reading this—we're talking about the federal district court in Washington, D.C. We're not talking about what's called the D.C. Superior Court, which is known as the D.C. Court.

Robertson: No.

Q: Between 1994, when you put on those robes—that your colleague thought weren't necessary—to September 11, 2001, can you give me just a general idea of the kind of cases you have presided over?

Robertson: Well, in the federal district court in Washington, we handle everything from street crime—by which I mean drugs and guns—to international cases, to anti-trust cases, to environmental impact cases, to employment discrimination cases, to the most boring case a judge can ever handle, which is a case brought under the Freedom of Information Act. We also handle cases that are brought by people who don't have lawyers, which are known as Pro se cases. It's easier to say what we do not handle than what we do handle. What we do not handle is juvenile cases, domestic relations cases, local crime, or local breaches of contract and real property cases—things of that sort.

Q: This is a lifetime appointment, of course.

Robertson: Yes.

Q: By the way, do you think it's necessary to appoint federal judges for a lifetime?

Robertson: Gee, that's a big, big question. Do I think it's necessary? If I stepped way back from the question and looked at it in some cosmic sense, I would have to say no, I don't think it's necessary. Do I think it's desirable in the best of all possible worlds? Yes, I do, because it defines what we call judicial independence. There's an old joke about the Tennessee lawyer who was appointed to a federal bench. His old cronies from the local political neighborhood came to visit him in his chambers one day, looked at the certificate on his wall, read the certificate, and said, "It says here you were appointed during your good behavior. What does that mean, Jim?" And Jim says, "Well, it means that if I don't steal money from widows or do any bad things to small boys, I can be a judge for the rest of my life." And one of the Tennessee politicians says, "I don't know, Jim. If it was me, I'd go for ten years, certain." [Laughter]

Q: Still and all, your own point of view is that it's necessary? Not necessary?

Robertson: I don't think it's necessary, but I think it has cemented the federal judiciary into a group of judges whose independence is unquestionable and unquestioned.

Q: Well, in terms of your own career as a judge, do you ever have occasion to say to yourself, "Thank god I've got this appointment as long as I want it, because they're leaning on me and they're not going to be able to get anywhere."

Robertson: No, nobody ever leaned on me. And one of the reasons nobody ever leaned on me is because I was independent. The federal judiciary—as you probably know, the notion of lifetime appointments is not universally accepted and understood. And in the states, as distinct from the federal judiciary, there is a lot of pushback against the idea of complete independence. There is a lot of serious political thought that judges ought to be more responsive to political realities and to what the community thinks.

Q: I want to talk about that tomorrow to some extent, but right now, to ask the immediate question—in this very political town, nobody in a position of political influence, or no one senior in the bureaucracy that pervades this town, have ever leaned on you?

Robertson: Never. Not even close.

Q: Okay. Now I'd like to ask you where you were on September 11, 2001, but let us take a break, if we can.

Robertson: Sure.

[END OF SESSION]

VJD

Session Two

Interviewee: James Robertson

Location: Washington D.C.

Interviewer: Myron Farber

Date: January 29, 2013

Q: This is Myron Farber with Judge Robertson, on January 29. This is session two.

You had been on the bench for seven years when events happened in New York and here in Washington on September 11, 2001. Can you just tell me where you were on that day?

Robertson: Sure. Every American can tell you where they were that day. I was driving to the courthouse, and I was within sight of the courthouse when I had the radio on and I got word that a small commercial plane had flown into one of the Twin Towers. I thought that was pretty awful. I drove into the courthouse, parked, went up, and I had a jury in the box. Somehow—I've forgotten exactly who gave me the word—but one of the marshals came in and told me that it was much worse than that, that another plane had crashed into the other Twin Tower and that a plane was either on the way or had crashed into the Pentagon. At that point, it's a blur. We sent the jury home and tried to figure out how to get home. The phone lines were all down. There was no way I was going to drive home. I knew that. The subway wasn't—I walked home from the courthouse that day because there was no other way to get home.

Q: You were living, then, in Georgetown?

Robertson: I lived right here. My wife's stepbrother was visiting us from Sweden with his wife and I remember—he's kind of a leftie Swede, questioning about America—and he didn't like the fact that everybody was going around saying, "God Bless America." He didn't know why God should bless America more than anyplace else. Two or three days later we were on one of the first planes that left BWI [Baltimore/Washington International Airport] because we had longstanding plans to go to the Grand Canyon—to take him to the Grand Canyon. We went through with those plans, but, literally, it was one of the first airplanes that flew after 9/11. We flew out to Las Vegas. I remember being blown away by walking through the hotel in Las Vegas and seeing hundreds and hundreds of people sitting there playing the slot machines like nothing had happened. He said, "What kind of a country is this, that people are doing that?"

Well, everybody has his own personal experience of 9/11. It was devastating, of course.

Q: When you left the courthouse the Pentagon must have been hit already.

Robertson: Yes.

Q: Could you see anything? The courthouse is on Constitution and Third Street, isn't it?

Robertson: I couldn't see anything, but my wife's stepbrother had a camera with him and he walked up a few blocks here to a high point and thought he saw smoke coming from the Pentagon, and was able to photograph it. I knew Ted [Theodore B.] Olson's wife, Barbara [K.]

Olson, was on that plane. I knew her. That's as close as 9/11 got to me, personally. I didn't know anybody else. You know, the six degrees of separation—everybody knew somebody.

Q: Right. Do you know Ted Olson?

Robertson: I know him to speak to him.

Q: At that time?

Robertson: Yes.

Q: Was he the solicitor general [SG] then?

Robertson: I don't think he was SG then.

Q: He must have later become SG because he represented the government, I believe, in *Rasul* [*Rasul v. Bush*, 2004] a few years later. Well, [George W.] Bush had just been elected in 2000, right?

In any event, when did you get back to the courthouse? Was the courthouse functioning soon?

Robertson: Oh, yes. Yes. The courthouse was back in operation within a couple of days, really.

Q: And were people's minds on the work?

Robertson: Well, you know, you operate at multiple levels. Work was being done. Let's put it that way. Opinions were being written, orders were being signed, things were being filed, but obviously the whole country was in a state of shock then and remained so for some time.

Q: In your own thinking, did you think that this presaged anything in particular? I don't know whether it was known who was responsible. But whether it was known or not known at that time, did you think that this was an event that was going to change the course of anything, or this was just a singular event that would be dealt with singularly?

Robertson: As I recall it, my first reactions to that—and they're sort of quasi-judicial, sort of publicly aware citizen reactions—were that we might be facing a twenty-first century version of the Japanese internment camps, that the entire country was going to turn against Muslims, Iranians, Saudi Arabians, Egyptians, anybody who appeared to be from that part of the world—that we were going to have a national struggle that would have civil rights implications on people of Middle Eastern heritage or Islamic beliefs. That's what I was worried about. I didn't have any idea that we were going to immediately turn on Afghanistan and start scooping people up and putting them in Guantánamo. That didn't even cross my mind, at first.

Q: Well, actually, Congress approved the president's Authorization for the Use of Military Force that fall. And that fall the American forces, with others I suppose, at that time invaded Afghanistan in search of Al Qaeda. In January of 2002, the first detainees were brought to

Guantánamo Bay by the Defense Department. These were the initial detainees in this old place that you had known back when you were a young man in the Navy. Now, did you see the pictures of the first detainees when they arrived at Guantánamo Bay? And did you have any sense on whether or not that made sense—to have that place there as receiving quarters for detainees? Having been there?

Robertson: Well, I had trouble picturing it because, as I told you, my own memories of Guantánamo Bay were of the distance between where the ship docked and the officers' club. I didn't have any sense of how big it was or where you could put barbed wire enclosures. I didn't have a visual sense of the place that would enable me to imagine that. But did I see the pictures? Sure I did. What was my reaction to them? I don't remember, frankly, having any normative reaction to what I was seeing. I keep coming back to this metaphor that I relied on when I was talking to high school kids in California a couple weeks ago for history week. They wanted to know about the civil rights movement and I said, "You know, when you're living through history it's the rare person, or the historian, who thinks of it as historical when it's happening." The metaphor is "What is the current to a fish?" It's your life; it's not history. You're not thinking—you're not recording it for history. You're just watching it, living through it.

Q: Well, in this case—

Robertson: I had no strong reaction to it.

Q: Do you recall that at that time Vice President [Richard B. "Dick"] Cheney, and Secretary of State [Donald H.] Rumsfeld, and Chairman of the Joint Chiefs General [Richard B.] Myers were describing these people who were arriving at Guantánamo Bay as "the worst of the worst"?

Robertson: I think I do recall that.

Q: Do you have any memory of whether you had any reservations about that?

Robertson: I don't have any memory one way or the other, to be honest with you, about that. You remember, Cheney had not been vice president for more than nine months, eight months, and if you remember—well, certainly, my own recollection of that election was somewhere between horror that W. [George W. Bush] had been elected and a small measure of relief that at least his vice president was an adult. There was a certain group of people, of whom I was one, who thought of Cheney as a solid, responsible fellow, and had no idea of what Cheney really had become, or was becoming, or would become. For some period of time—I'm not sure when that impression began to erode or when it completely left me—maybe it was after 9/11, when Cheney disappeared into an "unknown location"—but I was one of those people who would be inclined to believe what Cheney said, because I thought Cheney was a responsible, experienced, kind of all-American guy. I had no idea of his real beliefs at that time.

Q: In brackets, let me ask you—and you've had some time to look back on it—did the Supreme Court act appropriately in terminating the count in Florida in 2000, of which the consequence was Bush was named president? I ask you that as a judge.

Robertson: Well, I'm not a student of that, Myron, and I don't have any fully formed, intellectually thought-through opinion about it. My own view of the Supreme Court's opinion in *Bush v. Gore* [2000] is that it was the most overtly politically directed opinion, maybe, in Supreme Court history—and it deserves no respect from anybody because of that. Could I pinpoint the exact errors they made, or whether they should have stopped the Florida vote, or step-by-step what they should have done? No, I can't do that. I think *Bush v. Gore* delegitimized the Supreme Court in the eyes of many Americans by a notch or two. I think it was a very, very bad decision—and destructive of the prestige and the place that the Supreme Court held, and should hold, in American thinking.

Q: So you went back to work like the other judges, and it was also during that fall that President Bush ordered that the detainees coming to Guantánamo would be tried by military commission rather than Article 3, to trial by jury. Did you know anything about military commissions then? Did you have any feeling about military commissions—to try anybody off the battlefield?

Robertson: Did I then know? No. I didn't know a thing about it.

Q: An old Navy guy like yourself?

Robertson: I knew about courts martial but I didn't know about military commissions. There's a difference.

Q: Well, as you would point out later on. Right. Do you remember being surprised when you heard that? Or was it just something that passed through the night for the time being—military commissions?

Robertson: One of the attributes—I'm not sure attribute is the right word—but one of the conditions of being a judge—I used to tell people that being a judge was a little bit like being trapped in amber. The world is moving along, you are in your cloister, and you just deal with what comes to you. You are no longer a political animal, by law. Even though I never was all that much of a political animal, I was certainly out there arguing with people in the marketplace of ideas, bitching and moaning about things. But when you get on the bench you stop doing that—except to your wife and your children—because you're not supposed to. You're not supposed to go around having political opinions about things. In some sense, it's a kind of a luxury. You deal with what's in your courtroom, on this day, what's before you now. You don't go out and make speeches, or go to town hall meetings, or involve yourself very much in the melee that is going on around you. Maybe that's an excuse for saying—I'm not sure that I was all that much aware of all that stuff.

Q: Well, is it ordinary, in a place like the federal district court, which had at that time about how many federal judges?

Robertson: Fifteen.

Q: Fifteen in Washington—and the Court of Appeals for the D.C. Circuit is also in the same building, isn't it?

Robertson: Yes.

Q: They had how many?

Robertson: Twelve.

Q: All right. Do you all go out to lunch, or do you have a cafeteria or something, where you sit around and shoot the breeze, and you say, "My god, did you see that?" Or, "Did you hear that?" or, "What do you think of this?"

Robertson: Yes, of course. There is a judge's dining room and it is populated on some days by both appellate judges and district judges. Some district judges never go there. Some appellate judges never go there. Some always go there, and there's a lot of talk in that lunch room. Yes.

Q: About?

Robertson: About everything. There's also a sign on the wall that says, "No word spoken in this room will ever leave the room," or something to that effect.

Q: I thought that was Las Vegas. [Laughter] But you talk about events in the world? Or you talk about your cases?

Robertson: Both. But rather like the ward room in the British Navy, there are some things you don't talk about. You also don't talk, for example—I'm going to be careful about the sign on the wall—for example, Judge X, Y, or Z, who are known to be conservative Republican members of the court of appeals are in the lunch room—you don't provoke them by talking about something that's going to provoke them. You don't talk about sex, religion, or, depending on who's there, about politics.

Q: Do you remember any talk in that kind of context about whether what was going on at Guantánamo Bay was inevitably going to have some impact on federal court here in Washington?

Robertson: I'm not sure we focused on that. It is an oddity of federal jurisdiction that terrorists—well, for one thing, there was a move—that never went anywhere—ten or fifteen years ago to establish a special terrorism court in the District of Columbia, in federal court in the District of Columbia. That never went anywhere. It never happened. But there is also a provision of federal statutory law that says anybody brought into the United States to answer a charge of terrorism, piracy, any international criminal charges must be tried in the district in which he originally lands in the United States, or in the District of Columbia—which is why they bring people in by air to Dulles [International Airport], so they can try them in Virginia. Or why the shoe bomber was charged in Massachusetts, because his plane landed in Massachusetts. Or why the guy with

the underpants was tried in Detroit—because that's where his plane landed. It's also the reason why, until Gitmo, so few terrorists were brought to the District of Columbia—because the government prosecutors, no matter what their stripe, considered D.C. juries to be too lenient and tried to avoid bringing those cases in the District of Columbia. The only reason that the Gitmo cases were ultimately assigned to the District of Columbia—and I explained this, I think, in the first couple paragraphs of my *Hamdan* [*Hamdan v. Rumsfeld*, 2006] opinion—is because one of the cases—the Ninth Circuit said that it thought the cases should be charged and filed in the district, which is why Judge [Robert S.] Lasnik in Seattle sent *Hamdan* back here. He was complying with the Ninth Circuit rule.

Q: That's right. Well, correct me if I am wrong here, as is inevitable. Before *Hamdan*, there were three major cases that the Supreme Court ruled on regarding Guantánamo Bay. One was *Rasul v. Bush*, *Hamdan v. Rumsfeld*—

Robertson: *Hamdi* [*Hamdi v. Rumsfeld*, 2005]

Q: Well, I mean with regard to non-nationals, non-Americans.

Robertson: Okay.

Q: So [Yaser] Hamdi had dual American citizenship, and it was decided in June 2004, at the same time *Rasul* was decided. There are reasons to refer *Hamdi*. But, essentially, I'm talking about the non-Americans held at Guantánamo. For that purpose, the Supreme Court ruled in

Rasul in 2004, they ruled in *Hamdan* in 2006, and they ruled in *Boumediene* [*Boumediene v. Bush*] in 2008. Let us return to yesteryear, as—was it—the Lone Ranger used to say?

Robertson: Yes, it was.

Q: Talk for a moment about—*Rasul* I think arose in the federal district court as early as 2002, the same year the detainees were brought in federal district court not—

[INTERRUPTION]

Do you remember who had *Rasul*? It was actually called *Al-Odah* at that time.

Robertson: Was it Colleen [Kollar-] Kotelly?

Q: I don't know. I don't know.

Robertson: I can find it here in two minutes, if you want to know the answer to that. But to be honest with you, I didn't pay any attention to *Rasul* when it came through our court—if that's your question.

Q: That is a question.

Robertson: There is a sense in which—this is very interesting—there's a sense in which federal district judges are all their own “mom and pop stores.” Yes, we have lunch together, but we don't talk about our cases that much, and we're all stovepipes. You may or may not know about a decision that another judge has issued. I'm not sure I knew about *Rasul*.

