

THE RULE OF LAW ORAL HISTORY PROJECT

The Reminiscences of

Ricardo M. Urbina

Columbia Center for Oral History

Columbia University

2013

PREFACE

The following oral history is the result of a recorded interview with Ricardo M. Urbina conducted by Myron A. Farber on January 31 and February 1, 2013. This interview is part of the Rule of Law Oral History Project.

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

VJD

Session One

Interviewee: Ricardo M. Urbina

Location: Washington, D.C.

Interviewer: Myron A. Farber

Date: January 31, 2013

Q: This is Myron Farber on January 31, 2013, interviewing the Honorable Ricardo M. Urbina, who, from 1994 until last May, 2012, was a judge of the United States district court here in Washington, D.C., and had occasion to deal with Guantánamo matters. This is for the oral history relating to Guantánamo.

Judge, I understand today is your birthday.

Urbina: Yes, it is.

Q: I suppose I have to ask how old you are then.

Urbina: I'm sixty-seven.

Q: The federal judgeship that you occupied is a lifetime employment.

Urbina: That's correct.

Q: Why did you choose to retire? You were only sixty-six at that time.

Urbina: Well, before my eighteen years on the federal bench, I had been a judge in the District of Columbia Superior Court, also appointed by the president of the United States, for thirteen years. And I decided that thirty-one years on the bench was enough. I wanted to dedicate more time to my family—my grandson in particular—and also to find some time to travel and enjoy my family, and my wife in particular.

Q: You were born in 1946, in New York.

Urbina: That's correct.

Q: Whereabouts in New York?

Urbina: I was born in Manhattan. I lived at 1727 Lexington Avenue until the age of nine. And then my parents bought a home in Queens—Jackson Heights, Queens—and that's where I lived until I was seventeen, when I came to Washington D.C., and began college.

Q: Where did you go to high school in New York?

Urbina: Monsignor McClancey Memorial High School, which was a relatively new high school at the time, in East Elmhurst. I had already gone to a Catholic grammar school—St. Gabriel's—and that was the path I charted before the time when I would go to college.

Q: And then you went to Georgetown.

Urbina: That's right.

Q: The childhood education that you got as a young man in New York, the boy and adolescent—was it up to snuff?

Urbina: Yes. It's an interesting story, to make the point. From the first to the third grade I went to three different grammar schools. Both my parents were working. I attended these different grammar schools largely to accommodate my parents' schedule. When we moved to Queens, and I started the fourth grade—the Sisters of Charity, St. Gabriel's—my skills were underdeveloped. I could not read well. I did not have command of basic mathematics—the times table and so forth. That was not my parents' fault, because they were surprised as well when they learned this. So my parents went on an intensive campaign to have me catch up, and within that year, rather than hold me back, my parents—my father in particular—said, "No, we promise you that by the second semester of the year he'll be caught up." And I was. So I have to take my hat off to the nuns, who I had the fourth and fifth grades. Then I had the Christian brothers in the sixth, seventh, and eighth grade. Then I had the brothers at the Sacred Heart, when I went to McClancey. I think those teachers were instrumental in enabling my success, academically.

Q: Your parents both worked?

Urbina: Yes.

Q: Working as—?

Urbina: My mother was a secretary for the president of a pharmaceutical firm and my father was a blue-collar worker. He had a few different jobs, but he was mostly involved in the tool and die-making industry.

Q: They had an alternative in the public schools, did they not?

Urbina: Well, when we lived in Manhattan, in Spanish Harlem, it was a very dangerous place. We lived in a four- or five-story walkup. It was not unusual, as I recall, to find people passed out on the stairs—sometimes with the needle still in their arm. There was crime, there was gang warfare, and my parents felt that they needed to leave that neighborhood as soon as possible. My two older brothers had already volunteered to go and fight in Korea. I was left behind, and when my parents decided to move it was, I think, a timely and a very wise choice on their part. I think it had a material effect on the rest of my life.

Q: Would you say you did well academically, in high school?

Urbina: Yes.

Q: And you ran track, too, did you not?

Urbina: Yes, I ran track. That's how I got from New York to Georgetown.

Q: I beg your pardon?

Urbina: That was the vehicle for my education—getting an education at Georgetown.

Q: You ran from New York to Washington? [Laughter]

Urbina: Well, I'm sure the coach would have liked to see that, but no. I was a very successful high school athlete. I had twenty-odd scholarship offers from various universities, and ultimately I chose Georgetown.

Q: In track?

Urbina: In track.

Q: From twenty universities?

Urbina: Oh, yes. I was national champion in high school. I was national record holder in the 1000 yards. In those days—maybe you recall—track was still a very big sport, and New York and the New York area was the hub of track excellence. I was very successful. I had a very good coach, and my success as a high school athlete presaged, perhaps, success as a college athlete. Therefore, many colleges were interested in recruiting me.

Q: What did you know about Georgetown when you accepted them, and when you had these other offers?

Urbina: What I knew about Georgetown was that the year before Georgetown had run the world's record in the two mile relay. I had followed the members of that team. I was familiar with them because as I ran high school meets, sometimes those meets would coincide with the college meets, and I would get to see them. In addition to that, there was a very strong recruiting effort made by the alumni of Georgetown, including one judge who came to my house several times to persuade my parents to have me go to Georgetown.

Q: And you ran track at Georgetown?

Urbina: Yes.

Q: How did you do there?

Urbina: I was NCAA [National Collegiate Athletic Association] champion in 1966. I was in the 880 [yards]. I ran the national record for the 1000 yards in 1966. I ran very good cross-country that year, as well. I was fifth in the IC4A [Division] cross-country—fifth of about three or four hundred. And I was thought to be a very versatile runner—I had good speed, and I had good stamina. The coaching, coupled with my well-developed talents, made me formidable as a track athlete.

Q: And you enjoyed it?

Urbina: I enjoyed it.

Q: Could you have been in the Olympics?

Urbina: I ran the Olympic trials, and I didn't get to the Olympics—when I ran the Olympic trials at the end of my first year in law school. I didn't make it—perhaps fortuitously, because perhaps I wouldn't be where I am today if I had followed that course. But yes. I could have run the Olympics, actually, when I was in high school because Puerto Rico—there was a rule that would have permitted me to run for Puerto Rico, since my mother was Puerto Rican and my father was Honduran. But my track coach in high school didn't want me to do that, so I wound up not running the Olympics in high school, and then just trying to make the Olympics in college.

Q: Have you ever seen a film called *Chariots of Fire*?

Urbina: Oh, yes.

Q: It's a good film.

Urbina: A lovely film. It captures a lot.

Q: In other words, these efforts on the track were not simply to get you scholarships—you actually liked it?

Urbina: I enjoyed it. It served a number of purposes, perhaps the most important of which is what it did to my mind as well as my body going forward. I enjoyed it. I thought it as a job. I felt that it was a job, but a job I enjoyed. The scholarship to Georgetown was complete; they paid for everything. They paid for my laundry—they paid for everything. I appreciated it then, but appreciate even more now how lucky I was to have that.

Q: When did you graduate from Georgetown?

Urbina: In 1967.

Q: Did you have a particular course of study in Georgetown, or was it a potpourri?

Urbina: It was pretty much a liberal arts education. I focused on Hispanic history, culture and civilization, and English as my second major.

Q: And then decided to go to law school?

Urbina: Yes. It was an interesting decision. I had started college, trying to fulfill my parents' wish that they have a doctor in the family—but organic chemistry ate me alive. So I dropped out of that, and did not know much about the law. I had not taken any law courses, but there were

fellows whom I'd been on the track team, who were still working out with the track team—who were at that point in law school. So I got some counseling from them, and I decided I would go to law school.

Q: It seems to be every mother's wish to have a doctor for a son. But on the other hand, lawyers usually come in second to that idea.

Urbina: I think so. [Laughter]

Q: Again, you stayed at Georgetown.

Urbina: I did.

Q: Wasn't it then called Georgetown Law Center?

Urbina: Yes.

Q: Right. Did you have any teachers there who were particularly inspiring?

Urbina: Yes. My first year in law school was, I think now predictably, a difficult year for me. Having no background in the law, having not taken any prelaw courses, not having come from a family where some of the terms and some of the business practice might have been familiar to me—that first semester was very difficult for me. Learning a new language, learning how to

write like a lawyer—although I had been told in college that I was a good writer—when I got to law school, that writing skill had to go by the wayside in order to learn how to write properly, according to the law.

So that first semester I had just gotten married, in 1967. I was working about twenty hours a week as a clerk messenger at Hogan & Hartson—which is a law firm actually now contained in this building—and going to law school fulltime. And, of course, that first year training—trying to train for the Olympics. So I bit off much more than I could chew. Probably half of that would have been more than I could cope with successfully. So it was a very souring experience that first year. My marriage did not go well. My work at Hogan & Hartson was fine—it wasn't difficult—then one of the lawyers there recruited me. Well, he asked me if I wanted to be his law clerk and I said yes, so that turned into a very positive experience.

But to answer your question—there was a professor who noted my absence on several occasions that first year. I was working or doing other things, and he asked someone—we were all seated in alphabetical order, and he asked the fellow who used to sit next to me to contact me and tell me to come in and see him, and I did. He spoke to me about my future and about myself in ways that were inspiring. I was very surprised that he would take the time and effort to single me out, and to motivate me. That really helped me develop more self-confidence and refocus. Then the job I had with the lawyer at Hogan & Hartson permitted me to accompany him to trials, and that was my first real exposure to trial work. That I fell in love with—trying cases—that was something I felt I could do, that I would enjoy. So once I got a glimpse of the anatomy of a

controversy as it played out in the courtroom, my whole perspective changed. My academics went well, and I became much more motivated.

Q: Really. And you graduated from law school in—

Urbina: 1970.

Q: 1970. And went to work for the D.C. Public Defenders' Service [PDS]?

Urbina: That's right.

Q: Did you really think that you would have an opportunity to try cases there as a public defender?

Urbina: Oh, yes. I had done some volunteer work as an investigator for PDS, so I had a sense for what they did. The lawyer at Hogan & Hartson had been a former deputy director of the Public Defender Service. So through him, I had been able to get a perspective that went beyond just what I learned as an investigator.

So yes. The then director, Barbara [A.] Babcock, director of the Public Defender Service, invited me to join the staff, and I did. It was probably one of the most dynamic introductions to the law I could possibly have gotten. I tried many cases. I tried serious cases. In those days all the felony jurisdiction in the District of Columbia was in the federal district court. It was only in 1971 that

the superior court was created. So, as I phased into the practice, the criminal defense practice—as I phased into that, many of the cases I acquired were tried in the federal courthouse, because of the residual jurisdiction.

So I got to try cases there. In those days even juveniles were entitled to jury trials, so I got to try cases there. I tried my first murder case when I was twenty-five years old. The learning environment was incredibly dynamic, extraordinarily bright, highly motivated people, not only in the leadership but also in the body of the staff. So there was a lot of camaraderie, and that was also an incentive to learn.

Q: When you first started standing up in court, was that easy?

Urbina: No. It was not easy. [Laughter] Always I had the butterflies. It was always something—those first several minutes were always stomach-churning, butterfly-producing, weak-kneed moments. But soon after I heard my own voice, and began to observe myself as an advocate, right there at the trial things became easier, and I found that it was a very good environment for me, since I had the ability to talk to juries and to the judges.

Q: Dare I ask—you're defending—is it fair to say you're defending the indigent?

Urbina: Yes. They were all indigent.

Q: Right—what kind of success you had?

Urbina: Well, I had eleven or twelve acquittals in a row. I remember it was a joke, because one of my best buddies—who's now a lawyer here in town with a big firm—would say that thirteen was going to be my unlucky number. As it turned out, I got a split verdict on the thirteenth.

But yes. The success was not so much in winning, because I think it was the satisfaction of knowing I did my maximum best that made me feel good. Because there were some trials I won, and as I looked back I felt it could easily have gone the other way if I had not done this or that. And there were some cases I lost, where I felt I had done absolutely everything I could have to protect my client's interest. So it wasn't just the winning and so forth, but the winning was very—well, the winning was very reassuring that I had picked the right thing to do.

Q: Did you ever have occasion, after you got an acquittal, to know what happened to the defendant later on? Or did they all just disappear?

Urbina: No. There were a few, at least—some of my clients were juveniles. Then, unfortunately, I saw them again in the adult criminal justice system. One or two of the individuals I represented I wound up seeing again because they worked in a place—maybe Georgetown. I had one client whose case arose out of a violent incident in Georgetown—not the university but Georgetown, the community—and then I would see him from time to time, because he used to work in the stores there, selling clothes.

So yes, I would see them. But it was the exception, not the rule.

Q: And you did that for a couple of years. Then you went into private practice.

Urbina: Yes.

Q: You mean you threw aside all of your—

Urbina: —all of my altruisms? [Laughs]

Q: What happened?

Urbina: Well, a very close friend, a fellow I had gone to law school with—Howard Libby—invited me to join him in the practice of law. His family was a very successful, wealthy family in the commercial real estate area, and having a child and a second one on the way, I figured I'd better start making some money in order to create the security needed. So he and I started our practice together, and we had just assumed that his family's clients would come thronging to us. But it didn't work that way, because they didn't want two kids, wet behind the ears, handling their complex and important money matters.

So while we were partners, those cases were not abundant. There were some commercial real estate cases, some litigation that we got involved in that Howard handled. Then, in order to keep things afloat, I started taking criminal cases again.

Q: Here in Washington?

Urbina: Yes.

Q: Did you ever think, during this period, "Maybe I ought to go back to Jackson Heights, or back to the Big Apple, and practice there?"

Urbina: Did I practice there?

Q: You never thought about doing that?

Urbina: No. Well, actually, when I came to Washington, D.C., I had a typical New Yorker's mentality—mindset—that New York was the capital of the world, and that D.C. was just a sleepy, southern, hick town. I was just waiting my time to return. But the District of Columbia really grew on me quickly. I found it to have benefits and assets that would not have been readily available to me back in Jackson Heights—Rock Creek Park and other things that really made city life a very different experience in Washington, D.C. It became clear to me at that point that the city was evolving. For example, when I was at the Public Defender's Service, I was the only Spanish speaker there, so I had all the Spanish-speaking clients—and there weren't many, but between the time I started and the time I left, the numbers increased. That suggested to me that there was now an influx of Latin Americans, and that that would be a trend—so that was something that I found encouraging.

But no. After a while, I determined that I didn't want to go back to New York—except, of course, to visit my parents and my brothers.

Q: Right. Then in 1974 or so, you became associated with Howard University.

Urbina: Yes.

Q: In a fulltime capacity?

Urbina: Yes.

Q: Tell me about that.

