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ADMINISTRATION
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NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American
Judges

HON. PATRICIA M. WALD
U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT
An Interview

with
Nancy Morawetz ('81)
Professor of Clinical Law
New York University School of Law

February 9, 2018

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[START RECORDING]

MS. NANCY MORAWETZ: Judge Wald,
00:00:15 thank you for meeting with me today.
As you know, I am Nancy Morawetz,
professor at NYU Law School and your
former clerk. Thank you very much
for sitting for this interview for
the Institute for Judicial
Administration at NYU

JUDGE WALD: My pleasure.

MS. MORAWETZ: Let's start with your
early life in Torrington,
00:00:38 Connecticut. Can you tell us about
that?

JUDGE WALD: Sure. I was brought up
in very much of a working-class
family by a working mother. My
mother and father—this is in the
beginning of the Depression - my
mother and father separated when I
was two years old, and actually, he
disappeared. I never saw him again.
00:01:04 She moved in with her family who were
immigrants. Her mother and father
had emigrated from Ireland, and she

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00:01:18 had three or four brothers and sisters. I moved into that household, and eight of us lived in a very small house, and everybody worked except me and my grandmother. My grandmother kept house for everybody. That was the kind of working-class time, and if you recall, this was the beginning of the Depression.

00:01:50 I can remember that my family, the entire family was very, very much admiring of Roosevelt. We had a little radio and we would hear the fireside chats on the radio, and I went around from door to door with them campaigning as it were, almost, at ages four and five for the president. I guess that I thought I was born a Democrat, but other than that everybody went to work, brought their paychecks home. Eight of us lived in

00:02:20 a very small house with a couple of bedrooms. I never had a bed of my

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own, I think, until my mother's
youngest sister finally moved out and
got married.

00:02:35 MS. MORAWETZ: How did you come to go
to Connecticut College, and how was
that experience for you?

JUDGE WALD: Well, I certainly
couldn't have gone on the resources
of my own family. I went to public
high school. There was just one
school for the entire city of 30,000.
It was a good experience because it
was an immigrant city. It was a

00:02:58 factory city with five or six
factories, and everybody more or less
worked in the factories. We had
Polish, Slovak, French, Irish,

Italian. It was a great mix of kids.
What was interesting about it though,
was that you immediately saw from day
one, the class distinctions began to
come out. There weren't too many

00:03:30 classes there, but there was a very
small group of students who were the
sons and daughters, primarily of the

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people who ran the factories in the managerial class. You had to sign up for a particular course in high school. If you were going to go to college, you signed up for college preparatory. If you were a smart person, but you weren't going to be able to go to college, but you might be able to go to teachers' training or nurse training. Then you signed up there. If you were going to go into the offices, you would sign up for business, and the boys signed up for technical kinds of things. Now, everybody would assume that I—because I was considered to be reasonably smart would sign up for the teacher nurse kind of thing.

00:03:44

00:04:08

00:04:31

But my mother said to me, "No, you're going to sign up for the classical college." We could no more have afforded college, then there were not public universities around at this particular time. She said, "I don't know, but you're going to sign up."

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So, I did, which was really a very critical point, because had I not taken all the pre-college courses, I never could have applied. Turned out there was a scholarship that was available for Torrington High School students if they met the qualifications, and I did, but it was to Conn. College. It was then Connecticut College for Women. I applied to other schools like Pembroke used to be part of Brown at that time. Radcliffe used to be part of Harvard. If my memory serves me correctly, I got in, but they never had any scholarships of any dimensions. There was no question that if I got the Conn. College Scholarship that is where I would go, and I never regretted it. I had a good education.

00:05:30

MS. MORAWETZ: Then from Connecticut College you applied to law school.

How did that happen?

JUDGE WALD: Well, it was primarily a

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dynamic teacher, I think. I started out as a math major. I was really quite a practical sort of person. I
00:05:41 was very good at math. I got all the way through two years of advanced algebra, and the theory of statistics, and whatever else was in line. Then I took a government course, and I just got entranced with the theory of governments and some of the practical notions.

Marjorie Dilley¹ was a teacher, the head of the Government Department,
00:06:12 and she was a middle-aged lady, single lady, and she had written a treatise on the British policy in Kenya. This is back in the 1940s, and she taught a course on constitutional law. She used the regular case book that they then used in colleges, and I just got absolutely fascinated by it, and so I switched over and became a government

¹ Marjorie Ruth Dilley taught at Connecticut College from 1935 to 1969.

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00:06:48 major. Then when it came time to
decide what to do after college, I
was faced with a sort of a parallel
dilemma. I certainly didn't have the
money to go to law school by myself.

00:07:04 And actually, I wasn't entranced with
getting a PhD even if I could afford
it. I was never truly a deep
academic type.

So, I wasn't sure what I would do. I
knew from working at home—in
Torrington I had worked back in my
summers in the factories to earn
money, but I also when the factory
went on strike one year, I worked for

00:07:38 the union on it, and I got very
interested in the whole union
movement. I thought I would like to
go to law school in order to become a
labor lawyer, not that I ever known a
labor lawyer. I knew of a labor
lawyer because the head of the union
there would have to confer, and he
conferred with a labor lawyer who was
down in Bridgeport down there, so I

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recognized the importance of law with the labor movement, and I thought, "That's what I want to do."

00:08:20 I was extraordinarily lucky. The Pepsi-Cola company gave national fellowships at that time, five or six, and you had to apply, and say what you wanted to do, write an essay, and then of course you had to have had a good record in college, which I did have. I applied for it and I got it. Then I applied to law schools. Now, at the time that I applied, which would have been 1940, I went in '44, Harvard was not taking women, Columbia was. I didn't apply to NYU. I don't know why. I was just sort of going on, and I applied to Yale primarily because one of my other government teacher's husband taught at Yale, and she had me go down there and meet people, et cetera, et cetera.

MS. MORAWETZ: Wow. So you arrived in law school in 1944, is that right?

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JUDGE WALD: Yeah, the fall of.

MS. MORAWETZ: What was it like in law school? You must have been one of very few women.

00:09:22

JUDGE WALD: Here's what was interesting. There were more women in my class that started in '44 than they had been in many years. Yale had been taking women, but really on a token basis, one or two since 1915. People were just in the Army—men, and the Navy. The services were just being decommissioned at the end of the war. Yale was not sure the law school, that all the people that had applied—the men, would be available.

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So, they took an extra component of women that year so that they would get their requisite tuition. So as a result, we had 11 women in a class of 180, which was bigger than any class before, and really for several years afterwards until you hit the seventies when you hit the big bump with women going to law school.

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MS. MORAWETZ: That was still though
just 11 out of 180. How was that?

JUDGE WALD: It was a very good
period for me. I know I've heard all
sorts of stories about the women at

00:10:36

Harvard, later on people telling
them, "You're taking the place of a
man," et cetera. Here's an
interesting point. I later got to
know Dean Griswold in my later
career. I used to sort of kid him
about—he once asked me to talk to the
Harvard alumni group in Washington.
I said, "Of course, I'd be delighted,
but I'd like you to know that he
denied me admission."

He said, "Well, the truth is," he
said, "At the time you applied the
board of overseers or whoever made
the policy there had decided already
to take women." He said, "But we
thought we needed a two-year interval
so that people could get accommodated
to the notion of having women."

This was after I'd been out of school

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for 20 years or so. So Yale was ahead of the time. It was, I suppose, in retrospect, and maybe by today's standards, we should have felt more downtrodden than we actually did. It was a fairly hardy bunch of women. A

00:11:51 couple of them, not just in my class, there were a couple of women in the class above me, they had been Waves² and Wacs.³ I mean, they had gone through the Army and the Navy. One used to spend all her summers on Merchant Marine. She was a member of the merchant marine, she worked on ships, and a couple of us were straight out of college, et cetera.

There were no women on the faculty. I suppose the biggest difference was that all the men at

² [Women Accepted for Volunteer Emergency Service \(WAVES\) in the U.S. Navy. https://www.britannica.com/topic/WAVES-United-States-naval-organization](https://www.britannica.com/topic/WAVES-United-States-naval-organization)

³ During World War II, Congress passed a law granting the women's army auxiliary unit full military status, becoming The Women's Army Corps (WACs). <https://www.britannica.com/topic/Womens-Army-Corps>

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that time lived in those ivy-covered buildings around the Yale campus.

They're all around the square, and so they can fall out of bed in the morning, and run across the

courtyard, and get breakfast, and go in. Of course, the women should

never be allowed to—whatever the

00:12:44 right word is, with these young men.

MS. MORAWETZ: Fraternize.

JUDGE WALD: Fraternize. Well, we fraternized a lot.

00:13:02 There was this really—I use the word, advisedly, “dilapidated”, old house that Yale owned. It's since been torn down, about five blocks away.

It was next to a railroad track, because I remember I had a room in there, and that's where the women law students and some women graduate students lived. Really it was

nothing, but there was a railroad

00:13:31 that ran, a train that ran from New Haven to Montreal. It went under my bedroom window for three years.

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Every night at quarter of 12 like
clockwork. We got to know each
other. I made a couple of close
friends.

00:14:02

In fact, I shared a room with a
person who's been a lifelong friend,
became quite a well-known lawyer, and
now lives around the corner. So
we're now at the stage where we take
walks together. But the male
teachers, I don't remember their ever
making us feel, or me feel, as
something different or something
less. I do remember, and maybe we
should have been more sensitive -
probably fortunately we weren't- that
we were called on a lot and the
notion was that if there was ever-
J.W. Moore of the famous Moore's
Federal Practice⁴ used to simulate
cases in his procedure class. There
was no question that if it was a rape

⁴ Moore, James William, 1905-1994. *Moore's Federal Practice: a Treatise on the Federal Rules of Civil Procedure*. Albany, N.Y.:M. Bender 193842.

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case,

00:14:50 if you were a woman - and you tended to be the only woman in a particular [section]—sometimes there would be two, but very often you were the only woman in a particular section, you are always going to be called upon to be the rape victim.

I did find when it was time to leave law school, and look for a legal career beyond, that actually several
00:15:15 of the male professors were very helpful at least to me, and probably to other people as well. So strangely enough I recall it, and so does my friend, as being very pleasant

00:15:32 years. For one thing, you did not want for company or people to have coffee with or a date, and out of the 11 women, something like five or six ended up—including me, marrying classmates.

MS. MORAWETZ: When you did reach that next stage of applying for jobs,

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what was that like?

00:16:03 JUDGE WALD: Well, that was interesting. For one thing, the law firms who came up to interview didn't really interview women. I don't know if you really tried desperately or objected, and we weren't at the stage women are now. We didn't carry on about [it]. Okay, so, my roommate and I said, "All right, if they don't come to us, we'll go to them." It sounds strange now, but we took a train down to New York, went over to Wall Street without appointments and knocked on doors, and we both got job offers, but we did happen to be the only two women who were on the Law Review, but

00:16:54 I had done all my work in securities for the Law Review, securities law. So, one of the securities firms offered me a job, but what I found out when I got back to the law school, and we exchanged experiences with all of our friends, was that one

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00:17:21 of my male classmates also got a job offer from the same law firm. He was on the Law Review for me, but we were roughly in the same category, but he was offered \$500 more. That was a lot in those days, and he wasn't married, didn't have children, et cetera.

MS. MORAWETZ: So that was \$500 dollars, what, a month, or a year?

JUDGE WALD: A year, I know it sounds—but salaries were like in the \$4,000's.

00:17:47 MS. MORAWETZ: It was a big difference.

JUDGE WALD: This was 1950, '51, anyway. It was enough, so I resented it. Fortunately, two of the

00:18:05 professors at Law School Fred Rodell, who you may have heard of. He was sort of he this kind iconoclastic, a little bit off to the side, he wrote "Woe Unto You, Lawyers!"⁵, and

⁵ Fred Rodell, *Woe Unto You, Lawyers!* Berkley Books (1980)

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various other criticisms of the legal profession. I took his writing class. He taught a course on legal writing, which is another interesting footnote because the class had always met at Mory's,

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"from the tables down at Mory's to the place where Louis dwells,"⁶ Maury's did not admit women.

So when I applied and got in, they had to move the class from Mory's to the faculty lounge at the law school, which he absolutely did. I wondered whether some of my male colleagues resented that or not, because it had always been part of the kind of the

00:19:10

gestalt of the class to go to Mory's and have your glass of beer at the time you were having—and here now they're stuck in the faculty lounge.