Q: Okay. Now Rasul—Shafiq Rasul had been born in 1977 in England, of Pakistani ancestry. He went to Pakistan with a couple of friends—later these people were called the Tipton Three—presumably to attend a wedding—or at least that's what he asserted, and then they decided to go over to Afghanistan in 2001, after the invasion, to see what was going on—after the American invasion. They were captured by the Northern Alliance, turned over to the U.S. military, and sent to Gitmo in January of 2002.

Now thereafter, in 2002, they brought a petition for habeas corpus in the federal district court in Washington. At that time, it was dismissed for lack of jurisdiction. That would be the first time, perhaps since 1950, when it was decided that the case of *Eisentrager v. Johnson* [1950] would come up. The district court judge, whoever it was, quoted *Eisentrager*—quoted Justice [Robert H.] Jackson in the Supreme Court case of *Eisentrager v. Johnson* in 1950—as saying, “The privilege of litigation,” in this case means even habeas corpus, “does not extend to aliens in military custody who have no presence in any territory over which the United States is sovereign.” So the judge dismissed, the D.C. Circuit upheld that dismissal three to nothing—the D.C. panel—with Judge [A. Raymond] Randolph writing the opinion.

Now at that time—we're into 2003, and you say you didn't know anything about that case working its way through the court—through the district court and through the court of appeals in the same building.

Robertson: If I did, I've forgotten it.

Q: Okay. Were you familiar with the case of *Eisentrager* at that time?

Robertson: Probably not. The answer to your question is the judge was Colleen Kollar-Kotelly.

Q: In *Rasul*?

Robertson: In *Rasul*.

Q: Okay. Now the *Rasul* case went up to the Supreme Court in 2004, and it was decided in June of 2004 on statutory grounds saying that non-American detainees down there in Guantánamo Bay did indeed have access to federal courts. And one of the questions that arose was whether Guantánamo Bay was covered by the writ of habeas corpus. Whether, because Cuba was Cuba and Guantánamo Bay was just a base down there—controlled by the United States—that was sufficient standing to the Guantánamo habeas applications. Now can you tell me, can you tell a history, very briefly—what is the writ of habeas corpus, and if you were sitting on that case, would you say that it applied at Guantánamo Bay?

Robertson: Well, I'm a little bit—my answer to that question is a little bit skewed because some years later I was asked to give a speech, an address, at Buffalo University Law School and I decided to talk about habeas corpus. They published the article—. [Laughter] You've done your homework! Good for you.

The James McCormack lecture on habeas—"Quo Vadis Habeas Corpus?" In the course of doing that, I learned a lot about habeas corpus that I didn't know back when *Rasul* was decided. Habeas corpus, as I hope this article spells out, has been diminished and weakened over time and is a mere relic of what it used to be. But habeas corpus, at its root, at its English common law root, was a writ that could be issued by any judge, anywhere, to require—

[INTERRUPTION]

Q: You were saying, with regard to the writ, that it stems from English common law, certainly since 1679 and later. It was something that the founders of the United States were certainly familiar with. Is that fair to say?

Robertson: Yes.

Q: It was incorporated into the U.S. common law, U.S. law. But, as it applied to the people at Guantánamo Bay, what was the application? What was the importance of access to the writ to those people? And were they entitled to the writ by virtue of being at Guantánamo Bay? Wasn't

it the U.S. government's position that because they were at Guantánamo Bay, they weren't entitled to habeas corpus?

Robertson: That's why they put them in Guantánamo Bay, to put them outside the reach of American courts.

Q: That sounds a little nefarious, doesn't it?

Robertson: Call it nefarious. That's why it was done. I have no doubt about that at all. There is historical precedent for it. Some of the people complaining about habeas back in the 1700s were complaining that the king was sending people to remote islands to avoid the reach of habeas corpus. It's not an unknown tactic.

Q: Well, isn't that what Judge Randolph was saying, essentially, even as early as *Rasul*—before the later cases—that these people were outside the bounds of where the writ could run by the United States.

Robertson: That's what he was saying, and that's what *Eisentrager* was saying.

Q: Right. Do you buy that?

Robertson: Well, I buy it because the Supreme Court has now said it. I frankly was a little surprised by the Supreme Court's decision in *Rasul* because I thought that it might be that the government had successfully placed these people beyond the reach of the writ.

Q: That's right. In fact, Randolph—Judge Randolph later quoted you. He later quoted you in one of his opinions. In *Boumediene*, later on, he says, "But as Judge Robertson found in *Hamdan*, not one of the cases mentioned in *Rasul* held that an alien captured abroad and detained outside the United States, or in territory over which the U.S. States exercises exclusive jurisdiction and control had a common law or constitutionally protected right to the writ of habeas corpus." He's quoting you!

Robertson: I didn't realize that. I'd forgotten that. Let me see that.

Q: That's in his later opinion—we'll get to it, but that's in his later opinion in *Boumediene*.

So, in other words, you're saying that you don't have any doubt that the United States put these people down there because they believed it was a legal black hole down there.

Robertson: I have no doubt about that at all.

Q: And you also feel that it's possible that people like Judge Randolph were right with respect to whether they were entitled to the writ from Guantánamo.

Robertson: Well, it all depended—as the Supreme Court—I think it was in *Rasul* that the Supreme Court spelled all this out. It all depended on what Guantánamo was. What the relationship was. What the degree of control was—whether it was American territory or not American territory. The Supreme Court did, I thought, frankly, did something of a handstand to get Guantánamo within the jurisdiction of the courts.

Q: It's interesting that you say that. Jack [L.] Goldsmith, who was later running the Office of Legal Counsel in the Justice Department, wrote a book in which he says, there and elsewhere, that the Supreme Court did "cartwheels" to distinguish *Eisentrager*.

Robertson: Okay. Cartwheels, handstands.

Q: Right. I'm at a loss here as to which way to look. But it's interesting that not long ago I had the occasion to be shown a book on the history of Guantánamo, way beyond, before this issue. It was written after this issue, but it covers a long period before this issue. In this matter—

[INTERRUPTION]

Q: Jonathan [M.] Hansen, who I think is at Harvard, wrote a book about the history of Guantánamo going way back, not particularly on this subject—but a couple of months before the Guantánamo decision, after the oral argument or around the time of the oral arguments in the *Rasul* matter. On April 20, 2004, he had an op-ed which was just recently shown to me, called, "Making the Law in Cuba." It's interesting because he says that the legal arguments in the case

about technical distinctions between sovereignty jurisdiction and control. “The historical record is plainer: Cuba has never been sovereign at Guantánamo Bay,” and he explains from a historical point of view about how Cuba *never* had control of Guantánamo Bay, regardless of the Platt Amendment and all that stuff that happened. Cuba never had sovereignty there. I leave it with you, because it's interesting from a historian's point of view. But, as you point out, that was an issue. That was an issue. The fact that the United States had control, absolute control, over that part of Cuba, where the detainees were being held, is what the Supreme Court said is deciding the case. It wasn't Cuba. Just because Cuba was a sovereign nation now, they weren't sovereign over Guantánamo Bay, even though—

Robertson: But you see, that's the trap they're now in with Bagram Air Force Base. It's a difficult proposition, if control is everything. What is control?

Q: Well, in *Rasul*, in any event, they concluded that Cuba did not have control over the base there, where you used to play dice or whatever you used to do.

Robertson: Exactly.

Q: That's right. Interestingly, in *Rasul*, they say—and this also becomes an issue—“Whether and what further proceedings may become necessary after respondents make their responses to the merits of the petitioners claims are matters that we need not address now.” Now that's the Supreme Court saying that, “We're holding that they're entitled to the writ of habeas corpus because the U.S. has got control down there, so jurisdiction lies there. But we're not telling

people like Judge James Robertson how to deal with that. We're just passing it on to him." Is that basically—?

Robertson: That's exactly what happened. And then the Ninth Circuit says, "These cases all belong in D.C.," and all of a sudden there are thirty habeas corpus cases in the district, or fifty, and we say, "What the hell do we do with these cases now?"

Q: Now the same month that Jonathan Hansen wrote this article saying that the historical record shows that Cuba was never sovereign down there—that same month, when there were oral arguments in the *Rasul* case before the Supreme Court, a couple of months before they decided the case—I think it was CBS [Columbia Broadcasting System] and maybe *The New Yorker*, or what have you, disclosed photos of what had happened at Abu Ghraib in 2003, I think, basically. Do you remember seeing those pictures?

Robertson: Oh, god, yes.

Q: Did they make an impression upon you?

Robertson: They made an enormous impression upon me and colored or influenced an awful lot that followed, I think.

Q: Influenced whom? Judges?

Robertson: Well, do you want to jump ahead to *Hamdan*? They sure as hell influenced me.

Q: Well, that's exactly where I'm going. Actually, I was going to ask first, just as we got to *Hamdan*—I was going to ask you whether it's conceivable that those photos and disclosures—as well as the disclosure of what came to be known as the Torture Memos, around the same time, a couple months later—whether that could have influenced the Supreme Court in *Rasul*, which was a six to three decision.

Robertson: We will never know, or at least most of us will never know the answer to that question. My own answer to the question is absolutely. The Supreme Court reads the newspapers—except Clarence Thomas, who refuses to read newspapers. I was thinking, as you were talking about *Rasul*, there is a linear connection between what I think was the thinking in the Supreme Court in *Rasul* and my own thinking in *Hamdan*, which is—and this is the way I suggest to you that many judges think—“What is the right thing to do, and can I get there using the law?” And if I cannot, I can't. If I can, I will. There was a mentor of mine—not mentor but a lovely friend of mine—in the district court who has now gone to his reward, who was named William [B.] Bryant. He died in 1993, about ten years ago, still trying cases. He used to say to me, “Jim, a district judge—.” The first African-American chief judge of our court. He said, “Jim, a district judge can't go out looking for cases. You've got to deal with the ones that come to you. But a district judge is kind of like a cannon on top of the mountain, guarding the harbor. Every once in a while something comes within range and the bearing is right, and boom. You hit it.” [Laughs] Truer words were never spoken. This is not a matter of ideology, I don't think. It's a matter of having a sense of what's the right thing to do now. I don't know whether the Supreme

Court was thinking like this in *Rasul*, but I'll tell you what I was thinking in *Hamdan*. I suggested somewhere in that opinion someplace that the most important influence on my thinking in the *Hamdan* case was an amicus brief that was filed by generals and admirals, retired generals and admirals, talking about reciprocity—talking about what happens to *our* people if they're arrested in foreign countries and talking about how the world needs to know that we treat people fairly and correctly so that our people are treated fairly and correctly if they're arrested somewhere else in the world. They put it more eloquently than that, but that's the gist of it.

Now whether the Supreme Court had Abu Ghraib in mind when they thought about *Rasul* or not, I don't know. But I think—I'm sure—some of them had in mind, “What is the face that America is showing to the world here? What are we saying? Are we saying we can drop people into a black hole and give them no justice at all?” We can't be saying that, if there's some way out of it, and the some way out of it is to figure out how much control we have in Guantánamo Bay and to extend the habeas writ to Gitmo if it's legally possible.

Q: You're saying that even though you thought from a legal point of view that the government had some merit to its argument, from a non-legal, or moral—or however you describe this point of view—they were on the wrong side?

Robertson: But it doesn't mean that they win by the law and they lose morality. And I'm not a student of *Rasul*. I can't answer probing questions about exactly what the Supreme Court did or didn't do in *Rasul*. But I do know that the Supreme Court had to thread a needle on the Gitmo control question in order to get that cartwheel where it needed to go, or whatever.

Q: Well, basically, what the Supreme Court was saying was that these people down there have access to the federal courts of the United States. That's basically what they said.

Robertson: Yes.

Q: And do I understand your position that, whatever you thought of the merits, the legal merits of the government's case, you would agree with that conclusion? That the detainees should have had access to the federal courts of the United States?

Robertson: Well, I'm going to retreat to saying it doesn't matter if I agree or don't agree. That's what the Supreme Court held, and I'm a judge.

Q: Okay, now the *Hamdan* case. You mentioned that you were also involved in a case concerning the Uighurs at Guantánamo Bay. These were Uighurs who had been sent to Guantánamo Bay in 2002, who were a Turkish-Chinese sect?

Robertson: Yes.

Q: Who had gone to Afghanistan, perhaps escaping the Chinese, who had cracked down on them. They had gone to Afghanistan, were there in 2001, and were rounded up and sent to Guantánamo Bay. There were seventeen of them, I think. Were you involved in that case before

Hamdan, or afterwards? Do you remember? Was that your first Gitmo case? If you want to check that—

Robertson: I will check that. I don't remember. It must have been before. It must have been before.

Q: Well, what they were saying was, "Let me go"? The Uighurs? It must have been after *Rasul*.

Robertson: Indeed, it must have been after *Rasul*. *Rasul* was decided when?

Q: June of 2004. And you ruled in *Hamdan* in November 2004, the arguments having been in December 2003, at least. I don't want to belabor the timing there. Do you recall—or perhaps you would like to put it off until tomorrow—do you recall being involved in the Uighurs case?

Robertson: Oh, yes.

Q: And your decision was what, with respect to the Uighurs?

Robertson: Well, the only decision I had to make was whether I could compel the government to release them from Guantánamo Bay because it was conceded that they had no reason for holding them. It was conceded that they were no longer enemy combatants—which I made fun of in my order, as if they'd ever proven that they were. They couldn't bring themselves to say they never were unlawful enemy combatants. But it was conceded that they were "no longer" enemy

combatants and the question was what to do with them. The government said, "Look. We can't find any place to send them. We can't send them back to China; they'll be tortured and killed. Where are we going to send them?" And the counsel for the Uighurs said, "Well, bring them into the United States if you can't find anyplace else to send them." I looked at the case law and the case law was very clear—still is very clear—that a district judge has no authority to order the executive to bring people into the United States. They said, "Well, bring them in under parole so you can decide their case here. Bring them across the border. As soon as they get across the border, they have a new set of rights." Now they had rights in Guantánamo Bay, but remember, *Boumediene* hadn't been decided yet. We didn't know what rights anybody had in Guantánamo Bay. We just knew that habeas corpus extended there.

So I delivered myself of, I think, a rather acerbic little opinion, and said, "It is unlawful for the government to hold these people, but I have no authority to tell the government to do otherwise."

Q: Now, as a premise—perhaps not as a premise—in *Hamdi*, which you mentioned earlier—which was decided the same day as *Rasul*, at least released the same day as *Rasul* in June 2004—which involved an American, involved a man named Hamdi—*Hamdi v. Rumsfeld*—Hamdi may have been a Saudi—I've forgotten—but he was also an American citizen. He had dual citizenship. In that case, where Justice O'Connor said the famous words—"A state of war is not a blank check for the president when it comes to the rights of the nation's citizens." She also dealt briefly with a subject, I think, that has puzzled me, that the Supreme Court recognized the power of the U.S. government to detain enemy combatants seized on the battlefield. That would come up time and time again. Can you straighten that out for me? If you can hold enemy combatants

for the duration of hostilities, doesn't that undermine going to a lot of other things? If you can hold enemy combatants at Guantánamo, for example, or Bagram, or anywhere—because you say they're the enemy, does that end the matter?

Robertson: Well, that is the great unresolved next question. The answer is it can't possibly end the matter. That's my answer. My answer is that it is unthinkable that that language of that opinion confirms the power of the executive to hold people for the rest of their natural lives without charging them with anything on the excuse that the emergency is still in existence or hostility still exists.

Q: And that they're enemy combatants.

Robertson: And that they're enemy combatants. You have to wonder, how long can the government hang onto that thread? As long as there is one person left in Afghanistan, does that mean that hostilities continue? If they really do a zero-net pullout in Afghanistan and there's nobody left, does that dictum in *Hamdi* still apply? The answer has to be that at some point—I was saying this to someone. In fact, I was saying it in a high school auditorium in California last week when somebody asked this question. This is a little bit like the affirmative action question—at what point is enough enough? At what point do we recognize that the reason for doing X no longer supports the continuation of X? That decision is going to be made—Judge Ric Urbina made that decision in the *Kiyemba* [*Kiyemba v. Obama*, 2008] Uighur case. He looked at my decision. He said, "Enough is enough. We can't keep this up forever. These people have to be

released." I thought he was right. I told him I thought he was right, even though it was a different result than I'd reached. It was four years later.