Urbina: Well, there was a gentleman who had just graduated from the Georgetown University [E. Barrett] Prettyman intern program, which is a graduate program for persons who get their LLM [Masters of Law] in trial work. He had just graduated from that program and he wanted to set up a program at Howard that would borrow a lot of what he had learned and acquired during his two years studying at Georgetown.

So he approached me, and he said, "I would like to start a criminal justice program—not an LLM program but a criminal justice program at the law school that would, under the rules, permit law students in their third year to try cases in the superior court. Would you be interested?" I said, yes, I would, so in August of 1974 I joined the faculty as an associate professor, and my

responsibilities changed very quickly in that this other gentleman—then a professor at the law school at Howard—decided to leave that position, and I became the director. The program was successful in that many more students applied than we had slots for. It was modeled after the Georgetown program, in that in the second year the students who got into the program would take a six-credit academic course, all in preparation for litigation. Then, in the third year, they would have an entire year of litigation in the actual D.C. Superior Court.

Q: These are law students?

Urbina: All law students.

Q: Right.

Urbina: So they would get academic exposure in their second year and then courtroom exposure in their third year. Then once a week we would meet to kind of pool the experiences that they had had. A couple of them actually had jury trials. It was a very gratifying experience.

Now when I got into this experience, when I got into this situation, I was concerned that, as a young person—I was only twenty-seven at the time—I had not really gotten enough depth in terms of really becoming the kind of trial lawyer I wanted to be. So I asked the deans—I served under three of them, who, by good fortune, all happened to be former trial attorneys—I asked them if it would be all right with them if I tried a complex criminal, or a complex civil case, a year—one a year, in addition to supervising, of course, the cases that my students would have.

They all agreed, so I was able to maintain a small private practice with a view towards trying a case a year. Then, of course, being second chair in the cases my students were handling.

Q: Right. In 1981—I think it was—you, yourself, became a judge of the superior court here in Washington. Now did you seek that position? How did that come about? Distinguish for me the kinds of things that you handled as a judge of the superior court from what you would then face as a federal district judge.

Urbina: One day—this would have been late 1979, early 1980. The dean called me to meet with him. I went down to his office—Charlie [Charles T.] Duncan, a very distinguished, very sophisticated, bright man—

Q: A law school dean?

Urbina: A law school dean.

Q: At Howard?

Urbina: At Howard, yes. He invited me and he said, "Listen—." I thought maybe I was in trouble. He said, "Oh, no, no, no. Quite the contrary. I'm very pleased," etc. "Have you ever thought about being a judge?" I said, "No, I haven't." He handed me an application and said, "I want you to apply for a judgeship. Fill this out and give it back to me tomorrow." So I did. It was just kind of a preliminary viewing of me and my background, etc. He read it, he thought that it

was consistent with an effort to join the bench, and he happened to be the chairman of the Judicial Nominations Commission at the time as well. So that didn't hurt. The next thing you know I was in the system—I was in the political system, and as you know, Washington, D.C. is two cities; it's a municipality and it's a federal city. The politics had to move through all of that in order to get my name to the point where I'd be nominated, and then President [James E. “Jimmy”] Carter [Jr.] nominated me in late 1980. Of course, he lost the election, and when President [Ronald W.] Reagan came in he extinguished all the then-existing nominees, and started the process over again. I became his first judicial appointment.

Q: Well, I didn't know that. The president nominates for the D.C. Superior Court?

Urbina: Yes. The federal government has decided that, yes, it will let the District of Columbia have its own city council, and yes, it will let the District of Columbia have its own executive mayor and so forth, but when it comes to judges, they retain the right to pick the judges.

Q: You know, I notice on the street, license plates here, D.C. license plates that say "taxation without representation." I thought I was in the middle of a rebellion down here! It was like on the plates in New Hampshire, “Live free or die,” or something like that! [Laughter] But has that been on the plates for a long time?

Urbina: Yes, it has been. When I first moved to D.C. there was no mayor; there was a commissioner. The powers of the commissioner were very limited. There was no city council. So it has evolved into a pretty self-sufficient—now there is a—there used to be a corporation

counsel as the city attorney. Now there's an attorney general for the District of Columbia. However, the federal government still maintains the prosecutorial process, in that the U.S. attorney's office prosecutes in the superior court and prosecutes in the federal court. So it has a reign over the criminal prosecutions in both courts.

So the federal government has given up and permitted a lot in terms of self-governance, but still it retains certain things to itself.

Q: And you were on that bench, the D.C. Superior Court, for thirteen years before you became a federal judge.

Urbina: Correct.

Q: Quite quickly, what is the difference between a top—what kinds of cases—without being too specific—what kinds of cases do you try, or preside over, in the D.C. Superior Court?

Urbina: The D.C. Superior Court had various divisions. It had criminal, civil, probate, tax, and family—four. Judges in those days rotated through all those divisions. They would be in a division for a year or so, and then they would be moved to another division, and so forth. The chief judge would select individuals to head those divisions—kind of the chief judge of that particular division. I was the presiding judge of the family division for about three years, so I tried a lot of those cases and I oversaw a lot of those cases. Then, of course, I was in the criminal division. In those days as well, the District of Columbia was crime-ridden, and the laws had

changed permitting the U.S. attorney's office to detain individuals for considerable periods of time if they were accused of certain crimes.

So the long and the short of it is that there was a huge backlog in criminal cases. I'll talk about that in a minute. Then in the family division, there was a huge backlog in that division as well, because child support was not being paid; juvenile delinquency cases were so abundant as to disable the system to process it quickly; the civil division cases would not get to trial, sometimes for two years or more, because of the backlog, and so forth. So I tried cases involving juveniles. Now, in the family division there were subdivisions. There was adoption, there was child support, there was domestic relations, all of that. So even within the family division itself, a judge might get a variety of experiences for a year or so. Because of the backlog that I just mentioned—and because of the outcry of the city, its populace, that these people were being detained without conviction for sometimes a year—the chief judge assigned three judges to try only two types of cases—the cases that were most frequently the cause of persons being detained for lengthy periods of time—murder, rape, and child molestation cases. So for about two years I did nothing but murder, rape, and child molestation cases. It was a very rapid process. I'd pick one jury, the trial, and then as they were walking out the back door to begin their deliberations, a new jury panel was walking in the front door, because that's the way it needed to be.

That was one experience. I never served in probate, because that was an area that people volunteered for who had probate experience. Civil division was probably my favorite because I thought those controversies were very interesting. Then I had many interesting experiences in the criminal division, and one of them I'll share with you because it captures one of the major

differences. Of course, U.S. district court only has criminal and civil. But in addition to that, I had a case involving a young man in his late twenties, early thirties, who kind of appointed himself as the neighborhood ombudsman with children who were having problems in their homes. Maybe their mother or father was in a drug addiction program or this or that. He would kind of see to it that they got to school, so on and so forth. Unfortunately, it developed that he was molesting boys. So the matter came to trial, and two of the boys declined. These were eleven, twelve, or thirteen-year-old boys. They said they didn't want to have anything—they didn't want to talk about this. There were three left, and one of the instances—the police had overstepped their authority in gathering evidence, where I had to suppress a lot of evidence. So that case weakened considerably. I think the government wound up dismissing it. So that left two. It came to pass that the man who was charged with molesting these boys was also HIV [positive], and had taken no steps to protect against spreading the virus. The case went to trial, he was convicted, and he got a very length period of incarceration.

So that's the kind of case you probably would never see here, because that's more of a D.C. case, D.C. children, D.C. situation. Now in the federal court, as you know, the federal jurisdiction on the civil side—the U.S. district court, anywhere, is a court of limited jurisdiction. The District of Columbia Superior Court is a court of unlimited jurisdiction. So the variety there is vaster than it is here—not to say that there isn't variety in the U.S. district court. But judges are pretty much confined to trying civil and criminal cases, those cases which, on the criminal side—those cases that the prosecutorial body has decided are violations of the U.S. code. Many of those types of cases are also violations of the D.C. code, but since the prosecutor prosecutes in both courts—where the violation exists in either court—frequently they're brought in the U.S. district court.

Q: In 1994, here you are—by the way, were you the first Latino judge on the D.C. superior court?

Urbina: Yes.

Q: That's hard to believe. That was the first?

Urbina: Yes.

Q: In 1981? That's not long ago.

Urbina: That's right. And I'm sure that that's one of the things that President Reagan had in mind when he appointed me.

Q: In any event, in 1994 you were nominated by President [William J. "Bill"] Clinton to the federal bench here. Again, how did that come about?

Urbina: Well, one of my mentors, even as I was a judge in the superior court, was one of the judges on the D.C. Court of Appeals, Judge William [H.] Pryor [Jr.]. One day I was in the parking lot—the garage, I should say. He saw me, and he called me over—

Q: You mean the United States Court of Appeals for the District of Columbia?

Urbina: No, he was on the D.C. Court of Appeals. He still sits as a senior judge, actually.

William Pryor.

Q: Not on the federal bench?

Urbina: No. No. But he saw me, and we chatted, and he said, "You know, you've been here just the right amount of time to consider applying for a judgeship across the street. Have you considered that?"

I said, "Well, no. I haven't."

He said, "Well, I think you should, because if you're here too much longer, nobody will think of you as a prospect anymore." So I was motivated by that, and the coincidence of there being several vacancies in this court, which President [George H.W.] Bush had not filled—for reasons which I don't know.

So I applied, and it was a long process.

Q: You mean George H.W. Bush?

Urbina: The first Bush, yes. So I applied in 1993, and was appointed in 1994.

Q: You make it sound pretty simple. "Oh, there's an application, I'll just become a federal judge."

Urbina: No, it wasn't simple. [Laughs]

Q: You know, in places like New York for example—or perhaps a number of states—a United States senator has a committee, and it looks around for the appropriate people to be federal judgeships, and they make recommendations to them—and a U.S. senator has a great deal of say in who gets nominated to the federal bench.

Urbina: Absolutely.

Q: Now you don't have senators here in Washington.

Urbina: That's correct.

Q: But you make it sound as if you just went over there with your application, and said, "I'm here."

Urbina: No, I just didn't want to belabor the point. Let me tell you this. When I applied for the superior court position, being aware of the fact that there were no senators that I could easily go to, I went back to New York. There was [Daniel P.] Moynihan and [Jacob K. "Jack"] Javits. Javits was the Republican, as you know, and Moynihan was the Democrat. Moynihan was not

receptive to being approached, so I went to Javits, and he gave me a brief audience. He said, "What do you want?" and I told him, "I would like your support." He said, "All right." Some people thought that that was a big mistake on my part because he was a Republican and he was trying to influence a Democratic administration. As it turned out, it turned out to be a blessing because when the Reagan administration took over, a Javits' Republican endorsement was one of the first things I imagine they saw in my portfolio.

Q: That's when you became a superior court judge?

Urbina: A superior court judge. Yes. So I was acquainted with the process. It was a very labor-intensive process on a couple of fronts, politically, logistically, and emotionally. It was labor-intensive. Because you have a job that you're doing all the time; then, of course, these were other things that needed to be done. You had to figure out who to talk to and who not to talk to, etc. So yes, it took quite a bit of thinking. I mention that because the process to the U.S. district court—at least I was experienced by that point. Again, no senator, but Eleanor Holmes Norton had assumed senatorial privileges under President Clinton, and she, too, I think, was interested. She was interested in me, and I had a good reputation. But I think, in addition to that, she knew that there were no Latinos on this bench, so she—

Q: On the federal—

Urbina: —on the federal bench. Yes—I keep on saying "this," as if I'm there.

Yes. So I think that might have been part of her motivation. So there were a whole group of us who came in, eight or nine of us who came in at once.

Q: To fill vacancies in the federal district court?

Urbina: Yes.

Q: Do you know whether there are many vacancies now in the federal courts?

Urbina: I believe there is one, and there is a candidate who is under consideration for that position. I think when she comes aboard there will be a full complement.

Q: Okay. So there you are. You're ascending to the federal bench in 1994, a lifetime appointment as a federal district judge—and your mother is still complaining that you haven't gotten a doctors degree at that point! [Laughter] No, I'm joking. Were your parents alive at that time?

Urbina: Well, my mother was. She was hysterical. She came to the hearing, and Senator [Alan K.] Simpson chaired that particular hearing.

Q: Your confirmation hearing?

Urbina: Yes, the confirmation hearing for the federal court. Senator Simpson chaired that, and he's a wonderful person, and there wasn't anything controversial, as far as I was concerned, and

as far as he was concerned. We went through a number of questions. He asked a lot of questions about this, and those types of questions that are more instructive than they are inquisitorial—"You're not going to be an activist judge?" That type of thing.

So after my turn, everything stopped, and the hearing was over, my mother called Senator Simpson and she said, "Come over here, please." She was in a wheelchair at the time. And he politely, gentleman that he is, walks down. I'm concerned, "What are you going to say to him?" She says, "No, no, no." She says, "Why did you have to ask him so many questions?" [Laughter]

Q: Your mother is asking Senator Simpson! [Laughter]

Urbina: And he explains to her that that's the way it's done, and so on. But he was just great.

Q: Is your mother alive today?

Urbina: No, she's not.

Q: Now just parenthetically—about seven years earlier, there had been the nomination of Robert [H.] Bork to the Supreme Court, with these explosive confirmation hearings. But you were here, as a superior court judge, at the time. You must have been following it.

Urbina: I did.

Q: Looking back on it, what did you make of that? Do you have a feeling whether Bork got a fair shot or not?

Urbina: I start with the premise that unless the person has an extraordinary blemish on his or her record, that the president's prerogative should be honored. That's the premise I start with. That's one of the executive privileges. So that's my starting point. He was apparently—I never knew him or met him. He was apparently kind of an ideologue, and he had very strong views on certain things, but he was a very intelligent, high-quality human being—I thought. Maybe I didn't know him well enough to think otherwise, but there was nothing about him that made me feel hostile or unhappy about his nomination—hostile towards or unhappy with his nomination. And I heard him speak once or twice, and he was very funny. He had a wonderful sense of humor, a wonderful sense of humor.

If I had to make a blanket statement, I'd say that he probably did not get the fair share—the fair break that he deserved, in light of the fact that he was so strongly supported by his president. Now that doesn't mean that everybody who is nominated by a president should get through, because not everybody is competent, not everybody is bright enough, not everybody has the intellectual flexibility—and that was the question with him—but not everybody has the intellectual flexibility, etc., etc. Because if a person already has certain strong, preconceived notions about how an issue should be decided, then it disarms the system in that that person, he or she, is not inclined to truly listen and heed the balancing factors in the situation. If I start off with a previous position, I won't listen so much. I think a judge can't afford to do that. A judge has to look at every issue with a beginner's mind. That's sometimes hard, but that's what I think.