But he was very helpful, and Boris

00:19:21

Bittker was a tax lawyer. I took a

⁶ "THE WHIFFENPOOF SONG" (Tod Galloway / George S. Pomeroy / Meade Minnigerode - 1909)(Based on Rudyard Kipling's poem "Gentlemen Rankers" and a piece of music written by Guy Scull in 1894)

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couple of tax courses and liked them-
had been himself a law clerk to
Jerome Frank ⁷much earlier. He was
Jerome Frank's first law clerk, and
Fred Rodell was very close to Jerome
Frank, and so they both went in and
proposed that he hire me. In those
days you didn't have anything like
the clerkship process now. I mean,
different

00:19:58 people would say why you don't look
at so-and-so. You had an interview
with the judge, and you either got it
or not, but there was nothing like
it. And the school, except on that
kind of ad-hoc process, didn't
participate in any organized way.
So, a wonder of wonders, I got the
clerkship, but Frank was an unusual
judge because he

00:20:25 had had a woman clerk before me⁸, I

⁷ Jerome N. Frank was a judge on the U.S. Court of Appeals for the Second Circuit appointed by President Franklin D. Roosevelt in 1941. <https://www.fjc.gov/history/judges/frank-jerome-new>.

⁸ Carmel "Kim" Prashker Ebb was the first female clerk to a federal appeals judge.

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think an NYU person.

MS. MORAWETZ: Well that's good to hear.

00:20:32 JUDGE WALD: But several years, I met her once, many, many, many years, but I didn't know her at the time. He had also been a New Deal Democrat and the head of several—a couple New Deal agencies. So he'd come from the Washington scene on that with that full background. He was also intensely interested in things that were not in the forefront of the legal profession at that time, like
00:21:00 the rights of criminal defendants. He was very much involved with us. He was also a man of many interests, some people thought too many, but he had been psychoanalyzed, he was very interested in the relationship between psychiatry and law, and he wrote several books, "Courts on

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Trial",⁹ and one or two others, which were very critical of the legal process in

00:21:35 that he thought it didn't look at the practicalities enough. For instance, he taught a course in fact finding at Yale Law School, because he thought facts were intensely, not just

00:21:48 interesting, intensely important, and that perhaps judges were too quick to jump into the abstractions of the law and say, oh, here we're going to have a case of political question or here we're going to have a case of due process, rather than looking to see what was actually involved, and what the consequences of what was involved were going to be on the human beings.

00:22:14 He was always reading things –it sort of it was a joke around the court, that you never knew what was going to appear in his opinions- but I can

⁹ Jerome Frank, *Courts on Trial: Myth and Reality in American Justice*. Princeton: Princeton University Press (1949)

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remember he would write footnotes on quotes from the language of the Hopi Indians or something. There was a wonderful story that went around from Boris Bittker¹⁰, who was his first law clerk, about some case

00:22:43 Frank had given [Boris] when he was a law clerk and said, "You write the first draft on this". Bori Bittker was a very precise—later became a tax lawyer- very precise legal thinker.

00:22:59 He wrote this nice little [draft] - , so then Frank took it. Bittker waited a couple days to see what he'd come back with. Well, Frank came back with a long, some might say rambling, opinion which had everything from soup to nuts on it, and said, "But don't feel too bad, Bori Bittker, we're just going to add yours on at the bottom." He was sometimes hard to

¹⁰ Boris I. Bittker was a legal scholar, author of *The Case for Black Reparations*. Boston: Beacon Press (1973). For more on Boris Bittker see YALE L.J. (2006). <https://digitalcommons.law.yale.edu/ylj/vol115/iss4/1>

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00:23:38 dissuade, dependent on Frank, and how interested he was in the case.

Sometimes if you were a law clerk, you got to have a great deal of input into it, including some draft. He always looked scrupulously carefully at the opinion as it finally emerged to make sure it accommodated everything you wanted and accorded with all his own views, but sometimes

00:24:02 the clerk got to write a fair amount of the first draft. Other times he would just take the case and move along with them, and you'd get his completed opinion for anything you

00:24:15 wanted to check out or bicker with, but he was a fascinating thing. One of his biographers said that his wife once described it as trying to hang onto the tail of a comet. Others have said he would have ten comments on everything, and nine of them, you would shake your head, and the other would be brilliant.

So I think one of the problems, or

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00:24:47 privileges of the law clerks, was to
try to ferret out the one. But it
was a great year. I enjoyed working
with him, and he did care. He cared
a great deal about the fate of the
people who were involved in his
cases, and I will tell you that that
was the year the first Rosenberg¹¹
case came up on appeal. Foley
Square¹², I can remember at various
times there

00:25:17 were protests in the square. It was
a very controversial case, and it had
been tried in the trial court by
Irving Kaufman¹³, and before we went
into the argument on the Court of

00:25:39 Appeals, Frank said to me, "If we
decide to affirm, Judge Swan" (who
was the Chief Judge who would do the

¹¹ The Rosenberg cases refer to the conviction and execution of Julius and Ethel Rosenberg. They were convicted of "Conspiracy to Commit Espionage" shortly after the start of the Korean War.

360 US 367 (1959). <https://caselaw.findlaw.com/us-supreme-court/346/273.html>

¹² Foley Square is the square in New York out front of the U.S. Court of Appeals for the Second Circuit.

¹³ Irving Kaufman was a trial judge on the Rosenberg case and later served on the United States Court of Appeals for the Second Circuit.

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assigning), he said, "I know they're going to give me the case to write because I'm Jewish." Judge Kaufman had been Jewish, the Rosenbergs were Jewish, and that's what happened.

Now, we did write the opinion, and he affirmed, but he made a separate

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plea in it to the Supreme Court to look at the sentencing. At that time the Supreme Court never reviewed

sentencing unless it was a clear violation of the sentencing statute, but he basically begged them in this particular case to scrutinize it to

see whether it really was merited, but they didn't. As you well know,

for many years afterwards it went up

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and down, and up and down, but they never changed it.

We had some other cases. I think the year that I clerked for Frank, we had four cases that went up to the

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Supreme Court. I think only one of them was reversed on, and that was a

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very interesting case called *On Lee*¹⁴,
in which there had already been
Supreme Court cases which held some
violation of premises. If you stuck–
at that time, it would be primitive,
a listening device on the wall or
something like that without the
requisite permission of the owner or
00:27:30 a warrant, it would be a violation.
So, the question in *On Lee* was, if
you send an informer into the place
of the defendant, was that the
equivalent? Of course, the Supreme
Court said no, it wasn't, but we had
said yes, it was. We also had the
case of the communist leaders that
came up that year. So there was a
lot and it was a terrific clerkship,
00:28:02 because at that time, as you well
know, Nancy, now circuit judges have
three to four law clerks. In that
year, we law clerks, we were single.
It was just one law clerk for the

¹⁴ Referring to *On Lee v. United States*, 343 U.S. 747 (1952).

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judge. Judge Frank lived in New Haven.

He had moved to New Haven to be near the law school, because he was teaching a law school class, and so we would do all our work up there, and go down one week a month to New York, listen to the arguments. He had his conferences with the other judges, and take all of our work and

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go back to New Haven. So, I got to go back to the law school. In fact, he had a regular professor's room in there, and I had another desk in the room. His secretary, because they had secretaries obviously, she didn't want to move from New York, so a secretary of his stayed in New York. He and I were in New Haven. I would type the first draft, and if you

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remember, Nancy, from your days in clerking, my typing is not of the sterling quality. It needs a translation as it were. Anyway, I would do it first, and then we'd

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00:29:28 send it to New York, and she'd do it
up nicely - whatever it was.
It was terrific. I had a great deal
of affection for him. I thought he
had his idiosyncrasies, for sure, but
his heart was in the right place. I
think he had some perception of where
the law should be going, certainly in
the area of crime it did. And I
think his notion of the
00:30:00 effects, he was very much of the
notion, you know, that a judge, you
could not avoid the impact of your
own experiences and your own
thoughts, and that's why he got into
the psychiatry. He really thought
all judges should be psychoanalyzed.
I'm not sure I ever came around to
that point of view. But anyway, his
notion being that you really should
00:30:26 be aware of your own, what they now
call implicit biases, et cetera.
Many of his thoughts were well ahead
of the time.
The one other interesting thing about

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00:30:39 that year was there were three
judges. Two had been deans of Yale
Law School, Tom Swan and Charlie
Clark, and Frank. Frank was not dean
but he taught there. He and Charles
Clark had both been New Deal Franklin
Roosevelt appointees, and they both
were sort of on the democratic
liberal democratic side before they
became

00:31:08 judges, but they just didn't get
along. This is an interesting thing
that happens on courts. The people
who get along are not always the
people who came from the same
backgrounds – but they just were like
oil and water. And in fact, the
other two law clerks that year had
been my classmates, Bill Rogers and
Ed

00:31:32 Snyder, so many times we would carry
messages back and forth. Rather than
those two judges having direct
contact, we would get together and
get the

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messages out there.

MS. MORAWETZ: So, that was an amazing year. At the end of that year where did you go next?

JUDGE WALD: Well, a very important thing happened at the end of that year. I got married to my classmate, Bob Wald, who had been clerking, or had a clerkship, not the year of the Rosenbergs, but the year after the

00:32:12

Rosenbergs, with Judge Kaufman in the District Court. So, for a while we'd been upstairs, downstairs. He got called back into [duty]—he hadn't seen active service in World War II. He'd been in the Navy, but he'd been at a training facility. He got called back in the Naval Reserve for active duty, which upset Judge Kaufman a great deal. He couldn't understand

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how the Navy had priority to call him back from a clerkship, but they did.

MS. MORAWETZ: And he didn't issue an injunction against him.

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00:32:50 JUDGE WALD: So, we got married in May, at the end of May. I stayed on to finish my clerkship. He, of course, had been back in the Navy on for sea duty since January. So I knew that I wanted to get as close to where I would see him. His ship went in and out of Norfolk. He was at the Atlantic fleet even though it was in the Korean War, and so I decided that Washington was

00:33:27 really the only place that a woman lawyer in 1951 was likely to find a job because the government was— certain agencies were hiring. The NLRB¹⁵ was known to be the place where you had a shot if you're a woman in the Navy. So I said to Judge Frank, "Would you write me a letter?" because he had old friends who had been with him in the New Deal

00:33:58 agencies who were still in Washington, and had left the

¹⁵ The National Labor Relations Board, a United States government agency that enforces United States labor law.

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government and started law firms,
actually. One was Arnold Fortas and
Porter and one was Shea Gardner,
Frank Shea.

00:34:12 He gave me letters to both. So, he
said to me, "Look, you draft the
letter and I'll sign it." And I
thought a little bit, not too long,
and I said, "Judge, I would rather if
you would just write one line that's
yours because I don't feel
comfortable writing my own letter."
He said, "Oh, well," -he tended to be
abrupt at times, not

00:34:43 brusque, but abrupt, and he goes,
"All right, all right, this I'll do."
He gave me a letter to several of
these, who are now heads of these
small firms, but they were getting a
line that said, "Dear Abe," or
whatever it was, "Dear Frank," this
is the best law clerk I ever had,
signed - - ." Needless to say [he]
opened the doors for me. It didn't
necessarily result in a deluge of job

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00:35:13 offers, but I did get an offer from
Arnold and Porter. So I went to
work. Bob's ship came in and out of
Norfolk, not too frequently, but when
it did, I went to work there. I
00:35:36 worked almost a year there. But
needless to say I did exactly what
the stereotypes of what law firms
were afraid was going to happen.
After three months of working there,
I got pregnant. I didn't tell them
until about six or seven months, and
they were pretty good about it. They
said, "Okay, go have the baby, and
you can come back, but no paid
00:36:02 leave." Needless to say, law firms
did not have policies about women
lawyers. There weren't that many. I
mean, I can't remember—I knew there
were some other women lawyers at
Brown and Washington at the time, but
none outside of the government, none
that I knew, or none that I even
remember meeting, to tell you the
truth. Even by the time I went on

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00:36:30 the Circuit, it was very unusual –
and it was still true in the year you
were a clerk– for a woman. She might
be at the counsel table, but for her
to be conducting the oral

00:36:41 argument, it was quite unusual.

MS. MORAWETZ: I think you're right
about that. Even then in '81, '82,
which is so much later.