Q: Let me come back to that. In the *Hamdan* case, though, just for the publishing of the record—Salim Hamdan, born 1970, orphaned at a young age, fourth grade education, worked for [Osama] bin Laden since 1996 at his Kandahar farm and most recently, before 2001, worked as a driver and was captured in Afghanistan in November of 2001, I believe by bounty hunters. The U.S. government sent him to Guantánamo Bay in June of 2002, claiming also that when he was arrested, when he was captured, he was driving a vehicle containing surface-to-air missiles near a combat area.

So he was sent to Guantánamo Bay. In 2003, mid-2003, Hamdan and five others were ordered by the government to be subject to the first military commissions. Two of those five were Brits who were later dropped from the matter. A Navy officer, JAG [Judge Advocate General] officer, a lieutenant, I believe, Charles [D.] Swift, was assigned to represent Hamdan.

Robertson: Lieutenant commander.

Q: Lieutenant commander. Okay. Now I guess it's worth noting that at that time—this is before *Rasul*—they didn't have lawyers. They didn't have access to lawyers down there at Guantánamo. Swift was appointed as I believe his representative—or perhaps he was a military lawyer, not a civilian lawyer—you can clarify that for me—to represent Hamdan in this military commission.

Is it the case that it was Swift who took a look at the military commission procedure and decided instead to file a writ of habeas corpus, which came to your court? Is that the sequence?

Robertson: Yes. But the original writ of habeas corpus, as I remember it, didn't really focus on the military commission procedures or trial. The original writ of habeas corpus focused on the fact that Hamdan had been held in solitary confinement, under inhuman conditions, for an extensive period of time. And when the case was first filed, that's what it was about. It was about getting him out of the worst of the Guantánamo confinement conditions. Then it morphed into something more complicated. You remember, if you have—I don't know how deeply you've delved into *Hamdan*, but at some point the government mooted the terms of confinement question by releasing him from solitary confinement and putting him in something more like the general population.

Q: True. True. And mid-2004, shortly after *Rasul*, the government charged Hamdan with a single count of conspiracy. That October, a couple months later in 2004, the combatant had what is called a CSRT—Combatant Status Review Tribunal—that held him to be an enemy combatant who warranted continued detention. It was this matter that comes before you, and you rule on it.

Now is there anything you can tell me about those days, as a consequence? You made an allusion before to the amicus brief of these generals and admirals.

Robertson: Well, I'll tell you a few things. My recollection has been refreshed by reading these notes that I made at the time, which are really rather interesting to review at this remove. My first

reaction to the case as I heard it—and I'm looking at what I said to myself—I said, "The government argues that the UCMJ's [Uniform Code of Military Justice] speedy trial guarantee is inapplicable, that the Geneva Convention is inapplicable, etc. I will probably deliver myself of some dicta but at the end of the day grant no relief for Hamdan." That was my first reaction. That was October 12, 2004, where I spent most of the day reading motion papers in what was then called *Swift v. Rumsfeld*, because Swift was the original plaintiff.

Q: Right, on his behalf.

Robertson: Yes. "In which I will be making a fairly high profile set of decisions." I said, "On a very quick reading, I think I will decline the government's suggestion that I abstain. But after that, it's hard to say where to go."

Q: Abstain?

Robertson: Well, they said—the abstention doctrine here says, "One court should not deprive another court of a case that's going on. You should abstain and wait and see what happens." The government's argument was nothing has happened until he's tried; they're going to try him. If you want to review it after he's tried, that's one thing.

Q: After the military commission.

Robertson: Yes. But you shouldn't mess around with this case while it's before a military commission. That's generally called the abstention doctrine, and it became a central part of this thing. I was very worried about the abstention doctrine, and later noted in my self-serving little memos to myself that the court of appeals didn't have any trouble with abstaining, mostly I thought so that Ray Randolph could write the opinion. He didn't want to abstain; he had something to say and he wanted to say it.

But that was October 12. By October 25, I heard the argument, long and exhausting. I said, "I am more inclined in this five minutes to issue an opinion excoriating the president by proceeding by tribunal rather than court martial, but abstaining on the Geneva Convention issues. The government moved Hamdan out of solitary confinement last week, one step ahead of the posse."

Okay. Then the next day I have a long note about I called my law clerks to rehearse what was going through my mind, and I can go through this with you.

Q: These are your law clerks?

Robertson: My law clerks. By the way, my law clerks played a significant part in this decision, because they sort of talked me into crossing the bridge.

[INTERRUPTION]

Q: You mentioned the Geneva Conventions. Very simply, when it got to you in November of 2004, after oral arguments, by Swift, Lt. Commander Swift—that was a higher rank than you had had in the Navy, wasn't it?

Robertson: Yes.

Q: Do you remember Swift?

Robertson: Oh, yes. Very much.

Q: Was he a competent guy?

Robertson: Competent? I would call him zealous past the point where most lawyers are supposed to be zealous. He was very emotionally involved in this case. He was flamboyant; he was out there.

Q: Why, do you think?

Robertson: Well, you know, he's one of those guys.

Q: It wasn't a question of he just felt that Hamdan was getting a raw deal?

Robertson: I'm sure he felt that Hamdan was getting a raw deal. Look—from looking at it through an old Navy guy's eyes—I looked at this guy on day one and I said, "That's a guy who's on his way out of the Navy because he knows that he can't keep carrying on like this and stay in the Navy. He's beyond the pale. The Navy will tolerate him, but it's never going to promote him." And I was right. In six or eight months, or a year, he had left the Navy. He was gone from the Navy. There was a cover story on the *New York Times Magazine* one weekend—

Q: Oh really? At that time, you mean?

Robertson: I think it related to *Hamdan*. I think I'm right about this. There was a *Times* magazine article about him.

Q: He had also brought in a Georgetown law professor named Neil [K.] Katyal.

Robertson: Smartest thing he ever did. Katyal is brilliant. Katyal was very young then. He is now—is he solicitor general? Is he acting solicitor general?

Q: I think you're right. I think he's deputy solicitor general or something—or was. I think you're quite right. When [Barack H.] Obama—

Robertson: [Sonia M.] Sotomayor was never SG. [Elena] Kagan. When Kagan went to the Supreme Court, Katyal became acting solicitor general. I think he was deputy under Kagan.

Q: That could be. In any event, the question—when it reached you, the essential question regarding *Hamdan* was what? I know what you decided. I think I know what you decided.

Robertson: The essential question was “Could he be tried by that military commission?” It was no longer “Could he be held in solitary confinement?”

Q: But was it Katyal or Swift who first raised an issue that I don't think had anything to do with *Rasul*, and that is whether the Geneva Conventions applied. Is that the first time that came up?

Robertson: I think so. I don't think it had anything to do with *Rasul*.

Q: But when you ruled in that, you were ruling on an issue—correct me if I'm wrong—that the defense had brought up?

Robertson: Yes.

Q: You didn't just pluck this out in thin air?

Robertson: Oh, no, no, no, no, no.

Q: So, essentially, what Katyal is saying is that Hamdan couldn't be tried by this military commission, and that, moreover, the commission was a violation of the Geneva Conventions. Is that the way to say it?

Robertson: Well, it wasn't that the commission was a violation of the Geneva Conventions; it was that the Geneva Conventions required that he be tried by court martial.

Q: Okay. And you ruled on November 4. Is there anything else you want to add to your thinking around that time before you issued your ruling?

Robertson: Well, yes. I can now bore you with some of this. Let's see. On the twenty-sixth of October I said I called my law clerks to rehearse what I was thinking. I was thinking that I need not and should not abstain. I was thinking that the president's so-called "inherent authority to convene military tribunals derives from Article 1, Section 8, of the Constitution, and is saved by the Uniform Code of Military Justice Article 21, but also limited." I said, "Hamdan is an offender and his crimes or offenses are triable under the law of war. Thus, he may indeed be tried by military commission but not *this* military commission, because the president has prescribed rules that are inconsistent with those of the Uniform Code of Military Justice, and the inconsistencies are so serious as to set this tribunal apart from the standards America has adapted for itself, and the standards expected in the rest of the world."

Q: In your opinion you say, "It is also unnecessary for me to decide whether, by virtue of his detention at Guantánamo Bay, Hamdan has any rights at all under the United States Constitution, or under 42 USC § 1981." I'm not familiar with 42 USC § 1981.

Robertson: It's a federal civil rights statute.

Q: In any case, you're saying that you're not deciding this on constitutional grounds here.

Robertson: No.

Q: Okay. That will soon come up. But you say, "Because Hamdan"—and this is your actual opinion—"Because Hamdan has not been determined by a competent tribunal to be an offender triable under the law of war, and because, in any event, the procedures established for the military commission, by the president's order, are 'contrary to or inconsistent' with those applicable to courts martial, Hamdan's petition will be granted, in part."

In the end—in the end you say that he can be tried by military commission but not *this* military commission, because of the rules of it, and that, also, you say Article 3 of the Geneva Convention applies. Now can you explain why it applied?

Robertson: Are you talking about Common Article 3?

Q: Right. That's right.

Robertson: Well, if I go along these notes—Common Article 3—there was a lot of torture in my mind about Common Article 3. Common Article 3—at some point in here I tell myself that Common Article 3 is so non-specific that it's hard to say that the rules don't comply with Common Article 3.

Q: Still—still you held that it was a violation of Common Article 3, and I think along the lines that because, among other reasons, this military commission allowed conviction based on evidence that the accused would never see or hear. You're saying it's a violation of Common Article 3 of the Geneva Conventions?

Robertson: Well, was I talking about the Geneva Convention—there are two Geneva Convention arguments that are wrapped up in this case.

Q: I'm speaking of Common Article 3.

Robertson: But is it clear that *I* was talking about Common Article 3 there?

Q: Well, you could have been talking about Article 4. But the bottom line is that—if I understand your opinion correctly—you're saying that there's something wrong with these military commissions, in part because the way they're set up, you could try this guy and he wouldn't be able to see or confront witnesses who had said things about him because this material was classified.

Robertson: That's right. And that flies in the face of all American ideas of justice and trials.

Q: And the Uniform Code of Military Justice.

Robertson: And the UCMJ.

Q: Right. Okay. So you're saying, "Forget trying him under these military commissions."

Robertson: Yes.

Q: And you're also invoking a section of Common Article 3 where you're saying, "If such a tribunal is not a 'regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people,' it is a violation of Common Article 3." Now you say, "That is a question on which I have determined to abstain."

Robertson: I say, "That is a question on which I have determined to abstain"?

Q: That's right.

Robertson: That's why—although I'm thrilled to claim complete vindication by the Supreme Court—

Q: I am going to come to that.

Robertson: —I wasn't actually vindicated by the Supreme Court because they relied on Common Article 3, and I abstained.

Q: Exactly. You're really saying, basically, in *Hamdan*, "This military commission—forget about it. It's too flawed, and you're not going to try this guy under that."

Robertson: Well, that's the right part. Then find the law to support it part is a little more complicated. Yes. It is too flawed. Absolutely, the key—the worst flaw in the military commission trial is this whole confrontation clause problem—not able to see and respond to evidence against him. But that would clearly be prohibited under Article 4 of the Geneva Convention. The question is whether Article 4 of the Geneva Convention applies or not. In order to decide that it doesn't apply, you have to have a competent tribunal. The president can't decide it because the president isn't a tribunal. Therefore, there remains doubt as to whether Hamdan should be treated as a prisoner of war and accorded full Geneva Convention/UCMJ court martial authority. I don't have to get to this Common Article 3 thing, which is a little murkier. The Supreme Court didn't worry about the murk; the Supreme Court decided that Common Article 3 was enough.

Q: We're going to get to that. Because before the Supreme Court rules in *Hamdan*—the second of the famous three cases having to do with non-national Gitmo detainees. A public judge—Ray Randolph, again! This is the second time—the first time he knocked down, knocked down *Rasul*—not you—Judge Colleen—

Robertson: Kotelly. Kollar-Kotelly.

Q: Now he's saying, "You're all wet." This is a two-to-one reversal, him writing the majority opinion, again invoking *Eisentrager*, and he holds that the military commission had been authorized by Congress—these military commissions had been authorized by Congress in the 2001 Authorization for Use of Military Force, and that the Geneva Conventions couldn't be judicially enforced.

Robertson: "Not self-executing."

Q: "Not self-executing." Okay. So he's rapping your knuckles, right?

Robertson: Right.

Q: And not only is he rapping your knuckles, less than a year after you ruled—but none other than Ed [Edwin] Meese [III], only a few days after your ruling, at the Federalist Society, said, "The danger I see is that the intrusive judicial oversight and second guessing of presidential determinations in these critical areas can put at risk the very security of our nation in a time of war."

Robertson: My, my. I didn't know that.

Q: Was he the attorney general at that time?

Robertson: No.

Q: Ed Meese?

Robertson: No. He had been attorney general, long before.

Q: Excuse me, he had been. Yes. That's right. But he was a big figure, was he not?

Robertson: Yes. He still is.

Q: In conservative circles. That's right. Now when he said that, did you turn to your wife and say, "Good god, we're in trouble?"

Robertson: No. [Laughter]

Q: It didn't stop you in your tracks and made you say, "Good god, have I made a mistake here?"

Robertson: On November 9, 2004, a day after my ruling—here's what I wrote. I said, "I expect to be reversed in about a nanosecond. I should have abstained. It's not for lower federal courts to second-guess the august opinions of Bork and Randolph about self-executing treaties. Presidents can determine that the Geneva Convention does not apply. But I don't care. I did what I thought was right, and that's a good thing."

Q: Those are your notes at the time?

Robertson: Yes.

Q: And when Ed Meese rapped your knuckles a couple days later, it didn't—?

Robertson: Nah. I didn't care about Ed Meese. But I did note some of the reactions to it. I said, "It's front page news in all three papers, below the fold, right column in the *Post*, top left lead in the *Times*, second news blurb in the *Journal*." My second fifteen minutes of fame, and it took just about fifteen minutes to read the three pieces—all of them quite accurate and reasonably respectful. Apparently, everyone was in a courtroom in Guantánamo hearing motions in Hamdan's case when my order arrived, and the proceedings came to a sudden stop. The Justice Department says I have put terrorism on the same footing as legitimate methods of waging war. [Douglas W.] Kmiec says I am "sadly mistaken." [Stephen A.] Saltzburg says, "No president is going to welcome the idea that some judge who sits in Washington supervises who is detained on the battlefield." My notes to myself say, "Come on, Stevie." Stephen Saltzburg. "[Eugene R.] Fidell says it may be too late for POW [prisoner of war] hearings, and the process was handled by people who do not know military law. Lt. Commander Swift, who is more than a little bit too emotionally involved, says his client is thrilled that I would stand beside him. I'm not standing beside anyone unless"—I said I couldn't say this anywhere but in my own journal—"it's the rule of law and America's place in the world."

Q: By the way—Fidell. Are you speaking of Eugene Fidell?

Robertson: Yes.

Q: He's married to—?

Robertson: Linda Greenhouse.

Q: Linda Greenhouse. So, in any event, you were not intimidated by any criticism of that. But Congress decided, "Well, we're going to pass the Detainee Treatment Act—"

Robertson: —and take jurisdiction away.

Q: —and take jurisdiction away from guys like you, and the Supreme Court, and what have you. Right?

Robertson: Right.

Q: They stripped the federal courts of jurisdiction to hear these habeas petitions, right?

Robertson: Right.

Q: And that, in the form of *Hamdan*, goes up to the Supreme Court in June of 2006. It ruled five to three, because Judge [John G.] Roberts [Jr.], now Chief Justice Roberts, had recused himself because he had ruled with Ray Randolph, Judge Randolph, against you on this issue in the

appellate—the U.S. Court of Appeals—and the Supreme Court says, "Wait a minute. You can't take our jurisdiction away." And they're saying, "You can't take our jurisdiction away." That Congress had failed to approve use of military commissions, and that in any event, the commissions as then structured violated protections of the Uniform Code of Military Justice, and by incorporation, Article 3 of the Geneva Convention regarding trial by regularly constituted courts, affording all the judicial guarantees which are recognized as indispensable by civilized people.