So if a person is determined not to be capable of doing that, then I can understand the opposition, and I can understand them pointing that up. But otherwise, I think the president should have his prerogative.

Q: Well, what you were describing just a moment ago is the, what you feel, is the appropriate mindset for a judge at the beginning of a case.

Urbina: Yes. Or at the beginning of his tenure. Yes.

Q: Yes. Or at the beginning of his tenure. Would you say that was your approach to listening to cases?

Urbina: Yes.

Q: Well, having been a judge, albeit on what is parallel to state court, as opposed to federal court, you must have been involved in some sort of—or maybe you didn't—some sort of judicial philosophy? Should I put it that way?

Urbina: No, no. No. No. Having a judicial philosophy is not inconsistent with starting off your analysis of a matter in a neutral position. Judicial philosophy is very important, and I think most judges—I feel in my heart that most judges have very similar judicial philosophies, given that judge's role. A judge needs to look at matters in a detached—you know, it's interesting. My best friend died several years ago. He was a judge in superior court, and one day he said to me, "One

of the most important qualities that a judge should have is not to be judgmental." That stayed with me a long time, because I understood—at first I didn't, but then I understood what he was talking about. And that is this whole preconceived approach. Now whether a human being who happens to be a judge has some preconceptions, or some predispositions—of course, we're human! We grow up. We have environmental factors, we have social factors—we have all sorts of things that influence our thinking. Obviously, when you're put in a situation—I may interpret this law to be unfair because my human experience tells me that the application of this law is really not correct, the way that it, de facto, works out. Or, I may feel otherwise. Guantánamo is an example.

But yes, I do feel that a judge needs to be able to look at a matter objectively and assess it in a way that meets the mandates of the Constitution. I always feel that the litigants have a right to believe and to take advantage of the fact that the judge is going to apply the law. If I decide to take the matter to court, I should feel that the judge is going to apply the law, no matter who he or she is, and the other side should feel the same way. Now how that law is interpreted is a whole other matter, but yes. I believe that a judicial philosophy notwithstanding, the judge has to start with a neutral mind.

Q: You hear people, certain politicians, decrying this judge or that judge as an activist judge. "We've got to get rid of these activist judges." Or, "God forbid us all that was an activist court." And, "If only Mitt Romney had won the election, we finally could have secured a non-activist Supreme Court, solidified that court for non-activists." Should the public pay any attention to this? What is the meaning of this "activist" term?

Urbina: Well, I think the political branches have a stake in influencing their constituencies in a certain way—and being influenced by their constituencies in a particular way. So if I'm a congressman or a senator in a jurisdiction where I sense that the people want a particular thing, need a particular thing—that it's good for them, that it's in their best interest—then I may decide, as a congressman or senator, to say or do things that will directly or indirectly bring what they want to the fore, and have it established. But the judiciary is not a political branch. It was not designed to be, and there are some arguments about whether it heeds political mandates or not. But that aside, the definition of activist judge has changed so much. If an activist judge is a judge who interprets a scenario—a fact scenario, a legal scenario—in a way that he or she feels the law either requires or permits, then the judge is doing his or her job. Every time a judge reads an opinion and writes an opinion, he is creating at least a variance if not a deviance from how the case has been decided before, in some other way. So if that's an activist judge, then there are activist judges around. But I don't remember seeing a judge, or reading about a judge, or experiencing a judge whose sole purpose it was to make sure that his or her ideology was advanced through his or her function as a judge. I don't remember seeing that.

Q: Well, as an observer of the Supreme Court, for example, what explains how so often, let's say, Chief Justice [John G.] Roberts [Jr.], Justice [Samuel A.] Alito [Jr.], and [Antonin G.] Scalia, and [Clarence] Thomas are on one side of an issue, and others are on another side of the issue. What explains that?

Urbina: The Supreme Court—and, I would say, probably circuit courts—circuit courts of appeal—I think are licensed to generate policy. Maybe "licensed" is too strong a word, but I see the Supreme Court and other federal appeals courts act in a way so as to create policy. And I think that, unlike trial judges, who don't do that, who shouldn't do that, and don't do that, as far as I know, they're not confined by the facts. They're sometimes not even confined by the law, because there are avenues that facts and the law open up, allowing interpretation. Now this whole other notion about having preconceived notions, and having tendencies to look at matters in a particular way, and therefore decide things in a particular way—I believe that that probably does happen in the Supreme Court. It happens so much, I think—and I'm talking about both sides—it happens so much that sometimes I feel it undermines the credibility of the Court. One of the best moments I've had recently about that is Roberts' decision on Obamacare. I said, "Wow. God. That's refreshing! That is refreshing!" He saw the law. Everybody else assumed he would go one way, he went the other way, and he was perfectly justified in doing it. That's the way I think a court should behave. But, as I said, not being an appeals judge, and not having an experiential view of how integrated policy should be in decision making—

Q: Well, that's fascinating. It seems to me that what you're saying, in a way, is that in the appellate arena it's more possible and more likely that judges will settle in their mind what the outcome should be, from a policy standpoint, and apply the facts that arrive at that answer.

Urbina: Well, I wouldn't want to say that they decide the matter purely on the issue of policy, but you have to remember that by the time it gets to an appeals court, it's already been litigated. The views, pro and con, have already been well aired. There have been motions, there have been

decisions on those motions, there has been an evolution in the case—even more so for the Supreme Court, that has developed these issues in a way that are more susceptible to policy than they would have been earlier on. And when the appeals court sees that the policy is indeed—in their mind, in the best interest of the public or whatever—then they may very well use that route to validate their point of view.

Q: Okay, and at some point a little bit later on we'll talk about the D.C. Circuit Court of Appeals. But in sum, in sum, can you give me some idea again about what kinds of matters you dealt with between your ascendancy to the court in 1994, the federal district court, and September of 2001? What kinds of things—?

Urbina: Sentencing, did you say?

Q: No, what you presided over in the period between 1994 and—

Urbina: Well, that was a very interesting period, a very interesting period, because I was meeting things for the first time—environmental issues, suits brought against the government for what environmental groups thought were violations of the Endangered Species Act—things like that. One of the first big trials I had was the trial of [Alphonso] Michael Espy, former secretary of the Department of Agriculture, highly, highly charged—nothing I had experienced within superior court—highly charged politically and racially.

Q: Racially?

Urbina: Oh, yes. He was the first African American to hold that position.

Q: He was agricultural secretary?

Urbina: That's right. The testimony in the case—the parties properly anticipated, I didn't—the parties properly anticipated that there were going to be a lot of racial issues in this case, one instance being consistent with some of the prejudices and biases that materialized in the form of these criminal allegations. So there was that. It was giant. Before we even got to trial, I had to determine whether or not the statute that was passed as a result of the book, *The Jungle*—Upton Sinclair.

Q: My god! *The Jungle*? Upton Sinclair's *The Jungle*—that was 1904, or something.

Urbina: That's right. I had to decide if the law—the meatpacking laws came out after that—whether the meatpacking laws made the secretary of the Department of Agriculture a meatpacker. Because there was a provision on how meatpackers were to be dealt with, right? I said no, the court of appeals said yes. Yes, he's a meatpacker. So that came back. All right. So he's a meatpacker. Some of the counts I dismissed stayed dismissed—that one did not. So it was building, and building, and building. There was a special prosecutor. It wasn't the U.S. attorney's office or the Department of Justice; it was a special prosecutor, and so forth.

So that was quite different. Picking the jury alone was something far and away from anything I had experienced in picking a jury in superior court.

Q: Why was that?

Urbina: Because both sides were sensitive to this racial issue. The trial was going to last two or three months. I had to get people who were willing to serve that long. It was quite complex. I issued questionnaires based on questions that the lawyers had proposed. It took a while to get those questionnaires back, and to collate them, and to deal with the arguments, etc., to pick the jury, and then, ultimately, to try the case. Right at the beginning of the case I thought there was going to be a problem. One of the marshals comes to me and says, "Judge, when I put the jury in the room, before I closed the door, I heard a comment." I said, "What do you mean?" and he repeated the comment. I said, "Well, we have to tell counsel." So we called them in and I said, "My marshal says that he believes one of the jurors said, 'No matter what happens, I ain't convicting this guy.'"

Of course, there was an interrogation. But that was right in the beginning. I had to come in. I said, "What do you want me to do?" They said, "Well, this situation has to be remedied. We have to know who else has been in there," so on and so forth. So I did that, and after doing that I asked the lawyers to leave. I came into the well of the court, with the jury sitting in the jury box, and I explained to them how fragile a trial is, and how any imperfection can result in a mistrial, and that it cost about \$28,000 a day for the taxpayers to try a case. I had to explain all of that—and I

knew who the person was. I didn't focus on him, but I made that there was eye contact—and everything went swimmingly after that. So that was another experience I'd never had.

Q: Now that case was called *U.S. v. Espy* [1998], wasn't it? *U.S. v. Michael Espy*. And he was acquitted, was he not?

Urbina: On all counts.

Q: Was that a surprise to you?

Urbina: Yes. It was a surprise. I thought there might be some convictions on something. But the government, the special prosecutor, shot himself in the foot one toe at a time during the trial—and I watched it. He alienated members of the jury, he bullied some of the witnesses on the witness stand, he made assertions during opening statements that he wasn't able to substantiate through evidence—he did a number of things, all of which the defense quite competently highlighted in its case. The defense didn't even put on a case. They did not even put on a case. Mr. Espy did not go on the stand. They did not put on one witness. They put their entire case on through cross examination of the government's witnesses.

Q: Do you remember who represented him?

Urbina: Yes. Tommy [Theodore V.] Wells [Jr.] and Reid [H.] Weingarten—he's from Steptoe [Steptoe & Johnson]. And Tommy Wells. They are both excellent lawyers. Excellent lawyers. They worked well during this trial, they complemented each other, and the jury loved them.

Q: Right. Tom Wells is a mega lawyer now.

Urbina: Oh, yes.

Q: Would you say that a really, really critical decision that anyone charged with a crime has to make is who is the best lawyer to have?

Urbina: For the case.

Q: For the case. There are some people who believe that if you've got the right lawyer, you're ninety percent to getting the most favorable outcome.

Urbina: Well, I think having the right lawyer is a material and substantial ingredient in getting an outcome that's favorable, even if it's not a complete acquittal in a criminal case, or even if it's not the highest judgment in a civil case. Having that lawyer who knows the court, knows the judge, knows the population, knows the—what do you call it? The popular culture—who knows all those things, and when she or he speaks is able to speak to a jury or the judge. Now these lawyers—Tommy Wells had not tried cases before; Reid Weingarten had. Now as you know, a lot of how a judge conducts a trial depends on whether or not trust exists.

Q: Oh, really?

Urbina: Oh, absolutely. Some lawyers will try to take advantage and do things, and say things, and mislead the judge, mislead the jury, and a judge will put a tight rein on that person. Some lawyers know how to conduct themselves in an honorable and zealous way, not sacrificing zeal for propriety. They'll argue a point of law—I had a situation with Reid Weingarten, for example, where the government wanted to use a prior document, a prior transcript of a witness on the stand, to impeach. Reid Weingarten objected, and I said, "Well, it's a prior recorded statement." And he goes, "No, no, no, Judge, that's not what the rule means." Of course, that firm already had people writing the appeal [laughter], in the audience. A group of them rushed out and looked it up, he came back and said, "Judge, you were right. This evidence, I agree, is appropriate for impeachment."

So there it was. We were dealing—I said, "Okay, I'll wait. I'll wait until you research it. I don't know what the answer is. I want you to confirm that I'm correct." Then he came back and said, "You're right."

Q: In other words, that job of being a federal judge here was of a different order of magnitude than being a superior court judge.

Urbina: A different order of magnitude in the sense that I've described, in terms of cases that affect matters nationally and internationally—I've tried terrorist cases too. But in terms of the

human issues, I can't distinguish the two. I've tried cases murder cases where a guy was accused of machine-gunning a guy to death while he sat in his car waiting for the light. This person was dead, just like a person under the federal system. In every case—and that's why trial judges are different than appeals judges, because the trial judges get to see the human beings involved. That sensitivity has to be there, as she or he makes decision. Appeals judges, god bless them, they don't have that. They have paper, they facts, they have law. So I wouldn't say "magnitude," because that would make it sound as if I was saying that a trial in the federal court is more important than the trial in superior court, and I wouldn't say that. No.

Q: Okay. Okay. In any event, we could spend a long time talking about the cases you had other than Guantánamo related—and alas, maybe another project will arise where we can do that—but I have to come back to Guantánamo in some fashion here—

Urbina: Can we break right now? I'd like to go to the bathroom.

[INTERRUPTION]

Q: Before we continue, Judge, I want to put on the record that *United States v. Espy* was in December of 1998, when you presided over that trial. Actually, it was a two-month trial. Espy, the former Secretary of Agriculture, had been charged in a thirty count indictment of accepting \$33,000 worth of gifts from Tyson Foods. And, as you point out, he was acquitted of all charges.

Urbina: They were predicting three months, because that was with the assumption that the defense would put on a defense. [Laughs] But they did not.

Q: Right. Well, they put on an effective defense on cross examination.

Urbina: Oh, they sure did.

Q: But let me ask you, where were you on the morning of September 11, 2001?

Urbina: Oh. The first part of that morning I was presiding over the naturalization of about 180 new citizens. Just before that, I had been with a group of Japanese delegates who were—was it just before or just after? Actually, I think I did the naturalization first, and then I went and met with a group of Japanese delegates who were here to look at the court and learn about the jury system, etc.

Q: Just visitors, you mean?

Urbina: Visitors, yes. I really enjoyed doing these naturalization ceremonies. It was one of those few things that a judge does where everybody walks away happy, but it was also a very keen reminder of what people are willing to go through to become Americans. It was very keen in my mind.

Anyway, I did not tell them until the very end of the ceremony. They didn't know, because they had been in the courthouse, kind of sequestered from early that morning, getting ready for the naturalization ceremony. I knew because people had come and reported the fact to me. So I did not say anything to them until the end, and then I gave a little speech, and I said, "It's a very dangerous thing to be an American. You have taken on a great responsibility," and then I explained what had happened. Half the audience started crying.

Q: Well, the planes had hit in New York, but had the Pentagon also been hit?

Urbina: Yes.

Q: You wouldn't have felt that in the federal court?

Urbina: No, we didn't feel a thing. No, we didn't feel a thing. So then I went into my courtroom, where the Japanese delegates were in the jury box. They didn't know either. I was explaining something, answering their questions about the jury system—they were fascinated by the jury system—and my law clerk came in and said, "Judge, we've been told to evacuate the building." I said okay, but I continued to speak for another five minutes. So he came in a second time, and he said, "*Judge*, we have been told to *evacuate* the building. With all due respect, we really need to leave." I said okay, okay. So as I began to talk again, he came in a third time and said, "God damn it Judge, we need to get out of here!" I said, okay, I dismissed them, I told them what was going on and we were dismissed.