JUDGE WALD: While I was there I
worked on the *Lattimore* case¹⁶. I
don't know if you remember, but
Arnold, Fortas, & Porter was the only
law firm of note who would represent
the loyalty client. We are in the

00:37:07 middle of the McCarthy era¹⁷, which is
one reason I didn't even apply to the
government. I did not want to work
in the government at that time. One
woman graduate from Yale Law School
that I knew had come down here and

¹⁶ *U.S. v. Lattimore*, 127 F.Supp 405 (D.C. Cir. 1955).

¹⁷ "McCarthy era" refers to a period in the late 1940s through 1950s during which many people were accused of being communist subversives and subjected to Congressional inquiries, often without substantial evidence. The inquiries were initiated by Senator Joseph McCarthy, a Republican for Wisconsin.

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00:37:36 taken a job with the NLRB, and then they cited her in loyalty, they called her up for a loyalty hearing on the basis of her participation in a branch of the A.C.L.U.¹⁸ at Yale Law School. That could easily have been me. I would have joined the A.C.L.U., but at that point, I was such a nerd because I was working on law journal stuff, and trying to keep my grades up that I just didn't do anything else. And so I didn't [apply for government], but I remember sitting with her two nights before the loyalty hearing when she was just- it just got to her, and she quit the job, went home and never worked as a lawyer again.

00:37:54 MS. MORAWETZ: Wow. That's
00:38:22 incredible.

JUDGE WALD: It was a really bad time. Arnold, Fortas, & Porter was really representing several of the

¹⁸ American Civil Liberties Union.

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people who had been called up at a higher level and Lattimore¹⁹ was one. I don't know at the time well-known, because he is the John Hopkins professor who edited a magazine on Asian policy, and they indicted him, not for being a communist. They didn't claim he was a member of the Communist Party, but that his views as he elaborated in the magazine paralleled those of the Communist Party.

MS. MORAWETZ: So you were representing him through Arnold, Fortas, & Porter?

JUDGE WALD: Yes.

MS. MORAWETZ: How interesting.

JUDGE WALD: Thurman Arnold was the lead Counsel in court. I think Abe Fortas²⁰ had represented him in

00:39:25 Congress, because Congress had these hearings too. The Attorney General

¹⁹ [Eric Pace, Owen Lattimore, Far East Scholar Accused by McCarthy, Dies at 88, The New York Times \(June 1, 1989\)](#)

²⁰ [Milton V. Freeman, Abe Fortas: A Man of Courage 91 Yale L. J. 1052 \(1982\).](#)

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at the time, and I always get them mixed up, it was either McGrath²¹ or McGranery²² because they were both sort of one in my mind. They're both Truman appointees, and they were both sort of hard core, followers of this. In fact one of them, at his hearing, McCarthy himself was one of the people

00:39:57 who was co-joined with him, had elicited from him what was practically a promise to re-indict Lattimore after the courageous judge, who had been a Republican governor

00:40:11 out in, I think it was either Minnesota or Illinois, dismissed it. He said this is First Amendment. This is- he was just putting a point of view about China policy in a magazine - - a parallelism, et cetera. So the Judge dismissed the indictment first, and it went up to

²¹ James Howard McGrath, United States Attorney General 1948-1952.

²² James P. McGranery, United States Attorney General 1952-1953.

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the circuit who uncourageously just
kind of bopped it
00:40:40 down or something, didn't
affirm it, didn't do anything.
Meanwhile, there was a switch in the
attorney general. They elicited a
promise from him in Congress that he
would re-indict Lattimore. So he re-
indicted Lattimore this time and
tried to recuse the good judge. And
the good judge refused to be recused
and wrote an even more emphatic First
00:41:06 Amendment, this time in the D.C.
Circuit, which it went up to affirm
per curiam with no opinion in its
usual courageous way. But it was
one of the few instances in that
period when mostly
00:41:19 the courts were falling down on it
when this Republican governor just
said, no, that's wrong to do this.
It's First Amendment.
MS. MORAWETZ: So when you left the
firm when you had your first child,
how long was it before you went back

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to your legal work?

00:41:44 JUDGE WALD: Well, it was about ten
and a half years, but I will say that
in the latter part of that, I began
doing a little work. I had friends,
we were lucky we traveled in legal
circles. My husband was, of course,
going through the early part of his
career and starting a law firm. But
for instance, one of our good friends
was writing a treatise on the
Robinson-Patman Act²³, and he needed
somebody to work on the footnotes.
00:42:11 So that was the kind of thing which
actually you could do if you got the
kids to bed, et cetera, or somebody
was taking a nap. But to go back a
step, cover a little territory,
00:42:26 we did have five kids in just under
seven years. So, they were very
close together. It was very hectic,
and I didn't have full-time help, or
au pairs, et cetera. We had brief

²³ A United States federal law which prohibits anticompetitive practices such as price discrimination.

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periods of babysitters, some good,
some not so good. And so, I was
pretty much caught up in that, but
toward the end of that period, I was
able to do that. I worked with
00:42:57 another friend who was doing a bar
survey on discovery practices in
D.C., and I did that, and began to
get involved in some bar work, et
cetera.

I was doing a little bit of part-time
stuff toward the end of the ten
years, but it wasn't really until my
youngest child got into kindergarten,
or nursery school, that I felt I
00:43:26 could go back. And then for several
years, I only worked part-time. I
can remember desperately leaving
offices at 2:30 to try and get home
in a taxi by 3:00, by which
00:43:39 time the kids would be coming home
from school, explaining to them if I
didn't, there was somebody there.
They weren't going to come to an
empty house, but explaining to them

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00:44:02 why I didn't...I remember at one time
one of the kids, there was a crossing
he had to go to, of course there were
crossing guards, but I wasn't there
in time on the other side, and he
wouldn't cross the street for the
crossing guard. So there are all
these little things going on, but I
will say the following:

00:44:29 my husband was in the law, and he was
intensely supportive through my
entire life, and through the entire
career. I couldn't have done
anything without his being there. We
had legal friends, so I didn't feel
entirely cut off from the profession.
I could keep up a little bit with it,
but it's a long time, ten and a half
years.

00:44:46 MS. MORAWETZ: And when you went
back, going beyond the first
commission work and so on, what job
did you take?

JUDGE WALD: Well, I have to go back
and repeat the part-time thing,

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because what got me really back into the profession wasn't a full-time job. It was Dan Freed who was over in the justice department, had been a classmate of mine, and they were social friends as well. He was working in Bobby Kennedy's Justice Department, and Bobby Kennedy wanted to look at the problems of the poor in the criminal justice system, and he defined three areas, right to counsel, right to bail, and I think it was transcripts, or something on the third one, and Dan who was in the antitrust division, I don't know how, but anyway, he got picked to head up a task force or whatever eventuated in becoming the Office of Criminal Justice, but in the beginning, it was just a couple of people pulled from other parts of the government to look into these. And so Dan got the Department to write a consultant contract for me, which was just so many hours a week,

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and that's what I was paid for, to work on the bail. So I actually, Dan and I did the bail study, which became "Bail in the United States"²⁴ and was the written part of the national conference on

00:46:29 bail and criminal justice, which we hear a lot about bail reform now. Actually, we were saying the same things, so I'm delighted that it just reinforces the notion of mine that every generation has to do everything all over again, but we did. We had a lot—the Chief Justice Warren came and spoke at the conference, and the Attorney General was 100% behind us.

00:46:56 That was sort of the way it got a little publicity in the Washington Post, got a picture of me with my five kids, I think four, because one of them was away at camp. And he was

00:47:10 mad.

Anyway, so that got me sort of back,

²⁴ Patricia M. Wald and Daniel J. Freed, *Bail in the United States* (1964) (Department of Justice and Vera Institute).

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not a full-time job, but back into talking with people where things were being done, et cetera. About a year after that, they were also beginning to talk about legal services in OEO²⁵, Sarge Shriver²⁶. They were going to have a conference on that. Jim Vorenburg²⁷ was now the head of the Office of

00:47:43 Criminal Justice, so he became a good friend afterwards. They liked the conference publication that we'd done on bail in the United States. They'd like to have a comparable one for the question of poverty, so I wrote *Law and Poverty*²⁸ in 1964. I did this one by myself.

On the same basis, I did most of the

²⁵ The Office of Economic Opportunity was the agency responsible for administering most of the programs created by President Lyndon B. Johnson's Great Society legislative agenda.

²⁶ Sargent Shriver (1915-2011) was a politician and activist. He was the first director of the Peace Corps and the brother-in-law of President John F. Kennedy.

²⁷ William Glaberson, James Vorenberg, Watergate Prosecutor's Right-Hand Man, Dies at 72, NYT (April 13, 2000), <https://www.nytimes.com/2000/04/13/us/james-vorenberg-watergate-prosecutor-s-right-hand-man-dies-at-72.html>

²⁸ Patricia Wald, *Law and Poverty, Report to the National Conference on Law and Poverty* U.S. G.P.O. (1965).

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00:48:12 writing at home. I took some trips
for field things. By this time my
kids I could leave with somebody, and
so that kept me in the swing of
things. It was very interesting—I
got very interested in the whole
thing from

00:48:29 talking to people who were out there,
running these initial storefront
legal service, the Cahns²⁹ and various
other people. That was the most
interesting part, actually, was the
field work in doing that. As a
result of that, I got appointed, a
surprise sort of to me too. There
was a 1968 national conference on
crime and criminal justice. That was

00:49:02 a national board and there were all
sorts of big wigs, Bill Rogers, and
the Attorney General, and various
other well-known people, but also
President Johnson, because D.C. was

²⁹ Jean Camper Cahn. See Glenn Fowler, *Jean Camper Cahn Is Dead at 55; Early Backer of Legal Aid to Poor*, The New York Times (Jan. 6, 1991), <https://www.nytimes.com/1991/01/06/obituaries/jean-camper-cahn-is-dead-at-55-early-backer-of-legal-aid-to-poor.html>

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called, at the time, "The Crime Capital of the World". It did have a lot of crime and it was a real problem with the police department here too.

00:49:27 And so he appointed a parallel body, which is the D.C. Crime Commission, and there were some judges on it, Judge Pine, the one who did the steel seizure case³⁰, and a judge from the

00:49:44 juvenile court, and the other Bill, the Bill Rogers who was former attorney general, and Abe Krash, who had come from Arnold Fortas & Porter, and myself, and Jack Miller was the chair who had been the head of the criminal division, in the Department of Justice. I worked on that again, as part-time, but it mostly met at night, because all these other people

00:50:14 had full-time jobs. It was fine with me. I still was home during the day.

³⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

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We did our report³¹ which was very well received, and I met a lot of people in the field, both federal and local. I enjoyed the work. It was a fairly liberal report for those days. It later called for kind of a complete overhaul of the police department, there were problems, especially in

00:50:46 D.C. at that time. The police department was almost entirely white. The people they were dealing with were largely black, et cetera, so you had a lot of racial problems, and so
00:51:03 that emerged.

But then that was 1968, and we all know what happened in 1968, we had a change, a change from Lyndon Johnson to Richard Nixon, and came the era of Law and Order, et cetera, et cetera. What happened to me, personally at that stage, was that all of my

³¹ POVERTY AND CRIMINAL JUSTICE, TASK FORCE ON THE COURTS, PRESIDENT'S COMMITTEE ON LAW AND THE ADMINISTRATION OF JUSTICE (1967), <https://www.ncjrs.gov/pdffiles1/Digitization/176NCJRS.pdf>

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friends and contacts in the Justice Department, in the local agencies, all went off to teach at

00:51:39 Yale, or they went off to work here. They went off to work there. I mean, a whole entirely new group of people came in with which I had no contact, and wished to have and they did not wish to have any contact with me particularly, I think, and so there I was. I can remember the summer of '68. We were at the beach for a week with all the kids, and I remember

00:52:04 sitting on the beach and thinking this is the end of my career. I don't know anybody, there's no place to go. I'm not mobile. I mean, I have five kids who are in various

00:52:16 stages of school, et cetera, et cetera.