Now the Supreme Court—they're taking your side, right? That's when you decided, "I'm going to write a letter to the *Post* saying, 'I'm vindicated.'" [Laughter] You wanted to, right?

Robertson: I have to tell you, though—it doesn't get any better than that for a trial judge. It really doesn't get any better than that—to be reversed by the court of appeals and then have them reversed by the Supreme Court. It happened to me twice in my career, and they were two pretty good days.

Q: What would the other be?

Robertson: Webster [L.] Hubbell. Ken [Kenneth W.] Starr and Webster Hubbell.

Q: Can you say, in three sentences, what that was?

Robertson: Webster Hubbell appeared before me in a criminal case brought by Ken Starr, riding out of the whole Whitewater business, and objected to the use of documents that he had turned over under an immunity promise. I reacted almost instinctively more than intellectually, that it was pretty scary for the government to grant immunity, then take it away and say they could use the documents. I granted the motion to suppress the use of the documents, which meant the end of the case against Webster Hubbell and the *New York Daily News* had a headline the next day, that I've kept somewhere, that said, "Hubbell out of Trouble." [Laughter]

Q: I was thinking, "Hubbell telescoped by judge."

Robertson: I was reversed on that decision, too, and the Supreme Court reversed the court of appeals on its decision.

Q: Okay. But in this *Hamdan* decision by the Supreme Court—I don't know whether you noticed this—a plurality of four said that conspiracy—which is the charge, which was certainly *a* charge if not *the* charge against Hamdan—was not a violation of the law of war, so, could not be tried by a military commission. Justice [John Paul] Stevens, who wrote the majority opinion, was hot on this—but he couldn't get Justice Kennedy to go along with that, so he had only four votes on that. But that would later emerge—in an interesting kind of way—this past October in the court of appeals.

Robertson: In the *Hamdan* case.

Q: That's right. We'll get to that.

Robertson: Now I've got an interesting note here. Speaking of Linda Greenhouse—March 29, 2006, the day after the *Hamdan* argument—

Q: —in the Supreme Court.

Robertson: —in the Supreme Court. [Reading from notes] Linda Greenhouse's piece on the *Hamdan* argument continues on the same page. She seems to think the court will protect its jurisdiction. She is less certain about the merits. “Kennedy seems to understand what I did and why, and Katyal may have gained some traction with his argument that conspiracy is not a war crime—an argument that I believe was never made to me.” And, of course, it came up later—conspiracy and material support, etc.

Q: That's right. But in that same Supreme Court opinion, they were ruling on statutory, not constitutional grounds—

Robertson: Correct.

Q: —as you had been.

Robertson: Correct.

Q: And they made a point of saying if that the administration was unhappy, it could go back to Congress. They also said that the military could continue to hold Hamdan and others who were determined to be enemy combatants—which is a matter we were discussing a bit ago. There's this thread, which perhaps we can come back to tomorrow, when I ask you what it all means. Some of it relates to the question of whether people can be held indefinitely, even if they win in court.

But I want to ask you now—when you consider the Supreme Court's rulings in *Rasul* and *Hamdan*, was it principally, do you think, a matter of the Supreme Court asserting its authority in this system of separation of powers? And were they really what Linda Greenhouse would later call modest decisions, that each time gave the administration the opportunity to go back and fix the situation, except for the fact that the administration didn't know what was good for it—she would say—and just as David [S.] Addington once said—"We're going to push, and push, and push"? So, first, could the administration have had what it wanted to do better? More successfully? And was it wrong, do you think, tactically, to have pushed, to have gotten Congress to strip the court of its power? Was that the key in losing?

Robertson: They only lost half the case that way, but it was certainly important to the loss. I think that part of it definitely was separation of powers stuff—"You're not going to tell us what to do. We're the Supreme Court. We know the Constitution says that we can conduct such cases as you tell us we can handle, but you didn't strip us correctly. If you're going to strip us, you've got to do it right, and you can't do it in—." I've forgotten the exact way in which the Supreme Court held it, but were they reacting to the court-stripping aspects of the statute? Absolutely.

Q: It's that important?

Robertson: Oh, I think so. These guys are pretty serious about their powers, about the separation of powers. These determined, very, very right-wing conservatives, after they get *Roe v. Wade*, [1973] reversed, they'll want to get *Marbury v. Madison* [1803] reversed. I mean, they really do. They really don't think the Supreme Court should have the authority to say what the law is if the people think differently. That goes back to the very first thing we talked about this morning—the independence of the judiciary. They take the independence thing pretty damned seriously. Now, modest? Yes. Roberts went up there saying he was going to be modest, and his Obamacare decision everybody thinks of as modest—it's not modest at all. That's for another day. [Laughs]

Q: Right. Some people will argue that you can almost forget the particulars of the Geneva Conventions, or what was going on at Guantánamo. As soon as the Congress stripped the courts, they were going to lose—period. One way or another, they were going to lose.

Robertson: I'm not sure I buy that. But they clearly pushed back on that aspect of it. Whether it colored the whole decision or not, I'm not prepared to say that.

Q: Well, bottom line—after *Hamdan* was decided by the Supreme Court, lo and behold the Bush administration goes back and passes the Military Commissions Act [MCA] of 2006—again stripping the judiciary of its authority in this matter. Isn't that correct?

Robertson: Well, not completely stripping it of its authority in this matter. The military commissions—we've now seen in *Hamdan* how—there were two more steps to *Hamdan*.

Hamdan's lawyers came back to me and said, "He's about to go to trial. We want you to stop this one, too, because these rules aren't good enough." I denied that motion. You know about that.

Q: You denied it in December of 2006. You dismissed his habeas petition based on the MCA of 2006 that I just mentioned, and that's when *Hamdan* said that the MCA violated the suspension clause of the Constitution.

Robertson: Well, I dismissed that one, but that's not the ruling I was talking about. I'm talking about my ruling on July 18, 2008.

Q: Well, there you held that Hamdan's claim couldn't be appealed until after the military commission trial.

Robertson: That's called abstaining.

Q: Okay. Okay. But why, Judge?

Robertson: Because I could not find anything in the rules, in the amended—because basically I thought that the Bush administration had done enough to amend the rules, and they had done it with congressional approval this time, that I couldn't find anything that was violative of the Geneva Conventions. I said, I think in the opinion or in court, that, “The military judge down

there is a real judge, and I'm not going to stop the trial. There's nothing in this situation that presents itself as it did the last time. There is congressional approval of the rules, and the rules don't violate any human rights rules that I can find, so I'm going to let it go ahead." Then, of course, as you know, he was acquitted of conspiracy, convicted of material support, and sentenced to credit for time served, and sent home.

Q: That's right. So Hamdan goes back to Yemen, where, I guess, he's still driving a taxicab.

Robertson: Yes.

Q: We'll get to this—what happened subsequently, it's rather interesting. He's a free man. He's a free man, as we might as well point out. Rasul is free, Hamdi is certainly free, Hamdan, and the next case we'll talk about—[Lakhdar] Boumediene—is also free. Not, perhaps, because they won cases—which is something I would like to come to in time. Two days after *Hamdan*, two days after the Military Commission Act of 2006 was passed, again stripping the courts—although amending the commission rules, as you pointed out. John [C.] Yoo, who had been in the Office of Legal Counsel and wrote—had a hand in the writing of these so-called Torture Memos—wrote an op-ed in which he said, "Congress told the courts, in effect, to get out of the war on terror." Well, that didn't happen in *Boumediene*. Boumediene—Lakhdar Boumediene, in 2008, was forty-two years old, and was an Algerian who had emigrated to Bosnia in 1997. He was legally a resident there. Weeks after 9/11 he was arrested by the Bosnian police on suspicion of plotting to attack the American embassy in Sarajevo. The Bosnian Supreme Court ordered him released for lack of evidence, but the police then turned him over to the U.S. military, which sent

him to Gitmo. The U.S. later withdrew the allegation of the embassy attack and instead alleged that Boumediene had planned to travel from Bosnia to Afghanistan in late 2001 and take up arms against American forces. This case—*Boumediene v. Bush*—arrived—well, I've forgotten who wrote *Boumediene*, the initial district judge—

Robertson: Joyce Hens Green. And there's a backstory there.

Q: What's that? This is when *Boumediene* reaches the district court, right?

Robertson: We talked earlier about how when all these habeas cases came to our court, we had a meeting of the judges of the court and said, "This is silly. We can't have fifteen judges going fifteen different ways in these cases. We have to have some central way of dealing with them." We had a big meeting and decided that Joyce Hens Green, who was then a senior judge—she may have even gone into inactive retirement. She either came back to do this, or she was still there as a senior judge—she agreed that she would coordinate all these cases. But then she said to me in a sidebar, she said, "You've already done some work on this *Hamdan* case, haven't you?"

I said, "Yes, I have."

She said, she said, "You'd like to continue with the *Hamdan* case, wouldn't you?"

I said, "Yes, I guess so."

She said, "Well, you keep that one. I'll take all the rest of them." There was one judge on our court who was not happy with the idea of turning over his case to Judge Green.

Q: I know who that was. Was that [Richard J.] Leon?

Robertson: Yes, it was Richard Leon. So he and Joyce Green had two companion cases decided on the same issue, different ways. Joyce Green decided that she did have jurisdiction, Richard Leon decided that he did not have jurisdiction, and the cases went up, in tandem, to the court of appeals. Leon was affirmed, Green was reversed, and they went to the Supreme Court, and Green was affirmed by the Supreme Court. It was another Ray Randolph.

Q: In *Boumediene*.

Robertson: Yes.

Q: That's the third opinion by Ray Randolph.

Robertson: Ray has never gotten over that.

Q: Do you think so?

Robertson: Oh, I think so.

Q: He was reversed three times, right?

Robertson: Yes.

Q: Now he was writing for the two-to-one panel in *Boumediene*, in the D.C. Circuit, and ruled that the MCA of 2006 applied to all detainee petitions and that it was not an unconscionable suspension of the writ. He goes into an extensive history of the habeas corpus with respect to sovereignty and *Eisentrager*. Again, it's *Eisentrager*—wherever he is today, buried today in Germany or wherever—[Laughs] he doesn't realize how prominent he became again.

But here we are dealing no longer with the statutes, American statutes, U.S. statutes, U.S. code. We're talking about the Constitution, right?

Robertson: Right.

Q: And in the Supreme Court, here, now, Justice Stevens, who was the second among equals at the court, the senior associate justice, and he, being in the majority, assigned the opinion to Justice Kennedy, rather than writing his third consecutive opinion on this Guantánamo Bay subject. What does Kennedy conclude? He rejects the court stripping again—it's almost beginning to sound lewd [chuckling]. He rejects the stripping again and rules that the Combatant Status Review Tribunals fall short of being a constitutionally adequate substitute for habeas and that habeas remains in force for the Guantánamo detainees. He says that, "The habeas history

that Ray Randolph goes on and on and on about is inconclusive as to what the founders, in 1789, would have said about this situation," which apparently drives Judge Randolph up the wall.

But to go back to the subject for a moment of whether Congress, in the MCA of 2006, had unconstitutionally suspended the writ of habeas corpus. Could you explain that? You can suspend the writ of habeas corpus in times of invasion or rebellion, if the public safety depends on it.

Robertson: Yes.

Q: But here he's saying you can't suspend it under these conditions?

Robertson: Kennedy is saying that?

Q: Yes.

Robertson: Well, I'd have to go back and reread *Boumediene* to answer that question, but I think that's what he did say. Invasion? Airplanes attacked the World Trade Center—I guess you could call that an invasion. Rebellion? No, there's no rebellion. The public safety requires it? I'm not sure anybody can say that the public safety requires it. If you get to kind of an originalist reading of what the suspension clause means, if you want to read it narrowly, and as it should be read—if you're doing something as important as suspending habeas—you can't quite get there on these facts, I think.

Q: Well, he's saying, "Look. The government, in its MCA of 2006, they want the Combatant Status Review Tribunals to be a substitute for habeas review by federal court judges." What Kennedy is saying is that if you have an adequate substitute for habeas, you can do that, constitutionally, but that the Combatant Status Review Tribunals are not an adequate substitute for habeas. So on that ground, they fail, and there's nothing more to be successfully learned from the framers. Which, of course, was very important to the D.C. Circuit below.

Robertson: I don't know where he got the idea that there could theoretically be a successful substitute. I don't know where that comes from.

Q: It wasn't his idea. He's saying that the CSRTs aren't a success. The government was arguing that.

Robertson: I know. But why is he saying "you could have a successful—"?

Q: No, no.

Robertson: This is not successful. But, theoretically, you could have one.

Q: Yes. It is permissible.

Robertson: I don't know where he gets the idea that it would be theoretically permissible. He doesn't get that from the founders.

Q: Well, I believe that's the case. I believe that's the case. But it was in this opinion that Scalia in his dissent said that the majority was making the war harder to fight and the decision would “almost certainly cause more Americans to be killed.” And Roberts is saying that, “The decision is not really about the detainees at all, but about control of federal policy to unelected, politically unaccountable judges. The majority merely replaces a review system designed by the people's representatives, with a set of shapeless procedures to be defined by the federal courts at some future date.”

That brings me to this point I was going to mention before. This is the thing that Judge Randolph, and Judge [Laurence H.] Silberman, and Judge [Janice Rogers] Brown—

Robertson: —and Judge [Brett M.] Kavanaugh

Q: —and Judge Kavanaugh really are upset about. Is that—among other things—this is being sent back. The Supreme Court in that decision said, in *Boumediene*, “They are leaving the contours of habeas,” of how to handle it, to “the expertise and competence of the district court.” That's what the majority said. That sounds like the situation back in *Rasul*. They're saying, “You figure it out. You figure out how to handle these things, from a substantive, or procedural, or evidentiary direction. That's not for us.”

Robertson: And that drives Silberman, and Randolph, and Brown, and Kavanaugh up the wall because they don't think district judges are competent to do that.

Q: Well, that may be your opinion. But the fact is that two years later, in 2010, when this is sinking in, Judge Randolph appears at the Heritage Society, I think it was.

Robertson: And gives an outrageous speech.

Q: Well, he gives a speech invoking our old Princetonian friend, [F.] Scott Fitzgerald, called, "The Guantánamo Mess," which he has repeated in writing—versions of it have appeared in *National Review*, online, and other places. "The Guantánamo Mess," he calls it, and he says in the beginning that he's using that term because like Tom and Daisy Buchanan, in Fitzgerald's *The Great Gatsby*, who were careless people who made a mess and left others to clean it up—that's what he's saying the Supreme Court did here. They created a mess, a wrong decision, and they left people like—were you off the court then, by 2010?—they left it to the district court judges to clean up the mess. He's not happy with that and he says there are all kinds of problems that have been created by that. You think that was an outrageous talk that he gave?

Robertson: Well, it was overtly disrespectful of the Supreme Court—which, we're all citizens, we can all do that. He was still a sitting judge. He still is a sitting judge. It's not the kind of speech I would expect a sitting judge to give publicly. But it certainly demonstrated Ray Randolph's biases in these cases. But to say that it was like Daisy and Tom leaving a mess for other people to clean up—the Supreme Court decided, in 1943 or something, in *Mapp v. Ohio*,

[1961], that improperly gathered evidence can't be used in trials, thereby creating a mess that is still going on for sixty years while people sort out exactly what that means. The history of the law has been that way since the beginning. That's how the law develops. It develops by one decision being made, and somebody else trying to apply it to different facts, and sorting it out, and sorting it out, and sorting it out. Ben Wittes—you probably know about Ben Wittes's piece about the Guantánamo cases. He was complaining about how unfortunate it was that the law on habeas corpus at Guantánamo Bay was now being made by district judges who are going all over the place. Well, that's what the court of appeals is for, and what the court of appeals has done. They've straightened it out. I don't like the way they've straightened it out. They've developed a lot of theories, which I suppose we'll talk about tomorrow.

Q: Exactly.

Robertson: But they're doing their job, and the district judges are doing their job. That's the way it works. That's the way it's supposed to work.

Q: Again, for a lay reader of this, many years from now—wasn't it, in this case, the job of the Supreme Court to lay out a more exacting roadmap for the district judges?