But it was a very tense day. It was like no other day. No other day. We were outside, because we didn't know what other threats, or un-communicated threats, there might be operative against the federal government. The U.S. district court and the D.C. Superior Court are right across the street from one another. If a terrorist ever wanted to cripple the city, and drive a big truck in there and blow both places up at the same time, it could happen. God forbid.

Q: Right. But could you see any of the damage from where you were in Washington D.C.? Could you see anything?

Urbina: No. I was not in the Annex at the time—which is the new buildings. I moved in there about five years ago. This was way back in my chambers—it only faced the municipal center. I couldn't see anything.

Q: Right. What did you do for the rest of the day?

Urbina: Well, for the longest time, we waited outside until the dogs and police cleared the building. Then I went back to chambers, I worked for a while, and then told everybody to go home.

Q: Now at that time, was it clear—? It was certainly clear that this had been a coordinated attack of some kind. I've forgotten now exactly when it was apparent that it was radical Islamists, Al Qaeda, associated with [Osama] bin Laden—who, after all, had been involved in other terrorist—or directing other terrorist attacks in previous years.

Urbina: Right.

Q: But how would you say your life carried on? Would you say that this event here, on the home soil, presaged a different order of things in the United States? Or did you think that this was just something that happened on September 11, and it would be dealt with, and we would go on in our own merry way?

Urbina: No. The first—I felt that the battle was brought to our shores, and that from this point forward we could no longer think of the conflict as being somewhere else, but that the conflict was here. We were vulnerable to it, and that there were people who were intent upon killing Americans and doing the United States as much damage as possible. So yes, I thought about the implications of it, and from that point to the present I still think of us as being a possible venue for future attacks.

Q: But did those events have a discernible impact on your job as a federal district judge here in Washington? Obviously, there are cases we've yet to talk about that are certainly relevant to this subject. But do you remember how soon, if at all, it came home to you that you, yourself, were now involved in this?

Q: I think it was within a year or two that I started getting civil cases for damages against Hezbollah, Al Qaeda and others group, who, it was alleged, had—with the assistance of bombs and collaborators—had killed or harmed people, many of them Americans, some of them Israeli.

One example was this. In the first set of these cases, Iran would not respond. It was a default case where you just try the case. The testimony was this—the person said, "It was my first day of college," in Israel, "it was orientation, and I met a few people. We went to a sidewalk café, we were talking, and we raised our glasses of wine to the new adventure we had just begun. Suddenly, the person across from me disappeared—completely disappeared," because of the blast. He said the person disappeared before he even realized that there was a blast—that the person joining him in the toast had been blown away.

Q: Where was this?

Urbina: This was in Israel. It was later on determined that it was Hezbollah. He, himself, had the fragments of the bomb—a screw had gone right into his heel, and was wedged right through his foot—through his heel into his foot. That was one of the damages he suffered. That so graphically brought to the fore not only the criminality but the cruelty and the resignation that people of that mindset—terrorists—were prepared to prosecute.

Q: Do you recall that in January of 2002, the first detainees—who would be called “detainees” at Guantánamo Bay—arrived at Guantánamo in these orange jumpsuits, with goggles, their hands and feet chained, and what have you—and there were pictures of it.

Urbina: I probably saw the pictures, but I don't recall them.

Q: Okay. Were you mindful of the fact—was it even important for you to be mindful of the fact—or useful—that in the fall of 2001, after Congress had approved the president's Authorization for the Use of Military Force, that a system of military commissions had been ordered by the president for prospective detainees? Were you aware of that?

Urbina: Yes.

Q: Did you know anything about military commissions?

Urbina: No, nothing at all. I've never served in the military, and I've never read anything that discussed the body called "the military commission." I'd heard of courts martial and things of that sort, but no.

Q: In fact, did you know anything at that time of the issue of legality—the statutory legality, let alone the constitutionality—of putting people, detainees, down in Guantánamo Bay, Cuba? Did you know anything about that?

Urbina: At first I knew nothing. Then, of course, there were articles in the newspapers and law journals, the monthly law journals, that discussed the authority needed in order for these military tribunals and so forth to function. At first I said to myself, without examining the legality of it, "Well, this is probably a good idea, in that if they pick judges to preside over these, they pick people who are truly objective and sensitive to the Constitution, and all of them, of course, have top-secret clearance, this will move things." Because the cases that the U.S. district court

ultimately got, they moved very slowly because of the clearances and so forth. Everything was at a snail's pace. At first I said, "Well, as long as the president picks the right people to preside over these things, this is probably okay." But then, as I read on, I realized that there was a real issue with respect to the legality of some of these entities.

Q: Right. And at that time, during that late fall or early winter, and then actually, for a long time thereafter, senior members of the administration were portraying these detainees, whom they had brought to Guantánamo Bay, as the "worst of the worst." That was Don [Donald H.] Rumsfeld's term, but it was echoed by Vice President [Richard B. "Dick"] Cheney and others in the administration. Just as an observer of the events, before you got really involved as a judge presiding over cases and ruling on them, did you have, yourself, any sense of whether you were looking at the "worst of the worst"?

Urbina: Yes. I assumed we were being told the truth, and who would know better than the Secretary of Defense, and who would know better than those who were in charge of scrutinizing the situation and governing their detention, etc.? So when they said they were the "worst of the worst,"—and, of course, it's on the heels of 9/11—I said, "Well, okay. These must be the worst of the worst." But then, of course, things began to unravel in terms of how these people were being described, facts about how they were collected, how bounties were put out—how people from different tribes were accusing individuals for the sake of money. All this began to come out, and I thought, "Wait a minute. This doesn't sound right."

So I knew—there's nothing that contaminates the thought process more than fear and anger, and there was so much of both around that time. I knew there would be statements and allegations that were larger than life, but I was just waiting to see how it was going to be sorted out.

Q: You had been on the bench seven years at that time, going on eight years. Did the federal district judges—how many in the courthouse that time would there be? How many would you say?

Urbina: Probably about twelve or thirteen, including former judges.

Q: Did you have barbecues together? Did you go out at night, drinking together? Did you at least have lunch sometimes, together?

Urbina: [Laughs] Oh, yes.

Q: And did you jaw about these things?

Urbina: Yes. No barbecues and no dinners, but we frequently had lunch together. There's a dining room, a judge's dining room, and there's a sign on the wall that says, "Nothing that is said in this room shall leave this room." But yes, we had talks, and we were all on a high state of alert, because this was a brand-new thing. We needed real guidance on how to organize what we were going to do, so there wouldn't be disparate decisions in every direction. And the chief judge—Chief Judge [Thomas F.] Hogan, and later on, Chief Judge [Royce C.] Lamberth—did an

excellent job of creating a process where everybody stayed informed of the scheduling of matters. For example, the chief judge would create a scheduling order for all of us, so we would all have a timetable that resembled each other's—timetables that resembled each other's. When a person wrote a decision, that decision was immediately disseminated—not so that we would all agree on it, but so that we'd know what had happened so far, in terms of hearings, with respect to these detainees. The chief judge did a lot of work to bring us together as a team.

Q: Well, in the first couple of years, before *Rasul* [*Rasul v. Bush*, 2004], was it clear that you people on the federal district court were going to have anything to do with this?

Urbina: Yes.

Q: The government was making an argument, wasn't it—wasn't it the government's position that these people were going to be tried by a military commission, and as far as submitting habeas corpus petition, they didn't have anybody to do that?

Urbina: That's right. Then *Boumediene* [*Boumediene v. Bush*, 2008] came down—

Q: Well, *Rasul* first.

Urbina: *Rasul* first, that's right, and later, *Boumediene*.

Q: In 2004. Actually, were there habeas petitions—did you ever get a habeas petition before 2004, where you had an uncertainty as to whether you could—?

Urbina: Yes. Some habeas petitions were filed, if I recall correctly, and the question came up at the luncheon. "What's your thinking? What authority are you thinking about?"

Q: Right. Right.

Urbina: Let me say this. On this court—at that time and currently—there were people who came from different backgrounds, different administrations, and different levels of exposure to the law, etc. It was a relatively diverse group, ideologically, as well, probably—in terms of what administration they came from. But everybody was on board. To my knowledge, everybody was on board in doing this the right way because it hadn't been done before. We were the only court that was going to be getting these, so it was us. We knew we had to do the right thing. No other court was going to be getting these cases, and we would be—I don't think the concern was that we'd be scrutinized, but I think the concern was that it had to be done correctly. As I said, the chief judge coordinated an effort and—the judges on this court are just—

Q: That wasn't clear for the first couple of years.

Urbina: No. No, it was not clear.

Q: But it was certainly clear after *Boumediene*. In *Rasul*, the Supreme Court ruled that detainees had access to file habeas petitions, and based on a statutory ruling, statutory grounds, had access to file habeas petitions in federal district court here in Washington. As you say, it's not worth getting into today, but ultimately this would be *the* court—the federal district court—and this would be the circuit court that would handle these things exclusively.

Urbina: Correct.

Q: But when *Rasul* was decided, do you remember any sense that, "Well, this is the way it ought to be"? Was there any resistance, as far as you recall, to any viewpoint in the district court that thought, "Well, the government's right. We don't really need to be involved"?

Urbina: I never heard that point of view expressed. In fact, I think the judges I did hear from who spoke up all felt, even before the fact, even before *Rasul*, that the Constitution would in all likelihood provide these detainees with access to the federal courts. People from all three branches of government take pretty much the same oath, and that is to uphold the Constitution. We don't all do it exactly the same way. The executive enforces the law. The legislature writes it, and hopefully in a way that's consistent with the Constitution, but the judges are married—we are married to the Constitution. That's *it*, for us. We don't have constituencies, we don't have to be voted into office, we don't have any of that stuff. We have the Constitution. And while, sure, there are different ways to interpret different things, I got the feeling then—and I was very proud, very proud of how the court handled it—I got the feeling then that all these judges were on board, even though there's been more work for us in an area that was brand-new. All these

judges were on board to do the right thing, and if habeas was the way it was ultimately decided it would go, then we would all do the right thing, and now the job was to coordinate an understanding of how to proceed, so there would be a uniform approach—not uniform decisions but a uniform approach—to getting things done.

Q: Well, you know, of course, that in response to *Rasul* and *Hamdi* [*Hamdi v. Rumsfeld*, 2004]—

Urbina: *Hamdi*. Yes.

Q: —which, of course, involved a person of dual nationality—he came under the American umbrella that these non-nationals down at Guantánamo didn't have—that Congress passed the Detainee Treatment Act of 2005, which stripped the courts, stripped the federal courts, of jurisdiction, again. Do you remember any reaction to that here? Did you pay any attention to that, really?

Urbina: Yes.

Q: I mean, it had to be decided.

Urbina: Oh, yes. We paid attention. I don't know that I engaged in enough discussion about that subject to know the general feeling, but we all paid attention because we thought it was interesting. At that point, I think most of the judges felt that this was a really interesting conflict that's taking place. It's almost a classic confrontation between branches of government, and

people were intellectually stimulated by this. As I say, you've got judges on this court who are truly intelligent and really are closely wedded to the law.

So yes, we paid attention, and we thought it was interesting. At one point, we just sat back and waited for the Supreme Court to make a decision.

Q: Right. Right. Now do you remember—in the spring of 2004—the *Rasul* case was decided in June of 2004, and it was the first case to make clear, at least in the Supreme Court's point of view, that you judges had jurisdiction over habeas petitions from Guantánamo. But literally, at the time the case was argued before the Supreme Court—*Rasul*, also known as *Odah*—in April of 2004 there were released some pictures from a place called Abu Ghraib, in Iraq. And then there were also released, soon thereafter—not released, but leaked or disclosed—some so-called Torture Memos that had been written in 2002 in the Justice Department. Do you remember—just to stay with the Abu Ghraib pictures—do you remember seeing them and having any particular reaction to them, one way or the other, or any of your colleagues?

Urbina: Now if I'm thinking about the same pictures—there were some pictures of detainees nude, and people piled on one another with their privates exposed, and that type of thing—and women soldiers as well as men soldiers had participated in it.

Q: Yes, exactly.

Urbina: I won't say I was shocked. I was sorely disappointed that this, in fact, was happening—that it seemed like this, in fact, was happening. My first thought was, you know, you find out what a person is made of when they're confronted by what they're afraid of. That's the old saying. I was, again, seeing some suggestion—I won't say strong evidence but some suggestion—that there were abuses on top of these people being detained—many of whom needed to be detained—. Let me put it this way. I've always wanted to make sure that people understood that, as far as I was concerned, people who are proven to be Al Qaeda, linked with Osama bin Laden, any kind of activity that put American lives or allied lives at risk, should be punished severely. I've always said that, and that's the way I feel today. But our job was not the punishment part; our job was kind of sorting it out so there was a process by which we could learn who the bad folks were.

So when these pictures arose, I said, "Oh, my god, this is just going to inflame and empower the adversaries," the people who benefit from anger, and fear, and terror. That's how I felt.

Q: Do you remember seeing the text of these so-called Torture Memos, where people like John [C.] Yoo were explaining how you could do these kinds of things?

Urbina: And [Alberto R.] Gonzalez?

Q: John Yoo. The Office of Legal Counsel—you know, "short of organ failure." That kind of thing.

Urbina: I remember seeing blurbs of it in the newspaper. I was very disappointed.

Q: But war is hell, right?

Urbina: Yes, well, this is true. This is true. War is hell, and there's always a good reason to avoid it and condemn it. But we, as a country, have been through plenty of war. I've said to myself, "You know, this is the kind of treatment that we've always condemned." When the Japanese were collecting, and torturing, and the Germans—this is exactly the mindset that we have distinguished ourselves from. It was very disappointing to envision us as participants in this kind of wrongdoing. Now, I'm not naïve. I know in war people get killed, people are angry, and people are afraid, and people have to take extraordinary measures. But in this situation, with Abu Ghraib, these were prisoners. They didn't pose a threat to anybody as far as I could tell. They were just being punished and humiliated for reasons which—I couldn't imagine good reasons.

Q: Well, to go back to Guantánamo Bay for a second—most people, I think, educated people, if you say "habeas corpus," they think, "Well, some guy is locked up in some Georgia prison or something, and he feels he's not being held legally. So he files a habeas petition—his lawyer files a habeas petition in federal court in Georgia or something, and they rule on it." It usually has to do with ordinary criminal convictions, isn't that correct?

Urbina: Yes.

Q: Not the kind of thing we're talking about at Guantánamo Bay.

Urbina: No. That's right.