I've found throughout my career that it's not an arc. It's more like a roller coaster. I mean, you can go up high and then suddenly something happens. It's out of your control,

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and you go down to the bottom, and
it's like you look around, nobody who
was with you on the first trip up on
the roller coaster to the height is
00:52:41 around anymore, and you're starting
from scratch. Just at a party or
something, a friend, or he wasn't
even a friend then, but somebody that
was some kind of contact, was running
the local legal service program, or
career site. I'd had a lot of
friends while I was doing a legal
service book, but I hadn't actually
worked. He said, "Well why don't you
00:53:17 come over and work with us?" But he
didn't offer me a full-time job.
They were going to split a job with
another woman, Margie Ewing, and she
later became a real
00:53:33 public interest type too and she had
kids. They split this job between
the two of us. At first I worked out
in the storefronts, but then they had
a sort of a test case unit, and
somebody, and it was downtown, it was

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right across from a local court above
a bail bondsman's office.

It had a great group of people.

Florence Roisman,³² who became

00:54:12

a paramount landlord-tenant lawyer
was there then, and there was a woman
who brought the consumer credit
case³³, the major one here in D.C.,
and there were just five or six
really good people. It was a real
highlight I'd like to think of in my
career. People working very hard and
somehow they got away with doing what
they were doing when no one was

00:54:42

looking kind of thing in terms of
there wasn't a great deal of
supervision about what issues were
raised or how you raise them.

A couple of things stand out in that

00:54:56

period for me, but before I get
there, very soon after I got there,

³² [Florence Roisman headed the National Housing Law Project and is now the William F. Harvey Professor of Law at Indiana University Robert H. McKinney School of Law.](#)

³³ *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965)
<https://law.justia.com/cases/federal/appellate-courts/F2/350/445/74531/>

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there was a test case about a woman's right to get a divorce in forma pauperis. This might seem strange these days, and eventually the Supreme Court settled it, but at that time no, a poor woman, if she just had to get—even if she was the victim of an abusive husband, or whatever she

00:55:34

needed, she could get a separation, but she couldn't get a divorce. Why? It was unclear except that the head of the unit, the family unit was a very devout Catholic, and did not believe in divorce.

Interestingly enough, the voluntary legal aid would not take a woman as a client for a divorce, only for a separation. So, Legal Services³⁴ was

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getting the women who wanted the divorce and there's a real reason why you can easily understand why you want a divorce in that situation, not

³⁴ D.C. Neighborhood Legal Services Project was created in 1964 with funding from the Ford Foundation.

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00:56:20 just a separation. I mean, you can't start a new life, et cetera, without a divorce. There are other legal consequences to being still in the marital state to this other person. In those days, it was before the Court Reorganization Act, we had to of course bring it in the local courts, and so they brought it, and it was dismissed, and they were denied all the way up—the local courts really were not at all sensitive to legal service cases. But you had this marvelous thing whereby you could apply for something like certiorari from the local courts if you were denied over there, petition to go over to the federal courts, which were the circuit. The circuit at that time consisted of David Bazelon, Skelly Wright, 00:57:16 Spottswood Robinson³⁵. These names

³⁵ [David L. Bazelon](#), [J. Skelly Wright](#), and [Spottswood W. Robinson](#), III were judges on the U.S. Court of Appeals for the D.C. Circuit.

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may not mean—but they were the most liberal, I'd like to say forward minded, judges.

00:57:31 We did have a couple of Nixon appointments, but they were, in my view, not hardcore conservatives. Wilkie³⁶ actually had a human kind development. He was a populist if you could get to him. McKinnon³⁷ was the father of Catherine McKinnon, the very well-known feminist. He was very conservative, but he was still a decent guy. Okay. The lawyer who had taken the case,

00:58:03 all the way up, was moving to Vermont, and something happened. They changed the schedule. He wasn't going to be able to argue the case. They asked me if I would argue it. I had never argued a case in court

³⁶ Malcolm Richard Wilkey was a judge on the U.S. Court of Appeals for the D.C. Circuit appointed by President Richard Nixon in 1970. <https://dcchs.org/judges/wilkey-malcolm-richard/?portfolioCats=5%2C4>

³⁷ George Edward MacKinnon was a judge on the U.S. Court of Appeals for the D.C. Circuit appointed by President Richard Nixon in 1969. MacKinnon served until his death in 1995. <https://dcchs.org/judges/mackinnon-george-edward/?portfolioCats=5%2C4>

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before. So, my first one, pity the poor woman client, my first case was before this erudite court in the Court of Appeals.

00:58:31 The panel I was fortunate enough, was McGowan³⁸ and Robinson³⁹, but it was also McKinnon, and everybody said to me in all the moot courts "McKinnon won't be for it," et cetera. "You'll have a

00:58:48 terrible time." The argument went fine, and about three or four months later, the court came down with the unanimous opinion saying yes, the local court couldn't do that. They - couldn't deny it and McKinnon wrote the opinion⁴⁰. So you never know. I also found that out as I went along in life. You can't put anybody in a cubby hole and be sure.

³⁸ Carl E. McGowan was a judge on the U.S. Court of Appeals for the D.C. Circuit appointed by President John F. Kennedy in 1963.

³⁹ Aubrey E. Robinson, Jr. was a judge on the U.S. Court of Appeals for the D.C. Circuit appointed by President Lyndon B. Johnson in 1996. <https://dcchs.org/judges/robinson-aubrey-e-2/>

⁴⁰ *Harris v. Harris*, 424 F.2d 806 (DC Cir. 1970)
<https://law.justia.com/cases/federal/appellate-courts/F2/424/806/385182/>

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00:59:16 I did some lots of other interesting stuff. I worked with Florence on some of the landlord tenant retaliatory eviction cases. I did a lot of guts, grubby work. I got some protective orders for women. I went and gave numerable speeches to welfare women's organizations, worked on those cases too. But I'll tell you what, the particular [reasons]

00:59:49 why I credit my legal service period of just a couple of years, as one of the most important experiences in my life. Two things: one, I actually did see what it was like to be a poor

01:00:02 person in the criminal justice system. That became useful. Strangely enough, much later, a case when I was in the court of appeals, I remember in the conference with another judge and it was a case that involved an allegation of insufficient counsel, that this counsel had not interviewed witnesses was the allegation. One of the other

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01:00:31 judges, one of the older, more conservative judges said, "well you can't expect that that lawyer is going to go down into the" – he didn't use the word ghetto, but deep into the poverty, crime ridden sections, looking for witnesses, and I thought, oh, yeah. We did that. That's exactly what we did do. We did go in pairs, but, that's exactly –

01:00:57 Another instance of experience and insights [from Legal Service] coming up at a later time, but perhaps just as important in my own career, was I was thrown into the courts from the lowest end up. I was

01:01:15 in the landlord/tenant court, but I saw how you filed the papers and how you waited, all the little tricks to try and get particular judges, you waited to see who would assign the case before you, and if you sort of knew the role anyway, and to write all the discovery motions, and to do

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01:01:43 all of that. So I learned the bread and butter stuff of lawyers, which I thought as an appellate judge was very good to know, very good to understand how the lower trial courts worked.

I think too many appellate judges come in from a high career, being the senior partner in a law firm where the associates carry your bags, et cetera. But it was very valuable—it was a lot of fun.

01:02:12 The people had a lot of spirit and gung-ho. Over the years, I think that was hard to maintain because of reduced expenditures, but this was sort of in the highlight of the

01:02:25 opening period and the courts liked this, or at least the court over here in the D.C. Circuit liked this. You felt welcome when you went in, unlike local courts. The local courts really didn't like you very much.

MS. MORAWETZ: Well, I know when I was starting law school, all of the

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cutting edge cases about housing and
consumer rights all came out of the
01:02:45 D.C. Circuit, and all from that unit
you had worked.

JUDGE WALD: That was Florence
Roisman, who's still a good friend of
mine. Florence, she was thrown out of
the D.C. City Council for being
obstreperous. These were really
people who cared a lot, who fought a
lot. It was great fun. I always
felt like a den mother. I mean, I
was 20 years older

01:03:10 than everybody. That continued
throughout much of my career before I
hit the Circuit Court. There, I was
20 years younger.

MS. MORAWETZ: From Legal Services
01:03:23 you went to the Mental Health Law
Project?⁴¹

JUDGE WALD: Well, Legal Services at
the end of my couple of years is

⁴¹ The Mental Health Law Project began as a project of the Center on Law and Social Policy, and later became an independent organization known as the Judge David L. Bazelon Center for Mental Health Law.

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beginning to have political problems here. OEO was too. There was a lot of mixture between racial tensions and OEO, there were allegations that OEO, that's the Office of Economic Opportunity⁴² - Poverty Program

01:03:46 basically, and that there were allegations that it was too much influence to run by white elite, et cetera, and there was a kind of black power movement to take over, which actually went down into the legal service offices too, and it was true. I never did any of that hiring, so I don't know what went on, but the people in my test case unit were all

01:04:18 white. They were terrific, and their hearts were in the right places, but I suppose better effort should have been made at another level to make it a more diverse unit.

01:04:30 Anyway, there was a kind of nasty

⁴² The Office of Economic Opportunity (OEO) was created in 1964 by President Lyndon B. Johnson's as part of his "war on poverty" initiative. A year later, OEO launched the Legal Services Corporation (LSC) to provide access to justice and fund legal services for low-income Americans.

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period where so many of the people, Florence and other people, including the other woman that I worked with, Margie Ewing, left, and some of the people in the offices out in the community left. And so at that point, again, that's one of those things where am I? What's next? That was the beginning of

01:04:59 the public interest movements here in Washington. That was mostly lawyers from firms who were starting up, Joe Onek,⁴³ and some of these bright, young people who came out of there, supreme court clerk - - Ben Heinemann⁴⁴. Later Joel Klein⁴⁵, et cetera. And they were getting funds from, or they were getting grants from big foundations

01:05:40 Ford I knew most about because for a period I was on the Ford board. Why I was on the Ford Board, I'm

⁴³ Joe Onek. <https://rabengroup.com/people/joe-onek/>.

⁴⁴ Benjamin W. Heineman, Jr. <https://hls.harvard.edu/faculty/directory/11221/Heineman>

⁴⁵ Joel I. Klein. <https://ourpublicservice.org/staff/joel-i-klein/>.

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sorry. I skipped something, Nancy.

I have to

01:05:51 go back. It was one of the things I wrote after the two books and bail and the poverty program. A friend of mine, Herb Steris, who I worked with on the head of the Vera Foundation, who I worked with on the bail stuff, and he'd run the bail projects up in New York, he was asked by the Ford Foundation if he would do

01:06:16 something on drugs. This was the heroin period. He wanted to look at the whole field and do an examination of what was going on. So he asked Peter Hutt and me— Peter was then a partner at Covington⁴⁶— if we would undertake it. They would give us a small staff to do it, because Peter was still a lawyer at

01:06:51 Covington—, this was the nearest I came to a full-time job, because by now my kids are in school, so I can

⁴⁶ The law firm of Covington & Burling LLP.

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work a regular workday.

01:07:03 We did sort of a national canvas of what was going on in drug education, it was published—and it was called “Dealing with Drug Abuse,”⁴⁷ and the *New York Times* book review section said it was the seminal work on drug abuse. It was a very interesting period there. I sank myself into the whole drug scene, as it were. Then we went up and gave a presentation to the board

01:07:35 of the Ford Foundation. I got to know them, and just at that time, I've always been lucky sort of in timing when opportunities arise when I'm ready to take advantage of them, because they decided they had no women on the Ford Board, and they decided it was time for them to get some women. Because I had been up there and they know me,

01:08:03 I and a woman professor from Bryn

⁴⁷ Patricia M. Wald and Peter B. Hutt, *Dealing with Drug Abuse, Report to the Ford Foundation* (Praeger Press 1972)

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Mawr became the first two women on the Ford Board.

01:08:15 Well, anyway I'm jumping ahead to where we are. We're starting public interest law. We were over in that old building, but just after I started came the 1972 election. And so I get a call from Jim Fluke, who used to work for Kennedy, and he said, would I like to work in the campaign? So I ended up heading up the - - the Sarge Shriver vice-presidential policy office,

01:08:51 which I was totally unequipped to do, totally unequipped. I'd never run anything in my life, and I certainly didn't know but there were some very smart people in that office. I wonder how, in retrospect, how they tolerated me but, you know, somehow. It was my first campaign which, if you wanted a career in politics in 1972,

01:09:18 the McGovern-Shriver campaign was not the place to begin.