Robertson: Absolutely not. Absolutely not. The law in these cases gets developed—for one thing, these are all fact-specific, fact-dependent. You can't lay out a roadmap and say it applies to all cases. This whole mosaic theory, for example, that the court of appeals has come up with, emerged from the court's looking at four, or five, or six other cases as they came up. The

Supreme Court couldn't look at this thing back when *Boumediene* was decided and say, "Now you will apply the mosaic theory to evaluating evidence," or, "You will decide that intelligence reports are entitled to regularity."

Q: Well, when Judge Brown, the appellate judge—whose full name is—?

Robertson: I'll come up with it.

Q: When she says, refers to the Supreme Court's "airy suppositions," and when Judge Silberman indicates that the Supreme Court, that they could set a rule if only they had the guts to do it!

Robertson: You have something very close to a rogue court at the court of appeals. You really do. These guys are over the top. Language like that used by the court of appeals is not done. These guys are blotting their copy books. At least that's my—

Q: Well, it must be more than your impression. You've sat on the bench for some time. Did you ever hear the judges criticizing—?

Robertson: I hear them criticizing us, but I don't hear them criticizing them quite that way.

Look. It's a free country. If they want to use language like "airy supposition," "if they had the guts," it's all right with me. I don't care. I'm not a PC [politically correct] person anyway. I

frankly cheer on robust language and straight from the shoulder commentary, so I don't care what they say. But it's surprising.

Q: When *Boumediene* was decided there were then about 270 detainees at Guantánamo. It's interesting because the vast majority—at its height there were, throughout the years, 779 detainees went to Guantánamo. It must have been something like six hundred at its height. As we said before, Boumediene was sent to France with a year of the *Boumediene* decision. But there were about 270 detainees. President Obama came into office in January of 2009, and he vowed to close Guantánamo within a year. Now I ask you, did you notice him saying that? Did you think he could do that? Did you think he *should* do that, when he made this announcement?

Robertson: Yes, I certainly noticed it. Did I think he could do it? I thought he had a rough road ahead of him. Do I think he should do it? Yes, I did think he should do it. I still think he should do it. I think Guantánamo is a blot on the American escutcheon. It's diminished, over time. The stain is sort of washing away over time because there are fewer people there and there are no current complaints of atrocities there—although a couple people commit suicide every once in a while down there.

By the way, I should tell you, just as full disclosure and as an aside, that my son in law—unfortunately about to become my ex-son in law because he and my daughter are separated—works for the Defense Department in the defense of Guantánamo Bay detainees and is down there right now.

Q: Oh, really?

Robertson: He is responsible—

Q: What is he doing down there?

Robertson: He's one of the lawyers defending detainees. There's a whole office. You saw Charlie Savage's piece in the *Times* yesterday about General [Mark S.] Martins?

Q: Yes, yes.

Robertson: Well, he's on the other side. There's a prosecution office and a defense office in the Defense Department. He's in the defense office, and he's largely responsible, I think, for the brief that caused the court of appeals to throw out the *Hamdan* case, on the grounds that material—

Q: I want to come to that in an organized way, but is he career military?

Robertson: No, he's not career military. He's a civilian. He has been a law professor, and—it's a long story, but he got involved in these cases. He's no longer teaching law, and he's working for the Defense Department as a civilian.

Q: Okay. So why didn't Obama close Guantánamo within a year?

Robertson: Well, because the political—

Q: Or close it at all?

Robertson: Because of the political opposition he got. His idea was to bring these people out and put them in a prison in Illinois. They'd bought some land or bought an old state prison or something in Illinois. They were going to bring these people into the country. He ran into a political buzz saw and couldn't get it—couldn't get the money to do it. I just read yesterday or the day before that the Obama administration has closed the office that was planning the transition of Guantánamo to domestic prison. So they've given up. They've given up. But it was pure politics. It was a not-in-my-backyard problem for Congress.

Q: Some people think he backed down. He shouldn't have backed down. They brought this fellow Ghailani, Ahmed Ghailani, to New York, who was tried. He was facing something like 270-some counts of terrorism related activities, and he was acquitted on all but one count. And, of course, that was red meat for the conservatives, who said, "Look. This just shows you the dangers. This guy narrowly escaped." Although I think he has not escaped harsh sentence—probably the same sentence as if he'd been convicted on all the counts.

Robertson: Well, even if he'd been acquitted on all accounts, I think the government asserted that they could still hold him at Guantánamo.

Q: Well, right. We'll come to that. We can certainly come to that tomorrow. The point is this is the only detainee who has been tried outside of Guantánamo, tried in the United States. Yet, haven't there been hundreds of terrorism related cases that actually have been tried in the federal courts?

Robertson: I don't know about "hundreds," but yes, there have been lots.

Q: These are not of detainees from Guantánamo.

Robertson: No, but they're terrorism-related. The first guy who drove a truck into the Twin Towers—[Ramzi] Yousef whatever-his-name-is was tried in New York.

Q: Ramzi Yousef.

Robertson: Ramzi Yousef. I tried a terrorism case in my court, but it was not related to modern terrorism; it was the Japanese Red Guards trying to bomb the American embassy in Jakarta. There have been lots of these cases tried in federal courts.

Q: Well, we'll resume tomorrow.

It's a fascinating situation. There are now about 166 detainees. About half of them are Yemenis approved for transfer.

Robertson: Like the Uighurs.

Q: Like the Uighurs. Right. Actually, there may be a few Uighurs left down there.

Robertson: I think there may still be. We've sent a lot of them to Palau, or something like that.

Q: Yes. Yes, and Bermuda.

Robertson: And the ones I dealt with wound up in Albania. They don't like Albania. [Laughter]

Who would?

Q: Okay. I especially want to talk tomorrow, among other things, about those who have been approved for continued detention but not for trial, and can't be tried for some reason.

Robertson: Talk about staining the American escutcheon. That's the biggest stain of all, I think.

Q: I'll be curious if you have a handle on why that's the case. Because there are maybe forty-some of those people, and that's more than have been referred for prosecution by the military commissions—of which, I suppose it's fair to say only a handful have ever been tried and convicted. Right?

Robertson: That's right. I think there may be only one or two who are serving any time. The rest have been let go.

Q: Shall we resume tomorrow?

Robertson: Yep.

Q: Thank you.

[END OF SESSION]

VJD

Session Three

Interviewee: James Robertson

Location: Washington D.C.

Interviewer: Myron Farber

Date: January 30, 2013

Q: This is Myron Farber on January 30, 2013, continuing the interview with retired judge James Robertson of federal district court here in Washington, as part of Columbia's Rule of Law Oral History, relating to Guantánamo Bay and related matters.

Judge, I made reference to the Uighurs yesterday. I think I said they were a Turkish-Chinese group. I think I may have left off the word "Muslim." They were a Turkish-Chinese Muslim group, and if I understand correctly, and to evade persecution by the Chinese, some of them had moved into Afghanistan before 9/11 and were living there. Then after the United States invaded in the fall of 9/11, they traversed to Pakistan—at least some of them did—and in the course of that they were picked up and sent to Guantánamo. I think that's basically the background. I'm sorry if I misidentified them.

Just to recap for a moment some of what we talked about yesterday, in *Rasul*, the Supreme Court said that the Guantánamo detainees had access to the federal courts of the United States. In *Hamdan*, you ruled that the military commission, as then set up, was unlawful to try Salim Hamdan—for a variety of reasons. The D.C. Circuit overruled you, but the Supreme Court upheld you, and established that not only were the military commissions unlawful—in part because President Bush had not gotten authorization from Congress—but they also had flaws, some of which you had identified, and couldn't go forward. In *Boumediene*, in 2008—two years

later—the Supreme Court, on constitutional grounds, ruled that the Guantánamo detainees had access to the federal courts for habeas purposes. It did not get into an issue that I'd like you to comment on today at some point, and that is whether its ruling of constitutionality of habeas for Guantánamo detainees applies to detainees held by the United States in other places, including Afghanistan. Also in *Boumediene*, the Supreme Court said that the detainees had to have a meaningful—meaningful—opportunity to challenge the factual and legal basis for their detention—meaningful. Which I think is language that had also been used by the Supreme Court. Is that a fair summary?

Robertson: It's a succinct and fair summary.

Q: Let us talk today about what has happened with regard to the detainees in the courts, that they were given access to post-*Boumediene* decision. Now you retired in the summer of 2010, was it?

Robertson: Yes.

Q: Certainly you were familiar with events up to that time, in those two years. Have you followed the events in the next two and a half years?

Robertson: Somewhat. I've not studied them. I've not immersed myself in them. I was particularly struck by the decision of the court of appeals six or eight months ago—in a case that I'm going to block on the name of—that involved the standard of reevaluating evidence in these

habeas cases. I'm going to block. Maybe you know the name of it. But I do know that no Gitmo prisoner has ever won outright release after a habeas order if the federal government appealed it.

Q: Why?

Robertson: Because the court of appeals has reversed every single one. *Latif* [*v. Obama*, 2011] is the case I'm thinking of.

Q: Is there something peculiar to that court that would cause that result?

Robertson: Well, first of all, that court is the only court that's hearing appeals from habeas decisions because the District Court of the District of Columbia is the only court that's hearing them originally. So they have a monopoly on the appellate rulings on these cases, which, interestingly, means there will not be any splits in the circuit for the Supreme Court to straighten out, and may be part of the reason why the Supreme Court has not granted cert in any of the attempts to go to the Supreme Court from the D.C. Circuit. Also, by some, I think, accident of coincidence—because I cannot believe otherwise—I know they assign their cases in the court of appeals randomly—but a small subset of the judges in that court have been very vocal, both in their criticism of the *Boumediene* decision and in their apparent determination not to sustain any habeas decisions from the district court. In saying that, I'm relying, frankly, more on some academic research that's been done by a professor at American University named Steve [Stephen I.] Vladeck than I am on reading or studying the actual cases themselves.

Q: I must say, Vladeck is enormously prolific.

Robertson: He is prolific.

Q: I wonder when he sleeps.

Robertson: Well, he's prolific, and he's a bit of a polymath on this subject, or maybe a unimath. He knows these cases inside and out, and speaks and writes a lot about them.

Q: When I say "prolific," I don't mean that he's got it right. I mean that he writes a lot about it.

Robertson: Fair enough. Everybody's entitled to his opinion about Vladeck.

Q: But you find him reliable.

Robertson: Well, I find him certainly interesting, at some level provocative. In one very long article that he wrote, oh, I don't know, a year and a half, two years ago, I think, he really attempts to pin the tail on four judges of that court, Randolph, Brown, Silberman, and to some extent Kavanaugh, as being—and this is my word, not his, I forget what his word is—but, very close to rogue judges, just doing whatever they can to undercut the Supreme Court's ruling. Particularly the meaningful review part of the *Boumediene* ruling.

Q: Just for the record, that's an article he wrote called, "The D.C. Circuit after *Boumediene*," that appeared in the Seton Hall Law Review, Vol. 42, 2011.

Robertson: Yes.

Q: But he is not alone in this regard. May I draw your attention to an appearance that you made—and he was also there that day—on July 17 of this past year at a Covington & Burling forum? You know, Covington & Burling, I saw them referred to only yesterday—or today—in the *New York Times*. It was mentioned as a “white-shoe law firm.” Lanny [A.] Breuer, the crème of the criminal division of the Justice Department, is apparently going back as a Covington & Burling employee, and it's called a "white-shoe" law firm. What does that term mean?

Robertson: It's misapplied. The term "white-shoe" used to be applied to the very Protestant New York Wall Street firms in the days when they didn't take Jewish lawyers. That's what "white-shoe" meant in those days. I haven't heard the term for years.

Q: Why white shoe? Were they wearing the white shoes, or was it the ones they wouldn't take?

Robertson: I don't know. [Laughter]

Q: That will have to be cleared up on some other project.

Robertson: It doesn't have any relationship, for example, to the term "white-collar," which is a different idea.

Q: Well, in fact, whether they're a white-shoe law firm or not, the lawyers at Covington & Burling, and many other prominent law firms, have worked many hours pro bono for these Guantánamo detainees. Isn't that true?

Robertson: Absolutely true.

Q: Well, why, do you think? What has prompted that?

Robertson: Well, for one thing, there is a very strong D.C. tradition—I would rather use the word “establishment law firms,” rather than “white-shoe,” but I'm talking about Covington and Arnold & Porter, Wilmer—what is now my old law firm, WilmerHale, and what used to be called Hogan & Hartson, now Hogan Lovells, Steptoe & Johnson—old line Washington firms. They led the nation in pro bono work back in the civil rights days. In fact, the Lawyers Committee for Civil Rights that I was working for was all about harnessing the pro bono efforts of big law firms. That was its original *raison d'être* as much as anything else. Responding to the president's question—“Here they are, Mr. President, at your disposal. We're going to Mississippi.”

Covington is one of the greatest of the Washington firms, always has been. Covington's pro bono work goes back a very, very long way. As a matter of fact, Covington wrote the amicus brief of those generals and admirals that I found so persuasive in the *Hamdan* case. Covington has been a

leader in this. Why they specifically latched onto these cases I don't know, but these big firms are always looking for interesting, important things to do. I noted when I was on the bench that there was a tremendous outpouring of pro bono support for Gitmo detainees. I remember one lawyer who appeared in one case before me was from a Hawai'i law firm and had made something like ten trips to Guantánamo Bay from Honolulu, pro bono. Imagine that.

But the mainline, established law firms have stepped up to serious pro bono challenges in Gitmo cases, in civil-rights cases, during Vietnam, in death penalty cases—areas of serious legal concern where lots of lawyers are needed.

Q: Well, they're always appealing to the so-called left?

Robertson: If you had to call it left or right, most people would put them on the liberal or leftish side of the ledger—although most lawyers would deny that and say, "We're talking about the rule of law here. It's neither left nor right; it's vindicating what the law should be."

Q: Actually, if you will please return for a moment to that brief by the generals and admirals that you mentioned yesterday—because what's important to in *Hamdan*. What was the heart of what they had to say?

Robertson: The heart of what they had to say was, "We are concerned about any result in American courts which could be turned around and used against our people if they are arrested or captured in foreign lands. We think the Geneva Convention applies, and should be applied, and

we think to unilaterally determine that there is no Geneva Convention support for people is very dangerous, on reciprocity grounds, to Americans.”

Q: Well, in *Boumediene* and in the Supreme Court ruling on *Hamdan*, they said that the detainees were protected by Common Article 3 of the Geneva Convention. But you originally, in your decision—while throwing out the military commissions—you abstained on that, did you not?

Robertson: Yes, I did. It goes back to our abstention discussion of yesterday. A district judge, I believe, needs to take the abstention doctrine very, very seriously, because any time a district judge acts when another court or another proceeding is going on, what he or she is doing is taking charge of another court. Now you can say, "Well, a military commission isn't really a court," but it was a legal proceeding. The distinction I made between the Geneva Convention, applicable to prisoners of war—which gave them court martial-type justice on the one hand versus Common Article 3 on the other hand—was that I could easily spot the differences between a court martial and what was going on in this military commission, and the differences were stark.

But looking at it through the lens of Common Article 3 rather than the Uniform Code of Military Justice and the courts martial rules, it was a lot fuzzier. My internal thinking, which I reminded myself of yesterday when I was looking through my own notes, was that there wasn't a precise enough, substantive enough set of rules in Common Article 3 that I thought enabled me to cut through that and say, "That's not good enough." I would have abstained if the only thing at issue

were Common Article 3. I did abstain on that one. I had to get to the prisoner of war status and the determination—or the failure to determine—whether he was a prisoner of war, in order to get to the court martial standard.

So it's a little complex, and may frankly have been a little precious, distinguishing, as I did, between the Common Article 3 and the other. But the Supreme Court doesn't have to abstain. [Laughs] The Supreme Court operates according to a different set of rules. The Supreme Court isn't bound by precedent on abstention the way I am, and the way I thought I was. They weren't required to be as "modest" in their application of the law as I thought I was.