Q: Can you characterize for me what would be a typical habeas, as it has evolved in the twentieth or twenty-first century? What's a typical habeas corpus petition?

Urbina: Well, I think you've hit the nail on the head. Usually it's someone who has proof, or believes he or she has proof, that the conviction they suffered in the appellate appeal was wrong. Or, that they are being subjected to cruel and unusual punishment, either as an act of commission or omission to protect, and that, therefore, their body should be produced—habeas corpus, produce the body—so it can be explained and appropriate measures taken. That's the typical situation when someone has a grievance that should be addressed under the law, and has not been, according to the petitioner, adequately addressed yet.

Q: Okay. Now down at Guantánamo—let's say you are Detainee X. You're Detainee X, you've been taken to Guantánamo, and you haven't been charged with—let's say this is 2001, 2002, 2003—you haven't been charged with anything. You haven't been convicted of anything. And time is going by. Actually, it wasn't until 2004 that you could even get access to civilian lawyers. But somehow or other, whether it's 2005, 2004, say, after *Rasul*, you or your lawyer decide to file a habeas corpus petition at the place that is available to you, which is federal district court in Washington.

Now what is the judge obligated—what was, in those circumstances, the judge obligated to do?

The detainee has filed this thing. It's now 2004, even 2005. What is the responsibility of the judge who gets this petition? What does he do with it?

Urbina: Well, given the recent pronouncement at that time by the Supreme Court, to some extent or another confirming that habeas corpus was a remedy available, once that was said I felt that the federal court, or courts, had an obligation to look at what was going on with a fresh eye. In other words, this is not your typical habeas corpus, where the person is on death row—the guy's not even a citizen! Now we have to look at this with a fresh look. Let's look back at what the Constitution—does the Constitution really cover it? That's what I felt the obligation of the court was—to look at it, and to go deeper into the Constitution. Not only to look at the letter but the spirit of the Constitution, and decide whether or not the spirit of the Constitution, together with the letter of the Constitution and the case law, would support some intervention by the court. That's what I felt a federal judge should do.

Q: And as it would come to pass, by 2008, the Supreme Court had ruled—on constitutional grounds—that detainees at Guantánamo constitutionally had access to habeas corpus in the courts. So one way or another, even though the Military Commissions Act of 2006 had again attempted to strip the federal courts of jurisdiction, that had not succeeded, and more or less it was conceded by now that you had the jurisdiction, and you had a whole lot of cases.

I would like, tomorrow, to talk about some of the cases that you actually had, and the kinds of issues that they raised with regard to everything from standard of detention—on what grounds you could detain someone—to burden of proof, for example

Urbina: You sure do know the issues.

Q: They may be, but I'm just a country boy trying to straighten this out. But we're going to get into the weeds tomorrow, if we can.

Urbina: If there is something—a synopsis, or something of the cases that I've decided, that you want to talk about—if you have that, I would benefit from reviewing it.

Q: I'm sure you would.

Urbina: Because we had so many of these some of them slip into the—

Q: I will show you. I will show you. Another thing we're going to talk about tomorrow, if we can, is the consequences in the district court of appeals of some of the district holdings—some of the federal, lower judge holdings, like yourself—and the phenomenon that seems to have ended up, whereby the D.C. Circuit Court of Appeals—not the Supreme Court—seems to be in recent years, the court of last result for the detainees. Then, of course, what does it all add up to?

But I'll shut this down now for today.

Urbina: Yes.

[END OF SESSION]

VJD

Session Two

Interviewee: Ricardo M. Urbina

Location: Washington, D.C.

Interviewer: Myron A. Farber

Date: February 1, 2013

Q: This is Myron Farber on February 1, 2013, continuing the interview with former, retired federal judge Ricardo Urbina, here in Washington, for the oral history project on Guantánamo and related matters.

Judge, what I'd like to try to do today is talk about what happened after *Boumediene*, in terms of the Guantánamo cases. Inevitably, we need to talk about, I suppose, some things leading up to that, but it's been almost five years since the *Boumediene* decision came down, and there have been any number of habeas petitions to the federal court here, from which you retired in May of 2012? Last May.

Urbina: Yes.

Q: Let me, if I may, start by citing a few figures that were compiled by a professor of law at American University named Stephen [I.] Vladeck, last July. He's talking about the period between *Boumediene* in 2008 and last July. He says that there were forty-four merit cases—if you don't count the Uighurs' case [*Kiyemba v. Obama*, 2008], which I'm not sure is the right way to do it—but apart from the Uighurs, there were forty-four merit cases, and in twenty-one cases the district court granted relief—the district court judge, like yourself would. In twenty-three cases, the district court denied relief, so it was fairly split. There were twenty appeals to the D.C.

Circuit. Six decisions granting relief were reversed by the D.C. Circuit, usually with the circuit saying that the district judge had gotten the facts wrong. Thirteen decisions were affirmed—the thirteen decisions that denied relief were affirmed—and in short, looking at these figures, no case since *Boumediene* was thought meritorious by the D.C. Circuit, and not a single Guantánamo detainee was released as the result of a district court favorable ruling here. Certainly none were released where the government didn't decide it was going to release them on its own. Is that your understanding?

Urbina: Yes, that is my understanding. For a while there, the chatter was that no case granting relief had survived. All those cases had been reversed.

Q: Well, in general, what do you make of that?

Urbina: Well, I make of it that the circuit was sending us a very clear message, in that by explaining that either the standard we were applying was wrong, or the approach we were taking to the evidence, as a whole, was wrong, or that the trial court was applying the wrong detention standard to the facts. From all of that, I got that the circuit was just plain dead against the release of these individuals, and was able to find an explanation that justified the reversals.

Q: Not one survived?

Urbina: Not one.

Q: Is there something inherent to that particular D.C. Circuit Court that would lead to that result? I can understand what you say about a variety of reasons they might have, but is there something peculiar about that circuit?

Urbina: Well, I thought so, and I think other judges felt the same way—which was that no granting of a habeas was going to survive review. Whether or not the circuit was correct in handling matters that way I guess is another question. But it seemed to me that when a trial judge reviews facts, that that review of the facts should be left alone. The court of appeals circuit is not there to assess facts. The judge who listens to the facts, and screens and filters them, and ultimately determines what the facts are—that's the trial judge's responsibility. If the trial judge misapplies the law, then of course I think that's a matter for the circuit to address directly.

So in those instances where, as you just mentioned, the circuit felt that the judge was mistaken in his determination of the facts, I have particular problems.

Q: Let me cite a few cases—the few cases where the D.C. Circuit was saying what the law is, so to speak. This is post-*Boumediene*, but let me return to one of the first post-*Boumediene* cases. In fact, this is a decision that you rendered in a case called *Kiyemba v. Obama*—sometimes referred to as *Kiyemba I*. And this, if I understand correctly, was the first time that a district court judge, federal judge here in Washington, had ordered a Guantánamo prisoner released from prison on a habeas corpus petition. The first time. This decision of yours was handed down in October. I think it was October 9, 2008. That's only months after the *Boumediene* decision the previous June. Do you recall that case?

Urbina: I have some recollection of it, but if you want to refresh my memory, that would be good.

Q: Well, this was a case that involved Uighurs. At that time seventeen Uighurs—

Urbina: Okay. Yes.

Q: —who had been brought to Guantánamo in 2002 by the government. They were a Turkish-Chinese Muslim minority from western China who had apparently, according to them, certainly to escape persecution by the Chinese, had moved into Afghanistan—some of them—and the government later claimed that they were up to no good there, so to speak, in terms of training for military action and that sort of thing. Others would dispute that entirely.

But, in any event, after the United States' invasion of Afghanistan, they fled into Pakistan, where they were seized by locals who, for \$5,000-a-head bounty, turned them over to the United States military, and they were sent to Guantánamo in mid-2002. If you could pick up the story there in terms of what happened. They began—I think as early as 2004 or so—to petition for release from Guantánamo, and eventually you got the case.

Urbina: Well, the chief judge—the court and the chief judge leading the process—needed to divvy up the cases. There were a block of cases that had come in, and the chief judge wanted these cases to be distributed among the judges in an appropriate and equitable fashion because

these cases, as we both have discussed, were both unique and challenging. So the chief judge convened us, and discussed the prospect of looking at all these cases and setting forth a procedure that we would be following. He would set up a scheduling order that, of course, would have variations based upon the particular situation that a judge or a petitioner was in. For whatever reason, I got all the Uighur cases. It made sense for one judge to have all the Uighur cases, so I got all of them. Shortly thereafter, the flow of information with respect to these people—I did not know what a Uighur was, to tell you the truth. I just didn't know.

Q: I didn't know myself, until recently.

Urbina: So information began to flow about who these people were. As the process began to unfold where the petitioners lawyers would ask the government—as they were entitled to do, for certain information before the charges gelled into something that would be right for a merits hearing—as the information came in, and as requests were made—for example, if the attorneys for the petitioners would say, "We need the following information, one, two, three, four, five," and then the government would say, "Well, we cannot give you one because it's couched in very sensitive, and top-secret terms. However, number two, we can give you part of it," etc. So the judges, all of us, were responsible for doing that, and my slice of this was the Uighurs.

So, as a result of that, I began to learn more about who they were or what they were doing, and I became a little bit concerned. At first I thought perhaps I was misunderstanding the situation, because it seemed to me that that group of cases was very different than other cases that I was also handling at the time. When I spoke to other judges, that impression was confirmed. By that I

mean that the allegations against these individuals were very weak—at first very weak, and then later on, ultimately, dissolved—with respect to their being dangerous, or their having participated as enemy combatants, etc. The whole situation dawned on me, that it was the government's intention to detain these people *indefinitely*.

Now my interpretation of habeas corpus, the great writ and all that, goes into an assessment of a case under habeas, which seeks equitable relief. It's an opportunity for the court to cut through the red tape and say, "Okay. Let's forget about that. Let's look at what the issues are, because there are human beings' lives here at issue. This is not a matter of money."

[INTERRUPTION]

This is not a matter of damages, so to speak. This is a matter of a people who, it appears—at first I said—it appears were fleeing from the Chinese into a zone where they were at the wrong place at the wrong time. Then, as a result of the bounties, and as a result of kind of a dragnet that the allied forces employed, to gather people up, etc., these people were—and I began to inquire as to whether or not there was something else going on—that maybe these people *were* dangerous, but there was something political about the situation, that it was not being revealed.

Now, of course, there was always information that came through the judge that was classified, and things of that sort. So I said, "Well, I have political sensitivities. I know that we need to be careful in revealing certain things, because it's a matter of nation states trying to deal with each other successfully, whether they're allies or whether they're our enemies." But nothing came to

me, and the petitioner's lawyers were very good. Let me put it this way. They were very conscientious, and they brought to light some of the things that I had feared, for example, that these people were not being treated well. They were being detained with—as far as they were concerned, with no hope of release. They had been away from their families, away from their friends, away from their culture. Yes, they were enemies, so to speak, of the Chinese—

Q: —of the Chinese.

Urbina: Yes, of the Chinese. But no one else that I could find. I asked questions in open court, when the time came, as to what danger they posed to the United States, and so forth.

Anyway, before we got to that point, the petitioners began to provide information associated with requests that they were making that to me was quite revealing about the conditions these people were in. Some of them were not well. Some of them were sick. Some of them were on hunger strikes. Some of them, their lives were at risk. Again, habeas corpus to me was an instrument for looking at what the executive was doing and then determining whether relief was appropriate under the circumstances. I knew we were at war, but not with these people. Not with these people.

So everything developed, and I kept waiting for some revelation to surface about these Uighurs that would suggest that indefinite detention was reasonable. That never came. To the contrary. When we had hearings, when I reviewed the submissions, there was nothing that suggested anything dangerous about these people. So I began to read more about them. I said, “Well, I

wonder if these people could be a danger to the United States. Is there any history of these people having ill feelings against the United States?" What I learned is that there is a very substantial community in the United States. That some of them are very wealthy, some of them did very well in business, that there are religious, faith-based organizations that were prepared to step forward and provide employment, and this and that for these people. On the day of the hearing, the famous hearing, the courtroom was packed. Standing room—every seat and every inch of space in that courtroom—and that's a big courtroom—was filled. Many of the people there were individuals associated with the Uighur community. There were Christians, there were Jews there who were prepared to step forward and say, "We understand these people. We will work with these people. If you bring these people here, we will put them up. We will give them a place to live." They were there, ready, able, and willing. It surprised me that there was so much community prepared to help these people. But, in any event, in my mind at least, it weakened the government's position even more. I asked the questions on the record directly—"Tell me any risk that these people pose to the United States," and they said that there was none that they knew of.

So this was my plan, and unfortunately the plan did not materialize the way I had hoped. When I heard everything and the arguments were done, I said, "All right. We'll bring them here."

Q: "Here" being—?

Urbina: —to my courtroom. "And a representative of the Department of State, a representative of Homeland Security, a representative of the president—anyone you want who thinks that they should have a say in what happens, ultimately, to these people, are invited to come. We'll have a

hearing. Then I'll have more information. But in the meantime, these people should not continue to be detained in the fashion they're being detained."

Q: You mean you wanted to have these Uighurs brought to your courtroom?

Urbina: Yes, brought to the United States, and to the courtroom. Some venue—I don't know if it would have been the courtroom, but some venue where it could happen, and my courtroom was as good a place as any. I had tried multi-codefendant cases. It could accommodate eleven, twelve, thirteen people who were criminals, allegedly. Certainly, it could accommodate people who were—

Q: But at that time—and the hearing you're talking about must have been maybe a month or more before—that you were going to have at least a month or so before your decision. But at that time, and over time, what *had* been the position of the United States government?

Urbina: The position of the United States government changed from time to time. But my recollection is that the challenge that petitioners' lawyers made to the legality of detention was reacted to by the government by saying that the government had "windup" authority. "Windup" authority.

Q: Before you say that, may I—having the advantage, unlike you, of having your opinion in front of me—before we get to the "windup," you indicate in your opinion that the government,

for years, going back as early as 2003, had decided that the Uighurs didn't pose any threat to the United States, and weren't enemy combatants.

Urbina: Yes.

Q: And over time, between 2003 and 2010, they simply maintained—I don't know if they were going around announcing that that was their position, but as it emerged, and as you record it in your opinion, it became clear that for some period of years, they had concluded that they were not a danger, and they had been trying to relocate them to other countries—not back to China, where they might be persecuted, but to other countries.

Urbina: That's what they said.

Q: But it's a two-pronged thing. Because when we get to the "windup" that you mentioned, they had already conceded—according to your opinion—for years, that these people were not dangerous.

Urbina: Yes.

Q: And yet, years are going by, and they're still there at Guantánamo Bay.

Urbina: Yes. And many of them, according to counsel for the petitioners, suffering circumstances that made their stay even that more intolerable. But yes. That's correct.