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01:09:33 It was fully downhill. I mean, I liked the people fine, but I mean, you know, we didn't have a tinkerer's chance, but I do remember that just the very beginnings of Watergate were showing up. Those articles were beginning to appear. We were calling the reporters begging for some kind of information. Of course, they didn't, and shouldn't, and couldn't, but we were just right on the edge of that, whether you remember how close

01:10:00 it was. I liked the people fine, but it was kind of a down experience, so I went back to the public interest law, and the Mental Health Law Project was an offshoot from the center. Part of that reason was that I was on the Ford Board, and I thought it was right that Ford shouldn't be making these grants to

01:10:33 some [project] with one of its members—although, they did do it. They did do it for the head of Brookings Institute, but I don't

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think I was exactly the same league
as that. So they did this
01:10:49 offshoot to the mental health law,
which didn't get money from Ford, but
in the ways of NGOs they were able,
so that people made application.
If there was money, if it could be
channeled to the non-Ford thing, and
so it was kept on the straight-and-up
kind of thing. I did that for, let's
see, four years or so, but I had
three fascinating
01:11:19 cases there, and I look back on that
period and say well gee, what are the
ones I not just enjoyed the most, but
maybe that I feel made substantial
contributions. There were a lot of
little stuff, but I had three main
big cases. One of the points of
public interest law was legal
services. It was great, but it
01:11:45 couldn't really get into complex
cases that had demanded factual—big
factual foundations. You couldn't
put a lawyer there for a year, or two

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years, kind of thing.

01:12:02 The first case we brought was here in the District, it was *Mills versus Board of Education*⁴⁸. So, it was only the second case in the United States for the right to special ed. The first was in Pennsylvania⁴⁹ but it covered only the mentally retarded children. I think ours covered everybody. It covered kids who are

01:12:26 thrown out of school, denied school, suspended from school for intellectual deficiencies, or emotional, whatever it was. We went on a statutory and a constitutional basis. Julian Tepper⁵⁰, who was with then—I'm trying to remember the name. It was another NGO, he and I, and another lawyer did

⁴⁸ *Mills v. Board of Ed. Of Dist. of Columbia*, 348 F.Supp. 866 (D.C. Cir. 1972) helped lay the foundation for Congress passing Section 504 of the Rehabilitation Act of 1973 and the law now known as the Individual with Disabilities Education Act (IDEA) ensuring special needs children the right to a public education.

⁴⁹ *Pennsylvania Association of Retarded Children v. Commonwealth of Pennsylvania*, 334 F. Supp. 1257 (Pa. 1972).

⁵⁰ [Julian Tepper was the director of the National Legal Aid and Defender Association National Office.](#)

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the whole thing. It was

01:12:59 very interesting because there were people in the D.C. government that were with us even though they were on the defendant side. Polly Shackleton, I remember I think was

01:13:08 on the [city] council, or on the Board of Education, and she would tell us she was on our side, but the D.C. government as such, who controlled the finances was fighting the case. Judge Waddi was an elderly African-American judge who had been somewhat of a Civil Rights figure, so he listened carefully, and we actually went up on summary judgment

01:13:46 on it, and he ruled for us on statutory [grounds]. It never got to the constitutional grounds, but it was big. And at the time that I remember visiting one of our main plaintiffs. He was an African American teenager or something, obviously with intellectual disabilities, relatively severe, and

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if you went up to the place there
would be a sign

01:14:17 in one of the tenement houses that
said something like "beware of"--not
wild child, but something, dangerous
child, or something like that. He
had never been in school and there
was

01:14:32 about one class run by the D.C. Board
of Education for any kind.
The other two cases I'll just mention
that I did in public interest, which
I think served a useful purpose where
we moved to deinstitutionalize mental
patients on the theory that a large
number of them could be dealt with
better in

01:15:01 the community if there were community
services, which of course, there
weren't at the time, but the whole
purpose of public interest litigation
often was try to create or to be a
force in creating resources that
weren't there before. We did win

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that case⁵¹, and Ben Heineman went on to become the general counsel of GE⁵² for the rest of his life when we won

01:15:28 that case. We did create the beginnings, there was a board that the court supervised, which ensured that people were put on an outpatient basis. Then the creation of some

01:15:43 resources, not enough ever, still going on, but it went on for another ten or 15 years with the Court trying to help create these resources in the community and to stop having everybody just thrown into this one big old gray stone place out there. The third one was perhaps the most interesting. We went in as an amicus in a suit against all of the juvenile

01:16:08 facilities in the state of Texas, and that's a lot, the Texas Youth Commission.⁵³

We went down there, I spent a lot of

⁵¹ *Dixon v. Weinberger*, 405 F. Supp. 974 (DC, 1975).
<https://law.justia.com/cases/federal/district-courts/FSupp/405/974/1432716/>.

⁵² General Electric, a multinational company.

⁵³ *Morales v. Turman*, 383 F. Supp. 53 (E.D. Tex. 1974).

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time. That was a four year case out
in the boondocks, but because there
were always institutions in Texas,
which were placed in small towns
because they happened to be the
hometowns of people who are prominent
01:16:30 in the Texas legislature, but there
were some terrible things, and the
boys' camps, and kids were beaten,
and the girls were treated miserably,
and without—I won't go into detail,
01:16:46 but we did have a wonderful judge,
Judge Wayne Justice down in Texas,
known for his work on the prisons and
the mental institutions, and
everything else. We had a six week
trial in a hot courtroom on top of
the post office in Tyler, Texas, and
we won and then it took years and
years and years trying to get the
decree implemented. I'm not honestly
sure how much better
01:17:12 at a 20 year period later things are,
but for a while, they were better.
MS. MORAWETZ: So tell us about how

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you came to work in the government.

JUDGE WALD: Well Mr. Carter, Jimmy Carter, got elected to be president, and one of his campaign promises was that he would put more women both in the government in high positions, and on the courts. One

01:17:37 thing he was, was conscientious in trying to keep his campaign promises. There was a sort of mobilization among women, and among women's groups at the time,

01:17:51 informal, to try to come up with lists of candidates that were being circulated. They came up with lists for virtually every office, including general counsels. It was said that the general counsels were becoming a woman's job, but the Justice Department, I got on the list and I had an interview with Griffin Bell⁵⁴, of Georgia - - .

⁵⁴ Griffin B. Bell served as a federal judge and as U.S. Attorney General during the President Carter Administration. and<https://www.nytimes.com/2009/01/06/washington/06bell.html>

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01:20:24 It was interesting. He had already
kind of picked out who we wanted,
many of whom were former law clerks,
'cause he had been on the Fifth
Circuit, but he knew and wanted to
conscientiously follow President
Carter's mandate, so he knew he
should take some women in, but he had
all the slots pretty much filled with
people he wanted. There was this
01:17:57 one office, the Office of Legislative
Affairs—well, I should say Barbara
Babcock⁵⁵ became head of the Civil
Division. She was an old friend.
She headed the public defender office
in D.C.
01:19:09 The Office of Legislative Affairs.
People didn't think too much of it.
It had probably the smallest
contingent of people underneath it,
probably 25 or 30, something like
that. The big divisions had
hundreds, Barbara's had offices all

⁵⁵ Barbara Babcock. <https://wlh.law.stanford.edu/barbara-babcock/>.

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over the United States, and on the west coast, but I was told that that was sort of open if I wanted. It was a

01:19:42 choice between that, I was also given a choice to head up L.E.A. –that's Law Enforcement Assistance. I was warned by a friend of mine who was there. He took me aside and he said, let's go have a cup of coffee next door. This was away from his office. He went and he said, "Don't take this job. Don't take this job." I said to the

01:20:01 Attorney General, "I don't think I want to take the job," so Bell said, "Yeah, I don't blame you. I wouldn't take it either." So I got this legislative job. I wasn't sure what

01:20:11 it was. My only legislative experience was testifying for Legal Services on the Hill, which could then testify. I used to go up before [Senator] Tydings' committee to testify for Legal Services, but other

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than that, I knew nothing about this.

I was really cold turkey.

But I went in there and I liked
working with Bell very much. I liked
all the

01:20:35

other people, the other assistant
attorney generals were very, very,
nice and very respectful, and also
very helpful, and we did some
interesting things. We passed the
F.I.S.A., the Foreign Intelligence
Surveillance Act⁵⁶, but what we passed
which is probably more important for
me and maybe for Carter too, was we
passed the judgeship bill⁵⁷ which gave
him 158 new

01:21:09

judges, both in the circuit and the
district courts. It didn't delight
the Republicans and the Congress at
the time.

There were some other legislative

⁵⁶ Foreign Intelligence Surveillance Act of 1978 ("FISA" Pub.L. 95-511, 92 Stat. 1783, 50 U.S.C. ch. 36)

⁵⁷ 92 Stat. 1629 - An act to provide for the appointment of additional district and circuit judges, and for other purposes. <https://www.govinfo.gov/app/details/STATUTE-92/STATUTE-92-Pg1629>.

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01:21:20 bids, and very important for me was I learned about the legislative process. That turned out to be invaluable to me on the circuit court, which, you know was the large part, much more statutory interpretation than it is constitutional questions. I really did pick up a fair amount of this running up to the hill, et cetera.

01:21:45 I've learned a couple lessons that it's more important to cultivate the staff up there if the staff likes you, it's more important than going to dinner with a senator the night before, because it's the staff in many cases who run the nitty-gritty, and if the staff liked you, they would tell you information and they would tell you which way to go to

01:22:09 accomplish certain ends. A lot of the staff were very nice at the time. I had kind of a tense two years, because I really didn't know what I was doing for the first six months,

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01:22:21 whatsoever. I remember the one time that I defied the order that was given to me, because by this time I thought I had gotten enough sense of it. It was on the dividing- there was a big fight about dividing the Fifth Circuit⁵⁸ when they were appointing new judges, and it just didn't seem to get settled. One

01:22:50 morning at breakfast, the Attorney General would always have all of the Assistant Attorney Generals come up. If you had any problem that arose you just showed up at the breakfast and discussed it with him. We were talking about how to do this, so together and largely, Bell he came up and he wrote on the back of an envelope a particular way of doing

01:23:15 it, and so they said to me, "Now, go up on the Hill and sell this."

I went first to the Senate, and

⁵⁸ See The Fifth Circuit Court of Appeals Reorganization Act of 1980. <https://www.congress.gov/bill/96th-congress/house-bill/7665>.

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01:23:36 Eastland was still—Senator, the famed
Senator Eastland was still the head,
and Thurmond was there too, Strom
Thurmond. They said that looked okay
to them, but then I had been told to
go to a certain person in the House
on the House Judiciary Committee, and
I remembered what Allan Parker, the
chief legislative counsel to Pete
Rodino had told me once, just in
conversation, he said, "Never bypass
the chair on something." So, I'm
walking across the lawn between the
Senate and the House, and I'm
thinking *I was told to go get this
okay'd with Representative X*. Then I
said, *I know but Allan Parker told
me...* so I went to Allan Parker, and
I said, "Here it is." And so he
said, "We'll walk it into Rodino
right away." So He walked in it into
Rodino, Rodino said yes, and
01:24:30 that settled it the next day. So
much of not just the legislative
experience, but other times as a

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01:24:47 lawyer, generally comes intuition, or a sense of this is the way it should go. You're not always right, and you can make some bad mistakes that way, but you should never discount it, if you just have that feeling of no, this is not right. This is the way to go, not that way. I think you have to give yourself some credit for it.

01:25:08 Anyway, that's enough of the legislative one because then in that legislative bill that I helped pass, with the creation of two new seats on the D.C. Circuit, so Attorney General Bell, who did like me, and I liked him, he said he'd like to put me up for one. So, needless to say that had been sort of my secret longing.

MS. MORAWETZ: Tell us about the confirmation process.

JUDGE WALD: Well, it was a horror.

01:25:44 It took me by surprise. I mean, you know, I had the credentials, and

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Mikva⁵⁹ who was put up with me, turned out to be a good friend. One day I'm sitting in my office. I was
01:26:03 preparing all my papers. In fact, the reason I got to be chief judge over Mikva, although we were nominated the same day, was because I got my papers in sooner. No, it's true. Life is made up of these little things. I got my papers in fast, so they were processed ahead of his. That's how I got to be chief judge. Anyway, and somebody called me and they said, "Did you
01:26:29 hear what the Republican Policy Group put out?" I said, "No," and they said, "Well, they put up his very damning piece on you." I was trying to think. I lived this kind of boring, blameless life. I hadn't even smoked a joint. They weren't around when I was in college. I

⁵⁹ Abner Mikva was a Congressional representative of Illinois later appointed to the U.S. Court of Appeals for the D.C. Circuit by President Jimmy Carter in 1979.