Q: Right. Now to go back to Covington & Burling—so you appeared at this forum at Covington & Burling on July 17, 2012, and I quote—one of the things you said, and I quote—"*Boumediene* called for a meaningful review, habeas review, and what happened in the circuit has been first to take the capital letter off the word 'meaningful,' then take the word 'ful,' take the letters 'ful' off the end of 'meaningful,' and then to sort of deprive it of meaning." There's nothing precious about that, right? That's pretty clear, what you're saying there. In fact, you also said that the court appears "to be hostile if not defiant to *Boumediene*," and you say the "Supreme Court seems to have washed its hands of this problem, which is incomprehensible to me, and we'll talk a little bit about it later," you said.

Well, here we are. Let's talk about it now. This is pretty direct stuff.

Robertson: Yes, it is, and I probably got a little carried away. I was preaching to the choir in that room, and you're probably reading what Lyle Denniston wrote in SCOTUSblog.

Q: No, I'm reading from the actual transcript.

Robertson: Oh, really? There is a transcript? Well, Denniston thought I said that to me that means that "meaningful review has been gutted."

Q: It's interesting you mention that, because—

Robertson: —and I don't think I said "gutted," but if that's what the transcript says.

Q: Well, the transcript does not say that. The transcript ends, or that portion of the transcript that I read, the first part, ends, "and then to sort of deprive it of meaning." When Lyle Denniston, who has covered the Supreme Court for many years and writes for SCOTUSblog, wrote an article about this—and he was there.

Robertson: Yes, he was. He was sitting as close to me as you are.

Q: When he wrote an article in SCOTUSblog about it, and he quotes you, correctly, and then includes in the quote, "and then, to me, that means it's gutted." Now I don't see that in the transcript.

Robertson: Well, I guess I'm kind of relieved to know that because I don't remember using the word "guttled."

Q: It sounds like you mean it, though. I don't understand how he could have included that. He's a very sharp reporter.

Robertson: Of course he is, and very knowledgeable on this particular subject. I mean, that's between you reporters. I have no idea how that happened. My own note to myself said—I thought I said something more like "gone" than "guttled."

Q: Well, the transcript didn't—

Robertson: The transcript doesn't even say that. I don't know.

Q: In any case, what I did read from the transcript is what you said.

Robertson: Well, let me tell you—I'm not sure whether that commentary was before or after the *Latif* decision. In fact, I sort of want to know that because it was *Latif* that really upset me.

Latif—and we couldn't remember all of Judge Brown's names, but her name is Janice Rogers Brown—Judge Brown wrote an opinion in a case called *Latif*, which is a habeas decision of Henry [H.] Kennedy's [Jr.].

Q: This was a decision by the D.C. Circuit, by Judge Brown, in 2011. Do you want to comment on that?

Robertson: On *Latif*.

Q: When I say "a decision by Judge Brown," I always have to be mindful—

Robertson: —of a panel, and she wrote for a panel.

Q: It's a panel—

Robertson: It's a panel decision.

Q: —and she's in the majority and writes for the panel. The same thing with Judge Randolph, and as we were talking about yesterday.

Robertson: Right.

Q: But she wrote the opinion in *Latif*, in the D.C. Circuit in 2011, and as you say, it was originally in the hands of federal district judge Henry Kennedy. The D.C. Circuit remanded it back to Kennedy. What do you want to say about that?

Robertson: Judge Brown's opinion imposes—and I would say invents—something called a presumption of regularity for intelligence reports. Now the stuff of habeas proceedings in district court is well shy of the kind of evidence we are used to hearing and receiving in courts of this country. Hearsay evidence is admissible in a habeas case, and what comes in as hearsay is oftentimes field intelligence reports that look like they came over a teletype machine or something. They're in shorthand, they're abbreviated, they're done on the spot—they're what I think intelligence people would call “raw intelligence.” They ought to be seriously questioned, maybe not as to their authenticity but as to their reliability and probative-ness. Judge Kennedy, in the *Latif* case, reviewed a pile of this stuff. We don't know exactly what it is because all these decisions are under seal, the records are under seal, and only Judge Kennedy saw what he saw. Only the court of appeals saw what Kennedy saw. But they contained a lot of this field intelligence stuff, which he decided was not reliable and not probative enough for him to rely on it. That's traditionally the bedrock job of a district judge, of a trial judge—to review, evaluate, and analyze evidence—to decide whether it seems trustworthy or not, to decide whether it's probative or not, and to decide what weight to give to it. Judge Kennedy did that job—that a district judge is supposed to do—found it to be wanting, and granted the habeas petition. The court of appeals said, “No, no, no, no, no. He should have granted—.” I'm blocking on a word I just used. “He should have assumed that these intelligence reports were regular and probative.”

Q: He should have given them a presumption of regularity.

Robertson: Thank you. Those are the exact words. Presumption of regularity.

Now, the word "presumption" means a lot to judges. It may not mean an awful lot to lay people. But to give something a presumption means, essentially, it shifts the burden of proof. It says, "Okay, it's regular unless you can tell me why it isn't regular." Now put yourself in the place of a detainee at Guantánamo Bay who's locked up, who can only talk to his lawyer a couple of hours a year, who doesn't have any incoming information, who has no power to reach out and subpoena witnesses, who can't go back to Afghanistan to find witnesses to testify the other way. How is he going to rebut—which is the right word—what resources does he have that will make it possible for him to rebut any presumption of regularity? The answer, self-evidently, is none.

So in these habeas cases, the court of appeals has now said, "Hearsay is admissible. Yes, it's okay to shift the burden of proof to the defendant. Basically, we don't care if there's no way he can rebut the presumption." Oh, and by the way, you've got to consider all the evidence together as a mosaic.

Q: Now that's another case, I think.

Robertson: Yes. It is another case.

Q: That's *Adahi* [*Al-Adahi v. Obama*, 2010] or *Al-Bihani* [*Al-Bihani v. Obama*, 2010]. But staying with *Latif*—

Robertson: *Latif*—well, I'll go on a little bit about *Latif*. *Latif* was a two-to-one decision. The dissent was written by David [S.] Tatel who, full disclosure, is a lifetime friend of mine and

succeeded me as executive director of the Lawyers' Committee for Civil Rights. He has been one of my closest friends for forty years.

Q: He was on that panel.

Robertson: He was on that panel and wrote a scathing dissent. A petition for certiorari was filed and I signed onto an amicus brief, which is way outside the norm for a judge.

Q: You mean after retirement?

Robertson: Oh, yes. Oh, yes, after retirement. I couldn't have done it otherwise. After retirement.

Q: Not in your own name.

Robertson: No, but there was an amicus brief filed by a group of retired judges and I was one of them. Unfortunately, we're probably getting to be considered the usual suspects. There's me; there's Ab [Abner J.] Mikva; there's [William K.] Sessions [III]; there are five or six others who are sort of predictably lefty complainers. That's why you've got to make yourself real scarce in these amicus briefs. [Laughs] But there was also an amicus brief filed on behalf of retired intelligence agents who said, "You've got to be kidding! Presumption of regularity for field intelligence reports—there's nothing regular about field intelligence reports." You know what they used to call newspapers—the first draft of history. But this is the first draft, of the first draft, of the first draft of history. It's shards, it's scraps.

Q: Yes, but is it true that when we speak about presumption of regularity, with regard to regularity, did the D.C. Circuit mean that—it means that regularity means that it was taken down faithfully from the source, by the U.S. military, in this case, Afghanistan—it was taken down accurately. It doesn't mean that it's true.

Robertson: Well, yes, you could parse the words to make it come out that way, but I think if you did, this court or that court—or, in that case—they would have said, "That's not what we meant. Regular means maybe not positively true, but it certainly means probative and burden-shifting."

Q: And you'd better rebut it.

Robertson: And you'd better rebut it. Yes.

Q: Well, it was in that opinion by Judge Brown, for the two members of the panel, that she referred to the "airy suppositions that cause great difficulty for the executive and the courts," meaning that the *Boumediene* ruling caused "airy suppositions that caused great difficulty for the executive and the courts." I mention that because I did an injustice, perhaps, to Judge Silberman yesterday—Judge Silberman of the appeals court—when I said that he made some reference to—colloquially—I made some reference to him saying that the “Supreme Court didn't have the guts” to do something. Actually, what he said, in an opinion called *Esmail* [*Esmail v. Obama*, 2011] in the brief concurrence, he makes reference to, "I doubt any of my colleagues will vote to grant a petition if he or she believes that it is somewhat likely that the petitioner is an Al Qaeda

adherent or an active supporter. Unless, of course, the Supreme Court were to adopt a preponderance of the evidence standard (which it is unlikely to do—taking a case might obligate it to assume direct responsibility for the consequences—."

Robertson: That's pretty close to "not enough guts." It's more elegantly stated, but that's what he's saying.

Q: I want to come back to that, though. But to stay with *Latif* for a moment—*Latif* is a very interesting case because among people like Lyle Denniston, or Linda Greenhouse, or the *New York Times* editorial board, or the aforementioned Stephen Vladeck—*Latif* was the best shot to being granted cert by the Supreme Court based on the circumstances of that particular case.

Robertson: Yes.

Q: And to deal with this question of presumptuality based on that case—because *Latif* was a Yemeni who had been imprisoned at Guantánamo since January of 2002, one of the earliest ones. He was picked up near the border between Afghanistan and Pakistan the month before he was sent to Guantánamo and the government had relied on an intelligence report to send him there. But he had a whole story about his medical history and why he was in Afghanistan that Henry Kennedy found plausible. And when the Supreme Court, after the D.C. Circuit ruled, when the Supreme Court didn't take the case, some people thought, "Well, if they won't take *that* case, whatever are they going to take?"

But to go back to what you were saying about Judge Tatel in the D.C. Circuit, Judge Tatel said that, "It's hard to see what is left of the Supreme Court's command in *Boumediene*, that habeas review be meaningful." That was a scathing kind of dissent—

Robertson: Yes.

Q: —but the Supreme Court didn't grant cert. What do you make of all these cases in which the Supreme Court *isn't* granting cert? Why do you think it's come to pass that way?

Robertson: Well, it takes four votes to grant cert, but even if four judges want to grant cert—if they're quite certain that they won't get the fifth vote when they actually hear the case, they might duck and not give cert enough votes to grant cert because a loss would be worse than not hearing it at all. That's the arithmetic of the way the Supreme Court works. So, for example—I've forgotten what cases there are all about—but for some time—well, let me mention a case that's near and dear to my heart, although it has nothing to do with Guantánamo; it has to do with judicial pay. Years ago, there was a case filed by some judges who claimed that Congress had promised regular pay raises to judges and then reneged on the promise. The promise was the same as a pay raise, and the Constitution says you can't diminish the pay of judges. So it's unconstitutional for you to make a promise and then renege on it. That was the basic case. The judges won in my court. It went to the federal circuit—

Q: You mean the judges are ruling on their own issue!?

Robertson: Well, some judge has to do it. Yes. What judge would you send it to, if it involves the pay of federal judges?

Q: You mean the judges are the plaintiffs here?

Robertson: Yes. The judges are the plaintiffs.

Q: And the judge in the federal court is saying, "Okay, I'm with you!"

Robertson: That's right. It went to the Court of Appeals for the Federal Circuit, which is the government contracts, patents, etc.

Q: Not to be confused with the D.C. Circuit.

Robertson: Not to be confused with D.C.—and they reversed. They said, "No, no, no." The case went to the Supreme Court on a petition for writ of certiorari and cert was denied. Now Larry Silberman—who knows a lot of people and keeps his ear to the ground—was and is convinced that the reason cert was denied was that four judges would have granted cert but didn't think they could get a fifth vote, and didn't want to lose this case in the Supreme Court, so they basically punted rather than lose the fifth vote. I've wandered off the track here.

Q: Are you suggesting that that's the case up there now with regard to not taking Guantánamo cases?

Robertson: I do believe so. The most common reason for granting cert these days is the so-called "split in the circuits." If the Third Circuit says one thing and the Sixth Circuit says a different thing, the Supreme Court has to straighten it out. But there's only the D.C. Circuit dealing with these Gitmo cases. No other circuit rules on them. So there's no split in the circuit, and my guess is that probably there are four votes for cert up there on these questions, but not five votes for reversal of the D.C. Circuit—or at least not five certain enough votes on the D.C. Circuit. And the cases are, you know—they're important to you, and they're important to me, and they're important to 167 people at Guantánamo Bay, but they're not going to govern the future of the country. So the Supreme Court just isn't doing it.

Q: That's a very interesting point.

Robertson: At some point—and another thing I said at this Covington & Burling thing—I said, “At some point, some court, someday, is going to find the government can't hold these people for the rest of their lives.” When that happens—I don't know—but it will ultimately have to happen in the Supreme Court. The Supreme Court is going to have the last word on that subject.

Q: Well, let's try to parse that a little bit for a layman reading this. As I mentioned at the end of yesterday's session, of the 166 people—by the way, before I forget—after the Supreme Court did not grant certiorari in *Latif*—

Robertson: He died.

Q: —he killed himself at Guantánamo.

Robertson: You're right. He killed himself. Did he starve himself to death?

Q: I don't think so, but he committed suicide. He was the ninth person over the years who has.

But it was after that.

But to go back to your point a moment ago, of the 166 people left at Guantánamo, there are some—these figures vary depending on who's giving them out—there are something like forty-four or something who the government has no plans to try.

Robertson: That's right.

Q: Now does that mean they have no plans to even charge them?

Robertson: Yes.

Q: What is an analogous situation to that here in the United States?

Robertson: Well, the closest analogy I can think of—except for, of course, prisoners of war, after the last war, which we kept them and then we sent them all home when the war was over. This, by the way, this—

Q: The document that you have laid out for me.

Robertson: —*Qassim* [*Qassim v. Bush*, 2006] opinion that I gave you, which is the earlier Uighur opinion—it talks about this a little bit. The government asserted in the Uighur case—these are people who are conceded to no longer be enemy combatants, meaning that—assuming that they ever were—but that they are not enemy combatants—the government says, “Well, there's a line of authority that says we have 'windup' authority.” After a war, after an emergency, to hold people for “windup purposes.” Well, I suppose our government is going to assert "windup" authority if it has to ever concede the hostilities are over in Afghanistan.

I'm not answering your question very directly. You said, "What else can you cite like this business of holding people?" How about the boat people, the Cuban or Haitian boat people who came over here—we locked them up in a prison in Pennsylvania for years. Remember what they were called?

Q: Do you mean the Haitian boat people? I don't remember. But while you think about this, let me go back to what you just said a moment ago about prisoners of war. Now in *Hamdi*, in *Hamdi*, wasn't it? And I think also in *Boumediene*—the Supreme Court made note of the fact that the government was entitled to hold people for the duration of hostilities.

Robertson: That's right.

Q: Anybody? Hold them because they are deemed prisoners of war? Hold them without any charge or determination about that?

Robertson: Hold them under the Authorization for the Use of Military Force because they are people—they have been found by a CSRT to have been members of, or affiliated with, or whatever the buzz words are—with the Taliban or Al Qaeda, in hostilities. The Supreme Court basically punted on that one, too, and said that you can keep these people under the laws of war for the duration of hostilities—begging the question of when hostilities will ever be deemed to be over, begging the question of what hostilities they're talking about, begging the question of whether the laws of war will allow our government to hold people indefinitely on our own say-so that hostilities have not ended.

It is a totally intolerable situation, but the sad truth is that the fewer people there are at Guantánamo Bay and the more we manage to send away—I mean, these people have no constituents. Obviously, there's nobody who wants to bring them into the United States and put them in a prison in Pennsylvania. “Not in my backyard!” Politicians don't want them in the United States. They don't want to be seen as having sanctioned even the possibility that these rabid Islamic jihadists would set foot on American soil. So there's no political support for them, and in the absence of another Abu Ghraib, or another waterboarding incident, or something that catches the world's attention again—there's not even any world human rights constituency for them anymore, except for a few do-gooders who have not forgotten about them. It's quite conceivable to me that it could be years—years—before these people are let go. And, of course, on top of that there's the problem of where do we send them?

Q: Well, of course, some people would say, "You can't let them go. They're going to go back and they're going to cause more trouble, like they did before, when you release them."

Robertson: Of course. Lots of people are going to say that.

Q: Well, there are cases.