Q: So the government is saying to you, "We have an indefinite windup period"?

Urbina: Yes. Indefinite windup period.

Q: "Windup" meaning we can wind up our affairs with regard to the Uighurs, and in the process we will detain them indefinitely.

Urbina: Indefinitely. That was the position and the authority they were taking. Yes. "We cannot tell you when they will be released. We do not know when they will be released." Of course, in the background there was something else, as you know, going on, which was this ostensible veto to put these people somewhere by the Chinese. The Chinese were actively engaged in making sure, to the best that they could, that these Uighurs were not given refuge anywhere. Because the feeling of the Chinese government—and I was surprised because, again, I didn't know anything about the Uighurs—was that they were terrorists, they were subversives, and they deserved not to be given refuge anywhere, because the Chinese had the right to deal with these people. Now one thing I learned that added yet another aggravation to the situation is that I learned that certain Uighurs were promised by their captors that their identity—promised that they would not be interrogated by Chinese. And my understanding is that they *were*—that the Chinese actually came and asked them questions and interrogated them while at Guantánamo.

Q: You mean at Guantánamo?

Urbina: Yes.

Q: Oh, really?

Urbina: Yes. It was never written up, but I heard this from more than one source, more than one government source. So these people felt very betrayed. Some of them wouldn't even accept counsel at first, because they just didn't believe that anybody, certainly not an American, was going to do anything for them, and that this was all kind of a plot to get information and give it to the Chinese. They were very suspicious, which I think they had the right to be. So the fact that the Chinese were pretty much calling the shots.

See, at first I didn't realize this. I knew that they had been a group fighting the Chinese, feeling that the Chinese were oppressing them religiously. These people were Muslims; the Chinese, of course, are not. There were some tensions which I still don't fully understand, but they were undesirables; they were *personas non grata* in their own country. But I did not appreciate, until later, how—I don't know what the word is—bitter? Angry? How adamant the Chinese were about what should happen to these people. I learned later—because at first I said, "Well, how could you not find a country? What do you mean you can't find a country?" "Well, we've tried this. We've tried this." I think they paid large sums of money for a couple of them to be put somewhere in Europe, a nation-state that was not vulnerable to Chinese influence, but that was just a couple of people. Eventually, I came to the conclusion that they *were* going to be held indefinitely, and I wasn't convinced that the U.S., that the government, the executive was making every effort reasonable to find a place for them.

As a footnote, even if you find a place for them they would be inserted into a different culture—no livelihood, no connection. Chances are they might not even have another Uighur there, unless more than one was transferred to a particular—Bermuda was one of the places that took one or two—

Q: Palau.

Urbina: —and Bermuda caught hell from England, because they still defer to the Queen, even though it's an independent country. They caught hell because England was not consulted about this. So, yes.

Q: Serious. And some went to Palau, and some were sent to Albania.

Urbina: That's right.

Q: But in your opinion you say, toward the end, "Liberty finds its liberator in the great writ, and the great writ in turn finds protection under the Constitution." Now this is post-*Boumediene*. The Supreme Court has said that the Guantánamo detainees have a constitutional right to habeas. Then you go on—"Thus, the carte blanche authority that the political branch has reportedly wielded over the Uighurs is not in keeping with our system of government. Because their detention has already crossed the constitutional threshold into infinitum, and because our system of checks and balances is designed to preserve the fundamental right of liberty, the court grants

the petitioners' motion for release into the United States." Now this is on the eighth day of October 2008.

Now what did the D.C. Circuit say about that? Here you were saying that these people can be admitted into the United States. But did you mean, at that time, for a hearing, or did you mean for settlement?

Urbina: No, for a hearing with a view toward settlement. As I said—and I believe I said this on the record—"You bring representatives from interested components of the government, and we'll create something that is satisfactory to the government and is satisfactory to these people."

Q: Okay. It sounded reasonable to you?

Urbina: It did.

Q: Well, the D.C. Circuit didn't agree with that did they?

Urbina: No, they didn't. They didn't.

Q: What did they say?

Urbina: Well, essentially they said that the power to admit people into the country is exclusively that of the executive. I think that, as a general principle, that's correct. However, as

Boumediene—

Q: That's been based on immigration cases, hasn't it?

Urbina: Yes, based on immigration cases. But as *Boumediene* and other cases have mentioned, there comes a time when the checks and balances have to—you can't provide a protection with no remedy. It would have eviscerated the intention behind *Boumediene* for the court to be able to rule in a particular way and not do anything about it. I thought that was silly. I thought that was inappropriate. And no one presented an alternative to that.

Q: This is the so-called remedy issue that arises in various cases.

Urbina: Yes.

Q: Whether, having reached a decision, you can provide a remedy.

Urbina: Yes.

Q: This is not the only case in which this has arisen.

Urbina: No, I guess not.

Q: So the D.C. Circuit said that the federal courts, in general, lacked the power to order a political branch of the government—meaning the executive—to admit non-citizens into territorial United States. But in the only case that I can see where the Supreme Court, post-*Boumediene*, granted certiorari, they granted it to this case. So they granted certiorari, if I understand correctly it went up to the Supreme Court, but the Supreme Court never decided.

Urbina: That's correct.

Q: Do you remember that?

Urbina: I do. And let me go back one step because you may—you probably know this, but it came to mind. When I made the decision and the original petition to appeal—the original reaction that one of the circuit judges had was favorable to granting—that was, I think, Judge [Judith Ann W.] Rogers. I think she spoke favorably in terms of granting the relief. But then, of course, she was overpowered by the rest of the panel—Judge [A. Raymond] Randolph leading the majority—and then when they actually wrote on the issue, they had been reversed.

But yes, that's right.

Q: But, as I said, the Supreme Court never decided it because the government then went about placing—finding places in Palau and elsewhere for these Uighurs, and the Supreme Court sent it back to the lower courts, sort of in abeyance.

Urbina: They didn't send it back to me. They sent it back to the circuit. Sometimes the circuit will send it back to the trial judge so additional facts can be ascertained, so the judge can take direction from the appellate body and fix it. But that didn't happen.

Q: Okay. Now before we leave *Kiyemba*—were you involved in what came to be known as *Kiyemba II*? Which is a case in which the Uighurs sought the courts to give them a ruling that they would be notified of where they were going to be sent, and be given an opportunity to be heard before they were sent someplace.

Urbina: I believe that was a case that came back to me. The *Kiyemba* cases would all have been mine, for the sake of continuity, and the chief judge, thankfully, did not feel that he needed to give it to another judge. So yes, I do believe that was mine, but you'd have to refresh my memory.

Q: Well, that was also decided unfavorably. A divided panel of the D.C. Circuit rejected that—rejected that. So *Kiyemba II* just didn't materialize.

Urbina: It had gone away.

Q: As I think we may have pointed out yesterday, since *Boumediene*, and with that exception of the certiorari granted to *Kiyemba*, the Supreme Court hasn't taken any Guantánamo cases. Do you have any feeling for why that is the case?

Actually, while you ponder that, and before we move to that, I just want to finish off with *Kiyemba* by saying, do you recall that after you issued the *Kiyemba* decision, you were assaulted in an article in *Slate* magazine called “Judges Who Would be King: The Judiciary is on an unprecedented power trip”? “When a federal judge ordered seventeen Chinese Uighurs, detained at Guantánamo, released into the United States in October, he took to its logical conclusion the judiciary's increasingly bold effort to supervise the president and Congress.” Did you see this at the time?

Urbina: I probably heard about it but I didn't read it. I don't always read what the media prints.

Q: It didn't reach you and throw a scare into you?

Urbina: No, no. You know, that's one of the advantages. You've got a job for life. That's why, I think, the framers gave people—judges—a job for life, because they wanted judges to operate independently of pressures. As I said yesterday, the executive branch has constituents. The legislative branch—and that's correct. The president should respond to the will of the people. The legislature should respond to its own constituency, but the courts should not be. I do not believe the courts are tied to that. The courts are tied to the law and the Constitution. My reading of the cases discussing the great writ and its statutory embodiment suggests to me that it is an instrument of equity—that in many instances it is an equitable response to a situation where the law, by itself, has gotten bogged down, or people's rights are being compromised, for reasons not consistent with the Constitution.

So, as I said earlier, why provide a remedy can you can't get relief? Why arm the judiciary with the ability to make the decision when the relief is unavailable?

Q: Well, to go back to that question I raised a moment ago—why do you think the Supreme Court, having decided *Rasul*, *Hamdi*, *Boumediene*, *Hamdan* [*Hamdan v. Rumsfeld*, 2006]—why do you think they haven't taken any cases, subsequently?

Urbina: I would only be guessing. I don't want to impugn the integrity of the Supreme Court because it's one of the most important institutions of our government. What the internal thinking might have been, who the decision maker would be in terms of granting cert or not granting cert—I believe that, underneath it all, this is such a hot button issue. We are at war. This is a hot button issue. The average person does not fully appreciate the plight of the Uighurs, and in order to address the plight of the Uighurs the Supreme Court would have to write something that would be an extension or a further elaboration of what I call *Boumediene*, and the other relevant cases. I just don't think the Supreme Court feels it should take the risk at this time, because it is a political issue, and it belongs in the political branches for the time being. The Supreme Court will only act on it if it absolutely necessary. That's my guess.

Q: Let me ask you, if I can, about a few of the cases that must have had some bearing on your life, and certainly have had a bearing on other judges of the court. Do you remember the case at all of *Al-Bihani* [*Al-Bihani v. Obama*, 2010]?

Urbina: Yes. Ghaleb Nassar Al-Bihani.

Q: Yes, Al-Bihani. It's a case that deals with the standard of detention. In *Al-Bihani*, the D.C. Circuit held that in order to be detained, or detainable, under the authorization for Uniform Military Code—Authorization for Use of Military Force, 2001 authorization—the government need only prove that a detainee is part of or has materially supported Al Qaeda or its affiliated groups. In other words, it's saying that the government didn't have to establish that the detainee had been involved in a particular act of belligerency. Do you remember that case?

Urbina: Yes.

Q: Was that regarded as of some consequence?

Urbina: Yes, I think so. Because many judges read that decision to mean that if this person was an adjunct, was associated with wrong-doers, then they would be legally detained. So it wasn't anymore that the government needed to prove that this person had taken affirmative action, had taken steps to assist the enemy forces, but just that he was part of it, was part of that organization and, therefore, culpable.

Q: Right. And this is something that you federal judges, district judges, have to adhere to. Isn't that right?

Urbina: Yes, it is.

Q: Would you agree with that decision? I know you have to abide by it.

Urbina: No. To the extent that it's guilt by association, I feel that interpretation of it takes it too far. I think it takes it too far.

Q: Takes it too far, you say?

Urbina: Yes. It goes too far. I learned, through the testimony of experts during some of these hearings, that the Taliban ran everything. If you worked for the post office, you worked for the Taliban. The Taliban was a structure that went beyond just individuals who were shooting at other persons; it was a governmental structure. Consequently, people were part of that organization who had nothing to do with warfare. Not everyone did. If you worked for the schools, or worked for some Taliban-sponsored organization—a hospital, doctors—you could be blamed as a member of the Taliban. I thought that was carrying it too far. That was my view.

Q: Another case, 2010 case, that seems to have had some consequences was *Al-Adahi* [*Al Adahi v. Obama*, 2010]. In *Al-Adahi*, Judge Randolph posited—and, after all, he was writing for the panel—something called "conditional probability." Some people have called it the "mosaic theory." Do you know what he's talking about?

Urbina: If I remember correctly, some people proposed that evidence was like a piece of a mosaic, and that only the pieces put together could actually present a persuasive case for this or that. That's what I think it was.

Q: And that was consequential.

Urbina: Oh, yes. So you could have a dozen apparently "innocent" acts, but if you put them together and you got a different picture, then you—you the judge—were obligated to find that the person was being legally detained. Because when you put everything together—he traveled from this country to that country—that might be an innocent act. He stayed at this particular guest house where jihadists were known to stay. A lot of these guest houses were like hostels, so you didn't only have jihadists there. But once you take all these together, it becomes more than a coincidence, and consequently the picture in its entirety presents what authorizes detention.

Q: Did you feel that that was a reasonable ruling?

Urbina: I felt that the court was correct, the circuit was correct, in urging the judges to look at all the combination of the circumstances. I mean, after all, the law has used this approach in our jurisprudence for a long time. They call it the totality of the circumstances. I felt that, yes, there certainly are instances where the totality of the circumstances say much more than any particular circumstance within that totality. So I was not as opposed—I wasn't opposed to that point of view. I didn't disagree with it. Trial judges have applied that approach for years—not in these cases, but overall.

Q: It's interesting though—I don't know what the explanation is—but according to a study by Seton Hall Law School in May of 2012, it came out in May of 2012—

Urbina: That's pretty recent.

Q: —before *Adahi*, detainees won fifty-nine percent of the first thirty-four habeas corpus cases. They lost ninety-two percent of the last twelve cases, and the study says that after *Adahi*, “After *Al Adahi*, the practice of careful judicial fact-finding was replaced by judicial deference to the government's allegations.” Now the government wins every petition. What is called the key element of the study, post-*Adahi*, is the decline of district courts' independent fact-finding powers. “The shifting pattern of lower-court decisions could only be due to an appellate court’s radical revision of the legal standards thought to govern habeas petitions.”

So they're saying that *Al-Adahi* had quite an effect on what the judges were ruling.

Urbina: Yes, and I think what you just mentioned is what really tipped it, which is that there was presumptive deference being given to evidence presented by the government—now that I had a problem with.

Q: Well, that comes up in the 2011 case of *Latif v. Obama*, which is a really interesting case. It is in that case that Judge [Janice R.] Brown, I believe, writing an opinion, held that government intelligence reports were entitled to what she called “the presumption of regularity.”

Urbina: Regularity, but not credibility—presumption of credibility.

Q: If I understand it correctly, the judge had to accept that the reports—done in a course, often in the theatre of war—that they were taken down—the report is an accurate transcription of what was said, not that what was said was true. Is that fair?

Urbina: Well, that certainly is a fair reading of the case. But one of the things that troubled many of us, many of the judges, was that we learned that the interpreters were not always reliable. That the interpreters would change things—that many interpreters didn't speak the dialect that they were being called on to interpret. So to put down a blanket rule that if it's written down, it's good. If it's written down you can rely on that. It's regular. In one of my opinions I mention the fact that some of the evidence indicated that the interpreters were interpreting things incorrectly. I didn't suggest it was on purpose.

So, no. I have a problem with that. I do. Carte blanche, yes—I think that's a problem.