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didn't even smoke.

01:26:57 It turned out that in one of the articles I had written about the rights of children, I talked about children's rights in certain circumstances to get health care, even if the parents refused. I made this one side remark, which I should never have made, but that there were even those that thought that some children were so intelligent at an early age, they should be allowed to vote. You don't realize sometimes when you say things conversationally or in an academic setting, that boom, somebody pulls them out, of all the writing—I must have written 40

01:27:16 articles by that time. They pulled this one sentence out, and they said, I'm anti-family and never mind the five kids, taking ten years off. I'm anti-family, 'cause I don't believe in the families' legitimate control over all this.

They really got a big thing going.

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They sent out editorials to my mother-in-law, who was summering some place in Arizona with her best friend. Her best friend was going, "Did you see what the 'Arizona Gazette' said about your daughter-in-law, that she's anti-family?" It was led by Gordon Humphrey, who only served one term, I think, from the Senate; but anyway, he got up there, and he called me all 'wild and whacky', were his terms. The "Evening Star," which was then the second paper, the "Post" was forming, the "Times" was forming. The "Evening Star" was against me, and couldn't take a chance on somebody like that who said these unorthodox things. I had great support from the bar. I had been a member and on the board of the D.C. Bar for several years. So this panel of Bar presidents came and testified for me. Women's groups were great, but it was an awful period to go through.

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Mikva, who they went after because of his vote on gun control told me that it was the worst period he went through including all of his congressional campaign. You can't answer yourself. You can't defend yourself. You have to depend on other people to defend you. And the stuff is so wrong out there. We had the hearing before Birch Bayh⁶⁰ finally, who was great, and fortunately in control of the Judiciary Committee at the time. The Evangelical groups were against me on this family thing and they sent up somebody from Bob Jones to testify against me.

Birch Bayh turns to him and says, "Have you ever met Mrs. Wald?" And of course he hadn't. He turned around and he called me "An instrument of the devil," and he said, "No."

⁶⁰ Birch E. Bayh, Jr., U.S. Senator for the State of Indiana from 1963-1981.
<https://www.nytimes.com/2019/03/14/obituaries/birch-bayh-dead.html>.

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Bayh said, "Well why don't you turn around and look at her, and tell me if you think she looks like an instrument of the devil?" kind of thing. Then all of my kids, I remember they called up, they said "Get every one of your children down there to the hearing. Get every one of your children down there." So, I had to pull—one was working in a fast food joint on Wisconsin Avenue. My youngest son, this was the seventies, had hair to here. He had only one suit, and it was a hot July day. It was court ordered and he was, you know, perspiring. And one was pulled back from his summer job as a summer intern at a law firm in Chicago. We had to sit him in the front row. One of the reporters came up to the youngest son who was then in high school, and said, "They called your mother an instrument of the devil. What do you think about that?"

01:31:10

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He said, "Well, she burns the lamb chops, but other than that, she's okay." I just have to give you two quick stories, I'm sorry, about the senatorial process. Senator Hatch, whom I worked with, friendly, calls me into his office. This is during that debate on the floor. The debate on the floor was

01:31:40 scary because they called it suddenly before Byrd, who is then the Whip⁶¹, and key people were not there. Teddy Kennedy was up at the funeral of the Boston Pops conductor.

01:31:57 All my key people, Senator Sarbanes was leading an intelligence committee kind of thing. So when I first got to the floor, there were nobody but the people speaking against me, Laxalt, and some various other people, Strom Thurmond. Eventually they came in, and it was like the

⁶¹ The major political parties in the Senate each elect a "whip", who assist floor leaders as spokesman and organizers of their respective parties.
https://www.senate.gov/reference/glossary_term/whips.htm

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part in a movie when the white coats finally get there. But Senator Hatch had said

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before to me, "If there's anything I can do to help you..." this was before the assault started. That day he calls me and he said, "I see you and your family,"- my husband, you know, was in the gallery there in the public- he said, "I want you to sit in my part of the-over in my [area]." Then he said, "I know you're fine. I don't have any doubts, but it's the U.N. Year of the Child." He said, "I'm getting a lot of mail." (This is a great women's proponent), and he said to me, "If it's close. I'll vote

01:33:10

for you." But if it's not close, I'll either abstain or I'll vote against you." He did vote against me, 'cause it was ten votes difference. Senator Simpson, on the other hand, Alan Simpson, a Republican too, I had a lovely chat with him in the office

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when you go around, and he said things like, "Well, the one thing you learn is, don't ever write anything down." Of course, these days, it's no good, but advice then, they'll never have a transcript of anything.

So when the judiciary committee voted, I saw the vote, it had him voting against me, and I thought well you know, that's Washington. What do you expect? So, I get a call at home personally

01:33:59

from him, and he said, "You know, I wasn't there for the meeting. My legislative assistant assumed I would vote against you, cast a vote against you." He said, "That's wrong.

I've called the committee and changed it. I've called the 'Washington Post' and explained to them," which I thought just goes to show—they're both Republicans. You just can never predict people. Okay, so it went through, and I took a week's vacation with my husband. I reported for

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work.

MS. MORAWETZ: What was it like to be
01:34:31 the first woman judge?

JUDGE WALD: It wasn't bad. It was
just for a year, Ruth Ginsburg came
on the following year. Everybody was
very nice to me. The one funny part
was old Judge Tam who was a gentleman
to the ultimate—in the robing room
where you get ready to go, and there
were two bathrooms. He insisted that
one be reserved exclusively for me.
So you

01:35:00 would have six or seven other judges
waiting. I said it really wasn't
necessary. I'd grown up, and was
currently occupying a multi-sex kind
of thing. But no, they were

01:35:16 extremely nice. I don't remember
anybody putting me down or making me
feel put down. They went out of
their way, I think, to be good. And
then within there were a lot of
changes. Mikva came a couple of
months after me, then Harry Edwards

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came, I don't know whether it was within a year, but then Ruth came by the end of that year, so there were really four of us who came within a year.

01:35:39

MS. MORAWETZ: How did the D.C. Circuit change over the years that you were there?

JUDGE WALD: Well, I inherited the last days of a kind of mini Warren court. It was a vast majority of judges, you know, the Bazelon, Wright, liberal, civil rights oriented, type.

01:36:07

Then within one year of going on the court, of course, the election came, with Nixon, and then within that decade, he appointed—the names mean something - Bob Bork, Nino Scalia, Ken Starr,

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Larry Silberman, Jim Buckley, Steve Williams, Sentelle, Henderson, Randolph. These are all real Republicans.

MS. MORAWETZ: These were Reagan's

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appointments?

JUDGE WALD: Yes, Reagan's and
Bush's at the end, and [Clarence]
Thomas was too. The whole
philosophical—if I can use that word,
orientation of the Court changed. I
came onto a court on

01:36:57 which I was definitely on majority
sentiment, and then slowly it changed
a lot. I'd say that the decade of
the eighties was a period in which
the Court was changing and moving
very much in the same direction in
which points of view were more
decisively different than they were.
And then later on in the early
nineties came the early

01:37:22 Clinton appointments,—and then that
continued, a couple of them continued
until I left in 1999.

When the Court changes—every time a
new judge comes

01:37:40 on- someone else has said this, the
Court changes because people adjust
to the dynamics. The dynamics were

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moving so fast, and they were moving
in one direction all through the
eighties so the fights were fights,
the differences were very defined,
and relationships sometimes got
strained. We had more en bancs in
the eighties, I think, than any court
01:38:06 in the country, and certainly since
before or later on. "En banc" meaning
that when a panel makes a decision,
the whole court can vote to hear it
again, and they do and sometimes
change it. And also we had issues—
think of the issues we had in that
period. We had the big regulatory
issues too, but we'll talk a little
bit later on about regulatory
[issues], but apart from
01:38:34 those, we had the handful of
notoriety-kind of cases. We had the
Iran Contra case⁶². We had the "Don't

⁶² *United States of America v. Oliver L. North*, 910 F.2d 843
(D.C. Cir. 1990).
[https://law.justia.com/cases/federal/appellate-
courts/F2/910/843/463467/](https://law.justia.com/cases/federal/appellate-courts/F2/910/843/463467/)

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ask, don't tell"⁶³ type, or the
homosexual, the gay cases. Later on,
01:38:56 we had the spinoff in the nineties
and the Whitewater⁶⁴, but and we also
had—we were trying to evolve along
with the Supreme Court about the
proper judicial formula for hearings,
regulatory cases too. So, there was
just a lot going on.

MS. MORAWETZ: Many of the cases you
would have worked on would involve
statutory issues and how to read what
01:39:26 Congress wanted. How did you
approach those cases?

JUDGE WALD: Generally, the approach
I took toward it was: okay, we have
three branches of government, the
executive, the legislature, the
courts. The legislature is given the
job of making the laws. The

⁶³ "Don't ask, don't tell" was a U.S. policy (2003-2011), instituted by the Clinton Administration regarding gay, bisexual and lesbians serving in the military. The policy was challenged as unconstitutional in the federal courts and repealed by the Obama Administration.

⁶⁴ Whitewater refers to a government investigation into a real property investment of President Bill Clinton and his wife Hillary.

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executive has to carry out the laws,
this is constitutional, and then the
court

01:39:57

gets to interpret any differences.
So it seemed to me that if you looked
a case, at complex cases, and these
were complex cases, I stress this
because the clerks used to call it
the trains

01:40:13

and planes circuit. But you remember
the volumes in the records would fill
up an entire bookcase. They were
about energy grids and they were
about methods for cleaning coal, for
clean air cases, or they were about—I
remember one case was about how a dam
worked, and I didn't know how a dam
works.

01:40:39

I didn't find the briefs to be at all
useful in that—there were these
arguments. I went to all the law
reviews looking for it and Yale,
Harvard, et cetera, were too
highfalutin to write books about it.
Somebody blissfully wrote an article

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in the *Rocky Mountain Law Review* all about dams. I took that back, and I was able to understand how the dam worked, and therefore to

01:41:03

apply the requisite law. It was never hard to figure out what law to apply. It was, in my view, finding out the facts of the case and what the actual on the ground interplay or transaction was that you were being asked to decide was that in line with the statute, or was not.

01:41:19

Actually, I ended up pretty close in my own view to the originally articulated Chevron⁶⁵ formula, namely, look, if Congress has made it clear what it wants, it doesn't matter whether you want it or not. That's a hard lesson for a judge to learn, and

01:41:48

I learned it the hard way. I had one case reversed early, which when I look back they were right to reverse

⁶⁵ [*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 \(1984.\)](#)

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me, even though it was a unanimous panel, because the law had said the Secretary of Interior had been using only one formula for giving out leases for offshore mining, and it was some kind of a cash bonus theory on the front-end, and Congress said we want him to experiment in the next five years with here are seven other ways—the notion was all being heavy loaded on one, and it was into the second year and he hadn't done any regulations on three or four of the seven, and he hadn't used several of them. The panel and I said statutes were being violated⁶⁶, but actually, Congress had not been specific enough. They said they wanted him to experiment. He did experiment with a few of the kind of lesser ones, didn't go near any of the main ones, and it was still two and a half years

⁶⁶ Energy Action Educ. Found. v. Andrus, 654 F.2d 735, 736 (D.C. Cir. 1980), rev'd sub nom. Watt v. Energy Action Educ. Found., 454 U.S. 151, 102 S. Ct. 205, 70 L. Ed. 2d 309 (1981)

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01:42:58 and he wasn't going to have time to
experiment with them, but it wasn't
quite clear enough for Congress to
have said it kind of thing.
So I think one of the first lessons
you learn, okay, is if they didn't
say it clearly, then you get into the
area of was it reasonable for the
agency? I always tended to, not
defer to the agencies, but think
unless something
01:43:25 hit me, is there arbitrary in their
actions, that as opposed to the court
making the interpretation of what was
reasonable in the statute versus the
agency, I would certainly like to see
01:43:37 the agency get the first cut on it,
because look, they're working on it
every day, and unless they're really
going out of their way to do
something bad, the Court comes to
this stuff with, at most, a couple of
days looking at ten volumes, which
they don't. As you well know, the
law clerks might look at them, but we

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01:43:59 don't look at all the ten volumes,
and for us to decide what was
reasonable in those circumstances.
I guess I thought the Supreme Court
sort of hit it right in the *Chevron*
case. Not to say it didn't overrule
the agencies on some instances where
they really—just there was one case
where the F.E.R.C., Federal Energy
Regulatory Commission, was told to—
under the statute, it did the
01:44:27 rate methodology on oil gas pipeline
rates- it was told to do “just and
reasonable” rates⁶⁷. This is during
the Reagan years, I think, and the
Reagan administration came in, and so
the
01:44:42 head said, “Our philosophy is we're
not going to touch the rates unless
it's an apparent exercise of
predatory pricing or something.