Robertson: They have forgotten the old adage that it's better that ten guilty men go free than the one innocent man is punished. They have forgotten that we routinely let people out of jail every day in this country who we know are going to be recidivists tomorrow.

Q: Have you any sense of—this is really an unfair question—of the level of recidivism? When I say "recidivism," that assumes that the guy was a bad guy in the first place. When you speak about recidivism—

Robertson: Well, I'm actually talking, more than anything else, about drug dealers. We know that the level of recidivism among drug dealing offenders is—

Q: Unrelated to Guantánamo.

Robertson: I know. It had nothing to do with—I'm just talking about recidivism in general.

Q: I don't mean that. I mean that—the government a few years ago, a couple years ago, put out some figures about recidivism and they lumped “people suspected of” with people who had actually done something—people who had come from, back, released from Guantánamo—and the figures were somewhat distorted by that. They had to backtrack on that somewhat. But when I think of recidivism—let us just say, hypothetically—there were a hundred people at Guantánamo. Eighty of them were released. Ten were found to have been throwing bombs around in Yemen or something. So you would say, "Well, let's see. That's ten percent recidivism, right?"

Robertson: Yes.

Q: But that assumes that that ten percent—that those people were doing that kind of thing originally, which isn't necessarily the case. They could have decided that once they spent five or six years at Guantánamo—

Robertson: —you might have successfully indoctrinated them into the jihad. [Laughter]

Q: I noticed just the other day that the government reported that the number two in command in Yemen, of Al Qaeda in Yemen, had been killed, I believe by drone—and he was a graduate of Guantánamo. Now he had been released. And one of the fascinating things about this whole subject is that when you examine the military's own schedule of risk-ness among people who have been released and those who've been held, you find that many of those released have the same level of risk-ness as those staying behind. It doesn't equate. It isn't as if all the low-level

risk people were let out by the Bush administration and the Obama administration. It's a hodgepodge, and there isn't a clear, bright line about what determined the risk-ness of those that go versus those who stay.

But that aside, when did you ever hear about the so-called black sites and rendition programs of the CIA?

Robertson: Oh, I heard about the same time as the American public heard about it. I'm not sure I know when.

Q: You had no privileged information.

Robertson: I had no privileged information. And, by the way, I served—as you may or may not have known—I served on the FISA [Foreign Intelligence Surveillance Act] court for some years.

Q: How many years?

Robertson: Four, I think. Three or four years.

Q: You were appointed by Chief Justice [William H.] Rehnquist.

Robertson: Yes.

Q: And you quit in December, something like December 20, 2005.

Robertson: I quit the day after it was announced that the NSA program was bypassing FISA.

Q: Right. Right. Now you didn't know anything about that warrantless program?

Robertson: Nope.

Q: Did you think any of the judges on the FISA court knew?

Robertson: Myron, that's a subject on which I'm going to draw a line that I think I have to draw and not comment on it.

Q: Well, but it was not only reported in the *Washington Post* on December 20, 2005 that you had quit the court—the court sure didn't put out a press release, did it? Excuse me—December 21, 2005. The court didn't put out a press release. How did they find that out?

Robertson: How did they find out that I had quit?

Q: Right.

Robertson: I don't know whether I made that letter public or not. I certainly didn't hide the fact that I had resigned. I wrote a letter to the chief justice of the United States—

Q: —who appoints members of the court.

Robertson: —who appoints members of the court. And I don't think you can send a letter to the Chief Justice of the United States that is under seal and resign from a court like that.

Q: Would you mind, for the record, just simply—what does the FISA court do?

Robertson: The Foreign Intelligence Surveillance Act establishes a Foreign Intelligence Surveillance Court, which is properly known as the FISC, which reviews and grants or denies applications for warrants to conduct usually electronic, covert surveillance of persons who are suspected to be agents of a foreign power, engaged in activities of which our intelligence people want to know about—agents of a foreign power. I've forgotten all the steps, but their warrant—what FISA judges do is go into a locked vault in—

Q: —the Justice Department.

Robertson: Well, now it's in the U.S. District Courthouse in the District of Columbia. They moved it—and read warrant applications, and question FBI officers, or government lawyers who are presenting the warrants, and satisfy themselves that there is reasonable cause to believe that the person that they want to do surveillance on is an agent of a foreign power, and that the attorney general, or the director of the CIA, has certified that there is an intelligence purpose for

the surveillance. He signs the warrant, and it's done. The warrant applications are sometimes two inches thick. They're huge.

Q: I think there are something like ten or eleven members of the court, are there?

Robertson: I think there are eleven now.

Q: What was the Bush administration doing that came in for criticism? Let's put it that way.

Robertson: The Bush administration, using the National Security Agency, was using a form of—I'm not sure I know exactly what it was—but it was basically a form of data collection and data mining on communications that passed through the switches of domestic internet providers and wireless providers, collecting information that clearly would have fallen under—I believe would have fallen under the jurisdiction of the FISA court. But they were not applying for warrants to do it.

Q: Well, the National Security Agency was carrying this out, right?

Robertson: Yep.

Q: They ordinarily operate abroad, right? On doing that kind of thing.

Robertson: Yes.

Q: Yesterday I happened to mention the name Jack Goldsmith. Do you know who that is?

Robertson: I know who that is. I don't know him.

Q: Well, he was at one time head of the Office of Legal Counsel, after John Yoo. He wrote a book called, back at Harvard where he teaches, he wrote a book called *The Terror Presidency*, and on page 181 of that book, he quotes David Addington, who some people think was *the* most powerful person in the government at a certain time—

Robertson: Cheney's guy.

Q: —[Laughs] with regard to do with all this having to do with terrorism. He quotes Addington—let me quote it here—“We're one bomb away from getting rid of that obnoxious FISA court,” Addington had told me, in his typically sarcastic style, during a tense White House meeting in February of 2004.” “That obnoxious—one bomb away.” In other words, “If there's another bomb, we can get rid of the FISA court,” I suppose is what he means.

Robertson: Yep.

Q: Now you didn't know he was talking like that.

Robertson: No, I didn't.

Q: But on December 16 of 2005, the *New York Times* revealed this warrantless program that was going on. And, as you say, you then resigned.

Now I appeal to your better instincts. Here we are, sitting in your house in Georgetown. It's just you and me and the recorder. [Chuckling] I have to ask you—why did you resign? Remember, this is for history. People are going to want to know this in the year 4000-whatever.

Robertson: Well, I'll answer that question. I refused to answer that question when I was on the bench. I spent days and weeks after my resignation refusing to answer that question. I got up one morning, went downstairs to pick up my newspaper from the curb, and there was a CBS cameraman out there pointing his camera at me in my skivvies. I promised him that if he wanted to take my picture, I would allow him to do so if he's allow me to get dressed first and go have a cup of coffee—because it was a cold morning. I was hoping he'd be called off to something else. But when I went out the door in my suit and tie that morning, ready to go to the courthouse, the camera followed me all the way to my car. I was invited to appear on *60 Minutes*. My former partner, David Westin—who was the head of ABC [American Broadcasting Company] News at the time—begged me to go on ABC. No. But that was almost ten years ago. I'm retired. Nobody really much cares anymore, and for you, Myron, I will answer your question.

It's a pretty simple answer. I felt like the FISA court had been used. I felt like the FISA court—somebody accurately quoted my beliefs—somebody I probably did talk to—accurately quoted my belief that President Bush had used the FISA court like Potemkin village. To show people

how regular and correct everything was, when, in fact, he was ignoring it, when it suited his purpose to ignore it. I resigned in protest of that and did not want to be part of it any longer.

Now, frankly, some part of me, I suppose, hoped that I would be as a beacon for the other judges and that they would all resign. But that didn't happen. None of them resigned. I don't know why. I never talked to them about it. I did not proselytize or try to bring anybody along with me. I simply resigned. That's why I did it, and I thought then and I still think that resignations under protest are some of the highest and best uses of public office and that it was the right thing to do, and that's why I did it.

Q: Well, at that time, in your letter to Chief Justice Rehnquist, resigning, did you say why you were resigning or was it apparent? Was it going to be apparent to him?

Robertson: I did not say why I resigned. At that time it was Roberts who was Chief Justice; I'm not sure he knew or cared anything about the FISA court.

Q: The judges on the FISA court—are they all based in Washington?

Robertson: A certain number of them are, because the statute requires a number of them to be close enough here for really real-time emergency contact when they need them. But what happens is they're appointed from all over the country. They fly into town and their duty is for a week. They fly into town on a Monday and leave on Friday, and then another judge flies in the

next Monday. Right now there are three judges from our court on the FISA court. John [D.] Bates is the presiding judge. Tom Hogan and Reggie [B.] Walton are all three on the FISA court.

Q: Well, isn't there a continuing controversy regarding the administration, this administration, even, and the FISA court—or Congress and the FISA court?

Robertson: Congress just reenacted the FISA act. I forget whether they did it at the last—or the beginning of this one. Yes. They extended it December 29.

I was a member—I am a member—of a group called the Liberty and Security Committee of the Constitution Project, which does sort of nonpartisan white papers on various things. They wrote a lengthy and passionate report about how the FISA act should be amended to provide more meaningful oversight by the judges than they now have, and that report was largely ignored. The FISA court was extended. I read this article when it came out. I've forgotten all the details of it. But Congress—there isn't much of a constituency for the kinds of privacy concerns that the ACLU [American Civil Liberties Union], Liberty Security Committee, and others have about the FISA court.

Q: Actually, wasn't it that kind of concern that led to the creation of the court in 1978?

Robertson: Yes. That was the genesis of it. It was Frank [F.] Church [III] and his—

Q: —committee, right—that dealt with the CIA.

Robertson: The CIA, and COINTELPRO [Counter Intelligence Program], and all that. The FBI and what the FBI was doing.

Q: Right. It was the sort of diminished that, the court.

Robertson: Right, put it in the hands of independent judges. Collect intelligence, but minimize it so that the private stuff is not kept in public records, etc.

Q: So as not to escape the question that I've put on the table, when you heard about the black sites and renditions—this was a few years after 9/11, when it came up. Was it then a surprise to you that the U.S. government was doing that?

Robertson: Yes. Oh, yes. It seemed like something out of a bad movie. It was hard to believe that our government was doing that. It sounded like fiction. But yes. Was my reaction surprise? Yes, it was.

Q: Condoleezza Rice, when she was secretary of state or national security advisor, and not her alone at the top of the administration, were publicly saying, "We don't torture and we don't send people to be tortured." Now what is one to make of that kind of statement, at the top of the government? The fact is that, whether you want to call it "enhanced interrogation technique," or torture, or what have you, I leave to others. But some rough things were going on that she knew about—about the CIA and black sites in countries like Poland, and Lithuania, and other places—

that were being kept from the public, that she surely knew about. And, we were also rendering people—some of whom ended up at Guantánamo—to Libya, Jordan, Egypt—places where not only did she have to know they were going to be roughed up, but may even have been observing the roughing up.

Robertson: Well, on this subject, you're talking to a person who is—I don't see this one in black and white. I really don't see this one in black and white, and I never have. I'm certainly no fan of John Yoo and I'm no fan of waterboarding. *But*, if you were to put before me, as a judge, the question of what is torture? And is waterboarding torture? Your answer to that question, frankly, has more to do with where you stand on lots of other issues than it does on actual waterboarding. Who has actually seen waterboarding or done waterboarding? I had a law clerk who was a Navy SEAL. He was waterboarded as part of the Navy SEAL [Sea, Air, Land] program. He said it was a terrifying experience; he did not call it torture. I'm perfectly happy to call it torture or not call it torture. I don't have a clear opinion on (a) whether waterboarding was torture, (b) whether what we did, other than waterboarding, was torture—stress positions, sleeplessness, cold and hungry, noise—whatever goes into the equation—roughing people up. I'm not a foot soldier in the war against that kind of technique. I'm just not. Do I think it's justifiable? If you give me the ticking time bomb scenario, I'd do damn near anything to find out what happens before the bomb goes off. Sure.

Q: Have you seen this movie, *Zero Dark Thirty*?

Robertson: Yes, I did see it. I saw the premiere showing of it over here at the Newseum.

Q: What did you think of that? I haven't seen the movie.

Robertson: I thought it was—good.

Q: Does it draw a link between what would have to be called enhanced interrogation techniques on this fellow, in the beginning, and the discovery of bin Laden, or the discovery of the Kuwaiti courier?

Robertson: If it does, it's a very hard link to follow. I don't think it's such a great film, as a matter of fact. I'm not sure why everybody's so gaga about it, except that it shows some simulation of what somebody thinks is sort of like waterboarding. It does show some people being very badly treated—beaten up, hung up like this, by their arms—

Q: —but not in a ticking bomb scenario.

Robertson: —not in a ticking bomb scenario. Is it bad behavior? Yes, it's very bad behavior.

Q: And the point—

Robertson: Is it torture? Do we torture? Do police use the third degree? Do people get beaten up in police stations? Stuff happens. I'm just not on that side of that issue.

Q: Okay. But just for my own curiosity—does the movie draw a link, a causal link, between beating up this guy and discovering the identity of the courier who leads to bin Laden?

Or maybe you weren't looking for that.

Robertson: Oh, I was looking for it and I didn't really find it. They beat up a couple of guys in the beginning of the movie. One of them came up with the name of Ahmed, and for the rest of the movie they're looking for Ahmed, and they finally find somebody called Ahmed. If you put that causal link before a jury and asked them if there was something that lawyers call "proximate cause," they would say, "No, there were too many intervening causes."

But is there a link? Sure. But it's a very attenuated link and it's probably a fictional link.

Q: Let me ask you to comment on a case that you had—and by the way, I should point out that you had cases like the *Awad* [*Awad v. Obama*] case in 2009, the *Khalifh* [*Khalifh v. Obama*] case in 2010, where you denied habeas relief—just so that's on the record. But there were times when you did grant relief—the *Slahi* [*Slahi v. Obama*, 2009] case.

Robertson: Oh, yes. I'm glad you asked me about *Slahi*.

[INTERRUPTION]

Q: Okay. With regard to the *Slahi* case—that's a very interesting case, is it not?

Robertson: I think it's one of the most interesting cases I ever handled, actually. For one thing, it was a very close call, for a lot of reasons. But go ahead and ask your question.

Q: First of all, why don't we simply say who [Mohamedou Ould] Slahi was.

Robertson: Mauritanian, wasn't he?

Q: Yes. Right. And he was one of the high value detainees originally, before he was sent to Guantánamo. Some people say that he was the highest value detainee, at Guantánamo, anyway, in 2003—

Robertson: —until they got KSM [Khalid Sheikh Mohammed], and some of the really—

Q: That's right. But he had been subject to the rendition program, sent by the Americans and/or the Mauritians after he was seized in 2001, and at the request of the CIA he was flown to a black site in Jordan. Later, at Guantánamo, he was subjected to a specially tailored, enhanced interrogation program that included prolonged isolation, prolonged sleep deprivation, beatings, death threats, and threats that his mother would be brought to Guantánamo, possibly gang raped—as the program was inaugurated—done to him in, maybe, 2003—and it included enhanced interrogation techniques authorized by then Defense Secretary Rumsfeld. It ended for him in August of 2003, after he was taken out on a boat wearing isolation goggles, while agents whispered within his ear shot that he about to be executed, and made to disappear.

Now he was to be tried before a military commission and the government appointed a Lt. Col. Stuart Couch to represent him. Couch, when he looked at the record, decided that what they—what had been done to him was so repugnant that he was "morally opposed to these techniques, and couldn't participate in Slahi's prosecution."

In any event, Slahi appealed for a habeas hearing and wound up in your court. Right?

Robertson: Right.

Q: What happened? By the way, it should be said that the government's position was that Slahi had been a recruiter since 1990. He had been a recruiter for Al Qaeda and he recruited two of the men who later became 9/11 hijackers—or, at least, he met with them on at least one occasion—and carried out orders to develop Al Qaeda's telecommunications capacity, and that he had connections with an Al Qaeda cell in Montreal, etc.

Robertson: This is a long and, unfortunately, somewhat legally complicated case, but it begins, as far as I'm concerned, with what the standard was for holding people under the Authorization for Use of Military Force—the AUMF. He had to have been shown to have been—do you have my opinion there?

Q: I have the conclusion.