Q: This was a two-to-one decision by the panel, and there was a dissent. It's perhaps worth noting that none of these habeas petitions that have been denied have successfully gone to en banc here in the D.C. Circuit. There are relatively few dissents. It doesn't seem as if there's a hotbed of division within the D.C. Circuit—although some people like that aforementioned Professor Vladeck think that the D.C. Circuit—that there are four judges in particular of the D.C. Circuit, Judges Randolph, [Brett M.] Kavanaugh, Brown, and—the other one escapes me—

Urbina: Was it [Laurence H.] Silberman?

Q: —Silberman, who are fighting a rearguard action, as he would put it, against *Boumediene* in particular.

But in any event, in *Latif*, Circuit Judge David [S.] Tatel—am I saying that right?

Urbina: Tatel, he pronounces it Tatel.

Q: He wrote, with regard to this presumption of evidence ruling, holding, that "This, then, represents a first among Guantánamo habeas appeals in this circuit. Never before have we reviewed a habeas grant to a Guantánamo detainee where all concede that if the district court's fact-findings are sustained, then detention is unlawful." In other words, Henry [H.] Kennedy [Jr.] had concluded—the district judge, before this holding—he had done the fact-finding that you were mentioning before, and he concluded that [Adnan] Latif had a plausible explanation for what he was doing in that part of the world before he was sent to Guantánamo—and it had to do with his medical condition and his efforts to get help for his medical situation. That's what the lower court judge had held. So what Tatel is saying, as you indicated before, is that, "Wait a minute. We're saying that Judge Kennedy, he didn't do it right! When he found that he had a plausible explanation, he didn't take all these factors into concern." Tatel goes on to say, "Imposing this new presumption, and then proceeding to find that it has not been denied, the court denies Latif the meaningful opportunity to contest the lawfulness of his detention,

guaranteed by *Boumediene*." Finally, he says that what the government has done is move the goal post in favor of the government. "In that world, it is hard to see what is left of the Supreme Court's command in *Boumediene*, that a habeas review would be meaningful." Do you know what he's talking about? Why he's upset?

Urbina: Yes, well, apparently things go on that we only see the end product of—but I gather that there was some serious dissension among some of the judges up there about what deference should be given to the trial judge, or the finder of fact. Because, as you know as well or better than I, that the tradition has been that when the finder of fact finds a fact, then that fact is found.
[Laughter]

Q: You can't keep finding it?

Urbina: You can't go, "Let's find it again." No. That doesn't make sense. Why have the trial judge? And in that instance, where there is not only a finding of fact but there is a conclusion reached by a federal judge, that it was a plausible explanation—

Q: —and habeas granted, the petition granted.

Urbina: Yes—then it's all the more puzzling.

Q: Do you remember any of your colleagues sitting around talking about these things, like the ruling of presumption of regularity and the conditional probability? Did you ever go out for a beer and say, "What does this all add up to for us?"

Urbina: I'm sure those conversations took place, but I wasn't part of them. As much off the record as we can be for the time being—certain judges congregate with certain judges, and sometimes, when a particular group of judges come into the dining room, the judges who were there talking about an issue stop talking about it.

Q: Really?

Urbina: This is not to say there is no collegiality. There is a very strong collegiality. But there are certain points that have implications that are so deeply philosophical, ideological, whatever, that I have never seen a sharing. I have never seen, let's say, for the sake of discussion, one of the Democratic appointees—one of the prime Democratic appointees and one of the prime Republican appointees just get together and talk this out. We read each other's opinions and we agree or disagree, but I've never seen that. Maybe it has happened.

But this business of—and I guess you'll get to the next part of it soon—about the burden of proof, and the presumption of regularity—the business record exception, as you know, employs this concept of regularity as giving authentication to what's been said. However, it's not the same situation. As I said earlier, you're in a war zone. You have people who have strong motives to write things up in a particular way. And you have, sometimes, a gap in communication because

of language or culture. So to presume that the product that's written down—it's regular, and, therefore, the next step would be that it's credible—takes an important tool away from the trial judge.

Q: Well, just parenthetically, when you see reports of federal court decisions in popular media, almost always they say, "That ruling was by this judge, who was appointed by President Jefferson," or what have you.

Urbina: Only if the media doesn't like the outcome. This is my impression. If the media likes the outcome, they don't paint it with a political brush, but if the media doesn't like the outcome, they will identify who appointed that particular judge. That's been my experience.

Q: Well, do you think it's helpful to the public to have it pointed out who appointed the judge?

Urbina: No, I don't. It may be relevant to a certain mindset, but no, it's not helpful because the general public doesn't understand enough about the deliberative process to be able to take in information and assess it properly. If you start adding to that, "Well, this guy is predisposed because he was appointed by such and such president," or, "This lady is predisposed—," then you start contaminating the perception of the public of how fairly the courts operate. So I don't think it's helpful. I really don't.

Q: The fact that President Clinton nominated you, that's not going to hold some sway with you, in your thinking?

Urbina: No. Maybe there are decisions that I made in a fashion consistent with his thinking, but not because of him. For example, I was on a three-judge panel soon after—a few years after my appointment—and the issue was the census. There were two basic proposals. One was let's revise this, because the way things are right now, minorities are underrepresented—minorities are not counted the way they should be because of the current census process not taking into account the following, blah, blah, blah. Then the administration's point of view was different.

Now some people would have assumed that because I am a minority, and because I have leanings toward making the law more accessible to people's involvement—the public's involvement in decision-making a fairer process, that I would have said, "Well, yes, we definitely need to change the way the census is taken." But I didn't. I contributed to the opinion, and I told the writer of the opinion, "I want to make sure there is language in this opinion that recognizes the fact that, according to the way things are done now, there is a very strong possibility, if not a probability, that minorities are undercounted." He said, "Yes, I will put that in, because I think that's a fact."

Later on, friends of mine—lawyers and non-lawyers, but mostly lawyers—came up to me and said, "What was that? Why did you go along with that?" And I said, "All right." This was around the time of Sammy [Samuel P.] Sosa and Mark [D.] McGwire. I said, "Suppose I was the umpire, calling balls and strikes, and Sammy Sosa gets up to the plate—and I identify with this guy, for a number of reasons—and I let that factor influence how I call balls and strikes. Would you respect me?"

He said, "No."

I said, "Okay. There it is. You do what you have to do."

Q: As we pointed out yesterday, you were the first Latino member of the D.C. Superior Court.

Was that true of the federal district court also?

Urbina: Oh, yes. Yes.

Q: And today?

Urbina: Well, today the person who replaced me is Latino. The following scene was publicly mentioned by the judge who's there in my place at his investiture, so it's a known fact that I spoke to the attorney general. I said, "If the president doesn't appoint a Latino, we'll be going backwards, not forwards." He said, "Well, give me some names." It happened to be that the Judge [Rudolph] Contreras, who took my place, was already a leading contender for the nomination and had hired him as an assistant United States attorney years ago when he was the U.S. attorney for the district. So he knew him. But he agreed that it should have happened that way.

Q: You didn't have any connection to the employment of Justice [Sonia M.] Sotomayor, did you?

Urbina: No. No. I was one of the throngs who were hopeful, and spoke out hopefully. But no.

Q: Of course, the Latinos may soon be in the majority in this country.

Urbina: Then we're going to have to change our tune. [Laughter]

Q: Some white lawyer who is trying to get on the court is going to have a problem.

Urbina: I don't know. I don't think that will happen.

Q: But it won't be a Republican administration, apparently.

But let me ask you something with regard to the burden of proof. The standard that has been approved by this circuit is that the government has to make a show, by a preponderance of the evidence, and I think it's fair to say that some of the lawyers for the detainees have argued for a clear and convincing—a higher standard. What do you think? Is preponderance of the evidence enough?

Urbina: As I look at how the system works in every other instance where a person's liberty is at stake, it seems to me—of course, habeas are civil cases, not criminal cases—but when the stakes are high, such as a person's liberty, etc., the law has generally sought a standard that is more than fifty-one percent, which is a preponderance of the evidence. So that fifty-one percent, giving a value of fifty-one percent of the evidence for detention would outweigh and prevail, if the rest of

the evidence is forty-nine percent. I think that that standard is too weak. I think it doesn't recognize enough the stakes that are involved in the process. So I would say clear and convincing would be a better standard. But, having said that, there are problems that go along with these cases as far as evidence is concerned. It was a surprise to me at the beginning that there are so many obstacles to finding out what happened. "No, we can't turn this over because this is top-secret." "No, the lawyer can't see it because he doesn't have a clearance yet." So to get the real picture, it's a gradual process, it's the result of a struggle, and at times even the petitioner doesn't find out—and the petitioner's lawyer—doesn't find out all the allegations involved. Nor do I. Because sometimes these allegations are so classified—they deal with a particular, important figure, important person, who, if identified, it might damage that person's role as a cooperator.

So I understand why the government wants the preponderance of the evidence standard to remain, and I think it's a strong argument. However, if you join that standard—preponderance of the evidence—with other presumptions that work in favor of the government, now you're upsetting the balance of things. If you say, "Well, hearsay is presumptively—"

Q: Which they have, the D.C. Circuit.

Urbina: That's right—hearsay is presumptively valid and credible, and you start adding on—if it's a writing—it's regular. You start adding that on, then the judge is obligated to give those things the type of weight that the circuit has designated. Then the preponderance of the evidence standard, I think the integrity of it is damaged.

Q: Although you wouldn't get support for that from Judge Silberman and Judge Randolph, who have both said that they believe that preponderance is too high a standard [Laughter], and that "some evidence" would be more appropriate.

Urbina: You just reminded me of that. I had forgotten that.

Q: And in *Esmail*—the case of *Esmail v. Obama*, in 2011, when the D.C. Circuit dealt with it, Judge Silberman actually says—at one point he is talking about the Uighurs, and he says, “If it turns out that regardless of our decision the executive branch does not release winning petitioners, because no other country will accept them and they will not be released into the United States...then the whole process leads to virtual advisory opinions. It becomes a charade, prompted by the Supreme Court's defiant—if only theoretical—assertion of judicial supremacy.” I thought the Supreme Court *did* have supremacy.

Urbina: Well, judicial supremacy, yes. I would think so.

Q: He's suggesting that the Supreme Court only has theoretical judicial supremacy. Anyway, my point is that I don't think he would be agreeing with you.

Urbina: No.

Q: And he says, "I doubt whether any of my colleagues would release a petitioner that the—" government ordered, or something. Your point, basically, is that there are a lot of hurdles.

Urbina: There are a lot of hurdles—

Q: —for a judge to reach a fair decision, to be able to. But more so than other kinds of cases you have?

Urbina: Oh, absolutely more so.

Q: Is it another world?

Urbina: It is another world. For example, finally the case comes to a hearing. Finally, after back-and-forth, and back-and-forth, and back-and-forth, and "You're entitled to this," and "You're not entitled to that," and, "Make sure they get this," etc. Then you come to in the courtroom. The government and the petitioner will make an opening statement, in public. Everybody is invited out of the courtroom, the courtroom is sealed, and then they'll make the *real* opening statement.

Q: Oh!

Urbina: Yes. I don't know if you knew that. Then the *real* opening statement is presented, under seal, and that's just an example of the obstacles that, perhaps necessarily, are put in place for the fact-finder.

Q: Judge, before we get—may I ask why you retired when you did?

Urbina: Well—life is very short. As you know, I was sixty-seven yesterday, and as I think back—I was thinking about this even when I took senior status, which then, ultimately, that did not provide me with the opportunities to do what I'm about to say. I really would like to finish my life having traveled, having spent time—I didn't spend enough time with my own kids when I was struggling to be a judge, etc. I don't want to make that mistake again with my grandson. I want to enjoy my wife. I want to grow old in a way where I will not regret how I spent my life before passing on. That sounds a little dramatic, but I can't believe that it was more than thirty-one years ago that I became a judge. It's gone just like that. [Snaps fingers] Just like that—which means that I don't have that much time left, in a sense. I'm on the tail end of things. And I felt that it was important. The prestige of the job, the importance of the job, the great professional and personal satisfaction I got out of the job—all those things kind of delayed my retirement decision and were considerations that made me, for a period, ambivalent. But now that I've retired, I realize I made the right decision.

Maybe you know this fellow—his name will come back to later—but he said, "Life is a stove with four burners, and we rarely get to have all four burners on at the same time—family, friends, health, and work. Chances are you've had to turn off two or three of those burners at a time in order to achieve something." What he implies by that is that you get to the spot where the burners that haven't been on so much—you get to turn them on, and spend time. But the ordeal of being a judge was not what ultimately persuaded me. I went through that very bad period

when the sentencing guidelines were operative, were in control. Then, of course, the sentencing guidelines were declared unconstitutional, etc. But this process of putting people in prison for very long periods of time also had its psychic effect.

Q: Were those federal sentencing guidelines?

Urbina: Yes. The federal sentencing guidelines, which came in in 1981, were very harsh.

Q: You mean applied to the D.C. Superior Court?

Urbina: No, no, no. Here.

Q: Yes. But you weren't on the bench until 1994.

Urbina: No, no. I'm saying they came into effect in the 1980s. By the time I got here, of course, they were well established. Indeed, not only were they well established, but there was a concerted effort to change them. Harold [H.] Greene—I don't know if you remember him—he was reversed several times when he declared they were unconstitutional, and the day the Supreme Court finally agreed, I said, "Harry must be turning over in his grave with joy, seeing that his belief was vindicated."

Q: But that was a tough period for you?

Urbina: That was a very tough period for me.

Q: You were giving out tougher sentences than you thought were appropriate.

Urbina: Yes. Not all the time. Let me put it this way. Most of the time, I thought the sentencing guidelines were on-target. I didn't feel that just because it was a sentencing guideline sentence that it was inappropriate. But from time to time, knowing the circumstances of what happened, and being deprived of the kind of discretion that I might have wanted in order to be able to make an adjustment to account for the circumstances, that was rough. That was rough. So some people got twenty, thirty years—young people—methamphetamine marketers. I don't look back and regret it, but I do look back and say I'm happy that I didn't finish my career being under that compulsion.

Q: Rumor has it that not that long ago you took up some Japanese martial art. Is that right? What is that?

Urbina: Aikido. I hold a black belt in Aikido. That was about ten years ago I did that.

Q: You didn't take that up in reaction to that attack on you in *Slate* magazine?

Urbina: [Laughs] No. I'll tell you why I took it up. You're going to laugh. I was driving home one day—my home is near the entrance to Rockwood Park. I was driving home in the middle of the day, and these two men were beating up a third guy—kicking him in the face, blood is

spurting everywhere. So I pulled the car over, I got out, and I said, "What's going on here?" And he said, "Oh, this motherfucker stole my mother's battery." I said, "Okay. Listen. I'll call the police. They can arrest him, but stop beating him." Their blood was up, and they got really angry at me. They said, "Why don't you mind your own business?" The next thing you know, they were approaching me. Fortunately, I had already dialed 911, the police arrived, and everything was fine. Nothing bad happened.