⁶⁷ *Farmers Union Central Exchange, Inc. v. Federal Energy Regulatory Commission, et al.*, 734 F.2d 1486; 236 U.S. App. D.C. 203, 59.
<https://www.courtlistener.com/opinion/436086/farmers-union-central-exchange-inc-v-federal-energy-regulatory/>.

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We'll let the market take care of the rest. We won't attempt to go below. We'll just look to see if there's a real outlier." And we said, "No, no, no. Sorry, Congress said you are supposed to pass on rates as to whether they

01:45:16 are just and reasonable, and it's not good enough just to say the market will take anything the market will do unless it's a steal." Baxter was then the Attorney General. Once I saw him at a party, I said, "You were right." I enjoyed the statutory cases. The law clerks joke sometimes. They said they were going to buy me ten shares of stock

01:45:41 in oil and gas stock for Christmas, so I'd be recused from all of the F.E.R.C. cases.

MS. MORAWETZ: What about legislative history? Did you find legislative history helpful?

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JUDGE WALD: I was a great proponent of legislative, and the great fight.

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Scalia and I had several bouts on legislative history—and I wrote two articles on legislative history⁶⁸. I thought this, I thought they are a co-equal branch, and the way they do their business is they have public debates, and they have

01:46:15 legislative hearings, and that's the way they compile their business and we all know that Congress—I mean, common sense tells you, Congress, when they pass a massive thing, say the tax statute that they've just passed,⁶⁹ the notion that that's going to be self-enforcing that there aren't going to be hundreds and hundreds and hundreds of

01:46:38 questions that have to be answered down the line... I cannot see why you would close your eyes to—I won't say

⁶⁸ Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. R. 195 (1983)

Patricia M. Wald, *The Sizzling Sleep: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the Supreme Court*, 39 Am. U. L. Rev. 277 (1990)

⁶⁹ The Tax Cut and Jobs Act of 2017, **Pub.L.** 115-97.

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any snippet that you find. That's always the argument. You

01:46:51 can't do a snippet, but any kind of consistent pattern you see in the legislative history, it should be a help for you in trying to find out what they did mean rather, than the courts are leaning down and saying, "no, no, no. We don't want to know that. We only want to know what you put finally in the final legislative language. And then if there is any

01:47:15 doubt about that, we'll decide".

MS. MORAWETZ: What do you think of courts turning to dictionaries to decide what the legislation means?

JUDGE WALD: You can turn to it. It could be a help in some cases, but not certainly as an exclusive, because we all know the dictionary usually has 15 meanings for any term of art that's likely to come up

01:47:39 legislatively. I think that closing doors on useful information, I think is not a good thing. I'm a little bit

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01:47:52 apprehensive about what this Court is going to do in the legislative area whether they're—I know that there is some sentiment up there for cutting back on just generally on the Chevron attitude, but I did find it very rewarding, the statutory cases, because after all – the repercussions of those statutory interpretations, in clean air and health conditions, et cetera, are so much greater than some

01:48:19 of our notorious cases that they affect so many more people.

MS. MORAWETZ: Can you describe any other cases that stand out?

JUDGE WALD: I'll just do one which stands out. We did have notorious, if that's the right word, cases that came out of the headlines. One was on a demonstration, the period of demonstrating against

01:48:43 apartheid, simultaneous demonstrations against the Soviet embassy because they wouldn't let the

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Jews emigrate to Israel, et cetera.

01:48:55 I got one of these cases, and I had been on the panel with Judge Bork and a visiting judge. The D.C. regulation said, "If you're for the embassy, if you're on the side of the embassy you can demonstrate within a certain-closer in. Period. If you're against the embassy your border lines have to be farther away." I said, "You know I think that opinion is oriented against the free speech."
Judge

01:49:26 Bork said no, it could be upheld under the Vienna⁷⁰ respect for embassies, and the visiting judge went along with him. So, I wrote a very relatively strong dissent, First Amendment dissent.⁷¹ Okay. So the case goes up to the Supreme Court.⁷² In the meantime,

⁷⁰ Vienna Convention Law Treaties.
<https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>

⁷¹ *Finzer v. Barry*, 798 F. 2d 1450 (D.C. Cir. 1986), rev'd sub. nom., <https://casetext.com/case/finzer-v-barry>.

⁷² *Boos v. Barry*. 485 U.S. 312 (1988).
<https://www.oyez.org/cases/1987/86-803>

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Judge Scalia who hadn't been on the panel, has been elevated to the Supreme Court. And Judge Scalia ends up writing the opinion in the Supreme Court in my favor of the dissent, 'cause he happens to be strong on the First Amendment. So, that was a sort of a fun case time, another example of you never predict anything. Another case I found—two other cases, and that's quick, I did a big dissent in the Iran Contra⁷³ case, in which I still think is right about the Fifth Amendment, and the extent of immunity. And lastly, the case which you saw discussed by both sides of the current dispute, the Espy case⁷⁴ about what the contours of executive privilege are in the mid-nineties happens to be the first case that came up in the circuit, including

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⁷³ *United States v. North*, 910 F.2d 843, 913 (D.C. Cir. 1990)(Wald, dissenting), withdrawn and superceded, 920 F.2d 940 (D.C. Cir. 1990)

⁷⁴ *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997).

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ours, after the Nixon tapes case⁷⁵,
and it dealt with a lot more of the
minutiae of who the executive
privilege extends to, what its
contours are, et cetera. So it was
sort

01:50:53 of fun for me to watch T.V., because
I heard both sides saying, "Well, we
got to watch out for the Espy cases,"
and the other side said, "Oh, but the
Espy case—" Nobody asked me what I
01:51:05 thought of it.

MS. MORAWETZ: So, from '86 to '91,
you served as Chief Judge and as one
of the very first women chief judges
anywhere in the country. What was
that experience like?

JUDGE WALD: It was a good
experience. I wanted to do it
because it would have been, except
for this token appearance of Florence

01:51:24 Allen⁷⁶ back in the Roosevelt days,

⁷⁵ *United States v. Nixon*, 418 US 683 (1974).
<https://www.oyez.org/cases/1973/73-1766>

⁷⁶ Florence E. Allen, of the Supreme Court of Ohio, was the
first woman appointed to a federal appeals court judgeship.

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and Judge Neils who died in a tragic accident too soon, I thought it was good for women in the judiciary to have, because although I don't know the Chief Judge doesn't get any votes or anything like that, still you deal with anything from parking spaces to grievances that arise from the bar, about the court, and some things

01:51:56

which never leave your office, and you're part of the judicial conference which is with all the other chief judges. It was something which lots of judge—some judges don't

01:52:11

even want it, some let it pass over them, because it's extra work.

I kept my regular caseload, so it's on top of everything else, but—I got a new cafeteria. I didn't get it, but I had a great circuit executive and because I was the Chief Judge, I had a lot to say about the hiring of the heads of the other divisions, so

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for the first time we

01:52:33

had a woman circuit executive. At one point we had a woman clerk, and we had women in charge of some of the other divisions. When I first came on the court, it was sort of like a queen—the opposite of a queen bee kind of thing. I mean, there were a lot of women working in the offices, but if you looked, almost every office was headed by a man. I think

01:52:58

we kind of pushed that one along a little bit.

MS. MORAWETZ: How did you approach working with law clerks?

01:53:06

JUDGE WALD: Well, I had been one myself, so I tried to recall a little bit the good parts and the bad parts on that, but I also worked—I also probably acted selfishly in the main. My main job, I thought, was to get these decisions out in the best possible way. So, you have probably a better vantage point on how it came through the other end, but my end was

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not this should be a wonderful
education

01:52:43

for these young folks. Rather, it
was let's see whether we can get the
very best out of, the most-est and
the best-est out of these law clerks,
and by and large that worked. I'd
say it worked. I had 70 law clerks
over the period of 20 years.

Incidentally, half of them were
women, roughly half. I did make it a
point to get as many fairly women. I
tried to get

01:54:10

some from the non-fancy elite law
schools, so I had several over the
period. I tried as much to get
diversity. It wasn't always easy
because some of the best

01:54:23

candidates that came to us in
diversity went to other judges who
were better "feeders" than I was to
the Supreme Court. We did get some
eventually, and the law clerks. I
thought it was like a hard job that
you had to do on a taskforce basis

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kind of thing. I wasn't, I think,
probably very tender perhaps, not
sensitive enough when I took their
01:54:55 draft.

You're a better speaker on this than
I am. I did feel, unlike some
judges, that I didn't mind letting
the clerks have, as you well know, a
chance to draft things. I know
Posner⁷⁷ has had a lot to say about
this, criticizing myself, even Ruth
Ginsberg, and other people because we
let the law clerks [draft]—but I
think by and

01:55:22 large when you're doing some of these
massive cases which you know about,
maybe Henry Friendly⁷⁸ could write
every word himself, but I certainly
was not capable of that. And my own
judge

01:55:33 that I clerked for had let you do

⁷⁷ Richard Posner was a judge on the U.S. Court of Appeals for the Seventh Circuit from 1981-2017.

⁷⁸ Henry J. Friendly was a judge on the U.S. Court of Appeals for the Second Circuit appointed in 1959 by President Eisenhower.

<https://www.nytimes.com/1986/03/12/obituaries/henry-j-friendly-federal-judge-in-court-of-appeals-is-dead-at-82.html>

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drafts, and as you well know a draft starts out one way. It's very, very different if it's an important case, very, very different when it comes out the other end, and it is a joint work product. But I valued the law clerks tremendously. I mean, the way the Circuit Court operates, at least when I was there, it couldn't exist without them. Anybody that plays around with thinking the judge goes in in the morning, writes all of these opinions, gives them to the clerk to check the footnotes and goes home, I think is silly or inefficient in a sense.

01:56:02

I enjoyed them tremendously. I saw a great range of them, and I've been very proud of them, including you,

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over the years, many, many have gone into academia and public interest, or are senior partners in major law firms, two are themselves judges on federal courts. All in

01:56:39

all it has been one of the most

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pleasant experiences. I don't know if it was for them at the time, but after a fact. And I think, I think the clerking thing is very, very valuable, and I especially think it's valuable for somebody who is going—you don't know you're going to become a judge, but anybody who is a judge, it's a valuable part of the career to know how the court works on that. As I go back and reread some old opinions, I wrote 835 opinions over the course of my 20 years, a lot of dissents, a lot of them were dissents, but still, as I look back at them and re-read them I think, "Did I write that?" They are so infinitely detailed. You are in the moment, as you well know. You're in a case,

01:57:06

01:57:34

you're in the moment, you know every— but the little details are so minute, and especially if as I did, and I think the clerks, most of them came to feel it's the facts that are so

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01:57:47 important, and that the facts almost
are when you get them - almost tell
you the way the law's got to go kind
of thing. It takes one person, and I
don't think, at least can't turn out
as we did 50, 60, 70 of these cases a
year. It's just not possible. So, I
thought they were invaluable, but
they were also a lot of fun to have
around.

01:58:11 MS. MORAWETZ: I recall you would say
that in chambers we could talk about
anything, whereas when you went to a
party you have to be very careful

JUDGE WALD: Yeah, that's right.
That's right. That's good. There
were no holds barred on that.

MS. MORAWETZ: When you look back on
the way you approach judging, how do
you think your life experiences, both
01:58:31 personal and professional affected

the way you approach the work?