Robertson: Let me try to reconstruct the—he had to be part of Al Qaeda. He had to be part of Al Qaeda. Now—

Q: He had to be part of Al Qaeda to what?

Robertson: He had to be part of Al Qaeda to be held under the AUMF.

Q: That's right. And just before you go into *Slahi*—that in a way is kind of confusing. What is the standard of detention? Does it keep evolving?

Robertson: Yes. At least in my view it keeps evolving. We talked yesterday about the collection of all these cases in one place and how the law began to evolve as different opinions were written by different judges. The most persuasive articulation of the rule of when you can hold somebody was written, I think, really, either by John Bates or by Reggie Walton, or maybe both of them. But it had to do with part of the command structure of Al Qaeda, or subject to the orders of Al Qaeda commanders in a time of hostilities. Now this guy, Slahi, admitted that he had been part of Al Qaeda—that he had, in fact, sworn the oath that Al Qaeda imposes, and some people think he swore it directly to bin Laden.

Q: Bayat.

Robertson: Bayat. Yes. But he did it back in 1991, at a time when—guess what? Al Qaeda was an ally of the United States in Afghanistan.

Q: Fighting the Communist government at that time?

Robertson: Fighting the Communist government. Actually, he got there after the Russians had left, so it was a little bit murky. At any rate, Al Qaeda wasn't doing anything nasty against the United States at that time. He then went back to Germany, where he studied and worked as an electronic engineer or something, in Germany. There was evidence that he had given a room in his house, for a night or two, to two people who later became part of the 9/11—

Q: —hijackers.

Robertson: —hijackers. There was some debate about what they wanted him to do, what he advised them to do. They were going off to do jihad someplace, and he said, "Well, why don't you go to Afghanistan?" Did he recruit people to bomb the United States? No. Did he recruit people who later bombed the United States? Not clear that he recruited anybody. What he apparently did was to give one night's lodging to people who were passing through Frankfurt, or wherever he lived.

But Slahi's situation got even dicier later on. He went to Canada, where he fell in with some other people who were later associated with that aborted attempt on LAX [Los Angeles International Airport] that was stopped at the Canadian border in 2000.

Q: The so-called "Millennium Plot."

Robertson: The so-called "Millennium Plot." The FBI was very interested in him because he knew those people, or roomed with one of them, or was involved with one of them in some way. But nobody ever pinned anything about the Millennium Plot on him directly.

Q: He was at a mosque where this same man—[Ahmed] Ressam, I think his name was—

Robertson: I think that's right. And maybe he was—whatever you call these clerics that are in mosques.

Q: Yes, yes. It was very circumstantial at that point.

Robertson: Well, the whole thing is circumstantial. Then he went back to Africa, went back to Mauritania, and tried to work as an electrical engineer there. He had something to do with helping to find some communications equipment that Al Qaeda wanted for Africa. Then he made a phone call to somebody from a pay phone someplace. Then there was the question of his uncle, who apparently was close to bin Laden.

Q: Well, a supposed spiritual advisor.

Robertson: Something like that. This stack-up—this fits Larry Silberman's construct perfectly. What was he doing in Frankfurt? He was also in Montreal. He was associated with these guys, he was associated with that guy, but he wasn't apprehended on the battlefield. There was no

showing that he had anything to do with Al Qaeda in the hostilities against the United States. On top of that, this was a guy that I actually saw and heard his testimony. Not in person, but there was a TV hookup with Guantánamo. Now this guy had been granted very special treatment by the Americans. He had a private cell.

Q: Well, this is the converse of the treatment that had been accorded him earlier. He'd become an informer.

Robertson: He'd become an informer. He had a private cell. He was allowed to grow flowers. He drank tea with the guards. He read carefully. He was fluent in English.

Q: *After* he had been mistreated.

Robertson: After he'd been mistreated. The problem with Slahi was, he looked like a duck and walked like a duck. But the standard that I thought I had to impose was not a duck standard; it was a part of Al Qaeda during hostilities standard and I didn't think the proof added up to that.

Now it was a very close call, I have to admit. It was a very close call, but I also had to deal, in that case, with the question of the burden of proof. There was no way he could counter the stuff that was being stated against him. He couldn't call witnesses; he couldn't reach out and mount any kind of significant defense for himself. But I conceded, I think, all the rules I should have conceded, and I just thought it was a close call, but (a) I didn't think he was dangerous anymore—although that's not the question.

Q: Did you know the kind of treatment that had been accorded him abroad by the U.S., the CIA, and other countries at the behest of the CIA, and at Guantánamo? Did you know that?

Robertson: Yes.

Q: That didn't enter into your equation? Even from a legal point of view—this is now 2010 you're doing this.

Robertson: All that does—and it did—was to make it impossible for the government to use some of the testimony or evidence they wanted to use—which I never saw—because the government itself conceded that there was some information they had that they were unwilling or unable to use. And when that's taken off the table, it's taken off the table. You can't say, “Well, I know you've got some other stuff behind the curtain there, and I'm going to assume it's pretty bad stuff, and use it against him.” You can't do that.

Q: Okay. By the way, just parenthetically, let me mention that a document—a Guantánamo document that was obtained and leaked by WikiLeaks, dated January 16, 2008, has Slahi—who had then been an informer, after having been through all of that—claimed that this Kuwaiti, the courier to bin Laden, later, two years later, had been wounded fleeing Tora Bora, in December of 2001, and had died in his arms. Slahi's arms! We know he didn't die in Slahi's arms, so this informer who is able to garden down there and what have you, I think he was off-base on that one.

Robertson: Now isn't that interesting. There's a little snippet in *Zero Dark Thirty*—I've forgotten who says it and the context within which it was said, but there was something in *Zero Dark Thirty* in which somebody says, "That guy is dead. That guy died a long time ago." It may have been a reference to that same Slahi leak.

Q: I don't know. In any event, you granted a habeas relief for him.

Robertson: Yes.

Q: Okay. And you were reversed by the D.C. Circuit—naturally.

Robertson: By Tatel, I think.

Q: Yes. I think your old friend Tatel—I think [David B.] Sentelle may have been in on that. I'm not sure. There comes up, I think, the consequences of another 2010 ruling by the D.C. Circuit, called *Al Adahi* [*Al Adahi v. Obama*]

Robertson: Yes.

Q: In *Al Adahi*, Judge Randolph, writing for the majority, comes up with a requirement that judges at your level—the district judges—use conditional probability.

Robertson: Yes, yes, yes!

Q: And that you hadn't used conditional probability in this case, he's saying here, when they reject you. [Laughter] Now, can you comment on that "conditional probability"?

Robertson: Well, I would make a more intelligent comment on it if I understood what the hell it meant. This is Ray Randolph—who is, by the way, an extraordinarily well-read, intellectually curious, and brilliant guy. No question about that. But where he came up with "conditional probability," and where he found it in the law, and how he managed to shoehorn that into the law of habeas corpus is totally beyond me. I don't know what conditional probability means. I've read that opinion three times and I still don't understand it.

Q: Well, it's being used, isn't it?

Robertson: Well, I'm sure it is.

Q: What does it really say? I believe he's saying that you have to weigh the aggregated whole of the evidence to see how it all fits together. And that even if all the pieces are circumstantial, from the same sources, you have to give—let me see this.

Robertson: Well, he's saying something like this—"Look, what are the chances that somebody who gives a night's lodging to two people, who later turn out to fly planes into the World Trade Center, knew what they were doing and was in some way involved with them?" Let's say it's one

in ten. All right, now what are the chances that that same person winds up in Montreal with people who are associated with the Millennium Plot and knows them in their mosque? Aha! Let's call that one in ten. And what are the chances that somebody who's bin Laden's uncle and sends electronic equipment to some Al Qaeda operation in Africa, who knows what they're up to and is involved with them—let's call that one in ten. But the chances that the same person has all three of those things happen—the conditional probability is, whoa! It's not three times one in ten, it's some other mathematical equation, and it becomes much, much more likely that this person is associated. That, I think, is what he was talking about.

Q: I think so. But you know that *Al Adahi* opinion in 2010 seems to have had a rather profound effect on the federal district judges because before *Al Adahi*, detainees were winning fifty-nine percent of the first thirty-four habeas cases. Since *Adahi*, they've lost ninety-two percent of the last twelve. They've lost ninety-two percent of the last twelve.

I don't know how to describe it to you, but some people believe—people like Vladeck—that it has to do with the application of this conditional probability by the district judges, or they're simply going to get a reverse if they don't adhere to it. But there is one other rule in there I'd like you to comment on that I think may have been ruled on by the D.C. Circuit while you were still on the bench, and that had to do with the *Al Bihani* [*Al Bihani v. Obama*, 2010] ruling, in which the D.C. Circuit says that “international law places no restrictions on the president's authority to order long-term detention of non-citizens, believed to be linked to terrorism.” It says that the government need only prove by a “preponderance of the evidence” what the charges against

them were. "A preponderance of the evidence." Whereas the detainees—some of them have been arguing for a clear and convincing standard.

What's interesting, in part, is that even after *Al Bihani*, Judge Randolph and Judge Silberman were advocating for an even lesser standard—just *some* evidence. Not even the preponderance of the evidence, weighing for the government. In fact, the one I quoted you earlier, by Judge Silberman, in the *Esmail* case—which I quoted at the beginning—he goes on to say, "I, like my colleagues, certainly would release a petitioner against whom the government could not muster even *some* evidence—that the government couldn't muster even some evidence." But he is inclined toward "some evidence" rule rather than even the higher preponderance of the evidence. And he goes on to say, "Of course, if it turns out, regardless of our decisions, the executive branch does not release winning petitioners because no other country will accept them and they will not be released into the United States, then the whole process leads to virtual advisory opinions. It becomes a charade, prompted by the Supreme Court's defiant, if only theoretical, assertion of judicial supremacy, sustained by posturing on the part of the Justice Department, and by the litigation exercise with the detainee bar."

Robertson: Wow.

Q: What did you say?

Robertson: I said, "Wow."

Q: I read that in part because it shows the temper of some of the justices on the court. But when he talks about the Supreme Court's "defiant, if only theoretical" assertion of judicial supremacy—last time I looked, I thought the Supreme Court *was* supreme authority.

In any event, I want to go the point where it says it could all end up a charade, with "posturing by the Justice Department to provide litigation for the detainee bar." You made a point earlier on that all these decisions have effects on the detainees down there, and some people—like I think Judge Randolph perhaps—believe that the D.C. Circuit's rulings are going to have a great deal of consequence for future circumstances in which the United States, god forbid, might find itself. But people like Vladeck, to give him credit, certainly have studied this a great deal, doubt that all this is going to have long-term impact. Is that reasonably where you stand?

Robertson: Yes. That is where I stand. Maybe I'm coming to that conclusion to make myself feel happier about the situation, because it is kind of dwindling away, out of the public's focus. It's not the issue du jour anymore. The American people forget quickly and are fickle in what they're interested in. We've already gotten the black eye in the world that we're going to get out of Guantánamo; it doesn't seem to be getting any worse. And is there going to be another situation like Guantánamo? Well, as you say, god forbid there should be—I don't see it coming anytime soon.

But to go back to the preponderance standard versus—clear and convincing evidence versus some evidence—I have to say that if you look at these proceedings in the historic light of habeas, Silberman and Randolph may have that part of it right. The origins of habeas did not require the

king to prove his case; it required the king only to show—"the king" was the prosecution—only to show that they had a viable reason for holding somebody. That's not necessarily preponderance of the evidence. Now preponderance—I'm satisfied with preponderance rather than clear and convincing. The problem with preponderance always has been that the detainee can't prove anything. The detainee has no power to subpoena, to bring on evidence, to adduce evidence. The detainee really has nothing but his own testimony—if the government has some evidence it's going to be a preponderance, because some evidence is more than no evidence.

Q: Well, before we leave today, let me ask you about the unexpected emergence, here in Washington, of Salim Hamdan, your old friend Salim Hamdan. Lo and behold, there he was in the news last October. What's that all about?

Robertson: Yep. Well, he was back in Yemen, driving a cab or whatever he was doing, but his lawyers kept going, pursuing that issue we talked about yesterday—whether the crimes he was charged with were war crimes, or crimes under the laws of war, or not—

Q: Well, why do they even care?

Robertson: —and he was charged with conspiracy and material support. Neither of those charges, it turns out, are or were recognized under the laws of war as indictable war crimes. It's an intriguing and unexpected result.

Q: Well, first of all, why would his lawyers be caring? The man was released in—I've forgotten when it was—and is back in Yemen.

Robertson: Because that's what lawyers do. They run out pop-fouls. They run out—they pursue issues. That's what they do. That's their job.

Q: Well, in any case, this has raised—General Mark [S.] Martins, I think his name is.

Robertson: Yep.

Q: He's the chief prosecutor now, at the revised—revised—revised—. You know, a New York lawyer named Joshua [L.] Dratel once described the changes in the military commission rooms as the "shifting of the deck chairs on the Titanic."

Robertson: [Laughs] I don't think that's fair, by the way. I think they've materially improved the process at Guantánamo Bay—materially. And, by the way, the *Hamdan* thing proves it, because there is now an independent review finally, up the line, from what happens at Gitmo. And it worked in the *Hamdan* case.

Q: Well, now, you thought they were improved enough in *Hamdan* to have to go to the military commission back at one time.

Robertson: They were improved enough that I had to abstain while the case went to the military commission.

Q: Okay. But in any event, there it comes up again, and here we have a D.C. Circuit opinion ruling in Hamdan's favor. Isn't that correct? Last October?

Robertson: Yep.

Q: This is the same D.C. Circuit we were talking about before? And I think the opinion was written by none other than Judge Kavanaugh.

Robertson: Yes, it was.

Q: Really. Now, have you any sense, Judge, of what the impact of their saying that Hamdan's conviction has to be thrown out—even though he's not served any time or what have you—his conviction has to be vacated because the charge of which he was finally convicted, material support of terrorism, was not a charge under the law of war at the time that he was convicted?

Robertson: At the time he was arrested or convicted, I don't know which. But yes.

Q: In other words, what he was doing when they arrested him was not a violation of the law of war—although they charged that later.

Robertson: That's right.

Q: They've got these military commissions and they're trying to get them going, again, down in Guantánamo. Many of these people are charged with charges like conspiracy and material support.

Robertson: And the general wants to drop all those charges.

Q: And the Justice Department doesn't want to.

Robertson: The Justice Department doesn't want to. Or, the Defense Department. I'm not sure which one is charging him.

Q: This just means more adventures of the—

Robertson: It's an intriguing development. I appeared with Brett Kavanaugh at a symposium a week or two after his opinion, and I was dreading—they keep calling me to go on these programs, mistaking me for an academic expert on this subject and I'm not—I always go to the talk with my heart in my mouth because I don't know these cases the way Steve Vladeck does. Or, for that matter, Brett Kavanaugh, who's a very brilliant young judge. I thought I was going to have to argue with Brett Kavanaugh about his decisions, and then he lands on this *Hamdan* case, and I said, "I have no disagreement with Kavanaugh. He's a great judge." [Laughter]

Q: Well, Mark Martins must be no one's dummy, either, because he graduated first in his class—General Martins—at West Point. He's a Rhodes Scholar. He got his Harvard Law degree with Barack Obama. He must have some idea of what he's doing.

Finally, Judge, today, let me ask you this. In 1994, you decided that you were going to stop making all this money—Wilmer, Cutler & Pickering—and you were going to become a federal judge. Was it worth it? Was the ride on that bench worth it?

Robertson: Oh, of course. You know, it's accepted in the legal profession that for a trial lawyer, there is no better job in the world than being a federal judge. It's a fabulous job. You can stay there as long as you like. You can be useful as long as you want to be. You don't have to worry about the greased pole of a partnership anymore. You don't have to worry about clients. You've got plenty to do. What you're doing—some part of it is of significant public importance. It was a great job. I am thrilled that I had a chance to do it. I think that answers your question.

Q: I think I've run out of reasons to further torture you today.

Robertson: It has not been torture, but great fun.

Q: If there's anything you want to add, now is the time. Otherwise, I'll say thank you, Judge Robertson.

Robertson: Thank you, Mr. Farber.

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