So that was a prompt to say, "You know, what would I have done if I had been attacked? Would I know how to handle it?" So I started the study of Aikido. Are you familiar with it?

Q: I'm not.

Urbina: It's one of the very few martial arts that has a ruling ethical component. In other words, you are required to do certain things. In the implementation of Aikido, the first rule is you walk away before you fight, and you inflict pain rather than injury. You inflict injury rather than maim. It's a very powerful martial art where you can really hurt someone. And you maim, rather than kill. That's the progression that you're supposed to have in your mind all the time, whenever you implement. I never had to implement it, other than in training.

Q: You mean you haven't used it against the D.C. Circuit.

Urbina: [Laughs] No.

Q: That has nothing to do with meditation, does it?

Urbina: Yes, it does. Aikido is not a sport. It's not classified as a sport. It has very precise movements. It's only one of two internal martial arts. An internal martial art is one where you don't need a lot of physical strength; all you need to do is learn how to use the person's momentum and strength against them. So, in a way, it's a kind of a "moving meditation." When you do it in the exercises, it's kind of a "moving meditation." But, I also meditate independently.

Q: Now, to go back to Guantánamo for a minute. You mentioned before that you were concerned about the conditions that the Uighurs were under, as well as, I suppose, other detainees down there—although I think everyone concedes that the circumstances at Guantánamo have changed dramatically since 2002. But another issue that the Supreme Court, or your court, doesn't seem to have dealt with is the question of these enhanced interrogation techniques—or torture—that the government used to make. Am I right about that?

Urbina: Yes. In fact, one of the opinions that I think you invited me to review—I found that some of the statements that the government had relied upon were the product of torture. I think I was reversed on that one.

Q: Yes. You mentioned that in the *Hatim* [*Hatim v. Obama*] case, I believe, that you decided in 2009. You point out that these statements had—

Urbina: I found that the detainee had been tortured. But, in any event, that's the extent to which we dealt with issues of waterboarding or torture. It would come up periodically. The petitioners would mention it from time to time, but it never became—it was never at the forefront of the issues. It was in the background.

Q: Right. Right. And with respect to the issue of how long detainees can to be held—you dealt with this, of course, in *Kiyemba*, but is there a general rule that can be understood as—even in *Hamdi*, and I think in *Boumediene*, again, the Supreme Court says something about you can hold people for the duration of hostilities.

Urbina: Yes.

Q: But is there not a rule that you can hold only bona fide enemy combatants for the duration? Can you just hold—you said yourself in *Kiyemba*, “You can't just continue to hold these people who haven't been deemed to be enemy combatants.” Is there a standard that is generally accepted that you can hold this/these under these circumstances, indefinitely, for the duration of hostilities?

Urbina: I have not heard it articulated, but I would imagine if an individual has already confessed during interrogations that were not necessarily coerced, has already indicated that there was hostile combatant behavior on his part, but there's been no merits hearing, so there's been no adjudication—I would imagine that that would be a strong case for the government to say, “This fellow has already confessed,” although that confession hasn't been reviewed by the court.

"Therefore, we would like to hold him for an indefinite period until we can decide whether or not he has additional information that would be helpful to the alliance, or to the United States." I imagine that's an argument that could be made. But as far as a number is concerned, I remember at one point six months was believed at the outset to be enough time for the United States and its allies to get the information needed. Of course, in six months the government can't even find the information they need. This was one of the problems that aggravated the detention situation. You had different components of the government, and they were not always sharing information. So the CIA [Central Intelligence Agency]—the Department of Justice would say, "Okay, we'll turn it in." The CIA would say, "No, you cannot turn that over. We are using that information." So there were kind of disparate interests. For example, there was a case where there was a translation of a will, a person's will—one of the detainees—and the petitioner wanted that translation of the will to prove that his intention was not to be at war, but to gain a better life, and to be able to leave something behind for his family, etc. When that information was offered—was requested and then offered—the CIA came in and said, "No, no. We're not permitting that to be released." So you have different executive agencies not always working in concert.

Q: You know, this kind of thing just arose this week, when there are hearings going on in Guantánamo Bay regarding military commissions for Khalid Sheikh Mohammed and others. Presided over by a Colonel [James L.] Pohl. At one point, someone cut off the transcription—not Colonel Pohl, or anyone that he had authorized—and he found that they had bleeped out something that Pohl had fully expected was part of the record, without his even knowing it! He discovered this and made a big deal—there was an article in the *New York Times* that made a big deal of it—and he's sought to have this put back on the record.

But, actually, since I mentioned this, last October the D.C. Circuit, with Judge Kavanaugh writing the opinion, held that the old charge against Salim Hamdan, who was convicted of material support—and of course he is living back in Yemen now. That was one of the main cases, *Hamdan v. Bush*, that the Supreme Court did rule on, in 2006—that even though he was later convicted of material support and then released for time served, essentially—having still pursued whether he was fairly convicted, the D.C. Circuit made a ruling last October saying that you had to vacate that conviction, because material support was not—what he was convicted of was not a law of war at the time that the activity supposedly took place—or, at the time that he was convicted. Did you read about that?

Urbina: I don't remember reading that.

Q: It has raised the question about conspiracy, also, whether that was a legitimate charge. And a number of these detainees have been convicted of—or they face those very counts. It's quite a hubbub down there in Guantánamo Bay.

Urbina: I didn't realize that.

Q: You know there are still some detainees—there are approximately 166 detainees left down there in Guantánamo.

Urbina: How many?

Q: One hundred and sixty-six, or so. But some will face military commissions—if these commissions go forward—but some have been designated for continued detention without charge. From what one reads, it apparently relates to how the evidence was gathered against them, or what was done to them. There are some cases where the government was talking about "clean evidence," and some cases, evidently, where they're stuck with an inability to—now do you think it's conceivable that the government will simply hold those people who haven't been charged or tried?

Urbina: As I said earlier, if the government has the goods on these people—there's been a confession, or there is incontrovertible evidence but there has been no adjudication—that would be a strong argument for holding them, especially if they are of the type—meaning the age and the predisposition—to go back into the fight. I think that has been a big concern—that some of the people who have been freed have gone back into the fight.

Q: Do you think there are reliable figures on that?

Urbina: No, I don't.

Q: There was an early alumnus of Gitmo—from the early days, who was later released—who became supposedly the number two of Al Qaeda in Yemen, and who was killed recently by a drone attack.

Urbina: By a drone attack, yes.

Q: I don't know. The figures the government put out a couple years ago on the idea of recidivism are very controversial as to whether they put together people who were suspected of going back into jihad, or those who actually had gone back. Of course, it didn't allow for whether they had been radicalized at Guantánamo or whether they were engaged previously—which perhaps could be the case.

Let me ask you about Congress. Did Congress have a role here in providing guidance to the district judges in the federal courts, post-*Boumediene*, as to how these cases—what standards should be set, and how these cases should be handled? After all, the judges have been making law—making it up as they go along, so to speak.

Urbina: Yes.

Q: Was there a role for Congress? Has Congress ducked that role?

Urbina: Yes, I think Congress ducked that. I think Congress understood early on that the federal courts could benefit from the input from lawmakers. Congress ultimately approves the federal rules of evidence—they're engaged! This is part of what they do. But I don't think they were very interested or motivated to create guidelines for—their thought, apparently, was to keep the courts out of it. They didn't want these matters before the federal judges.

Q: Well, they tried to strip the courts a couple times.

Urbina: Right.

Q: But the courts are there.

Urbina: Yes.

Q: I mean, could Congress write the statutes that would clear things up?

Urbina: Yes, it could. Whether I trust Congress to be able to do that effectively is another question. But yes, sure, of course. If they were really serious about creating a uniform approach to dealing with these people, vis-à-vis the lawmakers, then yes—they could have sat down, they could have consulted with judges, they could have formed a committee, they could have gotten people in who are actually engaged in the litigation of these matters, and discussed the standard, and discussed what, if any, presumptions are going to be given to evidence, whether something is going to be presumed regular. They could have done all of that, because many of them are lawyers and many of them are well-versed in matters of litigation. But I don't think they wanted to do that.

Q: Speaking of lawyers, Judge, you made reference earlier today to the high quality of the legal representation that many of these detainees have had. Why is that the case? Many of these people, or perhaps all of them, are pro bono. Is that an unusual circumstance?

Urbina: It is unusual. It is very unusual. The only analogous situation I've seen, where you say, "Wow, these group of lawyers are really motivated" is in these environmental cases, where they represent the environmental interests and the protected species. Those lawyers, they're really good and they're motivated. They're tough, and they're motivated. They're smart, and they're prepared.

Q: And they're doing it pro bono, some of them?

Urbina: Oh, no, no, I'm sorry. I didn't mean that part. I meant in terms of having a group of people who perform really well—

Q: That's interesting.

Urbina: Of course, the same is true of the lawyers who do railroad work, but they're compensated quite handsomely. But I can only imagine that these lawyers who agree to do this mostly pro bono work feel a real obligation to the Constitution, to their practice, to their profession, to represent the underprivileged—those who are at risk because of the law not being applied properly. That's the only thing I can imagine. I've never had a real conversation—and most of these people are well placed in firms, so it's not that they're poor. They're well placed in firms, they're taking this on, and some of these things, as you know, take years.

Q: Obviously, you haven't had any detainees in your court, or didn't have any in your courtroom, but did you ever have cases where there were feeds from Guantánamo—where you actually saw the detainee that the case was about?

Urbina: One. I'm thinking there was one. There's a special room here at the courthouse where you can convene a videoconference. I think there was one case. I think in a couple of cases the petitioner was there telephonically. But in those instances, they didn't want to be there for the whole thing. They just wanted to be there for a piece of it—maybe the opening statement. But no, I've never laid eyes, except perhaps this just one time, laid eyes on any of them.

Q: Okay. Finally, before you left the bench last year, did you notice, really, any difference between—or maybe you didn't pay any attention—to how the government representation under the [Barack H.] Obama administration was any different than under the [George W.] Bush administration?

Urbina: Not really. I was expecting a difference, but no. It's pretty much the same mindset, the same tactics, the same position, the same policies. I didn't see a difference.

Q: Well, he had begun by promising to close Guantánamo. That didn't happen. So there you did have Congressional action. Congress—they may not have written some evidentiary statutes, but they certainly stood in the schoolhouse door, so to speak, to stop detainees from even being prosecuted in the United States.

Urbina: That's right. That's correct. [Laughs] They don't want those people here under *any* circumstance. On the one hand, I can understand how their constituents might see that step as creating a new and present danger. But I think it's mostly a reaction of legislators to meet the will of the people that—

Q: —or the perceived will, certainly. Although, there are probably plenty of convicted so-called terrorists, or terrorist' associates, in federal prisons in the United States—particularly in Florence, Colorado—who are the equivalent of anybody down at Gitmo, who are serving long terms there. I don't think anybody has escaped, or caused any—

Urbina: No. I listened to a report the other day that said exactly that, that in the instances where we have detainees who have been incarcerated, the individual were serving sentences because of terrorism, that there's never been any incident—that we know of.

Q: Right. Well, if it had been left to you, would you have closed Guantánamo? Would you close Guantánamo? If Obama called you over to the White House and said, "Look, you have a lot of experience in this matter. Does it make any difference?" Does it make any difference anymore whether it's down there or not?

Urbina: I suppose I'd have to know what the alternative is. Are they just going to be moved from one frying pan into another? Does that mean that by closing it down it would cloak efforts to put these people in these kinds of detention centers—in places where nobody will find them? I would have to know what the alternative is. My strong preference would be not so much the

closing of Guantánamo—although I think, symbolically, that would be very important—but to actually identify the people who have been involved in terrorism activity. I mean, we as a country, and we as members of this country, we need some satisfaction for what happened on 9/11. I'm not a big revenge-type person. I think revenge is not productive conduct. But if the people who plotted to kill those three thousand folks can be identified, tried and convicted, then as I said earlier I think they should receive maximum penalty. But to have those people alongside other people who were turned in by those people who wanted to make money—that really irks me.

Q: You know, I don't believe *anyone* directly connected to the attacks on September 11 has been held to account.

Urbina: That's right.

Q: And all this time—it's eleven years now.

Urbina: Yes, going on twelve.

Q: And I suspect the actual trials and appeals and everything else—that relate to those who are in custody now, who were responsible for the attacks—will go on for years.

Finally, there was a lot of judging done—partly by you but by many others in the federal courthouse here in Washington since 2001—a lot of opinions written, a lot of lawyering done, a lot of time spent on it.

Urbina: Money.

Q: Money.

Urbina: A lot of money spent.

Q: A lot of money spent. And yet, as we were discussing at the beginning—and yet, no one got released because of that, to the extent they were ever released—and hundreds were released by the Bush administration. It was on the government's assertion that it was time to release them—the government's prerogative. So I wonder whether the lawyering and all the judging and all that's been done has been sort of a sideshow that really hasn't resulted in much. I'm not sure, even, about the law—the common law, the case law—that is being created, has much application in the future, given the peculiar circumstances in Guantánamo Bay. People like Judge Randolph, for example, in his now famous—infamous—speech called "The Guantánamo Mess," he says, "This is going to be important. What we're doing here is going to be important. We're setting down rules that are going to affect American servicemen in wartime," and what have you. For other people like Professor Vladeck, who has studied this very closely, he wrote last July that, "We can dismiss a lot of the Guantánamo jurisprudence, despite its very real effect on very real people at Guantánamo, as not having a long-term, systemic effect on other bodies of case law,

because there aren't going to be that many other contexts where who is detainable under Authorization for Use of Military Force [AUMF] of 2001 is actually going to be the question.”

Do you see what I'm saying? He doesn't think all this to-do is going to amount to much. What do you think?

Urbina: I think there will be more terrorism. I think that this country will experience more of the same, hopefully not much of it, but that there will be situations analogous to what happened on 9/11. These people are not afraid to die, and they're indoctrinated with ideas that make them difficult to beat. I think there will be circumstances when many of these people—either here or abroad, are detained, are arrested, are interrogated—but I don't think there will be situations closely analogous to what happened at Guantánamo. I think this country has learned, its executive has learned, that when you get these people, you don't put them all in one place where the world can keep an eye on them. You have to sort them out, find out what you can, make decisions, turn them, or incarcerate them. But not in an environment such as Guantánamo, where the world is watching. I don't think that's going to happen. So Wally Mlyniec may be correct.

Q: So unless there's anything that you care to add, I'll say thank you.

Urbina: No. This was very stimulating, interesting, and enjoyable. Thank you. Thank you very much.

Q: Thank you, Judge Urbina.

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