JUDGE WALD: Well, I do think that
almost everything I did and as you
can tell from my retelling, some of

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01:58:45 it just happened. I mean, I didn't—
sit down and make a plan. Some of it
fell into place, but some of it I
didn't even know was there at the
time, but so much contributed to it.
I mean, I think my growing up gave me
a sensitivity, I'd like to think, to
problems of ordinary people, I mean,
working in the factory as I did
several summers, working with the
01:59:10 union, understanding the aspirations
and the problems of the laboring
class, being in a family where at one
point in the depression we had eight
people trying to live on one day
laborer's paycheck.
So my early years, I think, taught me
the problems, hopes, aspirations of
ordinary working class people in
factories and labor unions, what they
01:59:37 were aspiring to, and the limitations
on their choices. It's so
ridiculous, some of the rhetoric that
I came across in the court filings,
as well as otherwise, about

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01:59:49 situations which I had some semblance
of experience with, but I wasn't sure
the people who wrote the briefs did.
And so, that taught me also, I think
it taught me emotionally to let my
emotions have some—they can't tell
you how to decide a case, and they
shouldn't, but I don't think you
should ever divorce yourself from the
emotional reaction you have when you
02:00:17 read all the briefs and the record of
a case if something sort of tells you
"Geez, you know, that's not right,"
that doesn't mean you can make a
right. Maybe Congress has already
taken that choice away from you, but
it's something to think about, and I
think along the way later on,
certainly the stint in Congress
helped with legislative history,
because I sort
02:00:44 of knew all the ins and outs and
intricacies of legislative history.
Again, I think the public interest
work brought me into contact with

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02:01:02 things like kids who got lost early
in the game, were thrown into the
public system. Then I think that
just working on the, on the court
itself, I think each case kind of
gives you a new insight sort of into
another facet of a problem—say you're
working with the F.E.R.C. statute.
It's a complicated statute,
MS. MORAWETZ: Federal
JUDGE WALD: Energy Regulatory. You
see one case, you'll learn everything
about the grid in
02:01:33 California. Another case you learn
about the light out, or the when the
lights went out on the east coast
kind of thing. So, gradually you get
this accumulation of knowledge about
a statute, and the way it's been
interpreted in different
administrations, and the
possibilities, et cetera and you kind
of get this intellectual capital.
02:01:56 I might also say that I did a lot of
work over the years in and out with

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philanthropic organizations. I was on
the board of the Ford Foundation.

Later on I was on the

02:02:05

board of one of the Soros

Foundations. I found that very

useful to some degree, because you

watched how if you had a big pot of

money, and they had some big pots of

money, the strategies or the

perimeters in which you made choices

on how to use that money. I found

that somewhat useful back and forth,

you know, to see how money that goes

02:02:37

into a certain kind of thing gets

used on the ground and what kind of

legal problems it raises, and

sometimes that can be buckled back,

and you can try to avoid those in the

future. Sometimes good intentions

make messes, and it's good to know

about them.

MS. MORAWETZ: What did you think of

mixing the role of being on the court

02:03:02

and also being involved in some

professional organizations?

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JUDGE WALD: You know the federal judges are limited. You can't get into anything politically,

02:03:12 so I was able to do, I think, a fair amount of that legitimately. The American Bar Association is one good outlet, because they have so many facets you can do. I was on the CEELI⁷⁹ Board and took a lot of trips abroad. I maybe took dozens of trips in Eastern Europe leading to my later going on the International Court, but that was fascinating all over –and

02:03:35 also, I think helpful to some degree bringing our experience legislatively, constitutionally over that. So, that was great.

The A.L.I.⁸⁰, I was vice president of the A.L.I. for a decade or so with Charlie Wright⁸¹ who was one of our great heroes in law, and the area you learned about –you went through

⁷⁹ Central and Eastern Europe Law Initiative.

⁸⁰ American Law Institute.

⁸¹ Charles Alan Wright (1927-2000) was a constitutional scholar and co-author of the 54-volume treatise, *Federal Practice and Procedure*.

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takes—the A.L.I. - - many years. I
02:04:03 spent ten years working fairly
closely with the drafters. I was an
advisor on a total revamp of the
modern model penal code on
sentencing, and just for ten years.
You really—my
02:04:18 God, if I went back on the court,
that happened to be mostly after I
left the court, if I went back on the
court, I think I would have brought
an enormous amount of new
information, new insights into that.
Those were, I think, the two most
useful outlets. And again, as I say,
you're fairly limited in what you
can't join, the A.C.L.U., or that
kind of thing.
02:04:42 MS. MORAWETZ: Tell us about your
decision to leave the court in
showing the international—
JUDGE WALD: Well, I had been on the
court 20 years. I don't know. It
may have been midlife crisis,
although I was well past midlife at

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the time, but as I just said, I'd
been all through the nineties after
the Soviet Union breakup and
02:05:03 the democracies were attempting to
become democracies in the Eastern
European countries. I've been to
most of those countries several
times, so, I really did know the
02:05:14 area. I got very interested in—there
was some basic kind of justice thing
that kind of got to me. That there
were these awful things that
happened. I was back in Bosnia, right
after the Dayton Accords⁸², and these
terrible things that happened and the
countries could not take any account
of them criminally, because either it
was
02:05:41 countries' governments, which had
perpetrated them, and they didn't
have the new governments in place
yet, or they just didn't have the

⁸² The Dayton Accords refers to the 1995 peace agreement signed in Dayton, Ohio by the presidents of Bosnia, Croatia and Serbia outlining a framework for ending the war in Bosnia. <https://www.britannica.com/event/Dayton-Accords>.

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facilities to do the investigating,
or they didn't want to do these so-
called homeland heroes kind of thing.
And yet the atrocities were so
terrible that the notion that there
02:06:04 would be no place, no place where,
even the worst ones could be tried,
and tried fairly. So, when they set
up the international criminal
tribunal for the former
02:06:16 Yugoslavia, I was initially asked if
I would be interested way back in
'93, and I wasn't ready to leave
then, but then again, Gabby
McDonald⁸³, who was the first American
judge over there, was leaving in '99.
And so, I got asked again. This time
I thought well, maybe it's the
adventurous soul in me or something,
but I'm going to do it. So, I did
02:06:46 it. I knew I'd been through a lot of
those countries. I didn't know much

⁸³ Gabrielle Kirk McDonald.
<https://www.thehistorymakers.org/biography/honorable-gabrielle-kirk-mcdonald>

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international law. That turned out to be not such a disadvantage, but I will tell you, arriving over there, and of course, you're the only American judge arriving over there, you're dealing with a different kind of law because it's combination of criminal, of Anglo American law and civil law, and you're dealing with different languages.

02:07:09

I was in the trial bench, which was, I thought—there was an opening in the appellate bench, which it would seem logical that I should go there, but of course logic never meets the day, and it turned out there were all kinds of little friendships and stuff going on, so that some other judge who came two months later got appointed to the appellate. I got put in the so-called French tribunal, which turned out to be great, because I think the

02:07:23

real experience was seeing the witnesses, seeing the facts, being at

02:07:43

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the trial level. I got to sit on several appellate court cases by designation, so I got a full scale experience, but actually– we had translators because you had prosecutors who could speak either French or English.

02:08:10 Then you had defense counsel who could speak French or English, didn't mean that the two French had to be paired either. The witnesses all talked Serbo-Croat dialect. It wasn't like Perry Mason, because you

02:08:23 had cross-examination. Somebody asks a question in French, has to be translated into Serbo-Croat for the witness to answer. Then it has to be translated back. It's not exactly a parry like you see on TV about cross-examination, but it was a very emotional experience. I sat on this Srebrenica Massacre of 8,000 young boys in a single week, and women

02:08:49 would get on the stand and say I lost my father, I lost my husband, I lost

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my sons, all in that one week, and not in the service of their country, just massacred. It was pretty raw stuff, but it was a very interesting experience.

I was not sorry I did it, and I think, even though international courts, they're on a hard time now.

02:09:16 I mean, our court had a pretty good record, actually, finished 162 cases and it took a long time to do it, but these are big cases. Bodies had been excavated from mass graves, witnesses

02:09:29 had to be tracked down, many of them were afraid to testify because several times perpetrators were still back in their villages, and they had to go back there. It was a completely different atmosphere.

Then, for instance, I sat on a—you sit on a panel of three in the trial court.

02:09:54 One judge that came from a domestic relations court in Portugal and one had been a kind of a professor in

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Egypt. I mean, we really didn't have a lot in common, but it was an amazing feat in some sense, because somehow we could get together and talk. Everybody spoke English, and I spoke a little French, but mostly we spoke in English, you could get it. All of us had one legal assistant or one law clerk, so

02:10:28 it was—and The Hague is a great place to work. I mean, Netherlands, if I had to move someplace, I think I would move there. The trains go on time, they don't collect the fares

02:10:40 half the time. Every village you'd go to is great. It's got history. It's got Hans Holbein⁸⁴. It's got some great things to see.

I felt the exercise was useful. I know the international courts have come in for a lot of criticism. I would have liked to see us join—I recognize problems, but I would have

⁸⁴ Hans Hoblein was a Renaissance-era artist.

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02:11:05 liked to see us join the I.C.C.⁸⁵., and
in fact, I worked with the American
Society of International Law on a
project, looking for a more
constructive approach in our attitude
toward the court, but it was a
completely different experience, and
they don't understand why we do what
we do any more than we understand
what they do.

02:10:29 MS. MORAWETZ: What words would you
like to share to future generations
about the judiciary?

02:11:40 JUDGE WALD: Future generations, it
would be primarily how important our
courts are and how important they
are. The executive and the
legislature are the action branches,
and they have to be political as you
know from current things going on
that they can go way, way, way far in
being political and how they run it,
and we have to keep our courts—this

⁸⁵ International Criminal Court. <https://www.icc-cpi.int/>.

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sounds old hat, but we have to keep our courts independent, and we have to keep them as a third branch, which will look down, and say, "no, you can't do this," or "you're not staying within the limits of your particular constitutional job."

02:12:07 In that regard, I think it's very important to have judges on the court who are picked not solely for the political purposes. Now I know that it's always been the tradition that a Republican administration picks Republican, and a Democratic

02:12:31 administration picks Democratic. It certainly happened in my case, but I think that you still, within that limits, you have to look for people with a varied background, is one

02:12:47 thing. I think that in my own case, I found it extremely valuable to have many different experiences. And I think many other judges that I know who have actually done other things are richer for that, kind of because

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you deal with so many facets of
experience from a bus driver with
psoriasis, which is one case I had,
down to children, and you just need,
02:13:23 I think, to be of the world, to be as
Holmes would say, to be a person, a
man or a woman of your times, to have
that outside experience.

I think, as I mentioned before, you
don't depress the emotional side of
your life. I mean if you intuitively
react to something, you don't
necessarily go the whole way on just
that, but you take that into account
too,

02:13:50 because it is a reflection of what
the total experience of what you're
looking at there is, and in terms of—
we've seen it in my lifetime, law
changes, and law should change

02:14:06 because the law is supposed to
reflect the best decisions of how
things should go in a good society.
As this society changes, and
certainly the one we're in now is

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changing rapidly, not just
technologically, the law has got to
change. I mean our law, I came from
five years, you know in intelligence,
supervision, operation, and you've
got to—we have some old doctrines,
02:14:35 which are mired back in the forties
and fifties when you picked up the
phone and got the operator, that kind
of thing.

I mean, it's ridiculous. They've got
to change. I think the Supreme Court
hopefully, even beginning this year,
is going to have to and will realize
that the law has got change too. You
know, if you're a judge and you're
02:14:56 part of that law changing, then you
have to understand what is going on
in the society so that you can change
it in a way that makes rational
[sense]—I don't think—I've never been
a slave

02:15:08 to precedent. I know you obey the
Supreme Court, and you obey the
prevailing law in your circuit, but

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if you think it needs to be changed,
then I think you do speak out and say
that it needs to be changed, kind of
thing. That's really about all.

MS. MORAWETZ: Well, thank you so
much, Judge Wald.

JUDGE WALD: My pleasure, as I said
02:15:29 in the beginning. I hope it's been
your pleasure.

MS. MORAWETZ: My pleasure. I want
to thank you on behalf of the
Institute for Judicial
Administration. It's really been
wonderful talking with you today.

JUDGE WALD: Good.

[END RECORDING]

Postscript

After the interview, Judge Wald noted her regret at failing to mention two things: One was the fairly intensive work she did for Barack Obama's presidential campaign in 2007-8, including knocking on doors in the Iowa caucus. The other, was the honor of being awarded the Presidential Medal of Freedom by President Barack Obama in 2013. She was the only woman U.S. Court of Appeals judge to have received that honor at that time.

Judge Wald passed away at the age of 90 on January 12, 2019, less than one year after this interview.